

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH, COURT -V**

C.P. (I.B) No. 1077/MB/2021

Under Section 9 of the Insolvency and Bankruptcy Code, 2016 read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudication Authority) Rule 2016)

In the matter of

SHAARC Projects Limited

309-C, Teesri Manjil, Megh Malhar Commercial Complex, Sector-11, Gandhinagar Gujarat-382011 IN

...Operational Creditor/Petitioner

Vs

Hindustan Construction

Company Limited

Hincon House Lal Bahadur Shastri Marg Vikhroli West MH 400083

...Corporate Debtor/Respondent

Order Dated: 24.04.2024

Coram:

**MADHU SINHA
MEMBER (TECHNICAL)**

**REETA KOHLI
MEMBER (JUDICIAL)**

Appearances:

For Petition: Mr. Kairav Trivedi (VC)

For Respondent: Adv. Pawan Kulkarni & Darshit Dave i/b
M/s. AVP Partners (PH)

ORDER

1. This Company Petition is filed by **SHAARC Projects Limited** (hereinafter referred as “**the Operational Creditor/Operational Creditor**”) seeking to initiate Corporate Insolvency Resolution Process (hereinafter referred as “**CIRP**”) **Hindustan Construction Company Limited** (hereinafter called “**Corporate Debtor**”) by invoking the provisions of **Section 9** of the Insolvency and Bankruptcy code, 2016 (hereinafter called “**Code**”) read with Rule 6 of Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016, for an Operational Debt of **Rs. 1,15,95,819/- (Rupees One Crore Fifteen Lakh Ninety-Five Thousand Eight Hundred and Nineteen)** which includes principal amount of Rs.33,08,941 (Rupees Thirty-Three Lakhs Eight Thousand Nine Hundred and Forty-One Only) and Rs.82,86,878/- (Rupees Eighty-Two Lakhs Eighty-Six Thousand Eight Hundred and Seventy-Eight Only) towards MSME Interest. The date of default is stated to 08.03.2019 as per part IV of the Company Petition. Demand Notice dated 12.07.2021 was sent by the

Petitioner and the same was not replied by the Respondent neither the balance amount was paid. Thereafter, the Operational Creditor preferred an Application under Section 18 of the MSME Act for principal amount of Rs. 21,25,085/- (Rupees Twenty-One Lakhs Twenty-Five Thousand and Eighty-Five Rupees Only) being Case No. GJ/09/S/GJT/06631 before the Micro and Small Enterprises Facilitation Council (MSEFC) at Gandhinagar, Gujarat on 31st July 2021. The Operational Creditor subsequently filed the present Petition under Section 9 of the Insolvency and Bankruptcy Code, 2016 before this Hon'ble Adjudicating Authority.

Brief Facts: -

2. The Petition reveals that the Operational Creditor supplied goods and rendered construction related services in compliance of 2 separate Work orders issued by Hindustan Construction Company, the Corporate Debtor above named, for 2 separate projects, namely; NC - 31 and Kutch Branch Canal (KBC).
3. The Operational Creditor and the Corporate Debtor entered into Work Order for Project NC-31 being Order Number 14016752 on 6th July 2012 (and Work Order for Project Kutch Branch Canal Being Order Number

14018414 dated 21st April 2014. Accordingly, the Operational Creditor raised various sales bills against the Corporate Debtor during the years 2012-2014 and 2014-2015.

4. It is submitted by the Operational Creditor that the Last Bill raised by them for Project NC - 31 was on 31st March 2014 and for Project KBC was on 27th April 2015.
5. Subsequent to the work being completed by the Operational Creditor the Corporate Debtor issued Completion Certificate (" CC") for the work completed. The CC for project NC - 31 was issued on 31th July 2013 and the CC for project KBC was issued on 25th October 2014.
6. The Operational Creditor submits that the amount of Rs.1,15,95,819/- remained unpaid by the Corporate Debtor even after the completion of the work. It is further contended that though the total amount unpaid amount is Rs.33,08,94/- MSMED interest of Rs. 82,86,878/- is added by them. Thus the total claim is Rs.1,15,95,819/-
7. The Operational Creditor in their Additional Document attached the Documentary proof justifying that Operational Creditor is MSME as per the classification

u/s 7 (b)(i)(ii) of chapter III of the MSMED Act 2006 from 2011 onward.

8. Further the Operational Creditor has relied on its Udhdyog Aadhar wherein it is classified as Small enterprise from 2017 mentioning 09th June, 2011 as the date of Commencement. Additionally, it has submitted a CA certificate confirming that the Operational Creditor falls under the classification of Micro Enterprise in all the Financial years starting from 2011-12 to 2016-17.
9. Further to justify the MSMED interest the Operational Creditor has stated that it falls within the definition of Supplier under Section 2(n) of the MSMED Act 2008 which is reproduced as under:

2(n). —supplier, means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes.

- (i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);*
- (ii) the Small Industries Development Corporation of a State or a Union territory by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956);*

(iii) *any company, co-operative society, trust or a body, by whatever name registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises;*

10. The Operational Creditor further submitted that it can claim the MSME interest even though it is not included in invoice. To justify the above, it has relied on the extracts of the relevant sections of the MSME act 2006

Section 15 of MSME act: Liability of buyer to make payment: -

“Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day.

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance”.

11. Hence in the present case the Operational Creditor submits that the bills have been raised by them after the acceptance of the services thus these bills are payable within a maximum period of 45 days as per MSMED act and HCC has failed to pay the balance amount till date.
12. Further reliance has been made the under Section 16 of the MSMED Act: Date from which and rate at which interest is payable: -

“Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank”.

Section 17 of the MSMED act:

“Recovery of amount due: - For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16”.

Thus the Operational Creditor placing their reliance on the above paragraphs has stated that the Section 15, 16, 17 of the MSMED Act mandates that MSMED Interest is payable by the buyer notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force.

13. Further it is stated by the Operational Creditor that since this MSMED Interest is as per statute it has to be included by the Buyer irrespective of whether the same is included in the Invoice or not and this has been clarified by the Notification so 5622 (E) dated 2nd November 2018 by the Ministry of Corporate affairs. Therefore, this interest needs to be included in the IBC application u/s 9 as it is under the special statute which is a beneficial provision cannot be denied.

14. The Operational Creditor further submits that the date of default as per the application in form V is 08/09/21, thus within the line period based on the Statement of accounts of HCC Ltd. Page 224 & page 232 of the application contained the ledger account of appearing in the books of accounts of HCC Ltd as in 2019. There are the separate ledger accounts project wise which shows the principal amount of Rs. 33,08,941. Thus, this liability for payment is undisputed. Further the last line on page 232 shows

that the last payment was made on 08.03.2019 and since after this are no further payments made therefore the notices issued under IBC within 3 years and application u/s 9 is filed within 3 years of the last payment date. Hence it is submitted that the application is well within the period of Limitation.

15. The Respondent in its reply submits that the petition is not maintainable as the petitioner has clubbed the Principal Amount along with purported MSME interest to meet the threshold to trigger the provision of IBC.
16. Further the Corporate Debtor has submitted that under section 16 of the MSME Act stipulates that the 'buyer' is bound to pay the 'seller' a compound interest amounting to three times the bank rate specified by the Reserve Bank of India. The Corporate Debtor submits that Section 16 read with section 2(b) of the Act, this interest was to be calculated from the appointed date. In the factual matrix of this present case, the Corporate Debtor states that this appointed date would fall on the dates that the services of the Applicant were accepted without any objections - i.e., the dates on which this respondent issued the Completion Certificates. Hence, the significant dates would fall on 31st July 2013 and 25th October 2014.

17. The Respondent most respectfully submits that as per the MSME certificate annexed by the Applicant itself and the MSME database, the Applicant was registered as a MSME only on 11th February 2017. Therefore, the purportedly the Petitioner has charged MSME interest upon this Respondent for the period where the petitioner was not even registered as an MSME. It is submitted that this course of action on which the Petitioner is proceeding with is wholly unsustainable.

18. It is further submitted that Section 16 read with Section 2(b) of the Micro, Small and Medium Enterprises Development Act, 2006 ("the MSME Act") provides that the interest is to be calculated from the appointed date. In the present Petition, the appointed date would fall on the dates that the services of the Operational Creditor were accepted without any objections, i.e., the dates on which the Corporate Debtor issued the Completion Certificate. As mentioned earlier, the Completion Certificate was issued on 31st July 2013 for the NC-31 project and on 25th October 2014 for the KBC project respectively. The Operational Creditor registered as a MSME on 11th February 2017, after the completion of the said projects. Hence, the MSME interest is not applicable in the present Petition as the Operational Creditor was not registered as a MSME at the time of the issuance of

the Completion Certificate. And thus, the actual claim, if any, is only Rs.33,08,941/- (Rupees Thirty-Three Lakhs Eight Thousand Nine Hundred and Forty-One Only), which is below the threshold limit and does not trigger the provisions of Section 9 of Insolvency & Bankruptcy Code, 2016, in order to enable the Operational Creditor to file the present Petition. Hence, on this ground alone, the Petition deserves to be dismissed since the claim amount is below the threshold limit of Rs. 1 crore.

19. It is submitted by the Respondent that Operational Creditor is claiming before this Hon'ble Adjudicating Authority what it could not claim under the MSMED Act before the MSMED Council. Therefore, on this ground itself the petition deserves to be dismissed.

20. It is further submitted that the Operational Creditor has failed to provide clarification on the date of default. It is the Operational Creditor's case that the date of default is the last date of payment to the Operational Creditor by the Corporate Debtor. According to the Petitioner, the date ought to be 08.03.2019, however, in the present case, the date of the last invoice was 19th May 2015. According to clause 12.8 of the Work order, the last date of payment of the abovementioned invoice is 30 days from the date of invoice. Accordingly, the last date for the

payment of invoice would be 18th June 2015. Further, the Respondent submits that the date of default cannot shift or change. It is trite law that the date of default will be the date on which the amount became due and payable.

21. The Respondent argues that the last payment occurred in 2015, and according to the petitioner's limitation, which extends until 2018, any subsequent partial payments do not merit an extension of this limitation. Therefore, the Date of Default cannot be identified as 08.03.2019, as the case filed was already barred by limitation.
22. The Respondent further submits that there is a technical error on the part of the Operational Creditor as it has failed to comply with the Statutory Requirements of furnishing the Affidavit under section 9(3)(b) of the Insolvency and Bankruptcy Code, 2016. Form 5 as prescribed under the Code is incomplete and defective.

Findings/Conclusion

Upon thorough consideration of the arguments presented by both the Operational Creditor and the Corporate Debtor, as well as a review of the provided records, the following key points have emerged:

23. It is evident that the Operational Creditor and Respondent were involved in two projects: NC-31 in 2012 and Kutch Branch Canal (KBC) in 2014. Sales bills were raised against the Corporate Debtor for these projects between 2012 and 2015. Completion Certificates (CC) for NC-31 and KBC were issued by the Corporate Debtor in 2013 and 2014, respectively. The Operational Creditor claims that an amount of Rs. 1,15,95,819 remains unpaid by the Corporate Debtor. However, the Corporate Debtor disputes this, arguing that only Rs. 33,08,941 is owed, disputing the addition of MSMED interest amounting to Rs. 82,86,878 by the Operational Creditor, which inflates the total claim to Rs. 1,15,95,819.

24. The Counsel for Operational Creditor in its argument to establish that whether it was mandatory for SHAARC Pvt. Ltd a Micro/Small enterprise to file the Memorandum under Section 8(1) of the Act in order to fall within the definition of a Supplier under Section 2(n) of the Act, so as to claim MSME Interest without Registration has placed their reliance upon the judgement of the ***Hon'ble High Court of Delhi in the matter of M/s Ramky Infrastructure Private vs Micro***

and Small Enterprises. The Hon'ble High Court of New Delhi has held as under-

Para 24 of the Delhi HC order

“An examination of Section 2(n) of the Act indicates that it is in two parts. The first limb defines a supplier to mean a micro or small enterprise which has filed a memorandum with the authority referred to in sub-section (1) of Section 8 of the Act and the second limb refers to (i) National Small Industries Corporation; (i) the Small Industries Development Corporation of a State or a Union territory; and ii) a company, co-operative society, trust or a body engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises. The two limbs are joined by the word —and,: Usually, this would mean that the conditions as specified in both the limbs must be satisfied. However, it is obvious that the same is not the opposite way to read Section 2(n) of the Act. This is so because, admittedly, neither the National Small Industries Corporation - which is a Government of India Enterprise - nor the Small Industries Development Corporation of a State or a Union territory is required to file a memorandum as referred to under Section 8(1) of the Act. Thus, the two limbs of Section 2(n) of the Act are required to be

read to exhaust all categories. The second limb, which specifies three categories to fall within the definition of the term _supplier, is in addition to the category of small and medium enterprises that have filed the Memorandum under Section 8(1) of the Act. Thus, the term _supplier as defined under Section 2(n) of the Act must be read to comprise of four categories: (i) micro or small enterprises that have filed the Memorandum under Section 8(1) of the Act; (ii) National Small Industries Corporation; (iii) Small Industries Development Corporation of a State or a Union territory; and (iv) a company cooperative society, trust or a body engaged in selling goods produced by micro or small enterprises or rendering services provided by such enterprises”.

The Operational Creditor, citing a precedent set by the Hon’ble Delhi High Court, argues that private Limited Companies are not obligated to file the Memorandum under Section 8(1) of the MSMED Act to qualify as a "supplier" under Section 2(n) of the same Act. Further, the Counsel representing the Operational Creditor highlighted Sections 15, 16, and 17 of the MSMED Act, stressing that they necessitate the payment of MSMED interest by the buyer. According to this argument, irrespective of any prior agreements or prevailing laws, MSMED interest is obligatory under the statute. This

interpretation is reinforced by Notification 5622 (E) dated November 2, 2018, issued by the Ministry of Corporate Affairs which is reproduced as under-
S.O. 5622(E). —In exercise of powers conferred by Section 9 of the Micro, Small and Medium Enterprises Development Act, the Central Government hereby directs that all companies who get supplies of goods or services from micro and small enterprises and whose payments to micro and small enterprise suppliers exceed forty five days from the date of acceptance or the date of deemed acceptance of the goods or services as per the provisions of the Act, shall submit a half yearly return to the Ministry of Corporate Affairs stating the following:

- (a) The amount of payments due; and*
- (b) The reasons of the delay.*

25. Upon perusal of the above, the issue that comes up is whether interest can be claimed by the Operational Creditor as MSME, the Bench while deciding the fate of operational creditors claiming interest amounts due in terms of the MSMED Act, has relied on the NCLT Mumbai in **Govind Sales v. Gammon India (2019)** wherein it was held as under-

“since the parties did not have a valid agreement stipulating an interest liability, it cannot be claimed by the operational creditor”.

26. Further it was also observed in the case of ***Teknow Consultants & Engineers Pvt. Ltd. v. Bharat Heavy Electricals Limited (2017)*** by NCLT Delhi that interest cannot be claimed due to lack of proper agreement between the parties, in the same scenario. Therefore, in the present case, there exists no explicit agreement or clause in the bills or invoices that would entitle the Operational Creditor to claim interest.
27. The counsel representing the Corporate Debtor submitted that based on the MSME certificate provided by the Applicant and the information available in the MSME database, it is evident that the Applicant was registered as an MSME only on February 11, 2017. Consequently, the assertion that the Petitioner has charged MSME interest during a period when the Petitioner was not officially registered as an MSME is significant. The above actions undertaken by the Petitioner are considered untenable, impermissible, and in contradiction to the directives issued by the Hon'ble Supreme Court in ***Silpi Industries Etc. versus Kerala State Road Transport Corporation and Another (2021 SCC Online SC 439)***, wherein the Supreme Court was tasked with deciding whether benefits of the MSME Act could be granted to a party who was not registered as a MSME when it entered into a contract. Similar course of action which is synonymous to the course of

action adopted by the present Petitioner was adopted by the Appellant - the Supreme Court opined that:

"26. In our view, to seek the benefit of provisions under MSMED Act, the seller should have registered under the provisions of the Act, as on the date of entering into the contract. In any event, for the supplies pursuant to the contract made before the registration of the unit under provisions of the MSMED Act, no benefit can be sought by such entity, as contemplated under MSMED Act"

28. The Supreme Court, in the same case, further went on to observe that:

"If any registration is obtained, same will be prospective and applies for supply of goods and services subsequent to registration but cannot operate retrospectively. Any other interpretation of the provision would lead to absurdity and confer unwarranted benefit in favor of a party not intended by legislation."

29. The bench also placed their reliance on Hon'ble NCLT Delhi order wherein it rejected the Section 9 petition in **CBRE South Asia (P) Ltd. v. United Concepts and Solutions (P) Ltd. (2022)** and stated that the interest sum cannot be combined with the principal amount to reach the threshold of INR 1 crore. Hence in view of the Judgments above, the Operational Creditor's

Claim of MSME interest amounting to Rs. 82,86,941/- is not maintainable and on this ground alone the Petition deserves to be dismissed. On deleting the interest element from the alleged due debt, the amount remaining is only Rs.33,08,941 which is much below the threshold limit of Rs.1 crore. Hence on these combined grounds the petition merits no consideration

30. It is further crucial to highlight that the most recent invoice issued to the Corporate Debtor by the operational creditor dates back to 19th May 2015. In accordance with clause 12.8 of the Work Order submitted by the respondent, the stipulated deadline for payment of the aforementioned invoice was set at 30 days from the issuance of the invoice. Thus, the final due date for settling the invoice would have been 18th June 2015, making the subsequent default date for the purpose of this petition the 18th of June 2015. Considering the petitioner's account, the limitation effectively expired in June 2018; Even if the case of the petitioner is taken to be true and the last date of payment is taken on 08.03.2019 rendering any partial payment made in March 2019 ineffective in extending the limitation period as limitation had already lapsed in 2018 itself.

31. Further it is evident from the document placed on record that the Operational Creditor initially sought recourse with the MSME Facilitation Council on 31st July 2021 before bringing the matter before this Hon'ble Adjudicating Authority. The bench by relying in the case of The Hon'ble NCLAT ***Arpana Packaging Private Limited v. Regma Ceramics Private Limited (Company Appeal No. 94 of 2023)***, as per the order dated 12th April 2023, it is established that when an operational creditor has already approached the Micro and Small Enterprises Facilitation Council under the MSME Act, it signifies the existence of a pre-existing dispute between the parties. This indicates that the unpaid amount was already a matter of contention awaiting resolution before the Council.
32. As per the ruling of the NCLAT in the aforementioned case, it was determined that the initiation of the Corporate Insolvency Resolution Process (CIRP) cannot be entertained in the presence of such a pre-existing dispute between the involved parties. Consequently, the current petition stands on the grounds of a pre-existing dispute and warrants dismissal accordingly.

33. In light of the above discussions, it is evident that the Operational Creditor has failed to establish the existence of an operational debt exceeding the prescribed threshold limit under Section 4 of the Code due and payable by the Corporate Debtor but remaining unpaid, which is essential for the admission of an application under Section 9 of the Code.

34. Therefore, the present Application filed by the Operational Creditor under Section 9 of the Code is rejected.

35. This Application bearing **C.P.(IB) No.1077/MB/2021** filed under Section 9 of the Code by SHAARC Projects Ltd., the Operational Creditor, for initiating CIRP in respect of Hindustan Construction Corporation Limited, the Corporate Debtor is **rejected**.

SD/-

MADHU SINHA
MEMBER (TECHNICAL)
/Aakansha/

SD/-

REETA KOHLI
MEMBER (JUDICIAL)