



IN THE NATIONAL COMPANY LAW TRIBUNAL MUMBAI - BENCH-VI

IA (I.B.C) No. 1116/MB/2024

AND

CP (IB) No. 1107/MB/2023

[Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 r/w Rule 11 of the National Company Law Tribunal Rules, 2016]

SKODA AUTO VOLKSWAGEN INDIA PRIVATE LIMITED

[CIN: U70102PN2007FTC133117]

Registered Office: E-1, MIDC Industrial Area, Phase-III

Village Nigoje, Mhalunge, Kharabwadi Chakan

Taluka Khed, Pune-410501, Maharashtra.

....Applicant

Versus

SUSEE AUTOMOTIVE PRIVATE LIMITED

[CIN: U50300TN2009PTC071532]

Registered Office: 25, Tamil Sangam Road

Madurai-625001, Tamil Nadu.

....Respondent

IN THE MATTER OF:

SUSEE AUTOMOTIVE PRIVATE LIMITED

...Operational Creditor

V/s

SKODA AUTO VOLKSWAGEN INDIA

PRIVATE LIMITED

...Corporate Debtor

Pronounced: 04.04.2025

CORAM:

HON'BLE SHRI K. R. SAJI KUMAR, MEMBER (JUDICIAL)

HON'BLE SHRI SANJIV DUTT, MEMBER (TECHNICAL)



Appearances: Hybrid

Applicant: Sr. Adv. Gaurav Joshi a/w. Adv. Feroze Patel, Adv. Pratik Pawar and
Adv. Shanaya Irani i/b. J. Sagar Associates

Respondent: Adv. Vinay Kumar Jain a/w. Adv. Pallavi Tikariha & Adv. Mohana
Sharda i/b. VKJ Law

ORDER

[PER: K. R. SAJI KUMAR, MEMBER (JUDICIAL)]

1. BACKGROUND

1.1 This Interlocutory Application, IA (I.B.C) No. 1116/MB/2024 (IA) has been filed on 26.01.2024, by Skoda Auto Volkswagen India Private Limited, the Applicant/Corporate Debtor (CD) under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Rule 11 of the National Company Law Tribunal Rules, 2016 (NCLT Rules), seeking rejection of CP(IB) No. 1107/MB/2023 (Main Application), filed by Susee Automotive Private Limited, the Respondent/Operational Creditor (OC) against the Applicant/CD, which seeks initiation of Corporate Insolvency Resolution Process (CIRP) against the Applicant/CD.

1.2 The Respondent/OC, filed the Main Application against the Applicant/CD under Section 9 of the IBC for an alleged default of Rs.4,52,15,921/-, which comprises of Rs. 97,41,134.49/- as principal amount as well as Rs. 3,54,74,787/- as interest, calculated at three times of the bank rate as per Reserve Bank of India notification from time to time in terms of the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act). The alleged default is based



on the failure of the Applicant/CD to make payments against the invoices and various discounts raised by the Respondent/OC during its tenure as the Applicant/CD's authorised dealer for Tirunelveli and Tiruchirappalli Districts in the State of Tamil Nadu during 2013 to 2021.

1.3 Pursuant to the execution of Dealership Agreements, the Respondent/OC performed its obligations and raised invoices for the same during the period of 2013 to 2021. Due to non-receipt of payments from the Applicant/CD regarding cash discount, corporate discount, etc., the outstanding amount due towards the Applicant/OC was Rs.97,41,134.39/- and the related invoices and claim sheets have been produced vide Annexure-5 of the Main Application. The details of the outstanding amount due and pending from the Applicant/CD are mentioned in the Main Application as under:

Sr. No.	Particulars	Amount (In Rs.)
1.	Pending claims for Tirunelveli	30,77,809/-
2.	Pending claims for Tiruchirappalli	33,98,888/-
3.	Cash Ledger Balance claims for Tirunelveli	13,74,816.15/-
4.	Cash Ledger Balance claims for Tiruchirappalli	18,89,621.34/-
	TOTAL AMOUNT	97,41,134.49/-

1.4 As the Applicant/CD failed to clear the aforesaid outstanding dues towards the Respondent/OC, it issued demand notice dated 14.12.2021 under Section 8 of IBC to the CD for payment of Rs. 4,52,15,921/- including interest as per Section 16 of MSMED Act. However, the Applicant/CD, *vide* its reply notice dated



31.01.2022, denied liabilities on the ground of the Respondent/OC's claims being barred by limitation and non-compliance of the provisions under Section 4 of the IBC. The Respondent/OC, *vide* its counter-reply notice dated 26.02.2022, refuted the Applicant/CD's contentions in its above-mentioned reply notice.

1.5 Since the Applicant/CD failed to make any payment after the issuance of demand notice, the Respondent/OC filed the Main Application on 09.04.2022 against the Applicant/CD. The date of default was not expressly mentioned in Part-IV of the Main Application; however, it contends that default occurred from 29.08.2012 to 13.10.2021, as stated in tabular form in Annexure-8 of the Main Application.

2. CONTENTIONS OF APPLICANT/CD

2.1 The Applicant/CD is a globally renowned automobile company engaged in the business of manufacturing passenger cars including 'Volkswagen' cars and it has substantial presence across India through various authorised dealers, while the Respondent/OC is a Tamil Nadu-based private company, engaged in the business of wholesale and retail trade of motor vehicles and other accessories. The Respondent/OC was appointed as the authorised dealer of the Applicant/CD for Tirunelveli and Tiruchirappalli Districts, Tamil Nadu, on principal-to-principal basis *vide* two Dealership Agreements dated 30.04.2013 (For Tirunelveli) and 17.07.2013 (For Tiruchirappalli) (Dealership Agreements). As per Article 20 of the Dealership Agreements, the Agreements shall become effective from 01.04.2013, and shall remain in effect for three full years from that



date, subject to the written notice by either party to terminate or amend the Dealership Agreements. Further, Article 23 of the Dealership Agreements refers to the termination of the Dealership Agreements on demand by either party.

2.2 The Respondent/OC never informed or disclosed regarding its registration as Micro, Small and Medium Enterprise (MSME) under the MSMED Act prior or during the existence of the Dealership Agreements. The Respondent/OC itself admitted that it was registered as a 'Micro' entity only on 31.05.2021, which is much after the termination of the Dealership Agreements on 15.02.2017 and after receiving the Respondent/OC's request for resigning as Applicant's authorised dealer *vide* its email dated 14.02.2017. Since the Respondent/OC was not a registered MSME for the period of the Dealership Agreements i.e., between 2013 and 2017, it could not have claimed any interest under the MSMED Act at all from the Applicant/CD. Further, the MSMED Act does not apply retrospectively enabling the Respondent/OC from seeking any claims against the Applicant/CD. To substantiate its contention, the Applicant/CD relied upon the Hon'ble Supreme Court's decisions in *Gujarat State Civil Supplies Corporation Limited Vs. Mahakali Foods Private Limited.*, [(2023) 6 SCC 401] and *Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and Anr.*, [Civil Appeal Nos. 1570-1578 of 2021].

2.3 The Respondent/OC's claims for interest under the MSMED Act cannot be admitted as 'operational debt' since neither the parties ever agreed upon any interest nor there is any provision for interest to be given to the Respondent/OC under the Dealership Agreements. The NCLT is not a forum to resolve the disputes pertaining to interest claims of an MSME entity, rather the appropriate



forum for such claims is Micro and Small Enterprises Facilitation Council (MSEFC) as held by this Bench in *Siddharth Enterprises Vs. Shapoorji Pallonji and Company Private Limited.*, [CP(IB) No. 3340/MB/2019].

2.4 The Main Application is defective as it does not meet the threshold limit of Rs.1,00,00,000/- under Section 4 of the IBC as per the Ministry of Corporate Affairs' Notification dated 24.03.2020. The Respondent/OC's claims against the Applicant/CD comprise of two parts- (i) principal amount- Rs.97,41,134.39/-; and (ii) interest- Rs.3,54,74,787/-. It is evident that the Main Application would have been clearly barred under Section 4 of the IBC had the Respondent/OC been seeking only the principal amount based on invoices and other documents. The inclusion of interest in its claims under the garb of MSMED Act in Part-IV of the Main Application cannot be admitted.

2.5 Contrary to the Respondent/OC's contention regarding the Applicant/CD's offer of Rs.50,00,000/-, the Applicant/CD did not admit any debt or default rather it was a mere goodwill gesture on its part to settle the dispute over claims of the Dealership Agreements and close the full and final settlement of accounts of both the dealership locations in the State of Tamil Nadu. The said offer was solely based on the without prejudice discussions between the Applicant/CD and the Respondent/OC, which are evident from the emails exchanged between the parties from January, 2021 to September, 2021, as annexed in the Applicant/CD's Affidavit-in-Reply dated 14.12.2023 to the Main Application.

2.6 The Main Application is primarily barred by limitation as the claims are based on the invoices, etc. The alleged dates of default are vaguely mentioned as 29.08.2012 to 01.03.2017, while the demand notice under Section 8 of the IBC



was issued on 14.12.2021 and the Main Application was filed in the year 2023.

As most of the Respondent/OC's claims were already time barred, the Respondent/OC cannot obtain the benefit of excluding COVID-19 Pandemic period for the purpose of limitation.

2.7 There is pre-existing dispute between the parties over reconciliation of accounts which could have been settled through arbitration as per Clause 38 of the Dealership Agreements. The Respondent/OC could not have filed the Main Application in the view of the already existing dispute resolution process in the Dealership Agreements itself.

2.8 The Main Application is not maintainable on account of preliminary objections raised by the Applicant/CD, *vide* the present IA, which ought to be adjudicated at the very outset. The intention of the Respondent/OC behind filing of the Main Application is nothing but mere recovery of money by treating this Tribunal as debt collection forum, which is contrary to the objectives of the IBC and the same amounts to abuse of legal process. Since the Main Application does not meet the minimum threshold of Section 4 of IBC and its claims are barred by limitation, it is prayed that the present IA be allowed and the Main Application be rejected.

3. CONTENTIONS OF RESPONDENT/OC

3.1 The Applicant/CD has suppressed material facts of the present matter. The Respondent/OC had already applied for MSME status as Micro entity on 19.06.2016 as evident from its Udyog Aadhar Registration Certificate dated 01.01.2021.



3.2 The Applicant/CD had acknowledged the outstanding dues towards the Respondent/OC as seen from the Applicant/CD's email dated 23.03.2021, wherein it shared the drafts of the Memorandum of Understanding for full and final settlement of outstanding dues for the dealership locations for a total amount of Rs.50,00,000/-. However, the Applicant/CD failed to make the payments despite the Respondent/OC sending the email dated 11.05.2021, to make the full and final payments.

3.3 The amount of Rs.3,54,74,787/-, based on the interest under the MSMED Act, is only a part of the alleged operational debt and it can include both the principal debt and the interest on any delayed payment for meeting the threshold limit of Rs.1,00,00,000/- under Section 4 of the IBC. There is agreement between the parties as to payment of interest on any delayed payment by the Applicant/CD to the Respondent/OC. The Respondent/OC relied upon the decision of the Hon'ble NCLAT, New Delhi in *Prashant Agarwal Vs. Vikas Parasrampuria & Anr.*, [Company Appeal (AT) (Ins.) No. 690 of 2022], wherein it was held that for the maintainability of the total claim, interest on delayed payment would also be considered for meeting the threshold under the IBC.

3.4 There are no pre-existing disputes between the parties and the Main Application is filed within the limitation period in the event of excluding the COVID-19 period from 15.03.2020 to 28.02.2022, as per the Hon'ble Supreme Court's decision in *In Re: Cognizance for Extension of Limitation.*, [M.A. No. 21 of 2022 in MA No. 665 of 2021 in *Suo Motu Writ Petition (Civil) No. 3/2020*]. Further, the existence of various email communications between the Applicant/CD and the



Respondent/OC since 2014, show that the Applicant/CD had acknowledged the debt towards the Respondent/OC.

3.5 The existence of arbitration clause in the Dealership Agreements does not oust the jurisdiction of the NCLT to exercise its residuary powers under Section 60(5)(c) of IBC to adjudicate disputes relating to the insolvency of the Corporate Debtor. To substantiate the contention, the Respondent/OC relied upon the decision of Hon'ble Supreme Court in *Tata Consultancy Services Limited Vs. Vishal Ghisulal Jain, Resolution Professional, SK Wheels Private Limited.*, [Civil Appeal No. 3045 of 2020].

4. ANALYSIS AND FINDINGS

4.1 We have perused all the documents and pleadings and heard both the Ld. Counsel for the Applicant and the Respondent.

4.2 It is important to consider that the Respondent/OC filed the Main Application for claiming an amount of Rs.4,52,15,921/-, including interest under the MSMED Act. Since the fate of the Main Application depends on the outcome of this IA, it is important to decide the IA at the very outset before proceeding further with the Main Application. This is the principle underlying the decision of the Hon'ble Supreme Court in *R.K. Roja Vs. U.S. Rayadu and Another.*, [Civil Appeal No. 5540 of 2016]. As requisite threshold limit under Section 4 of the IBC and limitation are crucial to the determination of debt and default in the case on hand, we feel that these are to be dealt with before final determination of the Main Application. The Hon'ble Supreme Court in *Arun Kumar and Ors. Vs. Union of India.*, [Civil Appeal No. 3270 of 2003], referring to *Halsbury's Laws of England*,



held that if a challenge is made to the jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue. The existence of jurisdictional fact is condition precedent for the exercise of power by a court of limited jurisdiction. Since threshold limit and limitation are jurisdictional matters in an application under Section 9 of the IBC, we hold that the same are to be dealt with and decided before proceeding further with the Main Application.

4.3 The major issue to be determined in the present IA is whether the Main Application is maintainable on account of (i) requisite threshold limit under Section 4 of the IBC; and (ii) is barred by limitation. Now, let us examine the issue.

4.4 As far as the requisite threshold limit under Section 4 of the IBC is concerned, the alleged operational debt claimed by the Respondent/OC is Rs. 4,52,15,921/- which includes the interest under the MSMED Act, aggregating Rs.3,54,74,787/- However, upon perusal of available documents, we find that the Respondent/OC had applied for MSME status on 19.06.2016, as seen from its Registration Certificate while the claims are based on the invoices for the period of 2013 to 2017. The Respondent/OC in its reply to the present IA has stated that it got UDYAM registration on 31.05.2021 to avail of the benefits arising out of the same. However, nowhere in the invoices produced by the Respondent/OC in the Main Application it is stated that the Respondent/OC was an MSME during the subsistence of the Dealership Agreements or any interest was to be paid by the Applicant/CD, in the event of delayed payments. Further, there is no mention of interest payable on the ground of delayed payment or for



any other reason in the Dealership Agreement. This means that there is no agreement as to payment of interest by the Applicant/CD to the Respondent/OC. On the contrary, on a perusal of the Dealership Agreements under '*III. Terms of Payment*', we find that the Applicant/CD shall be entitled to interest for delay of payments at 24% per annum from the Respondent/OC and not vice versa. In such a scenario, there is no justification for the Respondent/OC to make a claim for interest in the Main Application. We find that the claim is made by the Respondent/OC by including interest only in order to meet the threshold limit under Section 4 of the IBC to file the Main Application. The Respondent/OC's reliance on *Prashant Agarwal* (supra) is misplaced in view of the facts and circumstances of the present IA since there is no interest clause at all either in the Respondent/OC's invoices or in the Dealership Agreements. Since the Respondent/OC had no status of MSME at the time of entering into Dealership Agreements and also no interest clause was available in any other document produced by the Respondent/OC in the Main Application, advantages under the MSME Act cannot be claimed by it. In any case, MSMED Act does not have retrospective operation as laid down in *Silpi Industries* (supra) and *Mahakali Foods* (supra). Be that as it may, the appropriate forum for claiming interest for calculation under Section 16 of MSMED Act is MSEFC and not this Tribunal. We have also held in *Siddharth Enterprises* (supra) on the similar lines. If the interest component of the alleged operational debt is deducted, the alleged claims mentioned in Part-IV of the Main Application would be less than Rs.1,00,00,000/-. Thus, we hold that the interest, not agreed upon by the parties cannot be treated as part of the operational debt in terms of the



MSMED Act. We also hold that the MSMED Act does not have retrospective operation, in order to claim interest from a pre-date. Provisions of MSMED Act does not override the threshold limit stipulated under Section 4 of the IBC. Since we are not dealing with the arrangement between the parties for settlement of their disputes through arbitration, *Tata Consultancy Services* (supra) is also inapplicable in the present matter. Thus, we hold that the Main Application does not meet the requisite threshold prescribed under Section 4 of the IBC.

4.5 As regards limitation of the Main Application, the Ld. Counsel for the Respondent/OC argued that the Main Application is maintainable as there was acknowledgment of debt creating new period of limitation on the lines of *In Re: Cognizance for Extension of Limitation* (supra). According to the Ld. Counsel for the Respondent/OC, the email communications between the parties point to acknowledgement of debt by the Applicant/CD. However, upon perusal of available documents, we find that the Main Application was filed on 09.04.2022. No specific date of default is mentioned in Part-IV of the Application, except stating that default took place from 29.08.2012 to 01.03.2017 till 13.10.2021. However, there is no explanation as to the date of default being until 13.10.2021 in the Application. It is also observed that in the demand notice dated 14.12.2021, the Respondent/OC did not mention any specific date of default. Hence, we are unable to determine the exact date of default, which is *sine qua non* for maintaining an application under Section 9 of the IBC. Moreover, the Dealership Agreement between the parties was actually terminated with effect from 15.02.2017. The Respondent/OC itself by email dated 14.02.2017, informed the Applicant/CD that they had already given up their Trichy facility in



favour of one 'Ramani Group' the previous year. The Respondent/OC further clarified in the same email that their Tirunelveli dealership facility was also given up on the instructions of the Applicant/CD. However, these emails, which were not part of the Main Application have been produced by the Applicant/CD in the present IA. These emails do not form part of the reply filed by the Respondent/OC to the present IA. These emails refer to reconciliation of accounts and settlement of payments between the parties. Further, the Applicant/CD's alleged offer of paying Rs.50,00,000/- or alleged email communications cannot be considered as acknowledgement of debt for the purpose of extending limitation as it has come in evidence that the said offer was made by the Applicant/CD as a goodwill gesture, given the then prevailing situation due to COVID-19 Pandemic. In view of the above, we hold that there was no acknowledgment of debt by the Applicant/CD and thus the Main Application is barred by limitation. This issue is decided against the Respondent/OC.

4.6 In view of the facts and circumstances of the present case, it is a fit case for rejection of CP(IB) No. 1107/MB/2023. The Respondent/OC in their reply to the present IA prayed that the reply be taken as part of the Main Application. Considering the above, and since the pleadings and arguments advanced by both sides are sufficient for determination of the Main Application, there appears no necessity to separately hear and dispose of the Main Application.

ORDER

Thus, **IA (I.B.C) No. 1116/MB/2024** is **allowed** and **stands disposed of**. In the result, **CP (IB) No. 1107/MB/2023** is not maintainable and is rejected.

We, however, make it clear that any observations made in this Order shall not be construed as expressing opinion on merits. The Respondent/OC's rights available as per law before any judicial/quasi-judicial forum shall not be prejudiced on the grounds of rejection of the Main Application, CP (IB) No. 1107/MB/2023. **Ordered accordingly.**

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
K. R. SAJI KUMAR
MEMBER (JUDICIAL)

//Tanmay Jain//