

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI BENCH
COURT VI**

C.P. No. 2342/IBC/MB/2018

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

In the matter of

Khimji Poonja Freight and Forwarders

(U61100MH1994PTC079593)

74, Meadows Street, Nagindas Master Road, Fort,
Mumbai – 400 001.

...Applicant/Operational Creditor

Versus

M/s. Ingram Micro India Pvt. Ltd.

(U72900MH1996PTC136340)

Registered Office : 5th Floor, B-Block,
Godrej IT Park, 02 Godrej Business District,
Pirojsha Nagar, Vikhroli (W), Mumbai 79.

.....Respondent/Corporate Debtor

Order Pronounced on: 06.12.2023

Coram:

Hon'ble Ms. Lakshmi Gurung, Member (Judicial)

Hon'ble Shri. Sanjiv Dutt, Member (Technical)

For the Petitioner: Adv. Pooja Yadav and Ashok Pandey

For the Respondent: Adv. Kedar Wagle

Per: Ms. Lakshmi Gurung, Member (Judicial)

Order

1. The present Company Petition has been filed by *Khimji Poonja Freight and Forwarders* (“**the Applicant/Operational Creditor**”) on 20.01.2018 seeking to initiate Corporate Insolvency Resolution Process (CIRP) against *M/s. Ingram Micro India Pvt. Ltd* (“**the Respondent/Corporate Debtor**”) by invoking the provisions of Section 9 of Insolvency and Bankruptcy Code, 2016 (“**IBC/ the Code**”).

2. The present petition is filed before this Adjudicating Authority for claiming debt and default of **Rs. 1,09,43,366.61** (Rupees One Crore Nine Lakhs Forty-Three Thousand Three Hundred and Sixty-Six and Sixty-One Paise only) break up of which is Rs. 36,68,148.82 (Rupees Thirty-Six Lakhs Sixty-Eight Thousand One Hundred and Forty-Eight and Eighty-Two Paise Only) being unpaid invoices and Rs. 1,09,43,366.61 (Rupees One Crore Nine Lakhs Forty-Three Thousand Three Hundred and Sixty-Six and Sixty-One Paise only) being compound interest @ 21% per annum.

Brief Facts stated by the Applicant :-

3. The Applicant had entered into two agreements with the Respondent for rendering services to it. First agreement dated 27.11.2007 was for appointment of Applicant as a CHA for clearing and forwarding goods imported and exported by Corporate Debtor at the Airports, Seaports and ICDs in India. The second agreement was Agency Agreement for the work of refund claims for additional Duty of Customs at the port of Import (SAD claims). The Applicant rendered services and raised

invoices from time to time. Following payments remained unpaid despite repeated reminders through various emails: -

- a. Rs. 86,729/- under the first contract.
- b. Rs. 35,81,419.54 under the second contract.

4. The Applicant had issued statutory notice dated 22.04.2016 to the Respondent under section 433 and 434 of the Companies Act, 1956 and thereafter filed winding up petition on 27.09.2016 before the Hon'ble Bombay High Court. The said winding up petition stood automatically transferred under section 434 (1) (c) of Companies Act, 2013 from Bombay High Court to NCLT, Mumbai in view of the enactment of the Code. On 18.12.2017, due to technical defect, the petition was withdrawn with the consent of the Corporate Debtor but with liberty from this Bench to file a fresh petition in accordance with the provisions of the Code.
5. Pursuant to the provisions of the Code, the Applicant issued Demand Notice dated 15.12.2017 to the Respondent. The said Demand Notice stated as follows:

“We, M/s Khimji Poonja Freight Forwarders Pvt. Ltd., hereby provides notice for repayment of the unpaid amount of Rs. 36,68,148.82 (Rupees Thirty six Lakhs Eight Thousand One Hundred and Forty Eight and Eighty Two Paise only) plus compound interest @ 21% p.a. calculated as per the provisions of the Micro, small and Medium Enterprises Ac, 2006 amounting to Rs. 1,09,43,366.61 (Rupees One crore Nine Lakhs Forty Three Thousand three Hundred and Sixty Six and Sixty One Paise only) totalling to Rs. 1,46,11,515.43 (Rupees One Crore Forty-Six Lakhs Eleven Thousand Five

Hundred and fifteen and Forty Three Paise only) that is in default as reflected in the invoices attached to this notice.”

6. The Operational Creditor claimed that it is registered under MSME Act and is, therefore, entitled to interest at the rate of 21% under the MSME Act.

Submissions of the Corporate Debtor:

7. The Corporate Debtor has not filed any reply but has filed written submissions on 04.12.2018 and also compilation of documents on 25.02.2020 which have not been denied by the Operational Creditor.
8. The Corporate Debtor had replied to the Demand Notice vide reply dated 26.12.2017 primarily raising following contentions: -
 - a. the claim of the Operational Creditor is barred by limitation.
 - b. there is dispute in respect of the alleged claim on account of breach of Agency Agreement between Corporate Debtor's client and the Operational Creditor and, consequently, no debt is payable.
 - c. the Operational Creditor is not covered under the provisions of MSME Act and, therefore, interest @ 21% is not payable to the Corporate Debtor.
9. The Corporate Debtor is a leading company in the distribution of IT hardware and software products, telecommunication and office automation equipment and also has several accolades to its credit. The Corporate Debtor is one of the leading distributors for Apple, Samsung, Lenovo, Dell etc to name a few.

10. The Corporate Debtor is currently ranked 1st in the business of mobile phone distribution. Over the years, the Corporate Debtor had developed an excellent market and reputation in relation to the products it deals in and in relation to the services it provides. The Corporate Debtor has also achieved turnover levels in excess of Rs. 20,000 crores and net profit margins in excess of Rs.400 crores.
11. By an agreement dated 27.11.2007, the Operational Creditor was assigned the task of customs clearance and forwarding of consignments across all ports in the territory of India for consideration mutually agreed between parties.
12. Subsequently, the Operational Creditor was also assigned the task of claiming Special Additional Duty (SAD) refunds w.e.f. 01.04.2009 and for which a separate Agency Agreement was executed between the Corporate Debtor and the Operational Creditor on 22.10.2009.
13. In or around March 2011, some officers of the Customs Department were arrested along with senior executives of the Operational Creditor from their branch office at Ahmadabad and FIR was registered by the Central Bureau of Investigation (CBI) under the provisions of the Indian Penal Code, 1860 and Prevention of Corruption Act, 1988 as the concerned persons of the Applicant were found to have entered into a series of transactions of payment of illegal gratification. One Mr. Mehool Jhaveri, the Gujarat Regional Head of the Applicant had emerged as the king pin of the criminal conspiracy. Along with him, one Mr. Girish Malpani of the Applicant was also arrested. This amounted to breach of the Agency Agreement as against the material representations made on behalf of the Applicant. Charge sheet was filed under section 173 Cr.P.C against the

Custom officers as well as the Executives of the Operational Creditor. The licences of the Operational Creditor were suspended and later restored except for Gujarat region which was the subject matter of the Agency Agreement.

14. The Applicant has also acknowledged breach of clause 7 of the Agency Agreement and the Applicant is well aware of the fact that the Agency Agreement was terminated in view of the acknowledged breach. The Applicant was informed that by virtue of the said breach, invoices raised by the Company for the work of SAD refunds shall be forfeited and no further compensation/ payments shall be made by the Corporate Debtor. The alleged claims filed by the Company are not valid as per law being in breach of the Clause 7.1 of the Agency Agreement and also in relation to the matter filed by the CBI against the Operational Creditor for the said breach before the Special Judge, Mirzapur, Ahmedabad more particularly, Case No. 1/2012 and Case No. 22/2011. Thus, all other alleged claims were forfeited consequent to the termination of the Agency Agreement and the same has been duly acknowledged by the Applicant.

15. The pre-existing dispute was brought to the notice of the Applicant in the reply to the statutory notice under section 433 of the Companies Act, 1956 as well as in reply to the Demand Notice under section 8 of the Code. Operational Creditor acknowledged withholding of payment against the invoices under Clause 7 of the Agreement. All subsequent emails seek payments of bills other than the bills for SAD references by using the words **“Clean outstandings” or “excluding SAD references”**. The purported minutes of meeting of 9th April, 2015 also record by way of post script that **“P.S. SAD REFERECES not included in the above summary”**.

16. The Operational Creditor is not a "Micro" or "Small" enterprise. It has investment in plant and machinery in excess of Rs. 5 Crores. Even otherwise, it has not produced Udyog Aadhar Memorandum (UAM), which was notified by Ministry of MSME on 18.09.2015.
17. Claim of the Operational Creditor is barred by limitation as the invoices which are subject matter of the present Application relate to the period from September, 2010 to March, 2011.

Submissions of the Operational Creditor :

18. Per Contra, the Operational Creditor has submitted as follows:

Claims are not barred by limitation:

- 18.1 Winding up petition was filed against the Corporate Debtor in the Hon'ble Bombay High Court on 27.09.2016. Thereafter, the petition was automatically transferred to National Company Law Tribunal in view of the enactment of IBC. The petition was withdrawn due to technical defects but with the liberty from this Tribunal to file a fresh petition. Thereafter, the Operational Creditor had issued a Demand Notice dated 12.12.2017 under the provisions of the Code which was served upon the Corporate Debtor on 18.12.2017. Therefore, on the date of filing of the winding up petition in the Hon'ble Bombay High Court on 27.09.2016, the limitation clock stopped ticking and the period between 27.09.2016 till the filing of the present petition in June, 2018 would have to be excluded from the computation of the limitation period.
- 18.2 Out of total 18 invoices, there were 6 invoices which were raised in the year 2014 amounting to total of Rs.1,13,431.38 which were not barred by limitation as the proceedings were

filed within 3 years and debt amount was more than Rs. 1 Lakh which was the then prevailing threshold limit prescribed under section 4 of the IBC.

No pre-existing dispute

18.3 Respondent has not replied to the Applicant's various emails dated 16.08.2011, 19.08.2011, 12.03.2015, 26.03.2015, 06.04.2015, 08.04.2015, 10.04.2015 and 07.05.2015 and has not denied its liability. Thus, in the absence of any denial by the respondent, there is tacit admission of the liability on the part of the respondent.

18.4 The Operational Creditor has submitted a table which shows following outstanding payments:-

Sr. No.	Particulars	Principal amount	Interest @ 21% p.a.	Total
1.	General outstanding	1,13,431.38	1,24,678.76	2,38,110.14
2.	Other CHA Account	52,187.00	1,50,376.29	2,02,563.29
3.	SAD References	35,81,419.54	1,06,41,165.54	1,42,22,585.08
Total		37,47,037.92	1,09,16,220.59	1,46,63,258.51

18.5 It is stated that the Corporate Debtor continued to avail the service of the Corporate Debtor till 2015 without terminating the Agency Agreement. Hence, there was no pre-existing dispute till the date of demand of the above outstanding amounts. Hence, the Operational Creditor is entitled to initiate CIRP against the Corporate Debtor.

Analysis and Findings

19. Heard Ld. Counsel for the parties and carefully perused the materials on record and the written submissions of the parties.
20. Two primary questions on the basis of which this petition can be decided are :-
 - (a) whether the claim of the Applicant is barred by limitation and
 - (b) whether there is pre-existing dispute regarding debt.
21. The Counsel for the applicant submitted that the account between the applicant and respondent was in the nature of a running account. The applicant attached its bank statements to the Application to show that Respondent had been making payments to the Applicant till 2014. Our attention was drawn to the entry of an amount of Rs.4,99,581/- deposited in the Applicant's account on 12.05.2014 by the Respondent. Similarly, another payment of Rs.84,080/- has been deposited by the Respondent in the Applicant's Account. Upon carefully examining the invoices and the summary of the outstanding payments and bank statements, we find force in the argument of the Applicant that the Applicant and Respondent had maintained running account for the business transactions as series of payments were made to the Applicant. It is settled law that in case of running account, the limitation starts from the last date of payment made by the Corporate Debtor which is 29.04.2014.
22. It is also noticed that the Operational Creditor had issued statutory notice dated 22.04.2016 to the Corporate Debtor under Sections 433 and 434 of Companies Act, 1956. Thereafter, it had filed winding up petition against the Corporate Debtor on

27.09.2016 before Hon'ble Bombay High Court. Thereafter, on 01.02.2017, the said winding up petition was automatically transferred from Hon'ble Bombay High Court to NCLT, Mumbai Bench in view of enactment of IBC, 2016. On 08.12.2017, due to technical defect, the petition was withdrawn with the consent of the Corporate Debtor but liberty was granted to the Operational Creditor to file a fresh petition. Thereafter, the Operational Creditor issued a Demand Notice dated 15.12.2017 to the Corporate Debtor under the provisions of the Code. The Corporate Debtor sent a reply dated 26.12.2017 to the Operational Creditor denying its liability to pay any dues. The present petition was filed on 20.06.2018.

23. As mentioned in para 21 above, the limitation period starts from 29.04.2014. As the Applicant had filed the winding up petition before Hon'ble Bombay High Court on 27.09.2016 against the Corporate Debtor, it is entitled for exclusion of period from 27.09.2016 till the date the said petition was transferred from the Hon'ble Bombay High Court in view of section 14 of the Limitation Act according to which the time taken for pursuing *bona fide* proceedings in another court without jurisdiction has to be excluded. Section 14 of the Limitation Act is reproduced below:-

“(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been

prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.”

24. The Operational Creditor was pursuing the remedy against the Corporate Debtor since 27.09.2016 and the present petition was filed on 20.06.2018 in continuation thereof, we hold that the present petition is not barred by limitation. Thus, Question (a) is answered in the negative i.e. in favour of the Operational Creditor and against the Corporate Debtor.
25. As far as dispute regarding debt is concerned, we have given our thoughtful consideration to the various emails exchanged between the parties, the reply to the statutory notice under section 433 of the Companies Act, 1956 and reply to the Demand Notice under section 8 of the Code furnished by the Corporate Debtor.
26. As regards the pre-existing dispute, the Corporate Debtor has drawn our attention to **Clause 7 of the Agency Agreement** which is reproduced below:-

“7.1. In performing this agreement, Agent shall comply with all applicable laws, rule and regulations of the Territory and shall indemnify and save Ingram Micro harmless from agent’s failure to do so. Furthermore, if this agreement, the relationship created hereby of the performance hereof is determined by Ingram Micro to be contrary either. (1) to the laws, rules or regulations of the Territory now or hereafter in effect, or (2) to Agent’s representations set forth in this clause, this agreement may be terminated effective immediately by Ingram Micro upon written notice to

agent and in such case, shall be deemed null and void from its inception and any compensation paid or accrued hereunder shall be forfeited by agent, **and no further compensation payments paid or accruals shall be made by Ingram Micro for Agent's account.** In this regard, Agent recognizes that Ingram Micro has entered into this Agreement with agent in material reliance on the following representations made by agent that:

Agent has not made, and will not make any direct or indirect payment, offer to pay or authorization to pay, any money, gift, promise to give, or authorization of the **giving of anything of value to any government official or the family of any such official for the purpose of influencing an act or decision of the government or such individual** in order to assist directly or indirectly, Agent or Ingram Micro in obtaining or retaining business or securing an improper advantage.

- 7.2 Agent represents that the performance of this agreement is permitted under the laws of the Territory and agent has all required licenses, permits, authorizations or registrations and is otherwise fully qualified under the applicable laws and regulations of the territory to perform this agreement.
- 7.3 Agent will promptly inform Ingram Micro of anything that it is asked to do under this Agreement which will violate this clause 7 in the Agreement or any pertinent laws, regulations or government orders and will provide Ingram Micro timely notice of any change in any such laws, regulations or government orders that come to its attention that may affect either party's performance of its obligations under this agreement.
- 7.4 Agent represents that the information about the Agent provided to Ingram Micro prior to this agreement is current, complete and accurate as of the date of this

agreement and Agent shall immediately inform Ingram Micro on any change to such information.”

27. The Corporate Debtor submitted that some of the Officers of Customs Department were arrested along with senior executives of the Operational Creditor operating from their branch at Ahmadabad and various offences were registered against them by the CBI under the provisions of Indian Penal Code and Prevention of Corruption Act. The Corporate Debtor has annexed copy of the Final Report Form dated 26.12.2011 filed by the CBI in the court of Special Judge, Court No. 3, Mirzapur, Ahmedabad evidencing filing of Charge Sheet against various customs officers and one Shri Mehool Navichandra Jhaveri, who was Regional Head of the Operational Creditor and one Shri Ramgopal Malpani, who was executive of the Operational Creditor. The extract of the charge is reproduced below:

Charge:

Shri Mehool Jhaveri state head of ***M/s Khimji Poonja Freight Forwarders Pvt. Ltd.*** entered into criminal conspiracy with *Shri Devender Preet Singh Sangwan, the then Inspector of Customs, Division, Surat, Shri Revjibhai Chhaniyabhai Chaudhari, the then Superintendent of Customs, Division Gujrat, Shri Veersinh Samjibhai Pargi, the then Superintendent of Customs, Division, Surat, Shri Naresh Babubhai Chaudhari, the then Inspector of Customs, Division, Surat, Shri Pankaj Narsinh Chaudhari, the then Inspector of Customs, Division Surat and Smt Sadhna Bhalchandra Bapat, the then Inspector of Customs, Division Surat* organized a network of bribe for getting his work done smoothly. Thus, he has committed offences of abetment to a public servant taking gratification other than legal remuneration in respect of an official act. He is also liable for the offence of habitually committing above mentioned offence.....

It is clearly established after hearing recording of the telephone surveillance of Shri Mehool Jhaveri that the conversation of Shri Mehool Jhaveri with Shri Devender Sangwan, Shri Ravjibhai C. Chaudhari and Shri Veersinh Sambhajibhai Chaudhari all the public servant and Shri Girish Malpani executive of M/s. Khimji Poonja Freight Forwarders Pvt Ltd were indeed regarding payment and acceptance of illegal gratifications by the accused public servants. The conversation clearly proves the payment and acceptance of illegal gratification by the accused public servants from Shri Mehool Jhaveri.

28. The Operational Creditor had sent an email dated 12.03.2015 to the Corporate Debtor requesting the latter to review its decision not to process the bills which indicates that the Operational Creditor was informed/aware of the fact that bills in respect of SAD claims would not be processed. Subsequently, the Agency Agreement with the Operational Creditor was terminated by the Corporate Debtor. Further, the Operational Creditor has in its email dated 12.03.2015 noted the decision of the Corporate Debtor for termination of services of the Operational Creditor after personal hearing to its director but contended that the action of termination of its services was punitive.
29. We note that the Agency Agreement was terminated much prior to issue of statutory notice under section 433 of the Companies Act, 1956 or Demand Notice under Section 8 of the Code. Our attention was drawn to various emails in which the Operational Creditor had agreed to withholding of payments of its invoices pertaining to "SAD references". The Operational Creditor has also admitted to the fact that there was FIR against its officials along with those of the Customs Department.

30. Thus, it emerges that *prima facie*, there was breach of clause 7 of the Agency Agreement which led to the dispute between the parties and ultimately termination of the Agency Agreement. We neither have jurisdiction nor are otherwise required to adjudicate whether the termination of the Agency Agreement was lawful or not or whether the Operational Creditor under the present facts and circumstances is entitled to the balance payment or not as the proceedings before the Adjudicating Authority are of summary nature and any disputes relating to adjudication of rights and liabilities of the parties are beyond the scope of the Adjudicating Authority under section 9 of the Code. As held by the Hon'ble Supreme Court in **Mobilox Innovations Private Limited Vs. Kirusa Software Private Limited (2018) 1 SCC 353.**, *what the adjudicating authority is to see is "whether there is a plausible contention which requires further investigation and that the "dispute" is not a patently feeble legal argument or an assertion of fact unsupported by evidence. It is important to separate the grain from the chaff and to reject a spurious defence which is mere bluster".*
31. No evidence has been placed before us to show that the Corporate Debtor has admitted the alleged operational debt. Clearly, there are disputes between the parties and we find that this is not a fit case for admission of the Corporate Debtor to CIRP under Section 9 of the Code. We are supported by the judgment of Hon'ble NCLAT in the case of **Oyster Steel and Iron Pvt. Ltd. Vs. Brilliant Metals Pvt. Ltd.** (2023) ibclaw.in 248, Company Appeal (AT)(Insolvency) No. 1089 of 2022 wherein it was held as follows:-

“20. In result, it is, therefore, clear that there existed signs of dispute between the parties. It is well settled that Section 9 of IBC can be invoked only if no notice of dispute has been received by the Operational Creditor. In the present case, it has been clearly disputed by the Corporate Debtor. The invoices having been disputed, they require detailed consideration which is beyond the ambit of the Adjudicating Authority since IBC only provides for summary proceedings and not a full throttled trial.....

*22. Having regard to the factual matrix of the present case, we are satisfied that the Adjudicating Authority has correctly recorded the findings that the Operational Creditor having not filed any bank statement and that there was no acknowledgment of debt on the part of the Corporate Debtor, this is not a fit case for admission of Section 9 application. We also do not find any material to have been placed on record by the Operational Creditor wherein the Corporate Debtor can be said to have admitted the operational debt claimed by the Appellant at any stage. Moreover, in view of running account maintained between the parties and taking note of trade practice, Adjudicating Authority has made no error of judgment in recording the findings that the amount between the parties had not crystallized and, therefore, the essential ingredients of debt and default was missing in the present matter. For such disputed operational debt, Section 9 proceeding under IBC cannot be initiated at the instance of the Operational Creditor. **Where Operational Creditor seeks to initiate insolvency process against a Corporate Debtor, it can only be done in clear cases where no real dispute exists** between the two which is not so borne out given the facts of the present case.”*

Emphasis provided

In the present case, clearly, there was a real dispute between the parties which truly existed in fact and which was not spurious, hypothetical or illusory.

32. In view of afore-mentioned reasons, we find that the present petition is not maintainable on the ground of pre-existing dispute and the same is hereby **dismissed**.

Sd/-
SANJIV DUTT
MEMBER (TECHNICAL)

Sd/-
LAKSHMI GURUNG
MEMBER (JUDICIAL)

/SKS/