

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – III**

C.P.(IB)-872(MB)/C-III/2022

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

In the matter of

Piaggio Vehicles Pvt. Ltd.

E-2, MIDC Industrial, Baramati Pune,
Maharashtra - 413133.

.....Operational Creditor/Applicant

Vs

Petronas Lubricants (India) Pvt. Ltd.

Unit No. 603, C- Wing, Corporate Avenue,
Andheri East, Mumbai- 400093.

.....Corporate Debtor/Respondent

Order Pronounced on: 11.01.2024

CORAM:

**SHRI CHARANJEET SINGH GULATI
HON'BLE MEMBER (T)**

**SMT LAKSHMI GURUNG
HON'BLE MEMBER (J)**

Appearances:

For the Operational Creditor: Adv. Rohit Gupta

For the Corporate Debtor : Adv. Shyam Kapadia

ORDER

Per- Lakshmi Gurung, Member Judicial

1. The Present Application is filed under section 9 of Insolvency and Bankruptcy Code, 2016 (**“IBC”**) read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 by Piaggio Vehicles Private Limited (**“Operational Creditor”**) for initiating Insolvency Resolution Process (CIRP) against Petronas Lubricants (India) Private Limited (**“Corporate Debtor”**) for default in repaying an amount of ₹2,77,99,307/- as on 01.03.2020.

Relevant Brief Facts as mentioned in the Petition

2. The Operational Creditor is in the business of manufacturing motor vehicle and the Corporate Debtor is a manufacturer of lubricants and functional fluids.
3. The Operational Creditor and the Corporate Debtor entered into a Supply and Technical and Commercial Collaboration Agreement (**“Agreement”**) dated 27.12.2014, wherein the Operational Creditor agreed to purchase Products, as mentioned in the Agreement, inter alia including lubricants and functional fluids, from the Corporate Debtor.
4. Under the said Agreement, the Operational Creditor also agreed to provide access to the Corporate Debtor of its Sales, Service & Marketing network including dealers, service outlets and stockists located in India.

5. Concerning the promotion and sale of the Recommended Products, as mentioned in the said Agreement, the Corporate Debtor agreed to pay to the Operational Creditor an amount corresponding to 10% of its quarterly net revenue exclusive of taxes & levies, as Royalty. The said Royalty was agreed to be remitted within a period of 60 days of the end of each quarter. The duration of the said Agreement was from 01.01.2015 to 31.12.2019.

6. The said Agreement defined 'net revenue' as the revenue of the Corporate Debtor for the supply of the Recommended Products or Products whose trademarks are indicated in the Owner's manual to the dealers/sub dealers/sales and service associates of the Operational Creditor, net of all applicable duties, taxes and promotional schemes & discounts.

7. **Submission by the Operational Creditor:**

7.1 The Operational Creditor submitted that before the termination of the said Agreement, the Corporate Debtor used to make the payment of the Royalty to the Operational Creditor as per the schedule mentioned in the said Agreement. The Corporate Debtor issued Royalty Statements for each quarter therein reflecting the amount of Royalty payable to the Operational Creditor and accordingly advanced payments for the same to the Operational Creditor except for the last quarter of the year 2019.

- 7.2 On 31.12.2019, the said Agreement was terminated by efflux of time as per the terms of the said Agreement. However, the Corporate Debtor failed to make payment for the amount of Royalty due for the fourth quarter of 2019 i.e. for the period of October, 2019 to December 2019.
- 7.3 On 01.03.2020, the debt fell due against the Royalty due for the period of October, 2019 to December 2019, i.e. within sixty days from the end of the quarter, i.e. from 31.12.2019, as per the terms of the said Agreement.
- 7.4 On 03.07.2020, vide an email, Ms. Binu Chandy on behalf of the Corporate Debtor, agreed to pay an amount of Rs. 2.75 crores as a lump sum fixed royalty for the existing stock of products manufactured before 31.12.2019 as a part of the phase out sale plan. The Operational Creditor further submitted that it was also admitted therein that the outstanding royalty for the fourth quarter (October 2019 to December 2019) was due to be paid by the Corporate Debtor to the Operational Creditor.
- 7.5 In furtherance of the email dated 03.07.2020, on 13.07.2020 the Corporate Debtor advanced royalty payment amounting to Rs. 1,48,00,000 as a part payment against the existing stock manufactured before 31.12.2019.
- 7.6 In acknowledgment of the operational debt due, the Corporate Debtor issued a PIAGGIO Royalty Statement for

the period “01.10.2019 to 31.12.2019” dated 16.07.2020 therein admitting that the net amount of royalty of Rs.3,36,95,167/- is payable to the Operational Creditor.

7.7 Even after admitting the operational debt due and payable, the Corporate Debtor failed to make the payments. Accordingly, in the month of October 2020 several rounds of discussions took place wherein the Operational Creditor requested for the outstanding payment of Royalty for the period of 01.10.2019 to 31.12.2019.

7.8 In furtherance of the email dated 03.07.2020, on 31.07.2020 the Corporate Debtor advanced royalty payment amounting to Rs. 1,55,87,500/- against the existing stock manufactured before 31.12.2019. Thus, the Corporate Debtor advanced a total payment of Rs.2.75 crores (exclusive of taxes) against the royalty amount for the existing stock manufactured before 31.12.2019 as agreed vide its email dated 03.07.2020. However, the admitted amount of royalty, the operational debt, due and payable for the fourth quarter of 2019 i.e. for October 2019 to December 2019 remained unpaid by the Corporate Debtor.

7.9 Further, on 11.09.2020 the Operational Creditor received an amount of Rs. 1,95,82,525/- (exclusive of tax deducted at source) from the Corporate Debtor against the Royalty

due and payable for the third quarter being July 2019 to September 2019.

7.10 Further, vide an email dated 30.10.2020, Ms. Binu Chandy on behalf of the Corporate Debtor stated that the revenue of Rs.4,84,84,794/- is allegedly outstanding and due from the dealers/sales and service/marketing associates. The Corporate Debtor again admitted vide email dated 30.10.2020 that the full and final amount of Royalty payable to the Operational Creditor is Rs. 3,36,95,167/- and that the same shall be paid on monthly basis in proportion to the outstanding revenues. The relevant extract of the email dated 30.10.2020 is reproduced as hereinbelow:

“ ...

a. As on 29th October 2020, the revenue of Rs 48,484,794.00 is outstanding and due from your dealers/sales and service/marketing associates. Please see attached the relevant report.

...

c. The full and final royalty amount payable to you is Rs.33,695,167.00 which we shall pay on monthly basis in proportion to the outstanding revenues realized by us.”

7.11 Further, the Operational Creditor vide an email dated 15.12.2020 communicated to the Corporate Debtor that even after several communications and meeting between the parties, they had not received payment against the Royalty amounting to Rs. 3,36,95,167/- for the fourth quarter of 2019 i.e. for October 2019 to December 2019.

7.12 Subsequently on 26.03.2021, Mr. Pranav Bhanage Dhananjay on behalf of the Corporate Debtor vide an email assured that the Corporate Debtor will release the outstanding payment of the Royalty as and when the alleged dues is collected from the market. It was also stated therein that the Corporate Debtor will abide by Article 24.1 of the said Agreement. It is submitted that Article 24.1 of the said Agreement provides for payment of the Royalty by the Corporate Debtor. Further, the Corporate Debtor also mentioned therein that the outstanding amount allegedly due to be collected by them from the market amounted only to Rs.3,40,67,121/-.

7.13 However, the Corporate Debtor failed to fulfil its obligations and make payments towards its admitted outstanding operational debt. Accordingly, the Operational Creditor issued a Notice of Demand dated 18.02.2022 under Section 8 of the Code requesting the Corporate Debtor to make payments towards its outstanding liabilities/operational debt.

7.14 Subsequently on 04.03.2022, the Corporate Debtor sent a reply to the Demand Notice beyond the stipulated period of ten days as required under the Code, wherein it raised false, frivolous and baseless grounds to defy the admitted amount of operational debt i.e. Royalty, however, the Corporate Debtor admitted that the outstanding amount of Rs.3,40,67,121/- is due and payable by the Corporate Debtor to the Operational Creditor.

7.15 The Operational Creditor further submitted that on 17.03.2022, the Corporate Debtor issued payment amounting only to Rs.58,95,860/- in favour of the Operational Creditor against the total outstanding of Rs.3,40,67,121/-, the admitted amount of debt i.e., Royalty for the period of October, 2019 to December, 2019. This is a part payment made by the Corporate Debtor to the Operational Creditor.

7.16 On 28.03.2022, vide an email, the Corporate Debtor provided the details for the payment released on 17.03.2022. The Corporate Debtor again admitted therein that the net amount payable is Rs.3,36,95,167/- but wrongly deducted an amount of Rs.2,77,99,307/- from the same to arrive at the figure of Rs.58,95,860/-.

8. **In response to this, the Corporate Debtor has filed a detailed reply and raised few preliminary objections as follows:**

8.1 Corporate Debtor's main defence is that the present Petition is not maintainable since pre-existing disputes were raised by the Respondent prior to the Petitioner's Demand Notice issued under Section 8 of the Code dated 18.02.2022. The Respondent is liable to pay royalty only after entire collection of the quarterly net revenues from the Operational Creditor's Market Associates.

- 8.2 The royalty amount was due to be paid to the Operational Creditor only after the revenue was collected from the dealers/sub-dealers/sales and services associates of the Operational Creditor. As there are outstanding dues to be recovered from them. Royalty payment is required to be released to the Operational Creditor on proportionate basis of collection/realization of revenue.
- 8.3 In fact, this is what has been expressly recorded in Article 24.1(a) of the Agreement which contemplates royalty payments only on those amounts that are invoiced and collected. Vide various emails, the Respondent informed the Petitioner that it shall pay whatever sums due to the Petitioner after realization of the outstanding dues payable to the Respondent by the Petitioner's Market Associates. The Petitioner effectively seeks to enforce a claim, in complete contrast to the Agreement between the parties, that too not in a recovery court, but under misconceived proceedings under the Code.
- 8.4 As on 14.12.2021, a total sum of Rs.2,80,75,109/- was payable by the Petitioner's Market Associates to the Respondent. In this respect, the Respondent also shared an independent CA report dated 27.12.2021 ("CA Report") who, after examining the accounts, documents, records, etc. of the Respondent, revealed and provided a list of 33 debtor accounts, all of whom were the Petitioner's Market Associates and who had not paid the outstanding dues of the Respondent. An amount of Rs. 2,44,80,910/- (Rupees

Two Crores Forty-Four Lakhs Eighty Thousand Nine Hundred and Ten Only) is still outstanding as on date to be recovered from the Market Associates of the Operational Creditor. It is crucial to note that, as per Article 24.1(a) of the Agreement, any royalty payable to the Petitioner by the Respondent can only be paid after collection of all the dues outstanding to the Respondent by the Petitioner's and its Market Associates. Therefore, only after such complete payment by the Petitioner and its Market Associates does the Respondent's obligation to pay the royalty to the Petitioner come into picture.

- 8.5 The Petitioner has also disregarded the fact that, as per Agreement dated 27.12.2014 executed between the Petitioner and the Respondent, the Respondent had agreed to provide goods to the Market Associates and to the Petitioner. The Respondent was entitled to directly receive their dues from the Petitioner for the goods sold to them directly. In this capacity, it is in fact the Petitioner that owes the Respondent a sum of Rs.18,49,197.86/- (Rupees Eighteen Lakhs Forty-Nine Thousand One Hundred Ninety-Seven and Eighty-Six paise only) for supplies made to it directly along with interest thereon for the delayed period. Despite the amounts being invoiced and pending, the Petitioner has taken no steps to make these payments. The Respondent reserves its rights to initiate and/or prosecute independent proceedings regarding these dues and/or claim the same as and by

way of set-off in respect of any claim made by the Petitioner in an appropriate recovery forum.

- 8.6 It is submitted that the Petitioner itself has failed to pay the sums due and outstanding to the Respondent and, therefore, is in no position to assert claims under the Respondent, let alone under the provisions of the Code. It is pertinent to note that the Respondent had delivered products to the Petitioner amounting to a principal sum of Rs. 18,49,197.86/- (Eighteen Lakhs Forty-Nine Thousand One Hundred and Ninety-Seven Rupees and Eighty-Six paise). The Petitioner has failed to pay the said sums to the Respondent till date. The aforesaid fact was also pointed out by the Respondent in its Notice of Dispute dated 31.03.2022 addressed to the Petitioner. Additionally, it is pertinent to note that the Petitioner has conveniently maintained silence as regards its own obligations to pay the outstanding sums due to the Respondent.
- 8.7 The Respondent has also raised other issues like existence of arbitration clause in the agreement, mis-match of amount mentioned in the Demand Notice and the Petition filed under section 9 of IBC and Respondent's entitlement for set-off/counterclaim.

Observations and Findings:

9. Heard the Counsel for Parties and perused the record.

10. The Operational Creditor and the Corporate Debtor entered into a Supply and Technical and Commercial Collaboration Agreement (“Agreement”) dated 27.12.2014, wherein the Corporate Debtor agreed to pay to the Operational Creditor an amount corresponding to 10% of its quarterly net revenue exclusive of taxes & levies, as Royalty on promotion and sale of the products of the Corporate Debtor by Dealers/Sub Dealers, Sales and Service outlets/Marketing Associates.
11. It is the case of the Corporate Debtor that the entire revenues have not yet been collected/realized by the Corporate Debtor from the market associates of Operational Creditor, therefore, the same is not yet due and payable by the Corporate Debtor. as the Agreement provides that royalty amount shall be due and payable on being “invoiced” and “collected”.
12. In this context, we note that clause 24.1 (a) of the said agreement executed between the parties stipulates as follows:

“24.1 Customer’s Royalty.

By way of consideration of all the Customer’s obligation contemplated for the entire duration of this Agreement, the Supplier shall pay to the Customer:

- a. Concerning the promotion and sale of the Recommended Products (as per Schedule 3) contemplated by this Agreement, the Supplier shall pay to the Customer an amount corresponding to 10% exclusive of all applicable taxes & levies of the quarterly net revenues of the Supplier (**invoiced and collected**) in respect of the Dealers/Sub Dealers, Sales and Service outlets/Marketing Associates of the Customer.*
- b. For the purposes hereof “Net Revenues” means revenues of the Supplier for the Supply of the Recommended Products (as per Schedule 3) or Products whose trademarks are indicated in the Owner’s Manuals, to the Dealers/Sub Dealers/Sales and*

Service Associates of the Customer, net of all applicable duties, taxes and promotional schemes & discounts contemplated by the relevant invoices and promotional campaigns.”

13. According to the aforementioned clause of agreement, royalty becomes payable to the Petitioner by the Respondent after invoiced and collection of all the dues in respect of the Dealers/Sub Dealers/Sales and Service outlets/Marketing Associates of the Operational Creditor.

14. The Agreement further provides the manner in which royalty fee calculation is supposed to be arrived in Schedule 7. It is explicitly mentioned that royalty shall be payable on net realization by the Corporate Debtor.

15. There are various emails sent by the Corporate Debtor prior to demand notice pointing towards non-realization from the Operational Creditor's dealers/market associates. One such email dated 30.10.2020 (annexed to the Petition) stated as follows:

“I refer to our several discussions on the full and final settlement of royalty, which I have summarized below:

a. As on 29th October 2020, the revenue of Rs. 48,484,794.00 is outstanding and due from your dealers/sales and service/marketing associates. Please see attached the relevant report.

b. While we are constantly reminding your dealers/sales and service/marketing associates to pay our outstanding dues, we need your assistance to realize payment from few accounts with significant dues. Please see attached the list of outlets where we require your assistance to realize payments of our significant dues. The associates highlighted in red is almost no recovery and yellow is slow recovery.

c. *The full and final royalty amount payable to you is Rs. 33,695,167.00 which we shall pay on monthly basis in proportion to the outstanding revenues realized by us.*

16. The Corporate Debtor communicated vide aforesaid email that the full and final amount of Royalty payable to the Operational Creditor is Rs. 3,36,95,167/- and that the same shall be paid on monthly basis in proportion to the outstanding revenues realized by the Corporate Debtor.

17. The Corporate Debtor again, vide email dated 26.03.2021 (annexed to the Petition) stated that: -

“...

As you are aware, that our teams have been having constant discussions over the settlement of royalty payment during which you have been informed and updated on our outstanding dues from the market. On monthly basis SOA is being sent to your team as well.

With reference to the call on 27th January 2021, between Piaggio Team and my KL and Italy team during which, in spite of our best efforts, we were unable to reach to any mutual amicable solution on settlement. Hence we will continue to abide by our contractual obligation under 241.1.a of the STCCA., i.e. to pay as per revenues collected from the market. Unfortunately, our dues from the market remains outstanding and we are struggling to recover it given the current liquidity crunch in the market.

I have attached our outstanding dues file for your ready reference which shows total outstanding dues of INR 34,067,121. We have been taking relentless efforts to recover our dues however the inflow from the market is not as expected. As we keep collecting our dues from the market we shall release payment of your royalty on proportionate basis.”

18. Further, we note that the content of the independent Chartered Accountant Certificate as follows:

“This is to certify that on the basis of Accounts, documents, records, and submission produced before us, we hereby certify that there are 33 debtor accounts under type OEM-AM-PIAGGIO group which reflect total outstanding amount of Rs. 2,80,75,109/- as on 14/12/2021. This amount are shown in the list of Sundry Debtors which are due to PETRONAS Lubricant India Pvt Ltd is correct to the best of our knowledge and belief.”

The Customer wise list of outstanding balance is given as Annexure-1 with this certificate reflecting outstanding amount of Rs.2,80,75,109/-.”

19. The Operational Creditor has not denied receipt of the above CA Certificate dated 27.12.2021 but has annexed the same to the Petition, which revealed and provided a list of 33 debtor accounts, all of whom were the Petitioner’s Market Associates and who had not paid the outstanding dues of the Respondent.
20. The demand notice was issued to the Corporate debtor on 18.02.2022, and the above emails between the parties predate the demand notice, clearly indicating the existence of a dispute about quantum of amount due to the Corporate Debtor.
21. We rely upon the judgement of the Hon’ble Supreme Court in the ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited [2018 (1) SCC 353]***

“51. It is clear, therefore, that once the operational creditor has filed an application, which is otherwise complete, the adjudicating authority must reject the application under Section 9(5) (2) (d) if notice of dispute has been received by the operational creditor or there is a record of dispute in the information utility. It is clear that such notice must bring to the notice of the operational creditor the “existence” of a dispute or the fact that a suit or arbitration proceeding relating to a dispute is pending between the parties. Therefore, all that the adjudicating authority is to see at this stage

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. However, in doing so, the Court does not need to be satisfied that the defence is likely to succeed. The Court does not at this stage examine the merits of the dispute except to the extent indicated above. So long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.”

22. In view of above, we are of the considered opinion that the Corporate Debtor have successfully demonstrated pre-existing dispute between the parties.

23. In view of above, the present Company Petition is ***dismissed as non-maintainable.***

Sd/-

**CHARANJEET SINGH GULATI
(MEMBER TECHNICAL)**

Sd/-

**LAKSHMI GURUNG
(MEMBER JUDICIAL)**

Arpan, LRA