

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH -I**

CP (IB) 1103/MB/C-I/2019

Under Section 9 of the Insolvency and Bankruptcy
Code, 2016

In the matter of

Gandhar Oil Refinery India Limited

[CIN:U23200MH1992PLC068905]

DHL Park, 18th Floor, S.V. Road, Goregaon West,
Mumbai-400062.

... Operational Creditor/Petitioner

Versus

TPI India Limited.

[CIN: L28129MH1982PLC026917]

Plot No. J-61, Additional MIDC, Murbad, Thane -
421401.

...Corporate Debtor/Respondent

Order Delivered on 23.06.2023

Coram:

Hon'ble Member (Judicial) : Mr. H.V. Subba Rao

Hon'ble Member (Technical) : Mr. Shyam Babu Gautam

Appearances:

For the Operational Creditor : Mr. Shyam Kapadia, Advocate.

For the Corporate Debtor : Mr. Pranav Dessai, Advocate.

ORDER

Per: H.V. Subba Rao, Member(Judicial)

1. This Company Petition is filed under section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) by **Gandhar Oil Refinery India Limited** ("the Operational Creditor hereafter referred to as Petitioner"), seeking to initiate Corporate Insolvency Resolution Process (CIRP) against **TPI India Limited** ("the Corporate Debtor hereafter referred to as Respondent").
2. The Respondent was incorporated on 14.04.1982 under the Companies Act, 1956. Its Corporate Identity Number (CIN) is L28129MH1982PLC026917. Its registered office is at Plot No. J-61, Additional MIDC, Murbad, Thane -421401. Therefore, this Bench has jurisdiction to entertain and decide the Petition.
3. The Total Outstanding amount alleged to be in default is Rs. 1,73,58,894/- (Rupees One Crore Seventy Three Lakh Fifty Eight Thousand Eight Hundred and Ninety Four Only) comprising of interest at the rate of 15% p.a. payable from 01.07.2018 till payment. The Date of Default is considered as the due date of the first outstanding invoice which is 31.03.2016.

Submissions made by the Petitioner:

4. The Petitioner submits that the debt arose owing to supply of goods to the Corporate Debtor. The said products were manufactured by Indian

Oil Corporation Limited (“**IOCL**”). The Petitioner supplied these products between March 2016 to June 2018 pursuant to various purchase orders by the Corporate Debtor.

5. The Petitioner in order to establish his locus, submits that a Consignment Stockist Agreement was executed on 13.05.2010 between IOCL and the Petitioner. In terms of the said consignment stockist agreement, the arrangement between the Petitioner and IOCL was such that, a) the products manufactured by IOCL were to be stored at the Petitioner's warehouse, b) the customers desirous of purchasing the products would place an order with the Petitioner and the Petitioner thereafter would confirm the availability and issue confirmation to the buyer, c) the products would be sold from the warehouse managed by the Petitioner and would raise an invoice specifying IOCL as the principal and the Petitioner as the consignment stockist, e) on raising the invoice the Petitioner would be liable to pay to IOCL the price of the products sold and the Petitioner would thereafter pursue the recovery of the cost of the products with the buyers and f) IOCL would pay a service fee to the Petitioner for the services rendered.
6. It is further submitted that the a Del Credere Associate Agreement was executed between the Petitioner and IOCL, through this agreement the Petitioner was appointed an associate of IOCL on a del cadre basis for securing prompt payment from the customers on behalf of IOCL.
7. The Petitioner submits that vide the above stated two agreements the arrangement between the Petitioner and IOCL was such that, upon the sale of products, an invoice would be raised by the Applicant specifying the Applicant as Del Credere Agent. Thereafter, the Petitioner would be

liable to pay IOCL the price of the products sold and subsequently pursue the recovery from the customer.

8. Since Corporate Debtor was one of the customers, initially an amount of Rs.1,97,41,222 was due and payable by the Corporate Debtor to the Applicant. The Corporate Debtor made a part payment of Rs.18,75,300/-. Accordingly, an amount of Rs.1,75,65,922/- came to be due and payable by the Corporate Debtor under the invoices and debit notes raised between March 2016 to June 2018.
9. The Petitioner has made payments in respect all the transactions to IOCL and pursued recovery with the Corporate Debtor vide emails dated 30.10.2017. 06.11.2017 and 30.01.2018. The Corporate Debtor has vide email dated 02.02.2018 acknowledged its liability and sought time to make payments. Further, an amount of Rs.5,07,028 was paid by the Corporate Debtor which was duly adjusted towards the outstanding amount. Therefore, an amount of Rs. 1,73,58,894/- remains due and payable by the Corporate Debtor.
10. The Petitioner had in the aforesaid circumstances issued a demand notice dated 07.07.2018 under Section 8 of Code calling upon the Corporate Debtor to pay an amount of Rs.1,73,58,894 along with interest at the rate of 15% p.a. The Corporate Debtor replied to the demand notice vide letter dated 20.07.2018 acknowledging its liability to the extent of Rs.1,25,51,437 towards the Petitioner.
11. Since, no payment was made by the Corporate Debtor, the Petitioner filed Company Petition No. 2960 of 2018 to initiate CIRP against the Corporate Debtor. However, the said Company Petition was withdrawn by the Petitioner with liberty to file afresh.

12. In the aforesaid backdrop, the Petitioner issued a fresh demand notice dated 26.02.2019 once again calling upon the Corporate Debtor to pay an amount of Rs.1,73,58,894 along with interest at the rate of 15% p. The Corporate Debtor has replied to the demand notice vide letter dated 08.03.2019 wherein the Corporate Debtor has raised various disputes with respect to the quality of the products.
13. Since no payment was forthcoming from the Corporate Debtor, the present Petition is filed by the Petitioner.

Submissions made by the Corporate Debtor/ Respondent by way of Affidavit in reply dated 07.11.2019 and Written Submissions dated 10.04.2023

14. The Corporate Debtor has raised the following defences:
- i. The Petitioner is an agent of IOCL.
 - ii. The Petitioner is not an Operational Creditor within the meaning of the Code
 - iii. There is no privity of contract between the Operational Creditor and the Corporate Debtor.
15. The Respondent submits that invoices for the goods supplied are made directly by IOCL in the name of the Corporate Debtor and the name of the Petitioner is mentioned as DCA (Del Credere Agent) and the invoice bears GST number of IOCL and the Corporate Debtor. The Respondent submits that it is an admitted position that under the consignment stockist agreement and Del Credere Agreement, the Petitioner had agreed to provide services to IOCL in capacity as an agent. The Petitioner in its capacity as a Del Credere Agent has filed the present Petition.

16. The Respondent submits that the Petitioner is not Operational Creditor as the invoices relied on by the Petitioner clearly demonstrate that the 'operational creditor' is IOCL. The operational debt if at all is due is towards 'IOCL'.
17. The Respondent submits that an operational debt ought to be in respect of goods or services provided by the Operational Creditor to the Corporate Debtor, however, in the present matter, neither the invoices nor the contract is between the Operational Creditor and the Corporate Debtor herein.
18. It is submitted that there is no privity of contract between the Petitioner and the Respondent and hence no documents to prove the same have been brought on record. The Respondent submits that purchase orders have not been annexed to the Petition. The Petitioner has relied on two agreements namely consignment stockist agreement and Del Credere Agreement cannot bind the Respondent, as it was not a party to the said agreements.
19. It is further submitted that the invoices placed on record by the Respondent vide sur-rejoinder dated 19.04.2022 clearly demonstrate that the same were issued by the IOCL to the Corporate Debtor. The invoices are completely in sync with the manner in which invoices were to be raised in terms of Consignment Stockist Agreement and Del Credere Agreement. The Respondents argues that invoices relied on by the Petitioner are not the invoices served on the Respondent, these are merely printouts of their internal records.

20. The Respondent has taken us through the relevant clauses of DCA and CSA wherein the term invoice was defined to mean invoice raised by IOCL for the sale of products to customer.
21. With respect to the contention of the Petitioner that the Respondent has admitted its debt vide email dated 02.02.2018, the Respondent states this is incorrect as the debt if at all admitted was towards IOCL.
22. Lastly, the Respondent submits that proceedings under the Code are not recovery proceedings, since the Petitioner is an agent, he is entitled to recover amount on behalf IOCL by filing a civil suit for recovery and not proceedings under Insolvency and Bankruptcy Code,2016.
23. In summation, the Respondent contends that it is clear upon perusal of the two agreements i.e. the Consignment Stockist Agreement and Del Credere Agreement that the Petitioner was an agent of IOCL, the products were sold by IOCL to the Respondent. The Petitioner was a facilitator who provided go down to stock goods and acted an del cadre agent to secure payments.

Findings

24. We have heard the submissions of both sides and perused the records.
25. The primary defence raised by the Corporate Debtor is that the Petitioner is not an Operational Creditor within the meaning of section 5(20) of the Code and the debt, if at all owed to him cannot come within the purview of the Operational Debt under section 5(21) of the Code. He further contends that the Petitioner is merely an Del Cadre Agent of IOCL.

26. Therefore, it is necessary to refer to the definitions of Operational Creditor and Operational Debt which are reproduced hereinbelow:

“section 5 clause (20) “Operational Creditor” means a person to whom an Operational Debt is owed and includes any person to whom such debt has been legally assigned or transferred,

section 5 clause (21) “Operational Debt” means a claim in respect of the provisions of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.”

27. The Respondent argues that the Petitioner is not an Operational Creditor as the Operational Debt is not owed to him, but to IOCL. The Petitioner has not placed on record any document evidencing deed of assignment or transfer.

28. Further, we observe that there is no privity of contract between the Petitioner and the Respondent herein. It is an admitted position that the two agreements being the Consignment Stockist Agreement and Del Cadre Agreement were executed between the Petitioner and IOCL. Undoubtedly, the Respondent herein is not a party to the said agreements. In the said circumstances, the argument of the Petitioner it can maintain an action against the Respondent for recovery pursuant to the clauses stipulated under the aforesaid agreements cannot be sustained. Therefore, the agreements so executed and the clauses therein cannot bind the Respondent herein.

29. In order to ascertain default under section 9 of the code, it is important to examine the invoices raised. The Respondent during the course of

final hearing held on 28.03.2023 tendered for inspection original copy of the invoices. The Respondent has placed on record photo copies of the said invoices vide their Written Submissions dated 10.04.2023. From a mere perusal of these invoices placed as “Annexure-1(colly)” of Written Submissions, it is clear that IOCL has issued the said invoices and the Petitioner is specified as “DCA” i.e. Del Cadre Agent.

30. It is an admitted position that the goods supplied were manufactured by IOCL. The Petitioner has attempted to canvas an argument that Petitioner being a Del Cadre Agent of IOCL is entitled to recover the dues from the buyers i.e. the Respondent herein as it has already paid IOCL in respect of all the transactions. It is interesting to note here, that the aspect in which a Del Cadre Agent differs from a regular agent is that it guarantees payment to principal i.e. IOCL in the event of default committed by the buyer.
31. The Respondent has relied on the Order dated 04.10.2021 of NCLT Chennai in the matter of *Alturas Trading Corporation vs VRMX Concrete India Private Limited CP/IB/173/CHE/2021* wherein the quorum was faced within an identical issue as that in the Captioned Company Petition. The relevant paragraphs are reproduced herein below:

“9. After hearing the preliminary submissions made by the Learned Counsel for the Operational Creditor, this matter was reserved for orders on the issue of maintainability as to how the Applicant in the present case is entitled to file the present Application in capacity as a ‘Operational Creditor’ of the Corporate Debtor. A perusal of the Agreement reveals the fact that the Operational Creditor herein is acting as an agent for the principal company namely, M/s Bharat Cement Corporation Private Limited and as such as per terms of the Agreement, the alleged

Operational Creditor herein would be entitled to certain commission only upon realisation of sale proceeds from the parties. In commercial parlance, a Del Cadre Agent is a person who is engaged by the Principal to assist in supply of goods or services by contacting potential buyers on behalf of the principal. The difference between other agents and a Del Cadre agent is that the Del Cadre Agent guarantees to make the payment to the principal even if the buyer fails to make payment to the principal before the due date while ordinary agent does not guarantee recovery of dues from Debtor. The Del Cadre Agent is incentivised in ensuring that the Credit/Sale is effected to the parties who are financially capable of borrowing the payment. Accordingly, in the event of inability to recover the sale proceeds Del Credere Agent is liable to compensate the Principal.

10. From the Agreement entered into between the Operational Creditor and M/s Bharat Cement Corporation Private Limited, there is no nexus between the Operational Creditor and the Corporate Debtor herein. Also, as per the averments made in the Application, it is seen that the invoices are raised by M/s Bharat Cement Corporation Private Limited against the Corporate Debtor and not by the Operational Creditor and under the said circumstances, the Applicant herein cannot be considered as an "Operational Creditor" in relation to the Corporate Debtor. Further, the goods have been supplied by the M/s Bharat Cement Corporation Private Limited and the Operational Creditor is acting only as an agent.

11. Thus, we are of the considered view that the alleged Operational Creditor herein has failed to satisfy this Tribunal that there is an "operational debt" which is due and payable by the Corporate Debtor herein and in the circumstances the present Application as filed by the Applicant in the capacity as the Operational Creditor under Section 9 of

IBC,2016 is not maintainable and accordingly stands dismissed on the ground of maintainability.”

32. We hold that the present Petition is not maintainable as the Petitioner is not an Operational Creditor within the meaning of Code. An action under section 9 of the Code could have been maintained by IOCL and not the Petitioner herein. The Petitioner is merely an agent. Further it is important to keep in mind that the Hon'ble Supreme Court and NCLAT have time and again through plethora of orders have reiterated this Adjudicating Authority is not a recovery forum. The Petitioner can as a matter of right agitate his grievance before an appropriate Civil Court.
33. In the aforesaid conspectus of facts, The Petition bearing **CP(IB) 1103/MB/C-1/2019** filed by **Gandhar Oil Refinery India Limited**, the Operational Creditor, under Section 9 of the IBC for initiating Corporate Insolvency Resolution Process (CIRP) against **TPI India Limited (CIN: L28129MH1982PLC026917)**, the Corporate Debtor, is **dismissed as rejected**.

Sd/-

SHYAM BABU GAUTAM

Member (Technical)

23.06.2023

Priyal

Sd/-

H.V. SUBBA RAO

Member (Judicial)