

In the National Company Law Tribunal
Mumbai Bench.

CP No. 1288/I&BC/NCLT/MB/MAH/2017

Under **Section 7** of Insolvency & Bankruptcy Code 2016

In the matter of
Abdullahai Abdul Kader

V/s

Mohan Aromatics Pvt. Ltd.

Order delivered on: 18.10.2017

Coram: 1. Hon'ble Shri M.K. Shrawat, Member (Judicial)
2. Hon'ble Shri Bhaskara Pantula Mohan (Judicial)

For the Petitioner(s): : 1. Vishaki Bhatia
2. Ajay Panicker, Advocates.

For the Respondent(s): : 1. Ashok M. Bhatia, Advocates.

Per M.K. Shrawat, Member (Judicial).

ORDER

1. The Petitioner in the capacity of "Financial Creditor" has submitted Form No.1 on 07.08.2017 to initiate Corporate Insolvency Resolution Process under section 7 of the Insolvency & Bankruptcy Code 2016; Read with Rule 4 of the Insolvency & Bankruptcy (Application to Adjudicating Authority) Rules, 2016) for an outstanding financial Debt of ₹4,34,79,673/- (Principal) and interest thereon ₹4,48,03,622/-, totalling ₹8,82,83,295/- to be recovered from alleged Corporate Debtor M/s. Mohan Aromatics Pvt. Ltd., Mumbai.
2. At the outset our attention has been drawn on an Order passed by this Bench of NCLT, Mumbai in the case of this very Petitioner under the same title bearing TCP No.281/I&BP/NCLT/MB/MAH/2017 dated 27.06.2017. However, in the capacity of Operational Creditor on one hand as Petitioner, and on the other hand the same Respondent as Corporate Debtor, wherein on receiving a Praecipe of 27.06.2017 it was held as under :-

"ORDER

Heard on : 27.06.2017
Pronounced on: 27.06.2017

The Learned Representatives of both the sides are present.

At the Praecipe of 27th June 2017 it is stated that :

The above Company Petition was originally filed in the Hon'ble Bombay High Court. Soon after filing the same, the matter was transferred to this Hon'ble Tribunal. The Petitioner inadvertently

could not attach the correct statutory notice to the above Company Petition. Instead of amending the above Company Petition and Form No.5 in the matter, the Petitioner wishes to withdraw the above Company Petition and initiate the fresh proceedings by issuing fresh notice and by filing fresh Petition before this Hon'ble Tribunal.

It is therefore, prayed that the above Company Petition maybe allowed to be withdrawn with liberty to initiate fresh Insolvency proceedings against the above Corporate Debtor."

3. The copy is served to the Learned Counsel of the Respondent alleged debtor.
4. On hearing the Learned Counsel for the Petitioner, prima facie, it appears that the Petitioner can be allowed to withdraw the Petition with the liberty to initiate the proceedings, if deem fit, under the I&BP Code, 2016.
5. The Petition is hereby dismissed as withdrawn. To be consigned to Records."

2.1 In view of the above, the Petitioner had filed a fresh Petition (*supra*) in the capacity of a Financial Creditor now *subjudice* for adjudication. On receiving this fresh Petition under section 7 of The Code the Respondent Debtor has placed **three issues**, can be summarised as under :-

- a. That there was no "**privity of contract**" between the alleged Creditor and Debtor because the Respondent Debtor is only a witness to the impugned agreements ?
- b. That the Petitioner is not clear about its stand **whether a "Financial Creditor" or an "Operational Creditor"** because of the admitted position that earlier a Petition was filed under section 8/9 of the Insolvency Code which was "withdrawn". The Petitioner is not entitled to file a fresh Petition on the same cause of action and the principle of *res judicata* applies ?
- c. That the fresh Petition filed in the capacity of "Financial Creditor" is incorrect because the Debt in question is not a "Financial Debt" as defined under the Code?

3. To answer these **three questions**, it is necessary to examine the facts of the case. The Applicant is a "Partnership Firm" engaged in the business of trading of general merchandize either in local market or in foreign market. The Respondent and another concern M/s. Allure International approached the Applicant to help them to purchase the fabrics from supplier by opening Letter of Credit in favour of the supplier of the goods in order to guarantee the payment of the goods supplied within 180 days of the receipt of the Invoice. It was assured to the Applicant that both the concerns shall be a guarantor to each other's transaction of purchase of goods. For the said facilitation services, the applicant was offered to pay facilitation cost @ 4% of the CIF value of the goods covered under L/C. It was further offered to pay additional facilitation cost of 2% per month of the full value of L/C amount. In addition to this, further offered to pay interest @ 3% per month on any amount paid by the Applicant on behalf of the Respondent. The Partners of the Debtor stood as guarantors. For number

of transactions several L/C agreements were signed by the parties. Pursuance to the Agreement "Letter of Credit" was opened in favour of the Bank of the Suppliers by issuing Irrevocable Letters of Authority. Copies of the Irrevocable Letters of Authority are placed on record. M/s. Mohan Aromatics Pvt. Ltd, then furnished the details of the goods which they proposed to purchase from their Suppliers, by furnishing the Proforma Invoices which contained the details of the goods. On the basis of these details given in the Proforma Invoices, the Letters of Credits forms and Applications were prepared for the opening and establishing of the Letter of credit in favour of the Bank of the Suppliers. On the basis of the documents and authority from M/s. Mohan Aromatics, the Applicant had opened Letter of Credit in Union Bank of India in favour of the Bank of the Supplier of goods i.e. State Bank of India and the details of several L/C opened and the facility amount is mentioned in the compilation. The proof of delivery of goods is also on record. As per the terms of the Agreement the Respondent remitted the Margin Money and the Import Facilitation Cost. The Margin Money was thus debited to the account of the Applicant. The compilation consisted the details of the Margin Money received from M/s. Mohan Aromatics against each L/C. In short, against 12 L/C total Margin Money deposited was ₹47,36,000/- and the balance remained in the L/C after deducting Margin Money ₹2,28,76,336/-. As per the terms M/s. Mohan Aromatics was under obligation to pay the remaining value of L/C with all charges to the Applicant within 175 days of receipt of delivery of Challan. After receipt of the delivery proof from the Bank the Applicant requested M/s. Mohan Aromatics and their financial guarantor M/s. Allure International to make the payment of L/C amount with charges. Initially, the Debtors have failed to make the payment hence requested for more time to make the payment as a consequence, the Applicant had to pay the entire L/C amount with Bank Charges. According to the Applicant, there is no "dispute" that the liability against the Bank was discharged; the L/C accounts were fully satisfied, opened with Union Bank of India. Rather, Union Bank of India issued a "No Due Certificate" dated 17.03.2016. A statement showing total amount of ₹2,76,39,602/- paid to Union Bank of India along with presentation memo-cum-advice of cost under L/C is annexed in the compilation. There is "no dispute" that the said amount was paid to the Bank by the Petitioner. It is pleaded that M/s. Mohan Aromatics Pvt. Ltd. by their letter dated 23.01.2015 admitted their liability to pay the amount as per the various Debt notes amounting to ₹1,92,81,165.51 against the Commencing from LC No.31840ILC0003814, which amounts the Applicant / FC has paid to their Banker on behalf of M/s. Mohan Aromatics Pvt. Ltd. In the said letter M/s. Mohan Aromatics Pvt. Ltd. has also admitted that further amount of Rs.39,85,000/- approximately was also due and payable by of Feb 2015 and that M/s. Mohan Aromatics Pvt. Ltd. further assured

that at least this amount would be paid without default, but even then they failed to honour this commitment. They had also agreed that to pay at least Rs.5,00,000/- per month commencing from Feb 2015 onwards towards repayment of their outstanding, dues. Even this amount was not paid regularly and they altogether stopped the payment and evaded all contractual obligations and commitments. According to the two Statements of Account provided by the Respondent, the Debt amount is duly confirmed for the period of 1st April, 2014 to 31st March, 2015 for ₹2,28,66,745/- and for the period 1st April 2015 to 1st September 2015 for ₹2,20,20,443/-. In the Balance Sheet of M/s. Mohan Aromatics drawn as on 31st March 2015 the Liability was shown as 'Trade Payable', as alleged by the Petitioner.

3.1 On accepting the Liability, the **Respondent had issued certain cheques** in favour of the Petitioner to discharge the Liability totalling ₹2,29,36,000/-, however, **dishonoured**. As a consequence, Demand Notices were issued but the Debtor had neither paid the amount nor replied to the said legal Notices. Demand Notices are annexed. Likewise, M/s. Allure International, Guarantor, had also issued cheques for discharging the Liability in favour of the Petitioner of the same amount of ₹2,29,36,000/- but all dishonoured. Demand Notices were issued to the Guarantor but there was no reply and there was no payment. The Applicant / FCs states that under the said L/C the State Bank of India of the Supplier of goods, demanded a total sum of ₹2,76,39,602.40 from the Union Bank of India of the Applicant / FC. The Applicant / FC having not received this amount from the defendants, they paid this amount of ₹2,76,39,602.40 to their Bank. The Applicant / FCs had to pay a total of ₹4,03,132.60 towards the costs and charges levied by their Bank. The Applicant / FCs for their service of opening L/C, and facilitating the finance, they have charged the 4% facilitation costs which comes to ₹11,83,938.00. The total principal amount thus receivable from the Defendants works out to **₹2,92,26,673.00. The Applicant / FC states that after adjusting the Margin money of ₹47,36,000.00** and further on account of payment of ₹27,20,229.00, the net balance principal amount receivable from the defendants worked out to ₹2,17,70,444.00.

3.2 From the side of the Respondent Debtor objections have been raised and pleaded that the Proceedings filed on the basis of the dishonoured Cheques and Demand Notices are misconceived because against the said Cause of Action remedy had already been exhausted by approaching the Civil Court by filing proceedings under section 138 of Negotiable Instruments Act. This fact had been concealed by the Petitioner and nowhere disclosed that the Debtor had been sued before a Magistrate. Learned Counsel of the Respondent Debtor had also pleaded that M/s. Mohan Aromatics had only witnessed the Agreements as a Guarantor of M/s. Allure International, hence no Petition is 'maintainable' against the Respondent. The

Debt amount claimed is also under "dispute" and the alleged Debtor is not liable to pay the interest. It is vehemently pleaded that there was no "privity of contract" between the Petitioner and the Respondent. Earlier for same Cause of Action a Petition (TCP 281/2017) was filed but being defective it was withdrawn and dismissed by this very Court hence the Petitioner should not be allowed to again file a fresh Petition on the same Cause of Action which had already been adjudicated upon. A legal question has been raised that the alleged facility was in respect of supply of goods hence the nature of Debt, if any, falls under the category of "Operational Debt". Hence the claim of "Financial Debt" is against the provisions of the I&B Code.

FINDINGS

4. Learned Representatives of both the sides have been heard at length who respectively placed reliance on the compilation on record and the reply filed. In the background of the facts as narrated hereinabove we consider it appropriate to answer the three questions posed for our adjudication.
- 4.1 Apropos to '**privity of contract**' we have noticed that the agreements have established a connection as well as relationship between the Petitioner and the Respondents. The terms and conditions as enumerated in number of Agreements have definitely given a **legal right to sue** any of the party in default. It is not a case that the Respondent can be treated as a Third party of those agreements. Otherwise also, in general the latest position is that the pattern of drafting Loan Agreements or Letter of Credit agreements have drastically changed and undoubtedly a complex arrangement is executed in such agreements. This is the latest trend in drafting the agreements to cover up the complex financial arrangements. Therefore, under the modern law and as per latest development, the doctrines of **implied warranty** and also **doctrine of strict liability** has wider scope which allow even a Third party as a beneficiary. Although the elementary principle connected with the doctrine of "privity of contract" is confined to the contractual rights and duties and therefore affect the parties to a contract. Contractual rights are undoubtedly binding and enforceable among the immediate parties to the contract. Nevertheless, under the emerging law the scope and the effect of this doctrine had enlarged because of the complex terms and conditions laid down in a contract thus includes more and more persons who may or may not be regarded in strict sense as "parties to the transaction". Now the law has developed to the extent that the "doctrine of privity" means that a person cannot acquire rights or be subject to liabilities arising under a contract to which he is not a party but that does not mean that a contract between "A" and "B" cannot affect the legal rights of "C". Therefore, our observation is that, Firstly, the agreements have clearly demonstrated that the **Petitioner and the Respondents are** directly involved in the arrangement of finance hence to be held as **"Party to the**

Litigation". But, Secondly, the terms and conditions as laid down while opening the Letter of Credit and consequent thereupon agreements were executed, the Respondent is otherwise a "necessary" party to the litigation. It is also a trite position of law that the "vertical privity" is very much recognized when there is a chain of distribution of a product from manufacturer to seller and finally ends up to consumer. A joint knowledge is also now within the scope of this doctrine due to complex emerging contracts. In this case the copies of the Agreement are part of the compilation which were executed between the Petitioner, on one hand as party of the First Part, referred to in the Agreement as "Agent" and on the other hand, the Respondent as party of the Second Part, referred to in the Agreement as "Principal". Undisputedly, the Principal has expressed the desire of purchasing raw material from Supplier and also desirous to open Irrevocable Letter of Credit in favour of the Supplier and for that purpose approached the Principal to establish usance Inland L/C. In some cases, it was for 180 days from the date of delivery challan on behalf of the Principal and in favour of the Supplier. The contents of the said Agreements have clearly mentioned the name of the Supplier, the description of the product (fabric) and the value of the product. As a consequence, we have no hesitation in holding that there was a "privity of contract" between the Petitioner and the Respondent hence the claim of outstanding Debt is enforceable under the eyes of law.

- 4.2 **Apropos to the doctrine of "res judicata"** we have noticed that undisputedly the merits of the case have not been considered or adjudicated upon by NCLT in earlier Order dated 27.06.2017 (TCP 281/2017). The Respondent had inadvertently submitted a wrong Form of Petition when its main Petition was transferred from the Hon'ble High Court. So as to avoid any controversy, pleaded to allow the withdrawal of the Petition with a liberty to file a fresh Petition as per law. To answer this question, we have also examined section 11 of 'The Code of Civil Procedure 1908' wherein this doctrine is defined that no Court shall try any suit or issue in which the matter directly or substantially is the issue in a former suit between the same parties litigating under the same title in a Court competent to try such subsequent suit and in the former suit the issue had been heard and finally decided by such Court. The key words are **"has been heard and finally decided by such Court"**. In the present case, the issue had not been heard and finally decided by NCLT in the former Petition. There was no adjudication on the facts and the merits of the previous Petition. As a result, the subsequent Petition now under consideration is definitely out of the ambits of the doctrine of "res judicata". The very purpose to withdraw the said Petition was that inadvertently the Petitioner had filed the said Petition in the capacity of "Operational Creditor". It is also important as well as worth to mention that the Petition had been transferred from the Hon'ble High Court and due to changed circumstances and

due to changed law the Petitioner was required to re-submit a Petition, otherwise, the old Petition was very much a legitimate Petition to be decided under section 433 and 434 of the Companies Act, 1956. Such a Petitioner should not face double jeopardy that on one hand again to pursue the recovery of Debt before another judicial forum and Secondly due to technical reason could face disentanglement of the claim which otherwise was a legitimate claim. It is also worth mentioning that the **Notification dated 07.12.2016 bearing No. G.S.R. 1119(E)** has clarified that the Petitions so transferred should be taken up by the NCLT from the stage it stood transferred and for the purpose of deciding the said winding up petitions, the old records so transferred from the High Court is required to be considered by NCLT. As a result, we find no force even in this technical objection of the Respondent.

- 4.3 **Apropos to** the objection that whether the Debt in question falls under the category of **"Financial Debt" or in the category of "Operational Debt"**, we have examined the definitions as prescribed under The Code. As far as "Debt" is concerned, it means a liability or obligation in respect of a claim which is due from any person and includes, both "Financial Debt" as well as "Operational Debt", as defined under section 3(11) of The Code. According to us on reading the connected definitions we are of the view that the financial transaction under consideration is more akin to "Financial Debt" as defined under section 5(8) of The Code, means a Debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes money borrowed against the payment of interest. **Interestingly, The Code recognizes 'Letter of Credit' as Financial Debt vide Sub-section (8) of Section 5 has Sub-section (h) which reads as under :-**

*"any counter-indemnity obligation in respect of a guarantee, indemnity, bond, **documentary letter of credit** or any other instrument issued by a bank or financial institution;"*

Therefore, on conjoined reading of Sub-clauses of Sub-section (8) of Section 5 of definitions it transpires that there should be a Debt i.e. a "liability" or "obligation" to pay any person the money borrowed which was disbursed against the consideration of interest which is a charge created for the time value of money. In the present case, as noted *supra* all the Agreements had specified in clear terms that the facility of Letter of Credit is subject to 4% of the CIF value of the goods covered under L/C. It was further offered to pay additional facilitation cost of 2% per month of the full value of L/C amount. In addition to this, further offered to pay **interest @ 3% per month on any amount paid** by the Applicant on behalf of the Respondent. Since the facility granted by the Petitioner to the Respondent is undisputedly interest bearing, therefore, the same is nothing but "Financial Debt".

5. For invocation of section 7 of The Code and for initiation of Corporate Insolvency Resolution Process by a Financial Creditor it is also required to examine that there is an existence of "default". This aspect is also considered and noticed that glaring evidences are on record such as dishonouring of Cheques issued by the Debtor and other corroborative evidences establishing the "default" on the part of the Corporate Debtor in repayment of the Debt amount. Resultantly, a conclusion can be drawn that the L/C facility in question was granted by the Petitioner as a Debt which was a Financial Debt not paid by the Respondent Financial Debtor hence default of non-payment was committed, therefore, the Petition in question deserves "admission".
6. The Petitioner has proposed the name of the Interim Resolution Professional Mr. Jitesh Gupta, 257, Vardhman City Centre, Near Shakti Nagar Under Bridge, Gulabi Bagh, Delhi-110052, Registration No. IBBI/IPA-002/IP-N00144/2017-18/10380. The IRP is hereby appointed who shall act upon as prescribed under the provisions of section 13 of the Code by making a public announcement immediately hereafter within a period prescribed therein. The IRP so appointed shall also comply with the provisions of section 15 onwards of The Code and collate all the claims submitted by other Creditors by constituting a Committee of Creditors. We hereby direct the IRP to inform the progress of the Resolution Plan along with a compliance report within 30 days on receipt of this Order. However, a liberty is hereby granted to intimate the progress even at an early date, if need be.
7. Once the Petition is held as fit for "admission", hence as a consequence the Moratorium as prescribed under section 14 shall commence henceforth. On enforcement of Moratorium certain prohibitions are applicable such institution of any Suit before a Court of Law, transferring of any Asset of the Debtor, encumbering any rights over the assets of the Debtor, however, the supply of essential goods or services to the Corporate Debtor shall not be terminated during Moratorium period. It shall be effective till completion of the Insolvency Resolution Process or until the approval of the Resolution Plan as prescribed under section 31 of The Code.
8. To conclude, the Petition is hereby "admitted" and the commencement of the Corporate Insolvency Resolution Process is hereby declared with effect from the receipt of this Order.

Sd/-

BHASKARA PANTULA MOHAN

Member (Judicial)

Date : 18.10.2017

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Sd/-

M.K. SHRAWAT

Member (Judicial)