

MANU/NL/0750/2023

**IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL, CHENNAI BENCH**

Company Appeal (AT) (Ch) (Ins) No. 298/2021

**Decided On:** 28.08.2023

Madras Chemicals and Polymers **Vs.** Vijay Aqua Pipes Pvt. Ltd.

**Hon'ble Judges/Coram:**

*M. Venugopal, J. (Member (J)) and Shreesha Merla, Member (T)*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: T. Ravichandran, Advocate*

**ORDER**

**M. Venugopal, J. (Member (J))**

Comp. App (AT) (CH) (INS.) No. 298 of 2021:

**1.** The 'Appellant / Company / Petitioner', through its 'Proprietor', has preferred the instant Comp. App (AT) (CH) (INS.) No. 298 of 2021, as an 'Aggrieved Person', in respect of the 'impugned order', dated 11.01.2021 in IBA / 1166 / 2019 (Filed by the 'Petitioner / Financial Creditor'), under Section 7 of the I & B Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, passed by the 'Adjudicating Authority' ('National Company Law Tribunal', Division Bench - I, Chennai).

**2.** Earlier, the 'Adjudicating Authority' ('National Company Law Tribunal', Division Bench - I, Chennai), while passing the 'impugned order', dated 11.01.2021, in IBA / 1166 / 2019 (Filed by the 'Petitioner / Financial Creditor'), under Section 7 of the I & B Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, at Paragraph Nos. 13 & 14, had observed the following:

**13.** "It is to be seen herein that there is no financial contract which is seen on record in order to establish that the relationship between the Financial Creditor and the Corporate Debtor herein in order for the Applicant to qualify as a 'Financial Creditor'.

**14.** Further as already stated the alleged Financial Creditor herein has filed present Application in terms of the powers given under Clause 15 Del Credere Agency Agreement wherein the powers have been delegated to the Agent which is the Financial Creditor herein to initiate legal proceedings in case of a default made by the party. However, as already stated in the said Clause 15 it clearly manifests the fact that if the Agent shall be able to initiate against the legal proceedings, only in the name and on behalf of the Company for the recovery of the outstanding amount and the Principal Company should execute a special power in favour of the Agent to initiate such proceedings. Clause 15 does not operate automatically in favour of the Financial Creditor herein to initiate the legal proceedings against any of the party which is at default. Further, it is also to be noted that the powers of an agent cannot also exceed or can be exercised to a power superior to that of his Principal. Under the Scheme of IBC, 2016, in relation to supply of goods and the default arising in relation thereto are to be

essentially treated as an 'Operational Debt' and in the present case, subject to Clause 15, not as a 'Financial Debt' failing within the definition of Section 5(8) of IBC, 2016."

and resultantly, dismissed the 'Application', as 'not Maintainable', on the ground of 'Maintainability'.

Appellant's Submissions:

**3.** Challenging the 'impugned order', dated 11.01.2021 in IBA / 1166 / 2019, passed by the 'Adjudicating Authority' ('National Company Law Tribunal', Division Bench - I, Chennai), the Learned Counsel for the Appellant / Petitioner, submits that the 'Appellant', is engaged in the business of procurement and supply of numerous Chemical Products, and is the 'Del Credere Agent', of a 'Company' called 'Chemplast Sanmar Limited', a leading Manufacturer of PVC Suspension Resin. Further the 'Respondent / Corporate Debtor', was engaged in the business of manufacture and supply of PVC Pipes and had purchased PVC Suspension Resins, from 'Chemplast Sanmar Limited', through the 'Appellant'.

**4.** According to the Appellant, it is a 'Del Credere Agent' of 'Chemplast Sanmar Limited', and a perusal of the 'Del Credere Agent Agreement', entered into between the 'Appellant', and the said Company, would reveal that the 'Principal' i.e., 'Chemplast Sanmar Limited', will supply the Products, only to the 'Parties', recommended / instructed by the 'Appellant' in 'writing'.

**5.** Moreover, the 'responsibility', in making the 'payments', to the 'Principal' rested solely with the 'Appellant', and any 'Non Payment', by the persons, who had received the supply will rest, solely on the 'Appellant'.

**6.** It is represented on behalf of the Appellant, that it is 'solely responsible', to the 'Principal' for 'payments', in respect of the 'Sale of the Products', which is evident in Clause 7 of the Agreement. In the event of 'Person / Party', instructed or recommended by the Appellant, failing to pay the Sum(s), to whom supplies were made by the Principal, the Appellant has to pay such amounts to the 'Principal'.

**7.** The Learned Counsel for the Appellant / Petitioner, points out that the 'Appellant', had recommended the 'Respondent / Corporate Debtor', for supplies of PVC Suspension Resin, and on the basis of the recommendations, the 'Principal', had effected supplies to the 'Respondent / Corporate Debtor', who had not made payment. However, the 'Respondent / Corporate Debtor', had made payments, by way of 'interest', to the 'Appellant'. In reality, the 'Respondent / Corporate Debtor', through email dated 15.03.2019, had acknowledged its 'Liability', to pay the amount.

**8.** The stand of the Appellant is that, it issued 'Recall Notice', on 24.07.2019, demanding a Sum of Rs.1,23,14,186/-, which remained 'Outstanding', as 20.07.2019, within 7 days from the 'date of receipt of the said Notice'. Because of the fact that there was no response, to the said 'Recall Notice', the 'Appellant / Petitioner', had filed the main Petition in IBA / 1166 / 2019 (On the File of the 'Adjudicating Authority' / 'Tribunal', under Section 7 of the Code), based on the reason that there is a 'Financial Debt'. Ultimately, the 'Adjudicating Authority', had dismissed the Section 7 Application (Filed by the Appellant / Petitioner), at the 'admission stage' itself, holding that there is no 'Financial Debt', as defined under the I & B Code, 2016.

**9.** The Learned Counsel for the Appellant / Petitioner, contends that the 'Adjudicating

Authority' / 'Tribunal', had not considered the 'Del Credere Agent Agreement, entered into between the 'Appellant' and the 'Principal', in real and proper perspective.

**10.** The Learned Counsel for the Appellant / Petitioner, submits that the 'Appellant / Petitioner', has fulfilled the 'criteria', specified under Section 5(8)(b) and (f) of the I & B Code, 2016.

**11.** The argument advanced on behalf of the Appellant / Petitioner is that, the 'Transaction' has the effect of 'Commercial Borrowing', and hence, the 'Appellant', has a 'Financial Debt', due and payable by the 'Respondent / Corporate Debtor'.

**12.** The other stand of the Appellant is that the Respondent / Corporate Debtor, had acknowledged its 'Liability', to pay the 'Sum', that it is liable to pay interest on such 'Sums', and that, there is a 'Time Value for Money'.

**13.** The Learned Counsel for the Appellant / Petitioner, points out that the 'impugned order', dated 11.01.2021 in IBA / 1166 / 2019, passed by the 'Adjudicating Authority', is against the Scheme of the 'Code', and against the ingredients of Section 5(8)(b) and (f) of the 'Code'.

**14.** The Learned Counsel for the Appellant / Petitioner, points out that in the first Invoice Bearing No.0100784616 dated 16.06.2017, in the name of 'Chemplast Sanmar Limited', under the Caption 'Terms of Payment', it is mentioned as under:

"Payment in respect of this Invoice should be made only in favour of Madras Chemicals and Polymers. There is an interest payment of 21% per annum at Column No.3, and the same is seen in all the Invoices, commencing from Pages 96 to 101 of the Volume I of the Appellant's Paper Book, vide Diary No.822 dated 24.09.2021."

**15.** The Learned Counsel for the Appellant / Petitioner, refers to the 'five Debit Notes', and they run as under:

S.No.	Debit Note No	Date of Debit Note	Debit Note Amount (Rs.)	Date of Payment	Details evidencing payment	Page No.
1	33	19.09.2014	1302/-	12.03.2015	Cheque No.961737	558
2	34	19.09.2014	13216/-	12.03.2015	Cheque No.961737	559
3	40	14.11.2014	8322/-	12.03.2015	Cheque No.961737	563
4	47	26.11.2014	163143.80	12.03.2015	Cheque No.961737	564
5	55	22.12.2014	2836/-	12.03.2015	Cheque No.961737	566

**16.** It is the contention of the Learned Counsel for the Appellant / Petitioner that the aforesaid 'Debit Notes', and the 'Corresponding Payments', would demonstrate that the 'Corporate Debtor', had acknowledged the fact that (i) The Amount is payable by it, to the 'Appellant' (ii) Interest was serviced, for the delayed payments and that the 'entire transaction' (between the Appellant and Respondent), has the effect of 'Commercial Borrowing', and as such, the 'Appellant', has a 'Financial Debt', due from the 'Corporate Debtor'.

**17.** According to the Appellant / Petitioner, the 'Adjudicating Authority' / 'Tribunal', had

failed to appreciate that the 'Appellant', had not supplied any 'Goods', to the 'Respondent / Corporate Debtor', and therefore, there cannot be any 'Privity of Contract'. Also that, a 'reading of 'Debit Notes', 'Invoices' and the 'Del Credere Agent', will establish that the 'Appellant', is a 'Financial Creditor', and the 'Debit', is a 'Financial Debt'.

**18.** The Learned Counsel for the Appellant / Petitioner, adverts to the decision of the Hon'ble Supreme Court of India, in the matter of Kotak Mahindra Bank Limited v. A. Balakrishnan and Anr., reported in MANU/SC/0736/2022 : (2022) 9 SCC, Page 186 at Spl. Pgs: 206, 207, 208 and 209, wherein at Paragraphs 44, 45, 46, 47, 48, 49, 50 & 53, it is observed as under:

**44.** "In this background, we will have to consider, as to whether a person, who holds a Recovery Certificate would be a financial creditor within the meaning of clause (7) of Section 5 IBC.

**45.** A person to be entitled to be a "financial creditor" has to be owed a financial debt and would also include a person to whom such debt has been legally assigned or transferred to. Therefore, the only question that would be required to be considered is, as to whether a liability in respect of a claim arising out of a Recovery Certificate would be included within the meaning of the term "financial debt" as defined under clause (8) of Section 5 IBC.

**46.** It will be pertinent to note that in clause (8) of Section 5 IBC, i.e, the definition clause of the term "financial debt", the words used are "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes".

**47.** At this juncture, we may rely on the following observations in the case of Dilworth vs. Commissioner of Stamps<sup>22</sup>, which have been consistently followed by this Court: (AC pp. 105-06)

" ..... The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to shew that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

**48.** This Court in the case of Associated Indem Mechanical (P) Ltd. vs. W.B. Small Industries Development Corpn. Ltd.<sup>23</sup> while construing the definition of the term "premises" as provided under Section 2(c) of the W.B. Government Premises (Tenancy Regulation) Act, 1976, observed thus: (SCC pp. 614-15, para 13)

*"13. ....The definition of 'premises' in Section 2(c) uses the word "includes" at two places. It is well settled that the word "include" is generally used in interpretation clauses in order to enlarge the meaning of the words or phrases*

*occurring in the body of the statute; and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. (See Dadaji v. Sukhdeobabu [MANU/SC/0346/1979 : (1980) 1 SCC 621; Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. [MANU/SC/0073/1987 : (1987) 1 SCC 424 : AIR 1987 SC 1023] and Mahalakshmi Oil Mills v. State of A.P. [MANU/SC/0314/1988 : (1989) 1 SCC 164] The inclusive definition of "District Judge" in Article 236(a) of the Constitution has been very widely construed to include hierarchy of specialised civil courts viz. Labour Courts and Industrial Courts which are not expressly included in the definition. (See State of Maharashtra v. Labour Law Practitioners' Assn. [MANU/SC/0121/1998 : (1998) 2 SCC 688 : 1998 SCC (L&S) 657] Therefore, there is no warrant or justification for restricting the applicability of the Act to residential buildings alone merely on the ground that in the opening part of the definition of the word "premises", the words "building or hut" have been used."*

[emphasis supplied]

**49.** It is thus clear that it is a settled position of law that when the word "include" is used in interpretation clauses, the effect would be to enlarge the meaning of the words or phrases occurring in the body of the statute. Such interpretation clause is to be so used that those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. In such a situation, there would be no warrant or justification in giving the restricted meaning to the provision.

**50.** In Karnataka Power Transmission Corporation and another vs. Ashok Iron Works Private Limited<sup>28</sup>, this Court, while construing the definition of the word "person" as could be found in Section 2(1)(d) read with Section 2(1)(m) of the Consumer Protection Act, 1986, observed thus : (SCC p.246, paras 17- 21)

"17. It goes without saying that interpretation of a word or expression must depend on the text and the context. The resort to the word "includes" by the legislature often shows the intention of the legislature that it wanted to give extensive and enlarged meaning to such expression. Sometimes, however, the context may suggest that word "includes" may have been designed to mean "means". The setting, context and object of an enactment may provide sufficient guidance for interpretation of the word "includes" for the purposes of such enactment."

**18.** Section 2(1)(m) which enumerates four categories, namely,

(i) a firm whether registered or not;

(ii) a Hindu Undivided Family;

(iii) a cooperative society; and

(iv) every other association of persons whether registered under the Societies Registration Act, 1860 (21 of 1860) or not

while defining "person" cannot be held to be restrictive and confined to these

four categories as it is not said in terms that "person" shall mean one or other of the things which are enumerated, but that it shall "include" them.

**19.** The General Clauses Act, 1897 in Section 3(42) defines "person":

"3. (42) 'person' shall include any company or association or body of individuals, whether incorporated or not;"

**20.** Section 3 of the 1986 Act upon which reliance is placed by learned counsel for KPTC provides that the provisions of the Act are in addition to and not in derogation of any other law for the time being in force. This provision instead of helping the contention of KPTC would rather suggest that the access to the remedy provided to (sic under) the Act of 1986 is an addition to the provisions of any other law for the time being in force. It does not in any way give any clue to restrict the definition of "person".

**21.** Section 2(1)(m), is beyond all questions an interpretation clause, and must have been intended by the legislature to be taken into account in construing the expression "person" as it occurs in Section 2(1)(d). While defining "person" in Section 2(1)(m), the legislature never intended to exclude a juristic person like company. As a matter of fact, the four categories by way of enumeration mentioned therein is indicative, Categories (i), (ii) and (iv) being unincorporate and Category (iii) corporate, of its intention to include body corporate as well as body unincorporate. The definition of "person" in Section 2(1)(m) is inclusive and not exhaustive. It does not appear to us to admit of any doubt that company is a person within the meaning of Section 2(1)(d) read with Section 2(1)(m) and we hold accordingly."

**53.** Applying these principles to clause (8) of Section 5 IBC, it could clearly be seen that the words "means a debt along with interest, if any, which is disbursed against the consideration for the time value of money" are followed by the words "and includes". Thereafter various categories (a) to (i) have been mentioned. It is clear that by employing the words "and includes", the Legislature has only given instances, which could be included in the term "financial debt". However, the list is not exhaustive but inclusive. The legislative intent could not have been to exclude a liability in respect of a "claim" arising out of a Recovery Certificate from the definition of the term "financial debt", when such a liability in respect of a "claim" simpliciter would be included in the definition of the term "financial debt".

**19.** The contention of the Appellant / Petitioner is that, the 'Appellant', had paid the money, in respect of the Invoices, under which, 'Supplies', were effected to the 'Corporate Debtor', and that the 'Corporate Debtor', had paid 'Interest', for the said 'Payment', and that the 'Corporate Debtor', had acknowledged its 'Liability', and hence, this will have an effect of 'Commercial Borrowing', and will attract Section 5(8) of the I & B Code, 2016.

**20.** The Learned Counsel for the Appellant / Petitioner, refers to the 'Order' dated 06.06.2019 of the 'Adjudicating Authority' (National Company Law Tribunal, Hyderabad Bench, in IA No. 397 of 2019 in CP (IB) No. 315 / 7 / HDB / 2018, between Gowr Petrochem Pvt. Ltd. v. Ashok Polymers Ltd., wherein, at Paragraphs 20 & 21, it is observed as under:

**20.** "RP and IRP present. They filed a memo dated 04.06.2019 stating that all

the expenses of CIRP are paid to the IRP & RP by the COC of the Ashok Polymers Limited and there are no pending CIRP expenses to be paid.

**21.** This Tribunal by exercising powers under Section 12A of the Code R/W regulations 30A of IBC (Corporate Insolvency Resolution Process) Regulations 2016, approved the application for withdrawal."

**22.** The Learned Counsel for the Appellant / Petitioner, adverts to the Order dated 19.02.2019 in CP (IB) No. 315 / 7 / HDB / 2018, wherein, at Paragraphs 14 & 15, it is observed as under:

**14.** "The only contention raised by Corporate Debtor that it had paid money covered by the invoices for which there is no proof. The second contention is that Petitioner is not a Financial Creditor which is also not correct as documentary evident support that Petitioner is a Financial Creditor and money was paid on behalf of Corporate Debtor to M/s. RIL for supply of goods and credit facility was provided to the Corporate Debtor and money was payable with interest. Further, Corporate Debtor relied on Hon'ble NCLT, Principal Bench, New Delhi order in CP No.IB-212(PB)/2018 in the matter of M/s.Cadillac Info-Tech Private Limited vs. Hallow Infrastructure Private Ltd. The facts of the case is different from the present case.

**15.** So, in the light of above discussion it is proved that Petitioner is a Financial Creditor and that the debt due by Corporate Debtor is a Financial Debt. Petition is in order and as such Petition is liable to be admitted. The Financial Creditor suggested the name of IRP who filed Form-2."

**23.** While summing up, the Learned Counsel for the Appellant / Petitioner, prays for 'allowing' the instant Comp. App (AT) (CH) (INS.) No. 298 of 2021, by this 'Tribunal', while setting aside the 'impugned order', dated 11.01.2021 in IBA / 1166 / 2019, passed by the 'Adjudicating Authority' / 'Tribunal'.

Gist of I & B Code, 2016:

**24.** The definition of Section 3 (6) of the I & B Code, 2016, means;

(a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;

(b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;

Corporate Debtor:

**25.** Section 3 (8) of the 'Code', enjoins that 'corporate debtor', means a 'corporate person', who owes a debt to any person'.

Creditor:

**26.** Section 3 (10) of the 'Code', defines 'Creditor', meaning 'any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder'.

Debt:

**27.** Section 3 (11) of the 'Code', defines 'debt', meaning 'a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt'.

Default:

**28.** Section 3 (12) of the 'Code', defines 'default', meaning 'non- payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not 1[paid] by the debtor or the corporate debtor, as the case may be'.

Financial Creditor:

**29.** Section 5 (7) of the 'Code', defines 'financial creditor', meaning 'any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to'.

Financial Debt:

**30.** Section 5 (8) of the 'Code', defines 'financial debt', meaning 'a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes-

- (a) money borrowed against the payment of interest;
- (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
- (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

1 [Explanation. - For the purposes of this sub-clause,-

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
- (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;



(h) 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;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause;

Assessment:

**31.** Before the 'Adjudicating Authority' / 'Tribunal', the 'Appellant / Financial Creditor / Petitioner', in IBA / 1166 / 2019 (Filed under Section 7 of the I & B Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules 2016, passed by the 'Adjudicating Authority' ('National Company Law Tribunal', Division Bench - I, Chennai), under the Caption 'Part IV - Particulars of Financial Debt', had mentioned that a Sum of Rs.93,11,116/-, was the 'Amount of Debt', was granted and the 'Amount Claimed', to be in 'Default', by the 'Respondent/Corporate Debtor', was Rs.1,23,14,186.94/-, as on 20.07.2019.

**32.** It comes to light that the 'Amount of Debt' of Rs.93,11,116/- was disbursed on various dates, like 16.06.2017, 22.06.2017, 14.07.2017, 19.07.2017, 24.07.2017, 22.09.2017 and 01.11.2017.

**33.** A perusal of the 'Del Credere Agency Agreement', dated 04.04.2017, entered into between 'M/s. Chemplast Sanmar Limited', and 'M/s. Madras Chemicals & Polymers' ('Appellant / Firm'), represented by its 'Proprietor' Mr. Ashok Gupta (the 'Agent'), in Clause 1, it is mentioned that the 'Company', hereby appoints 'M/s. Madras Chemicals & Polymers' ('Agent', as 'Del Credere Agent'), to sell the said Products, manufactured by the 'Company', on 'principal to principal basis', in the City of Chennai and its Suburbs, Tamil Nadu, and Customers, nominated by 'Chemplast', on a 'non-exclusive basis'.

**34.** In fact, the Clause 5 of the 'Agreement', enjoins that "the Company shall effect supplies of the Said Products only to the party/ies recommended / instructed by the 'Agent', in writing. The Company shall raise the Invoice/s in the name/s of the said party/ies and send the same to the Agent for collection / realising payments."

**35.** In fact, the Clause 7 of the 'Agreement', enjoins that "the Agent, shall be personally liable to the Company for payments towards sale of the Said Products to party/ies instructed/recommended by the Agent. The Agent hereby agrees to submit to the Company an unconditional and irrevocable Bank Guarantee / Cash deposit for a sum of Rs.40,00,000/- (Rupees Forty Lakhs only) towards Security Deposit. The Bank Guarantee so deposited with the company under this Agreement shall be initially valid for a period of eighteen months from the date of execution of this Agreement. The Agent further agrees to provide the Company with additional Bank Guarantees, for such value and validity period, as may be intimated by the company from time to time."

**36.** Clause 10 of the 'Agreement', speaks to the effect that "the Agent shall pay or arrange to pay the Company on or before the respective due dates the invoice amounts for the said products supplied by the company to any party as instructed / indicated by the Agent. In the event of the party/ies instructed / recommended by the Agent to whom supplies have been made by the Company have not effected payment on or before the respective due dates, then the Agent shall pay to the Company the entire Invoice amount forthwith."

**37.** Clause 15 of the 'Del Credere Agency Agreement', dated 04.04.2017, points out as

under:

"In the event of any party/ies to whom the Said Products are supplied, defaults or fails to effect payment, the Agent shall be entitled to initiate legal proceedings in the name and on behalf of the Company for recovery of the outstanding amounts. The Company would, if required, execute a specific Power of Attorney in favour of the Agent to initiate such proceedings. Notwithstanding such failure of default in payment or initiation of legal proceedings, the Agent shall be liable to effect payment to the Company in terms of Clause 10 above towards sale of the Said Products."

**38.** The Learned Counsel for the Appellant / Petitioner, adverts to the Clause 15 of the 'Del Credere Agency Agreement', manifests the fact that even though the 'Agent', shall initiate the 'proceedings', the same shall be initiated only in the name and on behalf of the 'Principal Company' i.e., 'M/s. Chemplast Sanmar Limited', and the said 'Principal Company', should execute a 'specific Power of Attorney', in favour of the 'Agent' in order to initiate such 'proceeding'.

**39.** The Learned Counsel for the Appellant / Petitioner, points out that it is not necessary that there should always be a 'Written Agreement', and the 'Invoices' and the 'Debit Notes', will establish the 'Respondent / Corporate Debtor', had agreed and indeed, 'paid interest', for the Sums, which are paid, on behalf of the 'Corporate Debtor', to the 'ultimate supplier'.

**40.** At this stage, this 'Tribunal', pertinently points out that the Appellant, had issued a 'Legal Notice', dated 24.07.2019, to the 'Respondent / Corporate Debtor', stating that the 'Appellant', is the 'Authorised Del Credere Agent' of 'M/s. Chemplast Sanmar Limited' (a Company manufacturing PVC Suspension Resin), and further that the perusal of the Invoice, raised by M/s. Chemplast Sanmar Limited, raised on the 'Respondent', will reveal that the payment, in respect of the 'Invoices', shall be made in favour of the 'Appellant' (a 'Proprietorship Concern'), and that, the 'Appellant', had paid the 'Amounts', detailed in the attached Annexure to M/s. Chemplast Sanmar Limited, in terms of the Invoice, the Amount, needs to be paid, within 10 days from the 'Date of Invoice', and in the event of failure, the same carried 'Interest at 21% per annum', but the Appellant restricts the same to 18% per annum.

**41.** In effect the 'Legal Notice', dated 24.07.2019 of the Appellant, mentions that the 'Respondent', is liable to pay a sum of Rs.1,23,14,186.94/- in respect of the Supplies made by M/s. Chemplast Sanmar Limited', on Appellant's instructions.

**42.** In the 'Legal Notice', dated 24.07.2019, issued by the Appellant's side to the Respondent, indicates that the 'Respondent', through Email dated 15.03.2019, had acknowledged a Sum of Rs.90.84 Lakhs, which was payable by the 'Respondent', as on 15.03.2019.

**43.** In reality, the Respondent, was called upon by the Legal Notice dated 24.07.2019 (issued on behalf of the Appellant), to pay a Sum of Rs.1,23,14,186.94/-, being the 'Sum Outstanding', as on 20.07.2019, within 7 days of receipt of the Notice.

**44.** A mere running of the eye of the Invoices dated 16.06.2017, 22.06.2017, 14.07.2017, 19.07.2017, 24.07.2017, 22.09.2017 and 01.11.2017 (vide Page 95 to 101 of Vol. I of the Appeal Paper Book of the Appellant - Diary No. 822 dated 24.09.2021), indicates that the Customer and the Delivery at Consignee, was mentioned as the Respondent / Vijay Aqua Pipes (P) Ltd., Tiruvallur, Tamil Nadu, and in all these

Invoices, the Product Description, was mentioned as K6701 PVC Suspension Resin 25 KG Bag and the 'Transporter Name', was mentioned as Western Carriers (India) Limited, the Vehicle details, were described as 'TN20AK4507, 57843' / 'Western'.

**45.** It is not out of place for this 'Tribunal', to make a pertinent mention that 'Agents', are not normally liable for the 'Dues', from the 'Creditors', and such 'liability' will arise, only if the 'Agent', is a 'Del Credere Agent'. Furthermore, this 'Tribunal', aptly points out the decision of the Madras High Court in Jayakrishna Trading Co., rep. by Partner K.T.K. Venkatesan and Ors. v. Kandasamy Weaving Factory, rep. by Mrs. Suryam Prabha, Komarapalayam, Salem, reported in MANU/TN/0708/1994 : (1995) 1 Law Weekly, Page 230 at Spl. Pg.: 231, wherein, at Paragraphs 23 and 24, it is observed as under:

"In other words, a Del Credere Agent is one who, in consideration of extra remuneration called del credere commission, undertakes that persons with whom he enters into contract on principal's behalf will be in a position to perform that duties. The extra remuneration is charged for the risk of bad debts. In this case the 1st defendant is not at all liable as del credere agent."

**46.** It cannot be forgotten that the true relationship of 'Agent' and the 'Principal', is to be gathered from the nature of the 'Contract', its 'Terms and Conditions', and the 'Terminology', used by the 'Parties', is 'not decisive' of the 'Legal Relationship', as per decision of the Hon'ble Supreme Court of India in Snow White Industrial Corporation, Madras v. Collector of Central Excise, Madras, MANU/SC/0360/1989 : AIR 1989 SC 1555.

**47.** In fact, the use of the word 'Agent', is not 'conclusive'. The actual relationship between the 'Parties', must be decided with reference to all the circumstances of each case, as per decision Firm Pursottam Das Ganpati Rai v. Gulab Khan, reported in MANU/BH/0119/1963 : AIR 1963, Pat 407.

**48.** It is to be pointed out that Clause 8 of the 'Del Credere Agency Agreement', dated 04.04.2017, between M/s. Chemplast Sanmar Limited and the Madras Chemicals & Polymers (Firm) - Appellant / Petitioner, proceeds to the effect "the Agent shall make their own arrangements, at their own cost, for collecting payments from the parties to whom the Company has effected / despatched supplies based on the recommendations / instructions of the Agent. Payment shall be effected by way of Cheque/s or Demand Draft/s drawn in favour of the Company, payable at Chennai".

**49.** Further, Clause 12 of the 'Del Credere Agency Agreement', dated 04.04.2017, between the 'Parties' enjoins that "Notwithstanding this Agreement, the Company is entitled to sell or distribute either directly or indirectly the Said Products in the City of Chennai and its suburbs, Tamil Nadu."

**50.** It is clear from Clause 3 of the 'Del Credere Agency Agreement' dated 04.04.2017 that the Company shall pay to the Agent, Commission, as intimated by the Company from time to time, against the sale of the said Products to the 'Parties', recommended / instructed by the 'Agent', further, the said 'Commission', shall be paid to the 'Agent', only upon 'Realisation of the Sale Proceeds', either from such 'Parties', recommended by the 'Agent' or from the 'Agent'. As a matter of fact, the 'Company', shall pay the 'Commission', within 30 days of such 'Realisation', etc.

**51.** More importantly, Clause 3 of the 'Del Credere Agency Agreement', dated 04.04.2017, points out that the 'Company', is entitled to 'deduct / adjust', any amounts whatsoever, payable by the 'Agent', to the 'Company', from and out of such

'Commission', payable and release the 'Balance'. Indeed, the 'Commission', in terms of Clause 3 of the 'Del Credere Agency Agreement', speaks of 'Del Credere Commission', payable to the 'Agent'.

**52.** A glance of the contents of Clause 15 of the 'Del Credere Agency Agreement', dated 04.04.2017, entered into between 'M/s. Chemplast Sanmar Limited', and the 'Appellant' ('Madras Chemicals & Polymers'), clearly points out that in the event of any of the 'Party/ies', to whom the Said Products are supplied, 'Defaults' or 'fails to effect Payment', the 'Agent', shall be entitled to initiate 'Legal Proceedings', in the name and on behalf of the 'Company', for 'Recovery' of the 'Outstanding Amounts'. Further, the 'Company' would, if required, 'Execute' a 'Specific Power of Attorney', in favour of the 'Agent', to initiate such 'Proceedings'.

**53.** It is to be remembered that the 'Proceedings', under I & B Code, 2016, are 'summary in nature', and it is not a 'Debt Enforcement Procedure'. An 'Adjudicating Authority' / 'Tribunal', is not a 'Recovery Forum' or 'Court' and it does not determine any 'Claim' or 'Suit', in 'Summary Proceeding'. No wonder, the 'objective' of the 'I & B Code', is to 'consolidate', and 'amend the laws', relating to 'reorganisation' and 'insolvency resolution' of 'corporate persons', 'partnership firms' and 'individuals', in a time bound manner for 'maximization of value of assets of such persons', to 'promote entrepreneurship', 'availability of credit' and 'balance the interests of all the stakeholders', including 'alteration in the priority of payment of government dues', and to 'establish an Insolvency and Bankruptcy Fund, and matters connected therewith or incidental thereto'.

**54.** Also that, it must be borne in mind that the 'I & B Code, 2016', seeks to provide for designating the 'National Company Law Tribunal', and the 'Debt Recovery Tribunal', as the 'Adjudicating Authorities', for 'Corporate Persons', and 'Firms', and 'Individuals', respectively, for 'Resolution' of 'Insolvency', 'Liquidation' and 'Bankruptcy'.

**55.** The Invoice No.0100784974 dated 22.06.2017 in the name of M/s. Chemplast Sanmar Limited, mentions the Customer's name as M/s. Vijay Aqua Pipes (P) Ltd, and in Delivery / Consignee's Column, it is mentioned as Vijay Aqua Pipes (P) Ltd., Tiruvallur.

**56.** In the aforesaid Invoice dated 22.06.2017, it is unequivocally mentioned that 'Payment', in respect of this 'Invoice', should be made only in favour of Agent 'Madras Chemicals & Polymers' ('Appellant / Petitioner'). The Invoice value is mentioned as Rs1,337,915/- and the 'rate of interest', was mentioned as 21% per annum, would be charged, if payment was not made on or before 'due date'.

**57.** In the instant case on hand, one can deduce safely and securely that the 'Appellant / Financial Creditor / Petitioner', as per 'Invoice', is enjoined to 'receive Money for and on behalf of M/s. Chemplast Sanmar Limited' ('Principal Company'). It cannot be gainsaid that 'no amount', was 'disbursed', to the 'Corporate Debtor', by the 'Appellant / Petitioner / Financial Creditor'. To put it precisely, Clause 15 of the 'Del Credere Agency Agreement', dated 04.04.2017, lucidly points out that the 'Agent' if he / it to commence any 'Legal Proceedings', it can do so, only in the name and on behalf of the 'Company' for the 'recovery' of the 'Outstanding Sums'. Also that, the 'Company' would, if required, is to 'Execute', a 'specific Power of Attorney', in favour of the 'Agent', to initiate 'such proceedings'.

**58.** There is 'no dispute', as to the fact that 'M/s. Chemplast Sanmar Limited', the 'Company' which appointed the 'Appellant' / 'M/s. Madras Chemicals & Polymers', as its 'Agent', manufactures PVC RESIN and as per the 'Del Credere Agency Agreement', dated

04.04.2017, is desirous of selling the Said Products through an 'Agent'. In the Invoices, the Product Description was mentioned as 'K 6701 PVC Suspension Resin 25 KG BAG', etc.

**59.** In terms of Section 5 (20) of the 'Code', an 'Operational Creditor', is defined, meaning, a 'Person to whom 'Operational Debt', is 'owed', and includes any 'Person' to whom, such 'Debt', has been 'legally assigned or transferred'.

**60.** As per Section 5 (21) of the I & B Code, 2016, 'Operational Debt', means, a 'Claim', in respect of the provision of 'Goods or Services', including 'employment' or a 'Debt', in respect of the 2[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', it means a 'Operational Debt'.

**61.** Going by the 'Objective' and 'Scheme' of the 'I & B Code, 2016', this 'Tribunal', on the basis of surrounding facts and circumstances of the instant case, in the teeth of Clause 15 of the 'Del Credere Agency Agreement', dated 04.04.2017 and keeping in mind of a prime fact that the 'Default', which took place, pertaining to the 'Supply of Goods', comes within the definition of 'Operational Debt', as per Section 5(21) of the I & B Code, 2016 and hence, Section 9 of the I & B Code, 2016, attracts in an 'unambiguous manner'. Viewed in that perspective, the 'Debt', in the present case, cannot be termed as 'Financial Debt', as per Section 5 (8) of the I & B Code, 2016, in the considered opinion of this 'Tribunal'.

**62.** It is relevantly pointed out that in the instant case, the 'Appellant / Petitioner', had issued a 'Legal Notice', dated 24.07.2019, to the 'Respondent / Corporate Debtor', and not issued a 'Legal Notice', demanding payment under Sub-section 1 of Section 8 of the 'Code'.

**63.** Section 9 (1) of the 'Code', mentions that 'after the expiry of period of ten days, from the 'date of delivery of the notice' or 'invoice', demanding 'payment', under Sub-section 1 of Section 8 of the 'Code'. If the 'Operational Creditor', had not receive 'payment', from the 'Corporate Debtor' or 'Notice' of the 'Dispute', under Sub-section 2 of Section 8, the 'Operational Creditor', may file an 'Application', before the 'Adjudicating Authority', for initiating a 'Corporate Insolvency Resolution Process'.

**64.** Admittedly, in respect of the occurrence of a 'Default', a 'Demand Notice', as per Section 8 (1) was not given to the 'Corporate Debtor'. Section 8 (2) of the 'Code', specifies a period of ten days of the receipt of the 'Demand Notice' or 'copy of Invoice', mentioned in Section 8 (1) of the 'Code'. The 'Legal Notice', dated 24.07.2019 of the Appellant / Petitioner's, only mentions 'within 7 days of receipt of this Notice', etc. As a matter of fact, the 'Legal Notice', dated 24.07.2019 of the 'Appellant / Petitioner', was not issued, in terms of Section 8 (1) of the 'Code'.

**65.** Be that as it may, the very fact that the 'Del Credere Agency Agreement', dated 04.04.2017, between 'M/s. Chemplast Sanmar Limited' ('Company') and the 'Appellant / Petitioner' ('Madras Chemicals & Polymers' - Firm), mentions that 'M/s. Chemplast Sanmar Limited' ('Company'), which manufactures 'PVC Resin', and for selling the Said Products, through 'Agent', had appointed the 'Appellant' / 'Petitioner', as its 'Agent', going by the 'Product Description', in the Invoices' (vide Pages 95 to 101 of the Appellant's Paper Book - Diary No.822 dated 24.09.2021). Considering the spirit and tenor of the 'Del Credere Agency Agreement', dated 04.04.2017, this 'Tribunal', comes to a clear cut conclusion that in the instant case, the 'Default', arose in relation to the supply of 'PVC Suspension Resin' ('Goods'), to the 'Respondent / Corporate Debtor', and

as such, the amount 'Claimed', to be in 'Default', by the 'Corporate Debtor', as on 20.07.2019, amounting to Rs.1,23,14,186.94/- (vide 'Part - IV' of the 'Application', under 'Particulars of Financial Debt'), is an 'Operational Debt', and for the said 'Operational Debt', only an 'Application', under Section 9 of the 'Code', will 'apply', as opined by this 'Tribunal'. Per contra, the 'Application', in IBA / 1166 / 2019 (Filed by the Appellant / Financial Creditor / Petitioner, under Section 7 of the I & B Code, 2016, read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, is 'Ex-facie, not Maintainable', in the 'eye of Law'. Looking at from this perspective, the conclusion arrived at, by the 'Adjudicating Authority' ('National Company Law Tribunal', Division Bench - I, Chennai), in IBA/1166/2019 dated 11.01.2021, holding that the 'Section 7 Application' of 'I & B Code, 2016', is 'not Maintainable', and resultant dismissal of the same, are free from any 'Legal Flaws'. Accordingly, the 'Appeal' fails.

Result:

In fine, the instant Comp. App (AT) (CH) (INS.) No. 298 of 2021 is 'Dismissed', of course for the reasons assigned by this 'Tribunal', in this 'Appeal'. No costs.

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