

**THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, COURT-I, CHANDIGARH
(Exercising powers of Adjudicating Authority under
the Insolvency and Bankruptcy Code, 2016)
(through web-based video conferencing platform)**

CP (IB) No. 109/Chd/Hry/2019

**Under Section 9 of the
Insolvency and
Bankruptcy Code, 2016**

In the matter of C.P. (IB) No. 109/Chd/Hry/2019

M/s Agarwal Foundries Private Limited

Having its Registered Office at
'Rama Tower', 5-4-83, TSK Chambers
Opp. Ranigunj Bus Depot, MG Road
Secunderabad, Andhra Pradesh- 500003
CIN: U74120TG2003PTC041421

...Petitioner

Vs.

POSCO E&C India Private Limited

Having its registered office at
Park Centra, 7th Floor, Tower-B
Sector- 30
Gurgaon, Haryana- 122001

...Respondent

Judgment delivered on: 06.06.2024

**Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. L.N. GUPTA, MEMBER (TECHNICAL)**

Present:

For the Petitioner: Mr. Anand Chhibbar, Senior Advocate
Mr. Vaibhav Sahni, Advocate

Mr. Vivek Sethi, Advocate

For the Respondent: Mr. Savar Mahajan, Advocate

Per: Sh. Harnam Singh Thakur, Member (Judicial)

Sh. L. N. Gupta, Member (Technical)

JUDGMENT

The instant petition has been filed by Agarwal Foundries Private Limited, (hereinafter referred to as **“Petitioner”**) against POSCO E&C India Private Limited (hereinafter referred to as **“Respondent”**) under Section 9 of The Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **“the Code”**), read with Sub-Rule 1 of Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, seeking initiation of the Corporate Insolvency Resolution Process in respect of the Respondent on account of default on behalf of Empathy Infra & Engineering Pvt. Ltd. (hereinafter referred to as the **“third party”**) in the payment of Rs. 2,11,68,580/- (Rupees Two crore Eleven Lacs Sixty Eight Thousand Five Hundred and Eighty only), (Rs. 1,05,49,581/- as principal amount and Rs. 1,06,18,729/- as interest).

2. The Petitioner averred the following in its petition:

- i. It supplied TMT bars to the third party, an independent contractor of the Respondent, for its Nirvana Project in Pune, Maharashtra, on the condition that the Respondent would stand as a Guarantor of the third party for the pending dues as per their arrangement, arrived at vide email dated 26.06.2015.

- ii. Vide email communication dated 26.05.2015 (Annexure-C), Respondent categorically agreed that in case the pending dues are not cleared by the third party, then it would clear the same.
- iii. The Petitioner supplied goods to the third party from time w.e.f. 06.11.2015 to 12.06.2016 on a credit of 45 days. As on 28.08.2015, the Petitioner had supplied goods worth Rs. 1,30,49,851/- to the third party, out of which only Rs. 25,00,000/- were paid. As of 30.09.2017, a sum of Rs. 1,84,42,383/- (Rs. 1,05,49,581/- + Rs. 78,92,532/- (interest at the rate of 36% p.a.) was due from the third party towards the goods supplied to it.
- iv. The Respondent, in its meeting with the third party held on 19.10.2015 resolved that in case the third party fails to make the payment, the same can be paid by the Respondent. Copy of minutes of the said meeting is attached as Annexure-H.
- v. The Petitioner issued a notice dated 17.07.2018 under Section 8 of the Code to the third party, which was received back on 25.07.2018 on account of being un-delivered. The Petitioner again issued a notice dated 24.10.2018 to the third party.
- vi. Demand Notice was also issued to the Respondent twice, one on 27.07.2017 and the other on 11.10.2017, to which the Respondent replied on 17.08.2017 (Annexure-K).
- vii. The Petitioner submitted that earlier an application CP(IB) No. 140/Chd/Hry/2018, under Section 9 of the Code, was filed before

this Adjudicating Authority against the third party, which was withdrawn with a liberty to file a fresh petition on the same cause of action against appropriate parties vide order dated 08.06.2018 (Annexure-L). Again, an application CP (IB) Np. 317/Chd/Hry/2018 was filed seeking initiation of the CIRP of the third party, which was also withdrawn vide order dated 15.10.2018 ((Annexure-M), with liberty to file a fresh petition on the ground that delivery of the demand notice as prescribed under Section 8 of the Code read with Rule 5 of the Application to Adjudicating Authority Rules, 2016, was not proper.

3. The Respondent, in its short reply dated 29.08.2019 filed vide diary no. 4477, pointed out material defects in the petition, which were rectified vide I.A. No. 517/2023. The Respondent filed its reply dated 07.02.2020, vide diary no. 1031, wherein it submitted that the alleged claim of the Petitioner is time barred and beyond the limitation period of three years, which expired on 28.08.2018, for recovering the alleged debt. The Respondent further submitted the following:

- i. The Petitioner has solely relied upon the email dated 26.06.2015, in respect of the debt claimed to be due and payable. The Respondent submitted that no contract of guarantee was ever executed between the Petitioner, the third party, and the Respondent. The said email dated 26.06.201 regarding assurance of payment was given by Mr. Kalpesh R. Patil, a former senior engineer, who is not an authorised

personnel to extend an assurance of payment, and the said email was not addressed to any key managerial personnel of the Respondent.

- ii. It is further submitted by the Respondent that the minutes of the meeting held on 19.10.2015 relied upon by the Petitioner to establish that the Respondent was the corporate guarantor of the third party, clearly states that *“if in case EIEPL do not pay M/s M.S. Agrawaal after receiving money from POSCO E&C then POSCO E&C can hold the certain amount of EIEPL and can pay directly to M/s M.S. Agrawaal”*. The Respondent did not attend the said meeting, and the same is evident from the list of participants mentioned in the said minutes.
- iii. The Respondent also submitted that the present petition is not maintainable as Section 9 contains provisions regarding filing of CIRP application in case there is default in payment of “Operational Debt”, and the alleged debt amount is not an “operatioal debt” as the goods in question were not supplied by the Petitioner to the Respondent, but were supplied to the third party . Thus, the Petitioner is not an “Operational Creditor” of the Respondent. Further, unlike the definition of “financial debt”, the definition of “operational debt” nowhere contains any mention of the term “guarantee”.

- iv. The Respondent further stated that the Petitioner, in support of its claim, has attached invoices to the present application which are not issued by the Petitioner, but by the following entities: (i) 'Machinery & Chemical Industries' and (ii) 'G.S.R. Marketing Limited', which cannot be relied upon.
 - v. In the last, the Respondent submitted that the Petitioner had filed a false affidavit under Section 9(3)(b) of the Code mentioning "*that the operational Creditor/applicant has not received reply to its demand notice from the third party*" but has annexed the reply sent by the Respondent as Annexure-K with the petition itself.
4. Written submissions dated 25.05.2022, were filed by the Petitioner vide diary no. 00509/2, reiterating the facts of the petition. Written submissions dated 20.05.2022, were filed by the Respondent vide diary no. 00509/01.
 5. During the course of arguments, the Ld. Counsel for the Petitioner relied upon Hon'ble NCLAT's Judgment dated 08.01.2019 in ***Company Appeal (AT) (Insolvency) No. 346 & 347 of 2018 titled "Dr. Vishnu Kumar Agarwal vs. M/s Piramal Enterprises Ltd. (Piramal case)"*** wherein it was held that Corporate Guarantors are also financial debtors and it is not necessary to initiate CIRP against the principle borrower before initiating CIRP against the corporate guarantors.
 6. Refuting the contentions of the Petitioner, the Ld. Counsel for the Respondent relied upon Hon'ble NCLAT's decision in the matter of ***M.S. Jain vs. TVG Limited and Another, Company Appeal (AT) (Insolvency) No. 952***

of 2019, wherein it was held that the indemnity obligation in respect of a guarantee admissible does not hold in case of an operational debt. The relevant paragraph of the judgment is reproduced hereunder:

"Intention of legislature is apparent as, while defining "financial debt" counter indemnity obligation in respect of a guarantee is covered but no such case is there when "operational debt" is defined. The learned Counsel for the Respondent has not been able to satisfy us as to how in a matter relating to operational debt, Guarantor can be roped in for the purpose of invoking IBC. If it was financial debt, Section 5(8)(h) and (i) could have been relevant but that it not the case with operational debt as can be seen from the definition. Thus, we find that for the dues of operational debt which is claimed to be against PTAL, proceeding under Section 9 against the Guarantor - Kiran Global could not have been maintained."

- i. The Ld. Counsel for the Respondent further argued that the claim of the Petitioner is time barred and relied upon the Hon'ble Supreme Court's judgment in the matter of **BK Educational Services Private Limited vs. Parag Gupta and Associates, Civil Appeal No. 23988 of 2017**, wherein the Hon'ble Apex Court held that proceedings under Section 7 and 9 of the Code are governed by the provisions of the Limitation Act, 1963, and the time barred debt could not be brought within the purview of the Code.

7. After hearing the Ld. Counsels of both parties and a careful perusal of the records produced before us, we would analyse the issues involved in the case in hand:

- i. Whether the petition filed is within the period of limitation?

The date of default stated in Part IV of the petition is 28.08.2015, whereas the present petition was filed on 11.02.2019. It is worthwhile to note that the the Petitioner had earlier filed two applications, out of which, one was filed against the Respondent and the other application, filed against the Respondent and the Principal Debtor/third party, both of which were dismissed by this Bench while granting the relief to file a fresh application on the same cause of action. Thus, the period of limitation of three years in the case in hand would be computed from the initial date when the default occurred for the first time, i.e., from 28.08.2015 which expired on 28.08.2018. Hence, the claim of the Petitioner is time barred.

- ii. Whether the Petitioner can be treated as an operational creditor of the Respondent.

The term Operational Creditor and Operational Debt are defined under Section 5(20) and Section 5(21) of the Code which are as under:

a) *Section 5(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;*

b) *Section 5(21): operational debt means a claim in respect of the provision 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;*

Thus, Operational Creditor is a person (i) to whom an operational debt is owed, (ii) to whom an operational debt is legally assigned or

transferred. In order to examine, whether the instant Petitioner is an Operational Creditor, we would refer to the invoices attached with the petition and the email sent by an employee of the Respondent, duly stressed upon by the Petitioner in support of its claim. The Petitioner in the instant case does not have any direct contractual agreement with the Respondent, as neither any goods nor any services were rendered by it to the Respondent nor there is any contractual relationship between the parties.

As admitted by the Ld. Counsel for the Respondent, goods were supplied by the Petitioner to the third party, not to the Respondent. Moreover, the invoices attached by the Petitioner for the goods supplied to the third party are not issued by it but by a third party, which are also not duly signed by either party herein.

Further, the Petitioner has failed to produce any documentary evidence/tripartite agreement stipulating the terms and conditions of the guarantee of payment undertaken by the Respondent on behalf of the third party for the goods supplied to it by the Petitioner. In the absence of any privity of contract between the parties, the Petitioner cannot be treated as the Operational Creditor of the Respondent.

Here, reliance can be placed upon the Hon'ble NCLAT's judgment in the matter of ***Harrish Khurana v. One World Realtech (P) Ltd. 2021 SCC OnLine NCLAT 5547***. The relevant extract of the said judgment is reproduced here under:

“9. A reading of the definition of ‘operational debt’ makes it clear that it is a claim in respect of provision of goods or services including employment. This should be based on a contract duly entered between the third party and the Operational Creditor and Operational Creditor is a person to whom an operational debt is owned. Therefore, for a relationship of Operational Creditor and third party to exist between two parties under the IBC, the Operational debt must be owed to the Operational Creditor by the third party.”

Therefore, it can be undisputedly concluded that the Applicant is not a ‘Operational Creditor’ in the instant case.

iii. The next question that begs for an answer in this case is whether CIRP could be initiated against a Guarantor of an Operational Creditor under Section 9 of the Code.

It is argued by the Ld. Counsel for the Petitioner that in ***Dr. Vishnu Kumar Agarwal vs. M/s Piramal Enterprises Ltd. (supra)***, the Hon’ble NCLAT held that Corporate Guarantors are also financial debtors and it is not necessary to initiate CIRP against the principle borrower before initiating CIRP against the corporate guarantors and it is always open to the financial creditor to initiate CIRP under Section 7 against the corporate guarantors under Section 7.

On the contrary, the Ld. Counsel for the Respondent has placed reliance on ***M.S. Jain vs. TVG Limited and Another, (supra)***, wherein the Hon’ble NCLAT held that the indemnity obligation in respect of a guarantee admissible does not hold in the case of an operational debt.

From the authorities referred to by the Ld. Counsels for both parties, it can be safely inferred that the CIRP against the Corporate Guarantor can be initiated under Section 7 of the Code by a financial creditor, whereas in the present petition being filed under Section 9, the petitioner's arguments with respect to the initiation of the CIRP against the Respondent are insubstantial.

8. We have weighed the contentions raised by the Ld. Counsel for the parties, and perused the records. We arrive at the irresistible conclusion that CIRP cannot be initiated against the Respondent as no privity of contract exists between the parties. The petitioner has failed to produce on record any substantial evidence/document to support its contention that the Respondent stood as a Guarantor with respect to assurance of payment on behalf of the third party. An email sent by an employee of a company extending assurance of payment on behalf of the company, without any authority to do so, cannot be treated as a guarantee extended by the Company. Similarly, the alleged assurance of payment is not signed or verified by the Respondent. There needs to exist a documentary proof signed and acknowledged by all three parties agreeing to the terms and conditions, along with their liabilities and claims thereto. Moreover, the Petitioner had dropped the third party as a party in the present petition, unlike the second petition filed by it, without any sufficient and reasonable cause, wherein the initial application filed by it was dismissed by this Adjudicating Authority with a direction to file the same against appropriate

parties. Further, the authority laid down in the case of ***M.S. Jain vs. TVG Limited and Another (supra)***, has settled the position that the indemnity obligation in respect of a guarantee admissible does not hold in the case of an operational debt.

Thus, the authority laid down in ***Dr. Vishnu Kumar Agarwal vs. M/s Piramal Enterprises Ltd. (supra)***, relied upon by the Petitioner is not applicable to the facts and circumstances of the present case and thus, distinguishable.

9. In light of the discussion foregoing, the present petition is not maintainable being time barred and under Section 9 of the Code, particularly when there is no privity of contract between the Petitioner and the Respondent. Hence, the petition ***CP (IB) No. 109/Chd/Hry/2019 is dismissed and is disposed off accordingly.***

-sd-
(L. N. Gupta)
Member (Technical)

-sd-
(Harnam Singh Thakur)
Member (Judicial)

June 06, 2024
ASG