NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1492 of 2024

[Arising out of the Impugned Order dated 06.06.2024 passed by the Adjudicating Authority, National Company Law Tribunal, Chandigarh Bench-I in CP (IB) No. 109/CHD/HRY/2019]

In the matter of:

M/s Agarwal Foundries Private Limited
Through its Authorized Representative
Having its Registered Office at:
Rama Tower, 5-4-83, TSK Chambers
Opposite Ranigunj Bus Depot,
MG Road, Secunderabad-500003
Andhra Pradesh, India

...Appellant

Versus

POSCO E&C India Private Limited
Park Centra, 7th floor,
Tower-B, Sector-30,
Gurgaon, Haryana-122001

...Respondent

Present:

For Appellant : Mr. Arijit Prasad, Sr. Advocate with Mr. Rajat Chaudhary, Advocates.

For Respondent : Mr. Savar Mahajan, Ms. Pooja Mahajan and Ms. Komal Abrol, Advocates.

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated 06.06.2024 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Chandigarh Bench-I) in CP (IB) No. 109/Chd/Hry/2019. By the impugned order, the Adjudicating Authority has rejected the Section 9 application filed by the Operational Creditor-Appellant seeking initiation of Corporate Insolvency Resolution Process (**'CIRP'** in short) against Respondent-Corporate Debtor-POSCO E&C India Private Limited. Aggrieved by this impugned order, the present appeal has been preferred by the Operational Creditor.

2. We have heard Shri Arijit Prasad, Ld. Sr. Counsel appearing for the Appellant and Shri Savar Mahajan, Ld. Counsel representing the Respondent.

3. Making his submissions on behalf of the Appellant, the Ld. Sr. Counsel outlining the sequence of events stated that the Appellant-M/s Agarwal Foundries Pvt. Ltd. was a supplier of TMT Bars and that the Respondent-POSCO E&C India Pvt. Ltd. vide their e-mail dated 10.06.2015 sought quotation from the Appellant for supply of TMT Bars to their contractor-Empathy Infra & Engineering Pvt. Ltd. (**'Empathy'** in short) in respect of their Nirvana Project. TMT Bars were thereafter supplied to Empathy from time to time for which invoices were raised by them against which payments remained

outstanding. As payment was not forthcoming either from Empathy or from the Respondent inspite of the latter being a Guarantor qua the dues of Empathy, Demand Notices were issued on 27.07.2017, 11.10.2017 and 17.07.2018 under Section 8 of IBC. These Demand Notices were withdrawn and a fresh Demand Notice was issued on 24.10.2018 alongwith relevant documents followed by a Section 9 application filed on 11.02.2019 against the Respondent being the entity which had requested for supply of TMT Bar and assured the payment from Empathy as a guarantor. The Section 9 application was dismissed by the Adjudicating Authority on 06.06.2024 and aggrieved by this order, the present appeal has been preferred.

4. Assailing the impugned order, the Ld. Sr. Counsel for the Appellant submitted that the Adjudicating Authority had erroneously held that their claim was time barred. It was contended that since the Demand Notice was issued to the Respondent on 27.07.2017 which Demand Notice was replied by the Respondent, this amounted to be an acknowledgement of debt. Hence the Section 9 petition having been filed on 11.02.2019, the petition was well within the period of limitation of three years. It was also vehemently contended that the Adjudicating Authority had wrongly held that there was no privity of contract between the Appellant and the Respondent. Relying on the judgment of the Hon'ble Supreme Court in ***Consolidated Constructions Consortium Ltd. Vs M/s Hitro Energy Solutions Pvt. Ltd. in CA No. 2839 of 2020,*** it was contended that since the goods and services were supplied by the Appellant to Empathy which was hired by the Respondent for its project, the Appellant was clearly the Operational Creditor of the Respondent. The various e-mails

exchanged between the Respondent and the Appellant effectively shows that the Respondent had undertaken to make payment in case Empathy failed to do so thereby assuming the role of a guarantor. Contending that signed agreement is not the only pre-requisite of a valid contract but even documents like e-mails etc. can also be seen to infer the existence of a contract it was further pointed out that the Adjudicating Authority had wrongly held that the Appellant cannot be treated as an Operational Creditor of the Respondent.

The liability of the Respondent to pay the outstanding dues of Empathy to the Appellant had become absolute and unconditional. It was incumbent upon the Respondent to make payment on account of the goods supplied by the Appellant and the Respondent having defaulted in clearing the liability qua the Appellant, the Section 9 application ought to have been admitted and the Respondent admitted into CIRP.

5. Refuting the contentions raised by the Appellant, the Ld. Counsel for the Respondent submitted that the Appellant had neither provided any goods nor any services to the Respondent directly and therefore cannot claim to be an Operational Creditor of the Respondent. It was also contended that there was no legally valid contract of guarantee executed between the Appellant and the Respondent and unauthorized e-mails cannot be the foundation of a contract of guarantee. It was asserted that the Respondent did not fall within the definition of a "Corporate Guarantor" under Section 5(5-A) of the IBC. There is no provision whereby guarantee is covered in the definition of "Operational Debt" under Section 5(21) of IBC. Hence, application under Section 9 of the IBC is not maintainable against a guarantor of an Operational Debt. Advancing

their arguments further, it was further submitted that the Adjudicating Authority had correctly held that the claim of the Appellant was time-barred. It was asserted that the limitation has to be counted from the date of default which is the point of time on which the cause of action arose. It was misplaced on the part of the Appellant to claim that the limitation period was to be counted from 27.07.2017 which was the date of issue of Demand Notice. The period of limitation cannot be counted from the date of issuance of Demand Notice or the date of reply to the Demand Notice. It was vociferously asserted that the Section 9 application was not filed for the purpose of CIRP but for recovery of from the Respondent money which was otherwise due from Empathy. Such arm-twisting of the Respondent which was a solvent company, to illegally extort monies from them tantamount to misuse of the provisions of IBC.

6. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

7. It is the case of the Appellant that they had agreed to supply TMT Bars to Empathy since the Respondent-Corporate Debtor vide their e-mail dated 26.06.2015 had agreed to take guarantee of payment on behalf of Empathy. Attention was adverted to certain other e-mails dated 10.06.2015, 24.06.2015, and 30.10.2015 which emails indicate that the Respondent had assured to make good the payment of goods and services rendered by the Appellant to Empathy for the Nirvana Project. Submission was made that the Adjudicating Authority had failed to take notice of a series of e-mails exchanged between themselves which show that the Respondent had undertaken to make payment

in case its Contractor-Empathy failed to do so thereby assuming the role of a guarantor. These e-mails clearly demonstrate that the Respondent was a party in the transaction qua the material supplied by the Appellant and attendant default.

8. It was vehemently contended that the Adjudicating Authority had wrongly held that there was no material on record to establish privity of contract between the Appellant and the Respondent. Further, in support of their contention that signed agreement is not the only pre-requisite of a valid contract but that other documents like e-mails etc. can also be seen to infer the existence of a contract, the Ld. Sr. Counsel for the Appellant has relied on the judgment of the Hon'ble Apex Court in ***M/s Trimex International FZE Ltd. Dubai Vs Vedanta Aluminium Ltd.*** in ***Arbitration Petition No. 10 of 2009.*** It was therefore asserted that when the Respondent had undertaken to make payment in case Empathy failed to make the payment, it was incumbent upon the Respondent to make payment on account of the services rendered by the Appellant. The Respondent having defaulted in clearing the liability qua the Appellant, the Section 9 application ought to have been admitted and the Respondent admitted into CIRP.

9. It is the case of the Respondent that there was no privity of contract between the Appellant and the Respondent. Further, the Appellant cannot claim to be an operational creditor of the Respondent since it had not provided any goods or services to the Respondent directly. It has also been denied that there was any legally valid contract of guarantee executed between the Appellant, Respondent and Empathy. Admittedly, no guarantee agreement was

executed in this regard. Hence the liability of operational debt of Empathy cannot be fastened on the Respondent by the Corporate Debtor.

10. The primary question before us is therefore to find out whether the Appellant is an Operational Creditor of the Respondent and whether the claim of the Appellant is an operational debt qua the Respondent. For better appreciation of the relationship between the Appellant and the Respondent and the nature of transactions in question, we may first look into the statutory provisions of the IBC to find out as to how 'Operational Creditor' and 'Operational Debt' is defined. Section 5(20) of the IBC lays down that, unless the context otherwise requires, "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(21) provides that "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. From a plain reading of the above definition of operational debt, it is clear that it is a claim in respect of provisions of goods or services including dues on account of employment or a debt in respect of repayment of dues arising under any law for the time being in force payable to Centre or State Government or local authorities. It is, thus, confined to four categories viz. goods, services, employment and Government dues. Further the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 under Rule 5(1) provides that any operational creditor can issue a notice in relation to an operational debt either through a demand notice or by sending

copy of invoices. Also, an operational creditor who is seeking to claim an operational debt in a CIRP can rely either on a contract or on an invoice for the supply of goods and services with the corporate debtor under Regulation 7(2)(b)(i) and (ii) of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.

11. When we look at the material placed before us, we find that the Appellant has not placed on record any documentary evidence or agreement between the Appellant, Respondent and Empathy stipulating the terms and conditions of the guarantee of payment allegedly undertaken by the Respondent on behalf of Empathy for the goods supplied to it by the Appellant. It has, however, been canvassed by the Appellant that there is no need for any signed instrument to substantiate a contract of guarantee and that the existence of such a contract can be conclusively established from other correspondences/documents exchanged between the parties in this context.

12. Coming to the e-mails which have been relied upon by the Appellant to substantiate their claim that the Respondent had stood guarantee, we find that consequent to a email dated 10.06.2015 received from the Respondent seeking competitive quotes from the Appellant for TMT bars, the Appellant on 24.06.2015 had requested the Respondent to issue a letter of assurance/guarantee of payment and for this purpose had even attached a format of the guarantee. The relevant extracts of the two emails are as reproduced below:

> ***From:*** *Kalpesh*
> ***Sent:*** *Wednesday,* ***June10, 2015****; 05:05 PM*

Subject: PISO-EM-Enquiry for TMT bar for June-2015-Nirvana Project.

Dear Sir,

We would like to receive your most competitive quotation for below mentioned requirement of TMT bars.

***From:** Sidharath Saraf*
***Sent:** Wednesday, **June 24**, 2015; 4:24 PM*
Subject: RE: PISO-EM-Enquiry for TMT bar for June-2015-Nirvana Project.

".....It is my earnest request to kindly issue us a letter of assurance/guarantee of the payment of Empathy Infra for which we would immediately dispatch goods on receipt. A format is attached for your reference...."

Sidharath Saraf

(Emphasis supplied)

The Appellant has further adverted attention to another email dated 26.06.2015 from an employee of the Respondent addressed to the Appellant stating that *"Posco E & C will take guarantee of payment for supply of TMT bars at Nirvana Project if our contractor M/s Empathy fails to pay you."* The fourth document which has been relied upon by the Appellant is dated 19.10.2015. This document is the minutes of a tripartite meeting purportedly held amongst the Appellant, the Respondent and Empathy wherein it is recorded that towards resolving the payment issue, a schedule of payment was worked out which was to be followed by Empathy. The fifth correspondence adverted to by the Appellant is a letter from the Respondent, on 30.10.2015, to Empathy directing them to make payment failing which the Respondent stated that they would think about 'another way' to make the payment.

13. From a reading of the first two emails dated 10.6.2015 and 24.06.2015, we do not find that any offer for providing a guarantee was made by the Respondent. To the contrary, this request was made by the Appellant to the Respondent forwarding a guarantee format to be furnished by them. However, the Appellant has failed to show that the Respondent had furnished any letter of guarantee. As regards the third email dated 26.06.2015, Respondent has questioned the bonafide and legitimacy of the email and submitted that the email has been issued by an employee of the Corporate Debtor who was not authorized/empowered to issue such an email and that such unauthorized emails cannot be the foundation of a contract of guarantee. At this stage, keeping in view our summary jurisdiction, we do not wish to dwell upon the charge levelled by the Respondent that the said email was unauthorized and a creature of misrepresentation. We have perused the said email which has been placed at page 111 of the Appeal Paper Book (**'APB'** in short) and find that the email does not make any mention of Empathy having agreed or consented to the said guarantee. To our minds, the contents of the email do not reflect any clear meeting of minds and mutual consent of all the three parties with respect to the guarantee in question. Now coming to the fourth document dated 19.10.2015 which happens to be the minutes of a tripartite meeting, as placed at page138 of APB, we find that though the minutes records a schedule of payment to be followed by Empathy, nevertheless the minutes do not bear the signature of the parties. As regards the fifth email dated 30.10.2015, we notice that this email is addressed by the Respondent to Empathy stating that if they falter in adhering to the payment schedule, strict action would be taken against

them and that the Respondent "*will think about another way*" in this regard. From a plain reading of this email, we are afraid that it cannot be treated as admission/acknowledgement of any liability on the part of the Respondent towards the Appellant or that the Respondent had taken the mantle of being a guarantor to any such liability.

14. In view of our analysis above, we are of the view that the Adjudicating Authority was not off the mark in observing that the Appellant 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 Appellant. In the absence of any privity of contract between the parties, the Appellant cannot be treated as the Operational Creditor of the Respondent.

15. This now brings us to the issue of the claim of the Appellant being an operational debt qua the Respondent. It is a well settled legal proposition that the operative requirement of operational debt is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be supplier or receiver. In the present case, the absence of any contractual agreement between the Appellant and the Respondent, defining their business relationship is an admitted fact. We find that the Adjudicating Authority in order to examine whether the Appellant is an Operational Creditor has referred to the invoices attached to the Section 9 application which in the given factual matrix was the correct course of action to adopt as invoices undoubtedly constitute the basic edifice of operational debt. It has been correctly noticed by the Adjudicating Authority that the invoices attached to the Section 9

application were not issued by the Appellant but by some other third parties, namely, Machine & Chemical Industries and G.S.R. Marketing Limited. Thus, in the facts of the present case, it is undisputed that goods were not supplied by the Appellant but supplied by some third parties. It is however the claim of the Appellant that they had supplied the goods through the third parties who were their local distributors. We are not impressed by the submission made by the Appellant that the suppliers were their local distributors since there is no agreement or documents placed on record to show that the goods were to be supplied by the Appellant through local distributors and that any such arrangement had been agreed to by Empathy or the Respondent. The assertion of Appellant is therefore at best a fanciful proposition bereft of any substance. Since the invoices were raised by third parties and not by the Appellant, basis these invoices, the Appellant cannot justifiably claim any amount as purportedly due to them from the Respondent. In any case, these invoices were not raised against the Respondent but raised against Empathy and hence liability to pay for the same cannot be fixed on the Respondent without the specific consent of the Respondent. To cap it all, the goods were also supplied by the third parties to Empathy and not to the Respondent. Thus, when there is no co-relation between the goods supplied by the third parties to Empathy and the claim raised by the Appellant in respect of such goods on the Respondent, the Appellant/Operational Creditor had clearly failed to fulfil the requirements of Rule 5(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to establish their operational claims. The operative and primary requirements of Section 5(21) not having been met, we

are therefore not convinced by the contention of the Appellant of their claim arising out of supply of goods as operational debt. In the absence of operational debt, no liability could be fastened on the Respondent to pay for these goods. We therefore hold that the precondition for initiation of Section 9 IBC proceedings was non-existent in the facts of the present case.

16. It is also pertinent to note that the Respondent has also denied any liability or dues payable to the Appellant in their reply to the demand notice. It has been contended that the allegations of existence of debt were false and concocted as the Respondent was not a party to any transaction involving the Appellant and that the Section 8 Demand Notice had failed to demonstrate the basis ingredients of a debt. It may be useful and constructive to peruse the relevant excerpts of the reply to the Section 8 Demand Notice which is as extracted hereunder:

> *"4. Before adverting to the matter in detail, it is to be noted that the Notice is purely an abuse of the process of the law in as much as it is an attempt to coerce the Company into settling a baseless claim in respect of an unsecured contractual payment arising out of a transaction between M/s. Agarwal and one M/s. Empathy Infra and Engineering Pvt. Ltd. ("M/s Empathy"). There is no privity of contract between the Company and M/s. Agarwal, in relation to the said unsecured payment. The entire alleged cause of action set out in the Notice apparently relates to a routine commercial transaction between M/s. Agarwal and M/s. Empathy and POSCO has no privity of contract with respect to the same. The transaction in question was, to the extent known by the Company, a bilateral contractual arrangement between M/s. Agarwal and M/s. Empathy.*
>
> *5. Furthermore; the allegations in the Notice under response is inconsistent with the actual facts and circumstances. All allegations of existence of a debt are purely false and concocted in nature as the Company is not even a party to the any transaction involving M/s. Agarwal. The Notice fails to demonstrate the basic ingredients of a debt*

and other applicable provisions as provided in the Insolvency and Bankruptcy Code, 2016 (the "Code").

8. The Company would like to reiterate and emphasize upon the fact that there is no privity of contract in existence between M/s. Agarwal and the Company and M/s. Agarwal did not supply any goods or services to the Company, accordingly, M/s. Agarwal does not qualify as an "operational creditor" of the Company under the Code. Therefore, the Code and the procedure prescribed thereunder ought not to be used by M/s. Agarwal as a means of recovery of monies by the M/s. Agarwal in the absence of any debt owed by the Company to M/s. Agarwal as alleged in the false and concocted Notice under response or otherwise."

(Emphasis supplied)

It is, therefore, clear that in the reply to the Section 8 Demand Notice, the Respondent has not only denied their liability to pay the claims raised by the Appellant but also raised question marks on the privity of contract between them.

17. On the aspect of limitation, we find that the Adjudicating Authority has examined the rival contention of both parties. The Adjudicating Authority has noticed the reliance placed by the Respondent on the judgment of the Hon'ble Supreme Court in ***BK Educational Services Pvt. Ltd. Vs Parag Gupta and Associates*** in ***CA No. 23988 of 2017*** wherein it had held that proceedings under Section 9 of IBC are governed by the provisions of the Limitation Act, 1963. We are satisfied with the findings of the Adjudicating Authority that the claim of the Appellant was time-barred since the limitation was to be counted from the date of default which is the point of time on which the cause of action arose. In the present case, the date of default shown in Part IV of Form 5 was 28.08.2015. However, the Section 9 application was filed on 11.02.2019 which

was clearly beyond the three years limitation period and hence clearly time-barred.

18. It is of paramount importance to keep in mind the objectives of IBC which is, inter-alia, to promote entrepreneurship, maximize value of assets, make available credit, and balance the interest of all stakeholders, in a time bound manner. We need to be mindful that no stakeholder takes any undue benefit of the provisions of the IBC. Interestingly, we find that the Appellant has been filing multiple Section 9 applications either against the Respondent or against the Empathy. The first Demand Notice under Section 8 of IBC was issued to the Respondent on 27.07.2017. The Appellant sent another notice on 11.10.2017 and followed it up with Section 9 application which was however withdrawn on 08.06.2018. Thereafter, the Appellant sent another Demand Notice on 17.07.2018 to Empathy and filed a Section 9 application against them which too was withdrawn on 15.10.2018. Subsequently on 24.10.2018, the Appellant sent a fresh Demand Notice to Empathy which was followed by a Section 9 application filed on 11.02.2019. This shows the malafide motive of the Appellant to keep the Section 9 pot boiling so as to arm-twist the Respondent which was otherwise a solvent company to illegally extort monies from them. Thus, the Section 9 application was not filed for the purpose of insolvency resolution but for recovery of money owed to them by Empathy from the Respondent. Such behaviour on the part of the Appellant amounts to misuse of the provisions of the IBC and is strongly deprecated.

19. For the foregoing reasons, we are of the view that the Adjudicating Authority has rightly rejected the application of the Appellant filed under

Section 9 of IBC. We are satisfied that the impugned order does not warrant any interference. There is no merit in the Appeal. The Appeal is dismissed. Parties to bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

Place: New Delhi

Date: 10.09.2024

Harleen Kaur/Abdul