

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
KOLKT BENCH,
KOLKATA**

C.P (IB) No. 2046 /KB/2019

In the matter of

An application under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.

And

In the matter of:

Orbit Towers Private Limited, CIN U65921WB1985PTC038834, having its registered office at 3B, Camac Street, Kolkata-700016.

... Financial Creditor

Versus

In the matter of:

Sampurna Suppliers Private Limited, CIN U51109WB2006PTC110095, having its registered office at 4, Ram Kumar Rakhit Lane, Kolkata- 7000097.

...Corporate Debtor

Date of hearing : 13/06/2022

Order Pronounced on : 27 /06 /2022

Coram:

Mr. Rohit Kapoor, Member (Judicial)

Mr. Harish Chander Suri, Member (Technical)

Counsels appeared through Video Conference

- | | |
|-------------------------------------|------------------------------|
| 1. Mr. Jishnu Saha, Adv. |] For the Financial Creditor |
| 2. Mr. Zeeshan Haque, Adv. |] |
| 3. Mr. Aishwarya Kumar Awasthi, Adv |] |

1. Mr. Mainak Bose, Adv.] For the Corporate Debtor
2. Mr. Neeraj Kumar Pandey, Adv.
3. Mr. Shakeel Mohammed Akhter, Adv.

ORDER

Per: Harish Chander Suri, Member (Technical)

1. The Court is convened by video conference today.
2. This petition under section 7 of the Insolvency and Bankruptcy Code, 2016 read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 has been filed by **Orbit Towers Private Limited**, through its Director namely Mr. Pramod Kumar Eshwa, authorised *vide* Board Resolution dated 27.09.2019 (Annexure-2) (hereinafter referred to as the Financial Creditor) for initiation of Corporate Insolvency Resolution Process in respect of **Sampurna Suppliers Private Limited**, having its registered office at 4, Ram Kumar Rakhit Lane, Kolkata- 7000097 (hereinafter referred to as the Corporate Debtor).
3. The Financial Creditor /applicant herein submits in its petition that the Corporate Debtor is a company essentially owned, managed and controlled by one Jagdish Sarda, a business associate of the Financial Creditor. It is submitted that when the Corporate Debtor was in need of funds for its business, the Corporate Debtor had approached various banks and Financial Institutions for loans and other financial accommodation. While the Indian Bank agreed to grant a loan of Rs.10,00,00,000/- in favour of the Corporate Debtor, it required such loan to be guaranteed and otherwise secured.
4. It is submitted that in view of the business association between the Financial Creditor and the said Jagdish Sarda, the Corporate Debtor approached the Financial Creditor with a request to give a corporate guarantee for such loan in favour of the Indian Bank and also to create an equitable mortgage of the Financial Creditor's property at 50 A, Prince Anwar Shah Road, Kolkata. As the said Jagdish Sarda had assured the Financial

Creditor that the said loan would be repaid before completion of the project for development of the property at No. 50A, Prince Anwar Shah Road, Kolkata and that the Corporate Debtor would obtain release of the title deeds of the said property from the Indian Bank prior thereto to enable commercial exploitation of the developed property, the Financial Creditor agreed to secure, and secured the borrowing of the Corporate Debtor from the Indian Bank both by executing a deed of corporate guarantee and by creating an equitable mortgage of its property at No.50A, Prince Anwar Shah Road, Kolkata which was sanctioned by the Indian Bank by its sanction letter dated January 17,2011.

5. It is submitted that the Financial Creditor executed a deed of corporate guarantee in favour of the Indian Bank and also created an equitable mortgage by depositing the title deeds thereof. It is submitted that although in terms of its promise and assurance, it was incumbent upon the Corporate Debtor to repay the said loan amount of Rs.10,00,00,000/- along with the accrued interest thereon and to obtain release of the property at 50A, Prince Anwar Shah Road, Kolkata from the Indian Bank well before the completion of the project of the same. The Financial Creditor called upon the Corporate Debtor to forthwith liquidate the dues of the said Bank, so that upon obtaining release of the property, conveyances of flats and other spaces thereat could be executed in favour of the buyers but the Corporate Debtor failed and neglected the payment of dues to the said Bank along with interest by ignoring request made by the Financial Creditor. The Corporate Debtor, therefore, became obliged to repay to the Financial Creditor, the said sum of Rs.8,45,19,907/- together with interest. Thereafter, upon several requests, the Corporate Debtor however paid a sum of Rs.2,60,00,000/- to the Financial Creditor towards part discharge of its liability and a sum of Rs.5,85,19,907/- remained due and payable.

6. It is submitted that the Corporate Debtor acknowledged its liability for the said sum to the Financial Creditor by signing balance confirmation of statement, on and from the year 01.04.2015 to 31.03.2016. In further

admission and acknowledgement of its indebtedness to the Financial Creditor, the Corporate Debtor made several part payments between 11.05.2016 till 04.10.2016.

7. It is submitted that the Corporate Debtor has defaulted in payment of the debt due to the Financial Creditor despite repeated requests, reminders and demands for pay payment of the same. It is submitted that as the last payment made by the Corporate Debtor was on October 4,2016, the Financial Creditor treats this date as the date of default for the purpose of present application.

8. On being served with the notice of the court, the Corporate Debtor has filed its reply affidavit. In the reply affidavit filed by the Corporate Debtor through one of its Directors, namely, Tarur Raman Venugopal, it is submitted that the present petition filed by the Financial Creditor under section 7 of the IBC is not maintainable and deserves to be dismissed. It is submitted that it would be evident that the Financial Creditor maintains the application based on payments made by the alleged Financial Creditor as a guarantor to Indian Bank on behalf of the Corporate Debtor, the principal borrower of Indian Bank.

9. It is submitted by the Corporate Debtor that the dues of the Indian Bank were in respect of the Corporate Debtor herein and one Jagrati Trade Services Private Limited, the admitted business associate of the alleged Financial Creditor herein.

10. It is submitted that the Financial Creditor as a guarantor claimed to have discharged the debt of both the Corporate Debtor and the Jagrati Trade Services Private Limited by allegedly paying to Indian Bank, a total sum of Rs.8,45,19,907/-, no dates have been mentioned in the said application as to when the Financial Creditor has paid to Indian Bank the sum of Rs. 8,45,19, 907/- allegedly towards the discharge of the dues of the Corporate Debtor. It is submitted that it has been incorrectly stated that the Financial Creditor has paid to Indian Bank towards the discharge of the dues of the Corporate

Debtor.

11. It is incorrect and false that the Corporate Debtor is obliged to pay to the alleged Financial Creditor, the aforesaid sum of Rs.8,45,19,907/- only and that the Corporate Debtor paid out of the said sum, a sum of Rs.3.90 Crores towards part discharge of its liability and failed and neglected to pay Rs.4,55,19,907/- . It is stated that no particulars of such payments have been disclosed in the said application. The Corporate Debtor further submits that from the documents appended to the said application, it would be evident that the Financial Creditor stood a guarantor towards the dues of the corporate debtor herein and Jagrati Trade services Private Limited. What has been paid by the Financial Creditor to Indian Bank on behalf of the Corporate Debtor was only a sum of Rs.3,20,26,000/- and not the sum of Rs.8,45,19,907/-

12. The Corporate Debtor further submits that the last payment was allegedly received by the Financial Creditor on 4th October, 2016 but the present applicant has been filed on November 28,2019.Even if it is assumed that the Financial Creditor has a cause of action to maintain the said application, such application is, otherwise, ex-facie barred by the laws of limitation and the said application liable to be dismissed on the said ground.

13. It is submitted that the alleged debt claimed by the Financial Creditor is not a “financial debt” within the meaning of Section 5(8) of the Code and the applicant is also not a Financial Creditor within the meaning of Section 5(7) of the Code and, therefore, the present proceedings are liable to be dismissed.

14. It is submitted that the Corporate Debtor has fully discharged its liability by admittedly paying off Rs.3,90,00,000/- to the Financial Creditor and admittedly the last payment was made on 4th October, 2016 i.e three years prior to the filing of the present application and there is nothing due and payable by the Corporate Debtor to the alleged Financial Creditor.

15. The Corporate Debtor has further submitted that the corporate guarantee which the Financial Creditor had given, was extended to the creditor facilities sanctioned by the Indian Bank to Jagrati Trade Services Private Limited as is evident from the letter dated 7th May,2014 issued by the Indian Bank (page 62 of the petition). Therefore, the purported attempt of the Financial Creditor to recover the dues payable by the Jagrati Trade Services Private Limited from the Corporate Debtor herein is wholly unjustified, mischievous and malafide.

16. It is submitted that there is no default within the meaning of sub-section (2) of Section 7 of the Code and therefore the Financial Creditor is not entitled to maintain the present proceedings against the Corporate Debtor.

17. In the Rejoinder also the Financial Creditor has given full details of the amount deposited by it with the Indian Bank. The said schedule containing the particulars of such payments is reproduced as under:-

**SCHEDULE OF PAYMENTS MADE TO INDIAN BANK, STRAND ROAD
BRANCH**

Sl.No.	Date	Amount(Rs.)
1.	16.08.2011	10,90,000/-
2.	26.09.2011	4,30,000/-
3.	05.012.2011	2,15,000/-
4.	10.02.2012	11,90,000/-
5.	22.02.2012	9,75,000/-
6.	25.06.2012	10,48,000/-
7.	21.07.2012	35,70,000/-
8.	12.09.2012	10,14,618/-
9.	15.06.2013	45,00,000/-
10.	11.07.2013	43,90,000/-
11.	11.04.2014	29,20,000/-
12.	22.07.2014	1,33,90,167/-
13.	22.07.2014	19,50,000/-
14.	23.08.2014	1,00,00,000/-
15.	27.08.2014	20,00,000/-
16.	04.10.2014	4,00,000/-
17.	04.10.2014	40,00,000/-
18.	17.10.2014	56,79,029.51
19.	17.10.2014	7,46,970.49
20.	31.12.2014	1,50,00,000/-

21.	31.12.2014	2,00,000/-
22.	18.12.2015	36,00,000/-
23.	18.12.2015	62,11,122/-
	Total:	8,45,19,907/-

18. The Financial Creditor has proposed the name of **Mr. Sudipta Ghosh**, to act as an IRP having Registration No. **IBBI/IPA-001/IP-P00484/2017-18/10872**, who has consented vide his affidavit and Form-2, and submitted that he has agreed to accept the appointment as IRP if an order admitting the present application is passed by this Adjudicating Authority. He has further submitted that no disciplinary proceedings are pending against him with the Board or Institute of Insolvency Professionals of ICAI.

19. The petition is otherwise complete in all respects.

20. Now, interesting question of law has arisen in this matter, where the liability of the principal borrower (Corporate Debtor herein) has been discharged by the Guarantor (Financial Creditor herein). Sections 140 and 141 of the Indian Contracts Act, 1872 talk of “right of subrogation”. It is the substitution of another person in place of the Creditor, so that the person substituted will succeed to all the rights of the creditor with reference to the debt. The guarantor’s right to be placed in the creditor’s position on the discharge of the principal debtor’s obligation, to the extent that the Guarantor’s property or funds have been used to satisfy the Creditor’s claim and to effect such discharge is called the Guarantor’s right of subrogation. The Guarantor who performed the obligations of the Principal Debtor which are subject to his guarantee is entitled to stand in the shoes of the Creditor to enjoy all the rights that the Creditor has against the Principal Debtor. Section 140 provides that rights of surety of payment or performance where a debt has become due on default of the Principal Debtor to perform, the surety upon making payment or performance of all that, is eligible for and is invested with all the rights which the Creditor had against the Principal Debtor. The Creditor had the rights to sue the Principal Debtor. The Guarantor may therefore, sue the Principal Debtor having got and invested with all rights of the Creditor. Section 141 of the Indian Contract Act, 1872 further provides

that the surety is entitled to the benefit of every security which the creditor has against the Principal Debtor, at the time when the contract of surety-ship is entered into, whether the surety knows of the existence of such security or not and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

21. In the present case, the Corporate Debtor had borrowed the aforesaid sum, admittedly, from the Indian Bank for which, the Financial Creditor stood surety for this Corporate Debtor and once the amount claimed by the Indian Bank had not been paid by the Corporate Debtor, the surety had to liquidate and discharge the liability of the Corporate Debtor towards the Indian Bank. Therefore, under the provisions of the Indian Contract Act, 1872, all the rights of the then Creditor i.e. the Indian Bank, would automatically become the rights of the surety (Financial Creditor herein). There can be no doubt that the amount has admittedly been paid by the Financial Creditor on behalf of the principal debtor/Corporate Debtor, to Indian Bank.

22. Now the question is when the surety has repaid the amount of financial debt owed by the Corporate Debtor to the Indian Bank, would it make the surety, a “Financial Creditor”, eligible for proceeding against the Corporate Debtor (the Principal Borrower) without there being any agreement between the two.

23. To our mind, any agreement of guarantee between the Indian Bank and the Guarantor is sufficient for the purpose of bestowing all the rights of the Bank/creditor upon the Financial Creditor herein once the Financial Creditor has discharged all the liability of the Corporate Debtor towards Indian Bank. There may or may not be any agreement between the Financial Creditor and the Corporate Debtor. It does not make any difference at all. The Law is very clear that once the Guarantor/surety discharges the liability of the Principal borrower towards the creditor, all the rights of the Creditor to recover that money would automatically be transferred in favour of the

surety/ Guarantor. This is exactly the right of subrogation. The right of subrogation provides that all the rights of the creditor with reference to the debt or obligation of the principal debtor that has been discharged by the surety/Guarantor would go to the surety. The Guarantor, who has performed the obligations of the principal debtor which are the subject of his guarantee, is entitled to stand in the shoes of the creditor and to enjoy all the rights that the creditor had as against the principal debtor.

24. In this matter, the Financial Creditor who executed an agreement of guarantee with the Indian Bank for the financial obligations and loan facilities granted to the borrower/ the Corporate Debtor herein, is fully empowered to proceed against the Corporate Debtor, as the Financial Creditor.

25. We have gone through all the pleadings and the documents placed on record by the Financial Creditor and the Corporate Debtor. In this matter admittedly the amount of debt has been repaid by the Financial Creditor to Indian Bank in its capacity as Guarantor for and on behalf of the Corporate Debtor, which has put the Guarantor in the shoes of the Creditor i.e. Indian Bank. When all the rights of the Creditor have been subrogated in favour of the Guarantor/Financial Creditor herein, the Financial Creditor is eligible and entitled to proceed against the Corporate Debtor for recovery of the said dues and file the petition under section 7 of the Code before this Adjudicating Authority or before any other Forum of competent jurisdiction. We, therefore, hold that the Financial Creditor is entitled to file this petition as Financial Creditor against the Corporate Debtor.

26. As regards the limitation issue, the Corporate Debtor has acknowledged and admitted the debt by issuing the balance confirmation statements as late as on 01.04.2016 and by making payment of Rs.25,00,000/- on October 4, 2016 and the balance sheets of the Corporate Debtor constitute a continuous admission and acknowledgement of its liability. Therefore, this issue of the application being barred by limitation does not survive .

27. Financial debt has also been acknowledged by the Corporate Debtor in its balance sheets as on 31st March, 2017 and 31st March, 2018 (Annual Reports of the Corporate Debtor at pages 70 to 90 annexed with the petition).

28. It has been further noticed that the Corporate Debtor has made payment of a sum of Rs.1,30,00,000/- to the Financial Creditor between 11th May 2016 to 4th October, 2016 to the Financial Creditor in acknowledgement of its dues to the Corporate Debtor and no payment has been made thereafter. Therefore, the 4th October, 2016 is taken as the date of default.

29. Since the amount has admittedly been paid by the Guarantor/ Financial Creditor herein to Indian Bank and the said amount is much above the threshold limit fixed by the Code for filing a petition under section 7 of the Code, which has not been repaid by the Corporate Debtor in spite of requests and demand made by the Financial Creditor, we, therefore, proceed to admit this petition . We, therefore, pass the following orders.

O R D E R S

- i) The application filed by the Financial Creditor under Section 7 of the Insolvency & Bankruptcy Code, 2016 for initiating Corporate Insolvency Resolution Process against the Corporate Debtor is hereby **admitted**.
- ii) We hereby declare a moratorium and public announcement in accordance with Sections 13 and 15 of the I & B Code, 2016.
- iii) Moratorium is declared for the purposes referred to in Section 14 of the Insolvency & Bankruptcy Code, 2016. The I.R.P. shall cause a public announcement of the initiation of Corporate Insolvency Resolution Process and call for the submission of claims under Section 15. The public announcement referred to

in clause (b) of sub-section (1) of Section 15 of Insolvency & Bankruptcy Code, 2016 shall be made immediately.

iv) Moratorium under Section 14 of the Insolvency & Bankruptcy Code, 2016 prohibits the following:

- a) The institution of suits or continuation of pending suits or proceedings against the Corporate Debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- b) Transferring, encumbering, alienating or disposing of by the Corporate Debtor any of its assets or any legal right or beneficial interest therein;
- c) Any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.
- v) The supply of essential goods or services rendered to the corporate debtor as may be specified shall not be terminated, suspended, or interrupted during the moratorium period.

- vi) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- vii) The order of moratorium shall have effect from the date of admission till the completion of the corporate insolvency resolution process.
- viii) Provided that where at any time during the Corporate Insolvency Resolution Process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of the corporate debtor under Section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.
- ix) **Mr. Sudipta Ghosh**, IRP, having Registration No. **IBBI/IPA-001/IP-P00484/2017-18/10872**, is hereby appointed as Interim Resolution Professional for ascertaining the particulars of creditors and convening a Committee of Creditors for evolving a resolution plan subject to production of written consent within one week from the date of receipt of this order.
- x) The Interim Resolution Professional should convene a meeting of the Committee of Creditors and submit the resolution passed by the Committee of Creditors and shall identify the prospective Resolution Applicant within 105 days from the insolvency commencement date.
- xi) The Financial Creditor/Applicant is directed to deposit **Rs 2,00,000/- (Rupees Two Lacs Only)** with the IRP appointed hereinabove within **three** days from this order. IRP can claim

the preliminary expenses and fees subject to the approval by the CoC and after constitution of CoC.

- xii) Registry is hereby directed to communicate the order to the Financial Creditor, the Corporate Debtor, the I.R.P. and the jurisdictional Registrar of Companies by Speed Post as well as through email.
- xiii) List the matter on **12/08/2022** for the filing of the progress report.
- xiv) Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

(Harish Chander Suri)
Member (Technical)

(Rohit Kapoor)
Member (Judicial)

Order signed on, this 27th day of June, 2022

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