



THE NATIONAL COMPANY LAW TRIBUNAL

COURT VI, NEW DELHI

I.A. 604/ND/2021, 1552/ND/2021, 1553/ND/2021

IN

Company Petition No. (IB) – 1032/(ND)/2018

*Under Section 7, 60(5) of the Insolvency and Bankruptcy
Code, 2016.*

IN THE MATTER OF:

PUNJAB NATIONAL BANK
(INTERNATIONAL LIMITED)
REGISTERED OFFICE AT:
INCORPORATED IN ENGLAND
AND WALES, 1 MOORGATE,
LONDON, EC2R 6JH

.... FINANCIAL CREDITOR/PETITIONER

VERSUS

M/SUPERIOR INDUSTRIES LIMITED
REGISTERED OFFICE AT:
3, TODARMAL LANE, BENGALI
MARKET, NEW DELHI.

..... CORPORATE DEBTOR



AND IN THE MATTER OF IA 604/ND/2021:

M/SUPERIOR INDUSTRIES LIMITED

.... APPLICANT

VERSUS

PUNJAB NATIONAL BANK
(INTERNATIONAL LIMITED)

...RESPONDENT

AND IN THE MATTER OF IA 1552 & 1553/ND/2021

PUNJAB NATIONAL BANK
(INTERNATIONAL LIMITED)

.... APPLICANT

VERSUS

M/SUPERIOR INDUSTRIES LIMITED

...RESPONDENT

CORAM:

SHRI. P.S.N PRASAD, HON'BLE MEMBER (JUDICIAL)

**SHRI RAHUL BHATNAGAR, HON'BLE MEMBER
(TECHNICAL)**

Counsel for Financial Creditor: Mr. Mithilesh Kumar Pandey,
Sr. Adv Mr. Krishnendu Datta
and Mr. Rajat Sinha Adv(s)



Counsel for Corporate Debtor: Sr. Adv. Mr. Anil k Airi, Mr.
Ravi Krishan Chandna, Mr.
Mudit Ruhella, Adv(s)

ORDER

PER: PSN PRASAD, MEMBER (JUDICIAL) &
RAHUL BHATNAGAR, MEMBER (TECHNICAL)

Date: 23.03.2023

1. IA 604/2021 has been filed by M/s Superior Industries Limited, Corporate Debtor under section 60(5) for seeking permission to place on record the additional documents with supporting affidavit. The following documents were attached with the application

- i. Letter dated 04.07.2020 sent by Punjab National Bank to M/s Narmada Drinks Pvt Ltd.
- ii. Reply dated 18.09.2020 sent by Narmada Drinks Pvt Ltd. to Punjab National Bank to letter dated 04.07.2020.



iii. Letter dated 24.08.2020 sent by Superior Industries to
Punjab National Bank International Limited

2. IA 1552/2021 & 1553/2021 have been filed by M/s PNB
(International) Limited, Financial Creditor under Rule 11 of
NCLT Rules, 2016 for seeking permission to place on record
additional documents with supporting affidavit. The following
documents were attached with the application IA 1552/2021

a. Copy of Record of default (Utility Information)
downloaded from National E-Governance Service Limited
(NESL)

3. In IA 1553/2021, the following documents were attached
with the application which are stated as under: -

1) Copy of the proposal dated 05.03.2020

2) Copy of reply to the proposal dated 16.03.2020 &
03.08.2020

3) Copy of Judgement of High Court of Justice, Business
and Property Court of England and Wales, Commercial



Court (QBD) in Claim no CL-2017-000569 dated
23.06.2020

4. We have heard the Ld. Counsels for both the parties at length in IA 604/2021, 1552/2021 & 1553/2021.

5. It is pertinent to refer to the judgement of the Hon'ble Supreme Court in the matter of *Dena Bank (Now Bank of Baroda) Vs. C. Shivakumar Reddy & Anr. 2021 SCC OnLine SC 543* held that there is no bar in law to the amendment of pleadings in an application filed under IBC, 2016 or to the filing of additional documents, apart from those initially filed along with application. Relevant portion of the aforesaid judgement is reproduced as under: -

144. There is no bar in law to the amendment of pleadings in an application under Section 7 of the IBC, or to the filing of additional documents, apart from those initially filed along with application under Section 7 of the IBC in Form-1. In the absence of any express provision which either prohibits or sets a time limit for filing of additional documents, it cannot be said that the Adjudicating Authority committed any illegality or error in permitting the Appellant Bank to file additional documents. Needless however, to mention that depending on the facts and circumstances of the case, when there is inordinate



delay, the Adjudicating Authority might, at its discretion, decline the request of an applicant to file additional pleadings and/or documents, and proceed to pass a final order. In our considered view, the decision of the Adjudicating Authority to entertain and/or to allow the request of the Appellant Bank for the filing of additional documents with supporting pleadings, and to consider such documents and pleadings did not call for interference in appeal.

6. Based on the judgement as referred to in supra and in the interest of justice, the Tribunal is of the opinion that all these applications deserve to be allowed and accordingly, **IA 604/2021, 1552/2021 & 1553/2021 are hereby allowed.**

7. Now, let us examine the main company petition. The main Company Petition (IBC) 1032/ND/2018 has been filed M/s PNB (International) Limited, a company incorporated in London and is a wholly owned subsidiary of Punjab National Bank through Authorised Representative, Mr. Rakesh Gandhi, Assistant General Manager, duly authorised vide Power of Attorney dated 02.08.2018 to initiate Corporate Insolvency Resolution Process (“CIRP”) against M/s Superior Industries Limited under Section 7 of the Insolvency and Bankruptcy Code 2016 (“the Code”) for the alleged default on



the part of the Respondent as Corporate Guarantor for an amount of Rs. 1,28,38,91,241/- (Rupees one hundred twenty eight crores thirty eight lakhs ninety one thousand two hundred and fourty one). The details of transactions leading to the filing of this application as averred by the Applicant are as follows:

- The applicant has provided loan facility to principal borrower i.e Vishal Cruise Private Limited, a Company registered in Mauritius in relation to the purchase of a four and a half-rated Luxury Cruise Ship Named "MV Delphin" by Vishal Cruise Private Limited. Pursuant to which a loan €10,000,000/- Euro (Rupees 79,75,05,256.80) was sanctioned in favour of the Principal Borrower for the Project ("First Facility Agreement"). Subsequently another facility agreement for overdraft facility of € 2,000,000/- (Rupees 15,95,01,051) was also sanctioned for the Project ("Second Facility Agreement").



- One of the securities for the facilities was the corporate guarantees provided by the Corporate Debtor i.e. Superior Industries Limited.
- The Corporate Debtor provided corporate guarantee dated 04.05.2012 and 28.01.2013 to secure the loan facilities.
- The Principal Borrower (Vishal Cruise Private Limited) defaulted in repayment of the loans. On 05.12.2016, a demand notice was issued to the Principal Borrower for repayment of loan and thereafter a demand notice dated 20.12.2016 was issued to the Corporate Debtor (Superior Industries Limited) in its capacity as corporate guarantor for repayments of the said amount.
- Therefore, in light of the above, the Applicant has prayed before this Tribunal for following relief(s)
 - (i) to admit the present application and order initiation of the corporate insolvency resolution process under the provisions of the Insolvency and Bankruptcy Code, 2016 against the Corporate Guarantor who is the Corporate



Debtor who is the Corporate Debtor (Respondent) in this Petition.

(ii) to appoint the Interim Resolution Professional and

(iii) to declare moratorium.

8. Consequent to the notice issued by this Tribunal, the Respondent filed its reply in which the following contentions were made:

- That the present application is barred by limitation since the Corporate Guarantee was of 2012 & 2013
- That the Corporate Guarantee on the basis of which claim has been filed is void and is not enforceable in the eyes of law and cannot be a basis for initiating any proceedings against the Corporate Debtor.
- That the Petitioner has failed to show any liability / debt or any kind of default on part of the Corporate Debtor and as such the petition merits dismissal on this ground alone. Even otherwise, the Petitioner has been holding in FDR the amounts more than amounts due under lien on the date of alleged default and therefore, there was no cause of action for initiating



any proceedings as against the present Corporate Debtor, as the Guarantee, if any, stood discharged on marking of lien.

- That payment in foreign currency cannot be made without prior permission of RBI as per FEMA and Guidelines/Regulations issued by RBI.
- The relevant regulation of The Foreign Exchange Management (Guarantees) Regulations, 2000 is reproduced as under: -

Regulation 3: Save as otherwise provided in these regulations, or with the general or special permission of the Reserve Bank, no person resident in India shall give a guarantee or surety in respect of, or undertake a transaction, by whatever name called, which has the effect of guaranteeing, a debt, obligation or other liability owed by a person resident in India to, or incurred by, a person resident outside India.

Regulation 5:

[d] a bank which is an authorised dealer may, subject to the directions of Reserve Bank in this behalf, permit a person resident in India to issue corporate guarantee in favour of an overseas lender or security trustee to secure an external commercial borrowing availed under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000



(Notification No. FEMA 3/2000-RB, dated 3-5-2000)

- Since no permission from RBI under FEMA was taken hence the Guarantee is void.
- Further it is submitted that the Respondent herein is a sound and solvent company having deep roots and is running profitable business in India from last several decades with hundreds of employees. The company is a solvent entity and is capable of discharging all its debts and liabilities. The Respondent company had been enjoying several banking limits with Punjab National Bank [PNB], Civil Lines branch, New Delhi from last several years and never defaulted on any occasion and has no litigation or issues with any Bank or Financial Institution.
- That PNB and Petitioner created day to day difficulty in the conduct of business of Respondent as a result of which the Respondent closed its operation with PNB. The Respondent paid a sum of Rs.32,50,00,000/- (Rupees thirty-two crores fifty lakhs) in March 2016 to PNB in discharge of its debts



and PNB issued a no due certificate to the Respondent. The other sister concerns of the Respondent who were also enjoying the said facilities also cleared all their dues of the PNB in March 2016. The total amount paid by Respondent and its sister concerns to PNB was more than Rs. 80 crores. The Respondent has filed the said details and documents evidencing the same. This shows Respondent is a sound and solvent company. The Respondent company is a running concern.

- That the process under the Code once set in motion, is irreversible and leads to exceptional and serious consequences. Once admitted it would mean suspension of Board of Directors of the Corporate Guarantor, appointment of IRP, so on and so forth. A running business which has made no default, would be put under resolution process.
- That, in light of abovementioned facts and circumstances the Corporate Debtor prayed that CIRP should not be initiated.



9. The Petitioner has made following submissions against the submissions made by Corporate Debtor.

- The objection made by Corporate Debtor that the Corporate Guarantees are not in accordance with provisions and guidelines issued by the Reserve Bank of India ("RBI") and Foreign Exchange Management Act, 1999 ("FEMA") and therefore no demand can be raised against the Corporate Debtor, it is submitted that the Financial Creditor was incorporated in England and Wales and is thereby governed under the provisions of Companies Act, 1985 (Act of the Parliament of the United Kingdom of Great Britain and Northern Ireland, enacted in 1985), therefore the Financial Creditor is not governed by the provisions of FEMA or RBI to that extent. That, the Corporate Guarantee provided by the Corporate Debtor does not require any prior approvals on part of the Financial Creditor from RBI. The person issuing a corporate guarantee i.e the Corporate Debtor was required to ensure compliances of RBI and FEMA.



- That the Corporate Guarantees are duly signed by the Corporate Debtor and even if the guarantee is not signed by the Financial Creditor, the Financial Creditor is still entitled to raise a demand and enforce all the rights available to the Financial Creditor under applicable law for the time being in force. It is enough if the guarantor knows he is signing an instrument of guarantee and no other document. It is not necessary for the creditor to read or explain to him the different clauses of the memorandum of guarantee. It is sufficient if the guarantor knows the type of transaction he is entering into.

10. We have gone through documents on record filed by both the parties and arguments advanced by counsels of both the parties.

11. Before going into the merits, the preliminary issue raised by the Respondent was that the present application is barred by Limitation. From the perusal of the application, it is observed that petition under section 7 was filed on 16.08.2018 and the date of first default was 03.05.2013,



thereafter payment was received on 30.06.2014, extending the period of limitation under section 19 of the Limitation Act, 1963. Subsequently, the principal borrower submitted a proposal by email vide letter dated 25.06.2016 thereby giving a fresh period of limitation under section 18 Limitation Act, 1963. The acknowledgement was no doubt made by the principal borrower and it will bind Corporate Guarantor as well (Corporate Debtor). Support can be taken from the Judgement of Hon'ble SC in the matter of Laxmi Pat Surana v. Union Bank of India and Ors. MANU/SC/0221/2021 para 38 the Hon'ble SC in para 38 held that: -

38. In the present case, the NCLT as well as the NCLAT have adverted to the acknowledgments by the principal borrower as well as the corporate guarantor-corporate debtor after declaration of NPA from time to time and lastly on 08.12.2018. **The fact that acknowledgment within the limitation period was only by the principal borrower and not the guarantor, would not absolve the guarantor of its liability flowing from the letter of guarantee and memorandum of mortgage. The liability of the guarantor being coextensive with the principal borrower Under Section 128 of the Contract Act, it triggers the moment principal borrower commits default in paying the acknowledged debt.** This is a legal fiction. Such liability of the guarantor would flow from the



guarantee deed and memorandum of mortgage, unless it expressly provides to the contrary.

Hence, we are satisfied that the present application is within the period of Limitation.

12. It is observed that the Corporate Debtor along with others filed an application against Financial Creditor i.e. PNB International Limited before the High Court of Justice, Business and Property Court of England and Wales, Commercial Court (QBD) in Claim no CL-2017-000569 in which the Corporate Debtor along with others prayed to set aside various orders of the courts concerning service out of jurisdiction and to seek anti suit injunction including injunction against proceedings initiated before this Tribunal. The application was dismissed vide order dated 23.06.2020 para 126-130 of the aforesaid judgement is reproduced as under: -

*126. NCLT proceedings are, as I have already noted, essentially in the nature of insolvency proceedings. Those are classically seen as the business of the courts of the place of incorporation of a company. **It is nowhere explained how the remedy sought in the insolvency proceedings could be sought here. So far as any problems arising from the NCLT procedure are***

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concerned, it is open to the Applicants to make submissions in those proceedings both as to jurisdiction, as to the timing of proceedings and as to the ultimate outcome. In fact, submissions have already been made as to jurisdiction. **I am unpersuaded that the NCLT proceedings overlap in any significant respect with the Bank's claims under the first SIL guarantee and the second SIL guarantee where the purpose of the English proceedings is to determine whether or not SIL is liable to the Bank and when the NCLT proceedings are considering the entirely separate question of whether SIL should be placed into insolvency.** That is, as I have already noted, an important distinction as regards the Srinivasan case.

127 So far as irreparable harm is concerned, that is in the nature of the proceedings. It is not a matter for this court and it is a matter on which the Applicants can make submissions in those proceedings. As such, it would certainly not meet the hurdle of "interests of justice.

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129. I also note that even if I were otherwise persuaded that the jurisdiction to grant an injunction were engaged, **SIL is unable or unwilling to offer any cross undertaking in damages. In those circumstances, I would in any event have declined to grant the injunction sought, as a matter of discretion.**

130. In conclusion, although Ms. Vora for the Applicants has done an excellent job of marshalling and presenting her many and various points, **the challenges brought are a collection of issues, all of which lack merit, I therefore dismiss the applications**



13. Now the next issue is that since PNB has marked a lien of the FDR, therefore, the debt has been discharged. We have gone through the submissions made by both the parties with respect to this issue. It is submitted by the Financial Creditor that no FDR has been appropriated till date and it is also submitted that the FDR is less than the principal amount of debt. The Corporate Debtor has already filed an application for release of FDRs before the Hon'ble Delhi High Court in Writ Petition No 742/2018. Hence, the Corporate Debtor cannot raise this plea that FDR is pending and can be set off against the debt and file an application for release of the same simultaneously. In the matter of Hon'ble High Court of Justice, Business and Property Court of England and Wales, Commercial Court (QBD) in Claim no CL-2017-000569 which was filed by the Corporate Debtor against the Financial Creditor, Mrs. Justice Cockerill has made following observations with respect to this issue: -

Ss 83 The next issue is that of lien. Here the Applicants rely on the fact that the claimant did not disclose that its 100 per cent parent company, PNB India, had imposed a lien on fixed deposits belonging to the Second Defendant's group associated company, Superior Drinks,



and two others and that there had then been proceedings initiated before the Delhi High Court.

84. I entirely accept that if this point offered a legal defence or even a 100 per cent defence to quantum this would be a matter which would be required to be disclosed. **However, the key point here is that the lien does not offer anything like a legal defence.** It is not in fact suggested that it does. **To say that it offered a legal defence would be inconsistent with the defence being advanced in those proceedings in India. An argument that it did offer some form of defence was dismissed without difficulty on a summary basis** by Butcher I in the judgment to which I have already alluded. So much for defence to liability.

85 **Nor does it offer a full defence to quantum. It is common ground that the sums in question would not have been sufficient: Those sums are less than the principal owing under the first Vishal facility, which was €10 million.** What was said was that if you added together the MV Delphin and this point, there would be essentially a full quantum answer and so the two should be considered in the round, and should in the round have been disclosed. Again, I refer back to the question as to no set-off but, in any event, in the light of the position which I have already reached on the MV Delphin point, this question of adding the two points together cannot assist in making one good point. This is the more so when what one is looking at is an obligation to make full and frank disclosure.

86 **The other significant issue here is that in any event the lien would only give rise to security, rather than even affecting quantum, until the**



cause of action were completed; and the fact that there is security would therefore not be material in this context.

Based on the above discussions we are of the view that the PNB has only retained the FDR and not appropriated the amount and most importantly the matter is pending before the Hon'ble Delhi High Court. Further it is observed that it is Punjab National Bank incorporated in India who holds the FDR and not PNB International Limited who is the Financial Creditor in the present case. Therefore, we cannot say that the debt can be set off against the FDR.

14. In the context of the lien on FDRs held by PNB (India) it is interesting to note that in the matter of Hon'ble High Court of Justice, Business and Property Court of England and Wales, Commercial Court (QBD) in Claim no CL-2017-000569 which was filed by the Corporate Debtor against the Financial Creditor, Mrs. Justice Cockerill has opined that *"The issue is as Mr. De Verghese submitted one which essentially has to be taken up with PNB India in its role as Authorised dealer in relation to the SIL and third defendants. The correspondence*



*does not suggest an agency relationship ¹with the bank. **It rather suggests as I have already noted, the advisory relationship of an Authorised Dealer ²assisting the SIL and third defendants.** That agent is Authorised by the letter to which I have already referred where the defendants are being asked take things up with PNB India.”*


15. The next issue raised by the Corporate Debtor is about legality of Guarantee due to the fact that there was no approval of RBI /FEMA. In the matter of Hon’ble High Court of Justice, Business and Property Court of England and Wales, Commercial Court (QBD) in Claim no CL-2017-000569 in Claim no CL-2017-000569 which was filed by the Corporate Debtor against the Financial Creditor, Mrs. Justice Cockerill has made following observations with respect to this issue: -

54. The issue really relates to the alleged invalidity of the guarantees if the guarantees are invalid there is no claim under them and this would be a good defence.

55 This is a matter of Indian law evidence. However, what emerges from this evidence is that there is a dispute. It appears to me to be a real dispute. Mr Thacker says they were invalid when executed and

¹ Agency Relationship of PNB (India) with PNB (International) Limited.

² Authorised dealer being PNB (India).



continue to remain invalid until the RBI grants permission (Known as post facto approval). Mr. Setalvad says they were valid at the time they were Signed and post facto approval can be obtained.

56 For all Ms. Vora's submissions that the Claimants argument faces enormous difficulties given the fact of the problems transferring money to the Claimants, **it appears to me on the material before me to be well arguable that the Bank is right on this point.** It is not fanciful to say that the guarantees would be valid. **It is very far from that. Furthermore, I am strongly of the view that the question: could not even arise as regards the first Vishal guarantees which are governed by English law. I would also incline to the view that the point could not apply in relation to the second' Vishal guarantees; essentially for the reasons; outlined in the claimant's skeleton argument as to the implied proper law. While there is no express governing law clause, there would appear to be a strong argument that the second Vishal guarantees. are governed by English law**

58. It is not the case of the Applicants that the guarantee was unlawful or illegal per se. It was possible to perform the guarantee in a legal way so there cannot possibly either be a Foster v Driscoll point; where you have the complementary principle that if somebody intends to do something-illegal it is caught and is not capable of being enforced. So, essentially, for those reasons, I form the view that the "serious issue to be tried" hurdle is surmounted.

In summary the Court is of the view that both the Guarantees are governed by English Law and since the Guarantee is



governed by English Law the question of illegality due to Indian Law i.e., FEMA does not arise. The Corporate Debtor has raised this objection that even if the submission of the Corporate Debtor is taken, the Corporate Debtor alleged that there is a violation of Regulation 5(d). Regulation 5(d) of the FEMA act is reproduced as under: -

*5[d] a bank which is an authorised dealer may, subject to the directions of Reserve Bank in this behalf, permit a person resident in India to **issue corporate guarantee in favour of an overseas lender** or security trustee **to secure an external commercial borrowing** availed under the provisions of the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 (Notification No. FEMA 3/2000-RB, dated 3-5-2000)*

The Corporate Debtor has relied on this Regulation however, the Corporate Debtor failed to show that how this Regulation violates Regulation 5(d) of FEMA. Since Regulation 5(d) deals with external commercial borrowing and in our understanding external commercial borrowing are commercial loans raised by eligible Indian resident entities from a foreign entity. However, in the present case the principal borrower and to whom guarantee was given was a foreign entity incorporated



outside India i.e. in Mauritius. However, from the letter dated 11.12.2015` it appears that RBI permission is required even for Corporate Guarantee to be given by an entity based in India in favor of an entity incorporated outside India which has borrowed monies from an overseas lender. It may well be covered under some other regulations/ guidelines issued by the RBI which have not been brought to our notice. Even if we assume that the Regulation as quoted above is applicable even then that would not make the Corporate Guarantee invalid. It is pertinent to refer to judgement of Hon`ble Delhi High Court in the matter of *SRM Exploration Pvt. Ltd vs. N and S and N Consultants S.R.O.* (21.03.2012 - DELHC): MANU/DE/2056/2012 wherein it was held that Corporate Guarantee is not void only due to violation of FEMA. Para 11 of the aforesaid judgement is reproduced as under: -

“11. We have perused the provisions of FEMA, 1999 Section 3 thereof prohibits dealing in or transferring of any foreign exchange save as otherwise provided therein or under the Rules & Regulations framed thereunder without general or special permission of RBI. We are unable to find any provision therein voiding the transactions in contravention thereof. We may mention that the predecessor legislation to FEMA namely FERA 1973 vide Section 47 prohibited

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*entering into any contract or agreement directly or indirectly evading or avoiding any operation of the said Act or any provision thereof. However, Sub Section (3) thereof also provided that such prohibition shall not prevent legal proceedings being brought in India for recovery of a sum which apart from the provision of FERA would be due. However, the legislature while re-enacting the law on the subject has chosen to do away with such a provision. **We are of the view that the same shows a legislative intent to not void the transaction even if in violation of the said Act.** Thus, we are of the opinion that the plea of the appellant Company in this regard is without any force.”*

Further in the matter of *Eurometal Limited vs Aluminium Cables & Conductors*, 1983 53 CompCas 744 Cal decided on 10 April, 1980, it was held that it was the duty of the company issuing the guarantee to take necessary permission from RBI/FEMA and the company cannot take advantage of its own default and set up the plea of absence of permission of the Reserve Bank of India. Relevant para of the aforesaid judgment is reproduced as under: -

4. Mr. S.B. Mukherjee, appearing with Mr. S. Baherjee, for the company, submitted that there are three conditions of the contract as set out in para. 7 of



the contract, that is (1) approval of the Reserve Bank of India, (2) realisation in India of the export proceeds in full by the company, and (3) successful completion of the contract. Mr. Mukherjee submitted that those conditions are not fulfilled in this case as there is no permission for a remission of the alleged debt due to the petitioning creditor by way of commission as claimed in the winding-up petition and the statutory notice. Secondly, the contract was not fully performed and, therefore, the export proceeds cannot be said to have been realised in full, and, thirdly, the contract was not completed as part of the goods were not delivered by the company. **In my view, the said submissions are not only a desperate attempt on the part of the company trying to confuse the real facts and issue before the court, as, from the documents exchanged between the parties, it appears that the company agreed to pay and remit the amount to the petitioning creditor as the agent through whom the said contract with WAPDA was finally entered into by the company for supply of the goods after obtaining permission from the Reserve Bank of India. It was the duty and it was also incumbent under the law, that is the F.E.R. Act and the Rules made thereunder, for the company to make the necessary application for permission for remitting the said amount to the petitioning creditor. The company cannot take advantage of its own default and set up the said plea of absence of permission of the Reserve Bank of India.**

We thus hold that even if RBI permission was required irrespective of the fact that the borrowing is by an entity



based outside India that would not constitute an External Commercial Borrowing in India in terms of Regulation 5(d) of FEMA, it was the company (Corporate Guarantor) which was required to make the necessary application for permission from RBI and other regulators. The Corporate Debtor cannot take advantage of its own default and set up the said plea of absence of permission of the Reserve Bank of India. Further it is clearly stated in the agreement that this is a Guarantee of Indemnity and the consequences of signing the Corporate Guarantee which clearly says as under

“This is a guarantee and Indemnity. If the Principal does not repay the bank you may have to pay instead. You are strongly recommended to seek independent legal advice before signing”.

Relevant extract of schedule of the Corporate Guarantee is reproduced as under



THE SCHEDULE
(The Guarantors Security)

WARNING: This is a Guarantee and Indemnity. If the Principal does not repay the Bank, **YOU MAY HAVE TO PAY INSTEAD.** You are strongly recommended to seek independent legal advice before signing.

EXECUTED and DELIVERED as a Deed
by Superior Industries Limited
acting by a Director and its Secretary or Two Directors)

For Superior Industries Limited

Director.....  Authorised Signatory

Director/Secretary..... 

Even after that the said Guarantee was signed by Authorised Signatory of Corporate Debtor after passing a resolution in its Board Meeting dated 18.07.2012. Now the Corporate Debtor cannot take this defense that the said Guarantee is void in the absence of approval of RBI/FEMA.

16. Mere plain reading of the provision under section 7 of IBC shows that in order to initiate CIRP under Section 7 the applicant is required to establish that there is a financial debt and that a default has been committed in



respect of that financial debt. That while dealing with an application under section 7 the Adjudicating Authority is required to consider the question whether the 'debt' and 'default' is proved or not. The Adjudicating Authority is not required to look into any other criteria for admission of the application. The applicant, through IA 1552/2021 has placed on record of Default of the Corporate Debtor as recorded in NESL. Hence Debt and Default is satisfied in the present case.

17. In light of the above discussion, after giving careful consideration to the entire matter, hearing the arguments of the parties and upon appreciation of the documents placed on record to substantiate the claim, this Tribunal **admits** this petition and **initiates** CIRP on the Corporate Debtor with immediate effect.

18. Sub-section (3)(b) of Section 7 mandates the Financial Creditor to furnish the name of an Interim Resolution Professional. In compliance thereof the applicant has proposed the name of Mr. Piyush Moona, for appointment as Interim Resolution Professional having



registration number IBBI/IPA-001/IP-P00990/2017-2018/11630 having email id piyushmoona@gmail.com.

19. Mr. Piyush Moona has agreed to accept the appointment as the Interim Resolution Professional and has signed a communication in Form 2 in terms of Rule 9(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 dated 30.07.2018. There is a declaration made by him that no disciplinary proceedings are pending against him in Insolvency and Bankruptcy Board of India or elsewhere. In addition, further necessary disclosures have been made by him as per the requirement of the IBBI Regulations. Mr. Piyush Moona has a valid Authorisation for Assignment (AFA) which is valid till 15.11.2023. Accordingly, it is seen that the requirement of Section 7 (3) (b) of the Code has been satisfied.

20. It is thus seen that the *requirement of sub-section 5 (a) of Section 7 of the code* stands satisfied as default has occurred, the present application filed under



Section 7 is complete, and as no disciplinary proceeding against the proposed IRP is pending.

21. We are satisfied that the present application is complete in all respect and the applicant financial creditor is entitled to claim its outstanding financial debt from the corporate debtor and that there has been default in payment of the financial debt.

22. As a sequel to the above discussion and in terms of Section 7 (5) (a) of the Code, the present application is admitted.

23. Mr. Piyush Moona, having registration number IBBI/IPA-001/IP-P00990/2017-2018/11630, is hereby appointed as the Interim Resolution Professional in the matter.

24. In pursuance of Section 13 (2) of the Code, we direct that public announcement shall be made by the Interim Resolution Professional immediately (3 days as prescribed by Explanation to Regulation 6(1) of the IBBI Regulations, 2016) with regard to admission of this



application under Section 7 of the Insolvency & Bankruptcy Code, 2016.

25. We also declare moratorium in terms of Section 14 of the Code. The necessary consequences of imposing the moratorium flows from the provisions of Section 14 (1) (a), (b), (c) & (d) of the Code. Thus, the following prohibitions are imposed:

“(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;

(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.”



26. It is made clear that the provisions of moratorium shall not apply to transactions which might be notified by the Central Government or the supply of the essential goods or services to the Corporate Debtor as may be specified, are not to be terminated or suspended or interrupted during the moratorium period. In addition, as per the Insolvency and Bankruptcy Code (Amendment) Act, 2018 which has come into force w.e.f. 06.06.2018, the provisions of moratorium shall not apply to the surety in a contract of guarantee to the corporate debtor in terms of Section 14 (3) (b) of the Code.

27. The Interim Resolution Professional shall perform all his functions contemplated, inter-alia, by Sections 15, 17, 18, 19, 20 & 21 of the Code and transact proceedings with utmost dedication, honesty and strictly in accordance with the provisions of the Code, Rules and Regulations. He shall file his report within 30 days before this bench.



Let a copy of this order be served to the parties concerned.

-SD-

(RAHUL BHATNAGAR)
MEMBER (TECHNICAL)

-SD-

(P.S.N PRASAD)
MEMBER (JUDICIAL)