

I. Case Reference

Case Citation	: (2022) ibclaw.in 610 NCLT
Case Name	: Orbit Towers Pvt. Ltd. Vs. Sampurna Suppliers Pvt. Ltd.
Financial Creditor	: Orbit Towers Pvt. Ltd.
Corporate Debtor	: M/s Sampurna Suppliers Pvt. Ltd.
Application/Appeal No.	: C.P (IB) No. 2046/KB/2019
Judgment Date	: 27-Jun-22
Court/Bench	: NCLT Kolkata Bench
Member (Judicial)	: Shri Rohit Kapoor
Member (Technical)	: Shri Harish Chander Suri

II. Brief about the decision

A. Right of subrogation

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. **(p20)**

In the present case, the Corporate Debtor had borrowed the sum 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.(p21)**

B. An agreement of guarantee between the Creditor and the Guarantor is sufficient to file u/s 7 application

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. The Adjudicating Authority held that:

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 Case 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.(p23)

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.(p24)

In this matter 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.(p25)

C. Period of Limitation

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. Financial debt has also been acknowledged by the Corporate Debtor in its balance sheets as on 31st March, 2017 and 31st March, 2018. 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.(p26)

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.(p29)**

III. Full text of the judgment

[Click here for Judgment](#)