

An 'operational debt' will include a debt arising from a contract in relation to the supply of goods or services from the corporate debtor

In the case of *Consolidated Construction Consortium Limited v. Hitro Energy Solutions Private Limited*,¹ the Supreme Court held that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services by the corporate debtor would also be considered as an "operational debt" under Section 5(21) of the Insolvency & Bankruptcy Code ("IBC").

Brief Facts & Procedural History

1. Consolidated Construction Consortium Limited ("**Appellant**") had executed a contract with Chennai Metro Rail Limited ("**CMRL**") for the supply of light fittings. Pursuant to the contract with CMRL, the Appellant had placed purchase orders with Hitro Energy Solutions ("**Proprietary Concern**") for the supply of light fittings. CMRL had issued a cheque for an advance amount of INR 50 lakh to the Proprietary Concern on behalf of the Appellant, but subsequently cancelled its contract with the Appellant as the project that CMRL was working on was terminated.
2. The contract with CMRL was cancelled, and the Appellant repaid the sum of INR 50 lakh to CMRL. However, the Appellant was not able to recover the said amount from the Proprietary Concern as the Proprietary Concern had encashed the cheque for INR 50 lakh.
3. During this time, Hitro Energy Solutions Private Limited ("**Respondent**") was incorporated. In its memorandum of association ("**MoA**"), it was mentioned that the Respondent would take over the Proprietary Concern. However, the Respondent later passed board resolutions resolving not to take over the business of the Proprietary Concern.
4. The Appellant argued that the Proprietary Concern had defaulted in repaying the sum of INR 50 lakh and filed an application with the National Company Law Tribunal ("**NCLT**") under Section 9 of the IBC against the Respondent (as under the MoA, the Respondent was to take over the Proprietary Concern). The NCLT admitted the application under Section 9 and declared a moratorium.
5. The Respondent appealed against the NCLT order to the National Company Law Appellate Tribunal ("**NCLAT**"), which reversed the decision of the NCLT. The Appellant appealed before the Supreme Court against the NCLAT judgement .

¹ Civil Appeal No 2839 of 2020, Supreme Court of India, judgement dated February 04, 2022.

Issues

The Supreme Court framed three issues for its consideration which are as follows:

1. Whether the Appellant is an operational creditor within the meaning of IBC even though it is a purchaser?
2. Whether the Respondent has taken over the business and liabilities of the Proprietary Concern?
3. Whether the application filed by the Appellant under Section 9 of the IBC is barred by limitation?

Analysis & Findings of the Supreme Court

Issue 1 - The Supreme Court held that although the Appellant did not provide any goods or services to the Respondent, but only availed of goods or services from the Proprietary Concern, the Appellant is an operational creditor and was owed an operational debt by the Proprietary Concern for the following reasons:

- (a) The term “operational debt” under Section 5(21) of the IBC is defined as “claim in respect of the provision of goods and services”. Thus, the definition does not restrict the claim to only those who supply goods and services, but it requires that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver.
- (b) On a conjoint reading of the Section 8(1) of the IBC read with Rule 5(1) and Form 3 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, it can be noted that a notice for an operational debt can be issued either through a demand notice or an invoice. It is not mandatory that an invoice for supply of goods or services to the corporate debtor is required to prove the existence of operational debt.
- (c) On a conjoint reading of Regulation 7(2)(b)(i) and (ii) of the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**CIRP Regulations 2016**”), it can be noted that an operational creditor, seeking to claim an operational debt in a corporate insolvency resolution process, has an option between relying on a contract for the supply of goods and services with the corporate debtor or an invoice demanding payment for the goods and services supplied to the corporate debtor. The contract for supply of goods and services would also include arrangements in which the operational creditor may have been the receiver of goods or services from the corporate debtor.
- (d) In the case of *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*,² the Supreme Court while differentiating between operational creditors and allottees of real estate projects, had discussed advance payments in relation to good and services as falling under operational debt.

ISSUE 2 - The Supreme Court held that Respondent had taken over the business and liabilities of the Proprietary Concern and was liable to pay for the debts owed by the Proprietary Concern for the following reasons:

- (a) Sections 4(1) and 10(1) of the Companies Act, 2013 (“**Companies Act**”) lays down the binding nature of the MoA on the activities undertaken by a company. Furthermore, Section 13 of the Companies Act requires the company to pass a special resolution for the amendment of the MoA of a company. It also requires the Registrar of Companies (“**RoC**”) to register the alteration of the MoA and certify the registration within thirty days of filing the special resolution with the RoC.
- (b) In the present case, the Respondent had brought on record a board resolution and an auditor’s certificate to support the fact that it would not take over the Proprietary Concern. However, the Respondent had not provided any proof to show that the board resolution was a special resolution as required by law under Section 13 of the Companies Act. The Respondent had also neither shown any proof that amendment of the MoA was filed before the RoC nor shown any proof that the amendment was registered by the RoC.
- (c) Since the Respondent had not complied with Section 13 of the Companies Act, the purported amendment of the MoA of the Respondent would not have any legal effect. Therefore, it could be concluded that the Respondent

² (2019) 8 SCC 416.

has taken over the Proprietary Concern and it would be liable to repay the debt of the Proprietary Concern.

ISSUE 3 - The Supreme Court held that the application filed by the Appellant under Section 9 of the IBC was not barred by limitation for the following reasons:

- (a) The Supreme Court had previously held in the case of *B.K. Educational Services (P) Ltd. v. Parag Gupta & Associates*,³ that limitation does not commence when the debt becomes due but only when a default occurs.
- (b) In the present case, CMRL had issued the cheque for INR 50 lakh to the Proprietary Concern on November 7, 2013. Subsequently, there had been negotiations between the Appellant and the Proprietary Concern regarding the repayment of the sum advanced, and on March 2, 2017, the Proprietary Concern had sent a letter refusing to pay back the amount. Thus, while November 7, 2013, would be the date the debt became due, the default occurred only on March 2, 2017. As the Section 9 application was filed on November 1, 2017, the application was filed within the prescribed three-year time period, and it was not barred by limitation.

Conclusion

The Hon'ble Supreme Court has interpreted the term "operational debt" under Section 5(21) of the IBC in a broad manner to include even claims from persons who receive goods or services from the corporate debtor. Therefore, if an advance payment is made to a corporate debtor for providing any goods or services, the advance payment will also be considered an "operational debt" under the IBC.

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³ (2019) 11 SCC 633.