

**IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI**

**COURT-VI**

**Item No. 603  
IB-197/ND/2022**

**IN THE MATTER OF:**

**M/s. Shapoorji Pallonji and Company Pvt. Ltd.**

**...PETITIONER**

**Vs.**

**M/s. ASF Insignia SEZ Pvt. Ltd.**

**...RESPONDENT**

**Section**

**U/s 9 of IBC, 2016**

**Order dictated in open Court on 05.08.2022  
(Virtual Hearing)**

**Coram:**

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

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

**For the Petitioner/Operational Creditor :**

**For the Applicant**

**:Ms. Aakanksha Kaul, Mr. Manek  
Singh and Mr. Aman Sahani,  
Advocates.**

**For the Respondent/Corporate Debtor :**

**ORDER**

**IA/1247/2022**

1. We have heard the submissions made by the Counsel for the Applicant. Counsel for the Applicant has submitted that the Corporate Debtor has executed a Comfort Letter dated 17.04.2018. On examination of the Paper-book it transpires that in response to notice under Section 8 of IBC, 2016 issued by the Applicant, the Respondent (Corporate Debtor) has replied vide Para 5 & 6 as under:-
  5. *"As apparent from the facts narrated above, at no point in time did ASF assume any repayment obligations towards SPCPL, not even in the*

(Mohit)


 

*capacity of a 'Guarantor' in terms of the Comfort Letter, as sought to be alleged by SPCPL in the demand Notice. The relevant portion the Comfort Letter is extracted hereunder for reference:*

*"We, AISPL, undertake that if BCSPL does not make payment with regard to duly certified works delivered by SPCPL, under the contract, then AISPL shall intervene and ensure prompt payment of such dues by BCSPL."*

6. *It is evident from the above that ASF merely indicated its intention to get involved and ensure that BCSPL complied with its payment obligation in the event of default, without assuming any repayment obligation upon itself. There exist no express or clear provisions which foster any payment liability upon ASF and therefore, the contents of the Comfort Letter cannot be construed in a manner to impose any guarantee obligation upon ASF."*

2. Apart from the above, Respondent in his reply to Section 8(1) notice has also stated that the settled position of law is that a contract of guarantee requires concurrence of three parties i.e. Principal Debtor, Surety and the Creditor and thereby Surety undertakes an obligation to repay the debt in case of default on part of the Principal Debtor. Therefore, the contract of guarantee is a separate independent contract by itself whereby Surety consciously agrees & accepts the repayment obligation and as such obligations cannot be levied by placing reliance upon the terms of the Comfort Letter. In fact, this Adjudicating Authority is also of





the considered view that a Letter of Comfort cannot be equated with a 'contract of guarantee'.

Section 126 of the Indian Contract Act, 1872, defines a contract of guarantee, which is reproduced as under:-

"A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'."


3. Another noteworthy development is the order of the co-ordinated Bench of this Tribunal (Court-5) in the matter of **M/s Shapoorji Pallonji and Company Private Ltd. V/s M/s Black Canyon SEZ Private Limited** filed under Section 9 against the Corporate Debtor. The Hon'ble Bench vide order dated 10.06.2022 declined to admit his claim against the 'principal borrower' for the detailed reasons recorded in the said order.
4. The Respondent in the present Section 9 application is an entity which has issued a 'Letter of Comfort' to M/s. Black Canyon SEZ Private Limited. The Applicant is same in both the cases. On examination, the nature of transaction between the Applicant and the Respondent the debt does not constitute as an 'operational debt' as the expression 'operational debt' is defined in Section 5(21) of IBC, 2016 which means a claim in respect of provision of goods or services including employment



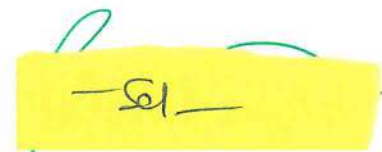


or debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government; any State Government or any Local Authority. It is also noted that Section 5(5A) of IBC, 2016 defines the expression "Corporate Guarantor", which means a Corporate person who is a surety in a contract of guarantee to a Corporate Debtor.

5. Having considered the contents of the averments and prayers made by the Applicant in Section 9 application, the Respondent being an entity which issued 'Letter of Comfort' cannot be treated as proper Respondent in this matter, more particularly "Corporate Debtor/Corporate Guarantor" within the framework of law. We are of the view also that there is neither any "operational debt" nor the Respondent is a Corporate Guarantor/Corporate Debtor. Therefore, Section 9 application is not maintainable on facts as well as law. Hence, the Section 9 application is **dismissed** without costs.



**(Rahul Bhatnagar)**  
**Member (T)**



**(P.S.N Prasad)**  
**Member (J)**