

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 781 of 2019

& I.A No. 746, 951 & 952 of 2021

IN THE MATTER OF:

C & C Construction Ltd.

Through Navneet Kumar Gupta, (RP)

361, Sunview, Pocket 4, Sector 11,

Dwarka, New Delhi- 75

...Appellant

Vs.

Power Grid Corporation of India Ltd.

B-9, Qutab Institutional Area

Katwaria Sarai

New Delhi – 110 016

...Respondent

Present:

For Appellant: Mr. Siddhartha Bhatnagar, Sr. Advocate Mr. Pulkit Deora, Advocate.

For Respondent: Mr. Krishnendu Datta, Sr. Advocate, Ms. Riya Kalra, Mr. Apoorv P Tripathi, Advocates.

Mr. Abir Phukan, Mr. Surya Prakash, Mr. Ashkrit Tiwari (for impleadment, Ministry of External Affairs)

Mr. Aayush Agarwal (Applicant for Axis Bank).

J U D G M E N T

DR. ASHOK KUMAR MISHRA, TECHNICAL MEMBER

1. The present appeal has been filed by Mr. Navneet Kumar Gupta 'Resolution Professional' (RP) of the 'Corporate Debtor' – 'C&C Construction Limited' under Section 61 of the 'Insolvency and

Bankruptcy Code, 2016' (in short 'Code') against the order dated 22.07.2019 passed by the 'Adjudicating Authority' (National Company Law Tribunal), Principal Bench New Delhi, in C.A No. 1248/2019 in C.P No. (IB) 1367(PB)/2018. The RP is aggrieved by the Adjudicating Authority order as it has vacated an 'ad-interim' injunction which it has previously granted against encashment of bank guarantee issued on behalf of Appellant to its various customers including the Respondent herein.

2. An 'Interlocutory Application' (IA) No. 746/ 2021 in Company Appeal (AT) (Ins) no. 781 of 2019 has been filed by Axis Bank Ltd., seeking clarifications / directions from this Tribunal regarding encashment of bank guarantee issued by 'Axis Bank Ltd' on behalf of the joint venture of the 'Corporate Debtor'. The joint venture named M/s. EPI – C&C JV, is an unincorporated joint venture between 'C&C Construction Ltd., and 'Engineering Projects India Ltd'. The 'Axis Bank' has issued bank guarantees in favour of the 'Ministry of External Affairs' for this joint venture projects based on the request of the Corporate Debtor for the project.
3. The 'Ministry of External Affairs' (MEA) has filed IA No. 951 of 2021 in the above stated appeal seeking a direction from this Tribunal to the 'Axis Bank Limited' to release the amount payable towards the encashment of the bank guarantee. They have also stated the Government of India (GoI) and Government of Myanmar had entered into a framework agreement to develop specific model transit projects in Myanmar and the 'Ministry of External Affairs' Government of India

is the nodal agency for this. They have also stated that on 31.03.2017 an EPC Contract was executed between the 'Ministry of External Affairs' GoI and M/s. EPI C& C JV, a joint venture of the Corporate Debtor where the Corporate Debtor is holding 60% and 'Engineering Projects India Limited', a Government of India enterprise is holding 40% shares. The 'Ministry of External Affairs', GoI has given 5(five) bank guarantees total amounting to Rs. 111.118 Crore to secure the repayment of mobilisation advance. They have also filed I.A No. 952 of 2021 for impleadment. They have also stated that the Applicant has disbursed the mobilisation advance of approximately Rs.151 Crore.

4. The 'Adjudicating Authority' has elaborately explained briefly the material facts of the case, the position of the 'Corporate Debtor' and the provision of the Code particular Section 3(31) and Section 14 of the Code and also considered the certain citations and, thereafter, has allowed the C.A No.1248(PB)/2019 wherein the petitioner - M/s. ICICI Bank Ltd. vide order of the Adjudicating Authority has allowed the petition to invoke/encash bank guarantee issued in its favour by the Corporate Debtor without seeking leave of the Tribunal. The Adjudicating Authority has also stated that the 'Performance Bank Guarantee' may not be invoked / encashed before 01.08.2019. The CIRP of the Corporate Debtor has been initiated vide order dated 14.02.2019 in CP (IB) NO.1367(PB)/2018.
5. The Appellant/ RP has submitted that the present case concerns not only the bank guarantee issued to the Respondent but to 20 others agencies of the Appellant. All are beneficiaries of bank guarantee which

has been issued by its banker against mobilisation advance, defect liability, retention money, machine advance, performance guarantee etc. The Appellant has also submitted that the application was preferred pursuant to powers vested in the RP u/s 20(2)(e) of the Code, and the jurisdiction vested with the Adjudicating Authority pursuant to Section 60(5), R/w Section 238. The Appellant has submitted that it is settled law that in the presence of mounting inequities a court may interfere in encashment of bank guarantees and grant an interim injunction such as that which has been sought herein. He has also submitted that the Interim injunction had been sought in view of special inequities that would befall the Appellant, in the event that such an order should be denied, which in effect would set the CIRP to naught. The Appellant has submitted that vacating the present injunction would tantamount to a liquidation of the Corporate Debtor which would be contrary to the aim and intent of CIRP and settled law which requires the Resolution Professional, the 'Committee of Creditors' (CoC) and the Adjudicating Authority to do every possible, during the CIRP, to maintain the corporate debtor as a going concern in order to give it a fighting chance for insolvency resolution. The Appellant has also submitted that the primary focus of the legislation is to ensure revival and continuation of the Corporate Debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors.

6. The Appellant is critical that the CIRP is in progress and law has provided a “calm period” where creditors stay their hands, the purpose is that the moratorium while in operation provides impetus for rival proposal and make up what has to be done. He has also submitted a good realisation can generally be obtained if the firm is sold as a going concern.
7. The Respondent is a GoI Enterprise and a Central Transmission Utility under ‘Ministry of Power’. As a national transmitter of Electricity the Respondent engages several contractors to set up electricity powers and conductors / wires where the Appellant is one such contractor. The Appellant and the Respondent has entered into 4(four) such contract/agreements dated 24.12.2010, 31.01.2012, 11.04.2016 & 27.09.2016. The Appellant has either completed the contract with much delay or has failed to return the material or has consumed excess material. All this has lead only under performance of the Respondent. As per the terms of the Contract, the Appellant has provided the various bank guarantee to the Respondent including in respect of work entrusted to the joint ventures. Such joint venture is not a separate legal entity. The Respondent has also stated that the Bank Guarantee is not an asset of the Corporate Debtor but the money will go from the account of the issuing bank and not from the Corporate Debtor, the Corporate Debtor will lose only margin money when the bank guarantee is encashed. They have also stated that bank guarantee can only be injuncted, if it is affected by fraud or encashment of bank guarantee will create special inequity that will cause ‘irretrievable

injustice'. The Appellant has failed to establish both the ingredients. They have also stated that, if appeal is allowed the Respondent will suffer a major injury as it will affect their completion of various contracts.

8. The learned counsel for the 'Axis Bank Ltd' has stated that 'Ministry of External Affairs', GoI is asking them to invoke such bank guarantee. However, such bank guarantee is covered by an 'omnibus counter guarantee' from corporate debtor. This bank has issued number of guarantees in favour of various beneficiaries. In any case finally they sought the direction / clarification in respect of encashment of such bank guarantee issued by 'Axis bank Ltd' in favour of 'Ministry of External Affairs'.
9. The learned counsel for the 'Ministry of External Affairs' submitted that the bank guarantee provided against the mobilisation advance were unconditional and irrevocable. The 'MEA' was constrained to approach the Axis Bank Ltd to forfeit the bank guarantee but they have refused to do so unless they get a clarification/direction from the Tribunal. The learned counsel has also submitted that the strategic importance of the project to the country. They have also stated that these bank guarantees involves bilateral relations with neighbouring country and delay in encashing the bank guarantee would result in further delaying the project of immense national and strategic importance.
10. The parties have submitted various citations to supplement and advance their arguments in their own format. They have cited

judgments both in relating to the Code and also relating to other laws to supplement their views.

11. We have gone through the elaborate submissions made by the parties and provisions of the Code. Section 3(31) and Section 14 of the Code are enumerated hereunder:

Section 3(31) – “Security Interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person;

Provided that security interest shall not include a performance guarantee;”

Section 14 - (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(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 Securitisation 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.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(3) The provisions of sub-section (1) shall not apply to
a. such transactions as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

b. a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

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 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.

12. The Hon'ble Supreme Court in SBI Vs. Rama Krishnan (2018) 17 SCC 394 at para 30-33 has elaborately discussed the subject of surety and also the status of surety in a contract of guarantee for corporate debtor. Section 14 (3) (b) of the Code, states that the provisions of this section shall not apply to a surety in a contract of guarantee to a corporate debtor. The Insolvency Law Committee appointed by Ministry of Corporate Affairs through its report dated 26.03.2018 has also clarified this subject vide para 5.10 that the assets of the surety are separate from those of the Corporate Debtor and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of the third party like surety. Section 14 (1) (c) makes amply clear that any security interest created by the Corporate Debtor in respect of its property is covered under moratorium. It is now amply clear that the bank guarantee issued by the bankers are also the responsibility of the bankers and the fund will go out of the fund of the banks and not directly the fund from the corporate debtor. However, in order to keep the corporate debtor alive during moratorium, keeping in minds the provisions of Section 14 (1) (C) r/w Section 14 (3) (b), if any, such bank guarantee is liquidated, it can be restricted to the full value of the guarantee minus margin money provided by corporate debtor to the banker for taking that bank guarantee and accordingly, banks can release the fund to the extent of full value of the bank guarantee minus margin money provided by the corporate debtor to the banker for the bank guarantee.

13. Accordingly, we are slightly modifying the Adjudicating Authority order dated 22.07.2019 and for brevity and clarity we are setting aside the Adjudicating Authority order with above observations and directions. Interim order, if any, issued by this Tribunal stands vacated. Pending IAs, if any, stands disposed of. No order as to costs.

[Justice Jarat Kumar Jain]
Member (Judicial)

(Dr. Ashok Kumar Mishra)
Member(Technical)

19th July, 2021

New Delhi

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