

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

ITEM No. 305
(IB)-1367(PB)/2018

IN THE MATTER OF:

ICICI Bank Ltd.

..... Petitioners/Applicant

v.

C & C Construction Ltd.

..... Respondents

Under Section 7 of Insolvency and Bankruptcy Code, 2016 (CIRP)

Order delivered on 22.07.2019

Coram:

CHIEF JUSTICE (RTD.) M. M. KUMAR
HON'BLE PRESIDENT

SH. S. K. MOHAPATRA
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the RP

Mr. Chhibber, Sr. Adv. with Mr. Pulkit Deora & Ms. Arunima Bhattacharjee, Advs.

For the Respondent

Mr. Swapnil Gupta, Ms. Shivambika Sinha & Ms. Ankita Sinha, Advs.

Mr. Debarshio Bhadra & Mr. Sanjay Kumar, Advs.

Mr. K. Datta, Mr. Apoorv P Tripathi, Mr. Dheeresh K Dwivedi & Ms. Pallavi Srivastava, Advs.

Mr. Abhishek Thakur, Adv. For R-19

ORDER

CA-1248(PB)/2019

This is an application filed by the Powergrid Corporation of India Ltd. with a prayer to modify the order dated 08.04.2019 passed by this Bench restraining the applicant to invoke/encash Bank guarantee issued in its favour by the Corporate debtor without seeking leave of this Tribunal. The order dated 08.04.2019 passed by us reads as under:-

“Notice of the application to the non-applicant respondent no. 1 to 19. Process dasti as well.



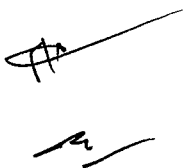
In the meanwhile, invoking of bank guarantee shall remain stayed with leave to obtain specific permission in this regard from this court. As already moratorium under Section 14 of the Insolvency and Bankruptcy Code is in operation since 14.03.2019, we have already taken the view against invocation as held in the case of Nitin Khandelwal Vs Maini Construction Equipment's Pvt. Ltd. (CA-20 in CP No.1236 of 2016) decided on 25.01.2018.

A copy of the order be given under signature of the Bench Officer.

List for further consideration on 16.04.2019.”

2. The aforesaid order, above extract order, continues to operate till date and the present application has been filed for its modification with further prayer to allow the applicant to encash the performance bank guarantee.

3. The applicant is an enterprise of Government of India and transmission utility notified under Section 38(1) of the Electricity Act, 2003. It is also deemed licensee under Section 40 of the Electricity Act, 2003. It has entertained into a supply agreement and a service agreement with the corporate debtor namely C & C Construction Ltd. on 27.09.2016 and for installation, transportation, insurance and other local services required for complete execution of the tower package fully detailed in the application (Annexure-4). The agreement dated 27.09.2016 is governed by general conditions of contract (GCC) and special conditions of contract (SCC) (Annexure-5). In pursuance of clause 2.2 of the Contract dated 27.09.2016 read with Appendix I, the corporate debtor issued two unconditional performance bank



guarantees worth more than 5 crores and worth more than two crores to that effect averments made in para 6 which reads as under:-

“That in pursuance of clause 2.2 of the Contract dated 27.09.2016 read with Appendix I thereto, the Corporate Debtor has issued 2 unconditional performance bank guarantees for Rs. 5,25,53,989/- (Rupees five crores twenty-five lakhs fifty-three thousand nine hundred eighty-nine only) bearing BG No. 0021BGR0017317 dated 11.11.2016 and for Rs. 2,10,59,744/- (Rupees two crores ten lakhs fifty-nine thousand seven hundred forty-four only) bearing BG no. 0021BGR0017217 dated 11.11.2016 (the **Unconditional Performance Bank Guarantees**), to secure its performance of the Contract dated 27.09.2016. That each of the Unconditional Performance Bank Guarantees are due to expire on 31.08.2019. A copy of the unconditional performance bank guarantees bearing BG Nos. 0021BGR0017317 and 0021BGR0017217 are annexed hereto and marked as **Annexure A-6 (Colly)**.

4. The aforesaid contract agreement was amended on 04.06.2018 (Annexure-7).

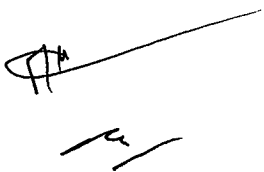
5. The allegation of the applicant is that the corporate debtor remained unable to adhere to the time line given in the agreement committing serious default in the performance of the contract dated 27.09.2016 despite regular follow ups, reminders and numerous extensions of time granted by the applicant. The last extension is expiring on 31.05.2019. The allegation is that only 50% of the contract dated 27.09.2016 was completed in June, 2019 and the applicant was constrained to terminate the contract by termination notice dated 26.06.2019 issued under clause 36.2. The copies of the default notice, extension and termination notice have been placed on record (A-8) to (A-10). The applicant is stated to have suffered substantial loss and damage on account of failure, omissions and



defaults of the corporate debtor and it is entitled to recover the difference from the corporate debtor along with reasonable overhead cost incurred by the applicant as a result of fresh award of the balance work under the contract dated 27.09.2016 and therefore it is entitled to encash unconditional performance bank guarantee which could not be done on account of order dated 08.04.2019.

6. Reply to the application has been filed by the Resolution Professional the fact that performance bank guarantee has been furnished has not been disputed. In reply to para 6 where specific averments with regard to unconditional performance bank guarantees have been made has not been disputed in the corresponding para 6 of the reply. All that has been said is that the facts stated therein are matter of record and not disputed. The other broad facts regarding extension, default notice and termination notice have not been disputed.

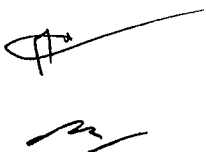
7. We have heard Mr. K. Datta, Ld. Counsel for the applicant-Powergrid Corporation of India Ltd. and the Ld. Counsel for the Resolution Professional-Mr. Anand Chhibber & Mr. Deora. Having heard the Ld. Counsel we find that the question raised before us is whether the principle of moratorium as contemplated under Section 14 of the Insolvency & Bankruptcy Code could be extended to the performance bank guarantees furnished by the corporate debtor. The aforesaid issue came up for consideration of the Appellate Tribunal in the case of '*GAIL (India) Limited v. Rajeev Manaadiar & Ors.*' (AT (Insolvency) No. 319 of 2018 decided on 24.07.2018 in similar facts Hon'ble Appellate Tribunal after referring to section 14 and 3(31) has held as under in categorical terms.



“6. From sub-section (31) of Section 3, it is clear that the ‘security interest’ do not include the ‘Performance Bank Guarantee’, therefore, we hold that the ‘security interest’ mentioned in clause (c) of Section 14(1) do not include the ‘Performance Bank Guarantee’. Thereby the ‘Performance Bank Guarantee’ given by the ‘Corporate Debtor’ in favour of the Appellant- ‘GAIL (India) Ltd.’ is not covered by Section 14. The Appellant- ‘GAIL (India) Ltd.’ is entitled to invoke its ‘Performance Bank Guarantee’ in full or in part.

7. If it is invoked, the Appellant will inform it to the ‘Interim Resolution Professional’ who will maintain the record and make it clear 4 Company Appeal (AT) (Insolvency) No. 319 of 2018 that the ‘Performance Bank Guarantee’ in full or part has been invoked by the Appellant which should also be brought to the notice of the ‘Resolution Applicant(s)’.”

8. The aforesaid view emerges from plain reading of Section 3(31) which excluded the performance bank guarantee from the definition of security interest. The expression security interest has been expressly used in Section 14(c) and once performance bank guarantee is not included in the security interest then the principal of moratorium contemplated by Section 14 would not apply to any such bank guarantee. Therefore, the judgement of the Hon’ble Appellate Tribunal having binding force must be followed and applied to the facts of the present case. Particularly it has not been disputed that the performance bank guarantee was furnished. On behalf of the Resolution Professional it was sought to be argued that the Hon’ble Supreme Court has held that there was no absolute rule prohibiting



grant of interim injunction relating to bank guarantees and in exceptional cases courts would interfere with the machinery of irrevocable obligation presumed by banks. A reliance is placed on *Adani Agri Fresh Limited v. Mahaboob Sharif and Others* [(2016) 14 SCC 517]. We are not impressed with the argument because the general principals emerging from general law as against the specific provision made by parliament in Section 3(31) read with Section 14 cannot be preferred. There is no possibility of applying the principle of general law to the specific provisions made in Insolvency & Bankruptcy Code. Accordingly, we have no hesitation to reject the aforesaid argument.

9. As a sequel to the above discussion this application i.e. CA-1248(PB)/2019 is allowed, the order dated 08.04.2019 is modified and is deemed to have merged in the present order. CA-640(PB)/2019 in which the interim order dated 08.04.2019 was passed is also disposed of. However, we make it clear that the performance bank guarantee may not be invoked/encashed before 01.08.2019.

10. Application disposed of in the above terms.

Sd/-

(M. M. KUMAR)
PRESIDENT

Sd/-

(S. K. MOHAPATRA)
MEMBER (TECHNICAL)