

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

ITEM No. 122
(IB)-1362(PB)/2018

IN THE MATTER OF:

ICICI Bank Ltd	...	Applicant/Petitioner
Vs		
Jyoti Builtech Pvt Ltd.	...	Respondent

Order under Section 7 of Insolvency & Bankruptcy Code, 2016, CIRP.

Order delivered on 03.02.2021

CORAM:

SH. B.S.V. PRAKASH KUMAR
HON'BLE ACTG. PRESIDENT

SH. HEMANT KUMAR SARANGI
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the RP : Mr. Vinod Chaurasia, Advocate
For the RMC : Mr. Vaibhav Sharma, Adv. for IRP in IA 5606/2020

ORDER

In IA2735-2019, submissions heard. **Order Reserved.**

On the application (CA148/2020) moved by the RP Counsel for exclusion of 66 days from the CIRP period of 270 days, the same is hereby excluded.

Accordingly, CA-148/2020 is hereby **allowed.**

List CA-2347-2019, CA-436-2020, IA-2950-2020 along with other pending applications for hearing on **16.03.2021.**

Sd/-

(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT

Sd/-

(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

CA-397/2020 & IA. No. 3102/2020

In

Company Petition No. (IB)-1362(PB)/2018

IN THE MATTER OF:

Vijender Sharma ... Resolution Professional / Applicant

Vs

Ranchi Municipal Corporation ... Respondent

And IN THE MATTER OF:

ICICI Bank Ltd. ... Applicant/Petitioner

Vs

Jyoti Builtech Pvt Ltd. ... Respondent

Judgment delivered on 24.02.2021

CORAM:

SH. B.S.V. PRAKASH KUMAR
HON'BLE ACTG. PRESIDENT

SH. HEMANT KUMAR SARANGI
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the RP : Mr. Vinod Chaurasia, Advocate

For the RMC : Mr. Vaibhav Sharma, Adv. for IRP in IA 5606/2020

AS PER: B.S.V. PRAKASH KUMAR, ACTG. PRESIDENT

CA397/2020 & IA-3102/2020

Heard and Pronounced on 03.02.2021

The RP has filed **CA397/2020** against Ranchi Municipal Corporation (corporation/ beneficiary) not to encash three Bank Guarantees for an amount of ₹35,96,25,023 and to declare the termination letter No.351 dated 08.08.2019 as null and void or to review the aforementioned termination letter.



2. As against CA397/2020, Ranchi Municipal Corporation has in turn filed **IA3102-2020** against the RP (**R1**) and Indian Overseas Bank (R2) to declare that moratorium triggers u/s 14 of IBC (**Code**) will not govern the Bank Guarantees issued by Indian Overseas Bank on behalf of the Corporate Debtor, therefore to direct Indian Overseas Bank to release the Bank Guarantees for an amount of ₹35,96,25,023 in view of the letter of invocation of Bank Guarantees dated 27.12.2019 issued by Ranchi Municipal Corporation.
3. For having both the parties filed applications against each other on the same issue, the parties are hereby referred to the corporate debtor as corporate debtor, Ranch Municipal Corporation as Corporation/beneficiary and Indian Overseas bank as the Bank.
4. The factual aspect involved in this case is, the Corporate Debtor along with Vibhor Vaibhab Infra Limited formed into a consortium and applied for a tender invitation notice dated 21.03.2015 given by the Corporation to take up the work of **Development of Sewerage Collection System and Drainage System for Zone -1 NIT No 983** (hereafter referred as **the project**), in the said tender, the debtor consortium was declared as successful bidder for the project. It is pertinent to mention that this work is in relation to sewage and drainage, which is directly related to the health of the public.
5. As per the bid, the contract cost is ₹359,25,00,465 and this work shall be completed within 24 months including rainy season. There is a clause in the agreement that **the corporation will, if requested by the contractor, make mobilization advance payments 15% of the Tendered Value, interest free, to the contractor to assist in defraying the initial expenses that will necessarily be incurred by the contractor for mobilization and design.** On the Letter of Intent (LoI) dated 08.09.2015 issued to the corporate debtor to arrange Performance Bank Guarantee for an amount of ₹60.02crore, Chartered Mercantile M. B. Ltd on behalf of the Corporate Debtor furnished three Bank Guarantees for an amount of ₹60.02corore to the Corporation. Thereafter the corporate debtor entered into an agreement with the Corporation on 01.10.2015 for the project under JNNRUM Scheme agreeing to complete it within 24 months



i.e., 30.09.2017. These Bank Guarantees were time to time renewed on behalf of the Debtor by Indian Overseas Bank. This is how Indian Overseas Bank has come into picture. As the corporate debtor availed this mobilization advance, it has provided irrevocable bank guarantees in amounts and currencies equal to the advance payment. In the agreement, it has been covenanted that the guarantee shall remain effective until the advance payments in installments are repaid by the debtor from the interim payments the debtor receives from the corporation for the portion of the work the debtor completed. And this mobilization advance liability as well as the Bank Guarantee shall be progressively reduced proportionate to the amounts realized from the interim payments paid to the debtor by the corporation to the portion of the work as certified in the payment certificates. As per the agreement, it is expected that the guarantor will mobilize sufficient funds, which should normally be not less than the advance provided by the corporation, so that adequate cash flow is maintained at all times during execution. The mobilization advance shall be repaid with percentage deductions in equal installments from the interim payments certified by the engineer of the Corporation, and such installments shall be calculated as per the time of completion of 70% of the work, as to incomplete portion of the work, since interim payments to the debtor will not arise, the payment of installments towards mobilization advance will get stuck. In such situation, the installments outstanding towards mobilization shall be recovered by encashment of Bank Guarantees provided advance payments have not been fully repaid prior to the time when the total amount of all interim payment certificates reaches 70% of that portion of the contract price related to the execution of the works or 16 months after the commencement date, or termination under clauses, whichever event occurs first, then the whole of the balance then outstanding shall immediately become due and payable by the contractor/debtor to the corporation, then the corporation is at sole discretion to encash the balance bank guarantees.

6. The details of the Bank Guarantees renewed by the Indian Overseas Bank on behalf of the Corporate Debtor are as follows:



BG Number	BG Amount	Beneficiary
006571119000027	18,00,00,000/- (INR Eighteen Crores Only)	Municipal Commissioner, Ranchi Municipal Corporation, Ranchi
006571118000055	14,94,25,023/- (INR Fourteen Crores Ninety-Four Lakhs Twenty- Five Thousand and Twenty- Three Only)	Municipal Commissioner, Ranchi Municipal Corporation, Ranchi
006571118000054	3,02,00,000/- (INR Three Crores and Two Lakhs Only)	Municipal Commissioner, Ranchi Municipal Corporation, Ranchi
Total	35,96,25,023/- (INR Thirty-Five Crores Ninety-Six Lakhs Twenty- Five Thousand and Twenty-Three Only)	

7. This table discloses the balance of the bank Guarantees that remained in force, which is in proportion to the work not completed by the Corporate Debtor. The reason for saying so is, interim payments have been released proportionate to the work done by the debtor, out of which, the corporation collected advance installments from that interim payments paid to the debtor, but as the corporate debtor failed to complete work, interim payments stopped coming to the corporate debtor, as a result, the corporation could not collect its installment towards mobilization advance, that is where the corporation was constrained to invoke the balance bank guarantee. It is evident on record, the bank guarantee liability is proportionately reduced to around ₹36crore from ₹60crore because the corporation proportionately reduced the bank guaranty to the amount it received towards mobilization advance. The Corporate Debtor failed to complete the work within the stipulated period of 24 months. The work completed is also of not up to the standards set out by the Corporation, thereby the Corporate Debtor was debarred from all future works of the Corporation through an Order No.232 (S&D) dated 22.05.2017.



8. However, the Corporation, upon the request of the Corporate Debtor, extended one more year to complete the project by 30.09.2018 through a letter dated 06.11.2017. When the Corporate Debtor failed to complete the work within the time extended as well, the Corporation issued to the debtor the termination notice under Clause 49 (b) (c) and (d) of the agreement, vide Ranchi Municipal Corporation letter No.345 dated 29.03.2019. Upon receipt of the termination letter, the RP wrote a letter dated 15.04.2019 asking for further extension of time for completion of work. But as the Corporate Debtor failed to complete the work even after extension of one year to complete the project, the Corporation issued final termination letter No.351 dated 08.08.2019. Subsequent to it, the RP sent another letter dated 18.10.2019 for reviewing the decision of the Corporation. Ultimately, the Corporation invoked the Bank Guarantees furnished by the Corporate Debtor through Indian Overseas Bank for an amount of ₹35,96,25,023 on 27.12.2019 but till date it could not encash the money because the Bank has not released the money despite they were invoked.

9. As against the invocation dated 27.12.2019, the Corporate Debtor through RP has filed IA 397/2020 on 10.01.2020 stating that the Corporation cannot invoke the Bank Guarantees furnished on behalf of the Corporate Debtor in the light of Section 14 of the Code. The RP Counsel has further submitted that the RP wrote a letter to the Corporation on 01.04.2020 seeking extension of Bank Guarantees in view of the extension of limitation provided by the Honorable Supreme Court of India due to Covid 19 pandemic with effect from 15.03.2020, therefore the Corporation could not have invoked owing to the extension of limitation by the Honourable Supreme Court of India. The RP counsel has further argued that it is not a performance guarantee, as per record, it is an advance bank guarantee, therefore it could not be called as exempted from the ambit of the Code.

10. Against this factual backdrop, the Corporation counsel submits that Indian Overseas Bank being a member of the CoC, it has colluded with the RP and is not allowing the Corporation to encash the guarantee amount despite the



guarantees were invoked long before, which the Bank is factually and legally not supposed to cause restraint in encashing the Bank Guarantee amounts.

11. On perusal of these factual aspects, it is evident on record that the rival parties are on the same page as to the facts are concerned, therefore this Authority is saved from culling out proved facts from the assertions made by both sides. The only point now to be examined is whether or not the legal stands taken by either side are supporting the factual story available on record.

12. Taking the factual aspects as well as legal arguments, the points for consideration are, whether or not this mobilization advance Bank Guarantee amounts to performance bank guarantee, whether or not this guarantee is governed by Section 14 of the Code, whether or not the Bank can stop the Corporation from encashing the guarantees already invoked.

13. We shall examine the scope of performance bank guarantee - a bank guarantee is an assurance agreement that bank provides to a contract (underlying contract) between two external parties, such as buyer and seller; or an employer and contractor; herein this case the applicant and beneficiary. The Bank guarantee serves as a risk management tool for the beneficiary, as the Bank assumes liability for completion of the contract should the buyer default on its debt or obligation. The underlying contracts constituting Bank Guarantee clause can be both financial, such as loan repayment, or performance-based, such as a service provided by one party to another, in such case, the beneficiary can seek reparations from the bank for non performance of the obligation as laid out in the contract. This assurance agreement of providing bank guarantee to the beneficiary is independent of the underlying agreement executed between the employer and contractor, as the case may be. Should the counter party fail to deliver on the services as promised, the beneficiary will claim their resulting losses from non-performance against the guarantor - the bank.

14. On examining the elements of performance bank guarantee and advance bank guarantee by placing them side by side, we have not found any difference between these two concepts, in both the cases, one - bank provides assurance to a contract between two external parties like any other bank guarantee; two -



the guarantee is based on an underlying agreement between two external parties; three - that bank guarantee is independent of the underlying agreement; four - the Bank assumes liability for completion of the work, should the promisor fail to do some action promised; five - the beneficiary in the bank guarantee is a promisee in the underlying agreement between the parties and six - the beneficiary can seek reparations from the Bank for non performance. In both the cases, work performance is linked to the bank guarantee deed, and Bank serves as risk management tool for the beneficiary. In a way, payment of advance Bank Guarantee is more justifiable than simpliciter performance bank guarantee because in the case of performance bank guarantee, the beneficiary will take bank guarantee and it will invoke that guarantee provided work has not been performed on time, in advance bank guarantee issue, the beneficiary or employer goes ahead to ensure its work is done effectively. And to ensure cash flows issues will not cause impediment in execution of the work entrusted to the contractor, it also provides advance to the contractor and collects it during the progress of the work. It will not get any benefit out of it, its object is to ensure work is performed. Such being the purpose, can it be said that since its nomenclature being different, it cant be treated as performance bank guarantee? In deed, it is a stimulus package to the contractor to start work instead of groping for monies.

15. The purpose and object of the mobilization advance money is not only to ensure work is performed, but also to give a stimulus to the contractor to start with. Moreover, if it is seen how the employer/corporation collects this money from the contractor/the debtor, it will be evident that the contractor/corporation receives this advance on instalment basis from the interim payments the corporation paid to the debtor for the work it has completed. It only collects a portion of money from each of the interim payment made to the debtor, this payment is staggered payment in installments spread over to cover to the interim payments the debtor gets to 70% of the project work it has completed.

16. The logic that could be derived is, advance bank guarantee is one of the species in the generic word of performance bank guarantee. It can safely be inferred that the mobilization advance bank guarantee has all elements the



performance bank guarantee has, indeed it has an additional element of stimulus package of providing money to start with. Merely by providing money, it will not lose the characters of performance bank guarantee, for this reason, it can't be invalidated as not falling within the caption of performance bank guarantee.

17. We must also deliberate that the monies to be paid towards bank guarantee is to be paid by the Bank, not by the corporate debtor, therefore nobody needs to remain under the impression that the beneficiary realizing it from the assets of the corporate debtor.

18. It is a bank Guarantees provided by the Corporate Debtor entitling the Corporation to invoke the bank Guarantees and to encash the same as and when the Corporate Debtor failed to complete the work as stated in the agreement. It is also a fact that is evident on record that this contract was awarded in the year 2015 to complete it by 2017, since the Corporate Debtor failed to complete the work within two years as stated in the agreement, the Corporation was considered it in extending the contract period for one more year to complete the same.

19. On reading the averments placed by both sides, it appears that the Corporate Debtor has not only not completed the work, but the work completed by the Corporate Debtor is of an inferior quality, therefore the Corporation has debarred the Corporate Debtor to do any future works except to the extent of the project on hand.

20. Since the Corporate Debtor has not completed the work even after one year time was extended, the Corporation issued a termination letter on 14.10.2019, whereas the Insolvency Petition was admitted against the Corporate Debtor on 07.03.2019 since the CIRP was initiated on 07.03.2019, the RP has started corresponding with the Corporation asking them not to invoke the bank Guarantees for two reasons: a) Since the moratorium has been invoked, the guarantee amount being an asset of the Corporate Debtor and the same being given as security, the Ranchi Municipal Corporation shall not invoke the bank guarantees while moratorium is in force. b) Since Covid-19 situation has set-in



in the month of March 2020, the Corporate Debtor has failed to complete the work, therefore the failure of completion of work cannot be attributed as a default upon the Corporate Debtor and it shall be treated as a natural calamity falling under force majeure.

21. As against these contentions, the Corporation Counsel submits that this contract was awarded in the year 2015, the Corporate Debtor was to complete this work by 2017, as the Corporate Debtor did not complete the work within two years provided in the agreement, the Corporation went a head and provided one more year to complete it, i.e., upto 2018. Then also, this Corporate Debtor failed to complete the work, besides this, a letter is already available on record showing that the work provided by the Corporate Debtor is of inferior quality, therefore this Corporate Debtor is in fact debarred from taking future works of the Corporation.

22. The Corporation Counsel submits that this itself reveals the Corporate Debtor not only failed to complete the work provided but also shows that the Corporate Debtor has not done the work as per the standards set-out by the Ranchi Municipal Corporation.

23. All these happened far before the Covid-19 situation has come in, therefore this Corporate Debtor cannot link its failure to the Covid-19 situation that has set-in almost two years after the Corporate Debtor failed to complete the work

24. Moreover, since an amendment has come in to Section 14 as sub-section 3 on 06.06.2018 stating that moratorium is not applicable to the contract of guarantees, this argument of applicability of moratorium holds no water, therefore that contention is liable to be dismissed. It pales into insignificance whether it is advance bank guarantee or performance bank guarantee. When it is a bank guarantee given by the bank, it has to abide by the principles applicable to bank guarantee, IBC has not come into force not to make other laws and age old principles governing market upside down.

25. Names and captions given to a nature of transaction will not change the nature of transaction. As the work was certified by the officials of the Corporation, the Corporation reduced the bank Guarantees proportionate to the



work completed by the Corporate Debtor. If at all, performance of work was there from the Corporate Debtor, then automatically this guarantee amount would have got reduced. If the proposition made by the RP Counsel is taken into consideration, it will become a double whammy upon the Corporation because it will not only suffer from not getting its work completed, it will not even get back the money it has already advanced.

26. With regard to the attitude of R2, it has to abide by the agreement and immediately release the guarantee money to the corporation. Moreover, the Bank on its own cannot stop from releasing the money save and except in a situation where a Court Order has been passed, here, no Court Order has been passed injuncting the Corporation invoking the bank guarantee and encashing the same, therefore we hereby hold that the Corporate Debtor has no legal right to stop the Corporation from encashing the bank guarantees.

Moreover, it is not the case of the Corporate Debtor that the bank guarantee issued is hit by fraud or by special equities as set-out by the Hon'ble Supreme Court in various cases, therefore we hereby **dismiss CA-397-2020 as misconceived** filed by the Corporate Debtor and **disposed of IA-3102-2020** filed by the Ranchi Municipal Corporation by allowing it to encash the bank guarantee as stated in the agreement between the Bank and Ranchi Municipal Corporation.

Sd/-

**(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT**

Sd/-

**(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)**