

National Company Law Appellate Tribunal,
Principal Bench, NEW DELHI

Company Appeal (AT) (Ins) No. 543 of 2021

Arising out of the order dated 31.05.2021 passed by National Company Law Tribunal, New Delhi, Principal Bench, in I.A. No. 2184 of 2020 in C.P. (I.B) No. 731/PB/2018.

IN THE MATTER OF:

IDBI Bank Ltd.

1st Floor, Videocon Tower, E-1,
Jhandewallan Extension, New Delhi- 110055

Address of Counsel

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...Appellant

Versus

1. Indian Oil Corporation Ltd.

Registered Address:

Indian Oil Bhavan,
G-9, Ali Yavar Jung Marg,
Bandra (East) Mumbai, Maharashtra-400051

Also at:

Haldia Refinery, Haldia,
Purba Medinipur, West Bengal-721607

Address of Counsel:

Meharia and Company
6A, Block-Q, Jungpura Extn.
New Delhi- 110014
(P): 011-41502006

...Respondent No. 1

2. Ashwini Mehra, Resolution Professional,
 Punj Lloyd Ltd.
 c/o Duff & Phelps India Pvt. Ltd, 206-207,
 World Mark 2, Hospitality District,
 Aerocity, New Delhi- 110037

Address of Counsel:

AZB & Partners
 Plot No. A-8, Sector-4,
 Noida- 201301

...Respondent No. 2

Present:

For Appellant: Mr. Ankur Mittal, Ms. Yashika Sharma, Ms. Muskan Jain, Advocates.

For Respondents: Mr. Gaurav Mitra, Mr. Abhinash Agarwal, Mr. Amit Mehario, Advocates for R-1

Mr. Sunil F., Mr. Raghav Chadha, Advocates for R-2.

(J U D G E M E N T)

[Per: Ms. Shreesha Merla, Member (T)]

1. Aggrieved by the Impugned order dated 31.05.2021, passed by National Company Law Tribunal, New Delhi, Principal Bench in I.A. No. 2184 of 2020 in C.P. (I.B) No. 731/PB/2018, the present appeal has been preferred by M/s. IDBI Bank Ltd. under Section 61 of the Insolvency and Bankruptcy Code, 2016 (herein after referred to as 'The Code'). By the impugned order, the Adjudicating Authority has dismissed I.A. No. 2184 of 2020 filed by the 'Resolution Professional' (RP) of Punj Lloyd Ltd. (Corporate Debtor) seeking encashment of the Bank Guarantees issued by the Appellant and Central Bank of India. The Bank Guarantees were issued on behalf of the Corporate Debtor, as required

under the terms of IOCL's EPCC-2 package of 'Aishwarya Project' at its Haldia Refinery in West Bengal.

2. Submissions of the Ld. Counsel appearing on behalf of the Appellant:

- Ld. Counsel for the Appellant contended that the 'Advance Bank Guarantees' (ABG) issued by the Appellant Bank have been wrongfully utilised by the IOCL, contrary to the terms of the Bank Guarantee. It is submitted that the Advance Bank Guarantee was provided to secure part of the mobilisation advance of Rs. 107 Crore and against 10% supply payment which has been wrongfully utilised by the Corporate Debtor to secure some other additional advances from IOCL, contrary to the contract and without concurrence from the Appellant bank, which is the issuer of the Advance Bank Guarantee and a party to the Bank Guarantee (BG) Agreement. The Letter dated 05.12.2017 from the Corporate Debtor to IOCL clearly reveals that the Corporate Debtor has sought additional advances from IOCL and assured IOCL on its own, that it shall not proportionally reduce the BG amount against the advance recovered as it is specifically required under clauses 7.2.6 and 7.3.1A of the special conditions of contract respectively.
- It is contended that the Corporate Debtor has illegally promised to keep the BG's issued by the Appellant alive for full value on its own, without any concurrence from the Appellant Bank.
- The Ld. Counsel drew our attention to the Letters dated 05.08.2017, 11.04.2018, 12.04.2018 in support of his contention that the Contract

does not stipulate any such advance payment except interest bearing mobilisation advance; that IOCL while approving additional advance to be directly paid to vendors towards payment of dues against comfort letters issued by IOCL, advised PLL to amend the Bank Guarantees to cover the interest of IOCL; that IOCL confirmed that it had extended advance to PLL considering the fact that balance amount from Rs. 60 Crore can be infused by PLL and IOCL may encash the BGs available for recovery of outstanding dues.

- It is vehemently contended that the Advance Bank Guarantees were fraudulently misused by IOCL and PLL in contravention of the Bank Guarantee terms as well as their inter-se contract.
- It is submitted that there is a categorical admission on the part of the IOCL regarding recovery of advances and no denial whatsoever of the factual aspects raised by the Banks regarding 'fraud'. IOCL has already recovered the entire mobilisation advance and has gone ahead and recovered an amount much higher than that and a backdoor arrangement has been entered into between the Corporate Debtor and IOCL. It is not the case of IOCL that having granted the mobilisation advance of 10% of total contract value i.e., Rs. 107 Crore, IOCL and Corporate Debtor modified the terms of the contract governing the grant of said mobilisation advance. The legal arrangement entered into between IOCL and the Corporate Debtor amounts to 'fraud' played upon the

Appellant Banks and such an arrangement would vitiate the very foundation of such BGs.

- It is argued that Advance Bank Guarantees are not the same as Performance Bank Guarantees and therefore, are not covered under the exception to Section 3(31) of the Code and hence, cannot be invoked during moratorium under Section 14 of the Code. Bank Guarantees are required to be strictly construed in terms thereof and no unilateral changes can be made to the Bank Guarantee terms without intimation to and concurrence of the Bank as the same would amount to novation of the contract.
- The Ld. Counsel placed reliance on the following Judgments in support of this submission:
 - *Delhi Development Authority vs. Joint Action Committee* [(2008) 2 SCC 672]- para 62,
 - *M.S. Anirudhan vs. Thomco's Bank Ltd.*, 1963 Supp (1) SCR 63: AIR 1963 SC 746- which relies on *Blest v. Brown* [1862 (45) ER 1225] and *Holme v. Brunskill* [1878 (3) QBD, 495]- para 27, 28.
- Additionally, Ld. Counsel for the Appellant also submitted that the entire mobilisation advances for which Advance Bank Guarantees were furnished by the Appellant was repaid to IOCL *much prior* to the invocation of the Bank Guarantees. IOCL in its affidavit dated 13.06.2020 filed before the Tribunal admitted that it had recovered an advance of Rs. 104.55 Crore + Rs. 73.69 Crore totalling to Rs. 178.24

Creore and has also recovered another amount of Rs. 14.74 Crore towards advance from invoking the guarantee furnished by Central Bank of India, thus totalling to Rs. 192.98 Crore. Hence, no amount is due and payable whatsoever towards mobilisation advance that was guaranteed by the Appellant Bank. If IOCL and Corporate Debtor have entered into new arrangements vide a fresh sanction letters, it was done without the concurrence of the IDBI Bank. IOCL was aware that this fresh round of funding was never guaranteed by the Appellant Bank and therefore it asked the Corporate Debtor to get the Bank Guarantees amended to cover the interest of IOCL. The fraud committed on Appellant Bank by IOCL in deceiving the Appellant Bank cannot be ignored. The interim order dated 21.10.2021 passed by this Tribunal has no bearing on the present appeal. An order passed by an Appellate Tribunal in Arbitration between Corporate Debtor and IOCL, against whom the Appellant Bank is alleging fraud is of no relevance in so far as the stand of the Appellant Bank before this tribunal is concerned regarding fraud being committed by IOCL and the Corporate Debtor. Those orders bind only the parties before it and not the Appellant Bank.

3. Submissions of the Ld. Counsel appearing on behalf of the First

Respondent:

- Ld. Counsel for the first Respondent/IOCL submitted that disputes between IOCL and Corporate Debtor are pending adjudication before the Hon'ble 'Arbitral Tribunal' and the same BGs are before the 'Arbitral

Tribunal', wherein the Corporate Debtor has filed an application under Section 17 of the Arbitration and Conciliation Act, 1996 praying for stay on the encashment of the same BGs. The Application was dismissed by the Hon'ble Arbitral Tribunal on 21.10.2021 and the BGs were encashed by the Bank on 22.10.2021. No appeal has been preferred by the Corporate Debtor against the dismissal of the application under Section 17 of the Arbitration and Conciliation Act, 1996 and hence the same has attained finality.

- The Arbitral Tribunal allowed encashment of the BGs only after appreciating the merits of the disputes between IOCL and the Corporate Debtor and the same cannot be allowed to be re-agitated by the Appellant Bank in the instant appeal. Independent Bank Guarantees created by third parties are beyond the scope of moratorium under Section 14 of the Code and as such the impugned order does not warrant any interference.
- Ld. Counsel placed reliance on the Judgment of the Hon'ble Supreme Court in **Standard Chartered Bank vs. Heavy Engineering Corporation Ltd. & Ors.** [2019 SCC Online SC 1638] [Para 26, 29, 45 & 53] in which the Hon'ble Apex Court has held as follows:

“26. In our considered view, once the demand was made in due compliance of bank guarantees, it was not open for the appellant Bank to determine as to whether the invocation of the bank guarantee was justified so long as the invocation was in terms of the bank guarantee.....”

- Ld. Counsel also submitted that in ***Bank of Baroda & Another vs. Indian Oil Corporation & Others*** [MAT No. 916 of 2019; dated 10.02.2020] [Para 6 to 9] the Hon'ble Division Bench of Hon'ble High Court of Kolkata has even directed Reserve Bank of India to consider cancelling the Banking license of the Bank of Baroda on account of refusal of encashment of the independent Bank Guarantees as per the RBI Master Circulars. The same was upheld and affirmed by the Hon'ble Supreme Court in '*Bank of Baroda vs. Indian Oil Corporation Ltd.*' [Special Leave to Appeal (Civil) No. 5148-5148 of 2020; dated 22.06.2020].
- As regarding fraud, the Ld. Counsel for the Respondent No.1 submitted that no case of fraud whatsoever was made out and that Banks are not allowed to contest the decision of the first Respondent as to any breach and the Appellant Bank is bound to honour encashment of the unconditional BGs and the decision of the first Respondent is binding upon the Bank and the same cannot be contested as held by the Hon'ble Apex Court in '***Gujarat Maritime Board vs. Larsen & Turbo Infrastructure Development Projects Ltd. & Another***' [(2016) 10 SCC 46] at Para 11 and 13. It is denied that any separate agreement whatsoever was ever executed between the first Respondent and the Corporate Debtor and that there is no illegality in the order of Adjudicating Authority.

Assessment:

4. The brief point that falls for consideration in the instant appeal is whether Bank Guarantees can be invoked/encashed during moratorium under Section 14 of the Code; whether the Adjudicating Authority has failed to appreciate that Bank Guarantees are required to be strictly construed in terms thereof and no changes can be made to the Bank Guarantee terms and whether there was any arrangement entered into between IOCL and the Corporate Debtor for seeking additional advances without any intimation to the Bank. Two Bank Guarantees of the Appellant involved in this matter are No. 160127IBGA00005 of Rs. 49,44,58,134/- and another BG being No.160127IBGA00014 for Rs. 29,47,64,102/- both of which are unconditional and irrevocable and payable on demand. Both these Bank Guarantees have been encashed on 22.10.2021 subsequent to the Arbitral Award dated 21.10.2021. It is the main case of the Appellant Bank that the entire mobilisation advance for which Advance Bank Guarantees were furnished by the Appellant Bank, was admittedly repaid to the IOCL much prior to the invocation of Bank Guarantees and that IOCL and Corporate Debtor entered into a new arrangement vide fresh sanction letters, for which the Appellant Bank did not grant any Bank Guarantee nor was its concurrence taken.

5. Ld. Counsel for the Appellant had vehemently contended that fraud was committed on the Appellant Bank by IOCL acting in concert with the Corporate Debtor. In the matter of Arbitration before the Hon'ble Arbitral Tribunal the Corporate Debtor was the Claimant and IOCL the Respondent wherein disputes

regarding the same Bank Guarantees was the subject matter of Arbitration. At this juncture, we would like to refer the findings of the Hon'ble Arbitral Tribunal with regard to the encashment of the Bank Guarantees as the same two Bank Guarantees were before the Hon'ble Arbitral Tribunal which had dismissed the application filed by the Corporate Debtor under Section 17 of the Arbitration and Conciliation Act, 1996, seeking stay on the encashment. This order has not been challenged and therefore the findings had attained finality.

6. The Hon'ble Arbitral Tribunal in paras 66 to 76 have given their findings which are relevant to the contentions raised by the Ld. Counsel for the Appellant Bank regarding fraud and other disputes inter se between the parties, regarding Breach of terms of the contract.

66. Moreover, as already observed in the preceding paras, the existence any dispute between the parties to the contract including the pendency of claims or counterclaims is not a ground for interdicting the enforcement/encashment of BGs. Furthermore, it is also a well-settled principle of law that the principle of unjust enrichment cannot be considered, while determining the question of interdicting of BGS.

67. Therefore, the only submission that deserves attention of the Tribunal as this stage is interdicting the BGs would jeopardise Claimant's CIRP pending before NCLT

68. In this regard, Ld. Senior Counsel for the Respondent, has submitted that law on the question of invocation/encashment of ABGS has now been well settled and does not call for grant of any relief to Claimant. He has inter alia submitted that no irretrievable injustice will be caused to Claimant because of the invocation/encashment of ABGs because:

- i. *The plea of irretrievable injustice pending CIRP is contrary to the statutory scheme under IBC.*
- ii. *Respondent is Public Sector Maharatna Company, and if Claimant is successful in the arbitration, an Award, for any amount, made in its favour would be satisfied by Respondent.*
- iii. *The amount of Rs. 78 Crore sought to be recovered through encashment of the ABGs is a relatively small sum in view of the admitted debt of Claimant of approximately Rs. 13,200 Crore.*
- iv. *Encashment of the ABGS would only result in decrease in Claimant's debt qua Respondent and a corresponding increase in the debt of the Claimant qua the Bank in the amount of the ABGS.*

69. The contentions of both parties with respect to Claimant's CIRP warrant a closer analysis of the Statutory scheme of the IBC so as to determine if pendency of CIRP would amount to "irretrievable injustice" to the Claimant.

70. The IBC upon initiation of CIRP imposes a statutory moratorium on the assets of a Corporate Debtor, which essentially prohibits and overrides all pending and potential recovery actions, during CIRP. The IBC was amended in 2018, and Section 14(3)(b) was introduced, which makes it clear that this moratorium does not apply to BGs. Section 14(3)(b) IBC reads as follows:

"14. Moratorium. –

.....

(3) The provisions of sub-section (1) shall not apply to-

.....

(b) a surety in a contract of guarantee to a corporate debtor."

71. It is also pertinent to refer to the Report of the Insolvency Law Committee that preceded 2018

amendment. The Committee while disagreeing with the view that the proceedings against sureties would affect the CIRP observed that:

"5.10 The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. **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 third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium** and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of Section 14".

72. This Tribunal is of the considered view, that from the aforesaid, the legislative intent behind the statute is very clear, that mere pendency of CIRP by itself is not a ground for interdicting BGS, which is a contract of guarantee.

73. Therefore, the Tribunal finds merit in the argument of Ld. Counsel for Respondent and is of the firm view that Claimant by merely stating that invocation of BG shall jeopardise the CIRP process, has failed to make out a case of irretrievable injustice. Claimant has merely argued that interdiction of the two ABGs would severely prejudice the CIRP or consequent liquidation proceedings, without assigning any reasons thereof. Claimant failed to prove as to how the encashment of BGs shall cause such an irreparable harm for which no restitution is possible.

74. Even otherwise, the Tribunal can see no reason as to how Claimant would be prejudiced due to the invocation of the ABGS. As has been argued by the

Ld. Senior Counsel for Respondent, it is a leading Public Sector Maharatna Company, therefore, if subsequently while deciding the merits of the dispute, the Tribunal decides that ABGS were wrongly invoked/encashed, the corresponding damages can be recovered by Claimant. It is not the case of Claimant, that Respondent will be unable to pay off any such award of damages that may be passed by the Tribunal against it.

75. Respondent had also taken up preliminary objections of non- arbitrability and res judicata to contend that the present application is not maintainable. However, in light of our aforesaid observations, the Tribunal deems it unnecessary to consider these preliminary objections of Respondent, as the issue has already been decided against Claimant.

76. In light of the foregoing discussion, the Tribunal sees no reason to interfere with the encashment of ABGS by the Respondent. Claimant has failed to establish that any irretrievable injustice or harm will be caused to it by the encashment of the two ABGS. The prayer of Claimant for restoration of already encashed BGs is also dismissed, since such a prayer involves a determination into the merits of the dispute. This issue will be dealt with by the Tribunal at the time of passing of the arbitral award. Therefore, the Application of Claimant is dismissed.

(Emphasis Supplied)

7. Having regard to the aforementioned findings in the Arbitration Award referring to the same BGs and encashment thereof and the observation of the Hon'ble Arbitral Tribunal that there was no reason to interfere with the encashment of ABGs by IOCL and that there was no injustice or harm caused to it by the encashment, we do not see any substantial ground to delve into the

issue of any breach of terms of the contract or any alleged fraud between IOCL and the Corporate Debtor.

8. It is also pertinent to note that the Appellant Bank had not taken any action with respect to the issue of fraud raised by them.

9. The relevant part of Section 14 of the Code is reproduced as hereunder:

“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.

xxx

xxx

xxx

(3) The provisions of sub-section (1) shall not apply to-

(a) such transactions, agreements or other arrangements 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."

10. Bank Guarantees are outside the scope of the moratorium under Section 14 of the Code and Section 3 (31) specifically excludes Performance Bank Guarantees (PBGs).

11. We also find it a fit case to place reliance on the Judgment of the Hon'ble Supreme Court in the case of ***U.P. Cooperative Federation Ltd. vs. Singh Consultants and Engineers Pvt. Ltd.*** reported in [(1988 1 SCC 174)] in which it is held as follows:

"When irrevocable and unconditional bank guarantee payable on demand without demur then, whenever such bank guarantee is sought to be encashed by the beneficiary, bank is bound to honour the bank guarantee irrespective of any dispute raised by the customer (at whose instance the guarantee was issued) against the beneficiary".

12. The Hon'ble Supreme Court in ***Dynepro Pvt. Ltd. vs. V. Nagarajan,*** upholding the decision of this tribunal has held that NCLT has no jurisdiction to decide the question of disputes and claims/counter claims.

13. Having regard to the ratio of the Hon'ble Apex Court in the aforementioned Judgments, and keeping in view the provisions of the Code, we are of the considered view that an irrevocable and unconditional Bank Guarantee can be invoked even during moratorium period in view of the amended provision under Section 14 (3) (b) of the Code. We are conscious of the fact that the Bank has not taken any steps with respect to the alleged fraud, if any, between IOCL

and the Corporate Debtor. The findings of the Hon'ble Arbitral Tribunal have also attained finality.

14. For all the foregoing reasons, this Appeal is dismissed accordingly. No order as to costs.

[Justice Anant Bijay Singh]
Member (Judicial)

[Ms. Shreesha Merla]
Member (Technical)

Principal Bench,
New Delhi
10th January, 2023

Suvigya