

(2023) 04 NCLT CK 0062

In the National Company Law Tribunal

Case No : IA (IB) No.52/KB/2021 in CP (IB) No.832/KB/2019

Bijay Murmuria Vs Karnataka Bank Limited ?

Date of Decision : 24-04-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 3(11), 3(31), 13, 14, 14(3)(b), 17(d), 17(1)(d), 18(c), 60(5)

Citation : (2023) 04 NCLT CK 0062

Hon'ble Judges : Bidisha Banerjee, Member (J);Rahul Bhatnagar, Member (T)

Bench : Division Bench

Advocate : Anuj Singh, Urmila Chakraborty, Rashmi Singhee, Madhuja Barman, Arun Kumar Singh, Bijay Murmuria, Parikshit Poddar, Subhasish Ghosh

Final Decision : Disposed Of

Judgement

Bidisha Banerjee, Member (Judicial)

1. This court convened via hybrid mode.

2. This is an Interlocutory Application filed under section 60 (5) of the Insolvency and Bankruptcy Code, 2016 ('the Code') by Mr. Bijay Murmuria, the Resolution Professional having its office at 11/1, Sarat Bose Road, Ideal Plaza, South Block, 4th Floor, Suite No. 405, Kolkata – 700 020 ('Applicant').

3. The Applicant herein seeks the following reliefs:-

a. Pass direction to Respondent No. 1 for release of INR 45,90,206 / - towards the ECGC claim as received by their good office on 28.05.2020 and INR 11,75,521 towards Fixed Deposits of the corporate debtor amounting to a total of INR 57,65,727 / - to the CIRP Account of the Corporate Debtor maintained by the Applicant herein within two weeks from the receipt of order;

b. Pass direction to Respondent No. 2 to release the Fixed Deposits of INR 3,01,500/- comprising of cash deposit of INR 2,74,500 / - and INR 27,000 to the CIRP Account of the Corporate Debtor maintained by the Applicant herein within two weeks from the receipt of order;

4. The Ld. Counsel appearing on behalf of the Applicant would submit as follows:
- i. Vide order dated 18 October, 2019 of this Adjudicating Authority, Dimension Steel & Alloys Private Limited ('Corporate Debtor') was admitted into Corporate Insolvency Insolvency Resolution Process ('CIRP') and Ms. Meena Sureka was appointed as the Interim Resolution Professional ('Erstwhile Resolution Professional' or 'Erstwhile RP').
 - ii. The Erstwhile RP in compliance with Section 13 of the Code made publication of Form – A on 22 October, 2019 in two newspaper (Financial Express in English and Aajkal in Bengali) to invite the submission of claims. The last date for submission of claims was 02 November, 2019.
 - iii. The Erstwhile RP received claims from Three Financial Creditors namely, State Bank of India, West Bengal Financial Corporation and Karnataka Bank Limited. Thereafter, in compliance with Section 18(c) of the Code, the CoC was constituted. The claim of Punjab National Bank was received after the constitution of the CoC and after admitting their claim, the CoC was reconstituted. AS per the reconstitution the voting percentage of the CoC were as follows;

SL. No.

Name of the Financial Creditor

Voting Percentage

1.

State Bank of India

42.01%

2.

Punjab National Bank

29.50%

3.

West Bengal Financial Corporation
Limited

21.73%

4.

Karnataka Bank Limited

6.76%

Total

100%

iv. While the claims of the CoC was pending verification, Karnataka Bank Limited ('Respondent No.1) and West Bengal Financial Corporation Limited submitted a revised claim to the erstwhile RP. Subsequently, second reconstitution of the CoC was done, with the following voting rights;

SL.

No.

Name of the Financial Creditor

Voting Percentage

1.

State Bank of India

36.88%

2.

Punjab National Bank

25.90%

3.

West Bengal Financial Corporation Limited

19.07%

4.

Karnataka Bank Limited

18.14%

Total

100%

v. The Applicant was appointed by the Committee of Creditors ('CoC') in the Second Meeting of CoC by 78.27% of votes on 09 December, 2019. The same was approved by this Adjudicating Authority on 23 January, 2020. The Applicant i.e., the RP took over the accounts of the Corporate Debtor on 23 January, 2020 from the erstwhile RP. In Fifth Meeting of the CoC the Applicant informed the CoC that the claims of the Financial Creditors were pending verification [Annexure – F].

vi. That the Applicant as discussed in the Fifth Meeting of Committee of Creditors, initiated verification of the claims as admitted by the Erstwhile IP and requested the members of the Committee of Creditors to provide certain documents for verification of the same vide emails dated 24 February, 2020 and

16 June, 2020. On verification of the documents as provided by the Respondent No. 1, namely Karnataka Bank Limited it came his notice that certain fixed deposits along with the interest thereon aggregating to INR 14,20,600/- (Rupees Fourteen Lacs Seventy Five Thousand Five Hundred Twenty One only) was lying with the Respondent No.1.

vii. Further, as per the ECGC claim covering letter vide reference no. ECGC/KBBB/WT-PC/28176/2020 dated 28 May, 2020 an amount of INR 45,90,206/- (Rupees Forty Five Lacs Ninety Thousand Two Hundred and Six only) was received by the Respondent No. 1 on account of the Corporate Debtor.

viii. The Applicant issued an email to the Respondent No. 1 stating that as per the CIRP Order of this Adjudicating Authority, moratorium under Section 14 is in effect and as per Section 17(d) of the Insolvency and Bankruptcy Code, 2016 the financial institutions maintaining accounts of the Corporate Debtor shall act on the instructions of the IRP/RP in relation to such accounts. The Applicant requested release of IN 60,10,786/- (Rupees Sixty Lacs Ten Thousand Seven Hundred and Eighty Six only) to the CIRP account of the Corporate Debtor maintained by the Applicant [Annexure G (colly.)].

ix. Meanwhile the State Government of West Bengal and Central Government with effect from 15 March, 2020 imposed complete lockdown in wake of Covid-19 restrictions and so the Applicant was unable to expedite with the CIRP of the Corporate Debtor as envisaged under the Code.

x. The Applicant on the basis of the information received by the Creditors finalized the List of Creditors and revised the reconstituted Committee of Creditors.

xi. Further, the Applicant on verification of claim as received from Punjab National Bank being ('Respondent No. 2') noticed that the Respondent No.2 has retained the deposit of the Corporate Debtor amounting to INR 3,01,500/- (Rupees Three Lacs One Thousand Five Hundred Only) comprising of cash deposit of INR 2,74,500 on 19 March, 2020 and INR 27,000 on 25. November, 2020. The Applicant felt that retention of such deposits tantamounts to appropriation of amount towards its dues during the period of moratorium, and it was in strict violation of the provisions of the Code.

xii. Thus an email was issued to the Respondent No. 2 to release the amount of INR 3,01,500/- (Rupees Three Lacs One Thousand Five Hundred Only) to the CIRP Account of the Corporate Debtor maintained by the Applicant herein [Annexure - I].

xiii. In response, the Applicant received a Letter dated 01 December, 2020 from the Respondent No. 1 namely, Karnataka Bank Limited in reply to email dated 25.11.2020, which clarified that the actual fixed deposits held by the bank was INR 11,75,521/- (Rupees Eleven Lacs Seventy Five Thousand Five Hundred and Twenty One Only) and that the said deposits were held as per the instructions of

West Bengal Financial Corporation ('WBFC'). The Applicant was requested to approach to the WBFC to instruct the Respondent No. 1 for liquidating and crediting the FD proceeds to the CIRP Account of the Corporate Debtor. The Respondent No. 1 further stated that ECGC amount was not to be adjusted towards the liabilities of the Corporate Debtor and requested to reduce their claim to the extent of INR 45,90,206/-[Annexure - J].

xiv. Thereafter, the Applicant issued an email dated 14 December, 2020 to WBFC to instruct the Respondent No. 1 namely to liquidate and credit the Fixed Deposits to the CIRP account of the Corporate Debtor maintained by the Applicant. However, WBFC vide its email dated 17 December, 2020 clarified that as per their records no such Fixed Deposits stood related to their Corporation [Annexure - L].

xv. Vide email dated 17 December, 2020 the Respondent No.1 informed that the export credit availed by the Corporate Debtor was covered under ECGC and there was a separate contract between their bank and ECGC that it was a third party guarantee. Further, that the report of default was lodged by the bank with ECGC before initiation of CIRP of Corporate Debtor and is not realized from the assets of the Corporate Debtor. However, the Fixed Deposits shall be credited on receipt of instructions from WBFC. No revert was received from the Respondent No. 2 for the emails dated 01 December, 2020 and 16 December, 2020 for release of the deposits.

xvi. The Applicant convened the Ninth Meeting of Committee of Creditors on 03 December 2020 wherein the status of release of Fixed Deposits and ECGC claims was deliberated amongst members of the CoC. The Applicant informed the members that the Respondent No. 1 requested to adjust the ECGC amount and reduce their claim to the extent of IN 45,90,206 / - and approach WBFC for their instructions to enable them to liquidate the referred FDs to the CIRP Account of the Corporate Debtor.

xvii. The Applicant further requested the Respondent No. 2 to remit the deposits amounting to INR 3,01,500/- to the CIRP Account of the Corporate Debtor. The representative of Punjab National Bank informed that the credit received was pertaining to the vehicle loan and the vehicle has been returned to the Corporate Debtor. The representative of the Respondent No. 1 stated that the Fixed deposits shall be released on receipt of NOC from WBFC [Annexure - N].

xviii. The Applicant would allege that;

(1) The receipt of amount by the Respondent No. 2 and release of vehicle by their good office during the CIRP of the Corporate Debtor is a serious breach of the provisions of Moratorium as envisaged under section 14 of the Code.

(2) Further, the retaining of the ECGC claim and Fixed Deposits by the Respondent No. 1, despite repeated instructions and request of the Applicant is a serious breach of the provisions of Section 17(1)(d) of the Code, 2016.

(3) Furthermore, the retaining and adjustment of amount during the moratorium period has created a serious impediment to expedite the CIRP of the Corporate Debtor.

5. Per Contra The Ld. Counsel appearing on behalf of the Respondent No.1 i.e., Karnataka Bank Limited would submit as follows:

i. This bank has sanctioned several credit facilities in favour of Corporate Debtor under a letter of sanction dated 24 July, 2017, which includes interalia Pre-shipment Credit Facility and Packing Credit Facilities to the tune of Rs. 1200.00 Lakhs (Rupees One Crore and Twenty Lakhs).

ii. Such Pre-shipment and Packing Credit Facilities have been provided for manufacturing of some goods and to Post Shipment thereof after the finished products are made ready for such shipment. In order to secure the sum advanced for preparation of those goods for post shipment, the Export Credit Guarantee Corporation Limited (ECGC) has provided the Performance Guarantee on behalf of the Corporate Debtor herein, for a sum of Rs. 45,90,206.00 (Rupees Forty Five Lakhs Ninety Thousand Two Hundred and Six) only.

iii. Further, that this bank along with other lending banks like, State Bank of India and Punjab National Bank, wherein State Bank of India was the lead bank, executed consortium documents with the Corporate Debtor to secure the credit facilities provided by said banks in respect of the hypothecated assets as well as moveable and immovable assets and properties of the Corporate Debtor, excluding the Pre-shipment Credit facility provided by the bank in favour of the Corporate debtor.

iv. Subsequently due to non performance of the terms and conditions of the said Pre-shipment credit, the bank by a letter dated 20 March, 2019 informed the ECGC and finally due to the failure on the part of the Corporate Debtor to comply with the terms and conditions of the said loan, this bank claimed the said Performance based guaranteed sum covered under the guarantee. In response thereto, the ECGC credited the guaranteed amount in favour of this bank.

v. With time the Corporate Debtor went into CIRP by an order dated 18 January, 2019. During the continuance of the CIRP, the Applicant held several meetings when it requested this bank to hand over the amount received from the ECGC as well as some fixed deposits alleged to have been kept by the bank.

vi. In response therefore, this bank by E-mails dated 01 December, 2020 and 17 December, 2020 interalia informed the Applicant that this bank has not obtained any fixed deposits from the Corporate Debtor, but kept those receipts as a custodian of WBFC and it will submit the fixed deposits in the account of the Corporate debtor, whenever instructed by WBFC.

vii. With regard to the amount obtained from the ECGC as a guarantor of Karnataka Bank Limited for non performance of the terms of Pre-shipment credit facility and/or Packing Credit facilities by the Corporate Debtor, it is submitted

that they are not the assets of the company and thus the demand of the Applicant is not tenable.

viii. It is alleged that the instant Application, being, I.A (I.B.C/52/KB/2021 in Company Petition (1B) No. 832/ KB/2019 against this bank as well as Punjab National Bank, inter alia praying for transfer of the Performance Guarantee Amount obtained from ECGC Limited in the account of the Corporate Debtor, is not maintainable. On the following amongst other Grounds:-

(a) That the guarantee amount obtained from the ECGC is not a Debt as per Section: 3(11) 'Debt' means a liability or obligation in respect of a claim which is due from any person and includes financial debt and operational debt of the Code, as an amount obtained after invocation of performance guarantee is not a debt. Neither it has been covered under any of the consortium documents nor it is part of the asset of the Corporate Debtor. It is a third party guarantee provided by surety for violation of the terms contained under the said guarantee document, but not covered under any of the loan documents. Thus, the amount obtained from the said ECGC is not a debt but obtained in lieu of non performance of an obligation covered under the guarantee.

(b) Non performance of the obligation by the Corporate Debtor in respect of the facilities availed of under the Packing Credit Limit is outside the purview of 'Security interest' Section:- 3(31) :- "Security interest" means right, title or interest or a claim 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., as defined under Section 3(31) of the said Code. The performance guarantee has been excluded from the security interest and since the guarantee provided by the said ECGC is a performance based guarantee, it does not comes under the purview of security interest as defined under the said Code.

(c) The definition of 'security interest' under the code includes an interest that has been created in favour of the Secured Creditor by transaction which secures payment against performance of an obligation, but though it includes performance obligations, the Legislature decided to exclude performance based guarantees from the definition. The legislature by carving out an exception for performance guarantee under Section 3(31) intended invocation of Performance Bank Guarantee during the Moratorium period.

(d) The observations of the Insolvency Law Committee Report, 2018 in Paragraphs 5.10 and 5.11 are 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 asset of the third party like sureties. Thus it is clear from its interpretation that the contractual principles of the guarantee are required to be respected even during the Moratorium period

and any alternate interpretation could not have been the intention of the Code

(e) The intent of the Code is not to terminate agreements that has created legal rights in favour of third parties without adhering to due process of law.

(f) The Hon'ble Supreme Court of India in several Judgements made it abundantly clear that the margin money acquires the character of 'trust' when it is given against the Bank Guarantee issued to the beneficiary and asset held under the 'Trust' cannot be considered as an asset of the 'Corporate Debtor'. It is significant to mention that the margin money was put by the Guarantor and not by the Corporate Debtor

(g) Further, the exception clause covered under clause 3(b) of the moratorium as prescribed under Section:- 14 of the said IBC is applicable in this instant case since under this exception clause ..' a surety in a contract of guarantee to a corporate debtor', is outside the purview of the moratorium as contained in Section-14 of the said Act.

(h) Moreover the Hon'ble Supreme Court of India in 'Andra Pradesh Pollution Control Board - Vs - CCL Products (India) Limited' (2019) 20 SCC 669 inter alia ordered that

'17. A bank guarantee constitutes an independent contract between the issuing bank and the beneficiary to whom the guarantee is issued. Such a contract is independent of the underlying contract between the beneficiary and the third party at whose behest the bank guarantee is issued.

...

...

20... A demand once made would oblige the bank to pay under the terms of the bank guarantee.'

(i) The Hon'ble Appellate Tribunal in GAIL India Ltd. - Vs- Rajeev Manandier & Ors. as reported in (2018) SCC Online NCLAT 374, held that Moratorium will not be applicable on the Performance based Guarantee as the definition of security interest under Section 3(31) of the Code explicitly excludes 'Performance Bank Guarantee from the purview of ' security interest '

(j) The Hon'ble Appellate Tribunal in Bharat Aluminium Co. Ltd. -Vs-M/S. J.P. Engineers Pvt. Ltd., inter alia held that 'the bank guarantee is irrevocable and unconditional and payable on demand without demur. 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 party like surety. Bank guarantee can be invoked even during the moratorium period issued under Section 14 of the IBC in view of the amended provision under Section 14(3)(b) of the Code.'

(k) It is the admitted position that the Corporate Debtor has never deposited the

said sum, which has been obtained by this Bank from ECGC, accordingly it cannot be said to be an asset of the Corporate Debtor in as much as no security interest has been created over and valid claim and thus the alleged demand to deport the said sum under the account, as prayed for, is not tenable and accordingly be dismissed in limine with costs.

Analysis and Findings;

6. Ld. Counsels appearing on behalf of the Parties were heard, rival contentions noted and implications of various legal provisions and proportions cited were considered.

7. In view of the explicit provisions in section 3(31) of the Code that expressly excludes performance guarantee from the definition of 'Security Interest' and the judgment referred to (supra) there is no reason why such prayer should be allowed, whereby the RP asked the Respondent No.1 to handover the amount received from ECGC. The claim in regard to such sum fails. However, any other fixed deposits which do not come under the purview of performance guarantee would be returned to CIRP Account.

8. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.