
(2023) 05 NCLT CK 0062

In the National Company Law Tribunal

Case No : IA Nos. 154, 642, 652 Of 2021 and 62 Of 2021 In CP (IB) No.218/
Chd/Chd/2018

?Jatinder Mittal Vs NBCC India Ltd and Others ?

Date of Decision : 24-05-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 3(31), 8, 14, 14(3)(b), 14(1)(c),
60(5)
Indian Penal Code, 1860 — Section 420

Citation : (2023) 05 NCLT CK 0062

Hon'ble Judges : Harnam Singh Thakur, Member (J); Subrata Kumar Dash,
Member (T)

Bench : Division Bench

Advocate : Harsh Garg, Mohinder Singh, Karan Kaushal, Karanvir, Viren Sharma,
Arvind Minocha, Gurpreet Singh, Rajat Khanna

Final Decision : Dismissed

Judgement

Subrata Kumar Dash, Member (Technical)

IA Nos. 154/2021, 642/2021, 652/2021, and 62/2021 are interconnected and interlinked and hence are taken up together.

IA Nos. 154/2021 & 652/2021

1. IA Nos. 154/2021 and 652/2021 are being filed by Mrs Mandeep Gujral-Resolution Professional of M/s Jaycon Infrastructure Ltd (Applicant) against NBCC India Ltd, (Respondent) under section 60(5) of Insolvency and Bankruptcy Code, 2016. It is prayed by the Applicant-Resolution Professional to issue necessary directions to the respondent to not to revoke performance guarantees issued by the corporate debtor as stated by the applicant in the application.

2. The brief facts of the case as stated in IA Nos. 154/2021 and 652/2021 made by Resolution Professional are that:-

i) The CIRP commenced in the case of the Corporate Debtor by order dated 07.10.2019 along with the declaration of Moratorium and the applicant has been

appointed as Interim Resolution Professional. The applicant has kept the corporate debtor as a going concern and even after the initiation of CIRP the Corporate Debtor has continued with the completion of the contract undertaken by the Corporate Debtor.

ii) The Corporate Debtor was awarded a contract with NBCC India Ltd by letter dated 19.01.2017 for the development of the site at Bapudham along with some other assignments for the construction of the Trading Centre at the same site (Project A) and another project was awarded at Kurukshetra by letter dated 14.01.2016.

iii) It is stated that due to unavoidable circumstances, the project could not be completed on time, therefore, the respondent by letter dated 14.12.2020 (Annexure A-6) has requested for encashment of the performance guarantee.

iv) The delay in the execution of the project as submitted by the applicant was due to the introduction of GST, scarcity of funds, delay in deciding excavated area, initiation of CIRP, redoing of work due to change in drawings, accumulation of water in the low-lying area along with some few others unavoidable circumstances.

v) It is further averred that Project A was to complete three buildings and out of the same, one building has been completed and similarly, Project B has been completed partly but the respondent has invoked the performance guarantee for no reason and without any show-cause notice.

vi) The petitioner has relied upon the judgement of NCLT, New Delhi Bench in the matter of SE Investment Ltd. Vs. Soni Ltd. (IB)-609(ND) of 2017 dated 27.02.2017 wherein, it has been held that

“upon Moratorium being declared no disbursal can be effected by the Applicant. In such scenario, it is the considered opinion of this Bench that any claim made by the Town and Country Planning Development should be made directly to the RP in this case. This Application does not merit consideration.”

vii) It is stated that the Bank guarantees cannot be invoked as the Corporate Debtor is undergoing CIRP and in terms of Section 14 moratorium has been imposed. All the Bank Guarantees have been renewed by the State Bank of India in the month of May 2021.

viii) In IA No. 652/2021, it is brought to the notice of this Bench that the Bank Guarantees of Vrindavan and CGO Complex projects were released as per the respondent's acceptance letter no. 563 dated 31.05.2021 on 30.06.2021 and 20.07.2021. However, NBCC failed to release the Bank Guarantee of Kurukshetra amounting to Rs. 2.72 crores in spite of the fact that 99% project has already been completed. It is also submitted in the application that in total there were 11 PBGs issued by the corporate debtor in favour of respondent which were related to projects at Bapu Dham (Project A), Kurukshetra(Project B), Vrindavan and CGO Complex.

3. Reply to IA No. 154/2021 on behalf of Respondent i.e. M/s NBCC India Limited is filed vide Diary No. 00072/2 dated 03.08.2022, wherein, it is stated that the respondent company has invited open e-tenders for the completion of the projects which were awarded to the Corporate Debtor. The Corporate Debtor has unconditionally accepted the condition of the tender as per the acceptance letter dated 12.11.2016. The relevant part of the contract is reproduced below-

"2.2 NBCC reserve the right of forfeiture of the performance guarantee in the event of the contractors failure to fulfill any of the contractual obligations or in the event of termination of contract as per terms and conditions of contract."

As per the terms and conditions of the letter of award, the Corporate Debtor furnished irrevocable Bank Guarantees as the corporate Debtor could not adhere to the aforesaid-stated agreements therefore, the respondent has invoked the Bank Guarantees in order to recover the losses and damages. As per Clause 2.2 of the General Conditions, the respondent has the right to forfeit the Bank Guarantees. In pursuance of the same, several letter and emails were written to the bank to encash but the same has not been done. It is submitted that the Bank did not act upon the letters written by the respondent for more than one year, which shows the mala fide intent and connivance of the RP, Bank and the Corporate Debtor. Section 14 of Insolvency and Bankruptcy Code, 2016, relates to the 'Moratorium' which empowers the adjudicating authority to declare moratorium for prohibiting any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of the property. Section 3(31) of the Code defines 'Security Interest' which categorically excluded 'Performance Guarantee'. The Bank cannot deny the encashment of the performance bank guarantees as they do not have power or jurisdiction under law to deny encashment.

4. The respondent has also filed reply by Diary No. 01533/2 dated 03.08.2022 in IA No. 652/2021 wherein the same facts have been repeated. The applicant has filed a rejoinder by Diary No. 01533/3 dated 11.01.2023 stating that the respondents are raising the demands arbitrarily and they have breached the moratorium and evoked the bank guarantees for the purpose of recovery and not for the purpose for which these were actually issued. There is no document on record to show the connivance between the applicant and the Bank.

IA 642/2021

5. IA No. 642/2021 has been filed by Mr. Jitender Mittal, Suspended Director against M/s NBCC India Limited (Respondent No. 1), Mandeep Gujral, Resolution Professional of the Corporate Debtor (Respondent No. 2) and State Bank of India (Respondent No. 3) seeking direction to Respondent No. 1 to act upon the terms of settlement and to settle/ release Bank Guarantee made against the Project-B (At Kurukshetra) and to accept balance payment of Rs. 0.05 crore in order to release the bank guarantee made against Project-A (At Bapudham) It is further prayed to revoke the encashment of all Bank Guarantees made in favour of

Respondent No. 1 and on behalf of the Corporate Debtor. In the present application, references have been made to the different projects situated at Bapudham (in short referred as Project A), Kurukshetra (in short referred as Project-B), Vrindavan (in short referred as Project C) and CGO Complex (in short referred as Project D)

6. In IA No. 642/2021, the Suspended Board of Directors has stated that he has been assisting the Resolution Professional to keep the Corporate Debtor a profit-making and going concern and he was engaged by Resolution Professional to conclude the ongoing projects. The Corporate Debtor has been carrying out pending construction projects even during insolvency. As per the applicant, there were four projects awarded which have been discussed in the formal paragraphs of this order. The applicant has opposed the performance guarantees and security deposits being encashed by letter dated 17.11.2021 by the respondent No. 1. It is submitted that Respondent No. 1 has party-acted upon the Settlement Agreement (Annexure A-4) and all the bank guarantees pertaining to Project C & D have been returned/released. The applicant has placed reliance in the case of Hon'ble Supreme Court in "UP State Sugar Corporation vs. Sumac International Ltd. 1997 (1) SCC 568".

7. The conditions as specified in regard to the Bank Guarantee in the letter dated 17.11.2021 are reproduced below :-

"2. This guarantee/undertaking shall be in addition to any other guarantee or security whatsoever NBCC may now or at any time have in relation to the performance of the works/equipment and the company shall have full re-course to or enforce this security in performance to any other security or guarantee which the NBCC may have or obtained and there shall be no forbearance on the part of the company in enforcing or requiring enforcement of any other security which shall have the effect of releasing the Bank from its full liability. It shall not be necessary for NBCC to proceed against the said Contractor/supplier before proceeding against the Bank.

3. This guaranteed undertaking shall not be determined or affected by the liquidation or winding up, dissolution or change of constitution or insolvency of the supplier/contractor, but shall in all respects and for all purposes be binding and operate until payment of all moneys payable to NBCC in terms thereof are paid by the Bank" (Emphasis supplied)

8. It is further submitted that the Respondent No. 1- NBCC undertook to release the bank guarantees after payment of Rs. 3 crores from the corporate debtor and even after receiving the aforesaid payment, respondent No. 1 has evoked the bank guarantee and the said amounts to criminal liability under Section 420 of IPC.

9. A reply has been filed by respondent No. 1 by Diary No. 01462/01 dated 24.05.2022 wherein the facts and submissions stated in the reply of IA No. 154/2021 and 652/2021 are repeated and same are not reproduced for the sake

of brevity. It is added that the corporate debtor was under a legal obligation and duty bound to complete the pending work with regard to the aforesaid projects and in order to compensate the corporate debtor agreed to infuse fund amounting to Rs. 3.50 crores. After the infusion of Rs. 3 crores, the bank guarantee mentioned in letter dated 31.05.2021 was released. However, the corporate debtor has failed to complete the Project B which is still incomplete.

10. A reliance is placed on the judgement of Hon'ble NCLAT in case of C & C Construction Ltd Vs. Power Grid Corporation of India Ltd. Company Appeal (AT) (Insolvency) No. 781 of 2019 & I.A No. 746, 951 & 952 of 2021 dated 19.07.2021 wherein it has been held that :-

"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.

(Emphasis supplied)"

11. A rejoinder has been filed by the applicant by Diary No. 01462/5 dated 08.09.2022 wherein it is stated that the Settlement dated 31.05.2021 is unconditional and carries no clause or stipulation prescribing the timelines for the pending work and Secondly, the delay has been occurred due to non-payment of operational dues of the corporate debtor to the tune of Rs. 7.85 crores. The corporate debtor has also served demand notices under Section 8 of IBC for various dues. It is also contended that the corporate debtor has already carried out work at Kurukshetra which stands completed and the building has been taken over by NID (Client). The invocation of the bank guarantees is breach of settlement in contrary to the Doctrine of Fairness and Wednesbury Principle of Reasonableness. There are various bank guarantees and security deposits which

are still attached with Respondent No. 1.

12. The Respondent No. 1 has filed a counter-affidavit to the rejoinder filed by the applicant by Diary No. 01462/6 dated 21.11.2022 wherein it has been stated that the corporate debtor has not completed the Project situated at Bapu Dham which is of National Importance and which is yet to be completed. It is submitted that the allegations with regard to non-payment of operational dues to the tune of Rs. 7.85 crores (approx.) are incorrect. The respondent has received demand notice dated 26.07.2022 in which only Rs. 4,00,55,692/- was claimed. It is averred that the claims are false as the RP by letter dated 28.07.2022 acknowledged the excess payment of Rs. 92,02,044/- which is to be deducted from the claimed amount of Rs. 4 crores (approx.). Therefore, the amount is stated to be disputed and the same can be established only after final report of reconciliation. The respondent has also denied the Settlement dated 31.08.2022.

IA No 62/2021

13. IA No. 62/2021 is filed by the State Bank of India against M/s NBCC India Limited (Respondent No. 1), M/s HLL Infra Tech Services Limited (Respondent No. 2) and M/s HLL Lifecare Limited (Respondent No. 3) seeking prayers to res MK train the respondents from releasing the dues towards the performance Bank Guarantee. Later on, an amended memo has been filed in which respondent No. 2 and 3 were deleted.

14. In IA No 62/2021, it is stated that various credit facilities were granted in favour of the Corporate Debtor and the bank has also issued various Bank Guarantees to Respondents. Respondent No. 1 has also invoked the Bank Guarantee by letter dated 14.12.2020. It is contended that the applicant is not liable to make payment to the respondents in view of the admissions order dated 07.10.2019 and the moratorium imposed as per Section 14 of the Insolvency and Bankruptcy Code.

15. It is stated in the application that the applicant is the surety of the corporate debtor qua the bank guarantees furnished by the corporate debtor with the respondent. The facts as mentioned by the Resolution Professional of the corporate debtor are repeated in this application and the same are not reproduced again.

16. Reply has been filed by the respondent by Diary No. 00169/3 dated 28.10.2021 and the replication by Diary No. 00169/5 dated 10.02.2022, repeating the submissions as discussed in the above application.

17. We have heard the learned counsel for the parties and have gone through the relevant records.

18. The issue for adjudication is whether the moratorium will come in the way of invoking the bank guarantee given by the corporate debtor to respondent-NBCC. In this connection, reliance is placed on the decision of the Hon'ble NCLAT in the case of C&C Construction Limited (Supra) wherein, it is held that "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. We also note that Section 3(31) of the Code which defines security interest categorically excludes "performance guarantee".

19. It is thus clear that, the respondent in the present case cannot be prevented from invoking the bank guarantee under the law provided there a violation of the provisions of the contract accepted by the corporate debtor by its letter dated 12.11.2016.

20. After going through the records, especially the correspondence between the parties, it is apparent that the Respondent-NBCC is not satisfied with the progress of the projects being executed by the corporate debtor. It is equally obvious that the corporate debtor has not been able to meet the timelines of the projects, some of which are of national importance. Various reasons have been cited by the corporate debtor including the difficulties faced during the Covid period for non-completion of the project. The records indicate that in some of the projects undertaken by the corporate debtor, demand notices have already been issued to the respondent-NBCC. The applicant in its rejoinder filed by Dairy No. 01462/5 dated 08.09.2022 has placed on record 3 such demand notices dated 25.07.2022, 26.07.2022 and 31.08.2022 but it is stated by the respondent that the payments will be made to the corporate debtor after reconciliation to be undertaken by the parties

21. We note that the NBCC has made the following offer to the corporate debtor by its letter dated 31.05.2021.

"In continuation to our earlier E-mail dated 16.03.2021, vide our letter No. NBCC/SBG (Delhi-1)/ CGM/2021/484 (A) dated 16.03.2021 regarding Sl. No. 1 to Sl. No. 4 works the contents of corrected E-mail may please be read as under:

1. As per your E-mail dated 27.05.2021, you have agreed to deposit amount of Rs. 3.00 Cr. immediately and balance amount of Rs. 0.50 Cr will be deposited shortly for completion of the projects.

2. After receipt of Rs. 3.00 Cr. admissible Performance Bank Guarantee of projects of Sl. No. 2 and Security Deposit, Bank Guarantee of Sl. No. 3 & 4 will be released as soon as we receive the payment of Rs. 50 lacs, the Performance Bank Guarantee of Bapudham shall be released."

22. It is also noted that the amount of Rs. 3 Crores is stated to have been paid and the performance bank guarantee of Project A (Bapudham) have already been released.

23. It is also noted that as per Clause 2.2, the terms of the contract includes the forfeiture of the performance bank guarantee of the corporate debtor on its "failure to fulfill any of the contractual obligations or in the event of termination of contract as per terms and conditions of contract."

24. While recognizing the rights of the NBCC to invoke the provisions of the contract accepted by the corporate debtor by its letter dated 12.11.2016, we observe that this Tribunal is not the forum to adjudicate the contractual issues between the parties. The main concern of this Adjudicating Authority is to ensure that the CIRP is concluded smoothly without any disruption. In this context, we note that as per the admission of the respondent itself, demand notice from the corporate debtor have been received and payments will be made to the corporate debtor after carrying out reconciliation of the demand notices with their accounts. Sufficient time has elapsed in this regard. The respondent is directed to make the payments after reconciliation for the work done by the corporate debtor within three weeks of this order. so that the necessary funds are made available to the corporate debtor to expeditiously complete the projects undertaken.

25. After analyzing the factual matrix in its entirety, we noted that the respondent-NBCC has made practical offers to the corporate debtor for facilitating the execution of the project at Bapudham. The respondent-NBCC has already made partial compliance of the offers made in its letter to the Resolution Professional dated 31.05.2021. Both the parties are directed to comply with the terms of this letter within three weeks of this order and necessary payments in this regard be made by the corporate debtor to the respondent-NBCC, if not made so far and the performance bank guarantee of Baapudham be released as per the aforementioned terms.

26. We, however, give liberty to the respondents to approach the appropriate forum for redressal of their grievance against the violations of the contract by the corporate debtor, if the same cannot be resolved through mutual negotiations.

27. In the result, IA No. 154/2021, 642/2021, 652/2021 and 62/2021 are dismissed with aforesaid directions.