

(2023) 07 NCLT CK 0037

In the National Company Law Tribunal

Case No : IA No. 924/2020 In CP (IB) No. 300/Chd/Hry/2019

Naresh Kumar Goel Vs Indian Overseas Bank ?

Date of Decision : 20-07-2023

Acts Referred:

Insolvency and Bankruptcy Code, 2016 — Section 14, 14(1)(c), 14(3), 14(3)(b), 17(1)(d), 17(2)(e), 18(1)(f)(iii), 25(2)(a), 33(5), 36(3)(c), 43(2)(a), 238
Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016 — Regulation 12, 41

Citation : (2023) 07 NCLT CK 0037

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

Bench : Division Bench

Advocate : Nahush Jain, Ashok K. Juneja, Saurabh Goel

Final Decision : Disposed Of

Judgement

Subrata Kumar Dash, Member (Technical)

IA No. 924 of 2020:-

1. The present application has been filed by Mr. Naresh Kumar Goel, the liquidator of the corporate debtor under section 60(5) of the Insolvency and Bankruptcy Code, 2016 (herein referred to as IBC) for seeking directions, in respect of the release of the Fixed Depository Receipts (herein referred to as FDRs).

2. The applicant has stated the following facts in its application:-

a) This Adjudicating Authority passed an order dated 21.11.2019 admitting the CIRP against M/s BR Knitwears Private Limited (herein referred to as corporate debtor) and Mr. Naresh Kumar Goel was appointed as the Interim Resolution Professional of the corporate debtor.

b) In the second meeting of the COC held on 24.12.2019, it was resolved to file an application before this Adjudicating Authority for the liquidation of the corporate debtor as there were no possibilities of revival of business of the

corporate debtor. On an application, this Adjudicating Authority on 13.03.2020 passed an order for the initiation of liquidation of the corporate debtor, and the applicant was duly appointed as the liquidator of the corporate debtor.

c) The liquidator made a public announcement in accordance with Regulation 12 of the IBBI (Liquidation Process) Regulations, 2016 on 15.03.2020.

d) After going through the records of the corporate debtor, the applicant came to know that the FDRs total amounting to Rs.10,00,308/- were lying with respondent No. 1, and thereafter, the applicant wrote a letter dated 17.01.2020 requesting respondent No. 1 to maintain the status quo of the account of the corporate debtor. (Annexure-5 of the application)

e) Further, the applicant vide letter dated 24.01.2020 requested respondent No. 1 to provide details of the bank guarantees issued by respondent No. 1 in favor of respondent no. 2 i.e., Assistant/Deputy Commissioner of Customs, ICD, Tughlakabad, New Delhi. (Annexure-6 of the application)

f) In another letter dated 20.02.2020 sent by the applicant to respondent No. 1, respondent No. 1 was requested to premature the FDR and make a fresh FDR of Rs. 10,00,308/- as a 100% margin against the bank guarantee issued by respondent No. 1 in favor of respondent No. 2. (Letter dated 20.02.2020, has been annexed as Annexure-7 of the application)

g) Respondent No. 1 vide email dated 26.02.2020, informed the applicant that a letter was received from respondent No. 2 wherein the custom department sought for invocation of bank of bank guarantees issued in its favor. (Annexure A-9 of the application). In its reply, the applicant stated that in pursuance to the moratorium imposed under Section 14 of the IBC, the bank guarantees cannot be invoked by respondent No. 2, for which a separate claim had to be filed by respondent No. 2 before the applicant. (Annexure A-10 of the application)

h) Vide letter dated 19.03.2020 and email dated 08.05.2020 the applicant requested respondent No. 1 to liquidate the FDRs amounting to Rs.10,00,308/- in the name of the corporate debtor and transfer the funds so generated along with the interest occurred till date on the aforesaid FDR for the purpose of liquidation of the corporate debtor. (Annexure- 11 of the application). In response to the afore-mentioned email, respondent No. 1 in its letter dated 11.05.2020 (Annexure-12 of the application) stated that an amount of Rs.8,35,019/- had been released and a fresh FDR of Rs.10,00,308/- was kept as 100% margin against aforesaid bank guarantee, issued by them to respondent No. 2.

i) The applicant again on 31.08.2020 wrote a letter to respondent No. 1 to liquidate the FDR and transfer the principal amount along with interest to the liquidation account of the corporate debtor (Annexure-13 of the application). In response to the above-mentioned letter, respondent No.1 gave its reply on 12.10.2020 stating that the amount lying with respondent No. 1 will be released

only after obtaining NOC/permission from respondent No. 2.

j) It has been stated by the applicant that the applicant has failed to liquidate the FDRs and hence seeks directions from this adjudicating authority to direct respondent No. 1 to transfer the aforementioned FDRs for the purpose of liquidation.

3. Mr. Ranjith Kumar, the Principal Officer of Overseas Bank, i.e. respondent No.1 has filed its reply and has stated that:

a) The corporate debtor was a borrower or having an account with the answering respondent along with a bank guarantee of Rs. 10, 00, 308/- in favor of respondent No. 2 w.e.f. 27.09.2011 up till 27.09.2021 with 100% deposit margin in the form of FDR. This deposit was also marked as a lien to respondent No. 1.

b) The answering respondent provided the applicant with confirmation of the status of the FDR along with all the details and documents pertaining to the FDR and bank guarantee. Further, a request had been received from the applicant to release the interest accrued on the said FDR since there is a requirement of 100% margin only against the bank guarantee.

c) Respondent No. 2 also sent a letter dated 25.02.2020 to the answering respondent for enforcing a bank guarantee for a sum of Rs.10,00,308/- being the beneficiary of the bank guarantee. A detailed response was sent via email/ letter dated 11.05.2020 to respondent No. 2, requesting respondent No. 2 to approach the applicant. The receipt of the said letter dated 25.02.2020 for invoking the bank guarantee was also informed to the applicant.

d) Thereafter, the answering respondent was informed about the commencement of liquidation proceedings against the corporate debtor vide order dated 13.03.2020 of this adjudicating authority. Following this the answering respondent released the interest amount of Rs. 8,35,019/- vide Demand Draft bearing No. 862804724 dated 11.05.2020 in the liquidation account of the corporate debtor.

e) Upon the request of the applicant to liquidate the FDR amounting to Rs.10,00,308/-, the answering respondent claims that the said amount has been held by it to safeguard its own interest in view of the fact that there are multiple claims for the amount held by the answering respondent. Further, the answering respondent points out that the applicant has filed the present application without finding an amicable solution to the issue with respondent No. 2 and hence, the application is liable to be dismissed.

4. Respondent No. 2, i.e. Assistant Commissioner, Office of PR, Commissioner of Customs, (Import) Inland Container Depot, Tughlakabad, New Delhi has filed its reply and it has been stated that:-

a) The corporate debtor had obtained 2 EPCG, licenses registered with the answering respondent and the corporate debtor had imported duty-free goods

under this license.

b) A notice dated 12.03.2021 and demand letter dated 24.02.2022, under Circular No. 16/2017-Customs dated 02.05.2017 were issued to the corporate debtor, but no response was received. Thereafter, letters dated 10.12.2021 and 28.04.2022 were issued to respondent No. 1 for enforcement of the bank guarantee.

c) It has been stated that the FDRs of which the applicant seeks release are not merely fixed deposits but rather are bank guarantees along with 100% margin money in an independent contract between the beneficiary and the bank through FDR issued by respondent No. 1 in favor of beneficiary- respondent No. 2 and therefore, it is not refundable to the corporate debtor unless the bank is discharged. Respondent No. 1 is under an obligation to pay the amount of the invoked bank guarantee, to the answering respondent, i.e. Respondent No. 2.

d) Respondent No. 2, i.e. Customs Department places reliance on the judgment of the Hon'ble Supreme Court in the case of "Ansar Engineering Projects Ltd. Vs. Tehri Hydro Development Corpn. Ltd." [1996 (5) SCC 450] which states that:

" It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary.... "

" It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity prima facie made out in the case as triable issued by strong evidence so as to prevent irretrievable injustice to the parties.."

e) It has been stated that the bank guarantee issued by the bank in favor of respondent No. 2 is supported by the fixed deposit. It cannot be revoked as such revocation would result in frustrating the bank guarantee issued by respondent No. 1 in favor of respondent No. 2. Furthermore, it is added that the applicant is attempting to frustrate the right already created in favor of respondent No. 2 and is illegally provoking the corporate debtor to prematurely revoke the FDRs and to get fresh FDRs created. Respondent No. 1-bank is also under an obligation to pay the amount of invoked bank guarantee to the beneficiary respondent No. 2 without any reference to the corporate debtor.

f) The invocation of bank guarantee is between respondent No. 1 bank and respondent No. 2, therefore, the order of moratorium does not affect the right of

the department respondent No. 2 in any manner as the beneficiary respondent No. 2 is at the liberty to directly realize its dues from the bank guarantee, instead of initiating proceedings or making a claim against the corporate debtor. Hence, it is stated that the applicant-liquidator had no right to order or direct the corporate debtor to get the FDRs liquidated.

5. The applicant has filed its written statement along with a rejoinder to the reply filed by respondent No. 1 and respondent No. 2 and has stated that:-

a) As per the various provisions of the Code, the liquidator has the statutory obligation to take control of the assets over which the corporate debtor has ownership once the liquidation commences. Thus, in order to fulfill its obligation, the liquidator is duty-bound to get the said FDRs transferred to the liquidation account of the corporate debtor.

b) That there are no funds available in the liquidation account of the corporate debtor due to which the liquidator is not able to perform statutory duties provided under the law and also the Liquidator is not able to pay fees to the professionals engaged by the liquidator. The liquidator is in dire need of funds failing which the entire liquidation process is being hampered and clogged.

c) Rebuttal has been made on the ground that as per Section 14(1)(c), 17(1)(d), 17(2)(e), 18(1)(f)(iii), 25(2)(a), 36(3)(c), 43(2)(a) of Insolvency and Bankruptcy Code, 2016 and Regulation 41 of the IBBI (Liquidation Process) Regulations, the Respondent No. 1 has the statutory obligation to transfer the amount of said FDRs along with interest into the liquidation account of the corporate debtor.

d) It has been submitted that as per Section 238 of the Insolvency and Bankruptcy Code, 2016, the provisions of the Code have an overriding effect over the other laws, and IBC shall prevail.

e) Reliance has been placed upon the judgment of Hon'ble Supreme Court of India in Civil Appeal No. 7667 of 2021 in the matter of "Sundaresh Bhatt, Liquidator of ABG Shipyard Vs. Central Board of Indirect Taxes and Customs" dated 26.08.2022, in which vide para 53 of the judgment, it was held that "The IBC would prevail over The Customs Act, to the extent that once moratorium is imposed in terms of Sections 14 or 33(5) of the IBC as the case may be",

6. We have heard the counsel for the applicant and the respondent and have pursued the records carefully.

7. From the facts of the case, it is clear that the Corporate Debtor has provided a bank guarantee to Respondent No. 2 i.e. Customs Department. Respondent No. 1 has asked the petitioner to obtain NOC from Respondent No 2- Customs Department before releasing the amount of bank guarantee to the Corporate Debtor. The said bank guarantee is kept as a security by the Indian Overseas Bank in relation to the bank guarantee issued by the bank to the Customs Department. The bank guarantee is in respect of the EPCG licenses obtained by

the Corporate Debtor. The bank guarantee is in the nature of financial guarantee where respondent-bank has undertaken to assume the responsibility to meet the possible debt if the applicant-Corporate Debtor defaults.

8. The reason for the revocation of the Bank guarantee as mentioned in the letter dated 25.02.2020 from the office of Customs, Inland Container Depot, New Delhi is reproduced below :-

"In relation to the aforesaid license EODC passed by the DGFT has not yet been received in this office nor any information has been received from the party. Hence, the party did not complete the Export obligation which is contrary to the Regulations/ conditions of customs.

Therefore, you are requested to enforce the above bank guarantee immediately and a Demand Draft/ Banker Cheque may send to the PNB ICD, Tikdi, Commissioner of Custom (Import)."

9. In this connection, a reference is made to the decision of the Hon'ble NCLAT in the matter of Bharat Aluminium Co. Ltd. vs M/s. J.P. Engineers Private Limited; Company Appeal (AT) (Insolvency) No. 759/2020 dated 26.02.2021, which deals with the dual issue of invocation of bank guarantee and also whether the same can be invoked even during moratorium under Section 14 of the IBC. On the issue, whether the Bank guarantee is an asset of the Corporate Debtor, the Hon'ble NCLAT has considered the decision of Hon'ble AP Court in the case of Haryana Telecom Ltd. Vs. Aluminium industries Ltd. (1995)

SCC Online AP 721 in which it has been held that:-

"The bank guarantee cannot be said to be the property of the first respondent (buyer) simply because it is indirectly going to be affected by enforcement of the said bank guarantee by the writ Appellant"

10. Further, reference is made to the judgment of the Hon'ble Supreme Court in the case of UP State Sugar Corporations Vs. Sumac International Ltd. in Civil Appeal No. 15357 of 1996 dated 04.12.1996 in which it is held that:-

"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."

11. The order also refers to the Sub-section 3 of Section 14 of IBC substituted by the Insolvency and Bankruptcy Code (Second Amendment) Act 26 of 2018 with retrospective effect from 06.06.2018, which reads as under:-

"In Section 14 of the principal Act, for sub-Section (3), the following sub-section shall be substituted namely:-

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

(a) such transactions as may be notified by the Central Government in consultation with any financial regulator;

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

12. After considering all the facts and the related judicial decisions, the Hon’ble NCLAT in case of Bharat Aluminium Co. Ltd. vs M/s. J.P. Engineers Private Limited (Supra) has observed that “we hold that the Corporate Debtor has issued bank guarantee for ensuring the price of goods. 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 a third party like a 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 IBC.”

(Emphasis supplied)

13. We note the fact that the bank guarantee is being revoked for violation of an undertaking given under the Customs Act by the Corporate Debtor. We are of the view that the corporate debtor under the liquidation cannot escape the consequences of violation of contractual obligations.

14. In view of the above discussion and the decision in the case of Bharat Aluminium Co. Ltd. vs M/s. J.P. Engineers Private Limited (Supra), the prayers of the applicant cannot be acceded to. In these circumstances, IA No. 924/2020 is dismissed and disposed of accordingly.