

**IN THE NATIONAL COMPANY LAW TRIBUNAL
DIVISION BENCH-(Court-I)
KOLKATA**

I.A. (I.B.C) No. 699/KB/2023

C.P.(I.B.) No. 2179/KB/2019

In the matter of:

West Bengal State Electricity Distribution Company Limited (WBSEDCL)
...Applicant

Versus

Punjab National Bank & Others
...Respondents

Date of Hearing: 25/06/2024

Date of pronouncing the order: 24/07/2024

Appearances (through hybrid mode):

For the Applicant : Mr. Jishnu Saha, Advocate
: Mr. Debasish Chakrabarti, Advocate
: Mr. Snehasish Chakraborty, Advocate

For the Respondents : Ms. Urmila Chakraborty, Advocate
: Mr. Puspall Chakraborty, Advocate
: Mr. Prisanka Ganguly, Advocate

Coram:

Bidisha Banerjee : **Member (Judicial)**

Balraj Joshi : **Member (Technical)**

ORDER

Per: Balraj Joshi , Member(Technical)

1. The present application has been filed by the applicant seeking the following reliefs:

(a)Direct the respondent bank to forthwith release payment of the amount of the Bank Guarantee bearing no. 0089ILG005612 for the sum of Rs. 3,00,00,000/- Rupees Three Crore only] in favour of the applicant, within a particular time frame;

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(b) Direct the respondent no. 4 his no objection to the payment of the Bank Guarantee amount in favour of the applicant;

(c) Costs and incidental expenses incurred by the applicant to be borne by the respondent bank;

(d) Such further or other order or orders be made and/or direction or directions be given as to this Hon'ble Tribunal may deem fit and proper.

Facts of the case:

2. The applicant claims that it falls within the definition of Operational Creditor as defined under Section 5(20) of the Insolvency and Bankruptcy Code, 2016 to whom the Corporate Debtor owes an operational debt arising out of non-payment of statutory electricity dues including late payment surcharge and other charges within the time frame as was agreed between WBSEB (the predecessor-in-interest) and the Corporate Debtor by way of a Memorandum of Agreement (MoA) executed on 07.10.2004. In terms of clause 19 of the said MoA, a Bank Guarantee was executed by the Corporate Debtor as 'Security Deposit' in favour of the applicant which at present stood renewed at Rs.3 crore and was valid till June 17, 2023. The same is lying in custody of the Respondent No.1.
3. The Corporate Debtor was admitted into CIRP vide an order dated 22.07.2022 and as a result a moratorium under Section 14 of IBC, 2016 was declared. The Corporate Debtor had not paid the electricity charges since February 2022, therefore the applicant after serving disconnection notice as mandated under Section 56 of the Electricity Act, 2003, disconnected the connection on 09.09.2022.
4. The applicant states that as an amount of Rs.3,20,12,379/- became due and payable by the Corporate Debtor as on 21.07.2022, the applicant invoked the Bank Guarantee of Rs.3,00,00,000/- vide a letter dated 08.08.2022 addressed

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to the Respondent No.3 and requested to disburse the said Bank Guarantee within 7 (seven) days from receipt of the said letter. The Respondent No.3 on 20.08.2022 attached the communications dated 10.08.2022 and 16.08.2022 sent by the IRP and advised the applicant to take up the issue of invocation with the IRP.

5. The Respondent No.2 thereafter vide a communication dated 09.09.2022 informed its inability to honour the invocation because of the advise or direction of the then IRP which was conveyed through a letter dated 18.08.2022.
6. Thereafter vide an order dated 30.09.2022, this Hon'ble Tribunal appointed Mr. Avishek Gupta as the Resolution Professional on the basis of an application filed by the CoC. The Resolution Professional i.e., Respondent No.4 replied to the applicant via electronic mode on the issue of disconnection and invocation of Bank Guarantee and also forwarded the orders dated 22.07.2022 and 30.09.2022 alongwith specimen of a requisite form and public announcement.
7. The applicant on 29.11.2022 submitted its claim of Rs.3,20,12,379/- in requisite form alongwith supporting documents and the Respondent No.4 on 22.12.2022 through electronic mode and accepted the claim in full.
8. The applicant again on 04.01.2023 addressed a communication to the Respondent No.3 via electronic mode to release the Bank Guarantee to which the Respondent No.2 vide a letter dated 06.01.2023 replied and refused to disburse the said Bank Guarantee by stating that as the claim of the applicant has been accepted by the RP therefore the Bank Guarantee cannot be claimed as it would amount to dual claim.
9. The applicant states that this act of the Respondents is against the provision of Section 14(3)(b) of IBC, 2016. It was always communicated to the

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Applicant by Respondent No.4 that its claim would automatically stand reduced in case the payment is received against the bank guarantee. Therefore, the present application shall be admitted.

10. Reply by the Respondents

A. Respondent Nos.1 to 3- The contents of the Reply Affidavit filed by the Respondent Nos.1 to 3 are summarized as hereunder:

- (i) The Respondent No.1 had issued a Bank Guarantee dated 25.06.2012 for Rs.3 Crore on behalf of the Corporate Debtor for drawal of bulk supply to its premises at Hazinagar, Naihati, 24 Parganas (North) in favour of the applicant. The Respondent No.1 received the letter dated 08.08.2022 from the applicant for invoking the Bank Guarantee as the Corporate Debtor had defaulted in paying the electricity bill within time and was requested to invoke the said guarantee in full and send the outstanding payment by Pay Order/Bank Draft to be drawn in favour of the applicant.
- (ii) The Respondent No.1 received an email dated 10.08.2022 from the IRP to not allow such invocation during the period of moratorium. The IRP again made repeated requests for not invoking the guarantee by emails dated 10.08.2022 and 16.08.2022. The IRP sent a letter dated 18.08.2022 and once again requested to not invoke the Bank Guarantee in view of the moratorium as envisaged under Section 14 of IBC, 2016. The Respondent Nos. 1 to 3 informed the same to the applicant vide letter dated 20.08.2022 and requested to take up the matter with the IRP.
- (iii) That the applicant once again vide letter dated 30.08.2022 requested the Respondent Nos. 1 to 3 to encash the said guarantee but the respondent bank did not honor the same and the IRP was

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informed about the same vide a letter dated 09.09.2022. From the list of creditors, it is evident that the applicant already submitted its proof as an operational creditor vide Form-B dated 25.11.2022.

- (iv) The claim of the applicant has been admitted in full and it has been stated that in case any amount is recovered by invoking the bank guarantee, the same shall be informed to the RP and claim should be revised accordingly. The applicant cannot insist on encashment of the Bank Guarantee as the same will lead to double recovery.
- (v) It is also a fact that if any payment is made to the applicant during CIRP, it would tantamount to preferential treatment of the applicant over other creditors who are standing in a queue during the revival process of the Corporate Debtor. By filing its claim, the applicant has waived its right to recover from Bank Guarantee and it is also evident that the Bank Guarantee is valid upto 17th June, 2023 with claim period upto 17th June, 2024.
- (vi) The applicant once again requested to invoke the bank guarantee vide letter dated 04.01.2023 and the respondent bank vide letter dated 06.01.2023 stated that since the applicant has lodged its claim which is accepted in full by the RP, the same would amount to dual claim.

B. Respondent No.4

- (i) The Respondent No.4/the Resolution Professional has stated in its Reply Affidavit that by Form-B dated 25.11.2022, the applicant had filed its claim before the Respondent No.4 on 29.11.2022 for a total sum of Rs.3,20,12,379/- and after consideration and verification of the same, the claim was accepted in full and was communicated to the applicant vide an email dated 22.12.2022.

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The Respondent No.4 further communicated that if any amount is received by the applicant by invoking the bank guarantee, the same shall be communicated to the Respondent No.4 so that the claim can be revised accordingly.

- (ii) The Respondent No.4 also stated that the Respondent No.1 had filed its revised claim for a total sum of Rs.44,65,67,327.98/- (fund based) and Rs.4,82,47,109/- (non-fund based). The same was accepted and intimated to the Respondent No.1 vide email dated 19.01.2023. It was also informed that the non-fund-based claim was admitted under the head 'contingent claims'. That after receiving the revised claim from the Respondent No.1, the entire fund based claim was admitted alongwith non fund based being grouped under contingent claim and accordingly the share of the Respondent No.1 was reduced to 65.86% from 67.14%. The same was discussed with the CoC members in their 11th meeting held on 30.01.2023.

Submissions made by the Ld. Counsel on behalf of the applicant:

11. The Ld. Counsel for the Applicant submitted that on a plain reading of Section 14(3)(b) of the IBC, 2016 which states that a surety in a contract of guarantee to a corporate debtor shall not apply to the working of Section 14 (1) that is Moratorium. Therefore, the initial action of working of the then IRP and the Bank in refusing to disburse the sum of Rs. 3.00 crore indisputably was not correct and in violation of the provision of Section 14 (3) (b) of the Code.
12. The applicant submitted its claim/demand of Bank Guarantee amounting to Rs 3.00 crore letter dated 08/08/2022 within the validity period i.e., 17/06/2023 and claim period 17/06/2024. Therefore, in terms of the relevant clauses of the declaration dated June 25, 2012, the respondent bank is contractually and

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statutorily bound to release the Bank Guarantee amount in favour of the applicant.

13. The Ld. Counsel further submitted that in accordance with clause no. 8 stated in the declaration dated June 25, 2012 the applicant is also entitled to receive interest on account of delayed payment to be calculated on and from August 16, 2020 till payment of the Bank Guarantee amount by the Bank.

14. The Ld. Counsel also placed reliance on some judgments which are as follows:

a. The National Small Industries Corporation Limited (NSCI), Delhi -versus- Sh. Prabhakar Kumar & Anr [CA(AT)(Ins) No. 841 of 2021]

b. UP State Corporation -versus Sumac International Limited. [(1997) 1 SCC 568]

c. U.P. Cooperative Federation Limited -versus- Singh Consultants and Engineers (P) Limited. [(1988) 1 SCC 174]

d. IDBI Bank Limited -versus- Indian Oil Corporation Limited Para: 4. [CA(AT)(Ins) No. 543 of 2021]

15. For the reasons stated above, the present application shall be admitted.

Submissions on behalf of the Bank

A counter point was raised by Ld. Counsel Ms Urmila Chakraborty, who stated that since the claimant here is also an operational creditor, he would be getting the money in excess of his claim which he has already raised before the RP and has been admitted as well. By submitting to the RP and the entire process, the applicant has now become an operational creditor and therefore having submitted himself to the process, he must stand in the Queue under section 53 of the code. There are two faces of this argument – One is of course that being an Operational Creditor he must stand in the Queue having submitted to the remedy under IBC. Now he can't do a volte face and say that he would be encashing the Bank Guarantees.

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Analysis

16. We have heard the Ld. Counsels appearing for both the parties and perused the record.
17. It is the case of the applicant that the Corporate Debtor was admitted into CIRP on 22.07.2022. The applicant came to know about the same and communicated to the Respondents time and again to invoke such Bank Guarantee but the Respondents did not entertain such request stating that such Bank Guarantee cannot be invoked in view of the moratorium laid down under Section 14 of IBC, 2016. It was also stated by the Respondents that as the claim of the applicant has been admitted in full, the invocation of such Bank Guarantee would amount to a dual claim.
18. An objection has been taken by the Ld. Counsel appearing for the bank that since the claimant has submitted himself to the ecosystem of insolvency as contained in the Code, having filed its claim as prescribed, he must stand in the Queue under section 53 of the code. Consequently, it shall not be entitled to encash the bank guarantee, for if that is allowed, it would amount to a preferential treatment to the applicant. We have considered this objection and here and consider it useful for the context to extract the provisions of the code in this regard:

43. Preferential transactions and relevant time.

(1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44.

(2) A corporate debtor shall be deemed to have given a preference, if

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(a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and (b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53.

19. From the provisions above it is seen that, one of the necessary conditions for any transaction to be labelled as a Preferential transaction relates to the assets of the Corporate debtor, so to say that any transaction done in the relevant time by the Corporate debtor would be eligible for being called so only if done by the Corporate debtor i.e. out of its assets. However, since the Bank guarantee is a separate contract and the encashment thereof is not relatable to the assets of the Corporate Debtor, the encashment cannot be termed as Preferential transaction. Moreover, the said bank guarantee being a separate contract, does not come under the purview of the mechanism of Section 53. However, if encashed, the claimant shall have to revise its claim accordingly. Therefore, the contention of the Ld. Counsel for the Bank is not maintainable.

20. It is also contended by the Respondents that since the Corporate Debtor was admitted into CIRP and a moratorium under Section 14 of IBC, 2016 was initiated, the applicant cannot invoke such Bank Guarantee within the moratorium period.

21. In this regard, we would like to refer to Section 14(3)(b) of the Insolvency and Bankruptcy Code, 2016 which states as follows:

“Section 14 (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;

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

22. We refer to a judgment passed by the Hon’ble NCLAT, Delhi, in the matter of **Bhuvan Madan v. Nominated Authority, Ministry of Coal & Anr.**¹ in which it was held as follows:

18. Section 14, sub-section (3) was amended by Act 26 of 2018, w.e.f. 06.06.2018. Amendment made in sub-section (3) of Section 14 is as follows:

“14(3) The provisions of sub-section (1) shall not apply to —

(a) such transactions, agreements or other arrangement 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. “

19. Sub-section (3) above clearly provides that provisions of sub-section (1) shall not be applicable on a surety in a contract of guarantee to a Corporate Debtor.

20. In another judgment of this Tribunal in UCO Bank vs. Sudip Bhattacharya – Company Appeal (AT) (Insolvency) No.335 of 2021 decided on 21.09.2021, this Tribunal in paragraph 8, 9, 10 and 11 has held that Bank Guarantee cannot be held to be assets of the Corporate Debtor.

21. The learned Counsel for the Respondent has also relied on judgment of the Hon’ble Supreme Court in (2020) 13 SCC 574 – Standard Chartered Bank vs. Heavy Engineering Corporation Limited and Anr., where dealing with the precedents on the Bank Guarantee, following was held in paragraph 23:

¹ Company Appeal (AT)(Insolvency) no. 989 of 2024 decided on 01.07.2024

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“23. The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence. There are, however, exceptions to this rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.”

(emphasis applied)

23. Further in the matter of **IDBI Bank Ltd. v. Indian Oil Corporation Ltd.**², the Hon’ble NCLAT, Delhi has held as hereunder:

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,

² Company Appeal (AT)(Ins) No.543 of 2021 decided on 10.01.2023

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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”

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.”

24. In view of the law laid down above, we are of the view that the applicant has the right to invoke such Bank Guarantee of Rs.3,00,00,000/- and the Respondents should not come in the way of invoking the same. It shall not amount to dual claim as the amount recovered by invoking such Bank Guarantee can be adjusted and the admitted claim shall be revised accordingly.

25. Therefore **I.A. (I.B.C) No. 699/KB/2023** is **allowed and disposed of**.

26. A certified copy of this order may be issued, if applied for, upon compliance with all requisites.

(Balraj Joshi)
Member (Technical)

(Bidisha Banerjee)
Member (Judicial)

This order is pronounced on 24th day of July, 2024.

FA_LRA