

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1
VC AND PHYSICAL (HYBRID) MODE
ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON
15-04-2024 AT 10:30 AM**

CP(IB) No. 199/7/HDB/2019

AND

IA (IBC) 7 & 732/2022, IA (IBC) 715/2024 in CP(IB) No. 199/7/HDB/2019

u/s. 7 of IBC, 2016

IN THE MATTER OF:

IDBI Bank Ltd

...Financial Creditor

AND

Aster Pvt Ltd

...Corporate Debtor

C O R A M:-

DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)

SH. CHARAN SINGH, HON'BLE MEMBER (TECHNICAL)

ORDER

IA (IBC) 7/2022

Learned Counsel Mr Anal Shah, for respondent present through Video Conference.

Orders pronounced. In the result, we are of the view that the issue of refund of retention of money is not in the jurisdiction of this Tribunal. Hence, we dismiss this application as non maintainable. Accordingly, **this application is disposed of. No costs.**

IA (IBC) 732/2022

Learned Counsel Smt JVL Bharati, for applicant present through Video Conference. Matter passed over.

Matter called again. No representation for the applicant. Written submissions by respondent not filed despite the direction, hence opportunity closed. written submissions of applicant already filed. Matter adjourned to 30.04.2024.

IA (IBC) 715/2024

Learned Senior Counsel Mr S Niranjan Reddy, for applicant present through Video Conference. Heard learned senior counsel for applicant. **For orders on 30.04.2024.**

Sd/-

MEMBER (T)

Sd/-

MEMBER (J)

**NATIONAL COMPANY LAW TRIBUNAL, BENCH-1,
HYDERABAD**

IA (IBC)/7/2022

In CP (IB) No.199/7/HDB/2019

Application under Section 60(5) of the Insolvency and Bankruptcy Code,
2016

Between

M/s Aster Private Ltd. (CD)

Represented by:

Shri Naren Sheth

IA petitioner

Liquidator

Regd. Office at Plot no. 140&141/1, IDA Phase-II, Cherlapally,

Hyderabad- 500051 Hyderabad, Telangana 500081

(I.R.P. I.D. no.IP/P-00133-IBBI/IPA-001/IP-P00133/2017-18/10275)

And

Gujarat Energy Transmission Corporation Ltd....Respondent

GETCO (Represented by its M.D.)

Address Sardar Patel Vidyut Bhavan,

Race Course, Vadodara -390007

Gujarat (India)

Date of order: 15.04.2024.

Coram

Dr. Venkata Ramakrishna Badarinath Nandula, Hon'ble Member (Judicial)

Shri Charan Singh, Hon'ble Member (Technical)

Parties/ Counsels present:

For the Applicant : Ms. JVL Bharati, Counsel.

For the Respondent : Mr.Kush Bavishi for Mr.Anal Shah, Counsel.

Liquidator : Mr. Naren Sheth.

PER: BENCH

1. This is an Application filed by the Applicant under Section 60 (5) of the Insolvency and Bankruptcy Code, 2016 Read with Rule 11 of NCLT Rules, 2016 seeking to refund and remit back the retention amount of Rs. 6,08,77,844/- (Rupees six crores eight lacs seventy-seven thousand eight hundred and forty-four only) deducted from bills.

2. Gist of the application:

- a. It is averred that this Tribunal vide order dated 19.11.2019 passed liquidation order and appointed the Applicant as liquidator. Thereafter, public announcement inviting claims from stakeholders within 30 days of the public announcement was released.
- b. Meanwhile it is noticed that some unrealized debts are reflected in Books of Accounts. On further enquiry, the applicant received information from the Accounts Department of Corporate Debtor that Gujarat Energy Transmission Corporation Limited, respondent herein(Government Company incorporated under the Companies Act, having its registered office at Sardar Patel Vidyut Bhavan, Race Course, Vadodara, Gujarat- 390007), awarded two CAs, in the following project of GETCO. The project details are given below:

Project Details: Supply& Erection work of 400 KV D/C Amreli-Kasore (Part-III) 72.632 Km –AP-44 to Kasore Gantry on Trunkey Basis.

(i).CE (Pro) / II / 400KV/A-K-3/S & E /2134/ T – 3 / 355, Dated 21st

April 2011.

(ii) CE (Pro) / II / 400KV/A-K-3/S & E /2134/ T – 3 / 356, Dated 21st April 2011.

c. It is averred that the work orders pursuant to the Contracts as stated Supra were *revised* and as per the revised work orders the total value for Erection Works stood at Rs. 19,01,92,164/- and the revised value for Supply works stood at Rs. 53,65,39,902/- and the total value of the revised work orders stood at Rs. 72,67,32,066/-. It is humbly submitted that out of the total value of the work contract, the value of the executed works stands at Rs.64,15,00,000 (approx.) which is 88.27% of the total value of the work Contract. Copies of the revised work orders for Erection works and Supply works is enclosed along with petition as Annexure- 3. The Purchase Order statement received from the Respondent No. 1 Company which reflects the amounts received by the Corporate Debtor for the works executed is enclosed along with IA as Annexure-4 which shows that in terms of value of the Contract, 88.27% of the value of the Contract has been fulfilled.

d. **(i). Brief summary of Contract and details of work**

Total Order Value: Rs 70.46Cr

Total Executed Value: Rs 64.15 Cr

Balance Order Value: Rs 6.31Cr

- e. It is averred that the respondent has completed the following work as per the contract. Due to ROW issues at site time line of contract extended and the details regarding that are mentioned below:

Order Date: 21st April 2011

As per order Completion Date: 19th March 2012

1st Extension Received up to: 20th April 2014

2nd Extension Received up to: 26th December 2016

3rd Extension Received up to: 19th March 2017

4th Extension Received up to: 31st December 2019

Risk purchase initiated by Getco on: 24th December 2019 BG

Invoked on 29th December 2019

BG Amount invoked for Rs 12.49 Cr

- f. Details of bills raised by Applicant and payments released by respondent enclosed as **Annexure-A** to the Application.

Payment Terms as per the CA award :

- g. It is averred that 80% of supply value of each consignment of tower material including bolt nuts and accessories on submission of invoice along with 100% taxes, duties, F & I shall be paid within 60 days from the date of preparation of SR Note. 10%

payment out of balance 20% of supply value shall be paid on completion of erection & testing of the transmission line and completion certificate from Engineer-in-charge and CE (Projects). Balance 10% of supply value shall be paid on successful commissioning of transmission line against completion certificate and only after settlement of material account statement of items supplied, used, erected and successful commissioning is settled for complete lot and balance 10% will be released only after passing of final bill.

Details of BGs Invoked by Respondent

Type of BG	Bank Name	BG No.	Value in Rs	BG Validity
Performance BG	YES Bank	006GM01111460001	1,33,08,546	31-Jul-20
Security BG	YES Bank	006GM01111470001	4,60,82,185	31-Dec-21
Performance BG	Punjab National Bank	2273ILG023415	69,95,339	31-May-21
Performance BG	Punjab National Bank	2273ILG023515	54,07,501	31-May-21
Retention BG	Punjab National Bank	2273ILG000914	5,30,77,523	31-May-21
Total			12,48,71,094	

- h. It is averred that Respondent Company vide its letter dated 24.12.2019 informed the Corporate Debtor that it has decided to proceed with Short Closing of Contract and encashment of Bank Guarantees. It is averred that instead of extending the co-operation and ensuring that the project is completed smoothly, respondent has taken extreme step of short closure of contract and invocation of bank guarantee which will put the entire CIRP into jeopardy since the amount of Bank Guarantee involved is Rs.12.48 crores.
- i. It is averred that the conduct of the Respondent Company in invoking the Bank Guarantee is fraudulent, unjust and would cause irreparable loss and damage to the Corporate Debtor and the CIRP. Hon'ble Supreme Court in a plethora of cases held that where the invocation of BGs is fraudulent, the Courts will not remain as mute spectators and intervene to injunct fraudulent invocation and also order for refund of BGs that has been illegally invoked.
- j. It is averred that once the CIRP order passed there will not be any invocation of bank guarantee and since the company is under liquidation, liquidation regulations also applied. More over more than 80% of work has been completed, therefore there is non justifiable ground for

invocation of BGs be the respondent.

- k. It is averred that it is the duty of the Resolution Professional / liquidator that the Corporate Debtor should be kept as a going concern and moreover judgments of the Hon'ble NCLAT as well as the Hon'ble Apex Court have stressed on point that even during liquidation, it should be ensured that the Corporate Debtor runs as a going concern. The action of the Respondent Company to invoke the bark guarantees will derail this and would cause irreparable loss and injury to the Corporate Debtor.
- l. It is averred that liquidator is finding difficult in meeting day to day expenses as respondents are not releasing the mentioned dues. Thus praying the Tribunal to direct the respondent to release the amount retained by the respondent company amounting to Rs.6,08,77,844 which is deducted from bills.

3. Reply filed by the Respondent:

- a. Respondent denied the averments made by the Applicant and further stated that since the order of liquidation is under challenge before Hon'ble NCLAT and the Hon'ble NCLAT has stayed the same, thus the applicant has no locus to file the present application.

- b.** It is averred that respondent Company on 10.11.2010 issued public advertisement floating a tender for supply and erection work of 400 kv D/C Amerli-Kasor Line(Part III)- 72.632 K,(AP-44/0 to Kasor Gantry) on Turnkey basis having total estimated cost of Rs.53,29,15,756.13 on end cost basis.
- c.** Pursuant to the advertisement, corporate debtor submitted the bid and being the lowest evaluated bidder, selected for work and issued letter of intent dated 25.03.2011 and the work should be completed within 12 months from the date of the order.
- d.** An amendment for the supply order and erection order was also issued to the corporate debtor for the quantity variation for the work awarded to the corporate debtor is mentioned as page 4 of the reply. As per the terms and conditions of the contract, the corporate debtor was required to submit the Security deposit cum performance Bank Guarantee for 10% amount of the total contract value. Since the corporate debtor had failed to complete the work awarded as per the scope and even after giving sufficient opportunities, the work has remained incomplete.

- e. Thus, the respondent Company had to short close the contract awarded to the corporate debtor on 24.12.2019 and the balance work was to be executed at the risk & cost of the corporate debtor. Further, the tender for risk purchase of balance work was invited by the respondent Company on 07.02.2020 with due date of submission of bid on 05.03.2020. since no response was received from bidders, the tender was cancelled and again re-invited on 20.03.2020, which is still pending for finalization.
- f. Respondent denied the averment made by the applicant the invocation of bank guarantee is fraudulent as the corporate debtor failed to complete the work and with regard to this already approached appropriate civil court or invoking arbitration clause.
- g. It is further averred that the respondent company had submitted the claim for the provisional amount of Rs.5,26,80,286 to the RP by letter dated 20.02.2020 to recover the risk purchase amount of balance work. It is averred that the amount withheld for recovery of risk purchase of balance work is not liable to be released by the respondent Company until the finalization of balance work is completed and further submitted that since the order of liquidation

itself is under challenge, the liquidator has no locus to filed the Application. Hence liable to be dismissed.

4. Additional affidavit was filed by the Respondent by giving the detailed note of the tender issued to the corporate debtor and the issues involved in the present matter. Further stated that under the terms and conditions of the contract, the issue has been raised before appropriate Court/Forum or Tribunal. Hence submitted that the said issues cannot be agitated before this Tribunal by way of an application under Section 60(5) of IBC or otherwise.
5. Status memo filed by the liquidator on 13.03.2024 stating that “ Hon’ble NCLT Hyderabad, had passed an order in IA No.1489/2023 dated 27.02.2024 vacating the stay/hold on auction process and directing the liquidator to continue with the auction and file status memo within 15 days.
6. Thus, it is clear that there is no stay by NCLAT with regard to the liquidation order as stated by the respondent.
7. In the light of the contest put forth by both the parties, the point that emerges for our consideration is :

8. Whether this Tribunal can adjudicate upon the claim for return of retention amount deducted by respondent from the bills raised by the corporate debtor/Applicant and order return of the same?.

9. We have heard learned Counsel Ms.J.V.L.Bharati, for learned liquidator, Shri Naren Seth, and Learned Counsel *Mr.Kush Bavishi for Mr.Anal Shah*.
Perused the records, submitted by both sides.

Point:

Whether this Tribunal can adjudicate upon, the claim for return of retention amount deducted by respondent from the bills raised by the corporate debtor/Applicant and order return of the same?.

10. Learned Counsel for the Applicant submits that as per revised agreement dated 23.12.2013, 80% of the supply value of each consignment was to be paid within 60 days from the date of retention of SR Note, 10% payment out of balance 20% of supply value shall be paid on submission of equivalent Bank guarantee amount. Balance 10% will be released only after passing of final bill. No extra payment will be released for the material which is not required for completion of line, if supplied excess during execution of work and recovery will be made in final bill.

11. Learned Counsel for the Applicant further submitted that Bank Guarantees of Rs.5,30,77,523/- were given by applicant for releasing retention amount

which already have been invoked by respondent. Further, Rs.6,08,77,844/- is lying with the respondent as retention amount which has been deducted from the bills paid by the Applicant. Now applicant contends that since the contract is foreclosed by the respondent, the retention amount which is payable after passing of the final bill should be paid to the applicant. Thus, applicant prays the Tribunal to direct the respondent to refund the amount to the Applicant.

12. Learned counsel for the respondent stated that corporate debtor had failed to perform the terms and conditions of the tender like timely completion of different phases of the project and such default constituted breach of the terms and conditions of the contract. Respondent further submitted that as applicant could not complete the contract in time, thus the contract has been foreclosed by the respondent and the remaining work was assigned to some other vendor.

13. Respondent contended that since applicant has breached terms of the contract and not completed it in time the respondent legally has encashed the retention amount BGs and other PBGs and it is not liable to return the 10% retention amount held by it. Respondent submits that if applicant has any dispute pertaining to the terms and conditions of the contract which

inter-alia deals with release of retention amount, the same has to be raised before appropriate court/forum/Tribunal as the provisions of I&B Code, 2016 are of summary in nature and do not contemplate adjudication of such complicated disputes. Therefore, the respondent pleaded for dismissal of this Application.

Our findings:

14. Before we decide the point, we wish to first explain what is retention money, and for what purpose it is deducted from the bills and when it is paid back to the contractor/ vendor? It is a common practice in the construction industry to withhold a certain percentage of the contract amount from the bill amount payable to the contractor by the project owner until the completion of the construction project as per the terms and conditions of the said contract. This withheld amount serves as a form of financial security and is meant to ensure that the contractor fulfils all contractual obligations, including rectifying any defects or issues that might arise after the construction work is completed. Once the retention period has passed and the contractor has successfully fulfilled all contractual obligations, including rectifying any defects, the client releases the retained amount. This is typically done through a final payment or a

separate release process. The retention arrangement is typically outlined in the construction contract between the client and the contractor. For better understanding of the right of contractor / vendor to claim refund of retention amount we cite herein the ruling of Hon'ble Calcutta High Court order in Commissioner of Income-Tax vs Simplex Concrete Piles (India)

Pvt. para 12, wherein it was held that;

“12. The payment of retention money is deferred and is contingent on the satisfactory completion of the work and removal of defects and payment of damages, if any. Till then, there is no admission of liability and **no right to receive any part of the retention money accrues to the assessee**. Accordingly, the Tribunal was right in directing the Income-tax Officer to examine the question of retention money from this angle and make adjustments regarding the same, if necessary. ”

15. In the present case also the retention arrangement is typically outlined in the construction agreement between the corporate debtor/ applicant and the respondent according to which 20% retention money will be deducted and 10% of which can be paid back to the applicant upon furnishing of bank guarantees and rest 10% will be paid at the time of final payment. Admittedly, the project could not be completed by the corporate debtor and ultimately, the respondent foreclosed the contract and remaining part of the contract was assigned to some third person.

16. In view of the above backdrop, we are of the view that refund of retention money cannot be claimed by the applicant as a right as the payment of retention money is of contingent nature and can be claimed as a right only on the satisfactory completion of the work and removal of defects and payment of damages, if any as per the agreement. We further hold that adjudication of this application at this stage and under the circumstances of non-adherence to the terms and conditions of the agreement, will involve complex factual and legal issues which cannot be decided in this summary enquiry.

17. In view of the above backdrop, we are of the view that this issue of refund of retention amount is not in the jurisdiction of this Tribunal, hence we dismiss this application as non-maintainable before this Tribunal. However, we grant leave to the Applicant to agitate this issue at appropriate forum as per law.

18. Accordingly, this Application is disposed of with no costs on either side.

SD

Charan Singh
Member Technical

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SD

Dr. Venkata Ramakrishna Badarinath Nandula
Member Judicial