S. No. 21

IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH – 1

ATTENDANCE CUM ORDER SHEET OF THE HEARING HELD ON **26-09-2022** AT 10:30 A.M. THROUGH VIDEO CONFERENCE.

IA(IBC)/355/2021 in CP(IB) No.363/7/HDB/2020
U/s 7 of IBC, 2016

IN THE MATTER OF:

India Infrastructure Finance Company Ltd **…Financial Creditor**

Vs

Ind-Barath Power Infra Ltd **…Corporate Debtor**

C O R A M:-
DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, HON'BLE MEMBER (JUDICIAL)
SH. VEERA BRAHMA RAO AREKAPUDI, HON'BLE MEMBER (TECHNICAL)

O R D E R

IA (IBC) 355/2021:-

Orders pronounced and recorded vide separate sheets. In the result the application is dismissed.

List CP (IB) No. 363/7/HDB/2020 for orders on 29.09.2022.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

NATIONAL COMPANY LAW TRIBUNAL

HYDERABAD BENCH, HYDERABAD

IA No.355 OF 2021
in
CP (IB) No.363/7/HDB/2020

APPLICATION UNDER RULE 131 OF NCLT RULES, 2016 READ WITH SECTION 60(5) OF THE IBC, 2016.

BETWEEN :

Ind Barath Power Infra Ltd.

.. Applicant
Corporate Debtor

VERSUS

India Infrastructure Finance Co. Ltd.

.. Respondent
Financial Creditor

Date of order : 26th September 2022

Coram:
HON'BLE DR. VENKATA RAMAKRISHNA BADARINATH NANDULA, MEMBER (JUDICIAL)
and
HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI MEMBER (TECHNICAL)

Parties / counsels present:

For applicant .. Shri Yogesh Kumar Jogia, Advocate
Assisted by Shri DVAS Ravi Prasad, Advocate

For respondent .. Shri D.V. Sitaram Murthy, senior Counsel assisted by Shri Amir Bavani, advocate.

PER BENCH

ORDER

The applicant herein/ Corporate Debtor has filed this application, *inter alia,* praying that:

> "*(a) Pass an order directing the Financial Creditor/ respondent to produce for verification of this Hon'ble Tribunal the original copy of the corporate guarantee dated 20.05.2015 stated to have been executed and tendered/ submitted/ furnished to the Financial creditor."*

2. Averments made in the IA are such that:

(i) Financial Creditor has claimed that the Corporate Debtor executed Deed of Corporate Guarantee in favour of the Power Finance being security agent on 20.05.2015. In spite of such claim the Corporate Guarantor has never furnished the said Corporate Guarantee to the Financial Creditor.

(ii) Since the Financial Creditor relies on and invokes the said Corporate Guarantee, in para 1 of Part-IV of the Company Petition and the said copy of the said Corporate Guarantee dated 20.05.2015 is annexed to the Company Petition as Annexure-A8, it has become necessary for the Corporate Debtor to seek the said Corporate Guarantee to bring the truth on record.

3. Reply dated 01.12.2021 is filed by the Financial Creditor contending that:

(i) While adjudicating a petition under section 7 of the I&B Code, 2016, this Tribunal is concerned with existence of debt and default and completeness of the application. To place reliance on any other irrelevant details for admission of the Company Petition under section 7 of the I&B Code is in contravention of the established principles of the Code. In this regard the Financial Creditor relied on the following decisions:

- Decision of the Hon'ble NCLAT dated 29.01.2021 in The South Indian Bank Ltd Vs. Gold View Vyapar Pvt Ltd.
- Decision of the Hon'ble Supreme Court dated 31.08.2017 in Innoventive Industries Ltd Vs. ICICI Bank & another.
- Decision of the Hon'ble NCLAT dated 06.09.2019 in Vineet Khosla Vs. Edelweiss ARC Ltd & others.
- Decision of the Hon'ble NCLAT dated 06.08.2019 in Shobhnath & others Vs. Prism Industrial Complex Ltd.
- Decision of the Hon'ble NCLAT dated 01.02.2021 in Vibrant Buildwell Pvt Ltd Vs. Dilwara Leasing & Investments Ltd.

(ii) It is submitted by the Financial Creditor that this Tribunal is not required to enter into the disputed questions of facts and need not decide veracity and legality of the material documents in the Company Petition. Thus, production of the original copy of the Guarantee Deed as prayed for by the Corporate Debtor in the application is not required.

4. REJOINDER DATED 13.12.2021 is filed on behalf of the Corporate Debtor contending that:

(i) On the plea taken by respondent/ Financial Creditor that the document in question, Corporate Guarantee, is a material document and the question raised is disputed question of fact, which can be decided in trial, therefore the instant petition warrants rejection, the Corporate Debtor relied on decision of the Hon'ble Supreme Court in Sesh Nath Singh Vs. Baidyabati Sheoraphuli Cooperative Bank Ltd., (2021) 7 SCC 313, wherein the Hon'ble Apex Court observed that, "*Adjudicating authority does not resolve dispute.*"

(ii) The applicant/ Corporate Debtor claims that in view of the fact that the respondent neither produced original Corporate Guarantee dated 20.05.2015 nor confirmed that they are in possession of the same this petition deserves dismissal.

5. This is an application filed by the Corporate Debtor, for a direction to the Respondent/ Financial Creditor to produce for verification of this Tribunal the original Corporate Guarantee dated 20th May 2015 stated to have been executed and tendered/ submitted/ furnished to the Respondent/ Financial Creditor and to pass such other and further orders as this Tribunal may deed fit and proper in the circumstances of this case.

6. The petitioner/ Corporate Guarantor, contends that there is no denial that in pursuance of modification of loan vide letter dated

20.05.2015, the petitioner agreed to execute Corporate Guarantee and in pursuance thereof had executed the Corporate Guarantee. However, after execution the same was never submitted/ tendered/ furnished to the Respondent/ Financial Creditor herein. It is further contended that since the respondent/ / Financial Creditor is relying upon the Corporate Guarantee and its invocation and as per the records of the Petitioner the said Guarantee was never submitted/ tendered or furnished, the present application is filed to bring the truth on record by seeking discovery of Corporate Guarantee dated 20.05.2015 stated to have been submitted/ tendered/ furnished to the / Financial Creditor in terms of one of the conditions for sanction enjoined in letter dated 20.05.2015. Thus, contending the petitioner has prayed for allowing this petition.

7. Per contra, the respondent/ / Financial Creditor while denying the averments made in the petition, would contend that the petitioner is attempting to mislead the Tribunal as such the instant application is liable to be dismissed. The respondent states that the present application is filed only to delay the proceedings. It is further contended that as the Corporate Guarantor had categorically admitted execution of Corporate Guarantee dated 20.05.2015 and a copy of the same is already filed by the respondent/ Financial Creditor along with the cop, the present application

is thoroughly misconceived and unsustainable under the law. It is further contended that the scope of inquiry in an application under section 7 of the IB Code, 2016 does not even provide for /contemplate a petition of this nature. As such the petition is liable to be dismissed. The respondent placed reliance on the following rulings in support of its contentions that the present petition is not maintainable.

- B.K. Educational Services Private Limited Vs. Parag Gupta and Associates, (2019) 11 SCC 633.
- Hindustan Construction Co. Ltd. Vs. State of Bihar and others, (1999) 8 SCC 436,
- State Bank of Travancore Vs. Kingston Computers India Private Limited, (2011) 11 SCC 524, and
- Syndicate Bank Vs. Channaveerappa Beleri and others, (2006) 11 SCC 506.

Thus, contending the respondent prayed for dismissal of the petition.

8. In light of the above discussion the point that emerges for consideration is:

- Whether the Petitioner herein is entitled to invoke the power of the Adjudicating Authority under Rule 43 of the NCLT Rules, to call upon the Respondent/ / Financial Creditor to produce the original Corporate Guarantee deed dated 20.05.2015 executed but allegedly not submitted/ tendered/ furnished to the Financial Creditor *for verification of this Tribunal?*

9. We have heard Shri Yogesh Kumar Jogia, learned counsel appearing with Shri DVAS Ravi Prasad, learned counsel for the petitioner; and Shri D.V. Sitaram Murthy, learned senior counsel appearing with Shri Amir Bavani, learned counsel for the respondent. Perused the record and the case law.

10. Ld. Counsel for the Petitioner/Corporate Debtor would contend that in pursuance of modification of loan vide letter dated 20.05.2015, the petitioner agreed to execute Corporate Guarantee and in pursuance thereof had executed the Corporate Guarantee. However, after execution the same was never submitted/ tendered/ furnished to the Respondent/ Financial Creditor herein, it was never submitted/ tendered/ furnished to the Financial Creditor. Therefore, the petitioner seeks a direction to the respondent/ Financial Creditor to place the original Corporate Guarantee before this tribunal for its perusal.

11. However, the Ld. Sr. Counsel for the respondent/Financial Creditor contends that the Petitioner/corporate debtor having admitted the execution of the Corporate Guarantee dated 20.05.2015, where under it had duly undertaken to discharge the liability of the borrower/ Ind Barath Power (Madras) Limited, which is admittedly irrevocable is bound by the terms of the said guarantee and cannot insist the Financial Creditor to

produce the original Corporate Guarantee deed dated 20.05.2015 for verification of this Tribunal. Ld. Sr. Counsel further submits that under the scheme of adjudication in an application under Section 7 IB Code, it for the Tribunal to ascertain the existence of a default from the evidence either primary or secondary furnished by the financial creditor under sub-section (3) of Section 7 of IB Code, and the corporate debtor cannot insist that a particular document be produced by the financial creditor.

12. At the outset it may be stated that inquiry in an application under section 7 of the I&B Code, 2016 which is summary, is limited to the extent of finding whether the Financial Creditor has established the existence of a debt, which is due and payable to the financial creditor by the corporate debtor and the corporate debtor has *defaulted* in payment of the same.

13. In terms of subsection 4 of section 7 of IB Code, 2016 the Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor under sub-section (3).

14. Subsection (3) of section 7 of IB Code, 2016 states that the financial creditor shall, along with the application furnish—

> "*7. Initiation of corporate insolvency resolution process by financial creditor.*
>
> *(3) The financial creditor shall, along with the application furnish –*
>
> *(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;*
>
> *(b) the name of the resolution professional proposed to act as an interim resolution professional; and*
>
> *(c) any other information as may be specified by the Board.*"

Since the case on hand being one under section 7 of IB Code, it is for the financial creditor to place the necessary record enabling this Adjudicating Authority to ascertain from the record produced in any, the existence of a debt and its default by the corporate debtor Therefore, if a particular document be it primary or secondary is not placed/produced before the Tribunal by the financial creditor, the consequences if any, for such non-production may at best fall for consideration and invocation of the power of this Adjudicating Authority does not arise

15. Here we usefully refer to Rule 43 of NCLT Rules, which is as below:

> ***"43. Power of the Bench to call for further information or evidence.*** *–*
>
> *(1) The Bench may, before passing orders on the petition or application, require the parties or any one or more of them, to produce such further documentary or other evidence as it may consider necessary:-*

(a) for the purpose of satisfying itself as to the truth of the allegations made in the petition or application; or

(b) for ascertaining any information which, in the opinion of the Bench, is necessary for the purpose of enabling it to pass orders in the petition or application.

(2) Without prejudice to sub-rule (1), the Bench may, for the purpose of inquiry or investigation, as the case may be, admit such documentary and other mode of recordings in electronic form including e-mails, books of accounts, book or paper, written communications, statements, contracts, electronic certificates and such other similar mode of transactions as may legally be permitted to take into account of those as admissible as evidence under the relevant laws.

(3) Where any party preferring or contesting a petition of oppression and mismanagement raises the issue of forgery or fabrication of any statutory records, then it shall be at liberty to move an appropriate application for forensic examination and the Bench hearing the matter may, for reasons to be recorded, either allow the application and send the disputed records for opinion of Central Forensic Science Laboratory at the cost of the party alleging fabrication of records, or dismiss such application."

Thus, it is clear from the above provision that for the purpose of satisfying itself as to the truth of the allegations made in the petition or application before passing the order, if the Adjudicating Authority require the parties to produce such further documentary or other evidence as it may consider necessary, the Adjudicating Authority may pass a direction to produce the document, as such a direction to produce a document at the behest of the opposite party is neither contemplated nor be given at the behest of the party under this Rule.

16. Therefore, in the light of our discussion above and taking into consideration the facts and the circumstance of the case besides the submissions of the Ld. Counsel for both sides, we do not find any merit or substance in the Application and the same therefore deserves to be dismissed. However, with an observation that if before passing the order in the Company Petition this Adjudicating Authority comes to the conclusion that the original of the Corporate Guarantee is essential for the disposal of this application, the Adjudicating Authority will not hesitate to invoke its power under section 43 of NCLT Rules.

17. In the result, IA No.355 OF 2021 in CP (IB) No.363/7/HDB/2020 is hereby dismissed. No costs.

Sd/-

VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)

Sd/-

DR. N.V. RAMAKRISHNA BADARINATH
MEMBER (JUDICIAL)

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