



भारतीय दिवाला और शोधन अक्षमता बोर्ड
Insolvency and Bankruptcy Board of India

7th Floor, Mayur Bhawan, Connaught Place, New Delhi – 110 001

20th August 2023

Subject: Judgment dated 18th August 2023 of National Company Law Appellate Tribunal, Chennai Bench in the matter of Vijay Kumar Garg, Liquidator of M/s Lance Vidarbha Thermal Power Limited Vs. Deputy Commissioner of Customs & Ors. [Company Appeal (AT)(CH) (Ins) No. 259 of 2023]¹

Whether the BGs and FDRs deposited by the CD in lieu of materials received at the port and further released by the customs from Nhava Sheva Port and the Customs Private Bonded Warehouse at Wardha, be returned to the CD/liquidator?

I. BRIEF BACKGROUND

The present appeal has been filed against the order dated 15.06.2023 in I.A Nos. 636 of 2022 in CP (IB) No. 529/7/HDB/2018 passed by AA, Hyderabad Bench that rejected the application of liquidator and allowed invocation of Bank Guarantee (BG) during moratorium under section 14 of Code. In the facts of the case, for setting up a power project in Wardha Maharashtra, which was accorded an Importer Exporter Code (IEC) by Directorate General of Foreign Trade, Government of India, Corporate Debtor (CD) had to import materials from China. The project by virtue of being accorded the status of Provisional Mega Power Project was allowed to import material at zero import duty. The Ministry of Power provided the relief of zero import duty on a condition that CD had to furnish security in the form of Fixed Deposit Receipts(s) (FDR) for an amount equal to customs/excise duty payable. Furthermore, when the project acquires the status of Final Mega Power Project, securities submitted in the form of BG and FDR shall to be returned to CD.

CD obtained the status of Provisional Mega Power Project on 21.11.2011, which was valid till 21.11.2021. Subsequently, CD imported part of the material and furnished a BG in favor of Deputy Commissioner of Customs. Some more material remained at the port as CD could not furnish BG in lieu of payment of customs duty. Deputy Commissioner filed its claim pertaining to differential duty plus interest related to the materials.

CIRP was initiated against the CD while BGs and FDRs remained with the customs authority, and the material remaining in the customs warehouse was ordered to be sold.

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Appeal was filed by the liquidator for release of material instead of joint sale of the material held in Custom Private Bonded Warehouse.

Findings and Observations of the Hon'ble NCLAT

NCLAT while disposing the appeal relied on the judgment of Hon'ble Supreme Court in the matter of *State Bank of India vs. V. Ramakrishnan & Anr. (Civil Appeal No. 3595 of 2018 with Civil Appeal No. 4553 of 2018)* and its own judgment in the case of *Bharat Aluminium Co. Ltd. vs. M/s. J.P. Engineers Pvt. Ltd. & Anr. [CA(AT)(Insolvency) No. 759 of 2020]*, and held that BG can be invoked even during moratorium period as per section 14 of Code. NCLAT reiterated the point of view by referring to the excerpts of the two judgments i.e. *“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 third party like surety. Bank guarantee can be invoked even during moratorium period issued under section 14 of the IBC in view of the amended provision under section 14 (3)(b) of the IBC.”*