

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**

**CHENNAI BENCH**

**Company Appeal (AT) (CH) (Insolvency) No. 259 of 2023**

**In the matter of**

**Mr. Vijay Kumar Garg,  
Liquidator of  
M/s. Lance Vidarbha Thermal Power Limited,  
Plot No. 4, Software Units Layout, Hitech City,  
Madhapur, Hyderabad-500081.  
Telangana. ....Appellant**

**Versus**

**Deputy Commissioner of Customs,  
Division-I, Nagpur, GST Bhawan,  
Telangkhedi Road, Civil Lines,  
Nagpur-440001. Maharashtra. .... Respondent No. 1**

**Deputy Commissioner of Customs,  
Gr. VI, Nhava Sheva-V, JNCH,  
Tal-Uran, dist.- Raigad,  
Maharashtra-400707. .... Respondent No. 2**

**Assistant Commissioner of Customs,  
Contract cell, 9<sup>th</sup> Floor,  
New custom House, Ballard Estate,  
Mumbai-400001. .... Respondent No. 3**

**Present**

**For Appellant: Mr. A. Abdul Hameed, Sr. Advocate  
Ms. Anbarasi Rajendran, Advocate**

**For Respondent No. 3: Mr. Chiranjeet Singh, (Party-in-Person)**

**Judgment  
(Virtual Mode)**

**(Date: 18.08.2023)**

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**{Per: Dr. Alok Srivastava, Member (T)}**

This appeal has been filed by the Liquidator of Lance Vidarbha Thermal Power Limited (“Corporate Debtor”) under section 61 of the Insolvency and Bankruptcy Code, 2016 (in short “IBC”) aggrieved by the order dated 15.6.2023 (Impugned Order) of the Adjudicating Authority (National Company Law Tribunal, Hyderabad Bench) in IA No. 636 of 2022 in CP (IB) No. 529/7/HDB/2018, whereby the Adjudicating Authority has rejected the application of the Liquidator and allowed invocation of the Bank Guarantee (“BG”) during the moratorium period in force under section 14 of IBC.

2. Briefly, it is the case of the Appellant that the Corporate Debtor was setting up a power project of 2x660 MW in Wardha, Maharashtra and in this connection, he had to import materials relating to the Boiler, Turbine, Generator from China and the project was accorded an Importer Exporter Code (IEC) No. 0910024219 by the Directorate General of Foreign Trade, Government of India. The Appellant has further stated that the project was accorded status of Provisional Mega Power Project and

was allowed by the Ministry of Power to import the said equipment at zero import duty subject to the condition that the corporate debtor was required to furnish security in the form of Fixed Deposit Receipt ("FDR") for an amount equal to the customs/excise duty payable valid for a term of 36 months, which was extended to 120 months, within which the project company had to execute long term Power Purchase Agreement (PPA). It was also stipulated that after obtaining the Final Mega Power Project status within the stipulated period, the securities submitted in the form of Bank Guarantee (BG) and Fixed Deposit will be returned to the corporate debtor and the corporate debtor was accorded the status of Provisional Mega Power Project on 21.11.2011, which was valid till 21.11.2021.

3. The Appellant has further stated that the bond of Rs. 2160 crores and a BG of Rs. 10 crores issued by the Punjab National Bank were executed for the purpose of registering the contract in terms of the Project Import Regulations, 1986 and Customs Tariff Act, 1975 with the customs authorities. Later BGs were also issued by the banks when the imported materials were released from Customs Private Bonded Warehouse without payment of requisite import/customs duty. He has further stated that the

BGs which were issued by the bank carry a clause that they will renew the same on their own till the bank guarantee is fully discharged by the Deputy Commissioner of Customs, Nhava Sheva/Mumbai.

4. While explaining various aspects of this case, the Appellant has added that the corporate debtor imported certain materials to the tune of 32,786 MT through the Nhava Sheva Port, District Raigad for the project and out of this material aggregating to 8454 MT was shifted from the port premises to the Customs Private Bonded Warehouse near the project site in District Wardha (Maharashtra). Later, 4722 MT out 8454 MT of materials was released and lifted by the corporate debtor out of the Customs Private Bonded Warehouse by furnishing BG to the tune of Rs.17,44,76,012 in favour of the Deputy Commissioner of Customs. Thus, material aggregating 3732 MT was still lying in the Customs Private Bonded Warehouse as the corporate debtor could not furnish BG as required in lieu of payment of customs duty. He has further added that the Deputy Commissioner of Customs, Nagpur filed his claim in July, 2021 in Form 'C', but was asked by the Resolution Professional ("RP") to file its claim under Form 'G' and subsequently Respondent No. 1 filed its claim under

Form 'G' on 20.12.2021 of an amount Rs.65,57,71,618/- regarding differential duty plus interest pertaining to the materials. Thus, this claim of R-1 filed under Form 'G' was admitted by the Liquidator vide letter dated 23.3.2021.

5. In relation to the Deputy Commissioner (Customs), Raigad, R-2, the Appellant has stated that 32,786 MT of material was imported through Nhava Sheva Port, out of which 8454 MT was shifted to the Customs Private Bonded Warehouse in Wardha. The balance material aggregating to 24,332 MT was under the purview of Deputy Commissioner, Customs, Raigad and out of this 11877 MT was released after payment of full duty by the corporate debtor under the provisions of the Mega Power Certificate. Later, balance 12435 MT were released after corporate debtor gave securities in the Form of FDs or BG. The Appellant has further stated that the R-2 filed his claim after a delay of four months from the last date of receipt of claims, but did not file any application for condonation of delay before Learned NCLT, and hence, no claim of R-2 stood admitted by the RP.

6. In relation to R-3/Assistant Commissioner of Customs, Mumbai, the Appellant has stated that out of the materials imported, 7069 MT pertaining to Mumbai Customs was auctioned by Mumbai Port Trust on 14.5.2019 due to non-payment of wharfage and demurrage charges. The balance 12,709 MT of material was released and shifted to the plant site. He has added that for the balance material, FDs and BGs were furnished by the corporate debtor in favour of Deputy Commissioner of Customs, Mumbai for release and lifting of materials amounting to 12,617 MT by the corporate debtor. The Appellant has stated that R-3 has also not filed his claims till date before the liquidator.

7. The Appellant has further stated that on direction of the Stakeholder Consultation Committee, he filed IA No. 636/2022 against the Respondents with the prayer for release/delivery of the material instead of joint sale of the material held in Custom Private Bonded Warehouse in consonance with the judgment of Hon'ble Supreme Court in the matter of **ABG Shipyard vs. Central Board of Indirect Taxes and Customs (Civil Appeal No. 7667/2022)**. Another application bearing no. 781/2023 was filed in IA No. 636/2022 by R-1 with the prayer to set aside the ex-parte order against R-1 and to take his counter on record, which was allowed *Company Appeal (AT) (CH) (Insolvency) No. 259 of 2023*

and the counter of R-1 was taken on record, but R-2 and R-3 remained ex-parte. In IA No. 636/2022, the Impugned Order dated 15.6.2023 came to be passed by which the relief sought for allowing sale of material held in Customs Private Bonded Warehouse at project site in Village Mandawa, Dist. Wardha was allowed and the other relief seeking direction to Respondents to return BGs to the Appellant was rejected and while no order was passed in regard to the third relief, which was for direction to the Respondents to return the FDRs back to the Appellant. The Appellant has submitted that the corporate debtor was provided Mega Power Project status and the BGs and FDRs were issued in favour of the Respondents in lieu of the duty. Initially, the FDRs were issued and later, after permission of the Government, BGs were accepted instead of FDRs. The Appellant has filed this appeal aggrieved by the Impugned Order in that the Adjudicating Authority did not deal with all the three prayers regarding material in Customs Private Bonded Warehouse at the project site, BGs and FDRs on the same footing and should have ordered return of BGs and FDRs. The Appellant has, therefore, prayed for setting aside the Impugned Order dated 15.6.2023 passed in IA 636/2022 to the extent of rejection of return of BGs and allowing the reliefs of return of BGs and FDRs as prayed in IA No. 636 of 2022.

8. We heard the arguments of the Learned Counsels for the parties and perused the record.

9. The main issues in this appeal is whether the BGs and FDRs that were deposited by the corporate debtor in view of various materials received at the port and released by the customs from Nhava Sheva Port and the Customs Private Bonded Warehouse at Wardha, should be returned to the corporate debtor/liquidator.

10. The Learned Counsel for Appellant has argued that the corporate debtor is now in liquidation and R-1 has filed claim in the CIRP, which was admitted. In addition, he has submitted that R-2 filed his claim after a delay of four months from the last date of receipt of claim and therefore, his claim was rejected since there was no application for condonation of delay filed before the Adjudicating authority, which was allowed and also that R-3 did not file any claim before the Appellant. He has argued that once opportunity was provided to the Respondents to file their claims, these claims/dues will be considered in the light of section 53 of the IBC during the liquidation, and therefore, the BGs and FDRs

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that were provided by the corporate debtor should be returned so that these amounts could be used while for the benefit of all the stakeholders, including the Respondents, while paying of their dues. He has further argued that the objective of the IBC is maximization of value of the corporate debtor and therefore, with the return of BGs and FDRs held by R-1, R-2 and R-3, these amounts would go into the kitty to be used for paying of the debts of the corporate debtor. He has argued that the value maximization of the corporate debtor is the underlying theme of IBC, which cannot be ignored and the same should accrue to the benefit of all stakeholders and creditors of the corporate debtor.

11. The Learned Counsel for Appellant has cited the judgment of Hon'ble Supreme Court in the matter of **ABG Shipyard vs. Central Board of Indirect Taxes and Customs (supra)**, wherein it is clearly held that the claims can be assessed by the customs authorities, but no recovery can be undertaken by them and the proper course for them is to file their claims in the liquidation process which after due consideration shall be distributed in accordance with the provisions of section 53 of IBC. The relevant portion of the judgment is as under:-

*“44 Therefore, this Court held that the authorities can only take steps to determine the tax, interest, fines or any penalty which is due. However, the authority cannot enforce a claim for recovery or levy of interest on the tax due during the period of moratorium. We are of the opinion that the above ratio squarely applies to the interplay between the IBC and the Customs Act in this context.*

*45 From the above discussion, we hold that the respondent could only initiate assessment or re-assessment of the duties and other levies. They cannot transgress such boundary and proceed to initiate recovery in violation of Sections 14 or 33(5) of the IBC. The interim resolution professional, resolution professional or the liquidator, as the case may be, has an obligation to ensure that assessment is legal and he has been provided with sufficient power to question any assessment, if he finds the same to be excessive.”*

12. The Learned Counsel for Appellant has also argued that the BGs were furnished by the corporate debtor pursuant to the receipt of Mega Power Project status and therefore, BGs should also be treated at par with the FDRs, which are clearly assets of the corporate debtor. He has emphasized that FDRs were provided by the corporate debtor out of the funds of the corporate debtor and therefore, they are clearly the assets of the corporate debtor, which should be returned to the Liquidator for distribution as part of the liquidation state. The Learned Counsel for Appellant has also argued that the Respondents cannot claim any amount covered under FDRs and BGs in term of section 33(5) of the IBC and further in the definition of ‘property’ as defined in section 3(27)

of the IBC, which includes money, goods actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property. Therefore, the Adjudicating Authority should have directed return of FDRs and BGs (which were issued in lieu of FDRs) to enable the Liquidator to include the same in liquidation state.

13. The Learned Counsel for Appellant also referred to the amendment in section 14 of the IBC i.e. section 14(3)(b), which is applicable only in a case where guarantee is given at the instance of the third party or promoter director on behalf of the corporate debtor and not by the corporate debtor itself. The Learned Counsel for Appellant has reiterated that R-1 has filed its claim before the Liquidator and therefore, is now not entitled for return of BG amount and could only avail whatever would be the distributed amount consequent to its claim under the waterfall mechanism of section 53 of IBC. The Learned Counsel for Appellant has also claimed that the Appellant's prayer regarding return of FDRs has not been adjudicated in the Impugned Order

and the FDRs and the BGs both should be returned to the Liquidator/corporate debtor as argued earlier.

14. The Learned Counsel for Appellant has relied on the judgment in the matter of **ABG Shipyard vs. Central Board of Indirect Taxes and Customs (supra)** to claim that the BG and the FDRs cannot be invoked by Deputy Commissioner of Customs at Nagpur, Nhava Sheva and Mumbai. He has placed reliance on paras 44 and 45 of the above-mentioned judgment to content that the customs authorities could only initiate assessment or re-assessment of the duties and other levies, but cannot proceed to initiate recovery in violation of Section 14 or 33(5) of the IBC.

15. We note that in the present case, invocation of BG is not about recovery of any claim by the customs authorities, but is about revocation of surety provided by the corporate debtor to the customs authorities in the form of FDRs and BG. In this connection, the judgment of the 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)** is noted, wherein Hon'ble Supreme Court has noticed the *Company Appeal (AT) (CH) (Insolvency) No. 259 of 2023*

observations in the report dated 26.03.2018 of the Insolvency Law Committee appointed by the Ministry of Corporate Affairs, which is as follows:-

*“(iv) to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-a-vis the moratorium on the assets of the corporate debtor, it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed under the Code;”*

16. In line with the recommendation of the Insolvency Law Committee, an amendment was effected in the IBC by which section 14(3) was introduced by Act 26 of 2018. This sub-section 3 of section 14 of IBC is as follows:-

**“14. Moratorium –**

**xx xx xx xx**

*(3) The provision 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;*

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

17. The above decision of Hon’ble Supreme Court in the matter of **State Bank of India vs. V. Ramakrishnan & Anr. (supra)** has

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been noticed in the judgment passed by a coordinate bench of NCLAT in the matter of **Bharat Aluminium Co. Ltd. vs. M/s. J.P. Engineers Pvt. Ltd. & Anr.**[CA(AT)(Insolvency) No. 759 of 2020]. The said judgment of NCLAT observes in paragraphs 32-37 as follows:-

*“32. Hon’ble Supreme Court in the case V Ramakrishnan (Supra) held that sub-section 3(b) of Section 14 amendment being clarificatory in nature and is retrospective. Section 14 of the IBC refers only to debts due by Corporate Debtors, who are limited liability companies, and it is clear that the vast majority of the cases, personal guarantees are given by Directors who are not in management of the companies. The object of the IBC is not allowed such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why section 14 of the IBC is not applied to them. Also held that contract of guarantee is between the creditor and principal debtor and the surety whereunder the creditor has a remedy in relation to his debt against both the principal debtor and surety. As per Section 128 of the Contract Act, 1872 the liability of surety is coextensive with that of principal debtor and the creditor may go against either principal debtor or surety or both in no particular sequence.*

*33. We have considered whether the bank guarantee is an asset of Respondent No. 1 (Corporate Debtor).*

*34. Ld. Counsel for the Appellant has placed reliance on the Judgment of Hon’ble AP High Court in the case of Haryana Telecom Ltd. (Supra) 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” .*

*35. Ld. Counsel for the Appellant also cited the Judgment of Hon’ble Supreme Court in the Case of UP State Sugar Corporation (Supra) 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”.*

36. *Ld. Counsel for the Appellant has also cited the Order of this Appellate Tribunal in the Case of Gail India Ltd. (Supra) in this case the Corporate Debtor has issued performance bank guarantee whereas the case in hand is in regard to financial bank guarantee. Therefore, this judgment is not helpful to the Appellant.*

37. *With the aforesaid, 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 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.”*

18. The Learned Counsel for Appellant has cited the judgment of Hon’ble Supreme Court in the matter of **ABG Shipyard vs. Central Board of Indirect Taxes and Customs (supra)** in support of his contention. A perusal of this judgment shows that the customs authorities can assess/reassess customs/import duty, but are not allowed to recover such amounts, which should be claimed as part of the resolution process under IBC by the debtor. This judgment is distinguished on the basis that in the present case, the customs

authorities are not recovering any amount on the basis of assessed customs/import duty, but the issue in the appeal is about invocation of the BG and FDRs.

19. Therefore, in the light of the judgment of Hon'ble Supreme Court in the matter of **State Bank of India vs. V. Ramakrishnan & Anr. (supra)** and of this Tribunal in the matter of **Bharat Aluminium Co. Ltd. vs. M/s. J.P. Engineers Pvt. Ltd. & Anr.(supra)**, it is clear that section 14(3)(b) allows for invocation of BGs.

20. The Appellant has also raised the issue of return of FDRs and submitted that the Impugned Order of Learned NCLT does not adjudicate on relief sought with respect to the FDRs. In this connection, we are of the view that since Learned NCLT did not pass any explicit order regarding return of FDRs, it is presumed that such prayer that was made by the Liquidator in IA No. 636 of 2022 in CP (IB) No. 529/7/HDB/2018 was not acceded to and consequently rejected.



21. In view of the above stated position, we are of the view that the appeal is devoid of merit and does not deserve to be admitted at the initial stage itself.

22. The appeal is, therefore, dismissed with no order as to costs.

**(Justice M. Venugopal)**  
**Member (Judicial)**

**(Dr. Alok Srivastava)**  
**Member (Technical)**

**Chennai**

**18<sup>th</sup> August, 2023**

**/aks/**