

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) NO. 841 of 2021

[Arising out of the Order dated 25th August, 2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Court – IV), in I.A. No.3139/ND/2020 in C.P. (IB) No. – 364(ND)/2019]

IN THE MATTER OF:

**The National Small Industries Corporation
Limited (NSIC), Delhi**

Through Shri KGS Moorthy
Branch Office: NTSC Complex,
Okhala Industrial Estate,
Near Govindpuri Metro Station,
New Delhi – 110020
Email: delhinsic@nsic.co.in

...Appellant.

Versus

1. Sh. Prabhakar Kumar

Liquidator of Sh. Ganesh Equipment Pvt. Ltd.
Registration No. IBBI/IPA-002/IP-N00774/2018-
2019/12373
Having Office at: E-18, Ground Floor,
Gurunank Pura, Janakpuri,
New Delhi
Email: Prabhakar_acs@rediffmail.com

...Respondent No.1.

2. Canara Bank (formerly Syndicate Bank)

Through Branch Manager,
38, DLF Industrial Area, Kirti Nagar Branch,
New Delhi – 110015.

...Respondent No.2.

Present

For Appellant:

Mr. Sanjay Sharma Darmora and Mr. Yoginder P. Uniyal, Advocates along with Mr. K.G.S. Moorthy and Mr. O.P. Gupta (NSIC).

For Respondent:

**Mr. Ishwar Mohapatra, Advocate for Liquidator.
Mr. Sunil Kr. Jha, Advocate for R-2/Canara Bank.**

J U D G M E N T
(Through Virtual Mode)

[Per: Ajai Das Mehrotra, Member (T)]

1. The present Appeal is filed under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter called 'IBC, 2016') by National Small Industries Corporation Limited ('NSIC') Delhi (hereinafter called the 'Appellant') being aggrieved by the Order dated 25.08.2021 in I.A. No.3139/ND/2020 in C.P. (IB) No. – 364(ND)/2019, passed by the Learned Adjudicating Authority (National Company Law Tribunal, New Delhi, Court – IV).

2. I.A. No. 2256/2021 filed in the present Appeal was allowed vide Order dated 29.11.2021, condoning the delay of two days in filing the present Appeal. Amendment in cause title and pleadings, as requested by the Appellant were allowed in I.A.2555/2021, I.A.3344/2022 and I.A.3345/2022.

3. Brief facts of the case are that 'M/s. Ganesh Fire Equipments Private Limited' (hereinafter called 'Corporate Debtor') had entered in an Agreement dated 11.05.2012 with the Appellant for the raw material financial assistance against Bank Guarantee under the 'Raw Material Assistance Scheme' of the Appellant. The Appellant is a Government Company which facilitates MSME and also provides integrated support services under Marketing, Technology, Finance and other Support Services. It is submitted that as per Clause 4 of the Agreement, the Corporate Debtor had agreed and undertaken to repay the amount with interest. As per Clause 6 of the Agreement, raw material assistance was provided to the Corporate Debtor by the Appellant subject to furnishing of the Bank Guarantee in form of security. The relevant Clause 4

and Clause 6 of the Agreement dated 11.05.2012 are reproduced below for ready reference:

“4. That the amount(s) advanced, paid or incurred by the Corporation towards remittances for payment of material to the canalised/Government Agencies and others for storage, insurance charges, freight for movement of material, Clearance charges, charges for transporting the material, postal expenses and all other charges and expenses incurred by the Corporation in connection with the procurement of the material will be debited to the account of the Borrower and it agrees and undertakes to repay or reimburse the amount(s) so debited to its accounts with interest at the rate of 13.40 percent per annum or at such other rates as the Corporation may charge at its discretion depending upon the variation in its lending rates, within a maximum period of 90 days from the date of debit of such amount(s). In case the payment is not received within the stipulated period of 90 days, the Borrower shall be liable to pay additional interest Co 3 percent per annum on the amount(s) of the said advance and processing and administrative charges to the Corporation. The Borrower agrees that such repayment of or reimbursement of the amount debited to its accounts will be made on or before the expiry of 90 days from the data of delivery of the material to the Borrower or date of payment by Corporation whichever is earlier.

6. That the raw material assistance under this Agreement shall be granted by the Corporation to the Borrower subject to furnishing of the following securities by the Borrower. A Bank Guarantee executed by a Nationalized/Approved Bank to the satisfaction of the Corporation. The Corporation shall be entitled to invoke and encash the said Bank Guarantees on the terms and conditions as stipulated in the said Bank Guarantees. That the borrower hereby furnish the Bank Guarantees of the Nationalized Bank covering entire raw material assistance and requested the Corporation to waive the charge over hypothecated good/assets as the same are charged to the Bank. The Corporation has accordingly considered the request of the borrower and waived the creation of charge over the hypothecated good.” (sic)

4. Initially, the raw material financial assistance against Bank Guarantee was sought for Rs.1 Crore which was later increased to Rs. 2.99Crores by executing a supplementary Agreement dated 05.10.2018. In compliance of the two Agreements, 7 Bank Guarantees were submitted to the Appellant.

5. On an Application by the Operational Creditor M/s. Jasmeet Associates, the Corporate Debtor was admitted in Corporate Insolvency Resolution Process (‘CIRP’) in C.P. (IB) No. 364(ND)/2019. The announcement regarding initiation of CIRP was made in the newspapers on 12.02.2020. The Appellant invoked the Bank Guarantees vide letter dated 14.02.2020.

6. I.A. No.3139/ND/2020 in C.P. (IB) No. – 364(ND)/2019 was filed by the Resolution Professional praying that the actions of the Appellant in invoking Bank Guarantee were in violation of the provisions of Section 14(1)(c) of IBC, 2016, which provides Moratorium prohibiting any action to foreclose, recover or enforce any security interest created by the Corporate Debtor in respect of its property including any action under the SARFAESI Act, 2002.

7. The Adjudicating Authority vide Order dated 28.08.2021 quashed the Notices issued by the Appellant regarding invocation of Bank Guarantees. The relevant portion of the Order of the Adjudicating Authority is reproduced below for ready reference:

“15. Considering the documents on record and submissions made, we are of the view that the invocation of bank guarantee by NSIC in present case is not in consonance with provisions of code. While deciding this, aspect which needs to be looked into is whether present bank guarantee falls under the category of 'Performance Bank Guarantee' to qualify to exclude the same as per the provisions of section 3 (clause 31) of the I&B Code, 2016 and allow the invocation of such performance bank guarantee irrespective of the moratorium under section 14 of the code. The answer is No. The definition and

categorization of bank guarantees as per RBI guidelines clearly demarcates the area while considering particular bank guarantee for its classification. Name itself suggests financial bank guarantee for financial assistance and performance bank guarantee for non-performance of obligations in terms of performance of contract. NSIC admittedly was secured by bank guarantee against the purchase of raw materials and other allied purchases to enhance manufacturing of a unit, which is financial assistance to the unit. Nowhere the ingredients of performance bank guarantee are seen in the terms / clauses of bank guarantee in present case. Moreover, the Respondent No. 2 bank while filing its claim before RP has included the amount of bank guarantee in its total claim which is admitted by RP. Thus, the same claim cannot be allowed considered as payable twice though submitted by parties in different capacities.

16. As a consequence of above discussion, we allow the application and quash notices issued for invocation of bank guarantee by Respondent No. 1. A copy of the order shall be communicated to the Applicant and the Respondents by the Registry. A copy of the order shall be forwarded to IBBI for its records. The application is disposed of in terms of above order.”

8. Aggrieved by the said Order of the Adjudicating Authority, the present Appeal has been filed *inter alia* praying as under:

“(a) This Hon'ble Tribunal may be pleased to admit the Appeal, call for the records of proceedings and files from NCLT, New Delhi;

(b) Set aside the Order dated 25.08.2021 in IA No. 3139/ND/2020 in CP No. (IB)-364(ND)/2019 passed by the Ld. National Company Law Tribunal, New Delhi Bench at New Delhi and not to quash the notices issued for invocation of Bank Guarantees by the Appellant;

(c) This Hon'ble Tribunal may be pleased to declare that the Bank Guarantees in question can be invoked/encashed even during the moratorium period under section 14 of the IBC against the Corporate Debtor.

(d) Direct the Respondent No.2 to release the payment of Bank Guarantees invoked by the Appellant.

(e) Direct the Respondent No. 2 to release amount of interest @ 16.05% per annum on amount of Bank

Guarantees for date of invocation of such Bank Guarantees till date of realization of Bank Guarantees invoked.

(f) Pass any other order as this Hon'ble Tribunal may deem fit."

9. Learned Counsel for the Appellant submitted that in the Impugned Order the Adjudicating Authority has held that since the Bank Guarantee in question does not fall under the category of 'Performance Bank Guarantee' to qualify for exclusion as per provision of Section 3 sub-Section (31) of the IBC, 2016, invocation of such Guarantee is not permissible under Section 14 of the IBC, 2016. The Adjudicating Authority has erred in not accepting that the Bank Guarantee is irrevocable, unconditional and without demur and can be invoked even during the Moratorium period in view of the amended provisions under Section 14(3)(b) of the IBC, 2016. The Learned Counsel relied upon the Judgement of this Tribunal dated 10.01.2023, in the case of **Comp. App. (AT) (Ins.) No. 543 of 2021** titled as '**IDBI Bank Ltd.' Vs. 'Indian Oil Corporation Limited'**'. On the issue of double claim, the Learned Counsel for the Appellant submitted that the Appellant has not filed any claim either before the official Liquidator or the Resolution Professional. Thus, the question of claiming amounts pertaining to the Bank Guarantee twice does not arise at all. The Appellant is claiming the amount of Bank Guarantee from the Respondent Bank and even if the said amount of Bank Guarantee is included by the Bank in its claim before the Resolution Professional/Liquidator even then it will not amount to double claim.

10. Learned Counsel for the Respondent No. 1/Liquidator submitted that the Bank Guarantees as submitted by the Corporate Debtor were not Performance Bank Guarantee but only Financial Guarantees as they were

submitted only for obtaining raw material financial assistance and were not for securing the performance of providing any goods or services under any contract. The Learned Counsel further submitted that said Bank Guarantees are also not covered by the exception given in Section 14(3)(b) as it is not a 'surety' in a 'Contract of Guarantee' towards Corporate Debtor. Learned Counsel challenged the averment of the Appellant that Bank is a Corporate Guarantor and relied upon the provisions of Section 5A of the IBC, 2016 and submitted that Bank is merely issuing authority of a Bank Guarantee and cannot be treated as a Corporate Guarantor. Learned Counsel also pointed out that such averment is made by the Appellant for the first time before the Appellate Tribunal and no such averment was ever made before the Adjudicating Authority.

11. In its Written Submissions, Respondent No. 2 (Canara Bank) made submissions which were similar to the submissions made by the Liquidator stating that the Bank Guarantee invoked is a Financial Bank Guarantee, that Bank is not a Corporate Guarantor and that the provisions of Section 14(3)(b) of the IBC, 2016, are not applicable to the facts of this case.

12. We have heard the Learned Counsels for the Appellant and the Respondents and have perused their submissions.

13. The Adjudicating Authority while allowing the Application of the Resolution Professional has stated that invocation of Bank Guarantee by the Appellant (NSIC) is not in consonance with the provisions of the IBC, 2016, as the Bank Guarantees do not fall under the category of 'Performance Bank Guarantee' to qualify for exclusion as per the provisions of Section 3(31) of the IBC, 2016. The Adjudicating Authority held that since the Guarantee is

not 'Performance Bank Guarantee', the Moratorium under Section 14 shall apply. In arriving at this conclusion, the Adjudicating Authority noted that the Appellant (NSIC) had financed purchase of raw materials to enhance manufacturing capacity of the Corporate Debtor and was secured by the said Bank Guarantees, which tantamounts to financial assistance and there are no ingredients of linkage to performance to call it 'Performance Bank Guarantee'. We have gone through the provisions of the said Bank Guarantees and the Agreement between the Appellant and the Corporate Debtor wherein it is apparent that the Appellant was extending raw material assistance to the Corporate Debtor by providing finance on payment of normal interest of 13.40% and interest of 16.40% if the repayment is made beyond 90 days. The assistance was in the nature of financial assistance and the consequential Bank Guarantee was also for ensuring repayment/reimbursement. Clause 6 of the Agreement which is reproduced in para 3 supra clearly brings out that the Agreement was for financial assistance and the Bank Guarantee was to protect the interests of the Appellant regarding repayment.

14. The Appellant, however, had also adverted to Section 14(3)(b) of the IBC, 2016, and had submitted before the Adjudicating Authority that provisions of Section 14(3)(b) apply to the facts of the present case. In para 10 (ii) of its Impugned Order, the Adjudicating Authority has recorded the submissions of the Appellant regarding this. The Adjudicating Authority has also recorded the objections of the Resolution Professional in para 12 (ii) of the Impugned Order. However, this Tribunal finds that the Adjudicating Authority has ignored the submissions and has not given any observation or finding on applicability of provisions of Section 14(3)(b) of IBC, 2016.

15. From the perusal of the Agreement and the Bank Guarantee it is apparent that the Bank Guarantee was given by the Bank to secure the interest of the Appellant, as per Clause 6 of the Agreement reproduced supra in para 3, the raw material assistance under the Agreement was to be granted by the Appellant to the Corporate Debtor subject to furnishing of surety in the form of Bank Guarantee executed by a nationalised/approved Bank to the satisfaction of the Appellant. It further prescribes that the Appellant shall be entitled to invoke and encash the said Bank Guarantee on the terms and conditions as stipulated in the said Bank Guarantee. Para 31 of the said Agreement, reproduced below, provides that the Appellant shall have the right to recover the outstanding balance from the Guarantor Bank:

“31. Notwithstanding anything herein contained, the Corporation shall have the right to recover personally from the proprietor/Partners/Directors/members of the Borrower, from the first surety and second surety jointly and severally or from their properties or from the guarantor bank, as the case may be, the balance for the time being due from the Borrower and the Proprietor/Partners/Directors/Members of the Borrower of the first surety and second surety or the guarantor Bank, as the case may be hereby expressly waive/relinquish the defense/plea.”

(Emphasis Supplied)

16. From the perusal of the Bank Guarantee bond dated 30.05.2012, this Tribunal finds that the Bank had undertaken to pay the amounts due and payable under the said Guarantee without any demur, merely on a demand from the Appellant and the Bank had undertaken to pay the Appellant any amount so demanded notwithstanding any dispute raised by the Corporate Debtor and that the Bank's liability under the said Bank Guarantee is absolute and unequivocal. As per para 8 of the said Guarantee dated 30.05.2012, the Bank had undertaken not to revoke this Guarantee during

its currency except by previous consent of the Appellant. From the plain reading of the said document given at Page No. 88 to 91 of the Appeal Paper Book, it is apparent that the Bank had absolute, unequivocal and irrevocable liability to pay to the Appellant the amount guaranteed to the Appellant on demand without any demur and irrespective of any objection or dispute or any legal proceeding initiated by the Corporate Debtor.

17. Before deciding whether the case of the Appellant is covered under Section 14(3)(b) of the IBC, 2016, this Tribunal will like to consider why the provisions of Moratorium were brought in the IBC, 2016 and why the exception given in Section 14(3)(b) was brought in the said provisions in 2018. In the Report of the Bankruptcy Law Reforms Committee given in November, 2015, which was the precursor for the IBC, 2016, the aim of the Moratorium is stated in Para 5.3.1 as under:

“The motivation behind the moratorium is that it is value maximising for the entity to continue operations even as viability is being assessed during the IRP. There should be no additional stress on the business after the public announcement of the IRP. The order for the moratorium during the IRP imposes a stay not just on debt recovery actions, but also any claims or expected claims from old lawsuits, or on new lawsuits, for any manner of recovery from the entity.”

18. The Moratorium was envisaged to ensure that the Corporate Debtor's Assets are not liquidated or reduced till the CIRP is completed. The idea behind Moratorium was that no additional stress is brought on the business which is being rescued. In the instant case, the Appellant has raised the demand on the Bank for payment which was guaranteed by the Bank much prior to the initiation of the CIRP. No recovery is being made from the Corporate Debtor and therefore there is no threat immediately to the Assets

of the Corporate Debtor. As this Tribunal has noted in the pleadings, Appellant has not filed any claim before the Resolution Professional. Only the Guarantor Bank has filed its claim before the Resolution Professional.

19. This Tribunal would, at this stage, like to advert to provisions of sub-Section (1) and sub-section (3) of Section 14 of the IBC, 2016, which was amended in 2018 to introduce new Clause (b). While sub-Section (1) provides for Moratorium, the sub-Section (3) provides the exceptions to the Moratorium:

“14. Moratorium. –

(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely: -

(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a licence, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in

force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period;

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(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.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

(Emphasis Supplied)

20. The sub-Clause (b) was introduced in 2018 with retrospective effect from 06.06.2018 by Act 26 of 2018. The said amendment had followed the

Report of the Insolvency Law Committee given in March, 2018. In para 5.10 of the said Report, the Committee has noted as under:

“...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 parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of section 14.”

21. Since the assets of the ‘surety’ (Respondent No. 2) are separate from those of the ‘Corporate Debtor’, encashment of ‘Bank Guarantee’ would not impact the Assets of the ‘Corporate Debtor’. Only difference will be that instead of the Appellant, the claim against the said amount from the ‘Corporate Debtor’ will be shifted and will have to be raised by the Respondent No. 2 (Canara Bank). It has been submitted that the Appellant had not filed any claim before Resolution Professional and it is Respondent No. 2 who has filed the claim before the Resolution Professional.

22. As per the provisions of Clause (b) of sub-Section (3) of Section 14, the provisions of sub-Section (1) relating to Moratorium shall not apply to a surety in a contract of Guarantee to a Corporate Debtor. These terms are defined in Section 126 of the Indian Contract Act, 1872, which is given below for ready reference:

“126. “Contract of guarantee”, “surety”, “principal debtor” and “creditor”.—A “contract of guarantee” is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the “surety”; the person in respect of whose default the

guarantee is given is called the “principal debtor”, and the person to whom the guarantee is given is called the “creditor”. A guarantee may be either oral or written.”

23. The ‘Bank Guarantee’ is a ‘contract of Guarantee’ provided/furnished by the Bank, the “surety”, to perform the ‘promise’, or ‘discharge’ the liability, of the third person, being the Corporate Debtor herein, in case of his ‘default’. From the plain reading of Section 14(3)(b) of the IBC, 2016, along with Section 126 of the Indian Contract Act, 1872, it is apparent that the ‘Bank Guarantee’ given by the Respondent No. 2 to the Appellant is covered by the exclusion given in Section 14(3)(b) and that provisions of Section 14(1) shall not apply to the instant case.

24. The Appellant had also brought to the attention of this Tribunal to the Judgement of this Tribunal, wherein it was held that an irrevocable and unconditional ‘Bank Guarantee’ can be invoked even during Moratorium period in view of the amended provisions under Section 14(3)(b) of the IBC, 2016. The relevant portion of the Order of this Tribunal in ‘**IDBI Bank Ltd.’ Vs. ‘Indian Oil Corporation Ltd.’, Comp. App. (AT) (Ins.) No.543/2021**, dated 10.01.2023, is reproduced below for ready reference:

“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. We are conscious of the fact that the Bank has not taken any steps with respect to the alleged fraud, if any, between IOCL and the Corporate Debtor. The findings of the Hon’ble Arbitral Tribunal have also attained finality.

14. For all the foregoing reasons, this Appeal is dismissed accordingly. No order as to costs.”

25. In the instant case also the 'Bank Guarantee' is an 'irrevocable' and unconditional one, and the said Judgement squarely applies to the facts of this case on all fours.

26. In conclusion, as per the facts of this case, the 'Bank Guarantee', provided by the Respondent No. 2/Bank is held to be covered by the exception provided in provisions of Section 14(3)(b) of IBC, 2016, and the Moratorium prescribed under Section 14(1) of IBC, 2016, shall not apply to its 'Encashment'.

27. In the result, this Tribunal, in the teeth of foregoing qualitative and quantitative discussions mentioned supra, sets aside the Impugned Order passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Court – IV, in I.A. 3139/2020 in C.P. (IB) No.364(ND)/2019) and resultantly allows the present 'Appeal', of course, cementing on the reasons, ascribed to by this Tribunal. No order as to costs. The connected pending 'Interlocutory Applications', if any, are closed.

[Justice M. Venugopal]
Member (Judicial)

[Ajai Das Mehrotra]
Member (Technical)

**Principal Bench,
New Delhi
16th October, 2023**

himanshu