

**IN THE NATIONAL COMPANY LAW TRIBUNAL, MUMBAI
BENCH- I**

IA No. 2050 of 2023

IN

CP(IB) No. 3558 of 2018

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

IA No. 2050 of 2023

In the Application of

**Mr. Anil Mehta, Liquidator of Pratibha
Industries Limited**

...Applicant

Versus

VDB Projects Private Limited

...Respondents

In the matter of

Bank of Baroda

...Financial Creditor

Versus

Pratibha Industries Limited

...Corporate Debtor

Order Delivered on : 13.08.2024

Coram:

Hon'ble Member (Judicial) : SH. Justice Virendrasingh G. Bisht (Retd.)

Hon'ble Member (Technical) : SH. Prabhat Kumar

Appearances:

For the Applicant : Mr. Gaurav Jain, Advocate

For the Respondent No.1 : Mr. Rohan Aggarwal, Advocate

ORDER

Per: Prabhat Kumar, Member (Technical)

1. This Application bearing **IA No. 2050/2023** is filed by Mr. Anil Mehta, Liquidator of Pratibha Industries Limited (“**Applicant**”) in the Corporate Insolvency Resolution Process (“**CIRP**”) of Pratibha Industries Limited (“**Corporate Debtor**”) under the provisions of the Insolvency and Bankruptcy Code, 2016 (“**Code**”) seeking the following reliefs :

- a) Direct the Respondent to deposit an amount of Rs. 11,25,00,000/- (Rupees Eleven Crores Twenty-Five Lakhs Only) in the bank account of the Corporate Debtor bearing account no. 29100200000343, maintained with Bank of Baroda, Stressed Asset Management Branch having IFSC Code BARB0SAMMUM or such other amount as maybe deemed fit and proper.
- b) Direct the Respondent to pay interest @13% p.a. on the amount of EMD from the date of encashment notice sent to Bank of Baroda.

Brief Facts

2.1 This Tribunal initiated the liquidation proceedings against the Corporate Debtor vide Order dated 08.02.2021. On 01.03.2021, upon an application filed by the Liquidator, this Tribunal passed an order clarifying the Order dated 08.02.2021 and directing that the sale of the Corporate Debtor be conducted on a going concern basis.

Submissions made by the Ld. Counsel on behalf of the Applicant

- 2.2 On 10.06.2021, the Applicant issued an invitation for Expression of Interest (“**EOI**”) inviting parties to submit their proposal under Section 230 of the Companies Act, 2013 read with Regulation 2B of the Liquidation Regulations. The proposals received were not accepted by the Stakeholders’ Consultation Committee (“**SCC**”) and accordingly, the process was closed. Thereafter, on 23.10.2021 the Applicant issued a Sale Notice along with the E-auction Process Information Document for the sale of Corporate Debtor on a “going concern” basis.
- 2.3 On 22.11.2021, the Respondent No. 1 deposited INR 18,90,00,000/- (Rupees Eighteen Crores and Nineteen Lakhs Only) towards Earnest Money Deposit (“**EMD**”) through a Bank Guarantee that was valid up to 23.03.2022. The e-auction was scheduled on 11.12.2021 which failed since none of the prospective bidders participated in the e-auction. On 21.01.2022, the Applicant issued another Sale Notice for the sale of the Corporate Debtor and/or its business on a “going concern” basis scheduled to be held on 15.02.2022. The Respondent No. 1 submitted an EOI in relation to “Package A – Relinquished Assets” of the Corporate Debtor.
- 2.4 Upon request received from the Respondent herein, the EMD submitted by the Respondent by way of a Bank Guarantee of INR 18,90,00,000/- pursuant to the earlier e-auction in furtherance of the Sale Notice dated 23.10.2021 was carried forward in relation to the instant Sale Notice dated 21.01.2022.
- 2.5 The said e-auction was conducted on 15.02.2022, wherein the Respondent submitted a bid of INR 150,10,00,000/- (Rupees One Hundred Fifty Crores and Ten Lakhs Only). The Respondent was declared as the Successful Bidder in respect of “Package A – Relinquished Assets” of the Corporate Debtor, and a Letter of Intent (“**LOI**”) dated 07.03.2022 was issued in favour of the Respondent, which was unconditionally accepted by the Respondent on

08.03.2022. Pursuant thereto, on 17.05.2022, Applicant sent an email to the Respondent containing a preliminary draft of the Sale Agreement which was to be executed with the Sale Certificate to be issued upon payment of the entire sale consideration.

2.6 Meanwhile, the Bank Guarantee dated 21.11.2022 was nearing expiry. Therefore, upon request made by the Applicant, the Respondent extended the validity of the said Bank Guarantee from 23.03.2022 to 23.06.2023.

2.7 On 27.05.2022, the Respondent wrote an email to the Applicant assailing the issue of transfer of liabilities and on 31.05.2022 it filed an application bearing IA No. 1469 of 2022 majorly seeking direction to restrain the Respondent from insisting upon the execution of the 'sale agreement' in terms of the email dated 17.05.2022. However, *vide* an Order dated 03.06.2022, this Tribunal directed the Respondent to deposit an amount of Rs. 67.86 Crores along with interest at the rate of 12% on or before 06.06.2022. It further indicated that failure to comply with this Order for depositing the balance amount would culminate in cancellation of the sale process. In the meantime, on 06.06.2022, the 90 (ninety) days period for payment of the entire Sale Consideration Amount as per the E-auction Process Information Document expired. The Respondent filed another Application bearing I.A. No. 1517 of 2022 majorly praying for extension of time to deposit the amount of Rs. 67.86 crores along with interest at the rate of 12% by a period of 13 days.

2.8 On 13.06.2022, the Applicant informed the Respondent that upon failure of the Respondent to make payment of the entire Sale Consideration within the prescribed timelines, the sale process for sale of Relinquished Assets of the Corporate Debtor in favour of the Respondent stood cancelled. The Applicant further informed the Respondent that the Applicant shall invoke the Bank Guarantee dated 2.11.2022 and after realisation of the EMD aggregating to

INR 11,25,00,000/- (Rupees Eleven Crores Twenty-Five Lakhs Only), the balance shall be credited to the Respondent's account. However, instead of paying the sale consideration, Respondent No. 1 filed another Application bearing I.A. No. 1718 of 2022, inter alia, praying for a declaration that the email dated 13.06.2022 is illegal, null, and void wherein vide an Order dated 30.06.2022 in I.A. No. 1718 of 2022, this Tribunal directed the parties to maintain the status quo as on date till the disposal of the Application bearing I.A. No. 1469 of 2022.

2.9 On 23.12.2022, this Tribunal dismissed both the aforesaid applications, i.e. I.A. No.1469 of 2022 and I.A. No. 1517 of 2022 filed by the Respondent and directed the Applicant to get assets valued again and issue fresh E-auction sale notice and complete auction expeditiously.

2.10 The Respondent filed Company Appeal (AT)(Ins.) No. 55 of 2023 before the Hon'ble National Company Law Appellate Tribunal ("NCLAT"), challenging the order dated 23.12.2022 passed by this Tribunal.

2.11 On 20.01.2023, the Respondent herein submitted before the Hon'ble NCLAT that it was ready to deposit the entire bid amount with the Applicant within 3 weeks which may be kept in a fixed deposit receipt. The Hon'ble NCLAT recorded these submissions and directed that subject to the deposit of the entire bid amount by the Respondent No. 1 herein, the Applicant shall not proceed with the auction of the properties.

2.12 The Applicant submits that the Respondent No. 1 filed another application bearing I.A. No. 524 of 2023 before the Hon'ble NCLAT seeking modification of the Order dated 20.01.2023 to the extent that, instead of depositing the entire sale consideration

amount with the Liquidator, the Respondent be permitted to furnish a Bank Guarantee. The Hon'ble NCLAT, vide its Order dated 14.02.2023, was pleased to dismiss the said I.A. No. 524 of 2023.

2.13 On 28.02.2023, during the hearing of the Appeal before the Hon'ble NCLAT, the Respondent informed that they have challenged the Interim Orders dated 20.01.2023 and 14.02.2023 passed by the Hon'ble NCLAT before the Hon'ble Supreme Court of India vide Civil Appeal Nos. 1378 and 1379 of 2023.

2.14 On 03.03.2023, during the hearing of the said Civil Appeals, the Hon'ble Supreme Court did not find any error in the Orders dated 20.01.2023 and 14.02.2023 passed by the Hon'ble NCLAT and accordingly dismissed the Civil Appeals. Consequently, on 29.03.2023, the Hon'ble NCLAT also dismissed the appeal before them.

2.15 On 14.04.2023, the Applicant wrote to the Manager of Bank of Baroda requesting to invoke the said Bank Guarantee and remit the funds to the Corporate Debtor's account. On 25.04.2023 the Applicant sent another email to the Manager of Bank of Baroda explaining to him the entire situation including the fact that there was no embargo from any authority on encashing the said Bank Guarantee, requesting him to encash the Bank Guarantee and remit the funds. On 25.04.2023, the Chief Manager of the Bank replied to the said email stating that the said Bank Guarantee was not issued by it and that it had only advised the issuing bank. In response to the aforesaid email of Bank of Baroda, the Applicant herein once again sent an email on 29.04.2023 to the said Bank, however, through an email of 08.05.2023 the Bank once again expressed its inability to accede to Applicant's requests and advised the Applicant to take appropriate steps in this regard.

2.16 It is the Applicant's case that as per the provisions of the Liquidation Regulations and the e-auction Process Information Document, in

case the successful bidder is unable to pay the entire sale consideration within the prescribed timelines then the earnest money deposit furnished by the bidder shall be forfeited by the Liquidator. The liability of Respondent No. 1 does not come to an end once the Bank Guarantee is submitted, it shall remain liable until the EMD amount is actually encashed.

Submissions made by the Ld. Counsel on behalf of Respondent No. 1

- 3.1 The Respondent No. 1 submits that pursuant to issuance of the LOI on 07.03.2022, the Applicant shared a draft Sale Agreement which contained several clauses and conditions which were beyond the scope of the e-auction process document dated 30.01.2022 (“**Process Document**”). It is further submitted that the Process Document did not even entail that a separate Sale Agreement would be entered into between the Applicant and any prospective purchaser, upon conclusion of the auction process.
- 3.2 Respondent No. 1 further submits that the EMD was valid only upto 23.06.2022. It is submitted that the Applicant did not take any steps to either invoke or encash the EMD or call upon the Respondent to extend the validity thereof. This Tribunal had directed the parties to maintain status quo vide its Order dated 30.06.2022. However, by this time, the EMD had already expired and there is no provision in the Process Document for extension of Bank Guarantee.
- 3.3 The Respondent No. 1 has relied on Clause 4.1 of the Process Document to submit that the claim period of the EMD was a maximum of 6 months. The Process Document does not provide for indefinite extension of time for submission of the EMD, and therefore, the present IA having been filed after almost 10 months from the expiry of the EMD is an afterthought and not maintainable.
- 3.4 The Respondent No. 1 submits that when the Applicant requested the Bank of Baroda for encashment of the EMD, the Bank of Baroda

requested certain clarifications from the Applicant vide emails dated 14.06.2022 and 22.06.2022. However, the Bank of Baroda was not satisfied with the clarifications provided and therefore, the EMD was not encashed and consequently expired.

3.5 It is submitted that a Bank Guarantee is an independent contract between the Bank and the beneficiary under the Guarantee. The Respondent has placed reliance on judgements of the Hon'ble Supreme Court of India in the matter of ***Chemical Industries Limited v. Coal Tar Refining Co.*** and in the matter of ***Standard Chartered Bank v. Heavy Engineering Corporation Limited*** to submit that after having furnished the Bank Guarantee as required, any dispute in relation to non-encashment of the Bank Guarantee would strictly lie between the Applicant and the Bank. Therefore, the Applicant ought to have proceeded against the Bank of Baroda's inaction to encash the EMD between 14.06.2022 to 23.06.2022.

3.6 Respondent No. 1 also submits that the nature of the claim made by the Applicant is akin to damages/compensation and the same would be governed by the provisions of Sections 73 and 74 of the Indian Contract Act, 1872. The Applicant has failed to prove that any loss / damage was suffered on account of the alleged breach on the part of the Respondent.

3.7 It is respectfully submitted that a party complaining of a breach and consequently claiming damages has to firstly prove that actual loss / damage has been suffered. In the present case, there is no such plea taken by the Applicant. There is no material placed on record to prove any actual loss and/or damages suffered by the Applicant to enable him to claim damages/compensation. Reliance is placed on the judgment of the Hon'ble Supreme Court of India in the matter of ***Kailash Nath Associates v. Delhi Development Authority*** in this regard.

3.8 It is further submitted that there is no dispute that the Respondent had complied with its obligations and satisfied all necessary formalities for

submission of the EMD and the EMD was not encashed for reasons which were not attributable to the Respondent. The Applicant has chosen not to implead Bank of Baroda as a party Respondent to the present Application to avoid certain procedural lapses on the part of the Applicant. It is submitted that the present Application ought to be dismissed for non-joinder of parties.

Submissions made by the Ld. Counsel on behalf of Respondent No. 2

- 4.1 The Applicant filed IA No. 580 of 2024 for seeking amendment in the present Application thereby impleading Respondent No. 2 as a party Respondent which came to be allowed vide Order dated 21.02.2024.
- 4.2 The Respondent No. 2 submits that this Respondent is only an Advising Bank and not the Issuing Bank under the said Bank Guarantee and is not responsible in case of encashment request being made under the said Bank Guarantee. The role of the Advising Bank is to act as an intermediary between the issuer of a guarantee, i.e. the United Trust Bank SARL (“**United Bank**”) herein and the beneficiary, i.e. the Corporate Debtor herein. The Advising Bank’s main function is to advise the beneficiary of the receipt of the conditional guarantee and to authenticate the issuer’s signature and the Payment Bank after invocation of Bank Guarantee was United Bank.
- 4.3 It is submitted that the Applicant invoked the Bank Guarantee on 13.06.2022. The Respondent No. 2 vide various Swift messages and a letter dated 14.06.2022 called upon the Issuing Bank, i.e. United Bank to honour its claim. Respondent No. 2 submits that the Advising Bank does not engage itself in the transaction, and advises the Bank Guarantee “without any responsibility on our part” except in cases where it has been asked to act also as the conforming bank, the transferring bank or the payment bank. The payment liabilities remain with the Issuing Bank.

- 4.4 Respondent No. 2 has placed reliance on the Indian Bank Association's Circular dated 16.04.2015 which states that the role of the Advising Bank will come into play only after the Issuing Bank sends an Advice Message to the Advising Bank branch through SFMS, only after which the Bank Guarantee could become operative.
- 4.5 It is submitted that the Respondent No. 2 sent a Bank Guarantee Invocation Swift Message to the Issuing Bank and also sent hard copies of the original Bank Guarantee and the amended copies through courier to the Issuing Bank but the Issuing Bank, i.e. United Bank refused to honour the invocation and returned the hard copies of the Bank Guarantee without giving any reasons.
- 4.6 It is Respondent No. 2's case that denial by the Issuing Bank to abide by the terms of the Bank Guarantee cannot in any way create any liability against Respondent No. 2.

Submissions made by the Ld. Counsel on behalf of the Applicant vide Rejoinder

- 5.1 It is submitted that the Bank Guarantee was invoked by the Applicant on 13.06.2022, which was well within the validity period of the Bank Guarantee. It is a settled position in law that once a Bank Guarantee is invoked, the same has to be encashed without any protest or demur. However, the same has not been paid to date. The Respondent is under contempt of the various orders of this Tribunal and the Hon'ble NCLAT wherein reasonable opportunities were given to the Respondent to pay in accordance with the e-auction process.
- 5.2 The Applicant submits that as per Clause 4.6 of the Process Document, the EMD furnished shall be forfeited at any time, "*if the Bidder is identified as the Successful Bidder and fails to extend the validity of the EMD through the bank guarantee or does not accept the Letter of Intent issued by the Liquidator or is found ineligible under Section 29A of the IBC*

or fails to submit Performance Bank Guarantee within time or fails to perform and comply with any terms and conditions of the Process Document and provisions of the IBC and Liquidation Process Regulations.”

- 5.3 The Respondent had accepted the terms and conditions of the Process Document by participating in the e-auction process and cannot blame the Applicant for not taking any steps to encash the Bank Guarantee.
- 5.4 It is submitted that the Respondent has incorrectly stated that the dispute is between the Banks and the Applicant and does not concern the Respondent as the Respondent is also liable to pay the amount equivalent to EMD, i.e. Rs. 11,25,00,000/-. The Respondent's actions have caused losses to the Corporate Debtor and its stakeholders and has resulted in reduction of value of the assets of the Corporate Debtor.

Findings

4. Heard learned Counsel and perused the material available on record.
5. The Applicant's main prayer is that the EMD amount of Rs. 11,25,000/- submitted vide a Bank Guarantee by the Respondent No. 1 be honored and upon failure of Respondent No. 2 honoring the said Bank Guarantee, the Respondent No. 1 be made to deposit the said amount in the bank account of the Corporate Debtor to satisfy the forfeiture of EMD due to failure of payment of sale consideration by the Respondent No. 1.
6. The issue before us is whether the Respondent No. 2 can be made to make the payment under the Bank Guarantee as is being prayed by the Applicant. The Respondent No. 2 has submitted that as an Advising Bank, they cannot be made to pay under the Bank Guarantee, it is for the Issuing Bank to make the payment upon invocation of Bank Guarantee. We concur and have already recorded in the daily Order dated 27.06.2024 as follows-

“4. Learned Counsel for the Applicant fairly submits that in term of Uniform Customs and Practice (UCP 600) the advising Bank is not liable in case of the failure of the issuer Bank to honour the obligations. UCP 600 -Article 9 is reproduced as under

a. “A credit and any amendment may be advised to a beneficiary through an advising bank. An advising bank that is not a confirming bank advises the credit and any amendment without any undertaking to honour or negotiate.”

5. Accordingly, he submits that he is not pressing the relief qua Bank of Baroda. Noted.”

7. Hence, this issue stands settled.
8. The other issue before us is that whether the Respondent No. 1's liability to pay the EMD amount still remains after the failure of encashment of the Bank Guarantee.
9. It is the Applicant's case that the Process Document contemplated payment of EMD either through a Bank Guarantee or through a deposit vide NEFT or RTGS and hence the Respondent No. 1 cannot be absolved of its obligation to pay the EMD amount merely because of failure of encashment of Bank Guarantee. The Respondent No. 1 failed to pay the sale consideration and in accordance with the Process Document, the EMD ought to be forfeited. The Applicant has prayed that the Respondent No. 1 satisfy its liability by depositing the EMD amount in the Corporate Debtor's account. Per Contra, it is the Respondent's case that their liability under the Process Document stands discharged after submission of the Bank Guarantee. It is the Bank that has failed to pay, and hence it is the Bank that should be held liable and not the Respondent No. 1.

10. The Process Document provides for payment of EMD as follows :

“4.1 Earnest Money Deposit: Prior to participating in the E-Auction, the Bidder shall provide an amount which is equal to the amount mentioned above as EMD by way of a bank guarantee issued by any scheduled commercial bank in India ("Bank") in favour of Pratibha Industries Limited (In Liquidation), in the format provided in Annexure - V provided in this Process Document for a period of 5 months with additional one month of the claim period. Alternatively, the EMD amount can also be deposited by NEFT/RTGS/deposit in the following account:

(a) Beneficiary Name: Pratibha Industries Limited

(b) Name and address of the Bank: Bank of Baroda, Branch CFS, Fort, Mumbai

(c) Bank Account No.: 29100 200000 343

(d) IFSC Code: BARBOCFSBAL”

11. It is also to be noted that the Bank Guarantee submitted by the Respondent No. 1 has been issued by United Trust Bank SARL, a bank situated in the United Kingdom, which is not in compliance with the Process Document. The Process Document clearly states that the Bank Guarantee should be issued by a Scheduled Bank in India. The Counsel for the Applicant had brought this to our notice during the course of arguments and further submitted that this Bank Guarantee was accepted on advice given by the Advising Bank, i.e. the Respondent No. 2 herein. At the very outset, the Bank Guarantee was not in compliance with the Process Document and should not have been accepted by the erstwhile Liquidator. We are of the opinion that no recourse is possible on the basis of this Bank Guarantee as it is not in conformance with the Process Document. Nonetheless, after submission of Bank Guarantee, which was accepted by the Liquidator though ought not to have been accepted by him for not meeting with

the stipulations in this relation in the process document, the Respondent's obligation stands discharged in relation to being eligible for participation in the bid. The Earnest Money is sought in such transaction to protect the interest of the auctioneer company in the event of default on part of the participating bidders, but in no manner does it create a debt in favor of the auctioneer company in case the Bank Guarantee is not honoured by issuing bank. The Liquidator has recourse to legal remedies for claim of damages for loss caused to the corporate debtor, on account of failure of Respondent to pay the bid amount.

12. In light of the above findings, we are of the considered opinion that the Respondent No. 1 cannot be made to pay the EMD amount as that would mean acting on a document that should not have been accepted to begin with.
13. Accordingly, IA No. 2050/2023 is **dismissed** and disposed of accordingly.

Sd/-

Prabhat Kumar
Member (Technical)

/SP/

Sd/-

Justice V.G. Bisht
Member (Judicial)