

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1174 of 2023

(Arising out of Order dated 18.07.2023 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench-IV in C.P.(IB)/361(MB)/2021)

IN THE MATTER OF:

State Bank of India

A body corporate constituted under the
State Bank of India Act, 1955, having corporate
Office at State Bank Bhavan,
Madame Cama Road, Nariman Point,
Mumbai, Maharashtra – 400021
Branch: Stressed Assets Resolution Group
Commercial-III Branch, 112-115, 1st Floor
Tulsiani Chambers, Free Press Journal Marg
Nariman Point, Mumbai -400021

... Appellant

Versus

Cable Corporation of India Limited
Having its registered office at
Laxmi Building, 6 Shoorji Vallabhdas Marg
Ballard Estate, Mumbai, Maharashtra-400001

... Respondent

Present:

For Appellant: Mr. Krishnendu Datta, Sr. Advocate with Mr. Prateek Kumar, Ms. Raveena Rai, Ms. Apeksha Dhananjay, Advocates.

For Respondents: Mr. Abhijeet Sinha, Sr. Advocate with Mr. Arjun Krishnan, Ms. Savni, Mr. Kaustav Som, Mr. Lalit Munshi, Mr. Warisha, Mr. Arpit Dahoti, Ms. Palak, Ms. Siddhi, Mr. Saikat Sarkar, Advocates for R1
Mr. Nankani, Sr. Advocate with Mr. Shlok Das, Mr. Pranav Sarthi, Mr. Gaurav Vutts, Mr. Satchi Bhosls, Ms. Rema Deasi, Ms. Jyotika Raichandani, Advocates for R2
Mr. Satchit Bhogle, Advocate for intervenor.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal by a Financial Creditor has been filed challenging the order dated 18.07.2023 passed by National Company Law Tribunal,

Mumbai Bench-IV rejecting Section 7 Application filed by the Appellant. The Appellant aggrieved by the rejection of Section 7 Application has come up in this Appeal.

2. Brief facts of the case necessary to be noticed for deciding the Appeal are:

- (i) The Appellant extended various financial facilities to the Respondent - Cable Corporation of India Limited. Default was committed by the Corporate Debtor in servicing the financial debt. Account of the Corporate Debtor became irregular on 06.06.2019 and was classified as Non-Performing Asset (“**NPA**”) on 04.09.2019.
- (ii) Section 7 Application was filed by the Appellant on 12.03.2021 claiming default of an amount of Rs.58,44,90,194/- as on 01.03.2021. Notices were issued by the Adjudicating Authority in response to which reply was filed by the Corporate Debtor.
- (iii) During the pendency of Section 7 Application, a settlement was arrived at between the parties. The State Bank of India (“**SBI**”) vide letter dated 27.09.2021 accepted the offer of settlement of dues on payment of Rs.47.47 crores along with de-risking of live Performance Bank Guarantees (“**PBG**”) aggregating to Rs.30.40 crores. Twenty five percent of the compromise amount, i.e. Rs.11.86 crores was to be paid within three working days of the Sanction Letter. Seventy five percent of compromise amount was to be paid within 90 days of the

acceptance of the Sanction Letter. The Corporate Debtor also had to arrange for de-risking of all live bank guarantee outstanding with Counter Bank Guarantees (“**CBG**”) of other 1st Class Bank acceptable to the Appellant or 100% cash margin for the outstanding live bank guarantee within 90 days of the Sanction Letter.

- (iv) In pursuance of Sanction Letter dated 27.09.2021, the Corporate Debtor deposited the amount. After Adjudicating Authority granted extension of time for depositing of Rs.47.47 crores, on 01.06.2022 when the case was taken before the Adjudicating Authority, the Financial Creditor made a statement that Corporate Debtor has made the payment of balance amount of Rs.7.47 crores and additional interest of Rs.63 lakhs has also been made by cheque. The Adjudicating Authority vide order dated 01.06.2022, extended the time for replacement of the Bank Guarantees till 30.06.2022.
- (v) There were correspondence between the parties with regard to CBG. Certain issue was raised by the Corporate Debtor regarding the live Bank Guarantees. By letter dated 29.06.2022, the Corporate Debtor wrote to the Financial Creditor informing that Corporate Debtor through its banker, i.e., ICICI Bank issued CBG for 13 guarantees aggregating to Rs.7.26 crores. The SBI pointed out discrepancies in the format of CBG and asked the Corporate Debtor to modify the

CBG. Accordingly on 30.06.2022, the Corporate Debtor forwarded 12 soft copies of the CBG to SBI. The SBI issued a letter dated 01.07.2022 communicating that hard copies of the Bank Guarantees (“**BG**”) sent by Corporate Debtor on 30.06.2022 were in different format from the Bank’s specified format, which is not acceptable. The SBI informed the Corporate Debtor that BGs having not been submitted till 30.06.2023, the Bank is constrained to treat the compromise as failed. There was further discussion and exchange of correspondence in relation to format of PBGs between the parties.

- (vi) On 19.04.2023 SBI wrote to Corporate Debtor refusing to accept the CBGs, however, confirmed that BGs stood reduced to Rs.8.63 crores. On 15.06.2023, Corporate Debtor sent a letter offering deposit of 100% cash margin against the total outstanding BGs, amounting to Rs.8.63 crores. The Corporate Debtor also shared fixed deposit receipt for an amount of Rs.8.65 crores with SBI. On 16.06.2023 the SBI sent a letter to Corporate Debtor rejecting Corporate Debtor’s offer. The SBI informed the Corporate Debtor that if it intends to amicably resolve the matter, it may submit a fresh compromise proposal for both fund-based cash credit and non-fund based BG amount. The Corporate Debtor once again offered 100% cash

deposit by letter dated 27.06.2023, which was rejected by the SBI.

- (vii) The Adjudicating Authority heard the parties and by order dated 18.07.2023, dismissed Section 7 Application filed by the SBI. The Adjudicating Authority held that Corporate Debtor having paid entire settlement amount of Rs.47.47 crores, no debt was due and the Bank Guarantee cannot qualify as a 'debt'. It was further noticed by the Adjudicating Authority that Corporate Debtor has offered de-risking of BGs by deposit of 100% cash margin in the form of fixed deposit, subject to release of securities by the Financial Creditor. The Adjudicating Authority found bonafide efforts on behalf of the Corporate Debtor in de-risking by deposit of 100% cash margin and by recording the aforesaid findings, the Adjudicating Authority dismissed Section 7 Application. The Appellant aggrieved by the said order has filed this Appeal.

3. The Appeal was adjourned on several occasions on the request of the Appellant that it is taking steps to resolve the matter. An additional affidavit has also been filed by the Appellant, bringing on record subsequent letters and correspondences exchanged between the parties. In the additional affidavit, letter dated 13.12.2023, containing the fresh settlement between the parties with regard to live BGs amounting to Rs.7.85 crores was also brought on record.

4. We have heard Shri Krishnendu Datta, learned Senior Counsel appearing for the Appellant and Shri Abhijeet Sinha, learned Senior Counsel appearing for Respondent.

5. Learned Senior Counsel for the Appellant submits that Sanction Letter dated 27.09.2021 contained both the stipulation, i.e., payment of Rs.47.47 crores as well as de-risking of live BGs of Rs.30.40 crores. Although, the Corporate Debtor has made the payment of Rs.47.47 crores, but outstanding live BGs have not been de-risked within the time allowed. The Bank has already communicated to the Corporate Debtor by letter dated 01.07.2022 that compromise has failed. The Bank is, thus, entitled to recover the entire amount from the Corporate Debtor, i.e., Rs.77.87 crores as on 31.08.2021. It is submitted that Adjudicating Authority itself in its various orders dated 26.05.2022 and 01.06.2022 has noted that in event BGs are not de-risked within the time allowed, the Adjudicating Authority shall have no option except admitting Section 7 Application. The Adjudicating Authority committed error in rejecting Section 7 Application. It is submitted that after filing of the Appeal, the Bank approved the compromise proposal on submission of 100% cash margin or by way of CBGs amounting to Rs.7.85 crores vide its letter dated 13.12.2023. In response to which, Corporate Debtor has not fulfilled the conditions of settlement. The Corporate Debtor having failed to de-risk the live BG, Section 7 Application filed by the Appellant deserves to be admitted.

6. Shri Abhijeet Sinha, learned Senior Counsel appearing for the Respondent submits that as per settlement dated 27.09.2021, the entire

amount of Rs.47.47 crores has been paid by the Corporate Debtor within the time as extended by Adjudicating Authority. Thus, entire amount having been paid, no debt is left for which Section 7 Application could be admitted. It is submitted that insofar as de-risking of the BGs is concerned, as per the SBI on the date when order was passed by the Adjudicating Authority total live BGs as on date was for Rs.8.63 crores. The Corporate Debtor has forwarded the CBG from ICICI Bank, which was not accepted by SBI on the ground that it is not in required format. The attempt of Financial Creditor was to somehow refuse to accept the efforts made by the Corporate Debtor. It is submitted that the Adjudicating Authority has rightly taken the view that Bank Guarantees having not been invoked, there was no debt for which Section 7 Application could have been proceeded with. The Adjudicating Authority has rightly noted the bonafide efforts made by the Corporate Debtor in de-risking the live BG, which could not be fructified due to obstructive attitude adopted by the Appellant. The Appellant has been using the IBC proceedings for recovery, even when entire settlement amount of Rs.47.47 crores has been paid. Even the Bank also accepted the fresh compromise by letter dated 13.12.2023 in response to which the Corporate Debtor made all efforts to submit CBG through the Kotak Mahindra Bank/ ICICI Bank, which was not accepted on the ground that period of one month allowed by letter dated 13.12.2023 has elapsed, whereas the Corporate Debtor has requested for time. It is further submitted that after the aforesaid letter cash margin amounting to Rs.3.38 crores was paid, thereby reducing the values of Bank Guarantees to be de-

risked to Rs.4.27 crores. It is further submitted that two BGs have come to an end and expired on 11.04.2024 and as on date the live BGs are only of Rs.3.68 crores. The Corporate Debtor has always expressed its willingness to deposit 100% cash margin or by CBG, which due to one or other reason has not been accepted by the SBI. The Corporate Debtor has requested the SBI to issue No Due Certificate and also to release all charges, securities and guarantees with respect to the facilities sanctioned by handing over all original security documents, which was not accepted by the SBI. On 12.04.2024, the SBI again wrote to the Corporate Debtor that compromise has failed by referring to earlier letter sent by the Corporate Debtor. It is submitted that SBI is using IBC proceedings for other than insolvency of resolution of Corporate Debtor, which is not permissible as per the object and purpose of the enactment. The Adjudicating Authority did not commit any error in rejecting Section 7 Application.

7. We have considered the submissions of learned Counsel for the parties and have perused the records.

8. Section 7 Application was filed by the Appellant for an amount of Rs.58,44,90,194/- as on 01.03.2021 and date of default was mentioned as 06.06.2019 and date of NPA as 05.09.2019. Part-IV of Section 7 Application at Item-2 provides as follows:

“2.	AMOUNT CLAIMED TO BE IN DEFAULT AND THE	INR 58,44,90,194 (Rupees Fifty Eight Crore Forty Four Lakh Ninety Thousand One
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	DATE ON WHICH THE DEFAULT OCCURRED	Hundred and Ninety Four as on 10.03.2021) Date of default: The account of the Corporate Debtor became irregular on 6 June 2019 (due to repayment default) and was classified as NPA on 5 September 2019”
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9. It is to be noted that the SBI issued a Sanction Letter dated 27.09.2021 accepting the Compromise Settlement for amount of Rs.47.47 crores along with de-risking of entire live BGs outstanding of Rs.30.40 crores. The Sanction Letter, thus, provided for both the conditions, i.e. payment of Rs.47.47 crores and de-risking of live BGs of Rs.30.40 crores. The Sanction Letter further provided that, if the compromise amount or the de-risking of the BGs is not received within the stipulated period, the Bank reserve the right to cancel the compromise.

10. Insofar as payment of Rs.47.47 crores, which was the settlement amount, there is no dispute between the parties that the said amount stood paid by 01.06.2022, i.e., within the time extended by Adjudicating Authority. In the order passed by the Adjudicating Authority on 01.06.2022, the Adjudicating Authority has noticed the submission of Financial Creditor. The order dated 01.06.2022 is as follows:

- “1. Mr. Gaurav Joshi, Ld. Sr. Counsel for the Financial Creditor present. Mr. Ashish S. Kamat a/w Mr. Rashmin Khandekar, Ld. Counsel for the Corporate Debtor present.
2. This matter was listed in vacation Bench on 26.05.2022 wherein the Bench ordered the payment of the balance amount of Rs.7.47 crore latest by 31.05.2022 and for replacement of Bank Guarantees, a time up to 30.06.2022 has been allowed.
3. Counsel for the Financial Creditor confirms that the payment of Rs.7.47 crore has been made by the Corporate Debtor to the Financial Creditor before 31.05.2022 in compliance of the orders of this Bench. However, additional interest of about Rs.63 lakh has been made by the Corporate Debtor today morning by way of current date cheques. The Corporate Debtor will ensure that cheques of Rs. 63 lakh (Approx.) are cleared on presentation by the Financial Creditor. As the time is allowed up to 30.06.2022 for replacement of the Bank Guarantees, post this matter for further consideration on 04.07.2022.
4. It is made clear that no further extension on any account will be allowed to the Corporate Debtor for replacement of the Bank Guarantees and in case the Corporate Debtor fails in replacement of the Bank Guarantees to the satisfaction of the Financial Creditor, the Corporate Debtor will be admitted into CIRP.”

11. By order dated 01.06.2022, the Adjudicating Authority granted time to the Corporate Debtor till 30.06.2022 to de-risk the live BGs. The Adjudicating Authority in the impugned order noted that the Corporate Debtor had provided 13 CBGs issued by ICICI Bank, amounting to Rs.7.26 crores as against total outstanding of Rs.15.63 crores as on 30.06.2022, which came to be rejected on account of certain clause(s). The Corporate Debtor again intimated the Financial Creditor on 27.09.2022 that ICICI

Bank has transmitted CBGs amounting to Rs.15,62,64,943/-, the outstanding as on that date, but the Financial Creditor refused to accept the same on the ground that the settlement has failed on 30.06.2022. The Corporate Debtor has also filed an IA No.1798 of 2022 seeking further extension of time to submit CBGs or replace the live PBGs by providing 100% cash margin towards live PBGs. The Adjudicating Authority has returned the finding that as on 30.06.2022, the whole settlement amount was paid. It has been further noticed by the Adjudicating Authority that the BG, which was required to be de-risked have reduced from Rs.30.40 crores to Rs.8.63 crores, on account of expiry/ withdrawal of some PBGs. It is useful to note paragraph 6.3.1, 6.3.2, 6.3.3 and 6.3.4 of the order of the Adjudicating Authority, which is as follows:

“6.3.1. Per Contra, the Corporate Debtor has pleaded before this Bench, that whole of settlement amount of Rs. 47.47 Crores was paid within the period, extended by this Tribunal from time to time alongwith additional interest of INR 64 Lakh. Further, the non-compliance to settlement terms in the form of failure to de-risk the outstanding PBGs, which stood at INR15.63 crores as on 30.6.2022, was not attributable to the default on the part of the Corporate Debtor. Instead, the said failure occurred because of obstinate attitude of the Financial Creditor. It was also submitted that there has been no prejudice caused to the Financial Creditor due to the delay, if any, and on the contrary, the bank guarantee exposure of Financial Creditor has reduced substantially and non-release of securities, indirectly, de-risked such exposure. This is because, since the execution of the Sanction Letter, the value of the Bank Guarantees that needed to be de-risked have reduced from INR 30.40 Crore to INR 8.63 Crore, on account of expiry/withdrawal of some of PBGs. Our attention was also

drawn to one instance, where one of the Guarantee was invoked and the Corporate Debtor deposited the amount becoming payable on such invocation with the Financial Creditor within the permissible period, in accordance with the conditions of clause VII of the sanction letter.

6.3.2. The Financial Creditor drew our attention to Order dated 31.03.2022 & 26.05.2022 to contend that the said order(s) had categorically stated that, in the event of Corporate Debtor failing to de-risk the outstanding PBGs by 30.6.2022, it shall be admitted to CIRP as there exists debt, which is in default.

6.3.3. This Bench finds that, as on 30.6.2022, the whole of settlement amount was paid with the settlement period, as extended by this Tribunal from time to time, as well as the additional interest of Rs. 64 lacs in accordance with the terms of settlement sanction clause IX of the other conditions directions of this Tribunal to compensate the Financial Creditor for loss of interest because of extended period.

6.3.4. In relation to de-risking of outstanding PBGs as on 30.6.2022, which were also required to be de-risked by that date to make the settlement effective, this Bench finds that the Corporate Debtor had offered to provide counter-guarantee from ICICI Bank & Kotak Mahindra Bank, subject to the Financial Creditor clarifying whether it would release its security upon submission thereof. This Bench finds that the Financial Creditor, though dissatisfied with the extension order(s) passed by this Bench, did not file an appeal against those orders. Accordingly, these extension orders, having attained finality at relevant point, extended the period of settlement, which any person of ordinary prudence will be made to believe. This Bench finds that the Corporate Debtor still holds the securities, and the same have not been released, thereby securing the outstanding PBGs sufficiently, which has the effect of de-risking the same.”

12. The Adjudicating Authority further has posed the question “*whether a live guarantee constitute debt; and if yes, whether it can be said that a default can exist in such case*”. The Adjudicating Authority answered the said question by holding that BGs having not been invoked, it is not a debt. It was held that even assuming that there is any failure on the part of Corporate Debtor to de-risk Financial Creditor’s live guarantees, such a failure is not a failure to repay a debt and does not give rise to a default within the meaning of the IBC. Further, in paragraphs 6.4.5 and 6.4.6, following have been held:

“6.4.5. In the case of **Swiss Ribbons Pvt. Ltd. & Anr vs. Union of India & Ors. {Writ Petition (Civil) No. 99 OF 2018}**, it was held that “*It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors*”.

6.4.6. In the case of **Anita Jindal Vs. M/s Jindal Buildtech Pvt. Ltd. through The IRP (2022) ibclaw.in 564 NCLAT 14**, it was held that “*The Preamble of IBC is carefully worded to describe the spirit and objective of the Code to be ‘Reorganisation’ and ‘Insolvency Resolution’, specifically omitting the word ‘Recovery’. The Parliament has made a conscious effort to ensure that there is a significant difference between ‘Resolution’ and ‘Recovery’. The Hon’ble Supreme Court has time and again observed that the fundamental intent of IBC is ‘maximising the value of assets’ in the process of ‘Resolution’. In ‘Mobilox Innovations Private Limited’ Vs. ‘Kirusa Software Private Limited’, (2018) 1 SCC 353, the Hon’ble Apex Court has examined in detail the United Nations*

*Legislative Guide on Insolvency, in which the IBC finds its roots. Any Application to commence CIRP can be denied when the Creditor is using Insolvency as an inappropriate substitute for Debt Recovery Procedures. If IBC is purely used for the purpose of Debt Recovery, particularly when the amounts due are small, and the Company is a solvent entity and is a going concern, the question of 'Reorganising' or 'Resolution of the Company' does not arise. This Tribunal in **'Binani Industries Limited' Vs. 'Bank of Baroda & Anr.', Company Appeal (AT) (Ins.) No. 82 of 2018**, has differentiated between 'Recovery' and 'Resolution' and has observed that IBC is not a Recovery Proceeding. 'Recovery' dispossesses the 'Corporate Debtor' of its assets while a Resolution is an effort to keep it afloat".*

13. The Adjudicating Authority noticed that entire settlement amount having been paid, has rightly taken the view that there is no debt due on which Section 7 Application can be admitted. The Adjudicating Authority found that the live BGs of Rs.30.40 crores, which was required to be de-risked as per settlement dated 27.09.2021, had reduced to Rs.8.63 crores at the time of consideration of the Application and the Adjudicating Authority has noted that the Corporate Debtor had offered to provide counter-guarantee from ICICI Bank, which due to one or the other reasons was not accepted by the Financial Creditor. The Adjudicating Authority has rightly taken the view that due to non-invocation of BGs, no debt had become due and the Financial Creditor, could not insist for admission of Section 7 Application. More so, when Corporate Debtor has offered to deposit 100% cash margin or give CBG and CBG from the ICICI Bank were transferred, which were not accepted by the Financial Creditor. The

Financial Creditor has been taking the stand that since CBGs were not given within the time allowed as per settlement and even the order dated 01.06.2022 of the Adjudicating Authority noted that the settlement has failed and Financial Creditor is entitled to recover the entire dues from the Corporate Debtor. As noted above, insofar as settlement amount is concerned, there is no dispute that entire settlement amount of Rs.47.47 crores was paid within the time allowed. Only issue left is with regard to de-risking of live BGs. Live BGs, which were to be given of Rs.30.40 crores, admittedly were reduced to Rs.8.63 crores on the date when Application came for consideration as has been noticed by Adjudicating Authority. When the Corporate Debtor was ready to offer 100% cash margin or CBG, rejection of the said is not acceptable. Furthermore, the SBI itself on 13.12.2023, granted further one months' time from the date of receipt of the letter for submitting 100% cash margin or CBGs. The Corporate Debtor has prayed for extension of 30 days' time during which the Corporate Debtor has taken steps to submit CBGs, but the SBI refused to accept the said CBGs.

14. After having heard learned Counsel for the parties, it is clear that settlement amount having been paid, the Adjudicating Authority did not commit any error in rejecting Section 7 Application, which was only based on Corporate Debtor not being able to de-risk the live BGs within the time allowed. The present is not a case that BGs were invoked and the Corporate Debtor was asked to deposit the amount for invoked BGs. The BG were given by the Bank with regard to various contracts, which were undertaken

by the Corporate Debtor and Corporate Debtor was always ready to deposit the amount by 100% cash margin or by giving CBGs. The learned Senior Counsel for the Corporate Debtor has further submitted that after filing of the Appeal the Corporate Debtor has deposited amount of Rs.3.38 crores, which was required by the Bank for extension of two BGs, which were expiring and the amount of Rs.3.38 crores was deposited by the Corporate Debtor, reducing the amount of live BGs to the extent of Rs.4.27 crores only. Further, the case of the Corporate Debtor is that after expiry of two BGs on 11.04.2024, today, the live BGs, which need to be de-risked are only to the extent of Rs.3.68 crores.

15. In the facts of the present case, we are of the view that ends of justice will be served in directing the Corporate Debtor to deposit the amount of Rs.3.68 crores with the Appellant, which will be kept in no lien account, to be utilized for clearing the liabilities pertaining to outstanding PBGs, if any. The SBI after adjusting all its liabilities towards live PBGs, may refund the balance amount to the Corporate Debtor. On deposit of the amount of Rs.3.68 crores by the Corporate Debtor, the SBI to release all securities over subject facilities.

16. In view of the foregoing discussions, we dispose of this Appeal in following manner:

- (I) The impugned order of the Adjudicating Authority dated 18.07.2023 dismissing Section 7 Application filed by the Appellant, is up held.

- (II) The Corporate Debtor to deposit the amount of Rs.3.68 crores with the Appellant within thirty days from today, which shall be kept in no lien account, to be utilized for clearing the liabilities of existing live PBGs, if any. After satisfaction of all live PBGs, the SBI to refund the balance amount to the Corporate Debtor.
- (III) On deposit of amount of Rs.3.68 crores, the Appellant shall release securities over subject properties and handover the relevant documents to the Corporate Debtor.

Parties shall bear their own costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

[Arun Baroka]
Member (Technical)

NEW DELHI

23rd April, 2024

Ashwani