

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

COMPANY APPEAL (AT)(INSOLVENCY) NO.230 OF 2019

(Arising out of Order dated 5th March, 2019 passed by the Adjudicating Authority (National Company Law Tribunal) Hyderabad Bench, Hyderabad)

IN THE MATTER OF:

KSB Shanghai Pump Co Ltd.
1400 Jiangchuan Road,
Minhang,
Shanghai 2002245
China

Appellant

Versus

1. Lanco Infratech Ltd,
Plot No.4, Software Units Layout
HITECH City, Madhapur
Hyderabad 500081

(Represented by its IRP
Mr. Savan Godiawala)
7th Floor, Building 10, Tower B,
DLF Cyber City Complex
DLF City Phase -II,
Gurgaon 122002

2. IDBI Bank Private Ltd,
IDBI Tower, WTC Complex
Cuffe Parade, Colaba
Mumbai 400 005

3. Bank of China
No.23, Zhongshan Road (E-1)
Shanghai, P.R. China

Respondents

Ms Tine Abraham, Ms Varuna Bhanrale and Mr Akshay Vasishtha, Advocates for Appellant.

Mr. Ramji Srinivasan, Sr. Advocate with Mr. Vijayant Paliwal and Ms Charu Bansal, Advocates for Respondents.

And

Company Appeal (AT)(Insolvency) 234 of 2019

IN THE MATTER OF:

M/s TLT-Tourbo (Sichuan) Co Ltd
No.15, Wukexisilu, Wuhou district,
Chengdu, Sichuan,
People's Republic of China

Appellant

Versus

1. LancoInfratech Ltd,
Plot No.4, Software Units Layout
HITECH City, Madhapur
Hyderabad 500081

(Represented by its IRP
Mr. SavanGodiawala)
DeloitteTouche, Tohmatsu,
India LLP, 19th Floor,
Shapath-V, S.G.Road,
Ahmedabad.

2. Industrial & Commercial Bank of China,
Sichuan Branch,
Zongfu Building, No.35,
Zongfu Road,
Jinjiangdistt.
Chengdu City,
Sichuan
Province 610016
China.

3. IDBI Bank Ltd,
Trade Finance,
Specialised Corporate Branch
5-9-89/1 and 2, Chapel Road,
Hyderabad 500 001
Telangana, India

Respondents

Mr. Abhijeet Sinha, Mr. SulabhRewari, Ms Neha Maathen and Mr Aditya Shukla, Advocates for Appellant.

Mr. Ramji Srinivasan, Sr. Advocate with Mr. VaijayantPaliwal and Ms Charu Bansal, Advocates for Respondents.

And

Company Appeal (AT)(Insolvency) 235 of 2019

IN THE MATTER OF:

M/s Beijing Power Equipment Group Co Ltd
No.12, Haotian Street,
Liangxiang, FangshanDistt.
Beijing 102 401
People's Republic of China

Appellant

Versus

1. LancoInfratech Ltd,
Plot No.4, Softwarre Units Layout
Hitech City, Madhpur
Hyderabad 500081

(Represented by its IRP
Mr. SavanGodiawala)
DelloiteTouche, Tohmatsu,
India LLP, 19th Floor,
Shapath-V, S.G.Road,
Ahmedabad.

2. China Construction Bank Corporation,
Beijing Branch,
17/F, Entry 4, Building No.28,
Xuanwumen West Street,
Beijing 100 053 China

3. IDBI Bank Ltd,
Trade Finance,
Specialised Corporate Branch
3rd Floor, Khivraj Complex,
I, 480 Anna Salai,
Nandanam, Chennai 600035
Tamil Nadu,
India.

Respondents

Mr. Abhijeet Sinha, Mr. SulabhRewari, Ms Neha Maathen and Mr Aditya Shukla, Advocates for Appellant.

Mr. Ramji Srinivasan, Sr. Advocate with Mr. VaijayantPaliwal and Ms Charu Bansal, Advocates for Respondents.

J U D G M E N T**SUDHANSU JYOTI MUKHOPADHAYA, J**

In Corporate Insolvency Resolution Process against M/s Lanco Infratech Ltd (Corporate Debtor), the applicant/appellant, M/s KSB Shanghai Pump Co Ltd, filed application under Section 60(5) of Insolvency & Bankruptcy Code, 2016 ('I&B Code' in short) seeking directions to Liquidator to restrain from invoking or encashing the Bank Guarantee bearing No.GC 0608115000737 for US\$ 510,000 dated 07th August, 2018 issued by Bank of China and for further direction to Bank of China not to pay any amount to the Corporate Debtor's Bank.

2. Similar application was filed by the applicant/appellant, M/s TLT-Tourbo (Sichuan) Co Ltd, under Section 60(5) of I&B Code with similar prayer to restrain from invoking and encashing the Contract Performance Bank Guarantee (PBG) No.LG61205B500032 dated 30th October, 2015 and not to pay any amount to the Corporate Debtor's Bank.

3. The other applicant/appellant, M/s Beijing Power Equipment Group Co Ltd, also moved an application under Section 60(5) of the I&B Code for seeking direction to Resolution Professional to restrain from invoking/encashing Performance Bank Guarantee (PBG) No.11100020003190 dated 11th June, 2015 and to return to the applicant any amounts paid out upon encashment of the PBG.

4. The Adjudicating Authority by similar order all dated 5th March, 2019 taking into consideration the fact that the applicants/appellants have filed their respective claim before the Resolution Professional arising out of their respective contract, and the Resolution Professional has not accepted their claim, held that the applicants/appellant cannot seek injunction against Corporate Debtor for refraining it from invoking the 'Corporate Performance Bank Guarantee's (CPBG) and made following observations:-

“14. The burden is on the applicant to establish fraud in invoking Bank Guarantee. Admittedly, Bank Guarantee is being invoked which is in terms of Bank Guarantee. It is not the case of Applicant that any fraud was played in obtaining Bank Guarantee. Similarly, there is also no material to come to a conclusion that any fraud was played on the Applicant in invoking the Bank Guarantee. It is also not the case of the Applicant that any fraud was involved in invoking Bank Guarantee. It is true any disputed question of fact cannot be decided in a summary way. It is the case of Applicant that it has not committed any breach of the performance of the obligations covered by the contract. However, Resolution Professional/Liquidator disputed the same. In other words that it is the case of Resolution Professional/Liquidator that Applicant committed breach of the terms of contract. So dispute of this nature cannot

be decided in a summary fashion. Therefore, injunction cannot be granted in favour of the Applicant from invoking the Bank Guarantee by Corporate Debtor in the circumstances of the case.

15. Thus, it is clear, no material before the Adjudicating Authority that invocation of Bank Guarantee by Corporate Debtor in the present case is a fraudulent action and that Applicant will sustain irreparable injury. The only grievance of the Applicant that it has completed the contract work assigned to it. The question whether Applicant failed to perform its part of the contract or not, is a question to be determined by way of evidence. The said dispute cannot be resolved by summary procedure. If Bank Guarantee in terms of guarantee, then Corporate Debtor is entitled to invoke it. So injunction as prayed cannot be granted in respect of Bank Guarantee covered by this Application.

16. In the result, Application is dismissed. Interim order, if any stands vacated.”

M/s KSB Shanghai Pump Co Ltd.

5. The case of the applicant/appellant, M/s KSB Shanghai Pump Co Ltd is that the Corporate Debtor entered into a contract with the appellant on 24th April, 2015 for design, engineering, manufacture, assembly etc for 1x660 MW

Supercritical Ennore Thermal Power Station Expansion Project alongwith insurance, forwarding on FOB Shanghai Seaport on delivery basis including loading the vessel of main equipment and mandatory spares, apart from supervision, erection and commissioning of BFP. The above project was awarded to the Corporate Debtor by way of an Engineering Procurement and Construction Contract by TANGEDCO.

6. Learned counsel for the appellant has submitted that the appellant cannot be made to suffer irretrievable loss owing to Respondent, Corporate Debtor. It was also submitted that the Corporate Debtor through the Resolution Professional had fraudulently invoked the 'Performance Bank Guarantee' with a view to deprive the appellant of its monies and to make wrongful gain.

M/s TLT-Turbo (Sichuan) Co Ltd

7. Learned counsel for the appellant, M/s TLT-Turbo (Sichuan) Co Ltd submitted that main contract was executed between Lanco Industries Ltd (Corporate Debtor) and the Tamil Nadu Generation and Distribution Corp Ltd in the year 2014 for setting up of a 'Thermal Power Project' at Ennore. On 27th August, 2015 the contract was executed between the appellant and TLT and M/s Lanco Industries Ltd for design, supply, erection and commissioning of ID, FD and PA fans package (alongwith spares) for the Ennore Project. This was in the nature of a sub-contract. M/s Lanco Industries Ltd was obliged to open the Letter of Credit in favour of appellant- TLT on time, covering 50% of the Contract Price-which was a pre-requisite for appellant-TLT to arrange for the packing and delivery of goods. It was also submitted that Advance Bank

Guarantee was issued on 30th October, 2015 in terms of payment terms by Respondent Banks on behalf of appellant-TLT, in favour of M/s Lanco Industries Ltd for US\$ 418,066/- valid upto 27th June, 2016. It is submitted that Performance Bank Guarantee (PBG) was furnished by Respondent Banks on 30th October, 2015 in terms of Payment Terms in favour of M/s Lanco Industries Ltd for US\$ 418,066/- valid upto 1st April, 2020. The Contract specifically provided that where the equipment did not perform as per guaranteed value, this would amount to non-performance of the Contract and M/s Lanco Industries Ltd will be entitled to invoke the PBG.

8. It was further submitted that in between 4th January, 2016 to 12th June, 2016, M/s Lanco Industries Ltd failed to inspect the materials/supplies which were stored in China alongwith approved Manufacturing Quality Plan. M/s Lanco Industries Ltd was obliged to inspect the materials/supplied and issue MDCCs which were pre-requisite for appellant-TLT to claim payment and deliver goods. It was also contended that Monthly Progress Report was issued by appellant-TLT to M/s Lanco Industries Ltd on 1st February, 2016. In between January to May, 2017 correspondence exchanged between appellant-TLT and M/s Lanco Industries Ltd regarding further extension of Advance Bank Guarantee and communication by appellant-TLT that post amendment was necessary for further extension of the Advance Bank Guarantee beyond 27th April, 2017. It was submitted that on 7th August, 2017 the Corporate Insolvency Resolution Process was initiated against M/s Lanco Industries Ltd. As on the said date, the Advance Bank Guarantee had lapsed, therefore, there was no grievance of non-performance by appellant-

TLT so no request was made for extension of Advance Bank Guarantee. It was submitted that subsequently on 9th April, 2018 the principal contract between M/s Lanco Industries Ltd and TANGEDCO was terminated by TANGEDCO owing to M/s Lanco' Industries Ltd breaches. The Performance Bank Guarantee was purportedly invoked by the Resolution Professional of M/s Lanco Industries Ltd on 30th July, 2018 on the ground of alleged non-performance and failure to extend the Advance Bank Guarantee. No notice was given by the Resolution Professional of M/s Lanco Industries Ltd nor the Contract was terminated by M/s Lanco Industries Ltd .

9. According to counsel for the appellant a guarantee can only be invoked in accordance with its terms. The Bank Guarantee was issued towards timely completion and the faithful performance of the Contract in accordance with the terms and conditions specified in the Contract. Therefore the Professional/Liquidator does not have the power under IBC to invoke the Performance Bank Guarantee.

10. It was also submitted that in exercising functions under the I&B Code, the Resolution Professional was required to act in terms of the contract executed by the corporate debtor and Appellant. There being no case of breach of the contract by appellant-TLT made out by the Resolution Professional/Liquidator, and M/s Lanco Industries Ltd having not raised any dispute as to performance of appellant-TLT or taken steps for invocation of the Performance Bank Guarantee and having failed to fulfill the necessary pre-requisite for extension of the Advance Bank Guarantee, there was no

ground for the Resolution Professional/Liquidator to invoke the Performance Bank Guarantee.

11. It was further submitted that in terms of I&B Code, the Resolution Professional/Liquidator did not have the power to invoke the Performance Bank Guarantee before taking appropriate legal action.

Beijing Power Equipment Group Co Ltd

12. Similar plea has been taken by learned counsel for M/s Beijing Power Equipment Group Co Ltd as taken by M/s TLT-Turbo (Sichuan) Co Ltd, the details of dates of contract, advance bank guarantee etc have been shown as detailed below.

13. Contract was entered into between M/s Lanco Industries Ltd and M/s Tamil Nadu Generation and Distribution Corp Ltd for setting up of a Thermal Power Project at Ennore, Tamil Nadu in the year 2014. On 22nd April, 2015 the contract was executed between appellant-M/s Beijing Power Equipment Group Co Ltd and M/s Lanco Industries Ltd for supply, manufacture, delivery of a coal mill and seal air fans package for the Ennore Project and the total contract value was US\$ 4.98 million. The Advance Bank Guarantee was issued on 11th June, 2015 in terms of payment terms by Banks on behalf of appellant-M/s Beijing Power in favour of M/s Lanco Industries Ltd for US\$ 498,000/- valid upto 21st August, 2016. The Performance Bank Guarantee (PBG) was also furnished by Banks on 11th June, 2015 in terms of Payment Terms in favour of M/s Lanco Industries Ltd for US\$ 498,000/- valid upto 1st April, 2020. Correspondence dated 10th October, 2015 showed M/s Lanco

Industries Ltd's failure to open the LC on time as was required under the Contract leading to delay in performance. In between 5th November, 2015 to 14th January, 2016, correspondence were made which shows failure on the part of M/s Lanco Industries Ltd to inspect the materials/supplies that were stored in China so that delivery could be completed. Monthly Progress Reports were issued by M/s Beijing Power to M/s Lanco Industries Ltd between November, 2015 to 2016. M/s Beijing Power also sent e-mail dated 11th May, 2017 agreeing to extend the Advance Bank Guarantee upto 17th October, 2017 and extending the claim period upto 17th January, 2018. In the meantime Corporate Insolvency Resolution Process was initiated against M/s Lanco Industries Ltd on 7th August, 2017 due to which the contract between M/s Lanco Industries Ltd and TANGEDCO was terminated by TANGEDCO owing to M/s Lanco Industries Ltd's breaches on 9th April, 2018. Only thereafter the Performance Bank Guarantee was invoked by the Resolution Professional on 31st July, 2018.

14. It was submitted that the guarantee can be invoked only in accordance with its terms and conditions. The Bank Guarantee was issued towards timely completion and the faithful performance of the Contract as per terms and conditions specified in the Contract. According to appellant in no case for failure of performance of M/s Lanco Industries Ltd it can be invoked.

15. It was submitted that in exercising functions under the I&B Code, the Resolution Professional was required to act in terms of the contract executed by the corporate debtor and Appellant. There being no case of breach of the contract by M/s Beijing Power made out by Resolution

Professional/Liquidator, and M/s Lanco Industries Ltd having not raised any dispute as to about performance of M/s Beijing Power could not have taken steps for invocation of the Performance Bank Guarantee.

16. It was further submitted that in terms of I&B Code, the Resolution Professional had no power to invoke the Performance Bank Guarantee before first taking appropriate legal action.

17. Counsel for the Resolution Professional/Liquidator submitted that the performance bank guarantee is a separate contract which is unconditional and irrevocable. It was also submitted that the performance bank guarantee is an irrevocable and unconditional bank guarantee where under the Guarantor Bank has undertaken to make payment on first demand by the Corporate Debtor without any conditions/restrictions or any further proof. The performance bank guarantee clearly provides that any such demand made by the Corporate Debtor shall be conclusive and binding notwithstanding any dispute pending before any court, tribunal, arbitrator or any other authority. Accordingly the Corporate Debtor is well within its right to invoke the Performance Bank Guarantee without any reference to the terms of the underlying contract.

18. It was further contended that it is a settled position of law that courts must not interfere with the invocation of bank guarantees, unless the invocation amounts to fraud of egregious nature and the fraudulent invocation causes irretrievable damage to the rights of the persons against whom such bank guarantees are invoked. The onus of proof is on the Appellants to establish fraud of an egregious nature and or to establish

irretrievable harm. The Appellants have failed to establish both in the present facts and circumstances.

19. According to learned counsel for the Resolution Professional/Liquidator the issues raised in these Appeals cannot be determined. The decision of this Appellate Tribunal has been relied upon in *M/s Dynepro Private Limited Vs Mr. V. Nagarajan CA(AT)(Insolvency) No.229 of 2018* to suggest that the Adjudicating Authority cannot decide the disputed question of facts including claim or counter claim. In the said case this Appellate Tribunal held that a suit could only be filed in the appropriate forum after completion of the period of moratorium.

20. Referring to the relevant dates, as referred to above, it was submitted that the appellants have only raised claims for past dues.

21. It was also submitted that the claim submitted by the Appellants were found inadmissible since the goods were never supplied by the appellants. According to learned counsel as per terms and procedures of payment as laid down in Appendix 2 to the Contract, the Corporate Debtor made an advance payment of 10% of the contract price to each of the Appellants. Which stipulates:-

“a. 60% of the total contract price shall be paid upon shipment on pro rata basis as per the approved billing break up on submission of invoices and shipping documents alongwith material dispatch clearance certificate issued by the Purchaser or its authorized representative;

b. 20% of the total contract price shall be paid on pro-rata basis as per the approved billing break-up on receipt of equipment at site and physical verification and certification by the Purchaser or its authorised representative.

c. Balance 10% of total contract price shall be paid on successful completion of performance guarantee test of the plant and taking over of the plant by Employer/Owner or 1st October 2018 whichever is earlier.

22. It was further submitted that none of the above three conditions have been met by any of the appellant and till date i.e. the goods have not been shipped nor supplied on site. Therefore, the question of satisfying the guarantee test does not arise. Therefore, the occasion to make payment of remaining contract price does not arise. It was also submitted that the appellant, M/s KSB Shanghai Pump Co Ltd, was in breach of contract by not extending the Advance Bank Guarantee.

23. According to learned counsel for the Resolution Professional in terms of Clause 19.1 of the Special Purchase Conditions of the Contract the Corporate Debtor can get the Advance Bank Guarantee extended till the completion of supplies for the unit is achieved. However, admittedly the appellants had refused to extend the Advance Bank Guarantee despite specific request from the Corporate Debtor having been made on 10th July, 2017.

24. It was further stated that the only reason given by the appellants for refusing extension of Advance Bank Guarantee was that in view of 'public

announcement of bankruptcy' against the Corporate Debtor, they were not extended. However, it is pertinent to note that at the time of refusal of extension by the appellants, the Corporate Debtor was undergoing Corporate Insolvency Resolution Process which does not amount to company going through bankruptcy.

25. Similar objection has been raised by Resolution Professional/Liquidator in Company Appeal (AT) (Insolvency) No.234 of 2019. In this case also it was stated that the case of the appellant was found inadmissible since the goods were never supplied by the Appellant. It was informed that in accordance with the terms and procedures of the payment as laid down in Appendix 2 to the Contract, the Corporate Debtor had duly made an advance payment of 10% of the contract price to the Appellant. The terms of payment stipulate was as follows:

“a.50% of the contract price through Letter of Credit upon shipment on pro rata basis as per the approved billing break-up on submission of invoices and shipping documents alongwith with material dispatch clearance certificate issued by the Purchaser or its authorized representative;

b. 30% of the contract price shall be released on pro-rata basis shall be paid through Letter of Credit as per the approved billing break-up shall be paid through Letter of Credit on receipt of equipment at site and physical verification and issue of material receipt certificate by the Purchaser that the equipment has been received in good condition.

c. Balance 10% of contract price shall be paid on successful erection, testing and commissioning of the system, upon submission of an additional performance bank guarantee for 10% contract price valid until PG test (scheduled on 1st October, 2018).

26. It was also submitted that admittedly none of the above mentioned three conditions have been met till date i.e. the goods have not been shipped nor supplied on site and the following question of satisfying the guarantee test automatically does not arise.

27. It was submitted that the appellant was in breach of the contract by not extending the Advance Bank Guarantee. As per Clause 19.1 of the Special Purchase Conditions of the Contract, the Corporate Debtor has right to get the Advance Bank Guarantee extended till the completion of supplies for the unit is achieved. However, admittedly the appellant has refused to extend the Advance Bank Guarantee despite a specific request made by the Corporate Debtor.

28. It was further stated that the Performance Bank Guarantee was rightly invoked. According to learned counsel while managing the operations of the Corporate Debtor under its obligation to preserve and protect the assets of the Corporate Debtor, the Resolution Professional invoked the Performance Bank Guarantee in order to recover the substantial advance payment which have been lying unjustly with the appellant.

29. In respect to appellant of Company Appeal (AT) (Insolvency) No.235 of 2019 learned counsel took similar plea as taken in the case of TLT-Turbo (Sichuan) Co Ltd, Company Appeal (AT)(Insolvency) No.234 of 2019. In this case also it is stated that the case of the claim of the appellant was found inadmissible since the goods were never supplied by the Appellant. It was stated that in accordance with the terms and procedures of the payment as laid down in Appendix 2 to the Contract, the Corporate Debtor had duly made an advance payment of 10% of the contract price to the Appellant. The terms of payment stipulate was as follows:

“a.50% of the total contract price shall be paid upon shipment on pro rata basis as per the approved billing break-up on submission of invoices and shipping documents alongwith material dispatch clearance certificate issue by the Purchaser or its authorized representative.

b. 25% of the total contract price shall be paid on pro-rata basis as per the approved billing break-up on receipt of equipment at site and physical verification and certification by the Purchaser or its authorised representative.

c. 5% of total contract price shall be paid on successful commissioning of synchronization of the unit or within 27 months from the scheduled FOB date at China Port, whichever is earlier.

d. Balance 10% of total contract price shall be paid on successful completion of performance guarantee test of the plant and taking over of the plant by Employer/Owner or 1st October, 2018 whichever is earlier.

30. It has also been pleaded that admittedly none of the above mentioned three conditions have been met till date i.e. the goods have not been shipped nor supplied on site and the following question of satisfying the guarantee test automatically does not arise.

31. In this case also the same plea has been taken as taken in the case of TLT-Turbo (Sichuan) Co Ltd that the Performance Bank Guarantee was rightly invoked, the contract having become void.

32. In these appeals, we are not inclined to decide the claim and counter claim as has been made by the parties in view of the fact that the Adjudicating Authority has already passed order of liquidation of the Corporate Debtor.

33. In all the cases the appellants have sought direction to Liquidator to restrain from invoking or encashing the Bank Guarantee. However, the Bank Guarantees were invoked. Though it is not clear as to whether the amount have been realised by the Corporate Debtor on invocation of aforesaid Performance Bank Guarantees or not, which was to be released by the Bank of China.

34. Therefore, the direction as sought for by appellants to direct not to pay any amount to the Corporate Debtor, cannot be ordered.

35. In case the Performance Bank Guarantees have been invoked, and the Corporate Debtor has received the amount out of the Performance Bank Guarantees, in such case we are of the view that the appellants can file their respective claim before Liquidator who may decide the claim in terms of Section 40 of I&B Code. Thereafter if any person be aggrieved, such person is entitled to file appeal under Section 42 of Insolvency & Bankruptcy Code, 2016 before the Adjudicating Authority.

36. For the above said reasons this Appellate Tribunal is not inclined to decide the claim and counter claim as made by the parties, but give liberty to the appellants to move before the Appropriate Forum for appropriate relief. The appeals are accordingly disposed off with the aforesaid observations.

(Justice S.J. Mukhopadhaya)
Chairperson

(Justice Bansi Lal Bhat)
Member (Judicial)

Dated:25-9-2019

New Delhi

Bm.