

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

Company Appeal (AT) (Insolvency) No. 581 of 2022

IN THE MATTER OF:

**Bank of Maharashtra
Stressed Asset Management Branch,
4th Floor, Janamangal,
Samachar Marg,
Fort, Mumbai-400001**

...Appellant

Versus

**1. Manjeet Cotton Pvt. Ltd. & Anr.
Having its registered address at
318, N-3, CIDCO, Jalna Road,
Near Punjab National Bank,
Aurangabad, Maharashtra-431003**

...Respondent No. 1

**2. Parason Machinery (India) Pvt. Ltd.
Having its registered address at
Anukrupa 28, Venkatash Nagar
Jalna Road, Aurangabad,
Maharashtra - 431003.**

...Respondent No. 2

Present:

For Appellant : Ms. Pinky Anand, Sr. Advocate with Mr. Subir Kumar, Mr. Vardhman Kaushik, Mr. Nishant Gautam, Ms. Saudamini Sharma, Ms. Asees Kaur Chawla, Mr. Syed Ahmed, Ms. Ayushi, Mr. Prafful Saini, Ms. Eesha Sharma and Mr. Dhruv Joshi, Advocates.

For Respondents : Mr. Ramji Srinivasan, Sr. Advocate with Mr. Abhijeet Sinha, Mr. Chitranshul A. Sinha, Ms. Namrata Mohapatra and Mr. Jaskaran S. Bhatia, Advocates for R-1& R-2.

J U D G M E N T
(Date:14.11.2022)

[Per.: Dr. Alok Srivastava, Member (Technical)]

This appeal has been filed by the Appellant- Bank of Maharashtra, under Section 61 of the Insolvency & Bankruptcy Code, 2016 (hereinafter called as 'IBC') assailing the order dated 20.04.2021 passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench) in I.A. No. 534 of 2022 in I.A. No. 607 of 2021 in CP No. (IB) 1222/(MB) 2019 (hereinafter called the 'Impugned Order').

2. In brief, the facts of the case are that the Corporate Insolvency Resolution Process (in short 'CIRP') was initiated on an application filed under Section 7 of the IBC filed by the Bank of Maharashtra (in short 'BOM'), acting for and behalf of itself, State Bank of India and Vijaya Bank (which is now Bank of Baroda). Subsequently a Resolution Plan for insolvency resolution of the Corporate Debtor Fabtech Projects and Engineers Ltd. was submitted jointly by Manjeet Cotton Pvt. Ltd. and Parason Machinery (India) Pvt. Ltd. (in short 'Successful Resolution Applicant') which was approved by the Committee of Creditors (in short 'CoC') by a voting share of 85.18% and the Resolution Plan was approved by the Adjudicating Authority vide its order dated 16.11.2021.

3. It is the Appellant's case that under the terms of the Resolution Plan, the Successful Resolution Applicant- SRA undertook to pay 52.50% i.e. Rs. 29.30 crores to BOM/ SBI/ BOB in case the live bank guarantees are invoked by the beneficiaries.

4. It is further stated by the Appellant that the bank guarantee provided by the Bank of Maharashtra was invoked after the approval of the Resolution Plan by CoC but before the Resolution Plan's approval by the Adjudicating Authority took place. The request for paying the invocation amount of Rs. 29.30 crores were sent by Bank of Maharashtra to the Successful Resolution Applicants vide letter dated 18.10.2021. Accordingly, other bank guarantees were also invoked by the consortium member banks through various letters, the BOM, SBI and BOB informed the SRA that the bank guarantees had been invoked by the beneficiaries who had asked for payment of the invoked bank guarantees as per the terms of the approved resolution plan. Responding to these letters, the SRA informed the respondent banks that the invocation of the bank guarantees took place before the management and control of the corporate debtor was handed over to the SRA and therefore, the SRA cannot be held responsible for events taking place prior to the 'Transfer Date' and further denied its liability to pay the invocation amount of the bank guarantees to the respective banks.

5. The Appellant has stated that thereafter Bank of Maharashtra filed an IA No. 530 of 2022 in CP No. (IB) 1222/(MB) 2019 before the Adjudicating Authority seeking direction to the SRA for paying 52.50% of the invoked bank guarantees, and subsequently the SRA also filed an I.A. No. 534 of 2022 in CP No. (IB) 1222/(MB) 2019 requesting for direction that the financial creditors are not entitled to reimbursement of the invoked amount of the bank guarantees which were invoked prior to 'Transfer Date' i.e. 04.01.2022.

6. We heard the arguments of the Learned Senior Counsels for the Appellant and Respondent No. 1 & 2 and perused the record.

7. The Learned Senior Counsel for the Appellant has argued that the bank guarantees for large projects given by the members of the banking consortium, namely, BOM, SBI and BOB on behalf of the corporate debtor Fabtech Projects and Engineers Ltd. were live bank guarantees at the time of submission of the proposed Resolution Plan by the SRA, and this plan was eventually approved by the CoC and later by the Adjudicating Authority with the provision that the SRA would pay 52.50% (totalling to Rs. 29.38 crores) in relation to the bank guarantees provided by the banks once they are invoked by the respective banks. She has further argued that the Resolution Plan was approved by the CoC with a majority of 85.18% voting share, and thereafter approved by the Adjudicating Authority on 16.11.2021. She has

further claimed that the said bank guarantees were invoked by the beneficiaries Indian Oil Corporation and Oil India Ltd. vide letters dated 18.10.2021 addressed to the Bank of Baroda and Bank of Maharashtra asking for payment of proceeds of the bank guarantee of Rs. 7 crores and Rs. 6.86 crores to the BOB and BOM. Another bank guarantee was invoked through another letter dated 18.10.2021 addressed to the Bank of Maharashtra which was for an amount of Rs. 5.65 crores. She has claimed that these invocations of the bank guarantees took place before the Resolution Plan was approved by the Adjudicating Authority on 16.11.2021 but after the Resolution Plan had been approved by the Committee of Creditors. And hence the SRA which has committed itself to pay the invocation amounts to the extent of 52.20% in the resolution plan should honour its commitment.

8. The Learned Senior Counsel for the Appellant has taken us through the terms of the approved resolution plan, specifically clause 3.5 relating to 'Source of Funds' and its 'Utilisation' which shows the maximum payment guarantees towards invocation of live bank guarantees. She has further submitted that in the Section "Summary of Utilisation of Fund's", specifically at Serial No. 2 which reads "Payment to Secured Financial Creditors" totalling to Rs. 192.24 crores the double asterisk (**) appearing in the footnote of the table quite categorically states that the amount of Rs. 192.24 crores is

included in which equivalent to 52.50% of invoked bank guarantees issued by secured financial creditors pertaining to large projects.

9. In connection with the terms of payment to Secured Financial Creditors after invocation, the Learned Senior Counsel for the Appellant has adverted to Para 3.7 (2) (c) in the Resolution Plan to claim that the SRA/ corporate debtor is obliged to make payment to the secured financial creditors under the Resolution Plan which is in accordance with the treatment provided in the Resolution Plan upon invocation.

10. The Learned Senior Counsel for Appellant has relied on the following judgments in support of her contentions:-

- ***Andhra Bank v. F.M. Hammerle Textile Ltd. (2018) SCC OnLine NCLAT 883.***
- ***Export Import Bank of India v. Resolution Professional JEKPL Private Ltd. (2018) SCC OnLine NCLAT 465.***
- ***Canara Bank v. IVRCL Limited (2019) SCC OnLine NCLT 5327.***

11. The Learned Senior Counsel for the Appellant has also argued that a purposive interpretation of contractual terms should be made to support the commercial wisdom of the parties when the payment to the beneficiaries is to be made after invocation of the bank guarantees. In this connection she

has referred to the judgments of the Hon'ble Supreme Court in the matter of ***Enercon (India) Ltd. and Ors. V. Enercon GMBH and Anr. (2014) 5 SCC 1*** and in the matter of ***Union of India v. D.N. Revri and Co. and Ors. (1976) 4 SCC 147.***

12. The Learned Senior Counsel for the Appellant has submitted that the bank guarantees constitute independent contracts and don't come within the purview of Section 14 of the IBC and the interpretation of the SRA that only in the event of invocation post 'Transfer Date', liability would arise affects the right of the third party which has the right to invoke the bank guarantee at any point of time and claim money under the said bank guarantees from the banks. She has referred to the judgment of Hon'ble Supreme Court in the matter of ***Phoenix ARC Pvt. Ltd. v. Anush Finleash & Construction Pvt. Ltd. (IB) 1705 (PB)/ 2018*** and ***Pragdas Mathuradas v. Jeewanlal (1929), Limited (1948) SCC OnLine PC 46*** in this regard to claim that these judgments are support of her contention.

13. She has further claimed that the Adjudicating Authority while disallowing the claim of the appellant bank has relied on two Supreme Court's Judgements, namely, ***Ghanashyam Mishra and Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Ltd. (2021 SCC OnLine SC 313)*** and ***Committee of Creditors of Essar Steel India Ltd. v. Satish***

Kumar Gupta & Ors. (2020 (8) SCC 531). In this connection she has claimed that in both these judgements, the Hon'ble Supreme Court was considering the issue of new and surprise claim post the approval of the Resolution Plan whereas in the present case it is clear that the claim against the invoked bank guarantees were not surprise claims but the CoC and the financial creditors as well as the SRA were quite aware of these claims that could arise in the future and therefore took care to include payment towards secured financial debt including bank guarantees. She has also claimed that on the one hand, the SRA wishes to distance itself from making any payment towards invoked bank guarantee, but on the other hand has sought return of margin money from Bank of Baroda used in issue of bank guarantees.

14. The Learned Senior Counsel for Respondents No. 1 & 2 has argued that the Resolution Plan was approved by the CoC on 27.02.2021 and finally approved by the Adjudicating Authority on 16.11.2021. He has strongly argued that the 'Closing Date' of 31.12.2021 and 'Transfer Date' of 04.01.2021 which are defined in the Resolution Plan and not disputed by the Appellant very clearly establish that the management/ control of the corporate debtor would continue in the hands of Resolution Professional till the "Transfer Date" and will be handed over to the boards constituted by the Resolution Applicant on "Transfer Date" which would be within 15 days from the "Closing Date". He has further submitted that the invocation of the bank

guarantees took place vide letters dated 18.10.2021, sent by the beneficiaries Indian Oil Corporation and Oil India Limited to the respective banks and which was prior to the “Transfer Date” of 04.01.2022.

15. The Learned Senior Counsel for Respondent No. 1 & 2 has adverted to Para 3.7 which is regarding “Treatment under the Resolution Plan for the Financial Creditors” wherein in Para 3.7(2)(c) payment to be made to the Secured Financial Creditors of the EPC Division is mandated within 60 days for invocation of bank guarantees is included, and in the operative part under the head “Non-Fund Based Facility i.e. EPC - Live Bank Guarantee- 2 Large Projects” it is very clearly stated that the Resolution Applicants shall make payments to respective financial creditors to the extend of 52.50% of the invocation amount within 60 days of invocation of such Bank Guarantees, that are currently live, in the event of and with respect to invocation of such bank guarantees subsequent to the “**Transfer Date**”. He has emphasised that the actual payment after invocation of bank guarantee post the transfer date would be as per clause 3.7(2)(c) and any other mention in the resolution plan in Para 3.5 regarding the bank guarantees appears only to state the source of funds and how these funds may be utilised, which is to only show that the Successful Resolution Applicants possesses sufficient funds for an effective resolution of the corporate debtor.

16. The Learned Senior Counsel for the Respondents No. 1 & 2 has referred to Hon'ble Supreme Court's Judgment in the matter of **Kanataru Rajeevaru v. Indian Young Lawyers Association (through its General Secretary Bhakti Pasrva and Ors.) [2020 9 SCC 121]** wherein it is held that "when a statute is carefully punctuated and there is doubt about its meaning, weight should undoubtedly be given to the punctuation" to emphasise that the specific condition regarding "Transfer Date" in clause 3.7(2)(c) of the Resolution Plan was carefully inserted based on discussions in the Committee of Creditors and thus the argument of Appellant is not acceptable in view of the actual Para 3.7(2)(c) and its formulation. He has clarified that the Respondents never intended to make payments towards Bank Guarantees invoked prior to the "Transfer Date". He has also submitted that the SRA have made due payments to State Bank of India for a Bank Guarantee that was invoked subsequent to the "Transfer Date".

17. In support of his contention that any claim that is explicitly not covered in the payment schedule in the approved resolution plan for Successful Resolution Applicant, would be extinguished as is held by Hon'ble Supreme Court in the matters of **Ghanashyam Mishra and Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Ltd. (2021 SCC OnLine SC 313)** and also in the matter of **Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta & Ors. (2020 (8) SCC 531)**.

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18. We find that the issue for consideration in the present appeal is limited to whether the Appellant and other member banks of consortium were entitled to payment towards live Bank Guarantees related to large projects under Resolution Plan invoked prior to the “Transfer Date” by the Successful Resolution Applicant. In this regard reference is made to Para 3.7(2)(c) of the Resolution Plan which states as herein:-

“Non-Fund based Facility i.e. EPC- Live Bank Guarantee- 2 Large Projects

The Resolution Applicants shall make payment to the respective Financial Creditors to the extent of 52.50% of the invocation amount within 60 days of invocation of such Bank Guarantee, that are currently live, as mentioned below, in the event of and with respect to, the invocation of such Bank Guarantees subsequent to the Transfer Date.”

(emphasis supplied)

19. We note that Para 3.5 of the Resolution Plan (at Page 91 of the Appeal Paper Book Volume-I) shows the following :-

“3.5 Source of Funds and its Utilization

a. Source of Funds

<i>Sr. No</i>	<i>Particulars</i>	<i>Rs. Crore</i>
6.	<i>Maximum payment guarantee towards invocation of the live Bank Guarantee provided by respective Financial Creditors.</i>	62.09

b. Summary of Utilisation of Funds

<i>Sr. No</i>	<i>Application of Funds</i>	<i>Rs. Crore</i>
2.	<i>Payment of Secured Financial Creditors**\$</i>	192.24

20. The ‘Closing Date’ and the ‘Transfer Date’ are defined in the Resolution Plan (at Page 66 and 67 of the Appeal Paper Book, Volume-I):-

“C. DEFINITIONS

<i>“Adjudicating Authority”/ “NCLT”</i>	<i>The National Company Law Tribunal (Mumbai bench)</i>
<i>“Closing Date”</i>	<i>The date on which the entire Upfront Payments to the Financial Creditors are affected in terms of this Resolution Plan and payments as envisaged under this Resolution Plan are affected to Operational Creditors and CIRP Costs.</i>
<i>“Transfer Date”</i>	<i>The date on which Resolution Professional hand over the management/ control of the Corporate Debtor to the Board constituted by Resolution Applicants within 15 days from Closing Date.</i>

21. A perusal of Para 3.5(a) and (b) makes it clear that these paras only show the “Source of Funds” and “Summary of Utilisation of Funds” by the SRA. It is noteworthy that the two asterisks (**) that appear below the table of “Summary of Utilisation of Funds” states that the utilisation of funds will

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be in the manner as provided under this Resolution Plan. Further in the note that in the footnote with \$ sign it is stated that this amount also includes the amount equivalent to 52.50% of the invoked bank guarantees issued by the secured financial creditors pertaining to large projects, to be paid to such respective Secured Financial Creditors whose bank guarantees are invoked.

22. It becomes clear from perusal of the definitions of “Closing Date” and “Transfer Date” that the management and control of the corporate debtor will devolve to the board constituted by the Resolution Applicant on the “Transfer Date” which will be within 15 days of the “Closing Date”.

23. It becomes lucidly clear on a close reading of Paras 3.5 and 3.7 of the resolution plan that payment of live bank guarantee for two large projects will be made in the event of and with respect to the invocation of such bank guarantee subsequent to the “Transfer Date”. We have earlier noted that the “Transfer Date” relates to the date when the management/ corporate debtor goes in the hands of the board of the Successful Resolution Applicant. It is not disputed that the said bank guarantees were invoked vide letters dated 18.10.2021 (attached at Page- 169- 173 of the Appeal Paper Book) and the SRA replied to these invocation letters stating that it was not liable to pay any amount post such invocation, as the Bank Guarantees were invoked prior to “Transfer Date” i.e 04.01.2022. We follow the judgment of the Hon’ble

Supreme Court in the matter of ***Kanataru Rajeevaru v. Indian Young Lawyers Association*** (*Supra*) wherein it is held that in case a certain provision is carefully punctuated, weightage should be given to punctuation.

24. We also follow the judgment of Hon'ble Supreme Court in the matter of ***Ghanashyam Mishra and Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Ltd.*** and ***Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta & Ors.*** (*Supra*) wherein it is clearly held that Successful Resolution Applicant cannot be subjected to surprise claims which are not part of Resolution Plan.

25. In view of detailed discussion in the aforementioned paragraphs and the terms included in the approved Resolution Plan, we are of the clear view that any purported liability falling on the Successful Resolution Applicant prior to "Transfer Date" in respect of invocation of bank guarantees shall not be payable by the SRA. We, therefore find that the appeal is devoid of merit and it is accordingly dismissed.

26. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

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

**[Barun Mitra]
Member (Technical)**

**New Delhi
14th November, 2022**

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