

IN THE NATIONAL COMPANY LAW TRIBUNAL,  
MUMBAI BENCH – I

MA No. 1126 of 2022

In

CP(IB) No. 2295 of 2018

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

*Filed by:*

Macawber Beekay Private Limited.

...Applicant

Versus

Sunil Hitech Engineers Limited

...Respondent

*In the matter of*

American Express Banking Corp.

...Financial Creditor

Versus

Sunil Hitech Engineers Limited ...Corporate Debtor

**Order delivered on:29.02.2024**

***Coram:***

Hon'ble Member (Judicial) : Justice V.G. Bisht

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

***Appearances:***

For the Applicant : Mr. Gaurav Joshi, Senior Counsel  
a/w Mr. Kunal Vaishnav, Ms. Gauri  
Joshi, Advocates i/b Ganesh & Co

For the Liquidator : Mr. Viraj Parikh, Ms. Nandita Bajpai,  
a/w Mr. Dhruvad Vaghani, Advocates

**ORDER**

***Per: Prabhat Kumar, Member (Technical)***

1. The present Application is being filed by Applicant aggrieved by the illegal invocation of bank guarantees furnished by the Applicant herein, by the Resolution Professional. It is the Applicant's case that the Resolution Professional without providing any reasons invoked the bank guarantees. The reliefs sought by the Applicant are as follows:
  - a) That this Tribunal be pleased to Order and declare that the invocation of the Bank Guarantees (being Exhibits A(Colly), B(Colly), C(Colly) and D(Colly)) vide the four different Letters dated 06.03.2019 (being Exhibits Q, R, S and T) is bad in law, illegal and set aside;
  - b) That pending the hearing and final disposal of the present Application, this Tribunal be pleased to issue an order and injunction staying the encashment of and/or the the Respondent and/ or its officers, agents, representatives be restrained from acting upon the four different Letters dated 06.03.2019 (being Exhibits Q, R, S and T) and / or the Respondent be restrained from receiving monies, in respect of the any of Bank Guarantees (being Exhibits A(Colly), B(Colly), C(Colly) and D(Colly)) furnished by the Applicant;

- c) Pending the hearing and final disposal of the present Application, this Tribunal be pleased to direct the Respondent to disclose and provide copies of all proceedings relating to the said Project i.e Parli Vaijanath Thermal Power Station, District Beed in Maharashtra
- d) For costs; and
- e) for such further and other reliefs as this Hon'ble Tribunal may deem fit and proper considering the facts and circumstances of the case

2. The particulars of the bank guarantees are detailed hereinbelow:

BG No.	Name of the bank and type	BG Amount originally in Rs.	BG Amount after amendments in Rs.
2010/166	Corporation Bank -ABG Supply	4,44,00,000	28,58,846
2010/167	Corporation Bank – CPG E&C	20,00,000	20,00,000

2010/168	Corporation Bank- CPG Supply	4,44,00,000	4,27,73,989
2011/343	Corporation Bank- ABG E&C	20,00,000	10,72,672
	Total	9,28,00,000	4,87,05,507

3. Moreover, the Applicant had filed a claim in Form C which was rejected by the Liquidator vide letter dated 15.10.2019. The Applicant aggrieved by the aforesaid rejection of claim filed a Miscellaneous Application bearing No. 3388 of 2019 before us, the said application was heard at length and reserved for orders on 02.11.2023. The facts of the aforesaid MA are identical to the present Application before us. The dispute qua invocation of bank guarantees furnished by the Applicant and rejection of the Applicant's claim in the CIRP of the Corporate Debtor are intertwined and could not have been decided in isolation. Accordingly, we have vide order dated 21.02.2024 in MA No. 3388 of 2019 decided the issue pertaining to the bank guarantees. The relevant paragraphs are reproduced herein below:

*“34. As regards invocation of Bank Guarantees by the Resolution Professional, we note that, as on date of invocation, the Bank Guarantee No. 2010/66 towards Advance for Supply part of the contract was reduced to Rs. 28,58,846/-; Advance Bank Guarantee No. 2010/343 towards Advance for Service part of the contract was reduced to Rs. 10,72,672/-; and the Performance Bank Guarantee(s) No. 2010/168 and 2010/167 towards performance of Supply & Services Contract was reduced to Rs. 4,27,73,989/- and Rs. 20,00,000/- respectively. As regards Advance Bank Guarantee, we are of considered view that these amounts have already been paid to the Applicant, accordingly, these amounts shall be reduced from the claim, if any, admitted by the Liquidator and the Guarantee(s) shall consequently be released. As regards performance bank guarantee(s) in relation to supply and service contract, we note that these guarantee(s) have been invoked on alleged breach of contract on part of the Applicant and there exists counter allegations, which is required to be adjudicated by appropriate forum in terms of Contract between the parties. We find force in the contention of the Respondent that Bank Guarantee is a contract between the issuing Bank and the Respondent dehors the Applicant Corporate Debtor, however, the cause of action for invocation of performance Bank Guarantee is alleged breach of contract and this fact is still in dispute. At this juncture, it is pertinent to note that the Applicant*

*has fulfilled more than 90% of its obligations under the Contract in relation to Supply and Service part. There are counter allegations in relation to the attribution of delay on part of either party and the Applicant was awarded only 10% part of the Whole contract awarded to the Corporate Debtor by MAHAGENCO. It can not be said that the cause of action for invocation of Performance Bank Guarantee can be said to have arisen on prima-facie perusal of the facts of the case. As we have already held in preceding para that the dispute between the parties in relation to the accountability of the parties to the Contract in relation to fulfilment of the contract requires adjudication by appropriate forum, and adjudication of dispute shall lead to determination of damages payable by either party to the other party, which would eventually take care of the amounts payable under the Bank Guarantee(s), it would be appropriate if these performance Bank Guarantees be not encashed, however the same shall be kept alive so as to secure the interest of the Corporate Debtor till the adjudication of dispute by the Arbitrator and final settlement of account between the parties after the Arbitration Award.”*

4. As a sequel to the above, the issue before us pertaining invocation of bank guarantees is squarely covered by our order dated 21.02.2024. Accordingly, nothing survives in the present Application.

5. In view of the foregoing, the IA No. 1126 of 2022 is rendered infructuous and disposed of in terms of decision rendered in IA 3388/2019.

**Sd/-**

**PRABHAT KUMAR**  
**MEMBER (TECHNICAL)**

29.02.2024

**Sd/-**

**JUSTICE V.G. BISHT**  
**MEMBER (JUDICIAL)**