

NATIONAL COMPANY LAW TRIBUNAL  
MUMBAI BENCH COURT-II

**11. MA-417/2018 In CP(IB)1832/MB/MAH/2017**

CORAM : SHRI H.P. CHATURVEDI, HON'BLE MEMBER (J)  
SHRI RAVIKUMAR DURAISAMY, HON'BLE MEMBER (T)

ORDER SHEET OF THE HEARING OF MUMBAI BENCH OF THE  
NATIONAL COMPANY LAW TRIBUNAL ON **24.09.2020**

NAME OF THE PARTIES: EPC Construction India Limited .. Applicant.

V/s

(1)NLC India Limited ... R.1.

(2)Axis Bank Limited ... R.2.

In the Matter of

IDBI Bank ..... Financial Creditor.

V/s

EPC Construction India Limited .. Corporate Debtor.

Section :- 60(5)(a) & (c) r/w. Section 7 of I&B Code.

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**ORDER**

Advocate Mr. Prateek Mishra appears for Applicant, Advocate Mr. Sanjay Kelkar appears for Respondent No.1 and Advocate Bhanu Chopra appears for Respondent No.2 through Virtual hearing (VC).

The case is fixed for pronouncement of the Order in respect of MA-417/2018 filed by the Applicant/Corporate Debtor EPC Construction India Limited. The Order is being pronounced pursuant to the directions given and observation made by the Hon'ble Bombay High Court in the Writ Petition (OS-WP-LD-VC-251-2020) dated 24.08.2020 whereby this Bench was directed to pronounce the Order within Four Weeks. Thereafter the MA-417/2018 was heard denovo by us after reconstitution of this Bench. The Order was reserved and today, the case is fixed for pronouncement of order. The order in detail is recorded separately and the operative portion of our order and our conclusions reached therein read as under:-

- (i) The relief being sought for in the present MA-417/2018 does not fall within the purview of Section 14 of the Insolvency and Bankruptcy Code, hence it cannot be granted by this Adjudicating

Authority in view of the Order passed by the Hon'ble NCLAT in the matter of *GAIL (India) Limited V/s Rajeev Manaadiar & Others in Company Appeal (AT) (Insolvency) No. 319 of 2018 dated 24.07.2018* whereby the Hon'ble NCLAT pleased to observe and hold that the security interest does not include the 'Performance Bank Guarantee' and therefore the 'Performance Bank Guarantee' given by the Corporate Debtor in favour of the Appellant (GAIL (India) Limited) is not covered under section 14 of the Insolvency and Bankruptcy Code. Thus Appellant was entitled to invoke its 'Performance Bank Guarantee' in full or in part by this decision. The Hon'ble NCLAT was pleased to set aside the Order dated 12.06.2018 (passed in MA-521/2018 in CP/1374/I&BC/MNCLT/MB/MAH/2017). This Ruling is squarely applicable to the facts and circumstances of present case and it is binding on us. In view of this present MA-417/2018 must fail.

Moreover, in the present matter this Bench has already 'Admitted' the I&B Petition moved by the Financial Creditor and the CIRP has commenced, the Resolution Professional has taken over the charge of the Corporate Debtor and the Resolution Plan is also approved.

- (ii) We carefully examined and considered the facts and the issues involved and as narrated in the pleadings of MA/Affidavit in Reply filed by the RP and we are of the view that Order of the status quo as passed by this Bench stands merged with the Final Order dated 19/11/2018 approving the Resolution Plan. Hence, it no longer can survive until specific order or direction is given to NLC India Limited, in MA-417/2018 by restraining it and not to invoke its 'Performance Bank Guarantee' as the same would fall out of the purview of Moratorium u/s 14 of the I&B Code by following the

above stated decision of Hon'ble NCLAT and for want of proper jurisdiction of this Court under the I&B Code.

- (iii) In addition to the above, the Hon'ble Bombay High Court in its decision in the matter of *Murablack India Limited V/s UBS AC, an establishment organized and existing under the laws of Switzerland & Others (in Notice of Motion No. 2356 of 2000 in Suit No. 187 of 1997 decided on September 4, 2000)* took similar view by placing reliance on a decision of the Hon'ble Supreme Court in the case of *Hindustan Construction Company V/s State of Bihar (2000 Bank J. (S.C.) 314 : (1999) 8 SCC 436)*, where their Lordship of the Bombay High Court have pleased to observe and hold as such :-

“7. Secondly, can mere invocation of guarantee be said to be proceedings to hold section 22 of SIC Act would be applicable. The judgment in so far as *Maharashtra Tubes Limited (Supra)* is concerned, relates to the first part and not to the amendment brought by the Amendment Act of 1993. By the Amendment Act, all that is stated that a suit for recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted cannot be or be proceeded with. It does not speak of any other proceedings. Therefore, only suits will not be or can be proceeded with. It does not include other proceedings. That contention must, therefore, also fail. Even otherwise, on a consideration of language of Section 22, invocation of a Bank Guarantee is invocation of a term of the Guarantee. Invocation by itself cannot be read into Section 22 of the SIC Act. Further invocation of a Bank Guarantee is admittedly a transaction by itself.

8. It is independent of the main contract between the plaintiff and the Defendant no.1. If reference need be made, it can be made to the case of (*Hindustan Construction Company vs. State of Bihar*) 2000 Bank.J (SC) 314; (1999) 8 SCC 436. The Apex Court held that a guarantee constitutes a separate, distinct and independent contract. The contract is between the party as the guarantor and the person in whose favour the guarantee is given. It is independent of the contract

*between principal and the person on whose behalf the guarantee is given. However, suit by a plaintiff to restrain the Bank from making payment in terms of the guarantee is maintainable. Relief cannot be granted if in such a case plaintiff is able to make out a case of fraud and/or irretrievable injustice. In the instant case, defendant No. 5 who has given the Bank Guarantee has expressed no difficulty in making payment to the defendant No. 1. It is the contention of defendant No. 5 that considering international trade and commerce they have to honour the commitment to defendant No. 1 otherwise it is they who will have to suffer irreparable injury and loss in international financial circles. In these circumstances as defendant No. 5 is not invoking the provisions of section 22 assuming it could invoke, the question of the Court granting any relief at the instance of the plaintiff would not arise.”*

- (iv) Therefore, the Hon’ble Bombay High Court observed that a Guarantee constitute a separate distinct and independent contract between the parties. The contract is between the party as the guarantor and the person in whose favour the guarantee is given. It is independent of the contract between principal and the person on whose behalf the guarantee is given. However, suit by a plaintiff to restrain the Bank from making payment in terms of the guarantee is maintainable. Relief cannot be granted if in such a case plaintiff is able to make out a case of fraud and/or irretrievable injustice. In the instant case, defendant No. 5 who has given the Bank Guarantee has expressed no difficulty in making payment to the defendant No. 1. It is the contention of defendant No. 5 that considering international trade and commerce they have to honour the commitment to defendant No. 1 otherwise it is they who will have to suffer irreparable injury and loss in international financial circles. In these circumstances as defendant No. 5 is not invoking the provisions of section 22 assuming it could invoke, the question of the Court granting any relief at the instance of the plaintiff would not arise.”

- (v) We have also perused the decision of the Hon'ble Supreme Court in the matter of *Hindustan Construction Company (Supra)* and proposition laid down therein by the Apex Court. The relevant portion of the above referred Supreme Court decision for the purpose of placing reliance by us is being reproduced herein as below:-

*“Now, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary. In contracts awarded to private individuals by the Government, which involve huge expenditure, as, for example, construction contracts, Bank Guarantees are usually required to be furnished in favour of the Government to secure payments made to the contractor as "Advance" from time to time during the course of the contract as also to secure performance of the work entrusted under the contract. Such Guarantees are encashable in terms thereof on the lapse of the contractor either in the performance of the work or in paying back to the "Government Advance", the Guarantee is invoked and the amount is recovered from the Bank. It is for this reason that the Courts are reluctant in granting an injunction against the invocation of Bank Guarantee, except in the case of fraud, which should be an established fraud, or where irretrievable injury was likely to be caused to the Guarantor. This was the principle laid down by this Court in various decisions. [In U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers Pvt. Ltd.](#), [1988] 1 SCC 174, the law laid down in *Bolivinter Oil SA v. Chase Manhattan Bank*, [1984] 1 All E.R. 351 was approved and it was held that an unconditional Bank Guarantee could be invoked in terms thereof by the person in whose favour the Bank Guarantee was given and the Courts would not grant any injunction restraining the invocation except in the case of fraud or irretrievable injury. [In Svenska Handelsbanken v. Indian Charge Chrome](#), [1994] 1 SCC 502; [Larsen & Toubro Ltd. v. Maharashtra State Electricity Board](#), [1995] 6 SCC 68; [Hindustan Steel Works Construction Ltd. v. G.S.](#)*

Atwal & Co. (Engineers) (P) Ltd., [1995] 6 SCC 76; National Thermal Power Corporation Ltd. v. Flowmeore (P) Ltd., [1995] 4 SCC 515; State of Maharashtra v. National Construction Co., [1996] 1 SCC 735; Hindustan Steel Works Construction Ltd. v. Tarapore & Co., [1996] 5 SCC 34 as also in U.P. State Sugar Corporation v. Sumac International Ltd., [1997] 1 SCC 568, the same principle has been laid down and reiterated.

*What is important, therefore, is that the Bank Guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the Bank Guarantee or the person on whose behalf the Guarantee was furnished. The terms of the Bank Guarantee are, therefore, extremely material. Since the Bank Guarantee represents an independent contract between the Bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the Bank Guarantee; or else, the invocation itself would be bad.*

*For the reasons stated above, the appeal arising out of SLP(C) No. 6985/98 is allowed. The judgment and order passed by the Division Bench of the Bombay High Court insofar as it purports to vacate the injunction order, granted by the Single Judge in respect of "Performance Guarantee", is set aside and the injunction order granted by the Single Judge in respect of both the Guarantees, namely, "Mobilisation Advance" and "Performance Guarantee" is maintained. The appeal arising out of SLP(C) No. 12143/98 is dismissed. There shall be no order as to costs."*

- (vi) That part the Hon'ble Gujrat High Court in the matter of *ABG Shipyard Limited V/s Government of India (Special Civil Application No. 17666 of 2017)* was also pleased to observe as such:

*"In view of the rival submissions, it is required to be stated that normally the Court would declined to interfere with the invocation of the bank guarantee or the performance guarantee as it has been settled law*

*that the Court should decline interference with the invocation of the bank guarantee except on limited grounds. However, the Law declared and observation made has reference to ordinary commercial transaction and performance guarantee. In the facts of the case, subsequent application of the Insolvency and Bankruptcy Code, 2016 will have to be considered, which provides for a separate procedure in case of such Company, which is under resolution process.”*

- (vii) Therefore, by following the above stated Judicial precedents we are of the confident view that status quo order granted against the Respondent no.1 stands ceased to have its effect automatically soon after the approval of Resolution Plan. Further, there cannot be status quo against Respondent no.2 Axis Bank for discharging contractual obligation and performing its part of contract. Therefore, the Respondent no.1 being a contracting party is eligible and entitled to invoke its Performance Bank Guarantee. It cannot be restrained by this Adjudicating Authority at the instance of Corporate Debtor and it is upto a competent civil court/ forum and not necessarily by this Adjudicating Authority under the provisions of the I&B Code to deal with and decide the same. Hence, no injunction order can be passed, being out of the purview of the Section 14 of the I&B Moratorium.

For the aforesaid reason, the present MA-417/2018 is liable to be rejected with following observation to the Respondent no.1 NLC India Limited:-

- (a) In case of any surplus amount remains after invoking Bank Guarantee, the same should be kept in a separate Escrow Account opened in a Nationalized Bank and the same has to be dealt with as per Orders of a Competent Court of Law/ Forum.
- (b) Since the release of Bank Guarantee invocation amount was pending for some time and was lying with Axis Bank, we are of

the view that upon payment of Bank Guarantee Amount, the Bank has to pay applicable interest accrued, if any on the margin money received by the bank, to the NLC India Limited - Respondent No.1.

With the aforesaid observation, the MA No.417/2018 in CP(IB) 1832/MB/MAH/2017 is disposed of accordingly.

Sd/-

RAVIKUMAR DURAISAMY  
Member (Technical)

Sd-

H.P. CHATURVEDI  
Member (Judicial)

Dated this the 24th day of Sept. 2020  
aah/vc