

IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH – I

MA No. 3388 of 2019

In

CP(IB) No. 2295 of 2018

Under Section 42 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:21.02.2024

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

ORDER

Per: Prabhat Kumar, Member (Technical)

1. The present Appeal is being filed by Appellant under section 42 of the Insolvency and Bankruptcy Code, 2016 (“Code”) in the capacity as a claimant of the Corporate Debtor. The Applicant has filed its claim amounting to Rs.6,99,18,318/- in Form C with the Liquidator/Respondent herein of the Corporate Debtor. The said claim was rejected and moreover bank guarantees given by the Appellant to the Corporate Debtor were invoked by the Resolution Professional, aggrieved by this act of the rejection of claim and invocation of Bank Guarantee by the Resolution Professional, the Applicant has filed present application in terms of Section 42 r/w 60(5) of the Insolvency & Bankruptcy Code, 2016.

Facts of Case

2. On 31 August 2009, MAHAGENCO invited tenders (“NIT”) for the purposes of Design, Engineering, Manufacture, Assembly, Testing at Works, Inspection at Works, Transportation, including Insurance, Supply, Receipt and Handling at Site, Civil or Structural Works, Erection, Testing and Commissioning of Balance of Plant Package along with Supply of Mandatory Spares for 1x250 MW Thermal Power Project at Parli (Unit 8) (“Project”).
3. Pursuant to the same, the Applicant, Zuberi Engineering Company, Driplex Water Engineering Ltd. and the Company entered into a Pre-Bid Consortium Agreement dated 3 October 2010 (“PBCA”) for jointly

bidding as a consortium ("Consortium") for the said NIT on the basis of the terms and conditions mentioned therein. According to the PBCA, the lead member of the Consortium was to be the Company. Under the PBCA, the Applicant's scope of work was inter alia to be in respect of the Ash Handling Plant and Mill Reject Handling System.

4. The Company accordingly submitted its bid to MAHAGENCO on 9 November 2009. The bid was accepted by MAHAGENCO on 1st January 2010 and a contract was entered into between the Company and MAHAGENCO on 19th July 2011.
5. Thereafter, the Company issued two separate letters of intent dated 30th January 2010 upon the Applicant and thereafter formally executed two separate Agreements dated 09th November 2011 (hereinafter collectively referred to "Contract"). As per the terms of the Contract, the Applicant was supposed to design, manufacture, assemble, test at works, supply, unload, transport and deliver to site, inspect, test and commission along with trial operation performance guarantee test all the equipment, mandatory spares, including special tools and tackles for Ash Handling Plant and Mill Reject Handling system for of balance of plant package for the said Project.
6. The Respondent submits that as per clause 14 of the General Conditions of the Contract, the Applicant had furnished Contract

Performance Security in the form of a bank guarantee to the sum of 10% of the total contract price. Further as per clause 12 of the Special Conditions of the Contract, the Applicant had furnished Advance Bank Guarantee covering the advance amount. Thus, Advance Bank Guarantee bearing no. 2010/166 for INR 28,58,846 having validity period until 30.03.2019, Performance Guarantee - Erection and Commission bearing no. 2010/167 for INR 20,00,000 having validity period until 28.05.2019. Performance Guarantee Supply bearing no. 2010/168 for INR 4,27,73,989 having validity period until 28.05.2019 and Advance Bank Guarantee - Erection and Commission bearing no. 2011/343 for INR 10,72,672 having validity period until 28.05.2019 ("Bank Guarantees") were issued by Corporation Bank ("Issuing Bank") in favour of the Company on the request of the Applicant.

7. Based on the information collated on the basis of the records available with the Company and information as conveyed by the Resolution Professional, Mr. Ashish Rathi ("RP"), it was informed to the Respondent that during the course of the Project, the Company, through several correspondences, had informed the Applicant about the non-compliance to the terms of the Contract and / or the balance work that was required to be completed by the Applicant and during the corporate insolvency resolution process ("CIRP"), the Applicant's

claim of INR 6,99,18,318/- before the RP was also rejected. Further, on 6th March 2019, the RP invoked the Bank Guarantees stating that the Applicant had failed to comply with its obligations under the Contract.

8. It is the Applicants case that as per the terms of the two LOI's, the Applicant on 03.04.2010, furnished the following Bank Guarantees to the Respondent Company:

- i. Advance Bank Guarantee No. 2010/166 of Rs. 4,44,00,000/- towards manufacture, supply, testing of works, supply of equipment and mandatory spares for an Ash Handling Plant and Mill Reject Handling System Plant. By way of amendments arising on account of adjustment of advance done by Respondent company from time to time from the progressive invoices of the Applicant, the amount guaranteed under this guarantee was gradually reduced to the extent of Rs.28,58,846/-.
- ii. Performance Bank Guarantee No. 2010/168 of Rs.4,44,00,000/- towards manufacture, supply, testing of works, supply of equipment and mandatory spares for an Ash Handling Plant and Mill Reject Handling System Plant. The amount under this guarantee was eventually reduced to the extent of Rs.4,27,73,989/- , as recorded in the subsequent amendments.

- iii. Performance Bank Guarantee No. 2010/167 of Rs. 20,00,000/- towards the transportation, delivery, insurance, unloading, taking delivery, inter-site transportation and handling, etc. The amount under this guarantee has remained to the tune of Rs.20,00,000/-.
 - iv. Advance Bank Guarantee No. 2011/343 dated 30.11.2011 of Rs.20.00.000/- was provided towards the transportation delivery, insurance, unloading, taking delivery, inter-site transportation and handling, etc. was furnished to the Respondent Company. By way amendments, the amount under this guarantee was gradually reduced to the extent of Rs. 10,72,672 by way of amendments arising on account of adjustment of advance done by Respondent company from time to time from the progressive invoices of the Applicant.
9. This Tribunal passed an Order dated 25.6.2019 for liquidation of the Corporate Debtor.

Submissions Advanced by the Appellant and Brief Facts of the case:

10. The case of the Applicant in brief is that a claim was filed by the Appellant before the resolution professional amounting to Rs. 48,41,53,551/- (Forty Eight Crore Forty One Lakh Fifty Three Thousand Five Hundred and Fifty one only) and the same was not

decided. The claim comprised of gross billing for work performed for supply contract for Ash Handling Plant & Mill Reject Handling System For Unit-8, 1*250 MW MSPGCL Parli TPS, District Beed, Satara amounting to Rs.46,41,52,530/- and Erection and Commissioning (E&C) Ash Handling Plant & Mill Reject Handling System For Unit-8, 1*250 MW MSPGCL Parli TPS, District Beed, Satara amounting to Rs.2,00,01,021/-.

11. The claim before Resolution Professional for a sum of Rs. 6,99,18,318/- was rejected by him and on 06.3.2019, the Resolution Professional invoked the Bank Guarantees. Moreover, the four bank guarantees provided by the Appellant to the Respondent Company under the contract were invoked by the Resolution Professional vide letter dated 06.03.2019. Aggrieved by the said act, the Appellant herein recorded its objection vide email dated 07.03.2019 to the invocation and encashment of the performance bank guarantees. In this email, *inter alia*, it was brought to the notice of the RP that as per the Claim Status on the website of the Respondent Company, an amount of Rs. 1,18,90,988/- (Rupees One Crore Eighteen Lac Ninety Thousand Nine Hundred and Eighty-Eight only) as on 29th December, 2018 was reflected as “estimated as admitted”. Further, an amount of Rs.6,99,18,318/- (Rupees Six Crore Ninety-Nine Lac Eighteen

Thousand Three Hundred and Eighteen only) as on 22nd February, 2019 was reflected as “Amount under verification”.

12. Further, it important to note that the Appellant herein filed a Misc. Civil Application No. 195 of 2019 under Section 9 of the Arbitration & Conciliation Act, 1996 before the Hon’ble Court of Principal District and Sessions Judge, Nagpur (“Civil Application”). On 8th March, 2019, the Court passed an Order to maintain status quo in the matter. Further, on 18th July, 2019, the Hon’ble District Court, Nagpur passed an Order wherein it held that the Court did not have jurisdiction to entertain the said Application. Further, it was directed that the parties shall maintain *status quo* till 5th August, 2019.
13. Subsequently, on 25th June, 2019, the Corporate Debtor went into Liquidation and Mr. Avil Menezes came to be appointed as the Liquidator of the Respondent Company. The Appellant filed its claim in Form C dated 17th September, 2019 and appraised the Liquidator about the invocation of the bank guarantees was illegal and requested the return of the same.
14. The Applicant filed Writ Petition No. 5337 of 2019 before the Hon’ble Bombay High Court, Nagpur Bench seeking an order to quash and/ or set aside the Order dated 18th July, 2019 passed by the District Court, Nagpur (“**Writ Petition**”). On 1st August, 2019, the Hon’ble Bombay

High Court vide its Order directed that the interim order dated 18th July, 2019 passed by the Nagpur District court shall continue until further orders. However, on 1st August, 2019, the Hon'ble Bombay High Court vide its Order directed that the parties shall maintain *status quo* till 20th September, 2019.

15. Thereafter, on 15th October, 2019, the Liquidator of the Respondent Company sent an email informing *inter alia* that the claim was rejected (“**Rejection Order**”). It is the Appellants case that the rejection of the Petitioner’s claim has been wrongfully intertwined with the performance bank guarantees that were provided. The Liquidator did not provide any cogent reasons and/ or justification to reject the claim.
16. It is submitted that the Official Liquidator intentionally and wrongfully intertwined the contractual disputes between the parties with the adjudication of the Petitioner’s claim dated 17th September, 2019.
17. It is submitted that in the Rejection Order the Liquidator refers to and relies upon the Minutes of Meeting held on 12th December, 2017. However, the Liquidator fails to appreciate the fact that the Minutes of Meeting were in relation to the contractual disputes between the parties. Be that as it may, the Liquidator wrongly relies upon the said Minutes of Meeting and the contractual arrangement between the Petitioner and Respondent Company. However, the Liquidator

entirely fails and/ or neglects to consider that in the Minutes of Meeting, the Respondent Company expressly admitted its liability of a sum of Rs. 2,23,41,771/-. Therefore, the Liquidator is cherry picking the details from the Minutes of Meeting and does not consider the document as a whole.

Submissions made by the Respondent/Liquidator:

18. The Liquidator submits that on 31 August 2009, Maharashtra State Power Generation Company Ltd. ("MAHAGENCO") invited tenders ("NIT") for the purposes of Design, Engineering, Manufacture; Assembly, Testing at Works, Inspection at Works, Transportation, including Insurance, Supply, Receipt and Handling at Site, Civil or Structural Works, Erection, Testing and Commissioning of Balance of Plant Package along with Supply of Mandatory Spares for 1x250 MW Thermal Power Project at Parli (Unit 8) ("Project").
19. Pursuant to the same, the Applicant, Zuberi Engineering Company, Driplex Water Engineering Ltd. and the Company entered into a Pre-Bid Consortium Agreement dated 3 October 2010 ("PBCA") for jointly bidding as a consortium ("Consortium") for the said. NIT on the basis of the terms and conditions mentioned therein. According to the PBCA, the lead member of the Consortium was to be the Company.

Under the PBCA, the Applicant's scope of work was inter alia to be in respect of the Ash Handling Plant and Mill Reject Handling System.

20. The Company accordingly submitted its bid to MAHAGENCO on 9 November 2009. The bid was accepted by MAHAGENCO on 1 January 2010 and a contract was entered into between the Company and MAHAGENCO on 19 July 2011.
21. Thereafter, the Company issued two separate letters of intent dated 30 January 2010 upon the Applicant and thereafter formally executed two separate Agreements dated November 09, 2011 (hereinafter collectively referred to "**Contract**"). As per the terms of the Contract, the Applicant was supposed to design, manufacture, assemble, test at works, supply, unload, transport and deliver to site, inspect, test and commission along with trial operation performance guarantee test all the equipment, mandatory spares, including special tools and tackles for Ash Handling Plant and Mill Reject Handling system for of balance of plant package for the said Project.
22. Clause 14 of the General Conditions of the Contract required the Applicant to furnish Contract Performance Security in the form of a bank guarantee to the sum of 10% of the total contract price. Clause 12 of the Special Conditions of the Contract required the Applicant to furnish Advance Bank Guarantee covering the advance amount.

23. The Liquidator submits that on verification of various letters, communications exchanged between the Company, MAHAGENCO and the Applicant; it was prima facie evident that the Applicant had breached the Contract and therefore the claim ought to be rejected. Therefore, vide email dated October 15, 2019, the Applicant's claim was rejected. Further, on account of MAHAGENCO terminating the contract which was awarded to the Company due to non-completion of the obligations thereunder, the Company has suffered damages due to the Applicant's breach. The Liquidator submits that the company was entitled to levy liquidated damages on account of losses suffered by the Appellant.
24. The Liquidator argues that there is no moratorium against the Company and hence the court having competent jurisdiction to decide on the issue of stay of the invocation of the Bank Guarantees would be the one as agreed between the parties under the Contract. As the Contract contains an arbitration clause and an exclusive jurisdiction clause, the remedy if any, lies by way of interim relief under section 9 of the Arbitration Act before the competent court as defined under the said Act and as agreed upon by the parties in the Contract.

Affidavit in Rejoinder submitted by the Appellant:

25. The Appellant submits that the Liquidator is attributing damages suffered by the Corporate Debtor due to termination of contract by MAHAGENCO on account of non-completion of contract by the Corporate Debtor. The Liquidator has held the Appellant herein accountable for the said loss as it was a sub-contractor, on this issue the Appellant submits that the Corporate Debtor was awarded the contract of approximately Rs. 487.84 crore by MAHAGENCO. From this, the Corporate Debtor sub-contracted only a sum of approximately Rs. 44.77 crore to the Applicant, that is lesser than 10% of the contract awarded by MAHAGENCO.
26. In any event, MAHAGENCO invoked and encashed guarantees of more than Rs. 83 crore from the Corporate Debtor, however, the entire consideration and subject Guarantees provided by the Applicant to the Corporate Debtor were only of Rs. 4,87,05,507/- (as on the date of their invocation as advance bank guarantees were proportionately reduced to Rs. 39,31,518/-). Therefore, even on merits, the Liquidator has failed to establish that the termination of the contract and invocation of guarantees by MAHAGENCO is related to the subject Guarantees.

Findings:

27. We have perused the records and considered the submissions advanced by the learned counsel for respective parties.

28. The dispute in the present matter relates to (a) the determination of liquidated damages under a contract between the parties; (b) whether the claim of the Applicant, already admitted by the Corporate Debtor by approving its invoices, can be rejected de hors the liquidated damages, which are yet to be determined; and (c) whether this Tribunal can exercise its powers to decide whether the Bank Guarantees given by the Applicant could have been invoked by the Respondent considering that there exists a dispute between the parties that the Applicant has breached the contract.
29. It is important to examine the following relevant clauses of the agreement:

“Contractor's Default (Clause 28.1) - "If the contractor (the Applicant) shall neglect to execute the works as defined in the contract with due diligence and expedition or shall refuse or neglect to comply with any reasonable orders given to him in writing by the Engineer in connection with the works or shall contravene the provisions of the contract, the Purchaser/ Owner (the Respondent Company) may give a notice in writing to the contractor to make good the failure, neglect or contravention complained of. Should the contractor fail to comply with the notice within one week from the date of service thereof, then and in all such cases, the Purchaser/ Owner shall be

at liberty to employ other work and forthwith execute such part of the works as the contractor may have neglected to do...

Clause 6.4 - The Contractor (the Applicant) shall be liable for liquidated damages in case of delay in completion of the works upto 10% of the contract price as well as shortfall in the guarantee of the balance of plant equipment up to 10% of the contract price, with an overall cap of total liquidated damages restricted up to 15% of total contract price."

Clause 12.2.1 - "10% (ten percent) of the Total Contract Price (including taxes, duties, cess, etc.) shall be paid as advance within thirty (30) days of the fulfillment of the following:

...(iv) Submission of Advance Bank Guarantee covering the advance amount which shall be initially kept valid till ninety (90) days beyond the scheduled date of supply completion"

30. On 15.07.2017, the Applicant sent a letter to the Respondent Company stating inter alia that the Project was delayed for several reasons that could not be attributed to the Applicant, including initial delays due to belated input data availability, delays in approval of documents (designs, drawings, BBU) and delays in obtaining the approval of vendors and issuing MDCC & MRC. Further, delayed availability in work fronts prevented the Applicant from undertaking the site activities during execution. Moreover, during the execution of works, the scope

of work was revised by the Respondent Company. As on that date, the total supply order price was Rs.41,05,39,345/- (excluding taxes and duties) and this was fully supplied by the Applicant, save and except some non-billable items. In addition, the total service order price was Rs.1,81,32,366/- (excluding taxes), and from this only Rs.7,66,245/- value of work remained to be executed by the Applicant. However, since the Respondent failed to complete all of the obligations as agreed at the meeting held on 23.08.2016; the Respondent Company was called upon inter alia to (i) Release the PV of Rs.2,23,41,771/- and progressive payment of Rs.68,86,723/- by 25th July, 2017; (ii) Release the remaining work fronts listed in Annexure B thereof; and (iii) Withdraw the debit note of Rs. 32,64,045.

31. In response to and with a view to address the concerns raised by the Applicant a meeting was scheduled between the Parties on 22.12.2017. The meeting was attended by the representatives of the Applicant and Respondent, at which time certain terms were agreed by the Parties. These terms were recorded in the minutes of the meeting ("MoM of December, 2017") It was agreed that:

"(ii) Release of progressive payment amounting to Rs. 68,86,723/- against Supply and Erection: In this regard SHEL informed that as per SHEL ledger total outstanding is Rs. 1,42,03,711/- (excluding

retention money) including Supply, Erection & PV. To reconcile amount SHEL suggested MBPL to depute their account person in 1st week of Jan'18 to SHEL Nagpur office MBPL agreed for the same. MBPL requested to release pending RA Bill & PV amount to start work. However, SHEL agreed after lengthy discussion with MBPL to arrange Rs. 40 lacs two installment of Rs. 20 lacs each directly from MAHAGENCO

...

(iv) Release of PV Amount Rs. 2,23,41,771/-: After reconciliation of amount with SHEL ledger, PV will be released after completion of work & PG Test.

...

(v) Release of Adv BG: MBPL requested to release advance BG for supply & erection as advance is already recovered. SHEL will revert on this after discussion with Finance Dept. & reconciliation of account

32. It is noted from the Contract that the disputes between the parties were agreed to be decided by an Arbitrator but none of the parties has referred the matter for Arbitration. It is the case of the Applicant that the breach of contract qua MAHAGENCO can not be attributed to it as it had completed more than 90% of its obligations under the Contract and the delay, if any, occurred was outcome of various factors not

attributable to the conduct of the Applicant. It was awarded work constituting less than 10% of total contract value with MAHAGENCO and its scope of work was limited to Ash Handling Plant and Mill Reject Handling system; and the Respondents failed to adhere to the understanding arrived in the meeting held between the parties which is recorded in the MOM dated 12.12.2017. Per contra, it is the case of the Respondent that the failure on part of the Applicant led to termination of the contract by MAHAGENCO and invocation of Bank Guarantees submitted by the Respondent to MAHAGENCO for a sum of Rs. 83,30,34,644/- besides filing of claim of Rs. 49,45,00,000/- in the liquidation process of the Corporate Debtor, accordingly it is entitled to recover damages for breach of contract from the Applicant.

33. It is undisputed fact that the Contract contains an Arbitration clause and present dispute as regards liability of each party in relation to breach of contract ought to have been referred to Arbitration. The breach of contract has arisen dehors the insolvency of the Corporate Debtor, accordingly this Tribunal can not adjudicate the issue of liquidated damages payable to either party to the Contract in view of Hon'ble Supreme Court decision in the case of *Tata Consultancy Services v. Vishal Ghisulal Jain, Resolution Professional, S K Wheels Private Limited* {Civil Appeal No. 3045 of 2020} holding that, *the residuary*

jurisdiction of National Company Law Tribunal (“NCLT”) cannot be invoked if the termination of a contract is based on grounds unrelated to the insolvency of the corporate debtor. Since the claim of both the parties i.e. Applicant and Respondents, require adjudication by appropriate forum and the Contract itself provides for reference of disputes to Arbitrator and the issue of determination of liquidated damages can be determined by the Arbitrator only in this case, the claim of damages by either side is merely a contingent claim in nature and can not be allowed to be entertained till such time it is adjudicated by appropriate forum. Accordingly, we direct the Liquidator to adjudicate the claim of the Applicant in relation to approved invoices dehors claim for damages for breach of contract of either party.

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 de hors 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.

35. In view of the foregoing, the MA No. 3388/2019 is **partly allowed** and disposed of accordingly.

Sd/-

PRABHAT KUMAR
MEMBER (TECHNICAL)

21.02.2024

Sd/-

JUSTICE V.G. BISHT
MEMBER (JUDICIAL)