NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

COMPANY APPEAL (AT) (CH) (INS.) No. 385 / 2023

(Filed under Section 61 of the Insolvency and Bankruptcy Code, 2016)

(Against the Impugned Order dated 04.09.2023 in I.A. 1471 / 2022 in C.P.(IB) No. 492/7/HDB/2019 passed by the 'Adjudicating Authority', National Company Law Tribunal, Hyderabad Bench-II)

In the matter of:

1. IDBI Bank Limited
Chapel Road,
Hyderabad – 500 001. **… Appellant No. 1**

2. State Bank of India
Stressed Assets Management Branch-II,
D. No. 3-4-1013 / A, 1st Floor, CAC,
TSRTC Bus Station, Kachiguda,
Hyderabad – 500 027. **… Appellant No. 2**

3. Punjab National Bank,
1st Floor, 6-3-865, My Home Jupally,
Greenland, Ameerpet,
Hyderabad. **… Appellant No. 3**

4. Union Bank of India
Stressed Assets Management Branch,
3rd Floor, Andhra Bank Building,
Sultan Bazar, Koti,
Hyderabad. **… Appellant No. 4**

5. Bank of India
Bank of India Building,
4th Floor, 70-80,
M.G. Road, Fort,
Mumbai – 400 001. **… Appellant No. 5**

Versus

Mr. Sumit Binani,
Resolution Professional of
M/s. KSK Mahanadi Power Company Ltd.,
4th Floor, Room No. 6, Commerce House, 2A,
Ganesh Chandra Avenue,
Kolkata – 700 013. **…Respondent**

Present :

For Appellant: **Mr. P.L. Narayanan, Senior Advocate**
For Mr. E. Hariharan, Advocate

For Respondent: **Mr. Allwin Godwin &**
Ms. Niranjana Pandian, Advocates

J U D G M E N T
(Virtual Mode)

[Per: Shreesha Merla, Member (Technical)]

1. Aggrieved by the Impugned Order dated 23.08.2023, passed in I.A. No. 1471/2022 in CP (IB) No. 492/7/HDB/2019, the Appellant Banks preferred this Appeal, by which Impugned Order, the Adjudicating Authority has, while dismissing the Application, observed as follows:

> ***Decision on the Application:***
> *First of all, it is essential to recognize that a Bank Guarantee inherently serves as a mechanism to protect the interests of its recipient. The party providing the Guarantee assures the recipient of their financial stability and credibility. From the standpoint of banks or financial institutions issuing the guarantee, their primary interest lies in earning a commission for this service. If, for any reason, the Guarantee is invoked by the recipient, the banks or financial institutions pass on the resulting debt to the Guarantee provider.*
> *In the present case, it is evident that the Applicants' primary concern is not centered around*

safeguarding the Corporate Debtor's property value, but rather revolves around the commission they would lose if the Bank Guarantees are not renewed or extended. Moreover, the 'commercial wisdom' of the CoC concerning the Corporate Debtor's welfare is not discernible in this context, as the extension or renewal of Bank Guarantees does not inherently contribute to the ongoing operations of the Corporate Debtor.

The Applicants have failed to present any evidence indicating that discontinuing the Bank Guarantees would impede the Corporate Debtor's ability to continue functioning. At most, this scenario could affect the Customs Department's capacity to enforce their claim against the Corporate Debtor, potentially requiring them to pursue their claim through the CIRP process, which they have already undertaken.

To conclude therefore, u/s 25(1), the Resolution Professional can reject the CoC's proposal for renewal of Bank Guarantees provided by the Corporate Debtor prior to the initiation of CIRP proceedings, as renewing these do not in any way protect and preserve the assets of the Corporate Debtor or support its operations as a going concern.

2. Learned Senior Counsel Mr. P.L. Narayanan appearing for the Appellants submitted that the First Appellant, IDBI Bank, representing the other banks submits that the renewal of the Bank Guarantees is essential to avoid invocation of liability and would also be useful for the Resolution Applicants who acquire the Corporate Debtor as a 'Going Concern' together with all the rights, and after obtaining MPP status, they would get total exemption from payment of Customs Duty, thereby, improving the turnaround chances of the Corporate Debtor Company (KMPCL). Therefore, appropriate directions for renewal of Bank Guarantees are required to be issued to the Resolution Professional to safeguard the interests of the Stakeholders as well as the Corporate Debtor. The commission payable to the Banks for renewal of the Bank Guarantees would fall under the CIRP Costs to be borne by the prospective Resolution Applicants and there would be no prejudice caused to any Party. It is submitted that at the time of CIRP, three out of the six units had been commissioned while the other three were yet to be operational. Amongst the Operational Units, two units achieved the Mega Power Plant (hereinafter referred to as 'MPP') status, with two units attaining partial MPP status. This MPP status is crucial for eligibility of clearing Custom Duty Exemption. It was proposed that the Bank Guarantees can be renewed at a commission of 1% to be paid at the time of the renewal of the Bank Guarantee from the cash flows of the Corporate Debtor and the difference commission amount be treated as the part of the CIRP cost.

3. It is submitted by the Counsel for the Appellant that the moratorium imposed under Section 14 of the Code does not come in the way of invocation of the Bank Guarantees. The Members of the CoC in their commercial wisdom proposed renewal of the Bank Guarantees in favour of the Customs Department, but the RP did not take this into consideration. It is contended that the RP is duty bound to make every endeavour to protect and preserve the value of the property of the Corporate Debtor as a 'Going Concern' and this aspect was ignored by the RP.

4. It is submitted that balancing the two components by a fine scale viz whether it is advantage to the Corporate Debtor to have the Bank Guarantee renewed and continued, as opposed to discontinuing the Bank Guarantees which will nullify not only the current Custom duty exemption but also pull back the earlier custom duty exemption resulting in enormous loss to the Corporate Debtor, the scales will tilt in favour of continuing the Bank Guarantees so as to avoid the imposition of penalty and withdrawal of custom duty exemption. It is further submitted that the Respondent failed to consider the fact that the present custom Bank Guarantee liability (- Rs.6,00,00,00,000) for KSK Mahanadi Power Company Ltd., is contingent liability, in case these custom Bank Guarantee are not renewed by lenders, the Custom Department may invoke these Bank Guarantee's, which will convert to Fund Based liability for the lenders and Corporate Debtor's liability will increase to that extent and will affect the Corporate Debtor as a going concern and as well as for obtaining MPP status.

5. Learned Counsel appearing for the Respondent / RP of the Corporate Debtor Company submitted that since only partial MPP status was achieved with respect to Unit Nos. 2 and 5, KMPCL sought for exemption of customs duty for the goods imported with respect to Unit Nos. 2 and 5. This was rejected by the Deputy Commissioner, Paradip Customs Division and an assessment order was passed, making KMPCL liable to pay an amount of INR 7,19,98,660/-. In this regard, the Deputy Commissioner, Paradip Customs Division filed a claim on 04.11.2019 with the IRP/RP of KMPCL. On 14.10.2020, in the Minutes of the Meetings of the CoC of KMPCL, wherein the issue regarding whether the Customs Bank Guarantees should be renewed or not, was discussed and in the CoC meeting held on 19.09.2022, the Respondent reiterated that the issue of renewal of the customs

Bank Guarantees was discussed at length in previous CoC meetings and the Respondent had concluded that it is the discretion of the Appellant Banks to renew the customs Bank Guarantees from their end. However, it was stated that KMPCL will not be obligated to pay any commission on such Bank Guarantees due for renewal as per the request received from the Customs Department, as nonrenewal of these Bank Guarantees will not affect the 'Going Concern' nature of KMPCL.

6. It is strenuously argued by the Learned Counsel for the Respondent that the Second unit is fully commissioned but is not eligible for complete MPP status as per the guidelines of the Ministry of Power. Unit 5 is not operational and the goods pertaining to Unit 5 are still lying with Paradip Port Authority for the last 6 years since 2017. Unit No. 5 received only partial MPP status and cannot be changed to confirm the MPP status during the CIRP of KMPCL in view of the present circumstances. It is also submitted that as the Customs Department has filed a claim before the RP with respect to financial liability on Customs Duty incurred by KMPCL. The CoC has discussed all the details and only subsequent to these meetings, the RP informed the Appellants that the renewal of the Customs Bank Guarantee will not affect the 'Going Concern' status of KMPCL.

7. <u>Assessment:</u> The brief point which falls for consideration in this Appeal is whether the Adjudicating Authority was justified in concluding that the Customs Bank Guarantees are not essential for the 'Going Concern' nature of the Corporate Debtor Company.

8. It is an admitted fact that the requirement of MPP status for the Operational Units of KMPCL was only for the purpose of seeking exemptions on paying of the Customs Duty, on importation of any goods with respect to the Company. Prior to CIRP, initiated on 03.10.2019, KMPCL imported goods from China for utilising in the construction of KMPCL's Power Plant. The Customs Bank Guarantees were issued by the Appellants prior to the CIRP initiation of KMPCL, with a condition that the said Bank Guarantee shall be kept alive until Unit Nos. 2 & 5 achieve confirmed MPP status. Upon expiry of the Customs Bank Guarantees, the Appellants requested for renewal of the same pending the grant of MPP status of Unit Nos. 2 & 5. For ready reference, the MPP status of the subject units are detailed as hereunder:

Unit No.	**Status of operationalisation**	**Whether MPP status has been granted**
1	Not operational	Partial MPP status
2	Operational	Partial MPP status
3	Operational	Confirmed MPP status
4	Operational	Confirmed MPP status
5	Not operational	Partial MPP status
6	Not operational	Partial MPP status

9. From the aforenoted table, it is clear that Units 1, 2, 5 & 6 are only having partial MPP status. It is an admitted fact that the MPP status is important since it provides an exemption of Customs Duty. We find force in the contention of the Learned Counsel for the Respondent that since there are no goods being imported by KMPCL or its contractor, being SEPCO, from China during the CIRP of KMPCL, for the operationalisation of the units of KMPCL, there is no exemption which KMPCL can claim for customs duty liability and therefore, the Respondent has intimated the CoC that these renewals are not necessary for the 'Going Concern' nature of KMPCL.

10. A perusal of the Minutes of the Meetings dated 14.10.2020, 22.10.2020 and 19.09.2022 of the CoC evidence that the Respondent had informed the Appellants that the renewal of the Customs Bank Guarantees would only increase the financial burden of KMPCL which would have to bear the commission charges and renewal charges which are exorbitant amounts. It is also significant to mention that the Deputy Commissioner, Paradip Customs Division filed a claim dated 04.11.2019 with the IRP / RP of KMPCL stating that an amount of Rs. 7,19,98,48,660.49/- was payable by KMPCL as per the assessment Order.

11. Now we address to the role of the RP as per Sections 25(1), 20(1) read with Section 23(2) of the Code, whereby and whereunder the RP is duty bound to make every effort to preserve the assets and value of the property of the Corporate Debtor Company and manage it effectively as a 'Going Concern'. Section 15(3) of the Code provides that any costs incurred by the RP in running the business of the Corporate Debtor as a 'Going Concern' forms part of the CIRP costs. We are of the considered view that when there is no guarantee with respect to the MPP status of the Non-Operational Units and since there are no goods being imported by the Corporate Debtor Company as it is undergoing CIRP, there is no exemption which the Company can claim for Customs Duty liability and we are of the earnest view that the Corporate Debtor Company need not be burdened with the Commission and renewal charges approximately amounting to Rs. 70 Crores which would only increase the financial burden of the Corporate Debtor Company with no positive benefits accruing. Under Section 25(1), the RP is empowered to reject the CoC proposal for renewal of the Bank Guarantees provided by the Corporate Debtor Company, prior to the initiation of the CIRP as renewing those would not consequently lead to any advantage or any valuable gains.

12. Therefore, for all the foregoing reasons and taking into consideration the facts and circumstances of the attendant case on hand, we do not see any substantial grounds to interfere with the well-considered order of the Adjudicating Authority. Hence, this Appeal is dismissed accordingly at the threshold. No Order as to costs.

[Justice Rakesh Kumar Jain]
Member (Judicial)

[Shreesha Merla]
Member (Technical)

21/12/2023
RO/TM