

**IN THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH : COURT-IV**

IA-3963/2022 IN C.P.(IB)-893/(MB)/2021

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

Application moved by:

Cethar Ltd. ...Applicant
(represented by Liquidator)

Vs.

**SKS Power Generation
(Chhattisgarh) Ltd. & Ors.**
...Respondents

In the matter of

Bank of Baroda
...Financial Creditor

Vs.

SKS Power Generation (Chhattisgarh) Ltd.
...Corporate Debtor

Order Pronounced on : **06.10.2023**

Coram:

Mr. Prabhat Kumar
Hon'ble Member (Technical)

Mr. Kishore Vemulapalli
Hon'ble Member (Judicial)

Appearances:

For the Applicant(s) : Mr. R. Subramanian, Advocate.

For the Respondent-1 : Ms. Poorva Garg, Advocate.

For the Respondents-2&3 : Mr. Prakash Shinde, Advocate.

ORDER

Per: Kishore Vemulapalli, Member (Judicial)

1. This is an Application No. IA 3963 of 2022 filed on 28.11.2022 under Section 60(5)(a) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'the Code') by M/s Cethar Ltd. through its Liquidator ('Applicant Corporate Debtor') seeking for an order to restrain the Resolution Professional of M/s SKS Power Generation (Chhattisgarh) Limited ('Respondent Corporate Debtor') from proceeding to enforce the Bank Guarantees issued in its favor by two Public Sector banks (Respondent no. 2 & 3) at the behest of the Applicant.
2. The Applicant Corporate Debtor i.e. Cethar Ltd. was placed under CIRP in June 2017 and later on was ordered to be liquidated on April 2018. The process of liquidation is underway.
3. The Respondent Corporate Debtor i.e. M/s SKS Power Generation (Chhattisgarh) Limited was admitted into Corporate Insolvency Resolution Process vide order dated 29.04.2022 passed in C.P. (IB) -893/(MB)/2021
 - 3.1. It is submitted by the Applicant that the Applicant Corporate Debtor had borrowings of over Rs 1000 crores most of it from public sector banks. Various fraudulent acts and the matters with respect to the affairs of Applicant Corporate Debtor are under investigation by both Central Bureau of Investigation as also by the Enforcement Directorate. The investigation covers the transactions undertaken by the Suspended Management of Applicant Corporate Debtor, including the transactions with the Respondent Corporate Debtor and its Associate entities.

- 3.2. The said acts apart from offences under IPC and Prevention of Corruption Act 1988 and Prevention of Money Laundering Act 2002 are also offences under Companies Act 2013 and the Applicant has filed CP/169(MB)2022 for order of investigation under Section 213 of the Companies Act 2013 and the same is pending on the file of this Hon'ble Tribunal.
- 3.3. That one of the large fund diversion/siphoning exercise from the Applicant involved in respect of the investigation as above by CBI and ED is the diversion of Rs 228.6 crores out of the funds borrowed by the Applicant from public sector banks being diverted under the guise of trade advances through the 1st Respondent, its then parent company and promoters and their front entities and associates for the benefit of the 1st Respondent and its parent all involved being companies under the control of the 1st Respondent's promoters.
- 3.4. The documents created in 2011 between the Applicant and the 1st Respondent's associates as the basis to divert Rs 228.6 Crores of funds from the Applicant "entitled" the Applicant company to recover the same with 12% pa interest after 31.12.2015.
- 3.5. In June 2017, when Corporate Insolvency Resolution Process under the Code was on the verge of being initiated against the Applicant, the 1st Respondent and its associates colluded with the Applicant's promoters to create ante-dated records as though the receivables of the Applicant under the agreement of 2011 which by then including interest were over Rs 400 crores had been decided to be "settled" for Rs 4.59 crores in a transaction.
- 3.6. Thereafter even for this Rs 4.59 crores only fake records were created as though the said payments were made and the factum of forged bank statements produced by the 1st Respondent's associate company which

was a 49% shareholder of 1st Respondent are evidenced by the documents on record on the files of the NCLT Chennai.

- 3.7. Effectively the 1st Respondent by its fraud on the Applicant sought to defeat Applicant's right to recover the Rs 400 crores due in 2017 from the 1st Respondent as also its parent and associates, such amounts now amounting to over Rs 600 crores.
- 3.8. The entire set of transactions engineered by 1st Respondent starting from siphoning off money from Applicant in 2011 through a layer of 1st Respondent's associates used as conduits for routing the funds and culminating in 2017 with the creation of the ante-dated documents, whose terms were also unconscionable and fraudulent, reveal that the records got created in 2017 to subvert the right of the Applicant to recover the sum of Rs 400 crores due to it is clearly an act of fraud perpetrated in the main by the 1st Respondent and its parent using a network of front companies.
- 3.9. The Applicants then promoters had as part of the collusion with the 1st Respondent and its affiliates collusively acted to obtain bank guarantees in favor of 1st Respondent for a sum of nearly Rs 180 crores from the 2nd and 3rd Respondents. Such guarantees were invoked by the 1st Respondent alleging default by the Applicant herein and suits were also filed by the 1st Respondent at a stage prior to the CIRP initiation to enforce the same.
- 3.10. The Applicant states that owing to the pendency of the CIRP and the subsisting moratorium under Section 14 of the Code the Applicant cannot move any other forum to restrain the 1st Respondent from proceeding with to enforce and or execute the Bank Guarantee as even the original jurisdiction of the High Court in the matter is barred and as such the only

remedy the Applicant has is to approach this Hon'ble Tribunal under Section 60(5)(a) of the Code. The Applicant states that while avoidance proceedings are already filed in these matters by it at NCLT Chennai in 2018 in the CIRP of the Applicant and the same are pending and the 1st Respondent herein and its parent are arrayed as Respondents therein even the said proceedings cannot be pursued presently as the same would be hit by Section 14 of the Code.

3.11. The Applicant was not allowed to intervene in the Suit filed by the 1st respondent Corporate Debtor against the Respondent Banks. Presently the regular remedy normally open to the Applicant which is to file a suit for permanent injunction on exercise of the Bank Guarantee is not also possible as the bar under Section 14 of the Code is in force.

3.12. It is therefore necessary for this Hon'ble Tribunal which is solely authorised to act in the matter presently to restrain the 1st Respondent from taking any steps to enforce or execute the Bank Guarantees issued by 2nd and 3rd Respondents on behalf of the Applicant till the disposal of the CIRP given the evident fraud and the position that Applicant is barred from exercising any legal remedies to protect its interests during the said period.

4. The Respondent Corporate Debtor has filed Affidavit in Reply dated 12.04.2023 stating that the present Application is filed with the *malafide* intention of preventing Respondent No.1, a company in CIRP, from receiving approximately **Rs. 188 crores**. It is submitted by the Respondent that

4.1. The captioned Application seeks to restrain Respondent No.1 from enforcing the Bank Guarantees issued by Respondent Nos. 2 and 3, pursuant to series of

EPC Contracts entered with Applicant Corporate Debtor and its subsidiary, Cethar Constructions Ltd on 2nd March 2011, for the purpose of setting up a 4*300 MW Power Project in Chhattisgarh. The Project was a Bank-approved project. These Bank Guarantees were issued by the Banks at the instance of the Applicant, to secure the due performance of various agreements entered into between Respondent No.1 and the Applicant for construction of a thermal power plant.

4.1.1. At the Applicant's request, Canara Bank (Respondent No.2) and Indian Bank (Respondent No.3) issued five Bank Guarantees in favor of Respondent No.1 in an aggregate amount of Rs.121,65,00,000/- and Rs. 57,30,00,000/- respectively. All Bank Guarantees are unconditional and irrevocable.

4.1.2. The original scheduled completion date for Unit I and Unit II of Phase I of the Project awarded to the Applicant Company was 31st March, 2014 and 30th June, 2014 respectively. Due to the inordinate delay occasioned by the Applicant, the parties entered into amendment agreements dated 11th August 2012 and 12th November, 2013. The amended/ revised provisional completion date was 31st December 2014 for Unit I and 31st March 2015 for Unit II.

4.1.3. Instead of taking steps to complete the project, from 2014, the Applicant began progressively abandoning the Project. As a result, Respondent No.1 was constrained to take over the Project. As the Applicant had defaulted in

paying sub-contractors and vendors, Respondent No.1 had to enter into tripartite agreements with the Applicant's vendors and/ or sub-contractors and make payments to them. In the process, Respondent No.1 suffered huge losses apart from the added interest burden on loans availed of by it for the Project. Eventually, due to the efforts of Respondent No.1, Unit II of Phase I of the Project was completed in October 2017 and Unit I of Phase I of the Project was completed in April 2018.

4.1.4. In view of the default committed by the Applicant in honoring the Project agreements, and in view of the fact that severe losses were caused to Respondent No.1 by the actions of the Applicant, on 5th September 2017, Respondent No.1 invoked the Bank Guarantees.

4.1.5. As stated above, Respondent No.1 had availed of finance, *inter alia* from a Consortium of Lenders. In view of the huge losses occasioned due to delay in the commissioning of the Project, as a part of a resolution exercise, the Consortium of Lenders led by State Bank of India, initiated an open bidding process to select an entity to acquire the Promoter's shareholding in Respondent Company pledged to it. Pursuant thereto, the Respondent Company was acquired on 18th March 2019 by Agritrade Power Holdings PTE Ltd ("**Agritrade**"), a company listed in Hong Kong head-quartered in Singapore, and owned by Singapore based Promoters.

4.1.6. The actions of the Applicant in abandoning the EPC Contract as aforesaid have caused serious losses to Respondent No.1, and Respondent No.1 is entitled to enforce the Bank Guarantees to recover the

same. Despite causing serious losses to Respondent No.1, the Applicant has repeatedly attempted to thwart Respondent No.1 from recovering the losses by invoking and enforcing the Bank Guarantees, in the sum of INR 188 crores.

4.2. The Respondent has challenged this IA on ground of Res-judicata submitting that the Applicant has made five attempts against Respondent No.1 previously on identical grounds to either restrain the Bank Guarantee and/or to interfere with its enforcement. All the above attempts have been rejected by various fora including the Hon'ble NCLT Chennai, NCLAT, Supreme Court and Bombay high Court. The present Application is the sixth attempt. In view thereof, I submit that the issues raised in the present Application have already been conclusively determined by Orders of several Courts, and the present Application is this barred by *res judicata*. The Applicant is estopped from raising the same plea relentlessly in different proceedings.

4.3. Even if the case of alleged fraud, as sought to be pleaded by the Applicant is considered for what it asserts, it is clear that it pertains to what even the Applicant is forced to admit was an independent investment transaction between Cethar Ltd and a third party by the name, Compact Agencies Ltd. The Respondent states that the aforesaid investment transaction is once again entirely unconnected to the present proceedings and Respondent No.1 is not even a party to the same. Therefore, any claims/ allegations with respect to the aforesaid transaction can, by no stretch, defeat the rights of Respondent No.1 under unconditional and irrevocable bank guarantees which are the subject

matter of the present proceedings. In fact, the entire law of Bank Guarantee seeks to address the exact mischief that the Applicant is attempting to perpetuate.

4.4. The Applicant through its Liquidator has till date not filed any independent proceedings against the Respondent No.1 *qua* its allegations of fraud or in respect of the underlying contract. Instead, the Applicant has only repeatedly sought to interfere with the Bank Guarantees, filed in the teeth of settled position of law that bank guarantee constitutes an independent contract between the issuing bank and the beneficiary to whom the guarantee is issued.

4.5. Moreover, in the course of the recovery proceedings filed by Respondent No.1 against Respondent Nos. 2 and 3 on the Bank Guarantees, Respondent No. 1 has obtained decrees from the Hon'ble Bombay High Court against Respondent Nos. 2 and 3 for payment under the Bank Guarantees. The appellate proceedings filed by Respondent Nos. 2 and 3 against the decrees have also been dismissed by the Division Bench of the Hon'ble Bombay High Court. The orders passed by the Division Bench of the Hon'ble Bombay High Court in various appellate proceedings have been challenged by Respondent Nos. 2 and 3 before the Hon'ble Supreme Court of India, The Hon'ble Supreme Court of India is presently seized of the matter and proceedings are currently pending before the Hon'ble Supreme Court.

5. We have perused the material on record and heard the Counsel, as well as

Counsel for Respondent No. 2 & 3 Bank.

5.1. In this case the Corporate Debtor had invoked Guarantee on 05.09.20217 i.e. prior to commencement of CIRP in the case of applicant. However, the issuing bankers are holding back the proceeds of guarantee money and have not remitted the same to the Corporate Debtor. The Applicant submits that owing to the pendency of the CIRP and the subsisting moratorium under Section 14 of the Code, the Applicant cannot move any other forum to restrain the 1st Respondent from proceeding with to enforce and or execute the Bank Guarantee as even the original jurisdiction of the High Court in the matter is barred. The Applicant has sought directions from this Bench to restrain the Respondent-1 from realizing the proceeds out of Bank Guarantee from 2nd and 3rd Respondents till the conclusion of CIRP process in the case of Respondent-1.

5.2. This Bench finds that it is the case of Applicant that it does a counter claim against the Corporate Debtor as the money of Rs. 228.60Cr belonging to the applicant has been in enjoyment of the 1st Respondent and its parents from 2011 onwards. The Applicant has alleged that under guise of an agreement dated 15.03.2011, Rs. 228.6 Crore was got paid by the Applicant out of monies received as bank loans by it to M/s Compact Agencies Ltd. for 7.5% stake in the 1st Respondent parent company when M/s. Compact Agencies Ltd. was not even a shareholder of the 1st Respondent. In any event the manner in which M/s. Compact Agencies Ltd. dealt with the money also

clearly reveals it to be a mere friend of the 1st Respondent. We find that the applicant has explained the money trail in this relation to substantiate its contention.

5.3. In substance, we find that prayer for restraint order is based on a premise that the applicant has a prima facie case of wrong-doing against the Corporate Debtor and its erstwhile parent company and it is entitled to recover a sum of Rs. 238.6 Cr therefrom, which it cannot in view of moratorium being in place in case of Corporate Debtor. This Bench finds that the Corporate Debtor is no longer connected to its erstwhile parent after disposal of the entire shareholding by erstwhile parent to the current management at behest of its financial creditors. Further even if plea of moratorium being in force in case of corporate debtor is accepted, this Bench does not find any reason why the applicant cannot move against the erstwhile parent for recovery of the money being subject matter of wrongdoing. Further, we also do not find any force in the contention of the applicant that it can not proceed against the Corporate Debtor post its resolution, basing its arguments on Section 32A of the Code barring fastening of any liability in relation to prior offences against the property of the Corporate Debtor, which is subject matter of approved resolution plan. The Applicant shall be free to proceed against the management of the Corporate Debtor as well as its Shareholders, and can make them to contribute to the loss caused by wrongdoing, if found so. Accordingly, this

bench feels that no purpose would be served even if a restraint order is passed.

5.4. The Counsel for the Corporate Debtor drew our attention to the order dated 17.3.2023 in SLP (C) Nos. 23962/2022, 3536-3537/2023 and 2418/2023, whereby the Hon'ble Supreme Court has ordered that "*Meanwhile, the amount lying deposited in the execution court shall not be distributed*".

6. In view of the foregoing discussion and stay of the Hon'ble Supreme Court being in force, this bench feels that the prayer in the present application are infructuous and no order can be passed.

7. In view of foregoing discussion, IA-3963/2022 in CP(IB)-893(MB)/2021 is **dismissed**.

Sd/-
PRABHAT KUMAR
MEMBER (TECHNICAL)

Sd/-
KISHORE VEMULAPALLI
MEMBER (JUDICIAL)

06.10.2023/-