# NATIONAL COMPANY LAW TRIBUNAL
# HYDERABAD BENCH
# COURT HALL NO: II

## PHYSICAL HEARING

**CORAM: SHRI. RAJEEV BHARDWAJ – HON'BLE MEMBER (J)**
**CORAM: SHRI. SANJAY PURI - HON'BLE MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH, HELD ON 12.12.2023, At 10:30 AM**

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|---|---|
| **TRANSFER PETITION NO.** | |
| **COMPANY PETITION/APPLICATION NO.** | **IA (IBC)/412/2023 in CP (IB)No.420/7/HDB/2018** |
| **NAME OF THE COMPANY** | **Lanco Amarkantak Power Ltd** |
| **NAME OF THE PETITIONER(S)** | **Axis Bank Ltd** |
| **NAME OF THE RESPONDENT(S)** | **Lanco Amarkantak Power Ltd** |
| **UNDER SECTION** | **7 of IBC** |

## ORDER

**<u>IA (IBC)/412/2023</u>**

Orders pronounced, recorded vide separate sheets. In the result, application is dismissed.

**Sd/-**
**MEMBER (T)**

**Sd/-**
**MEMBER (J)**

Apoorva

**IN THE NATIONAL COMPANY LAW TRIBUNAL**
**HYDERABAD BENCH - II**

**I.A. No. 412 of 2023 in**
**CP (IB) No.420/07/HDB/2018**

**<u>In the matter of</u>**

**<u>M/S. LANCO AMARKANTAK POWER LIMITED</u>**

**<u>Between:</u>**

Mr. Saurabh Kumar Tikmani,
Resolution Professional of
M/s. Lanco Amarkantak Power Limited

.... **Applicant**

Vs.

1. The Principal Commissioner of Customs
   House, Port Area, Vishakhapatnam 530035.

2. Ministry of Power
   Through Secretary, Shram
   Shakti Bhawan, New Delhi 110001

**.... Respondents**

**<u>Date of Order: 12.12.2023</u>**

**<u>CORAM</u>**:

Hon'ble Sri Rajeev Bhardwaj, Member (Judicial)

Hon'ble Sri Sanjay Puri, Member (Technical)

**<u>Counsels present</u>**:

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| For the Applicant | : | Mr. Aayush Mitruka, Advocate<br>Ms. Rubaina Khatoon, Advocate |
| Heard on | : | 07.11.2023 |

**Per : Sanjay Puri**

**<u>O R D E R</u>**

1. The present Application filed by Mr. Saurabh Kumar Tikmani the Resolution Professional (RP) of Lanco Amarkantak Power Limited praying to Quash/set aside the letters dated 09.02.2023 and 10.02.2023 (incorrectly dated as 09.02.2022 and 10.02.2022) issued by the Respondent No.1 to Union Bank of India, Axis Bank Limited, Bank of India, IDBI, Indian Overseas Bank, Punjab National Bank and Indian Bank (collectively referred as "**BG Invocation Letters"**) invoking Bank Guarantees issued on behalf of the Corporate Debtor (CD) and also prays to direct Respondent No.2 to extend the benefit of the Office Memorandum F.No. A-3/ 2015 IPC (Vol III) dated 07.04.2022 (i.e., granting extension for achieving 'Final Mega Power' status from 120 months to 156 months). The Applicant had also prayed for grant of *interim/as-interim* reliefs including a Stay on the effect and operation of BG Invocation Letters during pendency of this Application.

**Applicant's Submissions:**

2. It is averred that this Hon'ble Adjudicating Authority vide Order dated 05.09.2019 admitted **C.P. No. 420 of 2028** filed U/Sec. 7 of IBC, 2016 by Axis Bank Limited and the Applicant was appointed as "IRP" and "Resolutions Professional" as well by the Committee of Creditors (CoC).

3. It is submitted that the CoC has approved a Resolution Plan dated 11.08.2022 (and modified on 01.11.2022) by an overwhelming vote of 95.4% members *inter alia* a specific prayer has been included by the SRA in relief and concessions section of the Resolution Plan to the effect that:

> "PMP Project Status to unit 3 and 4 of the project shall be extended and be valid, effective and available in favour of the Corporate Debtor, notwithstanding the requirement of signing of a Long Term PPA".

It is stated that the Applicant has approached this Tribunal for approval of the said Resolution Plan under Section 31 of IBC, which is pending consideration.

4. It is further submitted that prior to commencement of CIRP the CD was in the process of constructing and implementing two units of 660 MW (**Unit 3** and **4** or **Phase II**) of Coal Based Pit Head, Supercritical Thermal Power Plant situated at village-Pathadi in Korba District, Chattisgarh (**Project**). For this purpose, the engineering, procurement and construction (**EPC**) was contracted to the promoter group Company/holding Company of CD i.e., Lanco Infratech Limited (LITL) and a Contract Agreement (**CIF Contract**) dated 27.08.2009 was executed for supply of equipment and other supplies relating to the project. The CIF contract was registered under Project Imports Regulation, 1986 (**PIR 86**) vide letter[1] dated 18.08.2010 by which the CD was eligible to import equipment at a concessional rate. In order to obtain "PIR-86" CD deposited security amount in the form various Bank Guarantees (from the limits of LITL on behalf of the CD) aggregating to an amount of INR 42.565 Crores and obtained the PIR registration in 2010.

5. It is stated that in addition to this, the CD was also beneficiary of the Mega Power Policy, 2009. Vide letter dated 17.10.2011, the CD's project was given **"Provisional Mega Power"** status certificate[2], by Respondent No. 2 in terms of "Mega Power Policy" guidelines[3] issued

[1] Application Annexure-1
[2] Application Annexure-2
[3] Application Annexure-3

pursuant to the O.M. No. A-118/2003-IPC dated 14.12.2009 and O.M. No. A-4/2011-IPC dated 17.08.2011. By virtue of Provisional Mega Power status CD was *inter alia* eligible/ qualified for fiscal benefits while procuring goods/ equipment required for setting up the project. The CD was also exempted from paying any cash towards applicable custom/ excise duty, and instead it was allowed to furnish security deposits towards customs/ excise duty in the form of a Fixed Deposit Receipt (FDR) vide Office Memorandum dated 17.08.2011. Subsequently, the Customs Department vide its Notification dated 27.06.2012 permitted the replacement of FDRs by Bank Guarantee towards payment of custom duty.

6. It is averred that this Bank Guarantee was required to be kept alive till the CD entered into valid Power Purchase Agreements (**PPA**) within the stipulated time. Once a valid PPA is executed, a 'Final Mega Power' certificate was to be issued to the CD by the Respondent No.2 and the Bank Guarantees were to be released by the Respondent No.1 and other beneficiaries. In compliance with these requirements, the CD provided Bank Guarantees[4] aggregating to approx. INR 412.97 Crores to Respondent No.1.

7. It is pointed out that in accordance with the Notification[5] No. 12/2012-Customs dated 17.03.2012 issued by the Ministry of Finance (Department of Revenue), Government of India, a developer holding PMP Certificate was required to acquire the 'Final Mega Power Project' status within 36 months from the date of first import. Upon failure to do so, the security amount deposited by the holder was liable to be appropriated by Respondent No.1 (towards customs duty that would have been payable absent the exemption). Vide circular[6] dated

[4] Application Annexure-4
[5] Application Annexure-7
[6] Application Annexure-5

20.01.2014 issued by Respondent No. 2 the time period for acquiring 'Final Mega Power' status was extended from 36 months to 60 months from the first import, with an additional condition that the PMP certificate holder must tie up at least 65% of installed capacity/ net capacity through competitive bidding and up to 35% of installed capacity/net capacity under regulated tariff as per specific host state policy under long term PPAs with DISCOMS/ State designated agencies. Subsequently, *vide* another circular[7] dated 12.04.2017, the time period was further extended to 120 months from the date of first import. Both the circulars specifically name and enlist the CD's project as one of the projects to which the circular is applicable. In effect, the circulars (i.e., 20.01.2014 and 12.04.2017) the CD was provided time till October 2021 to achieve 'Final Mega Power Project' status.

8. It is submitted that the CD had completed about 70% construction work by August 2017. As on 07.08.2017, the EPC contractor was admitted into CIRP. This brought the construction work of the project to a standstill. Thereafter, *vide* order dated 05.09.2019, the CD was also admitted into CIRP. As a result, the construction process was stalled, and the import of equipment could not be completed. Accordingly, the project was also not commissioned and/ or implemented.

9. It is stated that considering the last date for achieving the 'Final Mega Power' status was approaching, the Applicant issued letters[8] dated 07.09.2021 & 04.04.2022 to Respondent No.2 requesting for extension of 36 months for submission of PPA.

10. Thereafter Respondent No.2 issued Office Memorandum[9] dated 07.04.2022, bearing F. No. A-3/2015 IPC (Vol III) granting another

[7] Application Annexure-6
[8] Application Annexure-8
[9] Application Annexure-9

extension from 120 months to 156 months for achieving 'Final Mega Power' status without including the project of the CD.

11. The Applicant then represented through letters[10] dated 20.06.2022 and 22.09.2022 to Respondent No.2 to "consider power project of Lanco Amarkantak Power Ltd. for extending the time period for furnishing mega certificates to Tax Authorities from 120 months to 156 months from the date of import (i.e., 21 October 2024 in line with the extension granted to the 10 projects vide MOP Office Memorandum dated 07 April 2022".

12. It is contended that the actions of Respondent No.1 in issuing Bank Guarantee Invocation Letters and Respondent No.2 excluding the CD's Project from the list of the developers who were granted, are violative of the letter and spirit of IBC.

13. The Applicant asserts that Respondent No.1's issuance of Bank Guarantee invocation letters is a violation of Section 14 of the Insolvency and Bankruptcy Code (IBC). Additionally, claims are made regarding the actions of Respondent No.2, alleged to be in contravention of Section 14 of IBC. According to the Applicant any measures taken by the Respondents that result in the denial or withdrawal of benefits under the Mega Power Policy, 2009, and PIR-86 to the CD during the pendency of the Resolution Process are illegal.

**Respondents:**

14. This Application was submitted on 28.02.2023 and was initially scheduled for hearing on 07 March 2023. At the Applicant's request during the first hearing, this Bench issued an interim Order granting a Stay against the invocation of Bank Guarantees provided by the

[10] Application Annexure-10

Applicant to the Respondents. Notably, the Respondents were not represented during this proceeding.

15. Subsequently, the Application was listed on 11 April 2023, and once again, there was no representation on behalf of the Respondents. No appearance from the Respondents persisted on the subsequent hearing dates of 20 April, 25 April, 4 May, 23 May, 16 June, and 30 June 2023. Consequently, the Respondents were set ex-parte, and the hearing was adjourned.

16. On 7th July 2023, a Vakalatnama was filed by Mr. B.V.S. Chalapathi Rao, Advocate, expressing the intent to represent the Respondents. However, during the hearing on 14 July 2023, the Respondents' Counsel expressed the desire to file a counter but was advised to submit an Application seeking the set-aside of the ex-parte Order dated 20 April 2023.

17. Subsequent listings occurred on 4 August, 10 August, 6 September, and 10 October 2023, but the Respondents remained unrepresented. Finally, on 7 November 2023, the matter was heard, and orders were reserved in the absence of any representation on behalf of the Respondents.

**<u>The Decision:</u>**

18. We first address ourselves to the prayer for quashing/setting aside of the letters dated 09.02.2023 and 10.02.2023 issued by Respondent No.1. These letters sought to invoke the Bank Guarantees provided by the CD. These Bank Guarantees were furnished by the CD with the aim of claiming exemptions from customs duty for the imports made for their Power Plant, which held a 'Provisional Mega Power' (PMP) status. It was specified that these Bank Guarantees were to remain in force until the CD entered into a Power Purchase Agreement (PPA) within the stipulated time, upon the execution of which it would be

certified as a 'Final Mega Power Project', which the CD as to attain by October 2021.

19. However, this could not be achieved due to stalling of the project by its Engineering, Procurement, and Construction (EPC) Contractor, who was admitted into Corporate Insolvency Resolution Process (CIRP) on 7th August 2017. Subsequently, on 5th September 2019, CIRP was initiated against the CD as well.

20. The period within which the CD was expected to achieve 'Final Mega Power Project' status lapsed during CIRP. The RP had formally requested the Ministry of Power to extend the deadline until 21 October 2024, considering the prevailing circumstances. However, no response has been received to date.

21. The CD while availing of exemption from payment of customs duty on the import of goods for the erection of its power plants, had furnished these Bank Guarantees

> "in the name of the President of India for an amount equal to the duty of customs payable on such imports but for this exemption, as and when the goods arrive …. And if the importer fails to furnish the final Mega Power status within thirty six months[11] from the date of importation, the said security shall be appropriated towards duty of customs payable on such imports but for this exemption…"[12]

22. Given the existing situation, where the CD was unable to reach the benchmark i.e. attaining the Final Mega Power Project status, set for obtaining exemption from custom duty, the decision of Respondent No.1 to invoke the aforementioned Bank Guarantees by withdrawing the exemption granted cannot be faulted. The argument that these

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[11] Extended up to 120 months vide Circulars dt. 20.01.2014 and 12.04.2017 (Pg 249 & 251 of the Application)
[12] Extracted from the Ministry of Power OM No. A-4/2011-IPC dated 17.08.2011 (Page 31-32 of Application)

Bank Guarantees cannot be invoked during CIRP is also flawed in view of Clause (b) of Section 14(3) of IBC which clearly exclude such Guarantees from the rigors of moratorium under that section

> *14(3) The provisions of subsection (1) shall not apply to –*
> *(a)….*
> *(b) a surety in a contract of guarantee to a corporate debtor*

23. The Guarantees, although issued on behalf of the CD, were provided by the Banks to the Customs Department. These Bank Guarantees, given by the Banks on behalf of the CD, were irrevocable and unconditional, payable on demand without hesitation. The terms specified that the Bank would be "liable to pay the guaranteed amount or any part thereof" if the holder of the Bank Guarantee were to submit "a written claim or demand" before the expiry date of the Guarantee. As per the amended provision under section 14 (3)(b) of the Insolvency and Bankruptcy Code (IBC), such a "*Bank Guarantee can be invoked even during the moratorium period issued under section 14 of the IBC*," as decided by the Hon'ble NCLAT in the case of Bharat Aluminium Co. Ltd. v. J.P. Engineers Pvt. Ltd.[13]

24. It is also useful to keep in view an earlier Judgment of the Hon'ble Supreme Court in the case of U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers Pvt. Ltd[14]. reported in [(1988) 1 SCC 174] in which it was held, that "*When irrevocable and unconditional Bank Guarantee payable on demand without demur then, whenever such Bank Guarantee is sought to be encashed by the beneficiary, Bank is bound to honour the Bank Guarantee irrespective of any dispute raised by the customer (at whose instance the Guarantee was issued) against the beneficiary*".

[13] CA(AT)(Insolvency) No. 759 of 2020 dt. 26.02.2021
[14] (1988) 1 SCC 174

25. In this regard, we are also supported by an Order of this Bench in the case of *Vijay Kumar Garg (RP of Lanco Vidarbha Power Ltd vs Office Supt. Range-II, Customs Division-I, Nagpur[15]),* where on the similar facts it was held that "**Bank Guarantee can be invoked even during moratorium period issued under Section 14 of IBC**". This decision of the Hyderabad Bench has been upheld by Hon'ble NCLAT[16]

26. Coming to the other prayer for directing Respondent No.2 to extend the benefit of the OM No. A-3/2015 IPC (Vol III) dated 07.04.2022 to the CD, as it was extended for ten other Power Projects, it is a policy matter for the Government to consider, and we can only recommend to the concerned Ministry that it may consider the request of the CD made through its letters of 20.06.2022 & 22.09.2022, keeping in view the provisions of IBC 2016.

The Application is dismissed with the above remarks.

The stay granted against the invocation of Bank Guarantees given by the Applicant to the Respondents, vide order dated 07.03.2023 is also vacated.

**Sd/-**
**(SANJAY PURI)**
**MEMBER (TECHNICAL)**

**Sd/-**
**(RAJEEV BHARDWAJ)**
**MEMBER (JUDICIAL)**

*Rohit*

[15] IA No. 636 of 2022 in CP(IB)No. 529/7/2018 dated 15.06.2023
[16] Vijay Kumar Garg v. Dy Commissioner of Customs, (2023) SCC OnLine NCLAT 490, order dated 18-08-2023