

FIT FOR INDEXING

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
PRINCIPAL BENCH

C.A. No. 453(PB)/2017

IN

C.P. NO. (IB)-160(ND)/2017

IN THE MATTER OF:

M/s Levcon Valves (P) Ltd. Petitioner
v.

Energo Engineering Projects Ltd.Respondent

**SECTION: Under Section 60(5) of The Insolvency and
Bankruptcy Code, 2016**

Order delivered on 24.08.2018

Coram:

CHIEF JUSTICE (RTD.) M.M. KUMAR
Hon'ble President

DR. DEEPTI MUKESH
Hon'ble Member (J)

PRESENTS:

For the Petitioner:

Mr. Arvind Nayar, Senior Advocate with Ms.
Vanita Bhargava, Mr. Aseem Chaturvedi &
Ms. Wamica Trehan, Advocates

For the Respondent:

Mr. Amit S. Chadha, Senior Advocate with
D. Abhinav Rao, Advocate

M.M. KUMAR, PRESIDENT

ORDER

A short question raised in the instant application filed by
the Resolution Professional under Section 60(5) of the Insolvency
and Bankruptcy Code, 2016 (for brevity 'Code, 2016') is whether

the moratorium could be extended to the bank guarantees furnished by non applicant-respondent nos. 2 & 3 namely State Bank of India and Bank of Maharashtra by restraining them to encash those bank guarantees.

2. Brief facts of the case are that a petition under Section 9 of the Code, 2016 was filed and vide order dated 05.09.2017 the petition was admitted. Consequently, moratorium under section 14 of the Code, 2016 was imposed. It is pertinent to mention that Respondent no. 1 Company-Corporate Debtor is engaged in the business of Engineering Procurement and Construction (EPC) services which includes customized turnkey solutions for Material Handling/Bulk Conveying, Ash Handling, Balance of Plant (BOP) Systems, operation and maintenance services for power plants and transmission/distribution of electricity. Respondent no. 1 company issued an order on 14.08.2013 to the Corporate Debtor-applicant for Ash Handling Plant-Wet Fly ash handling system etc. (Annexure-C). The total consideration was more than Rs. 9 crores and as per clause 13 of Order No. 1 for security, a bank guarantee was issued which was to be furnished along with the order endorsed in favour of Andhra Pradesh State Power Generation Corporation Limited-non applicant/respondent

No. 1 which was required to be 10% of the order value. Accordingly, as per the provisions of clause 14 a bank guarantee for 10% of the order value was opened by the applicant-Corporate Debtor, Energo Engineering Projects Limited, being the Guarantee No. 3139014BG200016 on 25.09.2014 in favour of non applicant-respondent no. 1 for a period of 12 months (Annexure-D). The bank guarantee has been renewed from time to time which is valid upto 31.03.2018. Similar bank guarantees have been issued in respect of order no. 2 dated 14.08.2013 and order no. 3 & 4.

3. The applicant received an e-mail stating that it had received invocations of the all four bank guarantees (in respect of four orders) and the details thereof is as under:-

BG No.	BG Amount	Beneficiary
1039015BG0000207	161392756.00	Telangana State Power Generation Corporation Limited
1039015BG0000206	25607244.00	Telangana State Power Generation Corporation Limited
3139014BG2000014	3542100.00	Telangana State Power Generation

		Corporation Limited
3139014BG2000016	9058500.00	Telangana State Power Generation Corporation Limited
Total	199600600.00	

4. In the email sent to the Resolution Professional it was further stated that as you are the Insolvency Resolution Professional in the aforesaid account and that he should provide funds for remittance of the above bank guarantees to be paid to the beneficiary.

5. Another e-mail was received by the Resolution Professional on 13.12.2017 from State Bank of India stating that as per claim request received from non applicant-respondent no. 1 for encashment of the bank guarantees they were in the process of invoking those four bank guarantees (Annexure-L). The Resolution Professional-applicant vide e-mail dated 13.12.2017 sent a reply to respondent no. 2 requesting it to withhold the encashment in view of the fact that the Resolution Professional has been appointed for the Corporate Debtor (Annexure-M). He continued receiving e-mails informing that bank guarantee dated 27.04.2015 has been invoked by non applicant-respondent no. 1



through a demand letter personally presented to bank-respondent no. 3. In nutshell all the bank guarantees were sought to be invoked. However, vide order dated 08.03.2018 we have directed the parties to maintain status quo with regard to encashment of bank guarantees on the ground that the similar order was passed in another case titled as M/s. Levon Valves Private Limited v. Energo Engineering Projects Limited.

6. The application has been opposed by filing a counter affidavit on behalf of non applicant-respondent no. 1. A precise submission made in the counter affidavit is that the encashment of the bank guarantees is dependent on an independent agreement and therefore, it is a lawful act permissible in law. The Corporate Insolvency Resolution Professional pending before us relates to the applicant-Energo Engineering Projects Limited. The answering respondent has not been a party to the same. The bank guarantees has already been encashed and the amount stood transferred to the bank account of respondent no. 1 on 16.12.2017. The application in any case has been rendered infructuous.

7. We have heard learned counsel at length.



8. Having heard the learned counsel for the parties and perusing the pleadings with their able assistance we are of the view that the application would not warrant acceptance. The question of law raised in the instant application would not survive for consideration as the Legislation itself has taken care of the situation like the one in hand. The provisions of Section 14 (3) of the Code, 2016 has been amended and the same reads as under:-

Moratorium.

14. (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—

(a)

(b)

(c)

(d)

(2)

(3) The provisions of sub-section (1) shall not apply to –

(a) such transactions as may be notified by the Central Government in consultation with any financial sector regulator;



(b) a surety in a contract of guarantee to a corporate debtor.

9. A close examination of the aforesaid provision would make it patent that moratorium would not apply to a surety in a contract of guarantee to a Corporate Debtor. It is therefore evident that Section 14(1) of the Code, 2016 would not come in the way of the non applicant-respondent no. 1 to encash the bank guarantee. Moreover, it is an independent agreement. We are also tempted to place reliance on a judgment of Hon'ble the Supreme Court rendered in the case of **State Bank of India v. V. Ramakrishnan & Ors.**, (Civil Appeal No. 3595 of 2018 with Civil Appeal No. 4553 of 2018) decided on 14.08.2018. Hon'ble the Supreme Court has taken note of the aforesaid amendment and has concluded that the amendment would apply to the pending proceeding as it is clarificatory in nature. In para 23 of the judgment it has been observed by Hon'ble the Supreme Court that Section 14 of the Code, 2016 cannot possibly apply to a personal guarantor and the reasons have been given as under:-

“.....First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, the protection of the



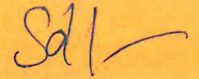
moratorium under these Sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and coextensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor – often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.”

10. When the aforesaid principles are applied to the facts of the present case it becomes evident that the performance guarantee

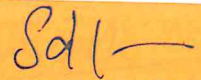
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furnished by State Bank of India and Bank of Maharashtra would not enjoy the benefit of moratorium as envisaged under Section 14 of the Code, 2016 and therefore, those guarantees have been rightly invoked. There is thus no doubt left that the interim order dated 08.03.2018 would also stand vacated.

11. As a sequel to the above discussion, this application fails and the same is dismissed. However, in the peculiar facts and circumstances of this case the parties are left to bear their own cost.



(M.M. KUMAR)
PRESIDENT



(DR. DEEPTI MUKESH)
MEMBER (JUDICIAL)

24.08.2018
Vineet