

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) (Insolvency) No. 176 of 2019
(arising out of order dated 19th February, 2019 passed by National Company Law Tribunal, Hyderabad Bench, Hyderabad in I.A. No. 721 of 2018 in C.P. (IB) No. 329/7/HDB/2018)

IN THE MATTER OF:

Thermax Limited

...Appellant

Versus

**Viswa Infrastructures Services
Private Limited & Anr.**

... Respondents

Present:

For Appellant :

**Mr. Rajiv Ranjan, Senior Advocate with
Ms. Nimita Kaul, Ms. Amrita Sarkar and Ms. Vijeta
Mukherjee, Advocates**

For Respondents :

**Mr. Ashu Kansal and Mr. Milan Singh Negi,
Advocates for Resolution Professional**

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

In the ‘Corporate Insolvency Resolution Process’ of M/s. Vishwa Infrastructures and Services Private Limited, the Appellant – ‘Thermax Limited’ (Operational Creditor) moved an application under Section 60(5)(c) of the Insolvency and Bankruptcy Code, 2016(‘I&B Code’ for short) read with Rule 11 of the National Company Law Tribunal, 2016 to direct the ‘Resolution Professional’ not to proceed with encashment of the Bank Guarantee. The Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench,

Hyderabad by impugned order dated 19th February, 2019 dismissed the application.

2. The case of the Appellant (Operational Creditor) is that the Appellant had given Bank Guarantee bearing BG No. N41GOPG130580001 dated 27th February, 2013 for a value of Rs.33,28,147/- which was valid till March 31, 2019. It was so granted for execution of one 'Sewage Treatment Plant' to the 'Corporate Debtor' at Gacchibowli, Hyderabad for metropolitan water supply and 'Sewage Board Project'. The plant was commissioned and handed over to the 'Corporate Debtor' for operation and maintenance more than one and a half year back. However, the Resolution Professional on baseless ground invoked the Bank Guarantee aforesaid.

3. Learned counsel appearing on behalf of the Appellant submitted that the Moratorium was declared by the Adjudicating Authority on 31st August, 2018. Vide letter dated 20th September, 2018, the Appellant had informed the Resolution Professional regarding the demobilisation of 7 MLD STP site at Khajaguda Talab, Gachibowli and informed on the ground that Rs.95,17,118/- was payable by the Corporate Debtor apart from Rs.23,61,000/- for the operation and management of work carried out for 17 months by the Appellant. Vide letter dated 10th October, 2018, 'Resolution Professional' informed the Appellant that the 'Performance Bank Guarantee' would be invoked since there is a possibility of the end-user i.e. 'Hyderabad Metropolitan Water Supply and Sewage Board' (HMWSSB) invoked the performance bank guarantee issued by the Corporate Debtor. Subsequently, by *e-mail* dated 18th December, 2018, the Appellant had suggested to reach for an amicable solution and offered to the Resolution Professional of the

‘Corporate Debtor’ about continuation with the operation and maintenance of the STP.

4. It was submitted that the Resolution Professional has not denied the disputed fact that the ‘Corporate Debtor’ had received the payments from the employer/owner i.e. ‘Hyderabad Metropolitan Water Supply and Sewage Board’ for operation and maintenance under the same work order.

5. Despite the above, the Appellant was not paid the operation and maintenance charges for 17 months which in turn constrained the Appellant to demobilise the site. Therefore, invoking the performance Bank Guarantee due to the demobilisation is clearly illegal.

6. It was further contended that the ‘Corporate Debtor’ never intimated that the performance Bank Guarantee has been invoked by ‘Hyderabad Metropolitan Water Supply and Sewage Board’.

7. Learned counsel appearing on behalf of the Resolution Professional submitted that the Appellant had executed ‘Performance Bank Guarantee’ equivalent to 5% of the total work order in favour of the ‘Corporate Debtor’. Pursuant to the commencement of the ‘corporate insolvency resolution process’ on 31st August, 2018, the Appellant malafidely demobilized the worksite shortly thereafter on 21st September, 2018. This fact has been disputed by the Appellant.

8. We have noticed the rival submissions and perused the record.

9. Admittedly, the ‘corporate insolvency resolution process’ was initiated on 31st August, 2018 and the order was passed under Section 14 of the ‘I&B Code’ declaring ‘Moratorium’. The Appellant is entitled to claim the past dues. The fact that the Appellant demobilize the worksite on 21st September, 2018

is on record. If 'Corporate Debtor' invoked the Bank Guarantee fault cannot be found. We further find that the claim of the Appellant has been admitted by the Resolution Professional, who can derive the benefit of the 'Operational Creditor' after the process is completed.

10. The Appellant has claimed Rs. 60.65 Lacs which is much higher than the Bank Guarantee.

11. In the case of '**Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company**' (AIR 2007 SC 2798), the Hon'ble supreme Court held that the beneficiary is entitled to realize a Bank Guarantee in terms thereof irrespective of any pending dispute relating to the terms of the contract.

12. In the present case, as the 'corporate insolvency resolution process' was continuing since 31st August, 2018 till the date of the impugned order was passed, we hold that the question of grant of any relief as sought for does not arise and the Adjudicating Authority has rightly rejected the application.

The appeal is dismissed. No costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice A.I.S. Cheema]
Member (Judicial)

[Kanthi Narahari]
Member (Technical)

New Delhi
20th December, 2019
/ns/