

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) (Insolvency) No. 590 of 2018

(Arising out of Order dated 12th September, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in I.A. No. 254 of 2018 in C.P.(IB) No. 150/9/HDB/2017; I.A. No. 149 of 2018 in C.P. (IB) No. 150/9/HDB/2017 and I.A. No. 153 of 2018 in C.P.(IB) No. 150/9/HDB/2017)

IN THE MATTER OF:

Axis Bank Limited

...Appellant

Vs

**Mr. Ashish Rathi,
Resolution Professional**

....Respondent

Present:

For Appellant: Mr. Krishnendu Datta, Mr. Akhil Anand, Mr. Abhishek Swaroop, Mr. Aditya Gupta and Mr. Naman Singh Bagga, Advocates.

For Respondents: Mr. Virender Ganda, Senior Advocate with Mr. Hitesh Kumar, Ms. Mamta, Mr. Ashish Rathi and Ms. Ashly Cherian, Advocates for R.P.

Ms. Zeenath Jahaan, Representative- RP.

Mr. Yogesh Jagia, Advocate for Ex-Mgmt.

Company Appeal (AT) (Insolvency) No. 641 of 2018

(Arising out of Order dated 12th September, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in I.A. No. 254 of 2018 in C.P.(IB) No. 150/9/HDB/2017; I.A. No. 149 of 2018 in C.P. (IB) No. 150/9/HDB/2017 and I.A. No. 153 of 2018 in C.P.(IB) No. 150/9/HDB/2017)

IN THE MATTER OF:**Runh Power Corporation Ltd.****...Appellant****Vs****Ind-Barath Power (Madras) Limited
Through its Resolution Professional & Ors.****...Respondents****Present:****For Appellant: Ms. Meenakshi Arora, Senior Advocate with Mr. Jayant Mehta, Ms. Anannya Ghosh, Mr. Abhinav Raghuvanshi, Mr. Anshuman Pande and Mr. Arun Mani, Advocates.****For Respondents: Mr. Virender Ganda, Senior Advocate with Mr. Hitesh Kumar, Ms. Mamta, Mr. Ashish Rathi and Ms. Ashly Cherian, Advocates for R.P.****Mr. Yogesh Jagia, Advocate for Ex-Mgmt.****J U D G M E N T****SUDHANSU JYOTI MUKHOPADHAYA, J.**

These appeals have been preferred by the Appellants against part of the impugned order dated 12th September, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad, in I.A. No. 153 of 2018 in C.P.(IB) No. 150/9/HDB/2017, whereby the application filed by the 'Resolution Professional' of 'Ind-Barath Power (Madras) Limited'- ('Corporate Debtor') seeking direction to the 'Axis Bank

Limited' to initiate invocation of Bank Guarantee bearing number: 37003020000267 for an amount of USD 68,46,000 has been allowed.

2. The aforesaid Bank Guarantee was issued by the China Bank on the request of the Appellant- 'Runh Power Corporation Ltd.' in favour of the 'Ind-Barath Power (Madras) Limited'- ('Corporate Debtor').

3. The grievance of the Appellants is that the Bank Guarantee given by the China Bank through Bank of Baroda has been ordered to be invoked by the Axis Bank which is against the provisions of law.

4. The brief fact of the case is as under:

The China Bank issued two Bank Guarantees in favour of the 'Corporate Debtor' at the request of the Appellant- 'Runh Power Corporation Limited' (earlier known as "Shandong Runh Power Engineering Technology Co. Ltd."), in relation to the Supply Agreement for 1 No. 660 MW BTG dated 31st August, 2010, (No. IBPML/RUNH/10-11/BTG-SUP/01) ("**Supply Agreement**") executed between the 'Corporate Debtor' and the Appellant for the 'Corporate Debtor's proposed 660 MW (2*330MW) thermal power plant to be set up in Tutitcorin, Tamil Nadu. In terms of Clause 4 of the Supply Agreement, the Appellant- 'Runh Power Corporation Ltd.' was required to provide advance Bank Guarantee for getting an advance payment of 5% of the contract price. Consequently, the Bank Guarantee dated 22nd September, 2014, for an amount of USD 4,564,000 (US Dollars Four Million Five Hundred and Sixty-Four Thousand Only) ("**First BG**")

expiring on 30th September, 2018 and the Bank Guarantee dated 25th November, 2011 for an amount of USD 6,846,000 (US Dollars Six Million Eight Hundred and Forty-Six Thousand Only) (“**Second BG**”) expiring on 30th September, 2018 were arranged to be issued in favour of the ‘Corporate Debtor’ for receiving the said advance payment. The First Bank Guarantee was invoked by the Axis Bank at the request of the ‘Resolution Professional’, however, it refused to invoke the Second Bank Guarantee against which the ‘Resolution Professional’ filed I.A. 153/2018 before the Adjudicating Authority, which was disposed of vide the Impugned order.

5. On hearing the parties and on perusal of the records, it is clear that the Appellant- ‘Runh Power Corporation Ltd.’ in terms of Supply Agreement had taken advance payment of 5% of the contract price. Consequently, the Bank Guarantee for an amount of USD 4,564,000 (US Dollars Four Million Five Hundred and Sixty-Four Thousand Only) was issued on 22nd September, 2014, which expired on 30th September, 2018 and the other Bank Guarantee for an amount of USD 6,846,000 (US Dollars Six Million Eight Hundred and Forty-Six Thousand Only) was issued on 25th November, 2011 which also expired on 30th September, 2018. Thereby, both the Bank Guarantees expired during Moratorium.

6. In this background, the Appellant- ‘Runh Power Corporation Ltd.’ having issued the Bank Guarantees against advance of 5% amount cannot

raise grievance on the ground that other Bank has been asked to encash the Bank Guarantee.

7. The grievance of the 'Axis Bank' is that the Bank Guarantees having obtained through Bank of Baroda, the 'Axis Bank' should not have been directed to encash the Bank Guarantees. On such direction, if the 'Axis Bank' invokes the Bank Guarantees, it will be against the law which may call for action against the Bank.

8. The 'Resolution Professional' has brought to our notice that a petition for liquidation has been filed before the Adjudicating Authority on 25th October, 2018. In the meantime, the Adjudicating Authority allowed the 'Resolution Professional' to continue till the final order is passed.

9. The 'Resolution Professional' has brought to our notice that the Appellant- 'Runh Power Corporation Ltd.' moved before Jinan Court, China wherein an injunction order has been passed on 23rd February, 2018 in regard to remittance of payment under the Bank Guarantees in question. Such order of injunction having been passed by Jinan Court, China, we hold that the Adjudicating Authority should not have directed the 'Axis Bank' to encash the Bank Guarantee, particularly when the Bank Guarantee has not been given through 'Axis Bank' but to Bank of Baroda.

10. For the reasons aforesaid, we set aside that part of the impugned order dated 12th September, 2018 passed by the Adjudicating Authority so far it relates to encashment of Bank Guarantees in question. After the order of

injunction was passed by the Jinan Court, China or till final order is passed, it will be open to the concerned party to move before appropriate forum.

Both the appeals are allowed with aforesaid observations and directions. However, in the facts and circumstances of the case, there shall be no order as to costs.

[Justice S.J. Mukhopadhaya]
Chairperson

[Justice Bansi Lal Bhat]
Member (Judicial)

NEW DELHI

23rd April, 2019

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