

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) (Insolvency) No. 1287 of 2019**

[Arising out of order dated 15<sup>th</sup> October, 2018 passed by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench, Hyderabad in I.A. No. 206 of 2018 in C.P. (IB) No. 111/7/HBD/2017]

**IN THE MATTER OF:**

**M/s FLSmidth Pvt. Ltd.**

FLSmidth House  
34, Egatoot, Kelambakkam,  
Rajiv Gandhi Salai (OMR)  
Chennai – 603 103.  
Tamilnadu represented by its  
Head Legal & Director  
Mr. Sivasubramanian Natarajan

**....Appellant**

**Vs**

**The Liquidator,  
Savan Godiawala Lanco Infratech Ltd.**

Lanco House,  
EPC Division,  
Plot No. 397, Udyog Vihar,  
Phase 3,  
Gurgaon – 122 016.

**....Respondent**

**Present:**

**For Appellant:** Mr. K. V. Balakrishnan, Advocate.

**For Respondent:** Ms. Vaijayanti Paliwal, Advocate.

## **J U D G M E N T**

### **BANSI LAL BHAT, J.**

Appellant – Operational Creditor is aggrieved of the impugned order dated 15<sup>th</sup> October, 2019 passed in I.A. No. 206 of 2018 in CP (IB) No. 111/7/HDB/2017 by the Adjudicating Authority (National Company Law Tribunal), Hyderabad Bench by virtue whereof the Appellant’s application assailing the action on the part of Respondent – Resolution Professional regarding invocation of Bank Guarantee came to be dismissed. The impugned order is primarily assailed on the ground that there was no breach on the part of Appellant in performance of its part of the contract and the Corporate Debtor through Resolution Professional could have invoked the Bank Guarantee only in the event of there being non-performance on the part of Appellant.

2. Heard learned counsel for the parties. It emerges from record that initially on an application filed by the Financial Creditor under Section 7 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as ‘I&B Code’) Corporate Insolvency Resolution Process was initiated against the Corporate Debtor – ‘M/s Lanco Infratech Ltd.’ wherein Respondent herein came to be appointed as the Resolution Professional. Appellant, which is an engineering company claimed to have supplied pipe conveyer and other materials under purchase order issued by the Corporate Debtor which

included design engineering manufacture, delivery on site, etc. Corporate Debtor is also said to have issued work order on the Appellant for CHP Services for erection, supervision and commissioning etc. of pipe conveyer and its allied equipments. 10% of basic contract price was paid by the Corporate Debtor against submission of advance bank guarantee of equivalent amount. According to Appellant, the Corporate Debtor failed to perform its part under the contract and failed to open letter of credit prior to 1<sup>st</sup> dispatch of materials in terms of the contract causing monetary loss to the Appellant who had commenced various activities under the contract. This led to a controversy in regard to reimbursement of charges of opening of letter of credit. Corporate Debtor is also alleged to have failed to take delivery of the fabricated panels, etc. prepared at the Appellant's facilities and thus failed to issue material dispatch clearance certificate to the Appellant in terms of the purchase order. Appellant also claims to have provided contract performance bank guarantees in favour of Corporate Debtor for 10% of the contract value. This, according to Appellant was to make payment to the Company in the event of contractor failing in its contractual obligations. Thus, it is contended that the Operational Creditor has not committed any breach in performance of contractual obligations and on the other hand, it is the Corporate Debtor who caused enormous delay and committed breach of contract resulting in the end user TANGEDCO terminating the contract with the Corporate Debtor. This happened after

the Appellant – Operational Creditor submitted its claim before the Interim Resolution Professional.

3. The Adjudicating Authority, while rejecting the application for declaring the invocation of Bank Guarantee by the Resolution Professional as illegal, observed that the Bank Guarantee has been invoked by the Resolution Professional to recover the amount of Rs.1,50,85,516/- based on books of accounts of the Corporate Debtor. The Adjudicating Authority was of the view that the Resolution Professional was duty bound to act on the information available in the books of the Corporate Debtor, both for securing the interest of the Corporate Debtor as also for maximizing the value of its assets.

4. The factual position emerging from the books of accounts of Corporate Debtor, as noticed by the Adjudicating Authority, has not been controverted and having regard to the duties of Interim Resolution Professional and the Resolution Professional, respectively across the ambit of Sections 18 and 25 of the I&B Code, no fault can be found with the action on the part of Resolution Professional in invoking the Bank Guarantee to secure the interests of the stakeholders and also to maximize the assets of the Corporate Debtor. That apart, it is not disputed that the Corporate Debtor has gone into liquidation and a Liquidator has been appointed. This clearly implies that the claim of Operational Creditor, whether based on breach of contractual terms or performance guarantee stands rejected. It is poignant

that the Appellant - Operational Creditor has glossed over the matter and even not placed on record objections filed by the Resolution Professional before the Adjudicating Authority, though, same are shown to have been forming annexure to the appeal. This would indicate nothing but suppression of material facts. Once the claim of the Operational Creditor stands rejected by the Liquidator under Section 40 of the I&B Code, the remedy provided is under Section 42 of the I&B Code, which provides for filing of an appeal against such rejection of claim before the Adjudicating Authority within the prescribed time. Admittedly, legal remedy contemplated under Section 42 of I&B Code has not been availed by the Appellant - Operational Creditor. It being so, this appeal in respect of invocation of Bank Guarantee and not Performance Guarantee would not be maintainable. The Bank Guarantee being distinct from Performance Guarantee and having been furnished in favour of Corporate Debtor for 10% of the basic contract value in lieu of advance payment of 10% of basic contract price paid by the Corporate Debtor bears no nexus with the Performance Guarantee and is independent of the obligations arising out of performance or breach in performance of the terms of contract. Appellant cannot be permitted to harp on the tune of non-performance of contractual obligations on the part of Corporate Debtor to resist invocation of the Bank Guarantee inspite of pecuniary benefit derived from Corporate Debtor in the form of 10% of the basic contract price. This would amount to paying

premium on dishonesty. Embarking on such course needs to be decried with the contempt that it deserves.

5. While we find this appeal devoid of merit, we have no doubt that it is frivolous. It is accordingly dismissed. However, there shall be no orders as to costs.

[Justice S. J. Mukhopadhaya]  
Chairperson

[Justice Bansi Lal Bhat]  
Member (Judicial)

[Justice Venugopal M.]  
Member (Judicial)

**NEW DELHI**

**4<sup>th</sup> December, 2019**

AM