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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **FAO(OS) 96/2019 and C.M.Nos.20780/2019 (Stay), 35960/2019**
(for dismissal of appeal)

MORGAN SECURITIES & CREDITS PVT LTD Appellant

Through: Mr.K.Datta and Mr.Simran Mehta,
Advocates.

versus

VIDEOCON INDUSTRIES LTD (THRO RP) Respondent

Through: Mr. Arjun Pall and Mr. Rakshit
Akshay Jha, Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

ORDER
% **28.08.2019**

Dr. S. Muralidhar, J:

1. This is an appeal directed against an order dated 7th February, 2019 passed by the learned Single Judge in O.M.P. No. 1106/2012, being a petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act') filed by the present Appellant.

2. The background to the present appeal is that an Award dated 29th April, 2013 was passed in favour of the Appellant and against the Respondent/ Videocon Industries Limited (VIL). That Award was challenged by VIL before the learned Single Judge by filing O.M.P. No.665/2013 under Section 34 of the Act. During the pendency of the said petition, the following order was passed by the learned Single Judge on 13th November, 2013:

“Mr. Sethi, learned senior counsel for Videocon

Industries Ltd. (VIL), says that for the moment, VIL will be able to furnish a bank guarantee in the sum of Rs.20 crores. He says that the bank guarantee will be furnished within two weeks from today.

Accordingly, VIL is directed to furnish a bank guarantee in the name of the Registrar General of this court within the time-frame indicated hereinabove by Mr Sethi. Mr Sethi also says that endeavours will be made to bridge the gap by the next date of hearing. The said bank guarantee will be kept alive till further orders of the court.

List on 21.01.2014.”

3. Subsequently, again during the pendency of the aforementioned petition under Section 34 of the Act, the present Appellant filed an application being I.A. No.10865/2018 under Section 9 of the Act for a direction that the bank guarantee (BG) for a sum of Rs. 20 crores should be encashed and the amount should be kept with the Registrar General (RG) of this Court in a fixed deposit so that it could earn interest. On 16th August, 2018 the following order was passed in the said application:

“2. This is an application seeking a direction that the amount of the bank guarantee bearing no. 0156113IFG000104 for a sum of Rs. 20 crores be kept in the account of the Registrar General of the Delhi High Court so that it can earn interest. The counsel for the Respondent submits that the company is now undergoing insolvency proceedings, and that he has instructions from the Insolvency Resolution Professional to appear for the company before this Court.

3. In order to ensure that the amount of Rs.20 crores is secured and earns interest, it is directed that the Registrar General may invoke the bank guarantee issued by Allahabad Bank Industrial Finance Branch) Mumbai bearing no. 0156113IFG000104 for a

sum of Rs.20 crores. The said amount be credited with the Registrar General's account within 10 days. The amount shall be kept in an interest earning fixed deposit initially for a period of six months on an automatic renewal mode.

4. With the above directions, I.A. is disposed of List before the Registrar General for issuing the invocation of the bank guarantee and appropriate orders on 21st August 2018.”

4. Subsequently, on 7th February, 2019 the learned Single Judge dismissed OMP No. 665/2013, affirming the Award dated 1st March, 2013 (as corrected on 29th April, 2013). By a separate order on the same date i.e. 7th February, 2019, the learned Single Judge disposed of OMP No. 1106/2012, which had been filed by the present Appellant under Section 9 of the Act. After noting that the BG stood encashed and the amount had been credited in the account of the RG, the learned Single Judge in the impugned order directed as under:

“4. Considering the fact that insolvency proceedings are pending before the NCLT Mumbai, the amount is directed to be retained in the account of the Registrar General. The same would be subject to further order that may be passed in the insolvency proceedings.

5. No further orders can be passed as the moratorium period under Section 14 of the Insolvency and Bankruptcy Code, 2016 has already kicked in. Morgan Securities is given liberty to move an appropriate application, subject to orders which may be passed in the insolvency proceedings. The Section 9 petition is disposed of.”

5. The Appellant is aggrieved by the impugned order to the extent that it has directed the amount of Rs. 20 crores to be retained with the RG, subject to orders that may be passed by the NCLT, Mumbai in the insolvency

proceedings.

6. Mr. Kishnendu Datta learned counsel for the Appellant referred to the amendment to Section 14 (3) of the Insolvency of Bankruptcy Code 2016 (IBC) brought about with retrospective effect from 6th June, 2018. Section 14 reads as under:

“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) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) transferring, encumbering, alienating or disposing off by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

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

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

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

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process: Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.”

7. Mr. Dutta submitted that since in terms of the amended Section 14 (3) (b), a surety in a contract of guarantee to a corporate holder is not covered by Section 14 (1) of the IBC, the amount of Rs. 20 crores, which was obtained as a result of encashment of the BG provided by the Allahabad Bank on behalf of the VIL, should not be made subject to the orders of the NCLT, Mumbai in the insolvency proceedings involving VIL. Mr. Datta has also referred to the judgment of the Supreme Court of India in ***State Bank of India v. V. Ramakrishnan*** AIR 2018 SC 3876, where the background to the introduction to the above amendment to the IBC was discussed.

8. This Court is unable to accept the above submission concerning the applicability of Section 14 (3) (b) of the IBC as amended, to the facts of the present case. The BG in question was encashed on 16th August, 2018 and the amount as a result of such encashment was kept as Fixed Deposit in the name of the Registrar General of this Court, so that it could earn interest. After that day and definitely on the date of passing of the impugned order

dated 7th February, 2019, there was no BG in existence. The question therefore of the applicability of Section 14 (3) (b) of the IBC to any such BG on the date of the impugned order i.e. 7th February, 2019 would not arise.

9. It is then contended by Mr. Datta that in any event, the amount obtained as a result of encashment of the bank guarantee was not the 'asset' of VIL. According to him, at best it was the asset of the bank, which was now being held by the Registrar General of this Court pursuant to the order dated 16th August, 2018. It is contended that under Section 18 (f) of the IBC, it is only those assets which are under the ownership of the corporate debtor i.e. in this case VIL 'as recorded in the balance sheet' of VIL that would form the subject matter of the insolvency proceedings, since it is only the said asset that the Interim Resolution Professional (IRP) is allowed to take control of under the IBC.

10. The Court finds that the above submission overlooks the fact that the amount of Rs. 20 crores which was obtained as a result of encashing the bank guarantee was kept with the Registrar General not as the asset of the bank but as an asset of VIL itself. As on the date of such encashment i.e. 16th August, 2018 it remained as an asset of VIL, for only then it could be offered as a security to protect the interests of the present Appellant in the arbitration proceedings. It was not yet the asset of the Appellant as well. This is because the outcome of the petition i.e. OMP 665/2013 filed by VIL was not yet known on 16th August, 2018.

11. To that extent, the learned Single Judge was right in concluding that as

on the date of passing of the impugned order i.e. 7th February, 2019 with the insolvency proceedings having already commenced, the moratorium in terms of Section 14 of the IBC would be in place. How the said amount of Rs.20 crores together with interest accrued thereon should be dealt with would, therefore, be subject to the orders passed by the NCLT in such insolvency proceedings.

12. Consequently, this Court rejects the submission on behalf of the Appellant that since the sum of Rs. 20 crores together with interest thereon is not the asset of VIL, it should not be dealt with or made subject to orders of NCLT, Mumbai. The impugned order does not call for interference. The appeal is dismissed. The applications are also dismissed.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 28, 2019

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