

Case Snippets

Volume 03, Number 17 (April 23, 2020)

M/s. Sanghvi Movers Ltd. (Applicant/OC) Vs. M/s. Albanna Engineering (India) Pvt Ltd. (Respondent/ CD) and Ors (NCLT-Kochi)

Section 14 r/w Section 238 of IBC, 2016 and Sections 221 and 222 of the Indian Contract Act, 1872 - Moratorium

In this matter an application u/s 60(5) of IBC 2016 was filed before NCLT, Kochi Bench, Kerala whereby OC of the CD seeking injunction/ direction against Respondent No. 4 Bharat Petroleum Corporation Limited (herein after referred as 'BPCL') to invoke the Bank Guarantee furnished by its parent company M/s Albanna Engineering LLC Dubai (herein after referred as 'parent company/ AELLC').

As CD is a 100% subsidiary of M/s Albanna Engineering LLC Dubai and the parent company has provided two performance bank guarantees to BPCL for the project amounting to Rs. 24.67 crores which was due to expire on March 31,2020.

The applicant further stated that the RP has requested the COC to consider filing application with this Bench to invoke the two bank guarantees of parent company and use the same for Resolution of CD.

The 4th respondent i.e. BPCL, stated that for the purpose of undertaking the contract work, AELLC had made use of the services of several sub-contractors/agencies including the Corporate Debtor as well as the Applicants herein. It has further come to the notice of the 4th Respondent that amounts are payable to these sub-contractors/ agencies by AELLC for the services rendered by them. Such subcontractors/agencies had filed several suits against AELLC as well as the Corporate Debtor for realization of money in various courts. It is respectfully submitted that the 4th Respondent does not have any contractual obligations with the 1st Respondent or any of the Applicants herein.

The counsel for BPCL has submitted that the entire amount, if any, payable to AELLC (Dubai) which is currently retained with the 4th Respondent by way of the Bank Guarantees and the final bill amount which is to be paid to parent company by the 4th Respondent, has been attached by various courts in several pending suits/garnishee proceedings and is restrained from parting with the amounts due to the judgment debtor therein i.e. the 1st Respondent/Corporate Debtor. However, there is no privity of contract between the Corporate Debtor and BPCL.





NCLT while allowing the application observed that the promoters/ directors of a company diversify the business in various field by creating several independent entities, call it subsidiaries, with the constitution of common directors and at some point of time if the Group gets financially stressed due to default in repayment of debt, at that juncture a right of recourse is required to be adopted. That is why, the right recourse shall be to examine the necessity of 'Consolidation' as the rule of principal-agent relationship is also applicable in this instant application. The Invoicing & Payment Terms in Agreement dated 19.05.2014 between the Prime Contractor (Albanna Engineering LLC) and Subcontractor (Albanna Engineering (India) Pvt. Ltd) clearly states that: " M/s. Albanna engineering LLC, shall raise the invoice on Client based on the measurement sheet provided by the Sub Contractor. The sub-contractor shall subsequently raise invoice on Albanna LLC for the duly accepted measurement sheet by the Client." As already pointed out, the management and ownership of these companies are same. NCLT have also stated that there is no other fall back mechanism for recovery of dues from the parent company unless they are not ready to settle the dues.

It was also pointed out by NCLT that the assets and properties, including any claim, interest therein, of Albanna Engineering LLC (Dubai) held through M/s Albanna Engineering (India) Private Limited will have to be said to be the property of the CD, for the purpose of the present CIRP.

Further it was observed by NCLT that the bank guarantee of parent company for completing the work for BPCL is done by M/s Albanna Engineering (India) Private Limited (sub-contractors), wherein the applicants, are the service providers and material suppliers for engineering projects for BPCL. Therefore, the assets held by them can be said to be "its" assets i.e. the assets of CD, which is under the CIRP.

NCLT further observed that the CIRP was initiated and moratorium was passed on 25.10.2019, therefore, it prohibits the institution of suits or continuation of pending suits or proceedings against the Corporate Debtor or its parent company, including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority. Section 14 read with Section 238 of Insolvency & Bankruptcy Code, 2016 is applicable.

