



SL. No.3

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH**

COURT HALL NO: II

Hearing Through: VC and Physical (Hybrid) Mode

**CORAM: SHRI. RAJEEV BHARDWAJ – HON'BLE MEMBER (J)
CORAM: SHRI. SANJAY PURI - HON'BLE MEMBER (T)**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 09.04.2025 at 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	IA (IBC)/1806/2023, IA (IBC)/440/2023 in Company Petition IB/88/7/HDB/2022
NAME OF THE COMPANY	Viceroy Bangalore Hotels Pvt Ltd
NAME OF THE PETITIONER(S)	Edelweiss Asset Reconstruction Company Ltd
NAME OF THE RESPONDENT(S)	Viceroy Bangalore Hotels Pvt Ltd
UNDER SECTION	7 of IBC

ORDER

IA (IBC)/1806/2023

Orders pronounced, recorded vide separate sheets. In the result, the IA (IBC)/1806/2023 is dismissed.

IA (IBC)/440/2023

Orders pronounced, recorded vide separate sheets. In the result, the IA (IBC)/440/2023 is dismissed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II**

I.A.(IBC)1806 OF 2023

in

C.P. (IB) No.88/07/HDB/2022
(U/s.60/5 of the Insolvency & Bankruptcy Code, 2016)

**In the matter of M/s.Edelweiss Asset Reconstruction Company Ltd. vs. M/s.Viceroy
Bangalore Hotels Pvt. Ltd.**

Between:

M/s. Edelweiss Asset Reconstruction Company Limited

Acting in its capacity as Trustee of EARC Trusts SC 236, 246, 249
and 253. A company incorporated under the Companies Act, 2013
and registered with the Reserve Bank of India as an Asset
Reconstruction Company under Section 3 of Securitization and
Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002, and having its
registered office at Edelweiss
House, Off CST Road, Kalina, Mumbai – 400098

.....Applicant

And

1. The Additional Commissioner of Customs,
Bengaluru City Customs Commissionerate,
Inland Container Depot, Whitefield, Bengaluru-560066
Email: icdbl-r-epg@gov.in
2. The Superintendent of Customs,
Export Obligation Monitoring Cell (EOMC) Section,
Inland Container Depot, Whitefield, Bengaluru-560066
3. Kotak Mahindra Bank Ltd
Uma Rajeswar Plaza, 9th Phase
KPHB Colony, Hyderabad-500072

.....Respondents

Date of Order: 09.04.2025

Coram:

Shri Rajeev Bhardwaj, Hon'ble Member (Judicial)
Shri Sanjay Puri, Hon'ble Member (Technical)



Counsels Present:

For the Applicant : Mr. G.Bhupesh, Advocate
For the Respondent No.3 : Mr.Raja Shekar Rao Salvaji, Ms.KVS Madhumita,
Advocates

[Per : Rajeev Bhardwaj, Member Judicial]

ORDER

I. The present application has been filed by M/s. Edelweiss Asset Reconstruction Company Limited (**Applicant/Financial Creditor/FC**) under Section 60 (5) of the Insolvency & Bankruptcy Code, 2016 (“IBC”, 2016) seeking the following reliefs.

- a. Direct the Respondents not to encash Bank Guarantees/Bonds submitted while obtaining License Nos. 930011086, 930011170 and 930011229;
- b. Direct the Respondent Department not to cause any inconvenience or interference with the revival process of the Corporate Debtor;
- c. Direct Respondent No. 3 not to release any amounts to Respondent No. 1 & Respondent No. 2; and
- d. Direct Respondent No. 3 to release the margin money and other amounts to the Applicant herein to deal with them in accordance with the Resolution Plan.



II. Application

1. M/s.Viceroy Bangalore Hotels Private Limited (**CD**) was admitted into CIRP vide order dated 05.08.2022, on a petition under Section 7 of IBC filed by the FC, in C.P.(IB) No. 88/7/HDB/2022. Mr.Kuresh Khambati has been appointed as the Resolution Professional ("**erstwhile RP**").
2. The CoC has approved the Resolution Plan of M/s.Dharampal Satyapal Limited (**Successful Resolution Applicant/SRA**). This Adjudicating Authority has confirmed the said Plan vide Order dated 22.05.2023.
3. On 12.10.2022, R1 filed a claim pertaining to 7 licenses and the said claim was considered by the erstwhile RP. Subsequently, a demand draft has been prepared as per the approved Resolution Plan to settle the claim of R1. Further, the concerned Department of R1 has been notified to collect it from the office of the erstwhile RP.
4. The erstwhile RP vide letter dated 05.07.2023¹ has informed the Central Board of Excise and Customs regarding the implementation of the Resolution Plan and also asked the R1 and R2, to dismiss the proceedings against the CD. R1 and R2 have replied vide email dated 19.07.2023², stating that the proceedings could not be dropped, as they were considered untenable.

¹ At pages 27- 31 of the application

² At pages 32-34 of the application



5. Later, the erstwhile RP vide letter dated 04.08.2023³ has informed R1 and R2 about the approval of the Resolution Plan and the extinguishment of the CD's liabilities. However, no response was received from R1 and R2 to the said letter. On 14.09.2023⁴ the erstwhile RP was directed by the Respondents to send the Demand Draft directly to their office and subsequently the Demand Draft was delivered on 03.10.2023⁵.
6. On 15.09.2023, R1 through R2 has issued a letter to the CD asking to fulfill the obligations to obtain the licenses, whereas the licenses and certain exceptions under Export Promotion Capital Goods Scheme (**EPCG**) have already been granted. Further, it was informed to the CD that in the event of CD's failure to meet these obligations, the Respondents will invoke the Bank Guarantees (**BGs**) submitted for the said purpose to which the CD replied on 27.09.2023⁶.
7. The CD registered under the EPCG had obtained the following licenses against which the exemptions were availed as per the letter as follows:

Sl. No.	ADV_LIC_No.	ADV_LIC_D	BOND_NO	BOND_DT	BOND_AMT	BO
1.	930011086	31-Mar-15	2000890030	31-Mar-15	3194956	EPCG
2.	930011170	13-May-15	2000890031	13-May-15	2025892	EPCG
3.	930011229	12-Jun-15	2000887329	12-Jun-15	7853280	EPCG

³ At pages 35-37 of the application

⁴ E-mails at page 44 -45 of the application

⁵ Speed post and the track report at pages 46 -48 of the application

⁶ At pages 38-41 of the application



8. In the meanwhile, on 03.11.2023⁷, the CD had merged with the SRA, in accordance with the Resolution Plan.
9. In these circumstances, the Applicant has strongly submitted that in view of the approval of the Resolution Plan, R1 and R2 are required to release the BGs without invocation, and Kotak Bank is obligated to return the margin money to the Applicant. The Resolution Plan stipulates that, *upon approval of the Resolution Plan, all liabilities of the Corporate Debtor prior to the Corporate Insolvency Resolution Process (CIRP) are deemed extinguished.* The Applicant has also referred to Clause no. 33(viii)(e), Schedule 2 and Part III (Point No. 13.21) of the Resolution Plan, to deny the claim of the Respondents, and the same is *reproduced* below:

Clause 33(viii)(e) "Payment to Assenting Financial Creditors," provides the following terms:

"Any amount, if received from Kotak Mahindra Bank in favour of the Corporate Debtor in relation to fixed deposits held as security by Kotak Mahindra Bank shall be transferred to the Assenting Financial Creditors as a pass through."

Schedule 2 of the Resolution Plan has mentioned about the Implementation Provisions. The extract says that, *"Upon payment of the OC settlement amount - all related claims, and obligations of the CD towards the Operational Creditors, will be irrevocable, extinguished and finally discharged and settled as per the Resolution Plan."*

Part III of the Resolution Plan consists of the Settlement proposal. And Point No. 13.21 reads as: *"Upon approval of this Plan by the NCLT, all dues under the*

⁷ At page 22 of the application



provisions of all the indirect Taxes, including but not limited to, the Central Excise Act, 1944, the Finance Act, 1994 (service Tax), the Customs Act, 1962, the Central Sales Tax Act, 1956, the Goods and Services Tax Act, 2017, the various states' value added tax acts and any other indirect Tax laws, including Taxes, duty, penalties, interest, fines, cesses, charges, unpaid Tax deducted at source/Tax collected at source to the extent applicable), whether admitted or not, due or contingent, whether part of the above mentioned contingent liability schedule dues or not, whether claimed by the Tax authorities or not, asserted or unasserted, crystallized or uncrystallized, known or unknown, secured or unsecured, disputed or undisputed, present or future, in relation to any period up to the Insolvency Commencement Date shall stand extinguished and the Corporate Debtor and the Resolution Applicant (pursuant to merger of Corporate Debtor with the Resolution Applicant) will not be liable to pay any amount against such demand.”

10. Moreover, the Adjudicating Authority while approving the Resolution Plan vide Order dated 22.05.2023 has observed as follows:

"29...we hereby approve the Revised Resolution Plan dated 30.03.2023 submitted by M/s. Dharmapal Satyapal Limited, along with annexure, schedules forming part of the Resolution Applicant annexed to the Application and order as under:

- i. The Resolution Plan along with annexures and schedules forming part of the plan shall be binding on the CD, its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force is due, guarantors and other stakeholders involved in the Resolution Plan.*



ii. *All crystallized liabilities and unclaimed liabilities of the CD as on the date of this order shall stand extinguished on the approval of this Resolution Plan...."*

11. Thus, pursuant to the approval of the Resolution Plan, all the Pre-CIRP liabilities of the CD have been extinguished, including claims from R1 and R2. Therefore, R1 and R2 cannot invoke BGs, as their claims were settled under the approved Resolution Plan.
12. In support of its stand, the Applicant has strongly relied upon the decision in *Ghanashyam Mishra and Sons (P) Ltd. v. Edelweiss Asset Reconstruction Co. Ltd.*⁸ wherein at para 95 the Hon'ble Supreme Court held:

"95.... (i) Once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of the resolution plan shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(ii) 2019 Amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which the Code has come into effect;

⁸ (2021) ibclaw.in 54 SC



(iii) consequently, all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the adjudicating authority grants its approval under Section 31 could be continued"

13. Further, the Supreme Court in the matter of Committee of Creditors of *Essar Steel India Limited V. Satish Gupta and Ors, (2020) 8 SCC 531: 2019 SCC Online SC 1478* has held as follows:

"a successful resolution applicant cannot suddenly be faced with 'undecided' claims after the resolution plan submitted by him has been accepted....".

14. Hence, the Applicant prays to restrain R1 & R2 from encasing the BGs/bonds pursuant to the letter dated 15.09.2023, as such actions would constitute an illegal act and a deliberate violation of the terms of the approved Resolution Plan. It is averred that, the cause of action arises from the issuance of the letter dated 15.09.2023, which is after the commencement of the CIRP, with R1 & R2 trying to make the Resolution Applicants liable for obligations incurred prior to the approval of the Resolution Plan, risking irreparable financial loss to the Applicant.
15. The Respondent No. 1 and Respondent No.2 were set ex-parte vide order dated 12.12.2023, due to their non-appearance, even after the issuance of notice.

III. Counter of Respondent No.3



1. The CD has been amalgamated with M/s.Dharampal Satyapal Limited (**Successful Resolution Applicant/SRA**), and as a result the Applicant does not have the *locus standi* to file this application. Also, the Applicant has acknowledged that the RP has become *functus officio*. Hence, the Applicant is no longer authorised to represent the **SRA**.
2. The Relief No. 4 has been sought solely against R3, without any corresponding relief against R1 & R2. Notably, the BGs were renewed post admission of the CD into the CIRP i.e. during the moratorium period.
3. Despite the claims of R1 & R2, having been admitted and settled by the erstwhile Resolution Professional, the demands by R1&2 have still continued as per the letter dated 15.09.2023. Additionally, they have asked the erstwhile RP to appropriate the bank deposits held by R3 in case of non-payment by the CD.
4. It is claimed that the involvement of R3 is limited to the issuance of BGs in favor of R1 & R2 at the request of the CD, against a 100% margin. Further, it is stated that he was unaware of the disputes pending between the CD and the other two Respondents.
5. The Respondent has strongly relied on the decision in the *Monitoring Agency of Anush Finlease & Construction Pvt. Ltd. Vs. State Bank of India & Ors*⁹ of the Hon'ble NCLAT New Delhi, wherein it was held that,

⁹ (2021) ibclaw.in 471 NCLAT



“Margin money is construed as substratum of a trust created to pay to the beneficiary to whom the bank guarantee is given and cannot be treated as an asset of the Corporate Debtor.” It is submitted that in the present case, the margin money is in the form of fixed deposit receipts and the same cannot be considered as an asset of the CD as already established in the above cited case.

6. Further, the CIRP was initiated on 05.08.2022 and the margin money was deposited much prior to the starting of the CIRP. It is also stated that, “The said margin money remains with the Bank, if the Bank Guarantee is alive.” In case, the bank guarantee is invoked by the beneficiary, the margin money goes towards payment of bank guarantee to the beneficiary, and nothing remains with the financial institutions, which can be reversed to the corporate debtor, and hence the CD cannot demand that amount.
7. It is contended that R3 can release the margin money only upon the return of the BGs by the CD in favor of R1 & R2, or on lapse of time. However, R3 cannot return the margin money because the applicant has not requested R1 & R2 to return the BGs to R3. Therefore, the Applicant lacks *locus standi* in this matter.

IV. Rejoinder:

1. The Applicant has reiterated the averments made in the application with respect to the *locus standi*, issuance of demand draft and the letters exchanged by the erstwhile RP and the Respondents.



2. It is averred that the Applicant (Edelweiss Asset Reconstruction Company Limited) is one of the Assenting Financial Creditors which has been authorised vide letter dated 31.10.2023 in which Vistara ITCL (India) Limited and other Assenting Creditors, have authorised the Applicant to file the present application.
 3. It is asserted that mere non-return of the expired original BGs is not a ground for refusing to release the margin money to the Applicant, despite the clear terms mentioned in the Resolution Plan.
 4. The prayer of relief against encashment of the BGs was sought against R1 & R2. Hence, R3 has no right to say that the Applicant has not sought correct reliefs against R1 & R2.
 5. It is averred that the return of original BGs which cannot be encashed need not be asked as return of such BGs is inconsequential.
- V. We have heard Learned Counsels for both parties and perused the records.

VI. Findings

1. The Corporate Insolvency Resolution Process was initiated against the CD on 05.08.2022, and the Resolution Plan was approved by the Adjudicating Authority vide Order dated 22.05.2023. Respondent No.3 had issued Bank Guarantees prior to the commencement of CIRP at the instance of the CD



in favour of Respondent Nos.1 and 2, securing benefits under the licenses issued to the CD. These Bank Guarantees were renewed by the RP during the CIRP period. For the issuance of such Bank Guarantees, the CD had deposited margin money in the form of fixed deposits with Respondent No.3. Subsequently, Respondent Nos.1 and 2, vide letter dated 15.09.2023, directed the CD to pay the bond amounts, failing which they would appropriate the fixed deposits. The beneficiaries have invoked the Bank Guarantees accordingly.

2. It is a settled position of law that a Bank Guarantee constitutes an independent and autonomous contract between the issuing bank and the beneficiary, enforceable irrespective of disputes in the underlying contract between the beneficiary and the CD. The Hon'ble Supreme Court in *Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation*¹⁰, and *Industrial Finance Corporation of India Ltd. v. Cannanore Spg. and Wvg. Mills Ltd.*¹¹, has reiterated this settled principle, holding that Bank Guarantees are to be honoured unless there is fraud or irretrievable injustice.
3. Furthermore, by virtue of the 2018 amendment to the Insolvency and Bankruptcy Code, 2016, clause (3) of Section 14 clarifies that the moratorium imposed under Section 14(1) shall not apply to a surety in a contract of guarantee to a Corporate Debtor. Additionally, performance guarantees stand excluded from the definition of "security interest" under Section 3(31) of the IBC and, therefore, fall outside the scope of the

¹⁰ (1996) 5 SCC 450

¹¹ (2002) 5 SCC 54



moratorium under Section 14. It is, therefore, well-settled that bank guarantees, including performance guarantees, can be invoked notwithstanding the moratorium under Section 14 of the Code.

4. Accordingly, any dispute concerning the primary contract between the Applicant and Respondent No.1 do not impede the invocation of the Bank Guarantee. Once a Bank Guarantee is invoked in accordance with its terms, Respondent No.3 is legally entitled to appropriate the margin money or fixed deposits earmarked for the said guarantee.
5. In the present case, the Bank Guarantees furnished were in the nature of performance guarantees, securing the performance of contractual obligations undertaken by the CD. Therefore, the moratorium provisions do not apply to such guarantees. The Hon'ble National Company Law Appellate Tribunal ("NCLAT") in *GAIL (India) Limited v. Rajeev Manaadiar & Ors.*¹², has categorically held that the moratorium under Section 14(1)(c) of the IBC does not extend to performance bank guarantees, since they do not constitute a "security interest" within the meaning of Section 3(31) of the Code. The beneficiary of a performance guarantee is thus entitled to invoke it fully or partially, notwithstanding the moratorium.

¹² Company Appeal (AT) (Insolvency) No. 319 of 2018



6. Additionally, margin money or fixed deposits earmarked against the performance bank guarantees are held in trust for the beneficiary of the guarantee. The Hon'ble NCLAT in *Punjab National Bank & Ors. v. Supriyo Kumar Chaudhuri, RP for JVL Agro Industries Ltd.*¹³, has held that once an asset is placed in trust for the beneficiary, the CD retains no ownership rights over it, unless the trust is extinguished or the beneficiary releases the asset. A similar view was reiterated in *Indian Overseas Bank v. Arvind Kumar*¹⁴.
7. Therefore, the inclusion of any clause in the Resolution Plan seeking release of the margin money or fixed deposits by Respondent No.3 to the CD would not affect the settled legal position discussed above. Such amounts, being earmarked for performance guarantees and held in trust, are liable to be appropriated by the bank upon invocation of the Bank Guarantee.
8. In view of the foregoing discussion, we are of the considered opinion that:
 - a) The invocation of the bank guarantees by Respondent Nos.1 and 2 is valid and in accordance with law.
 - b) Respondent No.3 is entitled to appropriate the margin money/fixed deposits maintained against the said guarantees upon invocation.

¹³ (2022) ibclaw.in 731 NCLAT

¹⁴ (2020) ibclaw.in 285 NCLAT



- c) Any clause in the Resolution Plan seeking release of the margin money/fixed deposits to the Corporate Debtor is of no consequence and cannot override the settled legal position governing the rights of the beneficiary of the bank guarantees and the issuing bank.
9. As such, the IA (IBC) 1806/2023 in CP(IB) No.88/07/HDB/2022 is dismissed.

Sd/-
SANJAY PURI
MEMBER (TECHNICAL)

Sd/-
RAJEEV BHARDWAJ
MEMBER (JUDICIAL)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, COURT-II**

I.A (IBC) No. 440 of 2023

in

C.P (IB) No.88/7/HDB/2022

[Under Section 14(1)(b), 14(1)(c) and Section 60(5) of Insolvency and Bankruptcy Code, 2016]

**In the matter of M/s.Edelweiss Asset Reconstruction Company Ltd. vs. M/s.Viceroy
Bangalore Hotels Pvt. Ltd.**

Between:

M/s. Edelweiss Asset Reconstruction Company Limited

Acting in its capacity as Trustee of EARC Trusts SC 236, 246, 249

and 253. A company incorporated under the Companies Act, 2013

and registered with the Reserve Bank of India as an Asset

Reconstruction Company under Section 3 of Securitization and

Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002, and having

its registered office at Edelweiss

House, Off CST Road, Kalina, Mumbai – 400098

...Applicant

And

1. **Kotak Mahindra Bank Ltd.**

76, Uma Rajeswar Plaza, 9th Phase

KPHB Colony, Hyderabad-500072.

...Respondent No.1/R1

2. **Office of the Deputy Commissioner of Customs**

Inland Container Depot

Sanath Nagar, Hyderabad-500018.

...Respondent No. 2/R2

Date of Order: 09.04.2025

Coram:

Shri Rajeev Bhardwaj, Hon'ble Member (Judicial)

Shri Sanjay Puri, Hon'ble Member (Technical)

Counsels Present

For the Applicant

: Mr. G. Bhupesh, Advocate

For the Respondent No. 1

: Mr. Raja Shekar Rao Salvaji and

Ms. KVS Madhumita, Advocates



[PER: RAJEEV BHARDWAJ, MEMBER (JUDICIAL)]

ORDER

1. The present application is originally filed by Mr. Kuresh Hatim Khambati, Resolution Professional of M/s.Viceroy Hotels Private Limited (**Corporate Debtor/CD**) against Kotak Mahindra Bank Ltd. (**Respondent No. 1/R1**) and Office of the Deputy Commissioner of Customs (**Respondent No. 2/R2**), inter alia, seeking the following reliefs:
 - a. To pass an order declaring that the appropriation of the fixed deposits of the Corporate Debtor amounting to Rs. 50,05,218/- (principal amount) by the Respondent No. 1 during CIR Process of the Corporate Debtor is illegal, unlawful, bad, improper and contrary to the provisions of the Code including Section 14 thereof;
 - b. To pass an order directing the Respondent No.1 to reverse the wrongful appropriation of the fixed deposits of the Corporate Debtor amounting to Rs.80,05,218/-(principal amount);
 - c. To pass an order directing the Respondent No. 1 to pay the Corporate Debtor a sum of Rs. 80,05,218/-along with applicable interest accrued from the creation date till the reversal date, which was wrongly appropriated, by depositing the same in the bank account of the Corporate Debtor; and
 - d. To pass an order restraining the Respondent No. 1 from appropriating in any manner whatsoever the fixed deposits of Rs.2,29,16,268/-.
2. Subsequently, vide Order dated 28.11.2023 in **I.A (IBC) No. 1626 of 2023** in C.P (IB) No. 88/7/HDB/2022, the name of the Applicant, Mr. Kuresh Hatim Khambati, Resolution Professional of the CD was replaced with



M/s.Edelweiss Asset Reconstruction Company Limited and the amendment to the Application was carried out on 01.04.2024.

3. Application

- (i) The CD obtained a loan from the consortium of four banks. Through a Deed of Assignment, the debt/loan was assigned to M/s.Edelweiss Asset Reconstruction Company Limited (**Applicant/Financial Creditor**). The total outstanding loan, amounting to Rs. 361,94,75,105/- which was restructured and reduced to Rs.317,00,00,000/- through a Master Restructuring Agreement (**MSA**) dated 06.06.2017.
- (ii) The CD failed to comply with the terms and conditions of the MSA, which led to the initiation of the Corporate Insolvency Resolution Process (**CIRP**) vide Order dated 05.08.2022. Mr. Kuresh Hatim Khambati, was appointed as an Interim Resolution Professional (**IRP**). Subsequently, in the 1st CoC meeting held on 15.09.2022, Mr. Kuresh Hatim Khambati was approved as Resolution Professional (**RP**).
- (iii) On 18.08.2022, the IRP issued a public announcement inviting claims from the creditors by fixing the last date as 30.08.2022.
- (iv) The CD was registered under Export Promotion Capital Goods Scheme (**EPCG**) and obtained license dated 19.02.2013 bearing no. 0930009064 (**License**). On request of the CD, R1 issued Bank Guarantees (**BGs**) in favour of R2, which are as follows:



SR. NO	BG NUMBER	BG DATE	BG AMOUNT
1.	74750BG19008261	30 th April, 2019	Rs. 2,43,500/-
2.	74750BG19012081	3 rd July, 2019	Rs. 5,95,000/-
3.	74750BG19009682	23 rd May, 2019	Rs. 32,67,100/-
4.	74750BG19007478	12 th April, 2019	Rs. 34,83,500/-
5.	74750BG19007485	12 th April, 2019	Rs. 4,16,118/-
TOTAL			Rs. 80,05,218/-

- (v) On 18.08.2022, R2 issued notice to CD stating that EPCG had expired and requested either an Export Obligation Discharge Certificate (“**EODC**”) or extension of Export Obligation Period (“**EOP**”) issued by the Director General of Foreign Trade (“**DGFT**”). The Applicant responded through letters dated 14.09.2022 and 21.09.2022, informing R2 about the initiation of CIRP. Vide letter dated 14.09.2022, the Applicant clarified that Specific Export Obligation (“**SEO**”) concerning EPCG and that due to shortfalls in second block period, the DGFT extended EOP until 19.02.2023.
- (vi) On 02.11.2022, R2 issued a notice to R1 invoking BGs issued in favour of “The Chief Accounts Officer, Officer of the Principal Commissioner of Customs, Hyderabad.” On 07.11.2022, R1 issued demand drafts. Subsequently, on 11.11.2022, the Applicant communicated to R2 regarding the Letter dated 14.09.2022 wherein it was stated that the EOP was already extended upto 19.02.2023 and requested R2 to allow the time until the expiry of EOP, i.e. 19.02.2023. As a result, R2 issued notice dated 17.11.2022, instructing R1 to hold the Bank Guarantees in abeyance. However, R1 wrongfully appropriated fixed deposit amounts of CD.



- (vii) The Applicant informed R1 of the moratorium imposed on the CD and requested for reversal of appropriation made within 7 days. The said request was not heeded by R1. In a letter dated 22.12.2022, R1 acknowledged that the fixed deposits, which had been provided as security for the bank guarantees, had been appropriated.
- (viii) Disputing R1's actions, the Applicant issued a letter on 03.01.2023, stating that the enforcement of Bank Guarantees and the appropriation of funds are distinct actions, and the fixed deposits cannot be appropriated during the moratorium period. On 10.01.2023, the Applicant reiterated this position in a further letter to R1. Despite these requests, R1 did not reverse the appropriation of the amounts.
- (ix) Records of Ministry of Corporate Affairs (MCA) reveal that charges were created on fixed deposits valued at Rs.3.10 crores on 21.10.2021. In addition to the amount covered in this petition, deposits amounting to Rs.2,29,16,268/- were provided as security for the BGs.
- (x) The Applicant placed reliance on the judgements of the Hon'ble NCLAT in *Indian Overseas Bank v. Diankar T. Venkatasubramaniam*, 2017 SCC OnLine NCLAT 608 and *Bank of Baroda v. Sundaresh Bhat*, 2020 SCC OnLine NCLAT 434 to assert that no amount can be recovered from the CD during the moratorium period.



4. **Counter By R1**

- (i) R1 denied the allegations regarding the violation of Section 14 of the Insolvency and Bankruptcy Code (**IBC**), asserting that margin money is not an asset of the CD and is held in trust. R1 further claimed that the letter dated 10.01.2023 was never received from the Applicant.
- (ii) R1 contended that the Fixed Deposit Receipts (**FDRs**) were deposited as 100% margin money for the BGs, and thus, do not fall under the definition of 'Security Interest' as provided under Section 3(31) of the IBC.
- (iii) R2 issued a notice dated 17.11.2022 instructing R1 to hold the bank guarantee in abeyance. However, R1 issued demand drafts dated 07.11.2022 as per request of R2 dated 02.11.2022 and the same were encashed by R2.
- (iv) R1 relied on the judgment of *Andhra Pradesh Pollution Control Board v. CCL Products (India) Ltd., (2019) 20 SCC 669*, asserting that a bank guarantee constitutes an independent contract between the issuing bank and the beneficiary.
- (v) R1 further placed reliance on the order of Hon'ble NCLAT, Principal Bench, New Delhi in *Punjab National Bank vs. Supriyo Kumar Chaudhuri & Ors. [Company Appeal (AT) (Insolvency) No. 657 of 2020]* and, another order of Hon'ble NCLAT in *Monitoring Agency of Anush Finlease & Construction Pvt. State Bank of India and Ors.*



[Company Appeal (AT) (Insolvency) No. 902 of 2020 emphasizing that margin money doesn't constitute Security Interest.

5. Heard the counsels of both the parties and perused the entire record.

6. **Findings**

- (i) The CD was admitted into CIRP vide order dated 05.08.2022. Respondent No. 1 had issued bank guarantees in favour of Respondent No. 2 on dates prior to the commencement of CIRP. However, the said Bank Guarantees were invoked and the corresponding amounts were appropriated after initiation of CIRP.
- (ii) The primary issue that arises for consideration is whether such Bank Guarantees, issued prior to the commencement of CIRP, can be invoked post commencement of CIRP, and whether the beneficiary can validly appropriate the guaranteed amount thereafter?
- (iii) It is a settled position of law that a Bank Guarantee constitutes an independent contract between the issuing bank and the beneficiary. Its enforcement is independent of the underlying contract between the beneficiary and the Corporate Debtor. The Hon'ble Supreme Court in *Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation, (1996) 5 SCC 450*, and *Industrial Finance Corporation of India Ltd. v. Cannanore Spg. and Wvg. Mills Ltd., (2002) 5 SCC 54*, has held that a Bank Guarantee is an autonomous contract, enforceable independent of disputes in the underlying transaction, except in cases of fraud or irretrievable injustice.



- (iv) Further, by virtue of the 2018 amendment to the Insolvency and Bankruptcy Code, 2016 (IBC), clause (3) of Section 14 clarifies that the moratorium under Section 14(1) shall not apply to a surety in a contract of guarantee to a corporate debtor. It is thus well settled that guarantees including performance guarantees can be invoked notwithstanding the moratorium under Section 14 of the Code. Moreover, performance guarantees are expressly excluded from the definition of "security interest" under Section 3(31) of the Code. Hence, performance guarantees fall outside the ambit of Section 14 of the Code.
- (v) In the present case, the Bank Guarantees furnished were in the nature of performance guarantees, issued to secure the performance of certain contractual obligations. Therefore, moratorium does not apply such Bank Guarantees. The Hon'ble National Company Law Appellate Tribunal (NCLAT) in *GAIL (India) Limited v. Rajeev Manaadiar & Ors., Company Appeal (AT) (Insolvency) No. 319 of 2018*, held that the moratorium under Section 14(1)(c) of the Code does not extend to performance bank guarantees, as they do not fall within the definition of "security interest" under Section 3(31) of the Code. It was held that the beneficiary of a performance bank guarantee is entitled to invoke the same in full or in part, notwithstanding the moratorium.
- (vi) Additionally, the margin money or fixed deposits earmarked against performance bank guarantees constitute a trust in favour of the beneficiary of the guarantee. The Hon'ble NCLAT in *Punjab National Bank & Ors. v. Supriyo Kumar Chaudhuri, RP for JVL*



Agro Industries Ltd., (2022) ibclaw.in 731 NCLAT, has held that once an asset is placed in trust for the beneficiary, the Corporate Debtor retains no right over it unless released from the trust. A similar view was taken in *Indian Overseas Bank v. Arvind Kumar, (2020) ibclaw.in 285 NCLAT*.

- (vii) In view of the settled legal position and the facts of the present case, we find that the invocation of the Bank Guarantees by Respondent No. 2 and the consequential appropriation of the guaranteed amount by Respondent No. 1 do not amount to a violation of the moratorium under Section 14 of the Code. The Bank Guarantees in question were performance guarantees, which are expressly excluded from the purview of the moratorium. Further, the margin money utilized was held in trust for the beneficiary and did not form part of the assets of the Corporate Debtor.
- (viii) Accordingly, we are of the considered view that Respondent No. 1 has not contravened any provision of the Insolvency and Bankruptcy Code, 2016 by allowing the invocation of the Bank Guarantees or by releasing the guaranteed amount in favour of Respondent No. 2.
7. In light of the above discussion, the application is devoid of merit and is hereby dismissed.

Sd/-
SANJAY PURI
MEMBER (TECHNICAL)

Sd/-
RAJEEV BHARDWAJ
MEMBER (JUDICIAL)