

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 902 of 2020

[Arising out of order dated 04.08.2020 in IA-2057(PB)/2020 in (IB)-1705 (PB)/2018 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench]

IN THE MATTER OF:

**Monitoring Agency of Anush
Finlease & Construction
Private Limited
Through its Chairman**

.... Appellant.

Versus

1. State Bank of India

Erstwhile State Bank of Mysore

3, 4 and 5, DDA Building,

Nehru Place, New Delhi – 110019

Mail ID: nehruplace1077@sbi.co.in

.....Respondent No. 1

2. State Bank of India

A-5, Ring Road, South Extension,

Part 1, New Delhi – 110049

Mail ID: sbi.13913@sbi.co.in

...Respondent No. 2

3. Deputy Commissioner

Office of Customs

ICD TKD, New Delhi – 110020

Mail ID(S):

Icdtkd-exp-custdel@gov.in

Commrtkdexp-cusdel@nic.in

...Respondent No. 3

4. Director General of Foreign Trade

Udyog Bhawan, H-Wing, Gate No. 2,
Maulana Azad Road
New Delhi:- 110011
Email:- dgft@nic.in

...Respondent No. 4

Present:

For Appellant: Mr. Ashish Verma and Mr. Iswar Mohapatra, Advocates.

For Respondents: Mr. Apoorv Sarvaria, Advocate for R-1 & R-2.

Mr. RP Vats, Advocate for R-4.

J U D G M E N T

(4th October, 2021)

Justice Anant Bijay Singh;

This Appeal has been preferred by the Appellant aggrieved and dissatisfied by the order dated 04.08.2020 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench in IA-2057(PB)/2020 in (IB)-1705 (PB)/2018 whereby and where under the I.A. No. 2057(PB)/2020 filed by one Mr. Aashish Gupta, Chairman of the Monitoring Committee (formed pursuant to approval of Resolution Plan) seeking directions against State Bank of India (Respondent No. 2 herein) and Director General of Foreign Trade (Respondent No. 4 herein) for release of Fixed Deposits Receipts of Anush Finlease and Construction Pvt. Ltd. (Corporate Debtor) wherein the Ld. Adjudicating Authority passed the following order:

“ **39.** For this reason alone, it has been said in Section 30(2)(e) that, the Resolution Plan shall not contravene any of the provisions of the laws for time being in force, the same is again reiterated in Section 238 of the Code saying that this Code will have overriding effect over other laws which are **inconsistent** with the provisions of this Code. Harmonisation of statutes is the hall mark of justice, not invalidating the rights conferred under one enactment by another enactment save and except to the extent mentioned.

40. Since it has been mentioned that Security Interest shall not include the Performance Guarantee, the incidental actions to the performance guarantee cannot be called as falling within the ambit of the Code. On the day the Bank is discharged, the applicant can get back this money from the Bank.

41. Accordingly, this application is hereby dismissed as misconceived.”

2. The facts giving rise to the instant Appeal is as under:

i) That the Corporate Insolvency Resolution Process (**for short CIRP**) Application filed by the Financial Creditor / petitioner i.e. Phoenix ARC Private Limited under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**for short IBC**) read with Rule 4 sub rule (1) of Insolvency and Bankruptcy Code (Application to Adjudicating Authority) Rules, 2016, was admitted by the Ld. Adjudicating Authority (National Company Law Tribunal), Principal Bench, Company Appeal (AT) (Insolvency) No. 902 of 2020

New Delhi vide order dated 30.05.2019, whereby Mr. Aashish Gupta (IBBI Registration No.-IBBI/IPA-001/IP-P00687/2017-18/11164) was appointed to act as Interim Resolution Professional (**for short IRP**).

ii) Further case is that in terms of the order dated 30.05.2019 a public announcement was published by the IRP with respect to the initiation of Corporate Insolvency Resolution Process against the Corporate Debtor, which was published on 04.06.2019 in the two leading Newspapers, i.e. Financial Express (NCR English Edition) & Jansatta (NCR Hindi Edition), whereby IRP invited claims as per Section 15 of the IBC read with Regulation 6 of CIRP. The said public announcement was also posted on the website of Insolvency & Bankruptcy Board of India.

iii) That pursuant to the publication inviting claims, it is incumbent upon the creditors to file their claims with the IRP. But no claim was filed by the Respondent (s) before the IRP.

iv) Further case is that pursuant to the publication of Form G, EOI was received from several prospective resolution applicants and final list of Prospective Resolution Applicants was issued by the Resolution Professional on 05.01.2020.

v) Further case is that after several discussions and modifications, the resolution plan dated 14.03.2020 of Kendriya Bhandar (Central Government Employees Consumer Cooperative Society Ltd. under the aegis of Government of India, Ministry of Personnel, P.G. & Pensions) (hereinafter 'Resolution Plan')

was approved by the Committee of Creditors by 77.54% voting shares on 20.03.2020 (Annexure A-3 at page 102 to 172 of the Appeal Paper Book).

vi) Further case is that the Resolution Professional had preferred an application under Section 30(6) read with Section 31 of the IBC for approval of the Resolution Plan. The Ld. Adjudicating Authority was pleased to allow the said application and the Resolution Plan stood approved vide order dated 01.04.2020 (Annexure A-4 at page 173 to 174 of the Appel Paper Book).

vii) Further case is that 'Anush Finlease & Construction Private Limited' (**for short AFCPL**) somewhere in the year 2012/13 prior to the insolvency resolution, in furtherance of its business operations had obtained authorisation for 40 export promotion capital goods (hereinafter 'EPCG Authorisation') from Additional Directorate General of Foreign Trade (CLA), New Delhi (hereinafter 'DGFT') for Duty Saved amount of INR 3,63,75,515.74/- against an Export Obligation of INR 29,80,86,017.92/- and USD 55,93,452.05 for import of capital goods.

viii) That as against the authorisations and licenses, 'Anush Finlease & Construction Private Limited' was maintaining certain Fixed Deposit Receipts (hereinafter 'FDR') with the Respondents Nos. 1 and 2. The details of the same are as under:

FDRs with Erstwhile State Bank of Mysore 3,4 and 5, DDA Building, Nehru Place, New Delhi

FDR No. 1. 64175959969

FDRs with State Bank of India A-5, Ring Road, South Extension, Part 1, New Delhi.

FDR Nos.

1.	31214228242	13.	32710692804
2.	32559560866	14.	32774155729
3.	32591314834	15.	32782848055
4.	32593898941	16.	32796424801
5.	32599872234	17.	32822666117
6.	32611498992	18.	32830552552
7.	32613558076	19.	32900604388
8.	32619562701	20.	32960716412
9.	32631233431	21.	32631209599
10.	32676289530	22.	32599824202
11.	32684625552	23.	32900597211
12.	32690911510	24.	32822673102

VIII. That the said FDRs were being maintained against some Bank Guarantees which were issued by AFCPL. Against the FDR being 64175959969 maintained by Erstwhile State Bank of Mysore, the following Bank Guarantees were issued in favour of the Department of Customs-

FDR Amount	BG Nos.	BG Amount (Aggregate)	BG Expiry Date

Rs. 50.58 Lakhs	4041510BG000026 4041510BG000027 4041510BG000029	Rs. 37.50 Lakhs	15.02.2019 15.02.2019 19.02.2019
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Copies of the Bank Guarantees No. 4041510BG000026, 4041510BG000027 and 4041510BG000029 are annexed herewith as **Annexure A-5**.

IX. That Bank Guarantees were issued against the remaining FDRs as well. Following are the details of the said Bank guarantees available with the Appellant-

FDR No.	FDR Amount (in Rs.)	BG Nos.	BG Amount (in Rs.)	BG Expiry Date
32559560866	2,35,500	0505112BG1000268	2,30,175	23.09.2021
32591314834	13,50,000	0505112BG1000285	13,47,976	08.10.2021
32593898941	5,10,000	0505112BG1000288	5,09,912	12.10.2021
32599872234	5,50,000	0505112BG1000289	5,50,000	12.10.2021
32599824202	6,70,000	0505112BG1000290	6,70,000	12.10.2021
32611498992	5,26,000	0505112BG1000303	5,25,735	19.10.2021
32613558076	4,01,000	0505112BG1000304	4,00,048	22.10.2021
32631209599	2,22,000	0505112BG1000316	2,21,748	02.11.2021
32631233431	2,48,000	0505112BG1000315	2,47,505	02.11.2021

32676289530	6,00,000	0505112BG1000350	6,00,000	28.11.2021
32690911510	1,25,000	0505112BG1000355	1,24,292	03.12.2021
32684625552	2,01,000	0505112BG1000354	2,00,534	03.12.2021
32710692804	3,22,000	0505112BG1000373	3,21,208	13.12.2021
32774155729	6,00,000	0505112BG1000015	6,00,000	17.01.2022
32782848055	1,50,000	0505112BG1000019	1,50,000	27.01.2022
32796424801	4,000	0505112BG1000022	3,500	30.01.2022
32822666117	1,10,000	0505112BG1000040	1,08,774	12.02.2022
32822673102	4,50,000	0505112BG1000039	4,48,643	12.02.2022
32830552552	8,80,000	0505112BG1000047	8,78,870	18.02.2022
32900604388	7,27,589	0505112BG1000089	7,25,634	22.03.2022
32900597211	7,92,731	0505112BG2000090	7,90,433	22.03.2022
32960716412	2,91,000	0505112BG2000131	2,90,918	25.04.2022
32619562701	13,27,000	0505112BG1000305	13,26,286	25.10.2022
Total	1,12,92,820		1,12,72,191	

ix) Further case is that vide later dated 07.04.2020 (Annexure A-8 at page 197 to 199 of the Appeal Paper Book), State Bank of India was requested to release the said FDR amounts into the controlled account of 'Anush Finlease & Construction Private Limited'. However, State Bank of India has failed to comply with the same.

x) Further case is that the representatives of the Monitoring Agency have on several occasions, telephonically contacted the concerned persons from State Bank of India requesting them to release the aforesaid FDR amounts.

However, on account of the failure of the State Bank of India to comply with the same, the Appellant was sent legal notice on 15.04.2020 (Annexure A-9 at page 200 to 207 of the Appeal Paper Book).

xi) Being aggrieved, the Appellant filed IA-2057(PB)/2020 before the Ld. Adjudicating Authority and the Ld. Adjudicating Authority has dismissed the same on 04.08.2020. Hence this Appeal.

Submissions on behalf of the Appellant

3. The Learned Counsel for the Appellant during the course of argument and his memo of Appeal as also Written Submissions submitted that M/s Kendriya Bhandar (a member of the Appellant) filed a resolution plan after approval of the resolution plan of the Corporate Debtor was appointed as Chairman of the monitoring agency of Anush Finlease and Construction (Appellant herein) and further I.A. No. 2057 of 2020 filed before the Ld. Adjudicating Authority seeking release of certain Fixed Deposits (FDRs).

4. It is further submitted that these FDRs were created by the former management of the Corporate Debtor and prior to the initiation of Corporate Insolvency Resolution Process were used as margin money. One of the FDRs was held with Respondent No. 1 and twenty-four FDRs were held with Respondent No. 2.

5. It is further submitted that against the FDRs being margin money, the Respondent No. 1 and the Respondent No. 2 issued certain Bank Guarantees in favour of the Respondent No. 3. The cumulative value of these guarantees

issued by the Respondent Nos. 1 and 2 aggregates to approximately INR 1.60 Cr.

6. It is further submitted that the approved resolution plan stipulated that all liabilities apart from those dealt with by the Resolution Plan were extinguished. Therefore, as per the resolution plan the FDRs being the property of the Corporate Debtor were as per the terms of the plan to be released to the custody of the Appellant.

7. It is further submitted that Ld. Adjudicating Authority has failed to consider is that the liability which the Bank Guarantees in question aim to cover has been extinguished by virtue of law. The Bank Guarantees seek to secure a liability incurred by the ex-management of the Corporate Debtor against the Respondent No. 3 - Customs Department.

8. It is further submitted that admittedly the Respondent No. 3 has not filed a claim. It is further an established fact that the claim of the Customs Department if any, is not dealt with under the resolution plan. The Ld. Adjudicating Authority has failed to consider that the Respondent No. 3 – Customs Department failed to file a claim before the Resolution Professional, the liability of the Corporate Debtor to the Customs Department has been extinguished. The said extinguishment is provided for in the resolution plan (at page 136, Clause 3.8.2 of the Appeal Paper Book).

9. Learned Counsel for the Appellant further referred on a judgment of the Hon'ble Supreme Court passed in **Committee of Creditors of Essar Steel India Limited V/s Satish Kumar Gupta and Others (2019 SCC OnLine SC**

1478), where the Hon'ble Supreme Court has held that no claims apart from those decided on merits by the RP can survive after plan approval. It is further submitted that the liability, if any, of the Corporate Debtor towards the Respondent No. 3 has been extinguished. Consequently, the Bank Guarantees have no reason to say alive and therefore, the margin money ought to be returned to the Appellant.

10. It is further submitted that the Ld. Adjudicating Authority has failed to notice that the resolution plan (at page 159, Clause 23 of the Appeal Paper Book) specifically provides for the release of the bank guarantees to the Appellant. The said Clause 23 is reads as hereunder:

“ An order approving the Resolution Plan shall be considered a deemed order upon any authority and/or any entity to cancel all pledge/lien/other encumbrances upon the fixed deposits of the Corporate Debtor and a further direction to any bank(s) holding such fixed deposits to immediately release in the controlled account. The details of the fixed deposits are detailed in Annexure3, however this may not be an exhaustive list and there may be other fixed deposits.”

11. Learned Counsel for the Appellant further submitted that by failing to grant the relief as prayed for, the Ld. Adjudicating Authority has in effect rewritten the resolution plan. So, based on these submissions the impugned order is set aside and the Appeal be allowed.

Submissions on behalf of the Respondent Nos. 1 and 2.

12. The Learned Counsel for the Respondent No. 1 - State Bank of India, Erstwhile State Bank of Mysore and Respondent No. 2 – State Bank of India during the course of argument and his Reply Affidavit as also Written Submissions submitted that the Respondent No. 1 - State Bank of India issued 23 Bank Guarantees on 100% margin on behalf of M/s Anush Finlease and Construction Pvt. Ltd. (“AFCPL” Corporate Debtor) involving a total amount of Rs. 1,12,72,191.00 which are due to mature on different dates in years 2021 and 2022.

13. It is further submitted that the aforesaid bank guarantees were issued in favour of the Government Departments / Deputy Commissioner of Customs and Director General of Foreign Trade, New Delhi (“the beneficiaries”) i.e. Respondent No. 3 and Respondent No. 4.

14. It is further submitted that there are three Bank Guarantees issued in favour of the Customs Department two of which have expired on 15th February 2019 and one expired on 19th February 2019. However, the Department of Customs has written to State Bank of India for revalidating the said Bank Guarantees and the Customs Department is laying their claim on these Bank Guarantees and is not accepting that these three Bank Guarantees have expired and has also not discharged the Bank and returned the original Bank Guarantees to the Bank.

15. It is further submitted that the Appellant herein filed an application being I.A. No. 2057 of 2020 before the Ld. Adjudicating Authority seeking directions against Respondent Nos. 1 to 3 for release of fixed deposits receipts

of AFCPL. The said application was erroneously based on the resolution plan approved in the CIRP of AFCPL vide order dated 01.04.2020 passed by Ld. Adjudicating Authority.

16. It is further submitted that the Appellant has in fact vide its aforesaid application sought for extinguishment of the guarantees between the bank and the beneficiaries (to which it is not even a party) and release of margin money deposited with the Bank without the Bank Guarantees having been discharged.

17. It is further submitted that the Ld. Adjudicating Authority passed a well-reasoned order dated 04.08.2020 and rightfully dismissed the IA No. 2057 of 2020 which is challenged in the instant Appeal filed by the Appellant, the same being unsustainable in law. The appellant challenging the order passed by the Ld. Adjudicating Authority on baseless and frivolous grounds, therefore, it is liable to be dismissed.

18. It is further submitted that because it is erroneous to treat the FDRs in the present case as mere fixed deposits as understood in banking parlance. These actually comprise of the margin money towards the bank guarantees issued by the Respondent Bank in favour of the beneficiaries named therein. These are not FDRs which can be realized by the Corporate Debtor as and when it wishes.

19. It is further submitted that a bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not affected or dependent upon the contract between the person at whose instance the bank guarantee was given and the beneficiary. As such the contract between the

bank and the beneficiaries is independent of the contract between AFCPL and the concerned Government Department.

20. It is further submitted that the Ld. Adjudicating Authority has rightly observed that as per RBI Guidelines and various judgments in this regard, 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.

21. It is further submitted that even in terms of Section 36(4) of the Code, assets owned by a third party which are in possession of the Corporate Debtor including the assets held in trust for any third party do not fall within the ambit of liquidation estate, clearly indicating that assets held in trust are not assets of the Corporate Debtor.

22. It is further submitted that explanation to Section 18 provides in explicit terms that the term “assets” shall not *inter alia* include assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment. So, based on these submissions, it is submitted that the FDRs in question are not assets of the Corporate Debtor and the same cannot be claimed as a matter of right under the guise of the demonstrating the same as mere “Fixed Deposits”.

23. It is further submitted that the Insolvency and Bankruptcy Code categorically provides that a resolution plan must not contravene any of the provisions of the law for the time being in force Section 30(2)(e). Any resolution plan which is in contravention of the provisions of law is unsustainable in law.

24. It is further submitted that reliance placed on the approved resolution plan in the CIRP of AFCPL is completely misplaced and untenable in law.

Resolution Plan cannot provide for extinguishment or cancellation of a contract of bank guarantee between third parties i.e. the Bank and the beneficiaries. The contract between the Bank the Beneficiaries is independent of the contract between AFCPL and the concerned Government Department. Therefore, the contention that the bank guarantee stands extinguished by the resolution plan is highly misplaced as the contract between the bank and the beneficiary is subsisting, valid and in force and the same could not be extinguished or cancelled, except in accordance with law.

25. It is further submitted that while obtaining the approval of resolution plan from the Ld. Adjudicating Authority, it was demonstrated as if the FDRs are mere fixed deposits as understood in banking parlance. Whereas, these actually comprise of the margin money towards the bank guarantees issued by the Respondent Bank in favour of the beneficiaries named therein. There is no mention or description of the same in the Resolution Plan.

26. It is further submitted that the purported extinguishment of bank guarantee by way of the resolution plan, is in contravention of Section 30(2)(e) and the provisions of the Indian Contract Act, 1872 with regard to bank guarantees.

27. It is further submitted that the beneficiaries of the said bank guarantees against which the FDR accounts were opened had not filed any claim with the Resolution Professional and as such as per Clause 7.8 of the Resolution Plan, any claims that were not received by the Resolution Professional are deemed to be extinguished and settled against NIL payment made to them.

28. It is further submitted that reliance placed on the decision of the Hon'ble Supreme Court in **Committee of Creditors of Essar Steel India Limited V/s**

Satish Kumar Gupta and Others (2019 SCC OnLine SC 1478), is highly misplaced and the Ld. Adjudicating Authority has rightly observed that decision of ***Essar (Supra)*** is about a claim, that claim is also an undecided claim and in this case, co claim has been made against the Resolution Applicant / Corporate Debtor.

29. It is further submitted that the Ld. Adjudicating Authority with regard to the concept of clean slate that if anybody makes any claim against the Resolution Applicant / Corporate Debtor after the approval of the resolution plan, the Applicant can make use of character of the asset of the Corporate Debtor. So, based on these submissions the Ld. Adjudicating Authority has rightly passed the impugned order. There is no merit in the instant Appeal, the Appeal is fit to be dismissed.

30. From the perusal of the order dated 16.07.2021 it appears that despite valid service of notice the Respondent No. 3 failed to appear and the matter is proceeded *ex-parte* against Respondent No. 3.

Submissions on behalf of the Respondent No. 4.

31. The Learned Counsel for the Respondent No. 4 – Director General of Foreign Trade during the course of argument and his Reply Affidavit as also Written Submissions submitted that the Bank Guarantee No. 0505112BG1000305 was issued by the Respondent No. 1 (State Bank of India) in favour of the Director General of Foreign Trade, New Delhi, i.e. the Respondent No. 4 on behalf of M/s Anush Finlease and Construction Pvt. Ltd. (AFCPL / Corporate Debtor). The said bank guarantee is admittedly valid till

25.10.2022 and the liability of the Bank still remains towards the answering Respondent under the said guarantee.

32. It is further submitted that the Ld. Adjudicating Authority passed a well-reasoned order dated 04.08.2020 rightfully dismissed the I.A. No. 2057 of 2020 filed by the Appellant herein, the same being unsustainable in law. The appellant challenging the order passed by the Ld. Adjudicating Authority on baseless and frivolous grounds, therefore, it is liable to be dismissed.

33. It is further submitted that the moratorium as envisaged under Section 14 of the Insolvency and Bankruptcy Code would not be applicable to the bank guarantee as firstly the same is not covered under the moratorium and also because the moratorium period subsists only till the approval of the resolution plan and not indefinitely. So, based on these submissions the Ld. Adjudicating Authority has rightly passed the impugned order. There is no merit in the instant Appeal, the Appeal is fit to be dismissed.

FINDINGS

34. After hearing the parties and gone through the records of the case as also Written Submissions, we are of the considered view that the following facts are admitted in the instant Appeal.

- The Respondent No. 1 – State Bank of India issued 23 Bank Guarantees on 100% margin on behalf of M/s Anush Finlease and Construction Pvt. Ltd. (“AFCPL” Corporate Debtor) involving a total amount of Rs. 1,12,72,191.00 which are due to mature on different dates in years 2021 and 2022.

- The aforesaid bank guarantees were issued in favour of the Government Departments / Deputy Commissioner of Customs and Director General of Foreign Trade, New Delhi (“the beneficiaries”) i.e. Respondent No. 3 and Respondent No. 4.
- It is also admitted fact that the Appellant filed an application being I.A. No. 2057 of 2020 before the Ld. Adjudicating Authority seeking directions against Respondent Nos. 1 to 3 for release of Fixed Deposits Receipts of AFCPL.
- It is also admitted fact that the said application was erroneously based on the resolution plan approved in the CIRP of AFCPL vide order dated 01.04.2020 passed by Ld. Adjudicating Authority.
- It is also admitted fact that the State Bank of India and Director General of Foreign Trade submitted before the Ld. Adjudicating Authority that this is not simple fixed deposit rather it is bank guarantee along with margin money is an independent contract between the beneficiary and the Bank, though these are shown as FDRs, issued by SBI in favour of the beneficiary, it is not refundable to the Corporate Debtor unless the Bank is discharged.
- It is also admitted fact that the Ld. Adjudicating Authority has rightly observed that as per RBI Guidelines and various judgments in this regard, 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.
- The State Bank of India has relied upon Hon’ble Supreme Court judgment in **Ansal Engineering Projects Ltd. Vs. Tehri Hydro**

Development Corpn. Ltd. [1996 (5) SCC 450] wherein the Hon'ble Supreme Court observed as follows:

“ It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary....”

“5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach. The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured. The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity prima facie made out in the case as triable issued by strong evidence so as to prevent irretrievable injustice to the parties...”

- It is also admitted fact that the assets of the Corporate Debtor are envisaged in Section 36 of the Code which is read as hereunder:

“ 36. Liquidation Estate.- (1) *For the purposes of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.*

(2) The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following:—

(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;

(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;

(c) tangible assets, whether movable or immovable;

(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;

(e) assets subject to the determination of ownership by the court or authority;

(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;

(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;

(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and

(i) all proceeds of liquidation as and when they are realised.

(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—

(a) assets owned by a third party which are in possession of the corporate debtor, including—

(i) assets held in trust for any third party;

(ii) bailment contracts;

(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;

(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and

(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;

(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;

(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;

(d) assets of any Indian or foreign subsidiary of the corporate debtor; or

(e) any other assets as may be specified by the Board, including assets which could be subject to set-off on account of mutual dealings between the corporate debtor and any creditor.”

And the duties of the IRP are mentioned in Section 18 of the Insolvency and Bankruptcy Code, 2016.

- Admittedly, in terms of the Section 36(4) of the IBC, it is a clear indication that assets held under Trust cannot be considered as the asset of the Corporate Debtor. The Ld. Adjudicating Authority has considered all these facts in correct prospective.

ORDER

35. We are of the considered view that there is no illegality in the impugned order and we hereby affirm the order dated 04.08.2020 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench and Ld. Adjudicating Authority has rightly dismissed the IA-2057(PB)/2020 in (IB)-1705 (PB)/2018. There is no merit in the instant Appeal, the Appeal is hereby dismissed. No order as to costs.

36. Registry to upload the Judgment on the website of this Appellate Tribunal and send the copy of this Judgment to the Ld. Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench, forthwith.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ms. Shreesha Merla]
Member (Technical)**

New Delhi

4th October, 2021

R. Nath.