IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD

IA No. 212/2020
In
CP (IB) No. 529/7/HDB/2018

Between:

Vijay Kumar Garg
Resolution Professional of
M/s. Lanco Vidarbha Thermal Power Limited

...Applicant/
Resolution Professional

AND

Punjab National Bank and 13 others

...Respondents

Order pronounced on 02.09.2020

Coram:

Hon'ble Shri Ratakonda Murali, Member (Judicial)

Hon'ble Shri Veera Brahma Rao Arekapudi, Member (Technical)

Counsels / parties present:

For Applicant: Shri P.Ravi Charan, and
Shri L.Venkateswara Rao, Counsels.

Per: Hon'ble Shri Ratakonda Murali, Member (Judicial)

Heard on: 02.09.2020

ORDER

1. The Application is filed U/s 60(5) of the IBC Code, 2016, praying the Tribunal to issue necessary directions to the

respondents to pay their respective portion of the Corpus to be created for the CIRP cost within 15 days to enable the Applicant to run the CIRP smoothly and fulfil his obligations under the code.

2. Withdrawal memo is filed on behalf of the Applicant/Resolution professional stating that he has received respective portion of the Corpus to be created for the CIRP costs from the Respondents No.1-14. Therefore prayed the Tribunal to permit the applicant to withdraw the Application IA No.212/2020.
3. Heard the Counsel for Applicant, who reported that memo is filed for withdrawal of IA No.212/2020. Memo is recorded.
4. Therefore IA NO.212/2020 is dismissed as withdrawn.

VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)

RATAKONDA MURALI
MEMBER (JUDICIAL)

Pavani

THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD

IA No.528 OF 2020
in
C.P (IB) No. 529/7/HDB/2018

Under section 60(5) read with section 14 of Insolvency & Bankruptcy Code, 2016.

In the matter between:

Vijay Kumar Garg
(IBBI/ IPA-002/IP-N00359/2017-2018/11060)
Resolution Professional of
M/s Lanco Vidarbha Thermal Power Ltd
Plot No.4, Software Units Layout
Hitech City, Madhapur
Hyderabad-500081, Telangana.

.. **Applicant**
(Resolution Professional)

AND

1. Office Superintendent
Range-II, Customs Division-I
Nagpur
GST Bhavan, Telangkhedi Road
Civil Lines, Nagpur-440 001.

2. IDBI Bank
Represented by its Chief Manager
IDBI Tower, WTC Complex
Cuffe Parade, Mumbai – 400 005.

.. **Respondents**

Date of order: 02.09.2020

Coram:

HON'BLE SHRI RATAKONDA MURALI, MEMBER (JUDICIAL)

and

HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI, MEMBER (TECHNICAL).

Parties / Counsels Present:

Resolution Professional	:	Shri P. Ravi Charan, Advocate assisted by Ms. Niharika Agarwal, Advocate.
For Customs Department	:	Shri Shantanu and Shri Kunal, Advocates.

Per: HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI, MEMBER (TECHNICAL).

Heard on: 22.07.2020, 24.07.2020, 06.08.2020 and 20.08.2020.

ORDER

The present application is filedby the Resolution Professional bearing Registration No.IBBI/ IPA-002/IP-N00359/2017-2018/11060, appointed by the Tribunal vide order dated 19.03.2020, **seeking reliefs** that letter dated 19.05.2020 (EXHIBIT A2, page 44) issued by respondent no.1 seeking to recover an amount of **Rs.4,25,55,191/-** towards three Bank Guarantees bearing nos.160041BGF00094, 160041BGF00091, and 160041BGF00097, dated 03.05.2016, be quashed. The applicant/ Resolution Professional has also prayed interim directions to respondent no.2/Bank not to release the said amount of Rs.4,25,55,191/- from the said three Bank Guarantees pursuant to said letter dated 19.05.2020 (EXHIBIT A2, page 44).

2. BRIEF FACTS :

2.1 The petition filed by Punjab National Bank under section 7 of the I&B Code against the Corporate Debtor has been admitted vide order dated 03.10.2019 (EXHIBIT A1 to this IA, pages 30-41) and the applicant has been appointed as IRP for the Corporate Debtor.

2.2 The present IA is filed by the applicant/ Resolution Professional aggrieved by the letter dated 19.05.2020 (Exhibit A2, page 44) issued by respondent no.1 seeking recovery of Rs.42555191/- from three Bank Guarantee issued by IDBI bearing nos.160041BGF00094, 160041BGF00091, and 160041BGF00097, dated 03.05.2016, for an aggregate amount of Rs.42555191/-.Said letter dated 19.05.2020 has been brought to the knowledge of the applicant by respondent no.2 vide its e-mail dated 10.07.2020. (Exhibit A2 Colly.).

2.3 It is averred in para 3 of the IA that the Corporate Debtor is a Special Purpose Vehicle (SPV) of Lanco Group incorporated for setting up a domestic coal based supercritical Thermal Power Plant having two units of 660 MW capacity each near Village Mandva, District Wardha, Maharashtra. Corporate Debtor is incorporated with Registrar of Companies on 23.02.2005. The Corporate Debtor was issued Provisional Mega Power Project Certificate by Ministry of Power vide letter dated 21.11.2011 (EXHIBIT A3).

2.4 It is averred in para 4 of the IA that respondent no.1 has issued Notification dated 17.03.2012, granting exemption to the categories of goods specified in Notification No.1 from payment of customs duty when imported to India. Condition No.93 to Notification No.1 stated that in case certification of Mega Power Project is provisional, exemption could be availed if the importer furnishes a security in the form of FDR from any scheduled bank for a term of 36 months or more. Relevant extract of the said Notification is at EXHIBIT A4.

2.5 It is averred in paras 5and 6 of the IA thatrespondent no.1 issued Notification No.43 of 2012 dated 27.06.2012(EXHIBIT A5), whereby Notification No.1 has been amended providing that security submitted by the importer could be in the form of either FDR or Bank Guarantee. The Corporate Debtor opted the form of Bank Guarantee to claim exemption from payment of customs duty.

2.6 It is averred in para 7 of the IA that apart from the above three Bank Guarantees the Corporate Debtor has also issued four Bank Guarantees dated 04.01.2016, 08.08.2016, 08.08.2016 and 30.05.2011 (EXHIBIT A6 Colly.). The said Bank Guarantees are renewed from time to time to meet the obligations of customs duty.

2.7 It is averred in paras 8 and 9 of the IA that Notification No.1 was further amended vide Notification No.05/ 2014- Customs on 17.02.2014, (EXHIBIT A7) extending time period **from 36 months to 60 months** for furnishing Final Mega Certificates to Tax Authorities. Ministry of Power, vide O.M. dated 12.04.2017 (EXHIBIT A8) amended Mega Power Policy, 2009 for Provisional Mega Power Project and inter alia, approved time period for Provisional Mega Projects, for furnishing Final Mega Certificates to the Tax authorities be **extended to 120 months instead of 60 months** from the date of import. By the said OM, Corporate Debtor was granted status of Provisional Mega Power Project. Thus, the period of 120 months or 10 years is calculated from 2011. Respondent no.1 is estopped from recovering any amounts whatsoever during the said period.

2.8 It is averred in paras 10 and 11 of the IA that the applicant having been appointed as IRP vide order dated 03.10.2019 (EXHIBIT A1 to this IA, pages 30-41), has issued public announcement on 05.10.2019 inviting claims by creditors of the Corporate Debtor for payments due as on insolvency commencement dated, viz. 03.10.2019. Respondent no.1 submitted proof of claim dated 20.03.2020 (EXHIBIT A9) in respect of the claim of custom duty payable on the goods kept in private bonded warehouse of the Corporate Debtor.

2.9 It is averred in para 12 of the IA thatdespite moratorium having been imposed by the Tribunal and despite having filed its claim for the amounts due in terms of Bills of Entries, respondent no.1 invoked Bank Guarantees and addressed letter of recovery dated 19.05.2020 (EXHIBIT A2, page 44).

2.10 It is averred in para 13 of the IA that by virtue of the impugned notifications and OM the Corporate Debtor is required to furnish Final Mega Certificate to respondent no.1 only by 2021. Till then the Corporate Debtor can avail concessions available as a Mega Power Project. The Corporate Debtor has accordingly renewed the BG upto 2021.

2.11 It is averred in para 14 of the IA that respondent no.1 vide impugned letter dated 19.05.2020 sought to invoke BG issued by PNB and UCO Bank in its favor. The applicant has filed a separate application being IA No.442 of 2020 for quashing of letter dated 19.05.2020 addressed to UCO Bank, wherein interim order dated 05.06.2020 was passed directing respondent no.1 not to invoke BG in question subject to renewal of BG. Relevant part of the order reads as under:

> *"It is true RP is to extend the bank guarantees pending hearing of this application. RP is directed to extend the bank guarantees by another three months initially leaving the bank guarantees already extended.*
>
> *The first respondent is therefore directed not to invoke bank guarantees referred in the application for a period of four weeks."*

Said interim order has been extended from time to time and said IA No.442 of 2020 was heard and reserved for orders on 10.07.2020. Copies of such orders passed in the said IA are at EXHIBIT A10 COLLY.

2.12 <u>CIRCUMSTANCES UNDER WHICH BANK GUARANTEE IS BARRED UNDER SECTION 14(1) OF THE I&B CODE</u>.

(A) The applicant, in para 16 onwards, has formulated the following circumstances under which a BG is barred under section 14(1) of the Code.

(i) The BG can be enforced only when duty becomes payable. In the present case duty would become payable only in 2021, if the applicant is not able to furnish Final Mega Power Certificate.

(ii) Purpose of moratorium is to preserve financial position of the Corporate Debtor during CIRP and ensure that no further liabilities and obligations are incurred during the said period. Any act of recovery of monies under the BG would cause irreparable damage and it will defeat the CIRP.

(iii) The BGs issued by the Corporate Debtor are not PBGs and hence come within the ambit of 'security interest' in terms of section 3(31) of the Code and are covered under section 14(1) of the Code.

(iv) Section 14(1) read with section 3(31) of the Code provides that a PBG has been specifically excluded from the ambit of moratorium under the Code as held by the NCLT, Ahmedabad Bench in the matter of NITIN HASMUKHLAL PARIKH Vs. MADHYA GUJARAT VIJ COMPANY LIMITED & OTHERS, rendered in IA No.340 of 2017 in CP (IB) No.28/ 10/ NCLT/ AHM/ 2017 (EXHIBIT A11). Relevant part reads as under:

> *"Section 3 (31) clearly says that Performance Guarantees are not included in the Security Interest. What is covered by the order of this Authority under Section 14 (1) (c) is the Security Interest. Therefore, the moratorium order passed by this Tribunal is not applicable to the Performance Guarantees given by the Corporate Debtor. The moratorium order passed by this Tribunal applies in respect of Bank Guarantees other than Performance Guarantees furnished by the Corporate Debtor in respect of its property since it comes within the meaning of 'security interest'. Therefore, Respondent no. 1 is not entitled to invoke Bank Guarantee other than that comes within the meaning of performance guarantee, during moratorium period."*

It is averred that the NCLT, Ahmedabad, vide above order, has prohibited all forms of BGs, whether Performance Guarantee or Non-Performance Guarantee.

2.13 <u>INVOCATIOIN OF BANK GUARANTEE AFTER FILING OF CLAIM</u>.

(A) It is averred in para 23 of the IA that the objective of the Code is revival and resolution of the Corporate Debtor in a time bound manner while aiming for optimization of value of assets keeping in view the interest of stakeholders, keep the Corporate Debtor as a going concern and thereby facilitate a resolution rather than liquidation. The act of respondent no.1 in invoking BG after claim is filed amounts to bettering its own position against other creditors of the same class.

(B) It is averred in para 24 of the IA that further objective of the Code is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons. Invocation of BG during moratorium would derail the corporate insolvency resolution process.

2.14 EFFECT OF INVOCATION OF BANK GUARANTEE.

(A) The Corporate Debtor was issued Provisional Mega Power Project Certificate by Ministry of Power vide letter dated 21.11.2011 (EXHIBIT A3). The Corporate Debtor has availed exemption form payment of customs duty in terms of relevant notifications. Said notifications provide that failure of the importer to furnish Final Mega Status Certificate within 36 months shall result appropriation of security.

(B) It is averred in paras 29 and 30 of the IA that invocation of BG would result in withdrawal of concession/ benefit granted to the Corporate Debtor by Provisional Certificate and the Corporate Debtor is liable to pay the BG to respondent no.1 which will add to the project cost and that causes irretrievable injury to the Corporate Debtor.

(C) The applicant relied on the following judgments of the Hon'ble Supreme Court.

- UP State Sugar Corporation Vs. Sumac International Limited, (1997) 1 SCC 568 (EXHIBIT A12), wherein it is held that encashment of unconditional BG would result in irretrievable harm or injustice to one of the parties concerned. The harm or injustice must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.
- In Gangotri Enterprises Limited Vs. Union of India, (2016) 11 SCC 720 (EXHIBIT A13), it is held that though there are settled principles of law, every case has to be decided with reference to the facts of the case involved therein.

- The impugned letter dated 19.05.2020 (EXHIBIT A2, page 44) issued by respondent no.1 to respondent no.2, directs the Bank to encash the BG as the Corporate Debtor has not adhered to the conditions of the Bond executed by them and has not paid the duties and liabilities. In fact, no such liability arose by virtue of Provisional Certificate and the OM impugned.
- Having filed its claim, respondent no.1 submitted to CIRP and has acknowledged its applicability over its claim. Thus, respondent no.1 cannot avail multiple remedies for the same claim.

2.15 EXPLANATION TO SECTION 14(1) OF THE CODE.

- Section 14(a)(1) of the Code, as amended, provides Explanation which is as under:

  Explanation below Section 14(1):

  "For the purposes of this sub-Section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period."

In light of the above explanation, the Corporate Debtor having been issued Provisional Certificate is entitled to the rights/ grants bestowed on it by the Ministry of Power as long as the Corporate Debtor is not in default. Thus, the action of respondent no.1 is violative of section 14(1) of the Code.

3. WRITTEN NOTE OF ARGUMENT DATED 06.08.2020 FILED ON BEHALF OF RESPONDENT No.1.

3.1 It is averred by respondent no.1 in para 3 of the Written Argument that the Corporate Debtor had imported goods as described in tabular form of this para for setting up a Mega Power Project availing benefit of Notification dated 17.03.2012 read with Notification dated 27.06.2012.Exemption of payment of tax is available only to those who complete the project within the time specified in the said Notifications. Whereas in the present case, the project undertaken by the Corporate Debtor has neither completed nor is there any indication that it will be completed within the prescribed time.

3.2 It is further averred that the BGs furnished by the Corporate Debtor are unconditional and are payable to the answering respondent on demand. PNB, one of the creditors, has filed proceedings under IBC in 2018 against the Corporate Debtor, which has been admitted vide order dated 03.10.2019. The impugned letter was issued to respondent no.2/ Bank as provided in the said BGs. Thereafter, IA No.528 of 2020 is filed contending that section 14 of the Code bars respondentno.1 from invoking BG.

3.3 It is averred that the Bank issuing Guarantee is not concerned with the underlying contract between the parties and that BG is an independent and distinct contract between the Bank and the person in whose favor the same is issued. Duty of the Bank, under a Performance Guarantee, is created by the document itself. Once the documents are in order, the Bank must honour the same and make payment.

3.4 Respondent no.1 relied on a decision of the Hon'ble Supreme Court in the case of STATE OF MAHARASHTRA & ANOTHER Vs. NATIONAL CONSTRUCTIOIN COMPANY, BOMBAY & ANOTHER, (1996) 1 SCC 735. A copy thereof is at DOCUMENT No.1 of this Written Note.

3.5 It is reiterated by respondent no.1 that the BG issued by the respondent/ Banks in favor of respondent no.1 is unconditional BG and the same needs to be honoured by the respondent/ Banks without any demur and without being influenced by any objection from the Corporate Debtor.

3.6 It is averred that section 14 of the Code is not applicable in case of a BG. Intent of the said section, as amended, is to ensure that guarantor does not escape from an independent and co-extensive liability to pay the amount of BG. It is averred that section 14 of the

Code is not applicable to the BGs of the present nature. In support of the said contention, respondent no.1 relied on decision of the NCLT, New Delhi, Principal Bench in the matter of M/S LEVCON VALVES (P) LTD. Vs. ENRGO ENGINEERING PROJECTS LTD. (DOCUMENT No.II of this Written Argument).

3.7 It is further contended that the Corporate Debtor having issued Unconditional BG in favor of respondent no.1, cannot avoid its obligation alleging that permitting respondent no.1 to encash the said BG will put respondent no.1 on a higher pedestal against other creditors. If such a plea of the applicant is accepted it would defeat the intention of the Legislature, as clarified by the amendment to section 14 of the Code, viz. such BG is beyond the scope of moratorium.

4. SUBMISSIONS DATED 06.08.2020 FILED ON BEHALF OF RESPONDENT No.1.

The Submissions dated 06.08.2020 are verbatim identical to the Written Note of Argument filed on behalf of respondent no.1. Therefore, averments made in this Submission are not dealt with separately.

FINDINGS

5. We have heard the learned counsels for both the sides through videoconference and have also gone through the record and the Written Note of Arguments submitted by respondent no.1. The application was filed by the Resolution Professional of the Corporate Debtor aggrieved by letter dated 19.05.2020 (EXHIBIT A2, page 44) issued by respondent no.1 seeking to recover an amount of **Rs.4,25,55,191/-** towards three Bank Guarantees bearing nos.160041BGF00094, 160041BGF00091, and 160041BGF00097, dated 03.05.2016.

6. The above Bank Guarantees were issued by the Corporate Debtor in favour of respondent no.1 for the amount equivalent to customs duty payable on the goods kept in the Customs Private Bonded Warehouse in the jurisdiction of Nagpur Zone of the Customs Department.

7. The petition filed by Punjab National Bank under section 7 of the I&B Code against the Corporate Debtor has been admitted vide order dated 03.10.2019 (EXHIBIT A1 to this IA, pages 30-41) and the applicant has been appointed as IRP for the Corporate Debtor.

8. Respondent no.1 has issued Notification dated 17.03.2012, granting exemption to the categories of goods specified in Notification No.1 from payment of customs duty when imported to India. Condition No.93 to Notification No.1 stated that in case certification of Mega Power Project is provisional, exemption could be availed if the importer furnishes a security in the form of FDR from any scheduled bank for a term of 36 months or more. Relevant extract of the said Notification is at EXHIBIT A4.

9. Apart from the above three Bank Guarantees the Corporate Debtor has also issued four Bank Guarantees dated 04.01.2016, 08.08.2016, 08.08.2016 and 30.05.2011 (EXHIBIT A6 Colly.). The said Bank Guarantees are renewed from time to time to meet the obligations of customs duty.

10. Notification No.1 was further amended vide Notification No.05/ 2014- Customs on 17.02.2014, (EXHIBIT A7) extending time period **from 36 months to 60 months** for furnishing Final Mega Certificates to Tax Authorities. Ministry of Power, vide O.M. dated 12.04.2017 (EXHIBIT A8) amended Mega Power Policy, 2009 for Provisional Mega Power Project and inter alia, approved time period for Provisional Mega Projects, for furnishing Final Mega Certificates to the Tax authorities be **extended to 120 months instead of 60 months** from the date of import. By the said OM, Corporate Debtor was granted status of Provisional Mega Power Project. Thus, the period of 120 months or 10 years is calculated from 2011. Respondent no.1 is estopped from recovering any amounts whatsoever during the said period.

11. The applicant having been appointed as IRP vide order dated 03.10.2019 (EXHIBIT A1 to this IA, pages 30-41), has issued public announcement on 05.10.2019 inviting claims by creditors of the

Corporate Debtor for payments due as on insolvency commencement dated, viz. 03.10.2019. Respondent no.1 submitted proof of claim dated 20.03.2020 (EXHIBIT A9) in respect of the claim of custom duty payable on the goods kept in private bonded warehouse of the Corporate Debtor.

12. In the present circumstances, respondent no.1 has invoked the said Bank Guarantees. Respondent no.1 has invoked Bank Guarantees claiming that protection of moratorium in terms of section 14(1) of the Code is not applicable by virtue of Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, which came into effect on 06.06.2018, by which section 14(3)(b) is inserted, which reads as under:

> "14(3)(b) *"a surety in a contract of guarantee to a corporate debtor."*

and the Bank issuing guarantee is not concerned with the underlying contract between the parties and that a Bank Guarantee is an independent and distinct contract between the Bank and the person in whose favour the same is issued.

13. The applicant vehemently opposed these contentions made by respondent no.1 and submitted that section 14(3)(b) of the I&B Code is not applicable to NBGs. He also submitted that the said Bank Guarantees furnished by the Corporate Debtor are, by no stretch of imagination, can be called PBGs as these were issued in order to avail exemption from payment of customs duty with a view to complete the project within the prescribed time period. Nature of these Bank Guarantees does not arise from a contractual arrangement but was issued as a security to respondent no.1, who would not insist on payment of customs duty upfront and release the goods imported by the Corporate Debtor based on the Bank Guarantee. However, respondent no.1 heavily relied on section 14(3) of the I&B Code, which prohibits applicability of moratorium set out in section 14(1) of the I&B Code, in cases of "a surety in a contract of guarantee to a corporate debtor" to defend its stand that it can invoke the Bank Guarantee in question

during the period of moratorium. On the contrary, the applicant contended that the Bank Guarantees issued by the Corporate Debtor are not in the nature of PBG, in fact they are in the nature of NBG. Hence the case falls within the ambit of 'security interest'. Section 3(31) of the Code specifically excludes PBG from its definition. Said section reads as under:

> *"3(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:*
>
> *Provided that security interest shall not include a performance guarantee;"*

Further section 14(1) of the I&B Code states 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 judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
>
> *(b) transferring, encumbering, alienating or disposing of 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."*

14. The applicant further averred that a conjoint reading of section 14(1) and section 3(31) of the Code leads to the conclusion that a PBG has been excluded from the ambit of moratorium under the Code as is

held in decision of the NCLT, Ahmedabad in the case of NITIN HASMUKHLAL PARIKH Vs. MADHYA GUJARAT VIJ COMPANY LIMITED & OTHERS, rendered in IA No.340 of 2017 in CP (IB) No.28/10/ NCLT/AHM/ 2017 (EXHIBIT A-11 of the Application), where encashment of a PBG during moratorium was permitted, by referring to the definition of 'security interest' as defined under section 3(31) of the IBC.

15. It is further the case of the applicant that as is apparent from the order of the NCLT, Ahmedabad Bench, which has laid down that NBGs are covered within the meaning of 'security interest' and thus deserve immunity from any action to recover in terms of section 14(1) of the Code. The applicant has also quoted decision of the NCLT, Mumbai Bench in the case of IDBI BANK LTD Vs. EPC CONTRUCTIONS INDIA LIMITED [MA No.661/2018 & MA No.1011/ 2018 in CP No.1832/ IBC/ NCLT/ MB/ MAH/ 2017] **(ANNEXURE A-4 COLLY of Written Note of Argument dated 09.07.2020 in IA No.442 of 2020)**, which clearly stated that,

> *"During the insolvency proceedings it is required to protect the interest of a Corporate Debtor. Keeping this object in mind, it is justifiable not to allow alienation or liquidation as far as possible of the assets of the Corporate Debtor, particularly if the subject matter is the invocation of the Bank Guarantee."*

16. The applicant has also quoted decision of the NCLT, Mumbai Bench in the case of KOHINOOR CRANE SERVICES Vs. PETRON ENGINEERING CONSTRUCTIONS LIMITED [MA 384/ (MB) 2018 in CP 1374/ I&BC/ MB/ MAH/ 2017] **(ANNEXURE A-4 COLLY of Written Note of Argument dated 09.07.2020 in IA No.442 of 2020)**, which has clearly laid down that alienation of any asset or recovery from any property of the Corporate Debtor is prohibited when moratorium is in place and hence the action of invocation of Bank Guarantee is against the provisions of the Code.

17. The applicant has also contended that invocation of Bank Guarantee after filing of claim for the dues is an ill-conceived attempt to

better its position and to place itself on a higher pedestal than the other creditors. The applicant contended that the object of the Code emphasizes on revival and resolution of the Corporate Debtor in a time bound manner while aiming for optimization of value of assets keeping in view the interest of all stakeholders. The applicant contended that by invoking Bank Guarantees after filing its claim with the RP, respondent no.1 is attempting to better its position as against other creditors of the same class. Such an action of respondent no.1 is at the cost of diminishing the value of the Corporate Debtor and jeopardize the CIRP of the Corporate Debtor. It also leads to destruction of value of the assets of the Corporate Debtor and any act of recovery of monies under the Bank Guarantee would cause irreparable damage, besides causing hardship to the entire resolution process of the Corporate Debtor and further decreasing the chances of the Corporate Debtor getting a viable resolution plan.

18. The applicant further contended that the action of respondent no.1 in invoking Bank Guarantees is an act of suspending/ withdrawing the benefit it granted to the Corporate Debtor, which is valid upto 2021 and the action to claim of custom duty is unjust and unfair and is violative of section 14(1) of the I&B Code.

19. In response to the above contention of the applicant, respondent no.1 has contended that the Corporate Debtor has applied for the customs private bonded warehouse in the jurisdiction of Nagpur Zone of the Customs Department to store the imported machinery for setting up mega power project on the terms and conditions mentioned in the Notifications issued by Government of India. In the instant case, the project undertaken by the Corporate Debtor has not been completed, nor are they any indications of completion of the same in the near future, far apart within the time specified in the said Notifications. Respondent no.1 further contended that the aforesaid notifications mentioned by the applicant do not exempt payment of tax on the import of the goods made by the Corporate Debtor. It clearly says that if the Corporate Debtor fails to complete the project, within the time stipulated in the said Notifications and during the said period, the payment of tax on the said goods is only deferred. Needless to mention

here the exemption of payment of tax is available only to the person, who completes the project within the specified period only. As per the said notifications Bank Guarantees are to be submitted by the assessee, in case the said assessee desires to avail the benefit of the said Notifications. The impugned Bank Guarantees of the Corporate Debtor are only given for that purpose. Respondent no.1 further points out that the said Bank Guarantees are unconditional and are payable to the Department by the issuing Banks, viz. respondents no.2 and 3. In light of the above circumstances, respondent no.1 came to the conclusion that there was absolutely no possibility of the Corporate Debtor completing the said project and therefore, the impugned communication is issued, as provided in the said Bank Guarantees. Respondent no.1 contended that the stand taken by the applicant/ Resolution Professional in the application is incorrect and contrary to the provisions of law which will be apparent from the following:

> *"Bank issuing guarantee is not concerned with the underlying contract between the parties and that a Bank Guarantee is an independent and distinct contract between the Bank and the person in whose favour the same is issued."*

20. Respondent no.1, therefore, contended that the Bank issuing guarantee is not concerned for the underlying contract between the parties to the contract. Duty of the Bank, under the PBG, is created by the document itself. Once the documents are in order, the bank giving guarantee must honour the same and make payment. In support of the above submission, respondent no.1 has cited case law decided by the Hon'ble Supreme Court in the matter of STATE OF MAHARASHTRA & ANOTHER Vs. NATIONAL CONSTRUCTION COMPANY, BOMBAY & ANOTHER, (1996) 1 SCC 735.

21. Respondent no.1 also contended that section 14 of the I&B Code is not applicable and not attracted in case of Bank Guarantee. It is submitted that the amendment is made to section 14 of the IBC with an object of not allowing the guarantors from escaping from an independent and coextensive liability to pay the amount of the said Bank Guarantee. In support of this contention respondent no.1 quoted the case law decided by the NCLT, New Delhi, Principal Bench in the

case of M/S LEVCON VALVES (P) LTD Vs. ENERGO ENGINEERING PROJECTS LTD., rendered in CA No.453 (PB)/ 2017 in CP No. (IB)- 160 (ND)/ 2017. In light of the above submissions, learned counsel for respondent no.1 contended that there is no merit in the application filed by the Resolution Professional and the same only needs to be dismissed by the Tribunal. From the above discussion, the following points are to be answered:

(i) Whether respondent no.1 is in order in invoking Bank Guarantees when O.M. dated 12.04.2017 (EXHIBIT A8), provides time period for Provisional Mega Projects, for furnishing Final Mega Certificates to the Tax authorities to 120 months, viz. by which validity is available upto 2021, for the applicant to avail benefit of exemption from payment of customs duty?

(ii) Whether the impugned Bank Guarantees can be termed as PBGs and are exempted from the moratorium under section 14(a)(1) of the IBC as amended by Insolvency and Bankruptcy Code (Amendment) Act, 2020?

(iii) Whether it is in order for respondent no.1 to invoke Bank Guarantees when, respondent no.1 has filed its claim with the Resolution Professional for the amount due from the Corporate Debtor for which these Bank Guarantees are issued?

ANSWER TO ISSUE No.(i) :

From the submissions made by the both the learned counsel it is clear that the impugned Bank Guarantees are furnished by the Corporate Debtor to avail benefit of the customs duty for setting up a domestic coal based supercritical Thermal Power Plant having two units of 660 MW capacity each near Village Mandva, District Wardha, Maharashtra. Both the counsels also agreed that the Corporate Debtor has applied for custom duty exemption in terms of Notification No.12/ 2012- Customs dated 17.03.2012 read with Notification No.43/ 2012- Customs dated 27.06.2012, by furnishing Mega Power Project status and security in the form of Fixed Deposit Receipt (FDR)/ Bank Guarantee, for a term of 36 months or more for an amount equal to the duty of customs payable on such imports, In terms of the aforesaid notifications, failure of the importer to furnish Final Mega Power Project Status Certificate within 36 months from the date of import, shall result in appropriation of said security towards customs duty payable on such imports. Copies of the said Notifications dated 17.03.2012 (extract) and 27.06.2012 are annexed as EXHIBIT A-4 and EXHIBIT A-5 of the IA. Government of India has amended Notification No.12/ 2012- Customs dated 17.03.2012 vide Notification No.05/ 2014-Customs dated 17.02.2014, wherein the time period for furnishing Provisional Mega Power Project Certificate was extended to 60 from 36 months. A copy of the said notification is at EXHIBIT A-7 of the IA. Thereafter, Ministry of Power, vide O.M. No.A-3/ 2015-IPC dated 12.04.2017, annexed as ANNEXURE A-8 of the IA, amended Mega Power Policy, 2009 for Provisional Mega Power Project and inter alia, approved time period for Provisional Mega Projects, for furnishing Final Mega Certificates to the Tax authorities be extended to 120 months instead of 60 months from the date of import. Further, as per serial no.20 of Annexure-1 of the above referred OM, status of the Provisional Mega Power Project, which was granted to the Corporate Debtor, was extended for 10 years from 2011.

We agree with the contention of the applicant as regards issue no.1 as the Corporate Debtor was given time to submit Final Mega Power Project Certificate within the period of 120 months and in the instant case the Corporate Debtor has imported machinery in the year 2011 and it enjoys benefit of exemption from payment of customs duty for 120 months till 2021. We therefore, have no hesitation in accepting the contention of the applicant that respondent no.1 is estopped from recovering any amounts whatsoever upto the said period of 120 months from the date of import. Accordingly, Issue No.1 is answered in affirmative. Respondent no.1 cannot invoke Bank Guarantee before expiry of 120 months from the date of import.

ANSWER TO ISSUE No.(ii) :

We have gone through section 14(1)(a), (b), (c) and (d) of the Code. Section 14 of the Code, which deals with moratorium is amended. Section 14(3) of the Code is amended by insertion of clause (b). It exempts a surety in a contract of guarantee to a corporate debtor from the intensity of moratorium. Further section 14(1)(c) prohibits 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). Therefore, the question before us is whether the impugned Bank Guarantee can be considered as PBGs which were exempted as per section 3(31) of the Code, which defines what is security. However, the proviso to section 3(31) of the Code exempts PBGs from the definition of security interest. Therefore, any Bank Guarantees issued as a PBG is not covered by the rigors of section 14(1)(c) of the Code. The important question to decide is whether the impugned Bank Guarantees issued by Corporate Debtor are PBGs or NBGs. When we go into the purpose for which the impugned Bank Guarantees are issued, we understand that these were issued for availing the benefits of exemption from payment of customs duty. Even though the underlying action is to furnish final Mega Power Project Status Certificate in time, then only this exemption is available to the Corporate Debtor. The basic object of this Bank Guarantee is to avail exemption only, not for completion of the project. Therefore, these Bank Guarantees cannot be termed as PBG. These can be termed as NBGs only. As such these guarantees are covered under security interest under section 14(1)(c) of the Code, and not under section 14(3)(b) of the Code, which was amended by Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. We are, therefore, of the opinion that our point of view is strengthened by the decision of the NCLT, Mumbai Bench in the case of IDBI BANK LTD Vs. EPC CONTRUCTIONS INDIA LIMITED [MA No.661/2018 & MA No.1011/ 2018 in CP No.1832/ IBC/ NCLT/ MB/ MAH/ 2017], the relevant part of which is as under:

"20. This application is filed on 12.03.2019 by Xylem Water Solutions India Pvt Ltd (hereinafter referred as 'applicant') against the RP of the Corporate Debtor seeking a direction for the RP "to discharge the Bank guarantee bearing No.5802687607 (84176), Bank guarantee bearing No.5800687607 (84174) issued and Bank Guarantee baring No.5801687607 (84175) dated 18.10.2013 issued by respondent no.5, Citi Bank Ltd., in favour of respondent no.3 Kotak Mahindra Bank Ltd. At the behest of the applicant for a sum of Rs.2 crores and return the Original Counter Bank Guarantee(s) in terms thereof as extended from time to time."

Further, the decision of the NCLT, Mumbai Bench in the case of KOHINOOR CRANE SERVICES Vs. PETRON ENGINEERING CONSTRUCTIONS LIMITED [MA 384/ (MB) 2018 in CP 1374/ I&BC/ MB/ MAH/ 2017] also had an important bearing on this case which decided that when moratorium is also imposed alienation of any asset or recovery from any property of the Corporate Debtor is prohibited, hence action of revocation of the Bank Guarantee is against the provisions of the Code.

Further, we look at the impact of invocation of Bank Guarantees on the value maximization of the Corporate Debtor. We are of the considered view that invocation of Bank Guarantee in question will result in decreasing value of the Corporate Debtor and it dissuades participation of prospective applicants from submitting their bids and increase cost of power as there will be substantial impact on the capital cost of the project.

From the above discussion, Issue No.(ii) is answered that the impugned Bank Guarantees are NBGs and are covered by rigors of moratorium under section 14 of the Code.

ANSWER TO ISSUE No.(iii) :

We observe from the submissions made by applicant that respondent no.1 has submitted his claim to the Resolution Professional for customs duty payable by the Corporate Debtor on the imports made. Even though respondent no.1 has not submitted his point of view on this, we are of the view that this will create a special status for respondent no.1. As on one hand respondent no.1 has filed its claim with Resolution Professional for consideration and on the other hand respondent no.1 tried to invoke Bank Guarantee to recover its dues, thereby putting itself on a higher pedestal than other creditors. The objective of the Code emphasizes on revival and resolution of the Corporate Debtor in a time bound manner while aiming for optimization of value of assets keeping in view the interest of all stakeholders. By indulging in the above act, respondent no.1 has attempted to better its position and to place itself on a higher pedestal than the other creditors of the same class. Therefore, we are of the view that respondent no.1 has already filed its claim with the Resolution Professional invoking Bank Guarantees, which is not in the spirit of the I&B Code, viz. maximization of value of assess of the Corporate Debtor and protection of interest of all the stakeholders.

22. We accordingly pass the following order.

(A) Respondent no.1 is restrained from invoking Bank Guarantees until the period of 120 months from the date import is completed or until the CIRP is over, whichever is earlier.

(B) The applicant is directed to take steps to extend Bank Guarantees issued by the Corporate Debtor till the expiry of 120 months from the date of import or till expiry of CIRP, whichever is earlier.

21. This IA is accordingly disposed of.

02/09/2020 2/9/2020

VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)

RATAKONDA MURALI
MEMBER (JUDICIAL)

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THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, HYDERABAD

IA No.442 OF 2020
in
C.P (IB) No. 529/7/HDB/2018

Under section 60(5) read with section 14 of Insolvency & Bankruptcy Code, 2016.

In the matter between:

Vijay Kumar Garg
(IBBI/ IPA-002/IP-N00359/2017-2018/11060)
Resolution Professional of
M/s Lanco Vidarbha Thermal Power Ltd
Plot No.4, Software Units Layout
Hitech City, Madhapur
Hyderabad-500081, Telangana.

.. **Applicant**
(Resolution Professional)

AND

1. Office Superintendent
Range-II, Customs Division-I
Nagpur
GST Bhavan, Telangkhedi Road
Civil Lines, Nagpur-440 001.

2. UCO Bank
Represented by its Chief Manager
FCC, New Delhi, Branch-5
Parliament Street
New Delhi-110001.

3. Punjab National Bank
Represented by its Senior Manager
LCB, Plot No.83, Section-29
Gurgaon-122009 (HR).

.. **Respondents**

Date of order: 02.09.2020

Coram:
HON'BLE SHRI RATAKONDA MURALI,
MEMBER (JUDICIAL)
and

HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI,
MEMBER (TECHNICAL).

Parties / Counsels Present:

Resolution Professional	:	Shri Ravi Charan, Advocate assisted by Ms. Niharika Agarwal, Advocate.
For Customs Department	:	Shri Shantanu and Shri Kunal.

Per: HON'BLE SHRI VEERA BRAHMA RAO AREKAPUDI, MEMBER (TECHNICAL).

Heard on: 05.06.2020, 17.06.2020, 30.06.2020, 24.07.2020, 06.08.2020 and 20.08.2020.

ORDER

The present application is filed, within the period of limitation, by the Resolution Professional bearing Registration No.IBBI/ IPA-002/IP-N00359/2017-2018/11060, appointed by the Tribunal vide order dated 19.03.2020, **seeking reliefs** that letter dated 19.05.2020 (Exhibit A2) issued by respondent no.1 to respondent no.2 seeking to recover amounts from Bank Guarantees be quashed; and letter of even date (Exhibit A2) issued by respondent no.1 to respondent no.3 seeking to recover amounts from Bank Guarantees be quashed.

2. The applicant also sought interim relief seeking directions to respondent no.2 not to release/ deposit amounts from Bank Guarantees to respondent no.1 pursuant to letter-Exhibit A2 issued by respondent no.1; and further directions to respondent no.3 not to release/ deposit amounts from Bank Guarantees to respondent no.1 pursuant to letter-Exhibit A2 issued by respondent no.1.

3. BRIEF FACTS :

3.1 The petition filed by respondent no.3 under section 7 of the I&B Code against the Corporate Debtor has been admitted vide order dated 03.10.2019 (EXHIBIT A1) with appointment of the applicant as IRP for the Corporate Debtor. Subsequently appointment of said IRP has been confirmed as Resolution Professional vide order dated 19.03.2020.

3.2 The present IA is filed by the applicant/ Resolution Professional aggrieved by two letters, both dated 19.05.2020 (Annexure A-2 Collectively of this IA), seeking recovery of the following amounts from Bank Guarantees.

(i) Letter dated 19.05.2020 (EXHIBIT A2) issued by respondent no.1 to respondent no.2/ UCO Bank, seeking recovery of aggregate amount of two Bank Guarantees of **Rs.54584969/-** towards the **Bank Guarantee-1**, during the pendency of CIRP of the Corporate Debtor and imposition of moratorium under the Code; and

(ii) Letter dated 19.05.2020 (EXHIBIT A2) issued by respondent no.1 to respondent no.3/ PNB seeking recovery of aggregate amount of two Bank Guarantees of **Rs.71727845/-**towards the **Bank Guarantee-2**, during the pendency of CIRP of the Corporate Debtor and imposition of moratorium under the Code.

3.3 It is averred in paras 4 and 5 (page 5) of the application that the Corporate Debtor is a Special Purpose Vehicle (SPV) of Lanco Group incorporated for setting up a domestic coal based supercritical Thermal Power Plant having two units of 660 MW capacity each near Village Mandva, District Wardha, Maharashtra. Corporate Debtor is incorporated with Registrar of Companies on 23.02.2005. The Corporate Debtor was issued Provisional Mega Power Project Certificate by Ministry of Power vide letter dated 21.11.2011 (EXHIBIT A3 of the IA).

3.4 It is averred in para 6 (page 5) of the application that the Corporate Debtor availed exemption from payment of customs duty in terms of Notification No.12/ 2012- Customs dated 17.03.2012 read with Notification No.43/ 2012- Customs dated 27.06.2012, wherein on furnishing Mega Power Project status and security in the form of Fixed Deposit Receipt (FDR)/ Bank Guarantee, for a term of 36 months or more for an amount equal to the duty of customs payable on such imports (without exemption). And if the importer fails to furnish final Mega Power Project Status Certificate within 36 months from date of importation, said security shall be appropriated towards duty of customs payable on such imports within excluding the exemption.

3.5 It is averred in paras 7 (pages 5 and 6) of the application that the applicant has furnished various Bank Guarantees including the Bank Guarantees in question, viz. at serial nos.5 & 6 and 4 & 7 below in relation to bills of 12.09.2011 and 19.10.2011, which were renewed from time to time aggregating to Rs.16,88,68,005/- in respect of obligation towards payment of customs duty.

Sl. No.	**Bank**	**Bank Guarantee No.**	**Date of issue**	**Amount Rs.**	**Valid upto/ expired on**
1	IDBI	160041BGF00094	03.02.16	15322561	20.06.19
2	IDBI	160041BGF00091	03.05.16	3226208	20.06.19
3	IDBI	160041BGF00097	03.05.16	2400642	20.06.19
4	Punjab National Bank	46151LG000116	04.08.16	61727845	20.06.20
5	UCO Bank	19451GFN002016	08.08.16	26984293	30.06.20
6	UCO Bank	19451GFN002016	08.08.16	2760676	30.06.20
7	Punjab National Bank	46151LG007611	30.05.11	10000000	31.05.21

3.6 Copies of Bank Guarantees and bills of 12.09.2011 and 19.10.2011 are at Exhibit A4 Colly.

3.7 It is averred in paras 8 and 9 (page 6) of the application that Ministry of Power, vide O.M. dated 12.04.2017 (EXHIBIT A5) amended Mega Power Policy, 2009 for Provisional Mega Power Project and inter alia, approved time period for Provisional Mega Projects, for furnishing Final Mega Certificates to the Tax authorities be extended to 120 months instead of 60 months from the date of import. By the said OM, Corporate Debtor was granted status of Provisional Mega Power Project. Thus, the period of 120 months or 10 years is calculated from 2011. Respondent no.1 is estopped from recovering any amounts whatsoever during the said period.

3.8 It is averred in para 10 (page 7) of the application thatrespondent no.1, through Deputy Commissioner, Customs Division-1, Nagpur has submitted proof of claim dated 20.03.2020 (EXHIBIT A6), in response to the public announcement issued by the applicant in respect of the claim of custom duty payable on goods kept in private bonded warehouse of Corporate Debtor. The applicant has requested respondent no.1 to share working of claim on 15.05.2020 and said information is pending for submission.

3.9 The applicant, in para 11, relied on decision of the NCLT, Mumbai Bench in the case of EPC CONSTRUCTIONS INDIA LIMITED Vs. JAMNAGAR MUNICIPAL CORPORATION & OTHERS, rendered in MA No.1011/ 2018 in CP No.1832/ IBC/ NCLT/ MB/MAH/ 2017, wherein it is held,

> *"During the insolvency proceedings it is required to protect the interest of a Corporate Debtor. Keeping this object in mind, it is justifiable not to allow alienation or liquidation as far as possible of the assets of the Corporate Debtor, particularly if the subject matter is the invocation of the Bank Guarantee. Keeping this aspect in mind these two Applications are decided."*

3.10 It is averred in paras 12 and 13 of the application that section 3(31) of the I&B Code provides that security interest shall not include a performance guarantee. The Corporate Debtor has provided Bank Guarantees to comply with the conditions to complete the project in time and to furnish Completion Certificate. However, NCLT, Mumbai in the above decision prohibited invocation of Bank Guarantees, whether it is performance guarantee or non-performance guarantee.

3.11 It is averred in paras 14 and 15 of the application that the Bank Guarantees are furnished as security for the amount of duties saved and they can be encashed when the duty becomes payable, viz. in 2021 in the present case, if the project is not completed. The applicant undertakes to renew the Bank Guarantees subject to directions of the Tribunal. Thus, invocation of Bank Guarantees now is illegal.

3.12 It is averred in paras 20 and 21 of the application that invocation of Bank Guarantees would affect CIRP of the Corporate Debtor. The recovery sought to be made by respondent no.1, by invocation of Bank Guarantees would defeat the object of the Code and would diminish the possibility of Corporate Debtor sailing as a going concern.

4. <u>SUBMISSIONS DATED 25.06.2020 ON BEHALF OF RESPONDENT No.1</u>:

4.1 It is averred in para 2(a) of the Submissions that in pursuance of the application of Corporate Debtor, respondent no.1/ Department has issued licence dated 06.06.2012 under section 58 of the Customs Act, 1962, for the Customs Bonded Warehouse situated in Wardha District, Maharashtra.

4.2 It is averred in paras 2(b) and (c) of the Submissions that the Corporate Debtor had imported goods described in para 2(b) having Invoice value of Rs.421122906/- and duty involved of Rs.367418630/-, for up a Mega Power Project, availing the benefit of Notification No.12/ 2012- Customs dated 17.03.2012 read with Notification No.43/ 2012- Customs dated 27.06.2012.

4.3 It is averred in para 2(e) of the Submissions that the Corporate Debtor could neither complete the above project within the time specified in the said Notifications nor could indicate expected date thereof.

4.4 It is averred in para 2(f) of the Submissions that the Corporate Debtor is not exempted under the above Notifications from payment of tax on the imported goods, if the Corporate Debtor fails to complete the project within the time stipulated in the Notifications. During the said period, payment of tax on the imported goods is only deferred. The Notifications provide exemption of tax for those who complete the project in time.

4.5 It is averred in para 2(g) of the Submissions that the said Notifications provide for submission of Bank Guarantees, if the assesse desires to avail benefit of the Notifications. Accordingly respondents no.2 and 3 furnished Bank Guarantees as mentioned above. It is contended that the said Bank Guarantees are unconditional and enforceable.

4.6 It is averred in para 2(h) of the Submissions that in 2018, respondent no.3/ Punjab National Bank has filed a petition under I&B Code against the Corporate Debtor and the Tribunal has admitted the said petition vide order dated 03.10.2019 and also appointed Resolution Professional.

4.7 Respondent no.1, in para (2), on page 4, of the Submissions refuted the claim of the applicant/ Resolution Professionalthat the Bank Guarantee is not enforceable now and emphatically contended that,

> *"Bank issuing guarantee is not concerned with the underlying contract between the parties and that a Bank Guarantee is an independent and distinct contract between the Bank and the person in whose favour the same is issued."*

It is further submitted that a Bank Guarantee is ordinarily a contract quiet distinct and independent of the underlying contract, performance of which it seeks to secure. It is further submitted that duty is cast upon the Bank to verify veracity of the documents and make payment, once they are in order oblivious of the underlying contract between the parties. In support of the said submission, respondent no.1 relied on a decision (Document No.I of this submission) of the Hon'ble Supreme Court in the case of STATE OF MAHARASHTRA & ANOTHER Vs. NATIONAL CONSTRUCTION COMPANY, BOMBAY & ANOTHER, (1996) 1 SCC 735 (paras 13 and 14).

4.8 It is averred in para (2)(ii), on page 5, of the Submission that section 14 of the I&B Code, 2016 has been amended to ensure that guarantor does not escape from an independent and co-extensive liability to pay the amount of the Bank Guarantee. In support of the above submission respondent no.1 relies on a decision (Document No.II of this Submission) of the NCLT, New Delhi, Principal Bench in the case of M/S LEVCON VALVES (P) LTD Vs. ENERGO ENGINEERING PROJECTS LTD., rendered in CA No.453 (PB)/ 2017 in CP No. (IB)- 160 (ND)/ 2017.

5. <u>WRITTEN NOTE OF ARGUMENT DATED 28.06.2020 FILED BY RESPONDENT NO.1.</u>

5.1 It is averred in paras 3(a) and (b) of the Written Argument that having obtained licence dated 06.06.2012 issued by the concerned Assistant Commissioner, Customs & Central Excise, Division-II, Nagpur under section 58 of the Customs Act, 1962, the Corporate Debtor had imported goods as detailed in para 3(b) of this Written Argument availing the benefit of Notifications dated 17.03.2012 and 27.06.2012.

5.2 It is averred in paras 3(e) and (f) of the Written Argument that there is no indication as to when the project undertaken by the Corporate Debtor will be completed, far apart within the time specified in the said Notification. It is needless to mention that benefit of exemption from payment of tax is available only to those, who complete the project in time.

5.3 It is averred in para 3(g) of the Written Argument that the Notifications impugned provide for submission of Bank Guarantee by the assessee, if the assessee intends to avail benefit of the said Notifications. Accordingly, respondents no.2 and 3- Banks issued Bank Guarantees for the Corporate Debtor. The said Bank Guarantees are unconditional and are payable to respondent no.1, on demand by respondents no.2 and 3.

5.4 It is averred in para 3(h) of the Written Argument that so far as Corporate Debtor is concerned, one of its creditor, viz. Punjab National Bank has filed proceedings before this Tribunal in 2018 against the Corporate Debtor under I&B Code, 2016. The Tribunal has admitted the same vide order dated 03.10.2019 and appointed Resolution Professional.

5.5 It is averred in para (2), page 4 of the Written Argument that the application filed by the Resolution Professional is not maintainable on the grounds that :

(i) Bank Guarantee is a contract, quiet distinct and independent of the underlying contract, performance of which it seeks to secure. To that extent, it can give rise to a cause of action separate from that of the underlying contract. Bank issuing Bank Guarantee is not concerned with the underlying contract between the parties to the contract. Duty of the Bank, under a performance guarantee, is created by the document itself. Once the documents are in order, the Bank giving guarantee must honour the same and make payment. In this regard respondent no.1 relies on decision of the Hon'ble Supreme Court in the case of STATE OF MAHARASHTRA & ANOTHER Vs. NATIONAL CONSTRUCTION COMPANY, BOMBAY & ANOTHER, (1996) 1 SCC 735 (paras 13 & 14) [copy at DOCUMENT No.1].

(ii) The Bank Guarantees issued by respondents no.2 and 3/ Banks in favour of respondent no.1 are 'unconditional guarantees', which are required to be honoured by the said Banks without influenced by any objection from the Corporate Debtor.

(iii) In view of the above settled law, the applicant/ Resolution Professional is not entitled to any relief of restraining respondent no.1 from encashing/ invoking Bank Guarantees. Nor it is open for the respondent/ Banks to avoid payment of the amount of the said Bank Guarantees to respondent no.1.

5.6 It is averred in para (ii), page 5 of the Written Argument that bar under section 14 of the I&B Code is not applicable in case of Bank Guarantee. On the contrary section 14 of the I&B Code is amended with a view to see that Guarantors do not escape from an independent and coextensive liability to pay the amount of the said Bank Guarantee. In this regard respondent no.1 relies on decision of the NCLT, Principal Bench, New Delhi in M/S LEVCON VALVES (P) LTD Vs. ENERGO ENGINEERING PROJECTS LTD., rendered in CA No.453 (PB)/ 2017 in CP No. (IB)- 160 (ND)/ 2017 (DOCUMENET-II of the Submission dated 25.06.2020).

6. WRITTEN NOTE OF ARGUMENT DATED 09.07.2020 FILED BY THE APPLICANT.

6.1 The applicant/ Resolution Professional, in para 2 of the Written Argument, has reiterated the averments made in para 4 of the IA that the Corporate Debtor, a Special Purpose Vehicle (SPV) of Lanco Group has been granted Provisional Mega Power Project Certificate dated 21.11.2011.

6.2 The applicant/ Resolution Professional has averred in para 3 of the Written Argument that the Corporate Debtor has applied for Customs Private Bonded Warehouse in the jurisdiction of Nagpur Zone of the Customs Department and was awarded licence on 06.06.2012 under section 58 of the Customs Act, 1952, for Customs Bonded Warehouse at 11th Milestone, Belgaon-Mandwa Road, PO-Mandwa, District Wardha, Maharashtra.

6.3 It is averred in paras 4 and 6 of the Written Argument that the Corporate Debtor availed exemption from payment of customs duty in terms of Notification dated 17.03.2012 read with Notification dated 27.06.2012 (ANNEXURE A-1 COLLY.of the Written Argument dated 09.07.2020) by virtue of Mega Power Project Status and security in the form of Fixed Deposit Receipt/ Bank Guarantee for a term of 36 months or more for an amount equivalent to customs duty payable on such imports (without exemption). The aforesaid Notifications provide that in case of failure of the importer to furnish Mega Power Project Status Certificate within 36 months from the date of import, shall result in appropriation of said security towards customs duty payable on such imports. Said time limit has been extended to 60 months as said Notification dated 17.03.2012 has been amended vide Notification dated 17.02.2014 (ANNEXURE A-2 of the Written Argument dated 09.07.2020).

6.4 It is averred in paras 7 and 8 of the Written Argument that vide Office Memorandum (OM) dated 12.04.2017 (ANNEXURE A-5 of the IA, at page 62) Mega Power Policy, 2009 has been amended and it is, *inter alia*, approved that the time period for Provisional Mega Projects, for furnishing, for furnishing final Mega Certificates to the Tax authorities has been extended to 120 months instead of 60 months from the date of import subject to importers keeping FDR/ Bank Guarantee (in lieu of the duty exemption claimed) alive. In the present case the Corporate Debtor has complied with the said condition. Name of the Corporate Debtor is found place at serial no.20 of the list of the projects, Annexure-I to the said OM dated 12.04.2017, by which status of Provisional Mega Power Project was granted to the Corporate Debtor. As per the said amendment, for the period of 10 years (120 months) as calculated from the year 2011, respondent no.1 is estopped from recovering any amounts whatsoever.

6.5 It is averred in paras 9 and 10 of the Written Argument that pursuant to order dated 03.10.2019 (EXHIBIT A1), CIRP has commenced and the applicant has issued a public announcement on 05.10.2019 inviting submissions of claims by creditors of the Corporate Debtor for payments due as on insolvency commencement date, viz. 03.10.2019. In response thereto, respondent no.1 submitted proof of claim on 20.03.2020 and submitted claim of custom duty payable on the goods kept in the private bonded warehouse of the Corporate Debtor and the applicant requested respondent no.1 to share the working of claims on 15.05.2020. Such process of claim verification is pending.

6.6 It is averred in para 11 of the Written Argument that when the claim of respondent no.1 was being examined, respondent no.1 issued the letters impugned seeking invocation of Bank Guarantees in question issued by respondent no.3. Respondent no.1, by way of its Submissions [para (2), on page 4] broadly raised two objections, namely:

(i) Protection of moratorium in terms of section 14(1) of the Code is not applicable in view of Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, which came into effect on 06.06.2018, by which section 14(3)(b) in inserted, which reads as under:

> "14(3)(b) *"a surety in a contract of guarantee to a corporate debtor."*

(ii) Bank issuing guarantee is not concerned with the underlying contract between the parties and that a Bank Guarantee is an independent and distinct contract between the bank and the person in whose favour the same is issued.

6.7 GROUNDS ADVANCED BY THE APPLICANT ON WHICH THE OBJECTIONS RAISED BY RESPONDENT NO.1 ARE NOT SUSTAINABLE:

(i) Section 14(3)(b) of the Code does not apply to non-performance of Bank Guarantees.

(ii) The contention of respondent no.1 that Section 14(3) of the Code as amended by Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, prohibits applicability of moratorium set out in section 14(1) of the Code, in case of a surety in a contract of guarantee to a corporate debtor, is not sustainable. The Bank Guarantees issued by the Corporate Debtor are **not** in the nature of Performance Bank Guarantee (**PBG**), but they are in the nature of **NBG** and come within the ambit of 'security interest' under section 3(31) of the Code, which exclude PBG from its definition. Section 3(31) reads as under:

> "3(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or

performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:

Provided that security interest shall not include a performance guarantee;"

The applicant has also relied on section 14(1) of the Code and contended that a conjoint reading of section 14(1) and section 3(31) of the Code leads to the conclusion that a PBG has been excluded from the ambit of moratorium under the Code. In this context, the applicant relies on a decision of the NCLT, Ahmedabad in the case of NITIN HASMUKHLAL PARIKH Vs. MADHYA GUJARAT VIJ COMPANY LIMITED & OTHERS, rendered in IA No.340 of 2017 in CP (IB) No.28/10/ NCLT/AHM/ 2017 (ANNEXURE A-3 of this Submission), wherein encashment of a PBG during moratorium was permitted by referring to definition under section 3(31) of the Code. By the said decision the applicant seeks to distinguish a Performance Guarantee from other forms of Bank Guarantees, by holding that NBGs fall within the meaning of 'security interest'. Any action to recover under section 14(1) of the Code deserves immunity.

(iii) In view of the above the purpose of issuance of Bank Guarantees in question was to provide a security to respondent no.1 and it is not in the nature of a PBG. Thus, the Bank Guarantees in question are security interest and are no enforceable. [para 18]

(iv) The applicant relied on decision of the Hon'ble NCLAT in the matter of GAIL (INDIA) LIMITED Vs. RAJEEV MANAADIR & OTHERS, rendered in Company Appeal (AT) (Insolvency) No.319 of 2018, (**ANNEXURE A-4 COLLY**of the Written Note of

Argument dated 09.07.2020 of the applicant), wherein it is held that PBGs are not covered under moratorium under section 14 of the Code. However, NBGs are covered within the meaning of 'security interest' and thus, enjoy immunity from any action under section 14(1) of the Code. [para 19]

(v) The applicant relied on decision of the NCLT, Mumbai Bench in the case of IDBI BANK LTD Vs. EPC CONTRUCTIONS INDIA LIMITED [MA No.661/2018 & MA No.1011/ 2018 in CP No.1832/ IBC/ NCLT/ MB/ MAH/ 2017] (**ANNEXURE A-4 COLLY**of the Written Note of Argument filed on behalf of the applicant), wherein it is observed that,

> " .. the provisions of the I&B Code are clear that the invocation of Performance Bank Guarantee cannot be stayed since as per the proviso (supra) the Moratorium does not apply on 'performance bank guarantees'. But fact of each case ought to have bearing for applying the provisions of a Statute."
>
> "During the insolvency proceedings it is required to protect the interest of a Corporate Debtor. Keeping this object in mind, it is justifiable not to allow alienation or liquidation as far as possible of the assets of the Corporate Debtor, particularly if the subject matter is the invocation of Bank Guarantee." [para 20]

(vi) The applicant further relied on decision of the NCLT, Mumbai Bench in the case of KOHINOOR CRANE SERVICES Vs. PETRON ENGINEERING CONSTRUCTIONS LIMITED [MA 384/ (MB) 2018 in CP 1374/ I&BC/ MB/ MAH/ 2017] (**ANNEXURE A-4 COLLY**), wherein it is held that action of invocation of Bank Guarantee is against the provisions of the Code. [para 21]

(vii) The applicant contended that the decision relied on by respondent no.1, in para (2)(ii), on page 5, of the Submission, in the case of M/S LEVCON VALVES (P) LTD Vs. ENERGO ENGINEERING PROJECTS LTD., rendered by NCLT, Principal Bench, in CA No.453 (PB)/ 2017 in CP No. (IB)- 160 (ND)/ 2017, **would not be applicable to the facts of the present case** as it was concerned with a PBG.

The question before the NCLT, Principal Bench was whether moratorium period could be extended to performance guarantees furnished by banks, thereby restraining them from encashing said Bank Guarantees. The NCLT, Principal Bench took note of the judgment rendered by the Hon'ble Supreme Court in the case of STATE BANK OF INIDA Vs. RAMAKRISHNAN & OTHERS, Civil Appeal No.3595 of 2018 with Civil Appeal No.4553 of 2018, wherein the Hon'ble Apex Court held that section14(1) of the Code would not apply to a 'personal guarantor'. The NCLT, Principal Bench, based on the law laid down by the Hon'ble Apex Court held that PBG furnished by SBI and Bank of Maharashtra would not enjoy benefit of moratorium under section 14 of the Code.

6.8 INVOCATION OF BANK GUARANTEE AFTER FILING CLAIM

(i) Action of respondent no.1 seeking to invoke Bank Guarantees issued by Corporate Debtor, if allowed, respondent no.1 will not only be in possession of the invoked amounts but will also be entitled to his dues in terms of the claims submitted to the Resolution Professional. Such an action by respondent no.1 would jeopardize the CIRP of the Corporate Debtor. [para 25]

(ii) Action of respondent no.1 seeking to invoke Bank Guarantees issued by Corporate Debtor, if allowed, it would diminish the value of assets of the Corporate Debtor and would decrease chance of Corporate Debtor getting a viable resolution plan. [para 26]

6.9 EFFECT OF INVOCATION OF BANK GUARANTEE

(i) The Corporate Debtor has been issued Provisional Mega Power Project Certificate by Ministry of Power (pages 29-30) dated 21.11.2011, which is a licence. It enables the qualified project to avail benefit/ concession by giving exemption from paying customs duty and excise duty on imports of machinery, etc. to be used in the project, by submitting equivalent amount of FDR/ Bank Guarantee. The security shall be released on furnishing Final Mega Power Certificate. Such exemption is given (a) to accelerate construction of power projects and bridging widening energy deficit, and (b) to help power plants in reduction of capital cost, which results into reduction in tariff per unit. [paras 30-31]

(ii) Invocation Bank Guarantee would result in withdrawal of concession/ benefit granted to the Corporate Debtor in terms of Provisional Certificate and the Corporate Debtor will be bound to pay respondent no.1, the amount of Bank Guarantee, which amount will be added to project cost. Ultimately, it defeats the intent of the Provisional Certificate. In this regard the applicant relied on decision of the Hon'ble Supreme Court in the case of UP STATE SUGAR COPORATION Vs. SUMAC INTERNATIONAL LIMITED, (1997) 1 SCC 568 (ANNEXURE A-5 of the Written Note of Argument dated 09.07.2020 of the applicant). The applicant further relied on the decision of the Hon'ble Supreme Court in the case of GANGOTRI ENTERPRISES LIMIED Vs. UNION OF INDIA, (2016) 11 SCC 720 (ANNEXURE A-6 of the Written Note of Argument dated 09.07.2020 of the applicant), wherein it is held with regard to invocation of Bank Guarantee that though there are settled principles of law, however, every case has to be decided with reference to the facts of case involved therein. [para 32-35]

(iii) The applicant would contend that liability of respondent no.1 has not become due and payable in terms of the Office Memorandum. Thus, invocation of Bank Guarantee is invalid. The Corporate Debtor cannot be said to have defaulted in payment of taxes under the Provisional Certificate as alleged by respondent no.1 in its letter dated 19.05.2020 (Exhibit A2) addressed to respondent no.2. It is contended that a conjoint reading of Provisional Certificate and OM makes it clear that the alleged liability is not due and payable and thus, invocation of Bank Guarantee is not valid. [para 36]

(iv) The applicant would further contend that respondent no.1 has already filed its claim with the applicant. Respondent no.1 cannot enjoy dual benefit of filing claim and invoking Bank Guarantee. Respondent no.1 has to avail the only remedy under the I&B Code, which has primacy. Having filed its claim respondent no.1 has submitted to CIRP process and has acknowledged its applicability over its claim. [para 37]

6.10 EXPLANATION TO SECTION 14(a)(1) OF THE CODE

The applicant relied on amended section 14 of theInsolvency and Bankruptcy Code (Amendment) Act, 2020, whereby the following explanation has been inserted effective from 28.12.2019:

> "Explanation.—
>
> For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota,

> concession, clearances or a similar grant or right during the moratorium period;"

6.11 The Provisional Certificate issued by the Custom authorities being licence pursuant to which the Corporate Debtor is entitled to avail benefit of exemption of customs duty and excise duty after submission of Bank Guarantee. The 'Explanation' to the above amended section 14(a)(1) of the Code provides that licence/ Provisional Certificate 'shall not be suspended or terminated on the grounds of insolvency'. Since the Corporate Debtor is not in default of its liabilities towards respondent no.1, invocation of Bank Guarantee is not sustainable. [paras 38-39]

FINDINGS

7. We have heard the learned counsels for both the sides through videoconference and have also gone through the record and Written Note of Arguments submitted by both the sides. The application was filed by the Resolution Professional of the Corporate Debtor aggrieved by the following communications, annexed as EXHIBIT A2, at pages 27 and 28 of the application.

(i) Letter dated 19.05.2020 (EXHIBIT A2) issued by respondent no.1 to respondent no.2/ UCO Bank, seeking recovery of aggregate amount of two Bank Guarantees of **Rs.54584969/-** towards the **Bank Guarantee-1**, during the pendency of CIRP of the Corporate Debtor and imposition of moratorium under the Code; and

(ii) Letter dated 19.05.2020 (EXHIBIT A2) issued by respondent no.1 to respondent no.3/ PNB seeking recovery of aggregate amount of two Bank Guarantees of **Rs.71727845/-** towards the **Bank Guarantee-2**, during the pendency of CIRP of the Corporate Debtor and imposition of moratorium under the Code.

The above Bank Guarantees were issued by the Corporate Debtor in favour of respondent no.1 for the amount equivalent to customs duty payable on the goods kept in the Customs Private Bonded Warehouse in the jurisdiction of Nagpur Zone of the Customs Department.

8. This Tribunal vide its order dated 03.10.2019 (EXHIBIT A1) initiated CIRP and moratorium was also declared against the Corporate Debtor. The Corporate Debtor availed exemption from payment of customs duty in terms of Notification No.12/ 2012- Customs dated 17.03.2012 read with Notification No.43/ 2012- Customs dated 27.06.2012, by furnishing Mega Power Project status and security in the form of Fixed Deposit Receipt (FDR)/ Bank Guarantee, for a term of 36 months or more. In terms of the said Notifications, failure of the importer to furnish the final mega power status certificate within a period of 36 months from the date of importation shall result in the said security appropriated towards duty of customs payable on such imports but for this exemption.

9. The applicant contended that the Ministry of Power, Government of India vide Office Memorandum F. No.A3/2015-IPC dated 12.04.2017 (EXHIBIT A5), has amended the Mega Power Policy, 2019 for Provisional Mega Power Projects by which time period for Provisional Mega Projects for furnishing the Final Mega Certificates to the Tax authorities is extended to 120 months instead of 60 months from the date of import. The period of 10 years as mentioned in the above notification shall be calculated from the year 2011 with regard to the Corporate Debtor. Therefore, the applicant has prayed to restrain respondent no.1 from recovering the amounts whatsoever by invoking the said Bank Guarantees and also from recovering any amounts whatsoever with regard to the said project.

10. The applicant has further submitted that this Tribunal vide order dated 03.10.2019 initiated CIRP against the Corporate Debtor in terms of the I&B Code and vide order dated 19.03.2020 confirmed appointment of the applicant as its RP. The applicant issued public announcement dated 05.10.2019, inviting claims of the creditors of the Corporate Debtor and other service providers for payments due as on insolvency commencement date, viz. 03.10.2019. He further submitted that proof of claim has been submitted by respondent no.1 on 20.03.2020 in response to the above public announcement issued by the applicant. The applicant requested respondent no.1 to share working of claim on 15.05.2020, which has been submitted by respondent no.1 and verification process is being done by the applicant. In the present circumstances, respondent no.1 has invoked the said Bank Guarantees. Respondent no.1 has invoked Bank Guarantees claiming that protection of moratorium in terms of section 14(1) of the Code is not applicable by virtue of Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, which came into effect on 06.06.2018, by which section 14(3)(b) is inserted, which reads as under:

> "14(3)(b) *"a surety in a contract of guarantee to a corporate debtor."*

and the Bank issuing guarantee is not concerned with the underlying contract between the parties and that a Bank Guarantee is an independent and distinct contract between the Bank and the person in whose favour the same is issued.

11. The applicant vehemently opposed these contentions made by respondent no.1 and submitted that section 14(3)(b) of the I&B Code is not applicable to NBGs. He also submitted that the said Bank Guarantees furnished by the Corporate Debtor are, by no stretch of imagination, can be called PBGs as these were issued in order to avail exemption from payment of customs duty with a view to complete the project within the prescribed time period. Nature of these Bank

Guarantees does not arise from a contractual arrangement but was issued as a security to respondent no.1, who would not insist on payment of customs duty upfront and release the goods imported by the Corporate Debtor based on the Bank Guarantee. However, respondent no.1 heavily relied on section 14(3) of the I&B Code, which prohibits applicability of moratorium set out in section 14(1) of the I&B Code, in cases of "a surety in a contract of guarantee to a corporate debtor" to defend its stand that it can invoke the Bank Guarantee in question during the period of moratorium. On the contrary, the applicant contended that the Bank Guarantees issued by the Corporate Debtor are not in the nature of PBG, in fact they are in the nature of NBG. Hence the case falls within the ambit of 'security interest'. Section 3(31) of the Code specifically excludes PBG from its definition. Said section reads as under:

> *"3(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:*
>
> *Provided that security interest shall not include a performance guarantee;"*

Further section 14(1) of the I&B Code states 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 judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
>
> *(b) transferring, encumbering, alienating or disposing of 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."

12. The applicant further averred that a conjoint reading of section 14(1) and section 3(31) of the Code leads to the conclusion that a PBG has been excluded from the ambit of moratorium under the Code as is held in decision of the NCLT, Ahmedabad in the case of NITIN HASMUKHLAL PARIKH Vs. MADHYA GUJARAT VIJ COMPANY LIMITED & OTHERS, rendered in IA No.340 of 2017 in CP (IB) No.28/10/ NCLT/AHM/ 2017 (ANNEXURE A-3 of this Submission), where encashment of a PBG during moratorium was permitted, by referring to the definition of 'security interest' as defined under section 3(31) of the IBC.

13. It is further the case of the applicant that as is apparent from the order of the NCLT, Ahmedabad Bench, which has laid down that NBGs are covered within the meaning of 'security interest' and thus deserve immunity from any action to recover in terms of section 14(1) of the Code. The applicant has also quoted decision of the NCLT, Mumbai Bench in the case of IDBI BANK LTD Vs. EPC CONTRUCTIONS INDIA LIMITED [MA No.661/2018 & MA No.1011/ 2018 in CP No.1832/ IBC/ NCLT/ MB/ MAH/ 2017] (**ANNEXURE A-4 COLLY**of the Written Note dated 09.07.2020), which clearly stated that,

"During the insolvency proceedings it is required to protect the interest of a Corporate Debtor. Keeping this object in mind, it is justifiable not to allow alienation or liquidation as far as possible of the assets of the Corporate Debtor, particularly if the subject matter is the invocation of the Bank Guarantee."

14. The applicant has also quoted decision of the NCLT, Mumbai Bench in the case of KOHINOOR CRANE SERVICES Vs. PETRON ENGINEERING CONSTRUCTIONS LIMITED [MA 384/ (MB) 2018 in CP

1374/ I&BC/ MB/ MAH/ 2017] (**ANNEXURE A-4 COLLY**), which has clearly laid down that alienation of any asset or recovery from any property of the Corporate Debtor is prohibited when moratorium is in place and hence the action of invocation of Bank Guarantee is against the provisions of the Code.

15. The applicant has also contended that invocation of Bank Guarantee after filing of claim for the dues is an ill-conceived attempt to better its position and to place itself on a higher pedestal than the other creditors. The applicant contended that the object of the Code emphasizes on revival and resolution of the Corporate Debtor in a time bound manner while aiming for optimization of value of assets keeping in view the interest of all stakeholders. The applicant contended that by invoking Bank Guarantees after filing its claim with the RP, respondent no.1 is attempting to better its position as against other creditors of the same class. Such an action of respondent no.1 is at the cost of diminishing the value of the Corporate Debtor and jeopardize the CIRP of the Corporate Debtor. It also leads to destruction of value of the assets of the Corporate Debtor and any act of recovery of monies under the Bank Guarantee would cause irreparable damage, besides causing hardship to the entire resolution process of the Corporate Debtor and further decreases the chances of the Corporate Debtor getting a viable resolution plan.

16. The applicant further contended that the action of respondent no.1 in invoking Bank Guarantees is an act of suspending/ withdrawing the benefit it granted to the Corporate Debtor, which is valid upto 2021 and the action to claim of custom duty is unjust and unfair and is violative of section 14(1) of the I&B Code.

17. In response to the above contention of the applicant, respondent no.1 has contended that the Corporate Debtor has applied for the customs private bonded warehouse in the jurisdiction of Nagpur Zone of the Customs Department to store the imported machinery for setting up

mega power project on the terms and conditions mentioned in the Notifications issued by Government of India. In the instant case, the project undertaken by the Corporate Debtor has not been completed, nor there are any indications of completions of the same in the near future, far apart within the time specified in the said Notifications. Respondent no.1 further contended that the aforesaid notifications mentioned by the applicant do not exempt payment of tax on the import of the goods made by the Corporate Debtor. It clearly says that if the Corporate Debtor fails to complete the project, within the time stipulated in the said Notifications and during the said period, the payment of tax on the said goods is only deferred. Needless to mention here the exemption of payment of tax is available only to the person, who completes the project within the specified period only. As per the said notifications Bank Guarantees are to be submitted by the assessee, in case the said assessee desires to avail the benefit of the said Notifications. The impugned Bank Guarantees of the Corporate Debtor are only given for that purpose. Respondent no.1 further points out that the said Bank Guarantees are unconditional and are payable to the Department by the issuing Banks, viz. respondents no.2 and 3. In light of the above circumstances, respondent no.1 came to the conclusion that there was absolutely no possibility of the Corporate Debtor completing the said project and therefore, the impugned communications issued to respondents no.2 and 3 as provided in the said Bank Guarantees. Respondent no.1 contended that the stand taken by the applicant/ Resolution Professional in the application is incorrect and contrary to the provisions of law which will be apparent from the following:

> *"Bank issuing guarantee is not concerned with the underlying contract between the parties and that a Bank Guarantee is an independent and distinct contract between the Bank and the person in whose favour the same is issued."*

18. Respondent no.1, therefore, contended that the Bank issuing guarantee is not concerned for the underlying contract between the

parties to the contract. Duty of the Bank, under the PBG, is created by the document itself. Once the documents are in order, the bank giving guarantee must honour the same and make payment. In support of the above submission, respondent no.1 has cited case law decided by the Hon'ble Supreme Court in the matter of STATE OF MAHARASHTRA & ANOTHER Vs. NATIONAL CONSTRUCTION COMPANY, BOMBAY & ANOTHER, (1996) 1 SCC 735.

19. Respondent no.1 also contended that section 14 of the I&B Code is not applicable and not attracted in case of Bank Guarantee. It is submitted that the amendment is made to section 14 of the IBC with an object of not allowing the guarantors from escaping from an independent and coextensive liability to pay the amount of the said Bank Guarantee. In support of this contention respondent no.1 quoted the case law decided by the NCLT, New Delhi, Principal Bench in the case of M/S LEVCON VALVES (P) LTD Vs. ENERGO ENGINEERING PROJECTS LTD., rendered in CA No.453 (PB)/ 2017 in CP No. (IB)- 160 (ND)/ 2017. In the light of the above submissions, learned counsel for respondent no.1 contended that there is no merit in the application filed by the Resolution Professionaland the same only needs to be dismissed by the Tribunal. From the above discussion, the following emerging points are to be answered:

(i) Whether respondent no.1 is in order in invoking Bank Guarantees when O.M. dated 12.04.2017 (EXHIBIT A5), provides time period for Provisional Mega Projects, for furnishing Final Mega Certificates to the Tax authorities to 120 months, viz. by which validity is available upto 2021, for the applicant to avail benefit of exemption from payment of customs duty?

(ii) Whether the impugned Bank Guarantees can be termed as PBGs and are exempted from the moratorium under section 14(a)(1) of the IBC as amended by Insolvency and Bankruptcy Code (Amendment) Act, 2020?

(iii) Whether it is in order for respondent no.1 to invoke Bank Guarantees when, respondent no.1 has filed its claim with the Resolution Professionalfor the amount due from the Corporate Debtor for which these Bank Guarantees are issued?

ANSWER TO ISSUE No.(i) :

From the submissions made by the both the learned counsel it is clear that the impugned Bank Guarantees are furnished by the Corporate Debtor to avail benefit of the customs duty for setting up a domestic coal based supercritical Thermal Power Plant having two units of 660 MW capacity each near Village Mandva, District Wardha, Maharashtra. Both the counsels also agreed that the Corporate Debtor has applied for custom duty exemption in terms of Notification No.12/ 2012- Customs dated 17.03.2012 read with Notification No.43/ 2012- Customs dated 27.06.2012, by furnishing Mega Power Project status and security in the form of Fixed Deposit Receipt (FDR)/ Bank Guarantee, for a term of 36 months or more for an amount equal to the duty of customs payable on such imports. In terms of the aforesaid notifications, failure of the importer to furnish Final Mega Power Project Status Certificate within 36 months from the date of import, shall result in appropriation of said security towards customs duty payable on such imports. Copies of the said Notifications are annexed as ANNEUXRE A-1 to the application. Government of India has amended Notification No.12/ 2012- Customs dated 17.03.2012 vide Notification No.05/ 2014-Customs dated 17.02.2014, wherein the time period for furnishing Provisional Mega Power Project Certificate was extended to 60 from 36 months. A copy of the said notification is at ANNEXURE A-2 of the Written Argument. Thereafter, Ministry of Power, vide O.M. No.A-3/ 2015-IPC dated 12.04.2017, annexed as ANNEXURE A-5 of the application, amended Mega Power Policy, 2009 for Provisional Mega Power Project and inter alia, approved time period for Provisional Mega Projects, for furnishing Final Mega Certificates to the Tax authorities be extended to 120 months instead of 60 months from the date of import. Further, as per serial no.20 of Annexure-1 of the above referred OM, status of the

Provisional Mega Power Project, which was granted to the Corporate Debtor, was extended for 10 years from 2011.

We agree with the contention of the applicant as regards issue no.1 as the Corporate Debtor was given time to submit Final Mega Power Project Certificate within the period of 120 months and in the instant case the Corporate Debtor has imported machinery in the year 2011 and it enjoys benefit of exemption from payment of customs duty for 120 months till 2021. We therefore, have no hesitation in accepting the contention of the applicant that respondent no.1 is estopped from recovering any amounts whatsoever upto the said period of 120 months from the date of import. Accordingly, Issue No.1 is answered in affirmative. Respondent no.1 cannot invoke Bank Guarantee before expiry of 120 months from the date of import.

ANSWER TO ISSUE No.(ii) :

We have gone through section 14(1)(a), (b), (c) and (d) of the Code. Section 14 of the Code, which deals with moratorium is amended. Section 14(3) of the Code is amended by insertion of clause (b). It exempts a surety in a contract of guarantee to a corporate debtor from the intensity of moratorium. Further section 14(1)(c) prohibits 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). Therefore, the question before us is whether the impugned Bank Guarantee can be considered as PBGs which were exempted as per section 3(31) of the Code, which defines what is security. However, the proviso to section 3(31) of the Code exempts PBGs from the definition of security interest. Therefore, any Bank Guarantees issued as a PBG is not covered by the rigors of section 14(1)(c) of the Code. The important question to decide is whether the impugned Bank Guarantees issued by Corporate Debtor are PBGs or NBGs. When we go into the purpose for which the impugned Bank Guarantees are issued, we understand that these were issued for availing the benefits of exemption from payment of customs duty. Even though the underlying action is to furnish final Mega Power Project Status Certificate in time, then only this exemption is available to the Corporate Debtor. The basic object of this Bank Guaranteeis to avail exemption only, not for completion of the project. Therefore, these Bank Guarantees cannot be termed as PBG. These can be termed as NBGs only. As such these guarantees are covered under security interest under section 14(1)(c) of the Code, and not under section 14(3)(b) of the Code, which was amended by Insolvency and Bankruptcy Code (Second Amendment) Act, 2018. We are, therefore, of the opinion that our point of view is strengthened by the decision of the NCLT, Mumbai Bench in the case of IDBI BANK LTD Vs. EPC CONTRUCTIONS INDIA LIMITED [MA No.661/2018 & MA No.1011/ 2018 in CP No.1832/ IBC/ NCLT/ MB/ MAH/ 2017], the relevant part of which is as under:

> *"20. This application is filed on 12.03.2019 by Xylem Water Solutions India Pvt Ltd (hereinafter referred as 'applicant') against the RP of the Corporate Debtor seeking a direction for the RP "to discharge the Bank guarantee bearing No.5802687607 (84176), Bank guarantee bearing No.5800687607 (84174) issued and Bank Guarantee baring No.5801687607 (84175) dated 18.10.2013 issued by respondent no.5, Citi Bank Ltd., in favour of respondent no.3 Kotak Mahindra Bank Ltd. At the behest of the applicant for a sum of Rs.2 crores and return the Original Counter Bank Guarantee(s) in terms thereof as extended from time to time."*

Further, the decision of the NCLT, Mumbai Bench in the case of KOHINOOR CRANE SERVICES Vs. PETRON ENGINEERING CONSTRUCTIONS LIMITED [MA 384/ (MB) 2018 in CP 1374/ I&BC/ MB/ MAH/ 2017] also had an important bearing on this case which decided that when moratorium is also imposed alienation of any asset or recovery from any property of the Corporate Debtor is prohibited, hence action of revocation of the Bank Guarantee is against the provisions of the Code.

Further, we look at the impact of invocation of Bank Guarantees on the value maximization of the Corporate Debtor. We are of the considered view that invocation of Bank Guarantee in question will result in decreasing value of the Corporate Debtor and it dissuades participation of prospective applicants from submitting their bids and increase cost of power as there will be substantial impact on the capital cost of the project.

From the above discussion, Issue No.(ii) is answered that the impugned Bank Guarantees are NBGs and are covered by rigor of moratorium under section 14 of the Code.

ANSWER TO ISSUE No.(iii) :

We observe from the submissions made by applicant that respondent no.1 has submitted his claim to the Resolution Professional for customs duty payable by the Corporate Debtor on the imports made. Even though respondent no.1 has not submitted his point of view on this, we are of the view that this will create a special status for respondent no.1. As on one hand respondent no.1 has filed its claim withResolution Professional for consideration and on the other hand respondent no.1 tried to invoke Bank Guarantee to recover its dues, thereby putting itself on a higher pedestal than other creditors. The objective of the Code emphasizes on revival and resolution of the Corporate Debtor in a time bound manner while aiming for optimization of value of assets keeping in view the interest of all stakeholders. By indulging in the above act, respondent no.1 has attempted to better its position and to place itself on a higher pedestal than the other creditors of the same class. Therefore, we are of the view that respondent no.1 has already filed its claim with the RP, invoking Bank Guarantees, which is not in the spirit of the IBC, viz. maximizationof value of assess of the Corporate Debtor and protection of interest of all the stakeholders.

20. We accordingly pass the following order.

(A) Respondent no.1 is restrained from invoking Bank Guarantees until the period of 120 months from the date import is completed or until the CIRP is over, whichever is earlier.

(B) The applicant is directed to take steps to extend Bank Guarantees issued by the Corporate Debtor till the expiry of 120 months from the date of import or till expiry of CIRP, whichever is earlier.

21. This IA is accordingly disposed of.

02/09/2020 2/9/2020

VEERA BRAHMA RAO AREKAPUDI
MEMBER (TECHNICAL)

RATAKONDA MURALI
MEMBER (JUDICIAL)

Karim