IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
PRINCIPAL BENCH

(IB)-1705(PB)/2018

IN THE MATTER OF:

Phoenix ARC Pvt. Ltd.	....	Applicant/petitioner
Vs.		
Anush Finleash & Construction Pvt. Ltd.	....	Respondent

Order under Section 7 of Insolvency & Bankruptcy Code, 2016 in CIRP

Order delivered on 04.08.2020

CORAM:
SH. B.S.V. PRAKASH KUMAR
HON'BLE ACTG. PRESIDENT

SH. HEMANT KUMAR SARANGI
HON'BLE MEMBER (TECHNICAL)

PRESENT:

For the Petitioner:	Mr. Apoorv Sarvaria, Adv. for SBI
For the Respondent:	Mr. R.P. Vats, Adv. for DGFT
	Mr. Aashish Gupta, RP
	Mr. Iswar Mohapatra, Adv. for Kendriya Bhandar
	Mr. PS Raman, Sr. Adv. with Mr. Ashish Verma, Adv.
	Mr. Devasish Garg, Adv.

ORDER

IA-2057(PB)/2020:-

It is an IA 2057/2020 filed by one Mr Aashish Gupta, Chairman of the Monitoring Committee (formed pursuant to approval of Resolution Plan) seeking directions against State Bank of India (R1&R2 - **SBI**) and Director General of Foreign Trade (**DGFT**) – R3 for release of Fixed Deposits Receipts of Anush Finlease and Construction Private Limited (AFCPL – **the**

Corporate Debtor) maintained with SBI in the Controlled Account of the Corporate Debtor.

2. The issue involved in this case is – this Corporate Debtor had obtained authorisation for 40 export promotion capital goods (EPCG Authorisation) from CLA (The Additional Directorate General of Foreign Trade), New Delhi for Duty Saved Amount of ₹3,63,75,515.74 and Export Obligation of ₹29,80,86,017.92 and USD 5593452.05 for import of capital goods.

3. As against the authorisations and licenses, at the instance of the Corporate Debtor, SBI issued 23 Bank Guarantees on 100% margin on behalf of the Corporate Debtor involving total amount of ₹1,12,72,191 which are due to mature on different dates in the years 2021 & 2022. It says that the aforesaid bank guarantees were issued in favour of Government Departments/Deputy Commissioner of Customs and the Director General of Foreign Trade, New Delhi / the Beneficiaries.

4. In addition, there are three Bank Guarantees issued in favour of Customs Department, two of which have expired on 15.02.2019 and one expired on 19.02.2019. However, the department of customs has written to

SBI for revalidating the said Bank Guarantees by laying their claim on these Bank Guarantees stating that it is not accepting that these three Bank Guarantees have expired, therefore not discharged the Bank and not returned the original Bank Guarantees to the Bank.

5. The point for adjudication now is that whether or not margin money shall be released on the premise that it is the asset of the Corporate Debtor.

6. The export obligation stands unfulfilled as on date, therefore, DGFT says that the Corporate Debtor is bound to fulfil export obligation as per the condition laid down in the condition sheet of EPCG Authorisation as per Foreign Trade Policy (FTP).

7. DGFT further states that the Corporate Debtor has not submitted fulfilment of export obligation within the prescribed period nor submitted any customs duty with applicable interest to regularize the case in terms of para 5.22 of Handbook of Procedures (HBP 2015 – 2020), therefore its right remains in force over the Bank Guarantee given by SBI on behalf of the Corporate Debtor.

8. In the given circumstances, this Chairman of Monitoring Committee has sought this relief for release of Fixed Deposits given as margin money against the bank guarantees after CIRP period is over.

9. The Applicant submits that DGFT on 20.11.2019 and 26.11.2019 wrote letters to SBI requesting renewal of bank guarantees against which FDR 64175959969 was maintained. To which, SBI responded to Customs refusing to renew the same by stating that it is discharged from all liabilities under the said bank guarantees. Subsequent thereto, this Bench on 01.04.2020 approved the Resolution Plan submitted by the Resolution Professional. Since monitoring committee was appointed, this applicant being the chairman of Monitoring Committee, on failure of SBI to release FDRs, he issued legal notice dated 15.04.2020 to SBI. Answering to the same, the Chief Manager of the Bank, on 22.04.2020, sent an email to the Applicant stating that release of FDRs is subject to the discharge of liabilities of SBI by the beneficiary of such bank guarantees, unless it is discharged, it cannot release FDRs.

10. In the back drop of these facts, the Applicant submits that these FDRs being the asset of the Corporate Debtor and the Resolution Plan being approved by NCLT, this asset shall revert to the Corporate Debtor. He further states that the Resolution Plan envisages cancellation of all pledges/ lien/any other encumbrances upon the fixed deposits, therefore, the said bank guarantees for issuance of which the fixed deposits have been provided, ceased to be legally enforceable as the very liabilities for securing which they were issued ceased to be in force.

11. The applicant states that DGFT has not made any claim with the Resolution Professional, therefore it has to be construed that DGFT has no claim against the Corporate Debtor. As there is no claim by DGFT against the Corporate Debtor, for the same being shown as written off in the Resolution Plan, the very purpose of providing FDRs is not required to be achieved, henceforth they shall be returned to the Applicant.

12. In support of this contention, he relied upon the ratio held in the case of "Committee of Creditors of ***Essar Steel India Limited Vs. Satish Kumar***

and Others in Civil Appeal No. 8766-67 of 2019 in Supreme Court, which is as follows:

Para 67:

"A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove .....".

13. He has also relied upon the following NCLT and NCLAT judgements:

"1) Pankaj Khaitan, RP Vs. Allahabad Bank, Lajpat Nagar, Branch passed on 22.02.2019 in CA No.169/C-IV/ND/2018 in CP CIV(IB)-275/(ND)/2018 by the National Company Law Tribunal, New Delhi.

2) M/s. Tata Blue Scope Steel Limited v. M/s Richa Industries Limited dated 29.04.2020 passed by the Hon'ble NCLT, Chandigarh Bench.

3) JSW Steel Ltd. v. Mahender Kumar Khandelwal & Ors. Company Appeal (AT) (Insolvency) No. 957 of 2019 dated 17.02.2020 passed by the NCLAT.

4) State of Haryana v. Uttam Strips Ltd., Company Appeal (AT) (Insolvency) No. 319 of 2020 dated 23.06.2020 passed by the NCLAT".

14. As against these submissions, SBI as well as DGFT submit that Bank Guarantee is an independent contract between the beneficiary and the Bank, though these are shown as FDRs, for they are given as margin money towards the bank guarantee issued by SBI in favour of the beneficiary, it is not refundable to the Corporate Debtor unless the Bank is discharged. They further submit that it is the settled law that bank guarantee is independent and distinct contract between the bank and the beneficiary and it is not dependent on the actions of the Corporate Debtor at whose instance the bank guarantee is given.

15. To substantiate this proposition, the Bank has relied upon Supreme Court judgment in ***Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450***, inter alia observed that:

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

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

16. They further state that in Section 30(2) (e) of the Code, it has been envisaged that the Resolution Plan does not contravene any of the provisions for the time being in force, thus purported extinguishment of bank guarantee by way of the Resolution Plan is in contravention of Section 30(2)(e) of the Code and against the provisions of Indian Contract Act with regard to the bank guarantee. The same has been held in *"IMICL Dighi Maritime Ltd. v. Dighi Port Ltd., [2019] 107 taxmann.com 431 (NCLT – Mum.), that the resolution applicant in its resolution plan, cannot seek to terminate agreements that have created legal rights in favour of third parties without adhering to due process of law by which those agreements could have been terminated in case there was no CIRP in place. Such termination of legally binding agreements would violate law under which such contracts are governed and, would thus be in violation of section 30(2)(e)*."

17. As to the allegation of the Applicant that the beneficiary does not make any claim, the Respondents have submitted that question of beneficiary making claim against default will not arise because in the event of default,

the beneficiary will realize its monies through bank guarantee given by the bank, not from the Corporate Debtor.

18. As to Tata and Pankaj case law supra, the issue in those cases is as to whether financial creditor, who issued the bank guarantee against the FDRs from Current Account of the Corporate Debtor, could adjust the FDRs against its other claims after discharge of the bank guarantee in the midst of the moratorium. But whereas in the present case, the Resolution Applicant is seeking for extinguishment of Bank Guarantee between the bank and the beneficiary to which the Corporate Debtor is not a party. Moreover, the Bank has already stated that once it is discharged from the Bank Guarantee, as per contract, it will release FDRs without any saying. In view of the above factual situation, the ratio decided in the above cases is not applicable to the present case. Besides this, SBI has mentioned that the adjudicating authority through its Order dated 01.04.2020 has held in the approval of the plan as follows:

"*In view of the urgency, I hereby approve the Resolution Plan under Section 31 of the IBC looking at the approval given by the CoC making it clear that the exemptions*

or discounts anything asked in this plan, ***which is not permissible under law, are not approved.***"

19. In view of the rider mentioned in the order stating that for the Adjudicating Authority having said whatever not permissible under law is not permitted in the Resolution Plan, it cannot be said that the bank guarantee is written off while giving approval to the Resolution Plan. In view of the same, this applicant cannot rely upon the resolution plan to state that the bank guarantees are extinguished based on the resolution plan proposing for write-off of the bank guarantee.

20. On hearing the submissions of either side, we have noted that the bank has not been discharged from the guarantees given to the beneficiary.

21) These FDRs are given towards margin money against the bank guarantees given to the beneficiary, not as FDRs to be realized by the Corporate Debtor as and when it wishes. We must say that as per RBI guidelines and also as per the ratio decided in various judgements, margin money is construed as substratum of a Trust created to pay to the beneficiary to whom Bank Guarantee is given. Once any asset goes into trust by

documentation for the benefit of beneficiary, the original owner will not have any right over the said asset unless is it is free from the trust. In this case, the Bank Guarantee being given to Government Authority, 100% margin money is deposited in the form of FDRs. In the event the margin money is free from the Bank Guarantee either by discharge or by efflux of time, then the Corporate Debtor is entitled for release of FDRs.

22. This ratio held in the judgment in between **Reserve Bank of India vs. Bank of Credit And Commerce (1993 78 Comp Cas 207 Bom)** clearly indicates that margin money acquires the character of trust when it is given against the Bank Guarantee issued to the beneficiary, which is reflected in the para below:

> **"***34. In my judgment, the facts of this case clearly indicate that the* ***margin moneys*** *in question were undoubtedly impressed with* ***trust*** *and the* ***bank*** *held the same as* ***truste****e for the benefit of the depositor to the extent of unutilised amount. Inview of the background of the Reserve* ***Bank*** *guidelines and segregation of the amounts from the current account of the applicant for a specific purpose, it must be held and it is held that the amounts deposited by the applicant were impressed with the* ***trust*** *and are refundable to the applicant in full to the extent of the unutilised amount. In my judgment, it is relevant that the mode followed by the* ***bank*** *was that of issuing the four fixed deposit receipts in favour of the*

applicant after segregation of the amounts from the current account of the applicant for the specific purpose as aforesaid. The applicant was not at all free to utilise the said fixed deposits or the amounts thereunder. The applicant could not seek encashment of the fixed deposit receipts even on expiry of the due dates of the fixed deposit receipts at least so long as the letters of credit subsisted. The said ***margin money*** *was constituted as a separate identifiable fund for honouring of letters of credit by the* ***bank*** *and for refund thereof to the applicant to the extent of credit by the* ***bank*** *and for refund thereof to the applicant to the extent of* ***money*** *not utilised for the specific purpose. The said fixed deposits were also impressed with* ***trust*** *as the same were earmarked for a specific purpose, i.e. as a separate and distinct identifiable fund for honouring of letters of credit. Having regard to the nature of the transaction, it is clear that the transaction entered into between the* ***bank*** *and the applicant was in a special fiduciary capacity. It is, therefore, irrelevant that the* ***bank*** *agreed to pay some interest to the applicant. The applicant did not deposit these amounts in fixed deposit in order to earn interest. The* ***bank*** *was not willing to open a letter of credit unless the applicant furnished security/****margin money*** *in terms of the Reserve* ***Bank*** *guidelines and retained the same till the letters of credit were worked out or cancelled on expiry thereof. Even if it is to be assumed that the* ***bank*** *had the permission of the applicant to use the amount of specific deposit in the meanwhile for purposes of its business, it would make no difference to the conclusion of the court. A* ***trust money*** *does not cease to be* ***trust money*** *merely because of user thereof by the* ***trustee****. In such a case, the* ***bank*** *in bound to reimburse the beneficiary an equivalent amount and the doctrine of tracing the* ***trust*** *fund would clearly apply. The principles laid down in Hallet's case [1879-80] 13 Ch 696 were clearly approved by the Privy Council in the case of Official Assignee v. Bhatt [1933] LR 60 IA 203 and by our Supreme Court in Shanti Prasad Jain's case [1963] 33 Comp Cas 231 (SC). Thus, the factual aspects emphasised by Mr. Thakkar noted in paragraph 23 of this judgment have not bearing on the ultimate conclusion of the court on the principal questions formulated in paragraph".*

23. Since it has been made clear margin money is to be construed as asset of the trust, now the point to be seen is, as whether the asset held in Trust amounts to the asset of the Corporate Debtor or not.

24. To find out that the asset held in Trust is not the asset of the Corporate Debtor, we shall read Sec. 36(4) of the Code, which is as follows:

Section 36:- Liquidation Estate:
1.....
2.....
3.....

Section 36(4)	**Sec.18 (1) Explanation**
"(4) ***The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation:—***	*For the purposes of this [1][section], the term "assets" shall not include the following, namely:—* *(a)* ***assets owned by a third party in possession of the corporate debtor held under trust or under***

(a) assets owned by a third party which are in possession of the corporate debtor, including— ***(i) assets held in trust for any third party;*** ***(ii) bailment contracts;*** *(iii) all sums due to any workman or employee from the provident fund, the pension fund and the gratuity fund;* *(iv) other contractual arrangements which do not stipulate transfer of title but only use of the assets; and* *(v) such other assets as may be notified by the Central Government in consultation with any financial sector regulator;* *(b) assets in security collateral held by financial services providers and are subject to netting and set-off in multi-lateral trading or clearing transactions;* *(c) personal assets of any shareholder or partner of a corporate debtor as the case may be provided such assets are not held on account of avoidance transactions that may be avoided under this Chapter;* *(d) assets of any Indian or foreign subsidiary of the corporate debtor; or*	***contractual arrangements including bailment;*** *(b) assets of any Indian or foreign subsidiary of the corporate debtor; and* *(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.*

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

25. In the above section, it has been envisaged that asset held in trust for third parties cannot be counted in as the asset of the Corporate Debtor. Ignoring this mandate, the Applicant counsel repeatedly canvassed that Sec. 18 envisages that IRP/RP is conferred with duties to take over the control and custody of the assets of the Corporate Debtor, therefore FDRs being asset of the Corporate Debtor; it shall come back to the Corporate Debtor.

26. As against this, if you put the functions of the interim Professional and the assets falling under liquidation estate under Sec. 36 (3) juxtaposition to each other, it can be ascertained that Section 18 (1) (f) is nothing but repetition of Section 36 (3) of the Code. They are as follows:

"36. (1) …

(2) ….

Section 36(3) **(Liquidation Estate)**	**Section 18 (1)(f)** **(Duties of IRP)**

(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following:—	*(f)Take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—*
(a) any assets over which the corporate debtor has ownership rights, including all rights and interests therein as evidenced in the balance sheet of the corporate debtor or an information utility or records in the registry or any depository recording securities of the corporate debtor or by any other means as may be specified by the Board, including shares held in any subsidiary of the corporate debtor;	*(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;*
(b) assets that may or may not be in possession of the corporate debtor including but not limited to encumbered assets;	*(ii) assets that may or may not be in possession of the corporate debtor;*
(c) tangible assets, whether movable or immovable;	*(iii) tangible assets, whether movable or immovable;*
(d) intangible assets including but not limited to intellectual property, securities (including shares held in a subsidiary of the corporate debtor) and financial instruments, insurance policies, contractual rights;	*(iv) intangible assets including intellectual property;*

(e) assets subject to the determination of ownership by the court or authority;	*(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;*
(f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;	*(vi) assets subject to the determination of ownership by a court or authority;*
(g) any asset of the corporate debtor in respect of which a secured creditor has relinquished security interest;	*(g) to perform such other duties as may be specified by the Board.*
(h) any other property belonging to or vested in the corporate debtor at the insolvency commencement date; and	
(i) all proceeds of liquidation as and when they are realized".	

27. On looking at the comparative chart of Explanation given to Sec. 18 and Sec. 36(4), it is a clear indication that assets held under Trust cannot be considered as the asset of the Corporate Debtor. When margin money has character of Trust for the benefit of the beneficiary, as long as the Bank Guarantee Contract is not determined, the margin money will have the character of Trust. When it is not the asset of the Corporate Debtor, the

Corporate Debtor, either during the CIRP process or after the CIRP period, will not have any legal right to have a claim on the said asset.

28. The Applicant has made another argument saying that this asset is covered by moratorium, therefore, Bank Guarantee cannot be invoked by DGFT nor Bank can release the same to the beneficiary.

29. As to this point, we make it clear that margin money was no where covered under Sec. 14 of the Code, (a) deals with prohibition of initiation or continuation of legal proceedings against the Corporate Debtor, (b) deals with prohibition of creation of rights over the asset of the Corporate Debtor, (c) prohibition of action under SARFAESI, it need not be said separately that performance guarantee is exempted from the ambit of Code, (d) speaks of recovery of property in possession of the Corporate Debtor, the present issue is not relevant to (d). In effect, margin money is not covered under section 14 of the Code, Moratorium is indeed a **calm period** to be maintained, but Moratorium will not alter or confer new rights upon anybody. Moreover, the period after approval of Resolution Plan will not fall within the ambit of Moratorium. Section 14 is as follows:

"[2]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;

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

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

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

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

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

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

***Provided** that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan*

under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be".

30. In view of the reasons aforementioned, the Applicant cannot claim any right over the margin money for it is not the asset of the Corporate Debtor.

31. As to the concept of clean slate, if anybody makes any claim against the Resolution Applicant/ Corporate Debtor after the approval of the Resolution Plan, the Applicant can make use of this concept as a shield but not to use it as a sword to take over the asset that does not have the character of the asset of the Corporate Debtor. With regard to the ratio decided in **Essar supra,** first it is about a claim, that claim is also undecided claim; in this case, no claim has been made against the Resolution Applicant/Corporate Debtor.

32. Here, in this case, DGFT has not made any claim against the Corporate Debtor or the Resolution Applicant. Merely having some Clauses in the Resolution Plan will not alter the legal rights of the beneficiary, which are not affected by the Insolvency and Bankruptcy Code. Moreover, this Bench has made it clear that clauses not permissible under law in the Resolution Plan is held as not approved, therefore, this Applicant cannot cite some

clause as a right conferred upon this Applicant to lay its hands on the margin money having character of Trust.

33. What assets are the assets of the Corporate Debtor is envisaged in Section 36 of the Code, as to Sec. 18, it is only about the duties conferred upon the IRP. Conferring upon a duty cannot to be construed as determination of the character of the assets of the Corporate Debtor. However, comparative study has above made so as to show that duties endowed upon the IRP over the assets are not over and beyond the liquidation estate mentioned in Section 36 of the Code.

34. The beneficiary is not a party to the resolution plan and it has not made any claim. It need not claim also because the beneficiaries are always at liberty to directly realize its dues from the bank guarantee instead of initiating proceeding or making claim against the Corporate Debtor. When a procedure is set out for easy realization by encashing bank guarantee, nobody would file a claim with the Corporate Debtor.

35. Write off is a concept that is applied to the receivables, but not with regard to payables. If liabilities are written off, it has to be done with the

concurrence of the person to whom it is payable. It is a categorical statement of the bank that no discharge note has been received from the beneficiary, therefore it could not be said that bank is free from the obligation of clearing the bank guarantee whenever it is invoked. It is on record that the bank guarantee expires in the years 2021 and 2022. Bank has also made a statement as and when discharge note has come from the beneficiary, it would on its own release the FDRs to the Corporate Debtor, therefore, today it could not be said that the Bank is free to release the FDRs taken as margin money from the Corporate Debtor. Indeed, today the Corporate Debtor has become the company of the Resolution Applicant; it would be the company of the Resolution Applicant. Assuming Bank has agreed for extinguishment of Bank Guarantee, it on its own cannot do or concede extinguishment of beneficiary right, because a party cannot create or invalidate a right that is not vested with it.

36. SBI, as to this issue, is not a Creditor to the Corporate Debtor. As long as claim is not raised by the beneficiary against the Corporate Debtor, no claim is considered to have come into existence

37. The approval of the Resolution Plan resolves the claims that come before the Resolution Professional, when claim itself has not been made, it cannot be assumed that the relationship in between the Corporate Debtor and the beneficiary as Creditor and Debtor relationship. It is pertinent to mention that IBC deals with Creditor and Debtor relationship and other aspects such as avoidance transactions, fraudulent transactions and undervalued transactions, etc. but not with the other transactions not culminated into Creditor and Debtor jural relationship. In this case, since DGFT has already been covered by bank guarantee, in the event of default, DGFT will realise its dues through bank guarantee. It can be other way said that DGFT rendering services on advance payment in reserve. The Corporate Debtor cannot, under the cover of clean slate, collect anything and everything from everybody and anybody bulldozing the rights of other parties. It is equally important to see that by virtue of this resolution plan or by virtue of liquidation, other parties' rights shall not be affected beyond the scope and the ambit of IBC. The reason behind it is, that whenever anybody's pre-existing right is to be curtailed, it cannot be kept on stretching beyond

the statute, indeed, it has been time and again said that strict interpretation to be given to the enactments when it deals with the legal rights of third parties.

38. Let us assume a situation tomorrow, the Beneficiary encashes the bank guarantee, in case FDRs are released to the Corporate Debtor on being asked by this Chairman/Applicant, who would be liable for the loss Bank incurs. What way public money is to be lost just by looking at the lofty principles of maximisation and going concern concept? Of course, they are the concepts applicable while dealing with CIRP process for timely conclusion of CIRP, for timely conclusion of liquidation, for timely realization from avoidance, undervalued, extortionate credit, fraudulent trading and fraudulent transactions and for timely approval of Resolution Plan. But for other reasons, we cannot invoke these concepts transgressing the ambit of the Code and nullifying the pre-existing rights of the parties.

39. For this reason alone, it has been said in Section 30(2)(e) that, the Resolution Plan shall not contravene any of the provisions of the laws for time being in force, the same is again reiterated in Section 238 of the Code

saying that this Code will have overriding effect over other laws which are **inconsistent** with the provisions of this Code. Harmonisation of statutes is the hall mark of justice, not invalidating the rights conferred under one enactment by another enactment save and except to the extent mentioned.

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

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

SD/-

(B.S.V PRAKASH KUMAR)
ACTG. PRESIDENT

SD/-

(HEMANT KUMAR SARANGI)
MEMBER (TECHNICAL)

04.08.2020
VINEET