NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI
(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (Ins) No.60/2024
(IA No.186/2024)

In the matter of:

Mr. Rajendra Prasad Tak,
Liquidator of M/s. KVK Nilachal Power Pvt. Ltd.
3/15, 4th Floor, Asaf Ali Road,
New Delhi - 110002 **… Appellant**

V

Mahanadi Coalfield Limited,
Office of the General Manager (Finance),
Dist.: Sambalpur Odisha – 768020 **…. Respondent No. 1**

UCO Bank,
Flagship Corporate Branch,
6-3-1108, Ground Floor,
Navbharat Chambers Raj Bhav Road,
Somajiguda, Hyderabad – 500082 **…. Respondent No. 2**

Present :

For Appellant : Mr. Abhishek Anand & Mr. Karan Kohli, Advocates

For Respondents : Mr. Kishore Balasubramanian, Advocate for R1
Mr. Surya Teja SS Nalla, Advocate for R2

J U D G M E N T
(Hybrid Mode)

Per : Justice Sharad Kumar Sharma, Member (Judicial):

1. The brief facts as they engage consideration in the instant Company Appeal (AT) (CH) (INS) No. 60 / 2024, where the Appellant has put a challenge to the Impugned Order of 13.04.2023 as it stood passed by the Ld. NCLT, Hyderabad

Bench in IA No. 553 / 2023, as preferred in CP (IB) / 328 / 07 / HDB / 2018 are that, the Interlocutory Application preferred by the Liquidator praying for, directing Respondent No. 1 to return the Bank Guarantees that, were lying with Respondent No. 2 on behalf of the Corporate Debtor and Respondent No. 2 to refund the Margin Money that stood deposited by the Corporate Debtor, as against the Bank Guarantees issued by Respondent No. 2 in favour of Respondent No. 1, was dismissed by Ld. NCLT by virtue of the impugned order.

2. The said interlocutory application, was declined to be allowed, on the ground that, the Liquidator would not be entitled for the refund, of the margin money once the Bank Guarantee has been invoked holding thereof that, the margin money is only a part of the amount for which the Bank Guarantee is taken and that the invocation of the Bank Guarantee would be against both the money which is termed as Margin Money deposited by the Appellant and the amount that is extended by the Banker for which the Loan Security could be taken.

3. The brief facts of the case are that;

The Corporate Debtor (M/s. KVK Nilachal Power Private Limited) was in the process of setting up a 300 MW Coal based Power Plant in Odisha and had entered into Loan Agreement with Financial Creditors for an amount of Rs.1,080 Crores, that as part of its plan it had entered into Fuel Supply Agreement with Respondent No. 1 (Mahanadi Coalfield Limited) and as a Security towards performance of its obligations, it furnished four Bank Guarantees in favour of

Respondent No. 1, that Corporate Insolvency Resolution process was ordered to be initiated by the Ld. Adjudicating Authority vide its order dated 17.09.2019 and Appellant was appointed as IRP, that on failure of the Resolution Process, the order of liquidation was passed on 17.12.2020 and the Appellant was appointed as to function as a Liquidator for the Corporate Debtor i.e. M/s. KVK Nilachal Power Private Limited, that the Liquidator invited claims and based on receipt of claims constituted the Stakeholders Consultation Committee (SCC), that the Appellant in the status of being the Liquidator initiated the process to sell the Corporate Debtor as a going concern through an E-Auction process, that despite several attempts and the multiple extensions to the E-Auction process, the sale could not be crystallized because of Covid-19 and that while the process of Liquidation was going on, Respondent No. 1 who did not even file his claim, invoked the Bank Guarantees given by Respondent No. 2 on behalf of the Corporate Debtor, that the Appellant requested Respondent No. 2 to return the margin money deposited and the Bank Guarantees in original and that failing in both, he filed IA No. 553 / 2023 seeking return of margin money and return of Bank Guarantees which was dismissed by Ld. Adjudicating Authority vide the Impugned Order.

4. The Appellant has challenged the Order of Ld. Adjudicating Authority on the grounds that, it is contrary to the objectives of the Code, that as per Section 35 of the Code, Liquidator is to take custody of all assets of the Corporate Debtor

including the Margin Money Deposit, that Respondent No. 1 should have filed its claims instead of invoking Bank Guarantees lying with them and Respondent No. 1 was merely a Unsecured Creditor who should have realised its claim as per Section 53 of the Code and that Ld. Adjudicating Authority failed to appreciate these points and hence, the Impugned Order be set aside with directions to return the Bank Guarantees and the margin money to the Corporate Debtor.

5. It is to be noted that the said principle pertaining to question of refund of margin money and return of Bank Guarantee has already been settled by the Principal Bench in ***Company Appeal (AT) (INS) No. 657 / 2020*** in the matters of ***Punjab National Bank V. Supriyo Kumar Chaudhuri & Ors.*** wherein, almost a similar issue came up for consideration with regards to seeking reversal of the transaction of appropriation of the margin money, on the grounds that it is in breach of the moratorium imposed under Section 14 of I & B Code, 2016.

6. The Principal Bench while considering the said controversy had laid down the basic principles to be followed while deciding on the issue of invocation of Bank Guarantee and forfeiture of margin money during CIRP / Liquidation period. It has referred to the Judgment of Hon'ble Supreme Court in the matters of ***Commissioner of Income Tax, Madras V. Laxmi Vilas Bank Limited, Karur***, as reported in ***1996 Vol VIII SCC 458*** wherein, in Para 5 & 6, the Hon'ble Apex Court has observed that, there is no such conception under law to prevent and restrict the Bank from adjusting the margin money forfeited by it and which had

become its own just at that point of time against the cost of the Securities. It has also observed that forfeiture of the margin money that has been deposited by the customer with it has been done by the Bank in the course of its usual banking business and that, the forfeited amount became the Bank's money and there is no reason why this amount should not be treated as to be the income of the Bank earned in the course of carrying on its business.

7. After considering the aforesaid implications, the Principal Bench has drawn its inference in the finding which has been recorded Para 16 and 17 of ***Punjab National Bank V. Supriyo Kumar Chaudhuri*** (supra) observing thereof that, the margin money is an amount given for the purpose of binding of a contract and that, rather, it is a money extended as a Surety for the purposes of execution of the Contract, to be deducted from the price in the event the contract is executed and to be forfeited if the contract did not fructify.

8. The Principal Bench, while making reference to the Judgment of the Hon'ble Apex Court as rendered in the matter of Commissioner of Income Tax, Madras (supra), has further observed that, the observation by Hon'ble Apex Court that, ``each deposit which was made for a specific transaction, in an event of default, the forfeited money becomes the Bank's money'', will apply to this case. Applying the precedent to instant case, it is to be held that the margin money cannot be permitted to be refunded to the Liquidator as it was prayed for in the

Interlocutory Application, which was preferred before the Ld. Adjudicating Authority.

9. The Principal Bench in the matter of ***Punjab National Bank V. Supriyo Kumar Chaudhuri & Ors.***, has also made reference to ***Indian Overseas Bank V. Arvind Kumar***, a Judgment as it was rendered in ***CA (AT) (INS) No. 558 / 2020*** dated 28.09.2020, and based on the findings of the said Judgment, has come to the conclusion as under:-

> *``17. A three Member Bench of this Tribunal in 'Indian Oversees Bank' Vs. 'Arvind Kumar', Comp. App. (AT) (Ins.) No. 558/2020, dated 28.09.2020 has held that 'margin money' is not a security and therefore does not require any registration of charge and that margin money is the contribution on the part of the borrower who seeks Bank Guarantee and the said margin money remains with the Bank as long as the Bank Guarantee is alive and in case the Bank Guarantee is invoked by the beneficiary, the margin money goes towards payment of Bank Guarantee to the beneficiary and nothing remains with the Financial Institution. This principle has attained finality as the Judgement has not been challenged. We are of the view that the same principle ought to be applied to the LCs also. Learned Sr. Counsel Mr. Ramji Srinivasan relied on the Judgement of this Tribunal in 'Bank of Baroda Corporate Financial Services' Vs. 'Sundaresh Bhatt', 2020 SCC OnLine NCLAT 434, by which Order, this Tribunal has observed that the Bank had internally given instructions to appropriate the margin money kept in the form of an FD, subsequent to invocation of Bank Guarantee, on 01.08.2017, on which date, the Section 7 Application was admitted against the 'Corporate Debtor'. The facts of this case are distinguishable from the facts on hand as it was held by this Tribunal in 'Bank of Baroda Corporate Financial Services', (Supra) that the 'Bank was aware regarding initiation of CIRP, but adjusted the margin money without the consent of the CoC/IRP and that the Bank could not have been done so as the FD Accounts were closed on 02.08.2017, subsequent to the Admission of Section 7 Application. It is significant to*

mention that the Judgement of 'Indian Oversees Bank', (Supra) was rendered subsequent to 'Bank of Baroda Corporate Financial Services', (Supra).''

10. In fact, as per the principles as laid down by the Principal Bench in Punjab National Bank (supra), the margin money is to be construed as to be the money, which has been deposited by way of a Trust created to be paid to the beneficiary to whom the Bank Guarantee is given and once, any asset goes into the Trust by documentation for the benefit of the beneficiary, the original owner cannot be said to have any vested right over the said asset unless it is made free from the Trust that was created.

11. Further, the said margin money, which has been deposited, imbibes within itself a character of the Trust for the benefit of the beneficiary and thus it cannot be taken to be the asset of the Corporate Debtor and consequently, cannot be permitted to be realized by the Corporate Debtor as and when it desires, unless the margin money so deposited is made free from all obligations in terms of the inter-se binding Contract, in continuation of which the said margin money has been deposited for extension of benefit as against, which the margin money has been deposited.

12. In these circumstances, the Principal Bench has opined in Para 26 of Punjab National Bank (supra) that both Sections 18 & 36(4) of I & B Code 2016, provide that assets held under the Trust, cannot be treated as to be the assets of the Corporate Debtor, and that the margin money, since it has the character of the

Trust for the benefit of the beneficiary, as long as the Letter of Credit / Bank Guarantee is kept alive and cannot be treated as to be the assets of the Corporate Debtor, which could be brought into the liquidation estate treating it to be an asset of the Corporate Debtor, since it has already taken the form of a created Trust.

13. Accordingly, the final conclusion has been drawn by the Principal Bench in the Judgment rendered on 16.02.2022 in Punjab National Bank (supra), which is contained in Para 27 of the said Judgment, which is extracted hereunder:-

> *``27. For all the aforenoted reasons, we are of the considered view that margin money can in no manner be said to be a 'Security Interest' as defined under Section 3(31) of the IBC. Section 14(1)(c) prohibits any action to foreclose, recover or ensure any 'Security Interest' created by the 'Corporate Debtor' in respect of its property. As we hold that no 'Security Interest' was created by the 'Corporate Debtor' with respect to the margin money that was deposited by the 'Corporate Debtor Company' towards the opening of the LC in the Appellant Bank, we are of the considered view that the Banks having appropriated this money during the period of Moratorium is justified as we hold that the amount is not an asset of the 'Corporate Debtor'. Therefore, a conjoint reading of Section 3(31) and Section 14 of the Code makes it abundantly clear that margin money is not included as a 'Security' and is not an asset of the 'Corporate Debtor.''*

14. In fact, the Judgment of the Principal Bench dated 28.09.2020 in the matter of ***Company Appeal (AT) (INS) No. 558 / 2020, Indian Overseas Bank V. Arvind Kumar,*** which is pronounced earlier to ***Punjab National Bank (supra)*** is even more explicit. While dealing with a similar matter, that is, whether the Bank can retain the margin money amount when Bank Guarantee has been invoked during Section 14 moratorium period, it has held that Security Interest,

which has been specifically defined under Section 3 sub-section (31) of I & B Code, 2016, does not include Performance Bank Guarantee and that Performance Bank Guarantee is not covered under Section 14 of the Code. The said pronouncement has been made in Para Nos. 10 & 11 of the said Judgment, which are extracted hereunder:

> *``10. This Appellate Tribunal in the case of Gail (India) Limited (supra) has held that:*
>
> > *"4. Section 14 of the Insolvency and Bankruptcy Code, 2016 (for short "I&B Code") relates to „Moratorium". Clause (c) of subsection (1) of Section 14 empowers the Adjudicating Authority to declare `Moratorium' for prohibiting any action to foreclose, recover or enforce any security interest created by the `Corporate Debtor' in respect of its property etc., which reads as follows:*
> >
> > > *"14. Moratorium. ─ (1) Subject to provisions of subsections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare Moratorium for prohibiting all of the following, namely: —*
> > >
> > > *Xxx xxx xxx*
> > >
> > > *(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"*
>
> *5. The expression `security interest' has been defined in subsection (31) of Section 3 of the `I&B Code', which reads as follows:*
>
> > *"3. Definitions.─ xxx xxx xxx*
> >
> > *(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"

6. From sub-section (31) of Section 3, it is clear that the `security interest' do not include the `Performance Bank Guarantee', therefore, we hold that the `security interest' mentioned in clause (c) of Section 14(1) do not include the `Performance Bank Guarantee'. Thereby the 'Performance Bank Guarantee' given by the 'Corporate Debtor' in favour of the Appellant- 'GAIL (India) Ltd.' is not covered by Section 14. The Appellant- `GAIL (India) Ltd.' is entitled to invoke its `Performance Bank Guarantee' in full or in part."

(emphasis supplied)

11. Thus, it is clear that 'Security Interest' does not include the 'Performance Bank Guarantee'. The Performance Bank Guarantee is not covered by Section 14 of the Code.''

15. Thus, the Principal Bench has conclusively declared that, the Performance Bank Guarantee, given by the Corporate Debtor in favour of the Institution is not covered under Section 14 of the I & B Code, 2016, and its invocation cannot be permitted to be reversed and to be refunded back to Corporate Debtor as prayed for in IA No. 553 / 2023, by the Liquidator / Appellant.

16. The Judgment as rendered in the matters of Punjab National Bank (supra) has categorically spelt out as to how the margin money will be dealt in Para 16 of the said Judgment which is extracted hereunder:

``16. The aforenoted Judgement drew a parallel between margin money and `earnest money'. Margin Money is an amount given for the purpose of

binding of contract, if in the event, the contract is executed the amount would be deducted from the price and in the event the contract did not go through, the amount would be forfeited. The observation by the Hon'ble Supreme Court that `each deposit was made for a specific transaction and in the event of default, the forfeited money became the Bank's money' is applicable to this case also.''

17. The same principle has been reiterated by the ratio as it has been laid down by the Principal Bench in Company Appeal (AT) (INS) No. 558 / 2020 Indian Overseas Bank V. Arvind Kumar, where too almost an akin circumstance arose for consideration and the same has been answered by the Principal Bench in Para 13, as to what status would the margin money enjoy. Para 13 of the said Judgment is extracted hereunder:

> *``13. The `margin money' is the contribution on the part of the borrower who seeks `Bank Guarantee'. The said margin money remains with the Bank, as long as the Bank Guarantee is alive. If the Bank Guarantee expires without being invoked, then the margin money reverse back to the borrower, and in case the bank guarantee is invoked by the beneficiary, the margin money goes towards payment of bank guarantee to the beneficiary, and nothing remains with the financial institutions, which can be reversed to the Corporate Debtor.''*

18. From the above, it could be safely concluded that, the Performance Bank Guarantee and the margin money deposited with the Bank towards such Performance Bank Guarantee, will not constitute to be a ``Security Interest'' for the purpose of Section 14(1)(c) of the I & B Code, 2016, and in the absence of the same being covered under Section 14 its invocation / appropriation as the case

may be, cannot be reversed in view of what has been discussed above in the light of the ratio of Punjab National Bank (supra), as well as that of the Indian Overseas Bank (supra).

19. The admitted facts, in respect to the proceedings, which were held before the Ld. NCLT, in the instant case are that at the relevant point of time when the Interlocutory Application was being considered, the Bank Guarantees had already been invoked and hence, it was contended that, as a matter of fact, the Interlocutory Application has become infructuous, because of the invocation of the Bank Guarantee was a fact that was not denied by the parties to the proceedings and hence, it was rightly observed by the Ld. Tribunal in its Impugned Order dated 13.04.2023, that the Appellant will not be entitled for refund of all the margin money once the Bank Guarantee has already been invoked because, the margin money is only a part of the amount for which the Bank Guarantee is taken and invocation of the Bank Guarantee would be both against the money which was deposited as margin money by the Corporate Debtor and the money which has been extended by the Bank towards securing the performance of the Corporate Debtor.

20. In view of what has been observed above by us, we are of the considered view that, there cannot be any iota of doubt, that though the Liquidator has the rights to preserve the assets of the Corporate Debtor, in the present set of

circumstances, where the Bank Guarantee and the margin money deposited to secure such Bank Guarantee would not constitute to be the asset of the Corporate Debtor, in the light of the ratio laid down by the Indian Overseas Bank (supra) as considered by us.

21. Hence, we endorse the view that the margin money is a contribution only, towards securing the Bank Guarantee, that it remains with the Bank, as long as the Bank Guarantee is alive, that if the Bank Guarantee expires without being invoked, the margin money reverses back to the Borrower and in case, the Bank Guarantee is invoked by the beneficiary, the margin money goes towards the payment of the amount guaranteed by the said Bank Guarantee to the beneficiary and nothing remains with the Financial Institution, which can be reversed to the Corporate Debtor.

22. In view of the wider principles laid down in the matters of Indian Overseas Bank (supra) and Punjab National Bank (supra), the relief sought for by the Appellant in the Interlocutory Application preferred being, IA No. 553 / 2023, praying for the refund of the margin money, cannot be granted and thus, the decision rendered by the Impugned Order, owing to the reasons which has been given therein, suffers from no apparent error which could call for interference by this Appellate Tribunal. Hence, the instant Company Appeal (AT) (CH) (INS)

No. 60 / 2024 lacks merit and the same is accordingly dismissed. All pending Interlocutory Applications, if any, would stand closed.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Jatindranath Swain]
Member (Technical)

25 / 07 / 2025

SR / MS / RS