

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) (INSOLVENCY) No. 263 of 2022

(Arising out of Order dated 20.01.2022, passed by National Company Law Tribunal, Mumbai Special Bench, in I.A. No. 2190/2020 in C.P. No. 4513/I&B/MB/2018)

IN THE MATTER OF:

**Engineering Projects (India) Ltd.
Core – 3, Scope Complex,
7, Lodhi Road,
CGO Complex,
New Delhi – 110003.**

...Appellant

Versus

**Mr. Ram Ratan Kanoongo,
Resolution Professional of
D. Thakker Construction Pvt. Ltd.
708, 7th Floor,
Raheja Centre, Nariman Point,
Mumbai – 400021.**

...Respondent

For Appellant:

Mr. Debarshi Bhadra, Advocate.

For Respondent:

**Mr. Shyam Kapadia and Mr. Ayush J.
Rajani, Advocates.**

J U D G E M E N T

[Per: Shreesha Merla, Member (T)]

1. Challenge in this Appeal is to the Impugned Order dated 20/01/2022 in I.A.2190/2020 in C.P. No. 4513/I&B/MB/2018, passed by the Learned Adjudicating Authority (National Company Law Tribunal, Mumbai Special Bench), whereby the Adjudicating Authority has allowed the Application preferred by the Resolution Professional (RP) under Section 14(1) of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as 'The Code'), wherein the RP has *inter alia* sought direction to M/s. Engineering Projects (India) Limited/the Appellant herein to refund the money equivalent

to the Bank Guarantees invoked by them. By the Impugned Order, the Adjudicating Authority has observed as follows:

*“10. Reference is also made to a decision of Hon’ble NCLAT in the case of **Indian Overseas Bank Vs. Mr. Dinkar T Venkatsubramaniam [Company Appeal (AT) (Insolvency) 267 of 2017]***

*“5. Having heard learned counsel for the Appellant, we do not accept the submissions made on behalf of the appellant in view of the fact that after admission of an application under Section 7 of the "I&B Code", **once moratorium has been declared it is not open to any person including 'Financial Creditor' and the appellant bank to recover any amount from the account of the 'Corporate Debtor', nor it can appropriate any amount towards its own dues.**”*

*11. Reference is also made to the decision of Delhi High Court in Power Grid Corporation of India V. Jyoti Structures Limited wherein the judiciary has interpreted Section 14 as being benevolent to the corporate debtor i.e. it would not apply to the proceedings which are in benefit of the corporate debtor in as much the proceedings are not 'debt recovery' actions and its conclusion would not 'endanger, diminish, dissipate or impact the assets of the corporate debtor in any manner whatsoever and hence shall be in sync with the purpose of moratorium'. **So as a corollary, any "debt recovery actions" are prohibited during the "Moratorium" period.***

12. In view of the above, the Bench directs the Respondent, Engineering Projects (India) Limited to refund an amount of Rs. 34,28,000/- which has been wrongfully encashed by the Respondent by invoking Bank Guarantee during the CIRP. The Bench directs that this refund be made to the account of the Corporate Debtor within one week of the pronouncement of this order.

13. With the above direction, the I.A. 2190/2020 is allowed and disposed of accordingly.”

2. Facts in brief are that the Appellant is a Central Public Sector Enterprise which had awarded Construction Work of 105 Residential

Quarters at 29th Battalion, ITBP, Jabalpur, Madhya Pradesh to M/s. D. Thakkar Construction Pvt. Ltd. (hereinafter referred to as the 'Corporate Debtor') for an amount of Rs.17,32,34,561/- to be completed within a period of 15 months, from the date of the Letter of Intent which is 18/05/2016. In pursuance to the stipulations of the Contract, the Appellant has submitted various Bank Guarantees namely a 'Performance Bank Guarantee' bearing No. 37890IGL0008317 for an amount of Rs.15 Lakhs/- and 'Mobilisation Advance Bank Guarantee' bearing No. 37890IGL0008217 dated 11/10/2017 for an amount of Rs.19,28,000/-, both issued by Union Bank of India. It was averred that the 'Corporate Debtor' on account of a financial crunch had requested the Appellant herein to directly make the payments to the suppliers involved in the said works. Subsequently, vide letter dated 11/12/2018, the 'Corporate Debtor' expressed its inability to complete the works and had requested the Appellant to take up the project. It was averred that the Appellant, in terms of the Contract, invoked the Bank Guarantees on 26/12/2018 and on 25/03/2019. While so, the 'Corporate Debtor' was initiated against the Corporate Debtor Company and Moratorium was imposed under Section 14 vide Order dated 27/03/2019.

3. Learned Counsel for the Appellant submitted that a Bank Guarantee being an independent Contract between the Guarantor Bank and a beneficiary and specifically a 'Performance Bank Guarantee' is not covered under the definition of 'Security Interest' as defined in Section 3(31) of the Code; that the Adjudicating Authority has not taken into consideration Section 14(3)(b) of the Code which is applicable with effect from 06/06/2018 (provided under the second Amendment of the Code; that the Bank

Guarantees already stood invoked as on 26/12/2018 and on 25/03/2019 which is much prior to the date of the Public Announcement of the CIRP i.e., 30/03/2019; that the Adjudicating Authority has ignored the ratio laid down by this Tribunal in 'Bharat Aluminium Co. Ltd.' Vs. 'JP Engineers Private Limited & Ors.', Company Appeal (AT) (Insolvency) No. 759 of 2020 and the Learned Counsel specifically drew our attention to para 37 of the Judgement which reads as follows:

"37. With the aforesaid, we hold that the Corporate Debtor has issued bank guarantee for ensuring the price of goods. The bank guarantee is irrevocable and unconditional and payable on demand without demur. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third party like surety. Bank guarantee can be invoked even during moratorium period issued under section 14 of the IBC in view of the amended provision under section 14 (3)(b) of the IBC".

4. It is strenuously contended by the Learned Counsel for the Appellant that the Adjudicating Authority has failed to differentiate that the Bank Guarantees invoked included a 'Performance Bank Guarantee' and a Mobilisation Advance Bank Guarantee which are not covered under Section 3(31) and under Section 14(3)(b) of the Code; that the Contract was terminated on 11/12/2018 as the 'Corporate Debtor' was unable to complete the works.

5. Learned Counsel for the Respondent appearing for the Resolution Professional submitted that Bank Guarantees were encashed one day after the initiation of the CIRP; that the Appellant had not terminated the Contract with the 'Corporate Debtor' as on the date of the CIRP; that the termination happened after the CIRP date; that the Amendment cannot

extend the Moratorium of Sureties; that the ratio of the '*Bharat Aluminium Co. Ltd.*' (*Supra*) relied upon by the Appellant Counsel, cannot be made applicable to the instant case as in '*Bharat Aluminium Co. Ltd.*' (*Supra*) the Contract was terminated as on the date of CIRP and therefore this Tribunal had rightly allowed the encashment of the same; that after the initiation of CIRP on 27/03/2019 all the Bank Guarantees (17 in No.) totalling to an amount of Rs.34,28,000/- were encashed on 28/03/2019; that such an invocation of the Bank Guarantees results in violation of Moratorium in terms of Section 14 of the Code as it is a 'Recovery Action', that Section 14(c) clearly provides that 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 SARFAESI Act, 2002, is prohibited under Section 14 of the Code and that the Adjudicating Authority has rightly relied on the decision of this Tribunal in '*Indian Overseas Bank*' Vs. '*Mr. Dinkar T. Venkatsubramaniam Resolution Professional for Amtek Auto Ltd.*', *Company Appeal (AT) (Insolvency) No. 267 of 2017*.

6. The main point which arises for consideration is whether a 'Performance Bank Guarantee' and/or 'Mobilisation Advance Bank Guarantee' be invoked or encashed after Moratorium has been imposed under Section 14 of the I&B Code, 2016. Section 14 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:—

(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.

[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;]

(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.

[(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified;]

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

[(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]

[(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.

(Emphasis Supplied)

7. The definition of ‘security interest’ as defined under Section 3(31) of the Code excludes ‘Performance Guarantee’. The said section is reproduced as hereunder:-

“3. Definitions.—*In this Code, unless the context otherwise requires,—*

.....

(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;”

(Emphasis Supplied)

8. The Insolvency Law Committee appointed by the Ministry of Corporate Affairs in its report dated 26.03.2018 discussing the issue of the scope of Moratorium on the assets of the ‘Corporate Debtor’, noted as hereunder:-

“(iv) to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-à-vis the moratorium on the assets of the corporate debtor, it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed under the Code;”

5. MORATORIUM UNDER SECTION 14

.....
Moratorium on proceedings against surety to corporate debtor

“.....5.10 The Committee further noted that a literal interpretation of Section 14 is prudent, and a broader interpretation may not be necessary in the above context. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety. Thus, contractual principles of guarantee require being respected even during a moratorium and an alternate interpretation may not have been the intention of the Code, as is clear from a plain reading of section 14.

5.11 Further, since many guarantees for loans of corporates are given by its promoters in the form of personal guarantees, if there is a stay on actions against their assets during a CIRP, such promoters (who are also corporate applicants) may file frivolous applications to merely take advantage of the stay and guard their assets. In the judgments analysed in this relation, many have been filed by the corporate applicant under section 10 of the Code and this may corroborate the above apprehension of abuse of the moratorium provision. The Committee concluded that section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to

*clarify this may be inserted in section 14 of the Code.
The scope of the moratorium may be restricted to the
assets of the corporate debtor only.*

(Emphasis Supplied)

Performance Bank Guarantee:

9. A Bank Guarantee is a Contract whereby the Bank promises to repay to the Creditor or Lender an amount on behalf of the Debtor i.e., if a debtor fails to fulfil its obligations and repay the amount, the bank will step into the shoes of the Debtor and discharge the commitment. In a 'Performance Bank Guarantee', compensation of money will be made by the Bank when there is any delay in delivering the performance. The payment will necessarily have to be made even if the service is delivered inadequately. A 'Performance Bank Guarantee' kicks in if services or goods are not provided to the buyer by the seller as per the specifications mentioned in the Contract. Thus, a 'Performance Bank Guarantee' provides an assurance of compensation in the event of any inadequate performance of Contract. Section 3(31) of the Code excludes 'Performance Guarantee' from the definition of 'Security Interest' which certainly expresses the intention of the Legislature.

Mobilisation Advance Bank Guarantee:

10. 'Mobilisation Advance Bank Guarantee' is meant specifically for facilitating the Contractor to spend for provisioning the works contract service. The contract provides a mechanism in the form of this Bank Guarantee which ensures that the advance is not diverted to any other purpose but utilised for the specific work contract. Its application as payment is therefore 'direct' and is like a 'consideration' whether or not in the form of a deposit for the supply of the works contract service.

11. Paras 5.1.0 and 5.1.1 of the Report of Insolvency Law Committee dated March 2018, specifies that encashment of a Bank Guarantee would not have a significant impact on the death of the 'Corporate Debtor' as a right of the Creditor against the 'Corporate Debtor' is merely shifted to the Bank to the extent of payment by the Bank.

12. This Tribunal in '*UCO Bank' Vs. 'Sudip Bhattacharya Resolution Professional of Reliance Naval & Engineering Ltd.'*, Company Appeal (AT) (Insolvency) No. 335 of 2021, has held that it is a well settled proposition that liability under 'Performance Bank Guarantee' cannot be terminated by actions of a third party and that a Bank which gives a 'Performance Guarantee' must honour its Guarantee according to its terms.

13. The Hon'ble Supreme Court in '*Ansal Engineering Projects Ltd.' Vs. 'Tehri Hydro Development Corporation Ltd.'* (1996) 5 SCC 450, observed as follows:-

"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..."

14. In ‘SBI’ Vs. ‘Mula Sahakari Sakhar Karkhana Ltd.’ (SCC p. 301, paras 33-34) the Hon’ble Apex Court has observed as follows:-

“33. It is beyond any cavil that a bank guarantee must be construed on its own terms. It is considered to be a separate transaction.

34. If a construction, as was suggested by Mr. Naphade, is to be accepted, it would also be open to a banker to put forward a case that absolute and unequivocal bank guarantee should be read as a conditional one having regard to circumstances attending thereto. It is, to our mind, impermissible in law.”

15. We are of the view that the intent of the Code was not to terminate Agreements that have created legal rights in favour of third parties without adhering to due process of Law. Such a termination of legally binding Agreements would be in violation of the provisions of Section 30(2)(e).

16. This Tribunal in ‘Bharat Aluminum Co. Ltd.’ Vs. ‘J.P. Engineers Pvt. Ltd. and Ors.’ in Company Appeal (AT) (Insolvency) No. 759 of 2020 dated 26.02.2021, observed that ‘Bank Guarantee can be invoked during Moratorium period issued under Section 14 of the IBC in view of the amended provisions under Section 14(3)(b) of the IBC’. The Hon’ble AP High Court in the case of ‘Haryana Telecom Ltd.’ Vs. ‘Aluminum Industries Ltd.’ (1995) SCC OnLine AP 721, held that the Bank Guarantee cannot be said to be the property of the Buyer simply because it is indirectly going to be effected by enforcement of such Bank Guarantee by the beneficiary. The communication of the Legislature in carving out the exception for the Performance Bank Guarantee is clear as encashing the same would violate the provisions of Section 14 of the IBC and frustrate the entire CIRP Proceedings.

17. The Hon'ble Supreme Court in 'Andhra Pradesh Pollution Control Board' Vs. CCL Products (India) Limited' reported in (2019) 20 SCC 669 SCC OnLine SC 985, observed as follows:-

“ – A bank guarantee constitutes an independent contract between the issuing bank and the beneficiary to whom the guarantee is issued – Such a contract is independent of the underlying contract between the beneficiary and the third party at whose behest the bank guarantee is issued – Absent a case of fraud, irretrievable injustice and special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in terms of the bank guarantee – Furthermore, it is not for the bank to determine as to whether the invocation of the bank guarantees is justified so long as the invocation is in terms of the bank guarantee – A demand once made obliges the bank to pay under the terms of the bank guarantee – Contract Act, 1872, S. 126)”

18. This Tribunal in 'GAIL India Ltd.' Vs. 'Rajeev Manandiar & Ors.' (2018) SCC Online NCLAT 374, held that Moratorium will not be applicable on the 'Performance Bank Guarantee' as the definition of security interest under Section 3(31) of the Code explicitly excludes 'Performance Bank Guarantee' from the purview of 'security interest'.

Whether the 'Performance Guarantee' and the 'Mobilisation Advance Bank Guarantee' issued by the Appellant herein falls within the ambit of the definition of an 'asset' which belongs to the 'Corporate Debtor' under IBC:

19. At this juncture, it is relevant to see the duties of IRP as provided for under Section 18 of the Code:

“18. Duties of interim resolution professional.—
The interim resolution professional shall perform the following duties, namely:—

(a) collect all information relating to the assets, finances and operations of the corporate debtor for

determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

(ii) financial and operational payments for the previous two years;

(iii) list of assets and liabilities as on the initiation date; and

(iv) such other matters as may be specified;

(b) receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary; and

(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—

(i) assets over which the corporate debtor has ownership rights which may be located in a foreign country;

(ii) assets that may or may not be in possession of the corporate debtor;

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

(v) securities including shares held in any subsidiary of the corporate debtor, financial instruments, insurance policies;

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

(g) to perform such other duties as may be specified by the Board.

Explanation.—For the purposes of this [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 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.”

(Emphasis Supplied)

20. Put in truly simple terms, the Appellant herein, having awarded a contract to the ‘Corporate Debtor’ for construction of 105 Residential Quarters, plays the role of a ‘Debtor’ and the ‘Corporate Debtor Company’ plays the role of a ‘Creditor’ who has the ‘obligation’ to perform and ‘execute the contract’ given to the Company in its totality. In order to secure itself against any shortfall/shortcoming/deficiency in the Performance of the Contract, the ‘Appellant/Project Owner’ in its role of a ‘Debtor’ issues a ‘Performance Bank Guarantee’ and a ‘Mobilisation Advance Bank Guarantee’, whereby and whereunder an ‘advance’ amount is given to the ‘Corporate Debtor’ meant for ‘Performance of an obligation’. The Appellant in its role as a ‘Debtor’ can invoke the ‘Performance Bank Guarantee’ in the event of any shortcoming in the Performance of the Contract. The ‘Corporate

Debtor' is a secured Creditor in whose favour the 'Security Interest' is created till the performance of the Contract is executed completely.

21. Mobilisation Advance is an advance meant for ensuring/performing a contract and does not construe a 'debt' except in the case of home allottees where there is consideration for 'Time Value of Money'. In the instant case, the amount given as an 'advance' under 'Mobilisation Advance Bank Guarantee' is not a 'debt' or an 'obligation in respect of a claim'. It is only on completion of the Project/execution of the contract in its totality, that the 'debt'/'liability' kicks in. An advance for a contract work which is still to be completed, there is no Time Value for Money. Therefore, we are of the considered view that the amount does not *belong to the 'Corporate Debtor'*. What does not belong to the 'Corporate Debtor' cannot be sought to be refunded back to the 'Corporate Debtor'. In the instant case, the 'Corporate Debtor' was unable to execute the work with the given advance and the 'Mobilisation Advance Bank Guarantee', which is generally issued at the commencement of the contract, viewed from any angle, cannot be said to be 'an Asset belonging to the Corporate Debtor'. Section 18(f) empowers the IRP to take 'control and custody of any asset over which the 'Corporate Debtor' has Ownership Rights'. The IRP/RP has no jurisdiction to take a third party asset, *which does not belong to the 'Corporate Debtor'*. For all these reasons, this Tribunal is of the earnest view that the amount involved in a 'Performance Bank Guarantee' and 'Mobilisation Advance Bank Guarantee' is not an 'Asset' of the 'Corporate Debtor'. Therefore, this Tribunal is of the considered opinion that undisputedly these two Bank Guarantees were issued to ensure 'Performance' of 'an obligation to construct 105 Residential

Quarters' and towards 'Security' for execution of the same, it is significant to mention that admittedly the 'Corporate Debtor' has vide letter dated 11/12/2018 expressed its inability to complete the works, and the Contract has been terminated by the Appellant on 27/08/2019, which was unchallenged.

22. Keeping in view Section 14(3)(b) read with Section 3(31) of the Code, we are of the considered view that a 'Security Interest' does not include 'Performance Bank Guarantee' and therefore is not covered under Section 14(1) and the Appellant is entitled to invoke its Performance Bank Guarantee in full. Having regard to the nature of the Guarantee, the relationship between the Appellant and the 'Corporate Debtor', the intent behind the issuing of the 'Mobilization Advance Bank Guarantee', we are of the considered view that it requires to be treated on an equal footing as that of a 'Performance Bank Guarantee'.

23. The decisions relied upon by the Adjudicating Authority namely '*Power Grid Corporation of India*' Vs. '*Jyoti Structures Ltd.*', passed by the Hon'ble Delhi High Court is dated 11/12/2017, and is clearly prior to the second Amendment of the Code. It is also relevant to note that the other decision relied upon by the Adjudicating Authority in '*Indian Overseas Bank*' dated 15/11/2017 and is also *prior* to the insertion of the second Amendment. Additionally, the Adjudicating Authority has also not discussed Section 3(31) of the Code.

24. The ratio of the Judgements of the Hon'ble Supreme Court in '*Ansal Engineering Projects Ltd.*' (*Supra*), '*SBI*' Vs. '*Mula Sahakari Sakhar Karkhana Ltd.*' (*Supra*) and '*Andhra Pradesh Pollution Control Board*' (*Supra*) with

reference to the Bank Guarantees being independent contracts and their invocation cannot be interfered with as long as the invocation is in the terms of the Bank Guarantee, is squarely applicable to the facts of this case.

25. We are also conscious of the fact that the Bank Guarantee stood invoked on 25/03/2019, whereas the Moratorium was imposed on 27/03/2019, which is two days *prior* to the date of imposition of the Moratorium. Factually, though the Bank released the amount on 28/03/2019, notwithstanding the provision for release of the Guarantee amount without a delay or demur as laid down by the Hon'ble Apex Court in '*UP Cooperative Federation Ltd.*' Vs. '*Singh Consultants and Engineers (P) Ltd.*', reported in (1988) 1 SCC 174, this Tribunal is of the considered view that for any deficiency/delay on behalf of the Bank, it cannot negatively impact the Appellant. It is also relevant to mention that the Resolution Professional in his Reply contended in para (d) that totally 17 Bank Guarantees were invoked aggregating to an amount of Rs.34,28,000/-, which is denied by the Appellants. It is observed from the record that invocation of only these two Bank Guarantees for an amount of Rs.15 Lakhs/- and Rs.19,28,000/- namely a 'Performance Bank Guarantee' and a 'Mobilisation Advance Bank Guarantee' is the subject matter of the Application I.A 2190/2020 filed before the Adjudicating Authority, which Order is in challenge before us.

26. Therefore, for all the foregoing reasons, we are of the considered view that the Adjudicating Authority ought not to have allowed the refund of the amounts covered under these two Bank Guarantees. Hence, this Appeal is

allowed and the Order of the Adjudicating Authority is set aside. No Order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Dr. Alok Srivastava]
Member (Technical)**

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

**New Delhi
06th May, 2022**
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