

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL
AT CHENNAI**

(APPELLATE JURISDICTION)

Company Appeal (AT) (CH) (INS.) No. 260 of 2023

(Filed under Section 61 of the Insolvency and Bankruptcy Code, 2016)

**(Arising out of the 'Impugned Order' dated 15.06.2023 in IA No. 1219 of
2020 in CP (IB) No. 529 / 7 / HDB / 2018, passed by the 'Adjudicating
Authority', (National Company Law Tribunal', Bench – I, Hyderabad)**

In the matter of:

Mr. Vijay Kumar Garg

**(IBBI / IPA – 002 / IP – N00359 /
2017 – 2018 /11060)**

Liquidator of

M/s. Lanco Vidarbha Thermal Power Ltd.

Plot No.4, Software Units Layout,

Hitech City, Madhapur,

Hyderabad – 500081, Telangana **Appellant / Petitioner**

v

**Power Grid Corporation
of India Limited**

B-9, Qutab Institutional Area

Katwaria Sarai,

New Delhi - 110016

..... **1st Respondent/1st Respondent**

IDBI Bank

Represented by its Branch Manager

Specialised Commercial Branch

D.No.5-9-89/1-2, Chapel Road,

P.B. No. 370,

Hyderabad – 500001

..... **2nd Respondent/2nd Respondent**

Punjab National Bank

Represented by its Branch Manager

Large Corporate Branch, Plot No. 83

U & I Building, Sector-29

City Center,

Gurgaon - 122002

..... **3rd Respondent/3rd Respondent**

UCO Bank

Represented by its Branch Manager
FCC 5, Parliament Street,
New Delhi - 110001

..... 4th Respondent/4th Respondent

Bank of Baroda (earlier Dena Bank)

Represented by its Branch Manager
Corporate Financial Services Branch
3rd and 4th Floor, 10/12, Horniman Circle,
Mumbai Samachar Marg,
Fort, Mumbai - 400001

..... 5th Respondent/5th Respondent

**Union Bank of India
(earlier Corporation Bank and
Andhra Bank both got merged
into Union Bank of India)**

having its branch offices both located
at Corporate Banking, Branch No.1,
Faiz Road, Jhandewalan,
New Delhi – 110005
and also at
M-35, Connaught Circus,
New Delhi – 110001
and both branches
Represented by respective
Branch Managers

..... 6th Respondent/6th Respondent

Punjab & Sind Bank

Represented by its Assistant Branch Manager
Large Corporate Branch
P-18/90, Connaught Circus,
New Delhi – 110001

..... 7th Respondent/7th Respondent

Present:

For Appellant : Mr. A. Abdul Hameed, Senior Advocate
For Ms. Anbarasi Rajendran

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

Justice M. Venugopal, Member (Judicial):

Background:

Comp. App (AT) (CH) (INS.) No. 260 of 2023:

Heard the Learned Counsel for the Appellant in Comp. App (AT) (CH) (INS.) No. 260 of 2023, at the 'Admission Stage' itself.

2. The 'Appellant / Petitioner', has preferred the instant Comp. App (AT) (CH) (INS.) No. 260 of 2023, as an 'Aggrieved Person', in respect of the 'impugned order', dated 15.06.2023 in IA No. 1219 / 2020 in CP (IB) No. 529 / 7 / HDB / 2018 (Filed by the 'Appellant / Petitioner', under Section 60 (5) read with Section 14 of the I & B Code, 2016 and Rule 11 of NCLT Rules, 2016), passed by the 'Adjudicating Authority' ('National Company Law Tribunal', Hyderabad Bench - I), in 'dismissing', the said 'Petition', without costs.

3. While passing the 'impugned order', dated 15.06.2023 in IA No. 1219 / 2020 in CP (IB) No. 529 / 7 / HDB / 2018 (Filed by the 'Appellant / Petitioner'), the 'Adjudicating Authority' ('National Company Law Tribunal', Hyderabad Bench - I), inter alia, at Paragraph Nos. 9 to 11, had observed the following:

9. *“In light of the Transmission Agreement dated 31.03.2016 entered into between Power Grid Corporation of India Ltd and M/s Lanco Vidarbha Thermal Power Ltd. (Annexure A-2, pages 87-97) and more particularly Clause-1 thereof, which reads:*

“The Bank Guarantee shall be encashed by Powergrid in case of adverse progress of work under the scope of ‘LVTPL’ assessed during Joint Coordination Meeting. However, the validity of Bank Guarantee shall be extended by ‘LVTPL’ as per the requirement to be indicated during Joint Coordination Meeting.”

We are of the view that adverse progress on the part of the Corporate Debtor in construction of transmission line is established and thus, respondent no.1 is entitled to encash the said Bank Guarantees. In case adverse progress on the part of the Corporate Debtor in construction of generating station as assessed during the Joint Coordination Meeting, the covenant of the said agreement also generally found that the covenant mandate of the said agreement in the event of adverse progress, the respondent has option to encash Bank Guarantee. During various Joint Coordination Meetings it was clearly held which is very much in the knowledge of the Corporate Debtor that there was an adverse progress in construction of generating station by the Corporate Debtor, which is very much in the knowledge of the Corporate Debtor itself. In light of the above agreement as well as various provisions of the I&B Code, 2016 as amended in 2018, we are of the view that the applicant herein could not provide a valid ground for invoking the letters issued by respondent no.1.

10. We are further of the view that respondent no.1, in the event of adverse progress encashment of Bank Guarantee is mandatory. We are also satisfied that the Bank Guarantees furnished by the Corporate Debtor are in the nature of Performance Bank Guarantees under the Transmission Agreement. Therefore, we are of the view that the applicant could not provide any sufficient cause to interfere with the invocation letters issued by respondent no.1 herein to respondents no.2, 3, 4, 5, 6 and 7 seeking to invoke the Bank Guarantees.

11. We further observe that the Corporate Debtor was also under liquidation wherein moratorium has no impact. We further observe that when liquidation order is passed against the Corporate Debtor, the submission that moratorium is in place cannot hold any ground at this point of time. We are of the view that the applicant herein could not offer sufficient reason to interfere with invocation of Bank Guarantee issued by respondent no.1.”

and consequently, 'Dismissed', the 'Application', without costs.

Appellant's Submissions:

4. Challenging the 'impugned order', dated 15.06.2023 in IA No. 1219 / 2020 in CP (IB) No. 529 / 7 / HDB / 2018 (Filed by the 'Appellant / Petitioner'), before the 'Adjudicating Authority' ('National Company Law Tribunal', Hyderabad Bench - I), the Learned Senior Counsel for the Appellant / Petitioner contends that the 'Adjudicating Authority' / 'Tribunal', should have appreciated that the 1st Respondent, never proceeded to implement its part of the obligation, for 'Construction of Transmission Lines', as agreed, under the 'Transmission Agreement', dated 31.03.2016, as the 'Bidding Process', for the 'Construction of the Transmission Lines', had neither commissioned nor the 1st Respondent, had made any 'Capital Investment' for the same. Moreover, the 1st Respondent, had already encashed 'Bank Guarantees' of Rs.30 Crores and want to unjustly enrich themselves, by another Rs.36 Crores, without making any investments themselves.

5. It is represented on behalf of the Appellant, that the 'Adjudicating Authority' / 'Tribunal', should have take note of the fact that 'CEA', itself had recorded in its 'Meeting', held on 04.12.2018 that there was 'no progress', in 'resolution' of the 'financial issue', by the 'Developer' of the

`Corporate Debtor', and as such, the `Bidding' of the Scheme, was put on hold, and that, `No Work', was started by the 1st Respondent'.

6. The Learned Counsel for the Appellant, takes a stand that the `Adjudicating Authority' / `Tribunal', should have appreciated the fact that the finding(s) of meetings of National Committee on `Transmission', clearly indicates that the implementation of the `Inter State Transmission System', strengthening in Chhatarpur area in Madhya Pradesh which was taken as a part of the Transmission Scheme `Connectivity System' for `Corporate Debtor', was put on hold, since the date of execution of the `Transmission Agreement' as `LITL', who was the `EPC Contractor' of the `Corporate Debtor', was facing `Financial' issues.

7. According to the Appellant, the `Adjudicating Authority' / `Tribunal', should have appreciated the fact that the Project of the `Corporate Debtor' was stalled due to the `Financial' issues of `LITL' (Developer of `Corporate Debtor', which later, went to `Corporate Insolvency Resolution Process and currently under `Liquidation'). Since the 1st Respondent, had not commenced its part of obligation of `Construction of Transmission Lines', nor made any `Capital Investment', it has `no right', to take benefit and enrich itself, at the cost of the `Corporate Debtor', on the ground of adverse progress.

8. The Learned Counsel for the Appellant, takes a stand that the 1st Respondent, had encashed 'Part of the Bank Guarantees', to the tune of Rs.29 Crores and enriched itself, at the cost of the 'Corporate Debtor', which is an 'ex-facie illegal and unreasonable' one.

9. The Learned Counsel for the Appellant, comes out with a plea that the 'Bank Guarantee', was issued on behalf of the 'Corporate Debtor', to compensate for the damages, sustained by 'PGCIL' for 'Loss', arising out of 'Non-performance of Obligation', by the 'Corporate Debtor'. In fact, in the absence of 'any Claim', for the loss, the question of damages, does not arise.

10. The Learned Counsel for the Appellant, brings to the notice of this 'Tribunal' that in any event, 'Computation of Loss and Damages', in terms of Section 72 and 73 of the Indian Contract Act, 1872, would arise, upon the same being determined by the 'Courts' and hence, 'Invocation of Bank Guarantee', at this stage, does not arise, as per 'Judgement of the Hon'ble Supreme Court of India', in 'Raman Foundary' case.

11. It is projected on the side of the Appellant that act of 'Recovery of Monies', by the 1st Respondent, will have direct impact on the 'Financial Health' of the 'Corporate Debtor', which is already under 'Liquidation'. Also that, the 'Maximisation of the Value of the Assets of the Corporate

Debtor', cannot be ignored nor it can be ignored, that the same should balance all the 'Stakeholders'.

12. The Learned Counsel for the Appellant, points out that the 1st Respondent, had never proceeded to implement its 'Part' of the 'Obligation' of 'Construction of Transmission Lines', as agreed under the 'Transmission Agreement', as the 'Bidding Process' for the Construction of the Transmission Lines', was never done and was kept in abeyance, as early as October 2017, when the 'LITL', who was 'Promoter', and 'EPC Contractor' of the 'Corporate Debtor', was admitted under Section 7 of the 'Code', and even request for 'Qualification', was not published for the 'Construction of Transmission Line', by the '1st Respondent', and these were not taken into account by the 'Adjudicating Authority / Tribunal', at the time of passing of the 'impugned order'.

13. At this juncture, a plea is raised on behalf of the Appellant, in the 37th Meeting of the 'Empowered Committee' on 'Transmission', that took place on 24.10.2017, of 'CEA – Power System Planning and Appraisal Division – Ministry of Power', the issue of connectivity system for Corporate Debtor was discussed and it was decided that the scheme connectivity system for Corporate Debtor be taken up for implementation only after resolution of financial issues and after ascertaining the progress

of the project, and this was not appreciated by the `Adjudicating Authority / Tribunal`, in a proper perspective.

Evaluation:

14. Before the `Adjudicating Authority / Tribunal, the `Appellant / Petitioner`, had preferred the IA No. 1219 / 2020 in CP (IB) No. 529 / 7 / HDB / 2018, against the 1st Respondent / Power Grid Corporation of India Limited and Ors., wherein he had sought the `Relief of Declaration`, that the following letters issued by the 1st Respondent, seeking to `recover` a Sum of Rs.36,32,00,000/-, towards the following `Bank Guarantees`, issued by the Respondent Nos. 2 to 7, as an `Arbitrary`, `Illegal`, one and to `quash` the same.

<i>Impugned Letters Ref and Date</i>	<i>BG No.</i>	<i>Amount Rs. In Cr.</i>
<i>C/CTU/CBG ENCASH/ IDBI / LVTPL Dt. 17.12.2020</i>	<i>1601331BGP00255 dated 26.05.2016</i>	<i>8.76</i>
<i>C/CTU/CBG ENCASH/ PNB / LVTPL Dt. 17.12.2020</i>	<i>46151LG000217 dated 28.02.2017</i>	<i>2.25</i>
<i>C/CTU/CBG ENCASH/ UCO Bank / LVTPL Dt. 17.12.2020</i>	<i>1945IGFIN002116 dated 08.08.2016</i>	<i>6.94</i>
<i>C/CTU/CBG ENCASH/ UCO Bank / LVTPL Dt. 17.12.2020</i>	<i>1945IGFIN00717 dated 07.04.2017</i>	<i>1.06</i>
<i>C/CTU/CBG ENCASH/ BANK OF BARODA / LVTPL Dt. 17.12.2020</i>	<i>116216IGPER0032 dated 24.05.2016</i>	<i>3.44</i>
<i>C/CTU/CBG ENCASH/ BANK OF BARODA / LVTPL Dt. 17.12.2020</i>	<i>116217IGPER0011 dated 10.02.2017</i>	<i>0.53</i>

<i>C/CTU/CBG ENCASH/ Corpn Bank / LVTPL Dt. 17.12.2020</i>	<i>2016/67 dated 25.06.2016</i>	<i>5.13</i>
<i>C/CTU/CBG ENCASH/ Corpn Bank / LVTPL Dt. 17.12.2020</i>	<i>2017 / 25 dated 18.02.2017</i>	<i>0.79</i>
<i>C/CTU/CBG ENCASH/ Andhra Bank / LVTPL Dt. 17.12.2020</i>	<i>008416IGPER0018 dated 27.05.2016</i>	<i>3.45</i>
<i>C/CTU/CBG ENCASH/ P&S Bank / LVTPL Dt. 17.12.2020</i>	<i>0717BG002417 dated 12.04.2017</i>	<i>0.53</i>
<i>C/CTU/CBG ENCASH/ P&S Bank / LVTPL Dt. 17.12.2020</i>	<i>0717BG007716 dated 20.07.2016</i>	<i>3.44</i>
<i>Total</i>		<i>36.32</i>

15. Also, the Appellant / Petitioner, had (during the Pendency of the Application), prayed for an issuance of necessary Orders / Directions to the Respondent Nos. 2 to 6 therein, not to 'Release the Amounts', under the 'Bank Guarantees', pursuant to the 'impugned' letters, issued as referred to Supra.

16. It is averred in IA No. 1219 / 2020 in CP (IB) No. 529 / 7 / HDB / 2018 (Filed by the Appellant / Petitioner) that the 'Appellant / Petitioner', agreed by the Letters dated 17.12.2020, issued by the 1st Respondent to Respondent Nos. 2 to 7, seeking to invoke the following Bank Guarantees and they are mentioned as under:

<i>Bank</i>	<i>Impugned Letters Ref and Date</i>	<i>BG No.</i>	<i>Amount Rs. In Cr.</i>
<i>IDBI Bank</i>	<i>C/CTU/CBG ENCASH/ IDBI / LVTPL Dt. 17.12.2020</i>	<i>1601331BGP00255 dated 26.05.2016</i>	<i>8.76</i>

<i>Punjab National Bank</i>	<i>C/CTU/CBG ENCASH/ PNB Bank / LVTPL Dt. 17.12.2020</i>	<i>46151LG000217 dated 28.02.2017</i>	<i>2.25</i>
<i>UCO Bank</i>	<i>C/CTU/CBG ENCASH/ UCO Bank / LVTPL Dt. 17.12.2020</i>	<i>1945IGFIN002116 dated 08.08.2016</i>	<i>6.94</i>
<i>UCO Bank</i>	<i>C/CTU/CBG ENCASH/ UCO Bank / LVTPL Dt. 17.12.2020</i>	<i>1945IGFIN00717 dated 07.04.2017</i>	<i>1.06</i>
<i>Bank of Baroda (e-Dena Bank)</i>	<i>C/CTU/CBG ENCASH/ BANK OF BARODA / LVTPL Dt. 17.12.2020</i>	<i>116216IGPER0032 dated 24.05.2016</i>	<i>3.44</i>
<i>Bank of Baroda (e-Dena Bank)</i>	<i>C/CTU/CBG ENCASH/ BANK OF BARODA / LVTPL Dt. 17.12.2020</i>	<i>116217IGPER0011 dated 10.02.2017</i>	<i>0.53</i>
<i>Union Bank of India (e-Corporation Bank)</i>	<i>C/CTU/CBG ENCASH/ Corp Bank / LVTPL Dt. 17.12.2020</i>	<i>2016/67 dated 25.06.2016</i>	<i>5.13</i>
<i>Union Bank of India (e-Corporation Bank)</i>	<i>C/CTU/CBG ENCASH/ Corp Bank / LVTPL Dt. 17.12.2020</i>	<i>2017 / 25 dated 18.02.2017</i>	<i>0.79</i>
<i>Union Bank of India (e-Andhra Bank)</i>	<i>C/CTU/CBG ENCASH/ Andhra Bank / LVTPL Dt. 17.12.2020</i>	<i>008416IGPER0018 dated 27.05.2016</i>	<i>3.45</i>
<i>Punjab & Sind Bank</i>	<i>C/CTU/CBG ENCASH/ P&S Bank / LVTPL Dt. 17.12.2020</i>	<i>0717BG002417 dated 12.04.2017</i>	<i>0.53</i>
<i>Punjab & Sind Bank</i>	<i>C/CTU/CBG ENCASH/ P&S Bank / LVTPL Dt. 17.12.2020</i>	<i>0717BG007716 dated 20.07.2016</i>	<i>3.44</i>
	<i>Total</i>		<i>36.32</i>

17. According to the Appellant / Petitioner, the 'Corporate Debtor', had decided to avail the 'Corporate Debtor', desired to avail 1320 MW connectivity to ISTS in accordance with Central Electricity Regulatory Commission (Grant of Connectivity, Long-Term Access and Medium-

Term Open Access in Inter-State Transmission and Regulated matters) Regulations, 2009 (Regulations) for transmission of 2*660 MW power from its thermal power plant at Wardha District Maharashtra.

18. It comes to be known that the dedicated 'Transmission Line', required for direct injection / drawal of power from premises of the Corporate Debtor TPS switchyard to the suitable premises of ISTS was required to be built, owned, operated and maintained by ISTS licensee Viz. Respondent No. 1's licensee.

19. It transpires that the 1st Respondent / Power Grid Corporation of India Limited, had granted 'Connectivity for Transmission of Power', subject to signing of 'Transmission Agreement', 'TSA' and 'Submission of Bank Guarantee', and 'Corporate Debtor', was required to share and pay all the applicable 'Transmission Charges' of the total 'Transmission System', from the date of connectivity or actual commissioning of the System whichever is later in accordance with sharing mechanism as determined by 'CERC'. Therefore, the 'Corporate Debtor', and the '1st Respondent', had entered into a 'Transmission Agreement', dated 31.03.2016, in and by which, as per Clause 1.0 (a) of the 'Transmission Agreement', the 'Corporate Debtor', was required to furnish a 'Bank Guarantee' for an amount of Rs.66 Crores as 'Security Mechanism', for

the 'Transmission System' to be built, owned and operated by ISTS Licensee (@ Rs.5 Lakhs MW).

20. That apart, the 'Corporate Debtor', had furnished 'Bank Guarantees', for a Sum of Rs.66 Crores, to and in favour of the 1st Respondent / Power Grid Corporation of India Ltd. & Ors., from different 'Banks', including from the 'Respondent Nos. 2 to 7'. As a matter of fact, the 'Bank Guarantee Details', issued by the 'Respondent Nos. 2 to 7, as required in terms of the 'Transmission Agreement', are run as under:

<i>Bank Guarantees</i>	<i>Date of Open</i>	<i>Rs. in Crores</i>	<i>Bank</i>
160133IBGP00255	26-05-2016	8,76,00,000	IDBI
4615ILG000217	28-02-2017	2,25,00,000	PNB
1945IGFIN002116	08-08-2016	6,94,00,000	UCO Bank
1945IGPER000717	07-04-2017	1,06,00,000	UCO Bank
116216IGPER0032	24-05-2016	3,44,00,000	Bank of Baroda (e-Dena Bank)
116217IGPER0011	10-02-2017	53,00,000	Bank of Baroda (e-Dena Bank)
2016/67	25-06-2016	5,13,00,000	Union Bank of India (e-Corporation Bank)
2017/25	18-02-2017	79,00,000	Union Bank of India (e-Corporation Bank)
008416IGPER0018	27-05-2016	3,45,00,000	Union Bank of India (e-Andhra Bank)
0717BG002417	12-04-2020	53,00,000	Punjab & Sind Bank
0717BG007716	20-07-2016	3,44,00,000	Punjab & Sind Bank
	<i>Total</i>	363,200,000	

21. To put it pinpointedly, as per Clause 1.0 (d) of the 'Transmission Agreement', the said 'Bank Guarantees', shall be encashed by the 1st Respondent, in case of 'adverse progress' of work, under the scope of 'Corporate Debtor' / 'LVTPL', assessed during the 'Joint Co-ordination Meeting'. Also that, it was categorically mentioned in the Terms & Conditions of the 'Bank Guarantees', that any delay / failure to construct the Generating Station / Dedicated Transmission System, or makes an exit or abandon its Project; PGCIL Viz. 1st Respondent, has right to collect the 'Transmission Charges' and or 'Damages', considering the total estimated 'Capital Investment', to be made by the '1st Respondent', for a total scheduled injection. Further, the said 'Bank Guarantees', clearly specify that they are being issued as security.

22. The plea of the Appellant is that , the 1st Respondent / Power Grid Corporation of India Limited, had not made any 'Capital Investment', till date, to enable it, to 'Claim', either for 'Invocation of Bank Guarantees', or claim for 'Transmission Charges', and or damages.

23. According to the Appellant / Petitioner, the 1st Respondent / Power Grid Corporation of India Limited, had never proceeded to implement its 'obligation part', relating to 'Construction of Transmission Lines', as agreed, in terms of the 'Transmission Agreement', and also 'Bidding

Process', for 'Construction of Transmission Lines', was not taken up and it was kept in abeyance, from October 2017.

24. In effect, the stand of the Appellant / Petitioner is that, the 'Invocation of Bank Guarantees', by the '1st Respondent / Power Grid Corporation of India Limited', is an 'invalid' and an 'illegal' one, and as such, the IA No. 1219 of 2020 in CP (IB) No. 529 / 7 / HDB / 2018, on the File of the NCLT, Bench – I, Hyderabad, is to be 'allowed', in furtherance of 'Substantial Cause of Justice'.

25. Per contra, the 1st Respondent / Power Grid Corporation of India Limited, in its 'Reply' (to IA No. 1219 of 2020 in main CP (IB) No. 529 / 7 / HDB / 2018), had averred that the IA No. 1219 of 2020 in CP (IB) No. 529 / 7 / HDB / 2018 (on the File of the NCLT, Bench-I, Hyderabad), is devoid of merits and that the 1st Respondent, had issued the 'impugned letters', seeking 'Invocation of the Bank Guarantees', in the background of the 'Commercial' and 'Statutory' relationship between the '1st Respondent / Power Grid Corporation of India Limited', and the 'Corporate Debtor'.

26. Furthermore, as per ingredients of Section 10 (3) of the Electricity Act, 2003, a 'Generating Company' (like the Corporate Debtor), is required to co-ordinate with the CTU for 'Transmission of Electricity', generated by it, through a 'Inter-State Transmission System'.

27. To be noted, that the 'Central Electricity Regulatory Commission' (Grant of Connectivity, Long Term Access and Medium Term Open Access in Inter-State Transmission and related matters) Regulations, 2009, had notified a detailed procedure under Regulation of the Connectivity Regulations. Continuing further, the 1st Respondent, was notified as 'Nodal Agency', to whom the 'Applications for Grant of Connectivity and Open Access to ISTS are required to be made'.

28. It comes to light that the 'Corporate Debtor' was desirous of putting up a Thermal Power Station with an installed capacity of 1320 (2 X 260) MW at District Wardha, State of Maharashtra, and applied to the '1st Respondent / Power Grid Corporation of India Limited', for grant of connectivity into the ISTS, to enable 'Evacuation of Power', to be generated from the Project, which was granted by the 1st Respondent to the 'Corporate Debtor', on its 'generation switchyard', with effect from December 2017 or availability of Transmission System for connectivity, whichever was later.

29. It is not in dispute that the 'Corporate Debtor', had executed a 'Transmission Agreement', dated 31.03.2016 with the 1st Respondent / Power Grid Corporation of India Limited, and in terms of Clause 1 of the said Agreement, the Corporate Debtor, had given 22 Nos. of Bank

Guarantees to the 1st Respondent / Power Grid Corporation of India Limited, aggregating in all, an amount of Rs.66,00,00,000/-, as a 'Security Mechanism', in terms of the 'Transmission Agreement'.

30. In reality, the 'Bank Guarantees', were to be 'valid for a period of six months', initially beyond the expected 'Date of Commissioning Schedule' of the 'Generating Units', and were liable to be 'Encashed', by the '1st Respondent', under the following circumstances:

"The bank guarantee shall be encashed by POWERGRID in case of adverse progress of work under the scope of "LVTPL" assessed during Joint Coordination Meeting. However, the validity of bank guarantee shall be extended by "LVTPL" as per the requirement to be indicated during Joint Co-ordination Meeting."

31. At this juncture, this 'Tribunal', usefully points out that the 1st Respondent / Power Grid Corporation of India Limited had averred (vide Paragraph 17 in its 'Reply' to IA No. 1219 of 2020 in CP (IB) No. 529 / 7 / HDB / 2018 of the Appellant's Appeal Paper Book – Vol. III at Page 520 – Diary No. 01639 dated 28.07.2023) that *".... the invocation of the bank guarantee is also not to be in contravention of any other explicit or implicit protection available to a generating station including those under Office Memorandum (OM) dated 8.3.2019, issued by the Government of India, Ministry of Power, which has an advisory of directory nature to all authorities, including Respondent No. 1 not to cancel the transmission connectivity of thermal power projects referred to CIRP under the Code"*

32. The clear cut stand of the 1st Respondent / Power Grid Corporation of India Limited is that the 'Bank Guarantees', given by the 'Corporate Debtor', were in the character of 'Performance Bank Guarantees', to secure the 'Performance of Transmission Agreement', by the 'Corporate Debtor', which is latently and patently evident from Clause 1.0 (d) of the 'Transmission Agreement', which required the 'encashment of BTs', in case of adverse progress of work, under the ambit of the 'Corporate Debtor'.

33. The version of the 1st Respondent, before the 'Adjudicating Authority / Tribunal', was that the 'Invocation of Bank Guarantees', in the case on hand, is on account of 'Adverse Progress of the Corporate Debtor', was a magnitude arising from the applicable 'Regulations' of the 'Central Commission', and added further, arising out of a resultant effect, arising from and out of the 'Transmission Agreement'.

34. The 1st Respondent / Power Grid Corporation of India Limited, took a stance before the 'Adjudicating Authority / Tribunal' that in Joint Co-ordination Committee Meetings, the progress of the Project and Transmission System was reviewed in a periodical manner at regular intervals, from 26.07.2016 till on 28.09.2020, where in 29th JCC Meeting

of Generation Projects connectivity / LTA in Western Region was granted.

35. It appears that the 1st Respondent / Power Grid Corporation of India Limited, because of the 'Adverse Progress of the Generation Project of the Corporate Debtor', had taken an 'appropriate action', as per 'Regulations of the Central Commission', and hence, according to the 1st Respondent / Power Grid Corporation of India Limited, no fault can be found fault with it, in 'Invoking' the 'Bank Guarantees'.

36. Coming to the aspect of Section 14 of the I & B Code, 2016, this 'Tribunal', points out that Section 14 of the 'Code', is not 'prohibiting actions against the Corporate Debtor's Guarantors', and indeed, the ambit of 'Moratorium', is confined, only to the 'Assets of the Corporate Debtor'.

37. In this connection, the 1st Respondent / Power Grid Corporation of India Limited, before the 'Adjudicating Authority / Tribunal', has placed reliance on Section 14 (3) of the I & B Code, 2016, which proceeds as under:

“14 (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.”

38. In so far as the stand taken by the Appellant / Petitioner in its IA No. 1219 / 2020 in main CP (IB) No. 529 / 7 / HDB / 2018, on the File of the 'Adjudicating Authority' ('National Company Law Tribunal', Bench – I, Hyderabad), to the effect that the 'Bank Guarantees', issued by the 'Corporate Debtor', are not in the nature of a 'Performance Bank Guarantee' ('PBG'), vide Paragraph 21 (iv) of IA No. 1219 / 2020 – vide Page 90 of the Appellant's Appeal Paper Book in Diary No. 01639 dated 28.07.2023), and hence, come within the ambit of 'Security Interest' in terms of Section 3 (31) of the 'Code', and is covered in terms of Section 14 (1) of the 'Code', this 'Tribunal', points out that Section 14 of the I & B Code, 2016, does not 'prohibit actions', against the 'Corporate Debtor's Guarantors', and the purview of 'Moratorium', is limited to the 'Assets of the Corporate Debtor' only and it is aptly pointed out that Section 14 (3) of the I & B Code, 2016, reads as under:

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

²[(a) such transactions, agreements or other arrangement 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.]”

and it is candidly crystalline clear that the 'Contract of Guarantee', is excluded from the ambit of 'Moratorium', in the considered opinion of this 'Tribunal'.

39. Undoubtedly, 'Performance of Bank Guarantee', is 'excluded' from the definition Section of 3 (31) of the I & B Code, 2016. Viewed in that perspective, this 'Tribunal', unhesitatingly holds in a cocksure manner that the 'Performance Bank Guarantee', does not fall under 'Moratorium', in terms of Section 14 of the I & B Code, 2016.

40. As far as the present case is concerned, in the various 'Joint Co-ordination Meetings', it was categorically observed that there was an 'Adverse Progress', 'as regards the Construction of Generating Station', by the 'Corporate Debtor', who was aware of the same.

41. The 'Transmission Agreement', dated 31.03.2016, entered into between the 1st Respondent / Power Grid Corporation of India Limited and M/s. Lanco Vidarbha Thermal Power Limited (vide Clause 1), unerringly points out that the 'Bank Guarantee', shall be 'encashed', by Powergrid, in case of 'Adverse Progress of Work', under the scope of 'LVTPL' assessed, during the 'Joint Co-ordination Meeting', etc. As such, it is clear that in the event of 'Adverse Progress', 'encashment' of 'Bank Guarantee', is a 'compulsory' one, as per the 'Transmission Agreement', entered into between the 'Parties'.

42. In the light of detailed foregoings, on a careful consideration of contentions advanced on behalf of the 'Appellant', bearing in mind of the well settled legal principle that the 'Bank Guarantee', is neither an 'Asset' nor a 'Liability' of a 'Company', considering the surrounding facts and circumstances of the case in an integral manner, this 'Tribunal', especially, keeping in mind, of a 'primordial fact', that the 'Invocation of Eleven Performance Bank Guarantees', furnished by the 'Corporate Debtor' to the '1st Respondent / Power Grid Corporation of India Limited', pursuant to the 'Transmission Agreement' dated 31.03.2016, the 'Connectivity Regulations' of the 'Central Commission' and the detailed 'Procedure', notified thereunder, coupled with the Letters dated 17.12.2020, issued by the '1st Respondent', to the 'Respondent Nos. 2 to 7', are just 'valid' and 'legally tenable', which cannot be found fault with, by the 'Appellant', as held by this 'Tribunal', in a cocksure and 'unequivocal manner'. Viewed in that perspective, the ultimate conclusion arrived at, by the 'Adjudicating Authority' ('National Company Law Tribunal', Bench – I, Hyderabad), in the 'impugned order', dated 15.06.2023, in IA No. 1219 / 2020 in CP (IB) No. 529 / 7 / HDB / 2018, in dismissing the said 'Interlocutory Application', is free from any 'legal infirmities'. Accordingly, the 'Appeal' sans merits and it fails.

Result:

In fine, the instant Comp. App (AT) (CH) (INS.) No. 260 of 2023 is Dismissed, ofcourse, for the reasons assigned by this 'Tribunal' in this 'Appeal'. No costs. The connected pending IA No. 819 of 2023 ('For Stay') is Closed.

[Justice M. Venugopal]
Member (Judicial)

[Dr. Alok Srivastava]
Member (Technical)

01 / 09 / 2023

SR / TM