

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1479 of 2023

[Arising out of order dated 30.10.2023 passed by the Adjudicating Authority
(National Company Law Tribunal, Principal Bench, New Delhi), in IA 2478
(PB)/2019 & IA/4393 (PB)/2023 in C.P. (IB) No.731(PB)/2018]

IN THE MATTER OF:

Mitsubishi Heavy Industries Limited

2-3 Marunouchi 3-Chome,
Chiyoda-Ku,
Tokyo -100-8332, Japan

...Appellant

Versus

1. M/s. Punj Lloyd Limited

Through Mr. Ashwini Mehra,
Liquidator Punj Lloyd
House 17-18, Nehru Place,
New Delhi-110019.

Also at:-

C/o Mr. Surendra Raj Gang,
GT Restructuring Services LLP,
L-41, Connaught Circus,
New Delhi – 110001.

...Respondent No. 1

2. State Bank of India

12th Floor, Jawahar Vyapar Bhawan,
STC Building, 1 Tolstoy Marg,
Janpath, New Delhi- 110001.

...Respondent No. 2

3. IDBI Bank Limited

Videocon Tower, Jhandewalan Extension,
New Delhi-110055.

...Respondent No. 3

4. United Bank of India

106-109, Ansal Tower
38, Nehru Place,
New Delhi- 110019.

...Respondent No. 4

5. Central Bank of India

Parliament Street
New Delhi-110001.

...Respondent No. 5

Present:

For Appellant : Mr. Krishnendu Datta Sr. Advocate with Ms. Anusha Ramesh, Ms. Bhargavi Vadeyar, Mr. Aparajito Sen and Ms. Alina Mathew, Advocates.

For Respondents : Mr. Sunil Fernandes Sr. Advocate with Mr. Parag Maini, Mr. Raghav Chadha and Ms. Diksha Dadu, Advocates for R-1.

Mr. Ankur Mittal and Ms. Yashika Sharma, Advocates for R-2.

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by the Appellant challenging the Order dated 30.10.2023 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Principal Bench, New Delhi) in I.A. No. 2478/2019 (re-numbered as I.A. No. 4393/PB/2023). The Adjudicating Authority by the Impugned Order has allowed the I.A. No. 2478/PB/2019 filed by the Resolution Professional ('RP'). Aggrieved by the Order, this Appeal has been filed.

2. Brief facts necessary to be noticed for deciding the Appeal are:

- i. In the year 2014, Indian Oil LNG Pvt. Ltd. (IOLPL) issued tender documentation for the construction of Liquefied Natural Gas ('LNG') Tanks in Ennore/Chennai. In 2015, Contract was entered between IOLPL and the Appellant.
- ii. On 15.09.2015, Appellant executed the formal Contract with Respondent No. 1 M/s. Punj Lloyd Ltd., sub-Contracting parts of the work relating to construction/installation of LNG Tanks in Ennore.

- iii. Under the General Conditions of the Contract, the Respondent No. 1 was obliged to provide an unconditional and irrevocable Bank Guarantee as security for punctual, proper and Contract performance of the obligations under the Contract. Performance Bank Guarantee of an amount of ₹47,72,34,933/- was issued by the State Bank of India in favour of the Appellant.
- iv. Under the Contract with Respondent No. 1 agreed date for Mechanical Completion was 23.03.2018. Appellant issued a Mechanical Completion Certificate with a Mechanical Completion date of 31.01.2019.
- v. On 08.03.2019, the Corporate Insolvency Resolution Process ('CIRP') was initiated against the Respondent No. 1 by the Adjudicating Authority.
- vi. On 26.08.2019, certain leakage was detected in the LNG Tanks.
- vii. Appellant communicated the Respondent No. 1 vide email dated 26.08.2019 and asked the Respondent No. 1 to inspect the site.
- viii. Respondent No. 1 send communication denying its obligation.
- ix. On 30.10.2019, Appellant invoked the Performance Bank Guarantee by issuing a letter due to persistent and fundamental breaches of the Contract, which included the failure to achieve Mechanical Completion within the agreed time and failure to inspect and repair a serious leakage in the LNG Tank, which arose during the Defects Liability Period.

- x. On 13.11.2019, the RP filed an Application before the Adjudicating Authority being CA No. 2478/2019, seeking direction to restrain Appellant from taking any steps towards encashment of Performance Bank Guarantee or the release of money against the Performance Bank Guarantee. An interim Order was passed by the Adjudicating Authority on same day staying encashment of the Performance Bank Guarantee on the ground of Section 14 of the Insolvency and Bankruptcy Code, 2016 (for short 'The IBC').
- xi. In the Order dated 13.11.2019, Adjudicating Authority noted that same legal issue is pending consideration by this Appellate Tribunal in '*C&C Construction Ltd., through Navneet Kumar Gupta (RP)*' Vs. '*Power Grid Corporation of India Ltd.*' in *Comp. App. (AT) (Ins.) No. 781/2019*.
- xii. An Application was also filed by the RP of the Respondent No. 1 against the Indian Oil Corporation Limited ('IOCL') in C.P. IB No.731 (PB) 2018 (i.e., the same Company Petition in which Impugned Order has been passed) praying for restraining the IOCL to encash the Bank Guarantees issued in favour of IOCL. The Adjudicating Authority by Order dated 31.05.2021, rejecting the Application filed by the RP.
- xiii. Appellate Tribunal on 26.07.2021 gave a final Judgment in '*C&C Construction Ltd., through Navneet Kumar Gupta (RP)*' (*Supra*) holding that Moratorium period under Section 14 of the IBC does not cover Performance Bank Guarantee.
- xiv. On 25.01.2022, Adjudicating Authority passed an Order on an Application filed by Erstwhile Resolution Professional ('ERP') seeking

stay on encashment of Bank Guarantee issued in favour of M/s. GAIL (India) Ltd. ('GAIL'), which Application was rejected permitting an encashment of the Bank Guarantee in favour of GAIL. While passing the said Order, the Adjudicating Authority has relied on the Order passed by this Tribunal dated 26.07.2021 passed in '*C&C Construction Ltd., through Navneet Kumar Gupta (RP)*' (*Supra*).

xv. By Order dated 27.05.2022, Adjudicating Authority directed for Liquidation of the Corporate Debtor as a going concern. Application I.A. 247/PB/2019 was heard and has been allowed by the Order impugned dated 30.10.2023 against which Order, this Appeal has been filed.

3. We have heard Learned Sr. Counsel Mr. Krishnendu Dutta appearing for the Appellant and Learned Sr. Counsel Mr. Sunil Fernandes appearing for the Respondent No. 1 and Mr. Ankur Mittal Learned Counsel appearing for Respondent No. 2.

4. Learned Counsel for the Appellant, Mr. Krishnendu Dutta challenging the Order impugned submits that the Performance Bank Guarantee given by the State Bank of India in favour of the Appellant was irrevocable and unconditional Performance Bank Guarantee. Respondent No. 1 had to complete the work and agreed date of Mechanical Completion is 23.03.2018, whereas, according to the Certificate issued Mechanical Completion date was 31.01.2019, i.e., the delay of 10 months. It is submitted that during the Defect Liability Period emails were sent to Respondent No. 1 on 26.08.2019 to inspect the leakage in the tank, which was refused by Respondent No. 1.

The Respondent No. 1 has breached the obligation under the Contract. The Appellant was constrained to invoke the Performance Bank Guarantee on 30.10.2019. The Application which was filed by the RP on 13.11.2019 for restraining the Appellant from taking steps towards encashment of the Performance Bank Guarantee was not maintainable. Adjudicating Authority lack jurisdiction to determine the legality of the invocation of the Performance Bank Guarantee and to adjudicate the underlying Contractual disputes between the Appellant and Respondent No. 1.

5. Without prejudice to the above submission, it is submitted that Performance Bank Guarantee is an independent Contract and it is settled law that Court should not interfere with its invocation except in exceptional circumstances, none of which circumstances exist in the present case. It is further submitted that since the Bank Guarantee is an unconditional and irrevocable Bank Guarantee, Appellant was not required to prove any losses at the time of invocation of Performance Bank Guarantee. Appellant has valid claims against the Respondent No. 1 on account of delay in Mechanical Completion and failure to cure defects which arose during the Defect Liability Period. It is submitted that the Defect Liability Period is 30 months from the date of Mechanical Completion or 24 months from the date of Mechanical Completion Certificate being issued. During the Defect Liability Period, the Respondent No. 1 was obligated to carry out such searches, test or trials as may be necessary to determine the cause of any defect. It is submitted that Order passed by the Adjudicating Authority, restraining the Appellant from encashing the Performance Bank Guarantee is without jurisdiction. Learned Counsel submits that Performance Bank Guarantee has been excluded from

Section 14 by an amendment made in the IBC by Act 26/2018, with effect from 06.06.2018.

6. Moratorium being not applicable with regard to Performance Bank Guarantee the Appellant was fully entitled to invoke the Performance Bank Guarantee, even after commencement of the insolvency against the Corporate Debtor on 08.03.2019. It is submitted that Adjudicating Authority itself has rejected Application filed by the RP in the same CIRP against the invocation of Guarantee by IOCL and GAIL, which Applications filed by the RP restraining the invocation of Bank Guarantee was dismissed, whereas Adjudicating Authority in the Impugned Order has allowed the Application filed by the RP in case of the Appellant. It is further submitted that the Adjudicating Authority noticed that issue is pending consideration before this Tribunal in '*C&C Construction Ltd. through Navneet Kumar Gupta (RP)*' (*Supra*), which Appeal was decided on 26.07.2021 holding that Moratorium period under Section 14 does not cover Performance Bank Guarantee, hence the Application filed by the RP was liable to be rejected.

7. Learned Counsel for the Appellant in support of his submissions has placed reliance on various Judgments of the Hon'ble Supreme Court and this Tribunal. We shall refer to it by considering the submission in detail.

8. Learned Sr. Counsel Mr. Sunil Fernandes appearing for the Respondent submits that the Adjudicating Authority has ample jurisdiction to adjudicate the Application filed by the RP being I.A. No. 2478/2019. It is submitted that the Adjudicating Authority has considered the similar Application filed by the RP with regard to pertaining the Bank Guarantee and passed Orders, deciding

the issues pertaining to Bank Guarantee of IOCL, GAIL, and Triveni-Mersens, hence it is now open for the Appellant to contend that Adjudicating Authority has no jurisdiction to examine the issue of invocation of Performance Bank Guarantee. Orders passed by the Adjudicating Authority in IOCL, GAIL and PLL have not been interfered with by Appellate Tribunal. Learned Counsel submitted Order dated 18.02.2022, in Triveni-Mersens is fully applicable in the facts of the present case. In case of Triveni-Mersens the Adjudicating Authority held that once MCC is issued then Bank Guarantee has to be discharged. It is submitted that even if Bank Guarantee is described as unconditional and irrevocable, it does not mean that Appellant can invoke it arbitrarily or whimsically or de hors the Contractual provisions applicable to Bank Guarantee invocation. In event, the Appellant had any claim within the Defect Liability Period such claim ought to be quantified and informed to the Corporate Debtor with sufficient material. Appellant has failed to quantify the claim till date. It is further submitted that as per Clause 7.1.2, it is clear that upon issuance of Mechanical Completion Certificate for any part or all part of the works, Contractor shall cease to be responsible for that part or all of the work from the date of the Mechanical Completion Certificate except for any damage to the works caused by or as a result of the Corporate Debtor's continued activities. In the present case, MCC was achieved on 03.09.2018, hence the Corporate Debtor could not be held responsible for purported leakage. The invocation of Bank Guarantee has direct impact on asset stripping of the Corporate Debtor. Argument of the Appellant that Bank Guarantee is not Asset of the Corporate Debtor deserves to be rejected. State Bank of India extended the Bank Guarantee based on underlying collateral

belonging to the Corporate Debtor. If the Bank Guarantee is wrongly invoked, State Bank of India would claim the same from the Corporate Debtor as a Creditor. Therefore, the ultimate loss and prejudice is that of the Corporate Debtor. It is submitted that the Adjudicating Authority has jurisdiction to entertain and examine all aspects pertaining to Bank Guarantee invocation including its factual aspects. It is submitted due to the special equities in favour of the Corporate Debtor the Bank Guarantee could not have been invoked, by the invocation of the Bank Guarantee, Corporate Debtor shall suffer irretrievable injury.

9. We have considered the submission of the Counsel for the parties and perused the record.

10. As noticed above, the Contract between the Parties dated 15.09.2015, provided an unconditional and irrevocable Bank Guarantee to the Appellant. Appellant has referred to Clause 6.4.1.4.1 of the Contract, which is part of General Condition. Clause 6.4.1.4 has been extracted by the Adjudicating Authority in Paragraph 31 of the Judgment, which is as follows:

*“31. Before examining this issue, we would like to cite relevant clauses of the agreement which took place between the parties. **Clause 6.4.1.4 of General Conditions- Contents (GCC) is as follows:***

6.4.1.4 PERFORMANCE BANK GUARANTEE

6.4.1.4.1 Within thirty (30) calendar days of the Effective Date of the Contract and before any payment whatsoever, the Contractor shall provide the Employer, at the address given in the Form of Agreement, with security for the Contractor's punctual, proper and correct performance of the Contractor's obligations under the Contract by means of an unconditional and Irrevocable bank guarantee. The bank guarantee shall be issued by a scheduled Indian bank acceptable to the Employer and shall be in the English language and

shall use the words used in Attachment 7 to these General Conditions. The amount of the bank guarantee shall be equal to ten per cent (10%) of the Contract Price and shall be in the same currency as the Contract Price. Such Bank Guarantee shall be valid until thirty (30) months of Defect Liability Period plus three (3) months after. Contractor shall bear the cost of providing the bank guarantee for such period.

6.4.1.4.2 Upon successful completion of the first (1) year of the Defect Liability Period, the Contractor shall be permitted to reduce the value of said Bank Guarantee(s) to half (1/ 2) with validity for balance period of defect liability period plus three (3) months i.e. for a further period of eighteen (18) + three (3) months, for which the Employer shall issue an unconditional notification to the issuing bank of Contractor authorizing reduction in value of said bank guarantee to a sum equivalent to five percent (5%) of the Contract Price.

6.4.1.4.3 Bank Guarantee as maintained by Contractor under the provisions of Clauses 6.4.1.4.1 and 6.4.1.4.2 hereof shall not be invoked by Employer merely for the sake of its similar Bank Guarantee(s) being Invoked by Owner under the Main Contract unless such invocation is caused due to the reasons solely attributable to the Contractor.”

11. Certificate of Mechanical Completion of Tank T101-T01 & T101-T02 was given on 30.03.2019 with date 31.01.2019. As per Contract between the Parties, Mechanical Completion was to be achieved on 23.03.2018.

12. Appellant claims to have issued email to the Respondent No. 1 on 26.08.2019, informing about the existence of leakage in the LNG Tanks. The email sent by the Appellant was replied that Contractor has completed and closed all the punch point, including testing of all tanks. It was after some correspondence between the Parties, the Appellant has issued invocation Letter dated 30.10.2019 to the State Bank of India claiming for invocation of Performance Bank Guarantee for an amount of ₹47,72,34,933/-. It was after issuance of Letter dated 30.10.2019, Respondent No. 1 filed an I.A. before the

Adjudicating Authority being I.A. 2478/2019. In the I.A., RP of the Respondent No. 1 prayed for following reliefs:

- “(a) Allow the present application; and*
- (b) Restrain the Respondent No. 2 from taking any steps towards encashment of Performance Bank Guarantees no. 0480314BG0000756;*
- (c) Restrain the Respondent Nos. 3, 4 and 5 from encashing the Counter Guarantees as described in para 2 above; and*
- (d) Quash the invocation letter issued by the Respondent No. 1 dated 30.10.2019 to the Respondent No. 2; and*
- (e) Quash the invocation letters dated 07.11.2019 issued by the Respondent No. 2 to the Respondent Nos. 3, 4 & 5 respectively;*
- (f) Restrain Respondent No. 2 to 5 from releasing any money against the Performance Bank Guarantee and Counter Guarantees to Respondent No. 1.*
- (g) Pass such further and other directions as this Hon’ble Adjudicating Authority may deem fit and expedient.”*

13. Adjudicating Authority on the I.A. after hearing the parties passed an Interim Order on the same date, restraining the encashing of Performance Bank Guarantee.

14. We have perused the Order dated 30.10.2023 passed by the Adjudicating Authority. Adjudicating Authority in the Order has noticed the respective submissions of the Parties and also referred to the Orders passed by the Adjudicating Authority in IAs filed by the RP of M/s. Punj Lloyd Ltd. against the GAIL India Ltd, against IOCL and against the Order passed in the Application and in Application filed in Mersens USA case. Adjudicating Authority has also referred to the various Judgments of the Hon’ble Supreme Court which has been relied by the Counsel for the Parties. The entire

discussion in the Judgment is contained in Paragraphs 43 to 45 prior to which, Adjudicating Authority has only noted respective submissions and Clauses of the Agreement between the parties. Adjudicating Authority further has also in Paragraph 33 has come to the opinion that Performance Bank Guarantee does not give the impression of it being unconditional. It is useful to extract Paragraph 33 of the Judgment which is as follows:

*“33. It is pertinent to mention the clause of the Contract pertaining to Performance Bank Guarantee **(Clause 6.4.1.4 @page 114 of this application (extracted supra) which forms the part of General Conditions of Contract (GCC) entered upon between parties.***

“Within thirty (30) calendar days of the Effective Date of the Contract and before any payment whatsoever, the Contractor shall provide the Employer, at the address given in the Form of Agreement, with security for the Contractor's punctual, proper and correct performance of the Contractor's obligations under the Contract by means of an unconditional and Irrevocable bank guarantee.”

On one hand, the term used is Performance Bank Guarantee and the object behind giving this performance bank guarantee is for the Contractor's punctual, proper and correct performance, and on the other hand, the words unconditional and irrevocable bank guaranatee' has been used by Respondent No. 1. Performance Bank Guarantee is to guarantee a certain level of performance of the product'. The indispensable feature of the performance bank guarantee is that it can be invoked if the Contract remained unperformed which is not in the present case more so after the MCC, issued though belatedly. Reading of the clause of performance bank guarantee does not gives the impression of it being unconditional and with no reason.”

15. Adjudicating Authority has also referred to Clause 6.4.1.4.3 in Paragraph 34, which is as follows:

“34. On perusal of the Clause 6.4.1.4.3 (supra), there is a prohibition on the power of invocation of the bank guarantee by the Employer (in this case, Mitsubishi) on the Contractor (Punj Lloyd) merely for the sake of its similar Bank Guarantee(s) being invoked by the Owner (IOCL) under the Main Contract unless such invocation is caused due to the reasons solely attributable to the Contractor (in this case Punj Lloyd, the Applicant). It is not the case of Respondent No. 1 that IOCL has invoked the Bank Guarantee on Mitsubishi which is due to the reason solely attributable to the Applicant / Contractor/ CD.”

16. The basis of Judgment of the Adjudicating Authority is that Performance Bank Guarantee is not unconditional and sufficient ground has not made out by the Appellant to prove the fault on the part of Corporate Debtor, hence the Guarantee could not be invoked.

17. The issue as to invocation of Performance Bank Guarantee during the period of Moratorium is now well settled. It is useful to refer to definition of Section 3(31) which define “Security Interest”. The proviso of Section 3(31) makes it clear that “Security Interest” shall not include Performance Bank Guarantee. Section 3(31) is as follows:

“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;”

18. Section 14(3) was amended by Act 26/2018 with effect from 06.06.2018. Section 14(3) clearly excluded security in a Contract of

Guarantee to Corporate Debtor from the Application of Section 14(1). Section 14(3) provides as follows:

“14. Moratorium

(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.”

19. We may refer to the Judgment of the Hon’ble Supreme Court in the matter of **‘State Bank of India’ Vs. ‘V. Ramakrishnan & Anr.’** reported in **(2018) 17 SCC 394**, where Hon’ble Supreme Court has noticed the amendment made in Section 14(3) and has also noted the Report of the Insolvency Law Committee dated 26.03.2018 in consequence of which amendments were made in Section 14(3). The Committee in its Report has opined that Assets of the surety are separate from those of the Corporate Debtor and proceeding against the Corporate Debtor may not be seriously impacted by the actions against Assets of third parties like sureties. In Paragraphs 31 & 33, following was laid down:

“31. *The Insolvency Law Committee, appointed by the Ministry of Corporate Affairs, by its Report dated 26-3-2018, made certain key recommendations, one of which was:*

“(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;”

(emphasis supplied)

33. *The Report of the said Committee makes it clear that the object of the amendment was to clarify and set at rest what the Committee thought was an overbroad interpretation of Section 14. That such clarificatory amendment is retrospective in nature, would be clear from the following judgments:*

.....”

20. Thus, it is well settled that Section 14 in no manner impact the right of the Appellant to invoke the Bank Guarantee during pendency of the Moratorium and in the present case, it was during currency of the Moratorium 30.10.2019, the Guarantee was invoked. We have noted the observation made by the Adjudicating Authority in Paragraph 33 that reading of Clauses of Performance Bank Guarantee does not give the impression of it being unconditional.

21. We have already referred to the Bank Guarantee which was issued by the State Bank of India in favour of Appellant. It is useful to extract the terms of Guarantee as contained in the Letter of Guarantee as follows:

“.....This letter of guarantee is issued in the following terms:

1. The Bank unconditionally and irrevocable guarantees, as a primary obligation and not as a surety, to pay to MHI on its first written demand, without any right of set off, counter claim or dispute whatsoever by the Bank or the Contractor or any other party, the amount that MHI may from time to time claim not exceeding the maximum aggregate amount of INR Forty Seven crores seventy two lakhs thirty four thousand nine hundred thirty three (INR 47,72,34,933)

2. No change in the work to be executed under the Contract, shall release the Bank from any liability under this letter of guarantee unless notified otherwise.

3. This letter of guarantee shall be maintained in the full maximum aggregate amount from the date of issuance until the earliest of the following (hereinafter called the “expiry date”):

(a) The Bank has paid to MHI the maximum aggregate amount for which it is liable hereunder; or

(b) By sixty (60) months and fifteen (15) days from the Effective Date of the Contract i.e. 23-August-2020.

4. Upon successful completion of the first (1st) year of the Defect Liability Period, the Bank shall be permitted to reduce the value of this Bank Guarantee(s) to half (1/2) with validity for balance period of defect liability period plus three (3) months i.e. for a further period of eighteen (18) + three (3) months, for which the Employer shall issue an unconditional notification to the issuing bank of Contractor authorizing reduction in value of this bank guarantee to a sum equivalent to five percent (5%) of the Contract Price.

At the expiry date i.e. upto 23.08.2020, the validity of this letter of guarantee shall expire, whether or not it is returned to the Bank for cancellation, and all liability of the Bank hereunder, shall expire except in respect of written demands received by the Bank from MHI prior to the expiry date. The Bank shall have no liability to MHI in respect of demands received from MHI after the expiry date.

MHI shall not assign or transfer this letter of guarantee without the prior written consent of the Bank.

This letter of guarantee shall be governed by and interpreted in accordance with the law of Republic of India.....”

22. The observation of the Adjudicating Authority that Guarantee does not appear to be unconditional is wholly erroneous and contrary to the terms of the Guarantee. In Clause (1) of the terms it is clearly stated “the Bank, unconditional and irrevocable guarantees”.

23. The law of invocation of Bank Guarantee is well settled by the Hon’ble Supreme Court and relevant Judgments were relied by the Appellant before the Adjudicating Authority. We may refer to the Judgment of the Hon’ble Supreme Court in the matter of **‘Himadri Chemical Industries Ltd.’ Vs. ‘Coal Tar Refining Co.’** reported in **(2007) 8 SCC 110**. In para 14 of the

Judgment principles for grant or refusal to grant injunction to restrain enforcement of Bank Guarantee has been noticed, which are as follows:

“14. *From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:*

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the Contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate Contract and is absolute in nature, the existence of any dispute between the parties to the Contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.”

24. Another Judgment which was relied before the Adjudicating Authority was Judgment of the Hon’ble Supreme Court in the matter of **‘Standard Chartered Bank’ Vs. ‘Heavy Engineering Corporation Limited & Anr.’**

reported in **(2020) 13 SCC 574**. The Hon'ble Supreme Court in the above case has revisited the precedents pertaining to invocation of Bank Guarantee and it concluded that the Bank Guarantees is an independent Contract between Bank and the Bank beneficiary and the Bank is always obliged to honour its Guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the Bank has given the Guarantee is immaterial and is of no consequence. The Hon'ble Supreme Court however, noticed the exception to the rule i.e., when there is a clear case of fraud irretrievable injustice or special equities. In Paragraphs 19 to 23, following was laid down:

“19. The law relating to invocation of bank guarantees with the consistent line of precedents of this Court is well settled and a three-Judge Bench of this Court in Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd. [Ansal Engg. Projects Ltd. v. Tehri Hydro Development Corpn. Ltd., (1996) 5 SCC 450] held thus: (SCC p. 454, paras 4-5)

“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. Unless fraud or special equity exists, is pleaded and prima facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the Contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking

transactions unhedged by pending disputes between the beneficiary and the Contractor.

5. ... 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.”

(emphasis supplied)

20. *A bank guarantee constitutes an independent Contract. In Hindustan Construction Co. Ltd. v. State of Bihar [Hindustan Construction Co. Ltd. v. State of Bihar, (1999) 8 SCC 436], a two-Judge Bench of this Court formulated the condition upon which the invocation of the bank guarantee depends in the following terms: (SCC p. 442, para 9)*

“9. What is important, therefore, is that the bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection and irrespective of any dispute that might have cropped up or might have been pending between the beneficiary under the bank guarantee or the person on whose behalf the guarantee was furnished. The terms of the bank guarantee are, therefore, extremely material. Since the bank guarantee represents an independent Contract between the bank and the beneficiary, both the parties would be bound by the terms thereof. The invocation, therefore, will have to be in accordance with the terms of the bank guarantee, or else, the invocation itself would be bad.”

21. *The same principle was followed in SBI v. Mula Sahakari Sakhar Karkhana Ltd. [SBI v. Mula Sahakari Sakhar Karkhana Ltd., (2006) 6 SCC 293] wherein a two-Judge Bench held thus: (SCC p. 301, paras 33-34)*

“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.”

22. Taking note of the exposition of law on the subject in *Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.* [*Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*, (2007) 8 SCC 110] , a two-Judge Bench of this Court in *Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd.* [*Gujarat Maritime Board v. Larsen & Toubro Infrastructure Development Projects Ltd.*, (2016) 10 SCC 46 : (2017) 1 SCC (Civ) 458] has laid down the principles for grant or refusal for invocation of bank guarantee or a letter of credit. The relevant paragraph is as under: (*Himadri Chemicals Industries Ltd. case* [*Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.*, (2007) 8 SCC 110], SCC pp. 117-18, para 14)

“14. From the discussions made hereinabove relating to the principles for grant or refusal to grant of injunction to restrain enforcement of a bank guarantee or a letter of credit, we find that the following principles should be noted in the matter of injunction to restrain the encashment of a bank guarantee or a letter of credit:

(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the Contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate Contract and is absolute in nature, the existence of any dispute between the parties to the Contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned.”

23. *The settled position in law that emerges from the precedents of this Court is that the bank guarantee is an independent Contract between bank and the beneficiary and the bank is always obliged to honour its guarantee as long as it is an unconditional and irrevocable one. The dispute between the beneficiary and the party at whose instance the bank has given the guarantee is immaterial and is of no consequence. There are, however, exceptions to this rule when there is a clear case of fraud, irretrievable injustice or special equities. The Court ordinarily should not interfere with the invocation or encashment of the bank guarantee so long as the invocation is in terms of the bank guarantee.*

25. Learned Counsel for the Respondent during the submission is relying on exception to invocation of the Bank Guarantee and submits that in the case where there is an irretrievable injury or special equities, invocation of Bank Guarantee can be injuncted and in the present case has rightly been injuncted by the Adjudicating Authority. We have noticed above that Adjudicating Authority has not allowed the Application filed by the RP on the exceptions as noted by the Hon’ble Supreme Court in the Judgment of the ‘**Standard Chartered Bank**’ (**Supra**) rather it went to observe that Appellant failed to prove fault on behalf of the Corporate Debtor nor quantifying its claim against the Corporate Debtor. We however to satisfy ourselves also proceeded to examine the contention of the Learned Counsel for the Respondent based on exception to invocation of Bank Guarantee as laid down by the Hon’ble Supreme Court in ‘**Standard Chartered Bank**’ (**Supra**). The submission for

irretrievable injury and special equity is based on submission of the Respondent that Liquidation Process has commenced and in event the Bank Guarantee is invoked, the State Bank of India shall become a Creditor of the Corporate Debtor which shall affect the Stakeholders claim in the CIRP of the Corporate Debtor.

26. Learned Counsel for the Appellant has relied on the Judgment of the Hon'ble Supreme Court in the matter of '**UP State Sugar Corporation' Vs. 'Sumac International Ltd.'**' reported in **(1995) 5 SCC 568**. Above was a case where a Bank Guarantee was required to be furnished by the Contractor to the '**UP State Sugar Corporation' (Supra)**, Bank Guarantee was furnished Contract having not been carried within the time envisaged under the Contract, the '**UP State Sugar Corporation' (Supra)** invoke three Bank Guarantees in respect of advance payments after giving credit to the Respondent for material. Petition was filed under the Arbitration Act. In the above case, one of the submissions raised on behalf of the Contractors was that of irretrievable injury. In Paragraphs 11 & 12 following was held:

“11. These bank guarantees which are irrevocable in nature, in terms, provide that they are payable by the guarantor to the appellant on demand without demur. They further provide that the appellant shall be the sole judge of whether and to what extent the amount has become recoverable from the respondent or whether the respondent has committed any breach of the terms and conditions of the agreement. The bank guarantees further provide that the right of the purchaser to recover from the guarantor any amount shall not be affected or suspended by reason of any disputes that may have been raised by the respondent with regard to its liability or on the ground that proceedings are pending before any Tribunal, Arbitrator or Court with regard to such dispute. The guarantor shall immediately pay the guaranteed amount to the appellant-purchasers on demand.

12. *The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country. The two grounds are not necessarily connected, though both may coexist in some cases. In the case of U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174] which was the case of a works Contract where the performance guarantee given under the Contract was sought to be invoked, this Court, after referring extensively to English and Indian cases on the subject, said that the guarantee must be honoured in accordance with its terms. The bank which gives the guarantee is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his Contractual obligation or not, nor with the question whether the supplier is in default or not. The bank must pay according to the tenor of its guarantee on demand without proof or condition. There are only two exceptions to this rule. The first exception is a case when there is a clear fraud of which the bank has notice. The fraud must be of an egregious nature such as to vitiate the entire underlying transaction. Explaining the kind of fraud that may absolve a bank from honouring its guarantee, this Court in the above*

case quoted with approval the observations of Sir John Donaldson, M.R. in *Bolivinter Oil SA v. Chase Manhattan Bank* [(1984) 1 All ER 351] (All ER at p. 352): (at SCC p. 197)

“The wholly exceptional case where an injunction may be granted is where it is proved that the bank knows that any demand for payment already made or which may thereafter be made will clearly be fraudulent. But the evidence must be clear both as to the fact of fraud and as to the bank's knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it charged.”

This Court set aside an injunction granted by the High Court to restrain the realisation of the bank guarantee.”

27. It was submitted before the Hon’ble Supreme Court that the Company is a sick Company, hence it will suffer irretrievable injury which argument was considered and rejected. In Paragraph 17 of the Judgment following was held:

“17. Before us, however, in the course of argument, the learned advocate for the respondent urged for the first time that in this case there would be irretrievable injustice to the respondent if the bank guarantees are allowed to be realised because the appellant is a sick industrial company in respect of which a reference is pending before the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985. The respondent contends that even if it succeeds before the Arbitrator it will not be able to realise its claim from the appellant. The mere fact that a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 is pending before the Board, is, in our view, not sufficient to bring the case in the ambit of the “irretrievable injustice” exception. Under the scheme of the said Act the Board is required to make such inquiry as it may deem fit for determining whether any industrial company has become a sick industrial company. Under Section 16(4) where the Board deems it fit to make an inquiry or to

cause an inquiry to be made in this connection, it may appoint one or more persons to be special directors for safeguarding the financial and other interests of the company or in the public interest. Under Section 17 after making an inquiry, if the Board is satisfied that a company has become a sick industrial company, the Board may then decide, by an order in writing, whether it is practicable for company to make its net worth exceed the accumulated losses within a reasonable time. If this is practicable, then the Board shall give such company the opportunity to make its net worth exceed the accumulated losses. Under sub-section (3) of Section 17 if the Board decides that this is not practicable within a reasonable time, it may adopt measures specified in Section 18 and provide for a scheme for appropriate measures in relation to that company. There can, therefore, be no presumption that the company will, in no circumstance, be able to discharge its obligations.”

28. Similarly, in the matter of **‘Maharashtra State Electricity Board Bombay’ Vs. ‘Official Liquidator, High Court, Ernakulam & Anr.’** reported in **(1982) 3 SCC 358**. Hon’ble Supreme Court held that the fact that the Company has gone into Liquidation could not have any effect on the liability of Bank i.e., Guarantor. In Paragraph 7, following was held:

“7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Indian Contract Act, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the Contract. A surety is no doubt

discharged under Section 134 of the Indian Contract Act by any Contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see *Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath* [AIR 1940 Bom 247 : ILR 1940 Bom 387 : 42 Bom LR 451] ; see also *In re Fitzgeorge Ex parte Robson* [(1905) 1 KB 462 : 74 LJ KB 322 : 90 LT 206]). In view of the unequivocal language of the letter of guarantee, no reliance can be placed by the Company in liquidation on the decision of this Court in *Punjab National Bank Limited v. Bikram Cotton Mills* [(1970) 1 SCC 60 : AIR 1970 SC 1973 : (1970) 2 SCR 462] in which the surety's liability was limited to the 'ultimate balance' found due from the principal debtor and the said balance had not been ascertained before the institution of the suit. The facts of this case are distinguishable from the facts in the case before us. As mentioned earlier the liability of the Bank to pay the amount as per the letter of guarantee did not depend upon prior proof of any default on the part of the Company in liquidation. Whether the whole of Rs 50,000 should be demanded or any lesser sum should be demanded from the Bank was entirely within the choice of the Electricity Board. The Bank has, therefore, to pay the amount due under the letter of guarantee given by it to the Electricity Board. On such payment it is open to the Bank to have recourse to the securities given by the Company in liquidation for the purpose of the issue of the letter of guarantee. The Electricity Board is not concerned with what the Bank does in order to reimburse itself after making payment of the amount guaranteed by it. It is the responsibility of the Bank to deal with the securities held by it in accordance with law. It was not, however, open to the Company Judge to make any order under the Companies Act prohibiting the Electricity Board from realising the amount guaranteed by the Bank as this had nothing to do with the assets of the Company in liquidation. The order of the Company Judge and the judgment of the Division Bench in appeal are, therefore, liable to be set aside and they are accordingly set aside."

29. Thus, the above Judgment clearly dispel the submission of the Counsel for the Respondent that injunction could have been issued on the exceptions of irretrievable injury and special equity as laid down by the Hon'ble Supreme Court in '**Standard Chartered Bank' (Supra)**. Now coming to the findings, we have noticed above that the Adjudicating Authority for allowing the Application gave the reason that Appellant failed to prove default of Contract by the Respondent. As per the law laid down by the Hon'ble Supreme Court, any dispute raised by the Contractor against the invocation of the Bank Guarantee was not to be looked into when the Bank Guarantee is unconditional and irrevocable. But to satisfy ourselves, we have looked into the above aspects also. There is no dispute between the parties that Mechanical Completion Certificate, the date for Mechanical Completion as per the Contract was 23.08.2018 and Certificate was issued as specifying the date of Mechanical Completion as 31.01.2019. Adjudicating Authority itself noticed the aforesaid dates in Paragraph 42 of the Judgment and has observed that it is delayed for certain period. When the Contractor does not complete the Contract within the period specified, it cannot be said that Contractor has complied the terms and conditions of the Contract. In the letter invoking the Bank Guarantee, it was clearly stated by the Appellant that Contractor has not perform his obligation in accordance with the Contract was advised of such failure and did not cure the failure within the time period allowed for in the Contract. When it is an admitted fact that Contractor did not complete the Contract as per the Mechanical Completion Certificate it is not open to hold that there is no default on the part of the Contractor. Details regarding correspondence between the parties regarding the leakage of Tank

is already on the record. Defect liability period is admittedly 24 months from the date of issuance of Mechanical Completion Certificate. Mechanical Completion Certificate was issued on 30.03.2019, Bank Guarantee itself was to be kept alive till August 2020 when the Appellant repeatedly informed the Corporate Debtor to inspect and remedy the defects. Refusal of Respondent No. 1 to inspect and remedy the defect cannot lead to finding that there was no fault on the part of the Corporate Debtor, nor any such fault.

30. In view of the forgoing discussion, we are satisfied that the Adjudicating Authority committed an error in allowing the Application filed by the RP of the Corporate Debtor for restraining the Appellant, the State Bank of India and other Bank who has given counter Guarantee to invoke the Bank Guarantee. Order passed by the Adjudicating Authority, thus is unsustainable.

31. We may further notice that although Learned Counsel for the Appellant has advanced submission that the Adjudicating Authority had no jurisdiction to entertain the Application filed by the RP for restraining the invocation of Bank Guarantee, but in the facts of the present case where Adjudicating Authority entertained similar Application with regard to other Bank Guarantee issued in favour of different entities, including Graphite India Ltd., IOCL, GAIL, Triveni-Mersens and the Adjudicating Authority decided all the Applications on merits which arises out of the same CIRP and the said Order has not been interfered with. It is not necessary to enter into the issue regarding lack of jurisdiction of the Adjudicating Authority to entertain the Applications in the facts of the present case.

32. More so, we having considered the Application filed by the RP on merits and having come to the conclusion that the Adjudicating Authority committed an error in allowing the Application, we see no necessity to consider the submission raised by the Appellant regarding lack of jurisdiction of the Adjudicating Authority in the facts of the present case.

33. In view of the forgoing discussions, we allow the Appeal, set aside the Order dated 30.05.2023, I.A. No. 2478/2019 (re-numbered as I.A. 4393/2023) is dismissed.

Parties shall bear their own cost.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

NEW DELHI

09th August, 2024

himanshu