

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL,**  
**PRINCIPAL BENCH, NEW DELHI**

**Company Appeal (AT) (Insolvency) No.989 of 2024**

Arising out of Order dated 29.04.2024 passed by the Adjudicating Authority (National Company Law Tribunal), Mumbai Bench, Court-IV in IA 1710(MB)2024 in C.P.(IB)/884(MB)2023)

**IN THE MATTER OF:**

Bhuvan Madan  
Interim Resolution professional of  
Indrajit Power Private Limited,  
A-103 Ashok Vihar Phase-3 (Behind  
Laxmi Bai College), New Delhi, National  
Capital Territory of Delhi ,110052.

... Appellant

Versus

1. Nominated Authority, Ministry of Coal,  
Government of India,  
120, F-Wing, 1<sup>st</sup> Floor, Shastri Bhawan,  
New Delhi - 110001.

2. Indian Bank (erstwhile Allahabad Bank),  
37, Mumbai Samachar Marg,  
Mumbai - 400023.

... Respondents

**Present:**

**For Appellant : Mr. Arvind Nayar Sr. Advocate with Mr. Mayank  
Goel, Advocates.**

**For Respondents : Ms. Shiva Lakshmi, CGSC and Mr. Rajdeep Saraf,  
Advocates.**

**J U D G M E N T**

**ASHOK BHUSHAN, J.**

This Appeal has been filed challenging the order dated 29.04.2024 passed by National Company Law Tribunal, Mumbai Bench, Court-IV in IA No.1710(MB)2024, which was disposed of by the Adjudicating Authority.

2. Brief facts of the case necessary for deciding this Appeal are:

- (i) On 16.03.2015, a Coal Mine Development and Production Agreement was entered into between the President of India (acting through the Central Government represented by the Nominated Authority) and the Corporate Debtor – Indrajit Power Pvt. Ltd. In compliance with the obligation under the Agreement, the Corporate Debtor deposited Performance Bank Guarantee (“**PBG**”) in favour of the President of India.
- (ii) On 01.06.2022 and 05.06.2022, the Nominated Authority issued Show Cause Notice to the Corporate Debtor stating that they did not achieve the Scheduled Production for Financial year 2018-19 to 2022-23. On 02.09.2023, the Corporate Debtor issued a Notice to the Nominated Authority under Clause 25.2 of the Agreement.
- (iii) Meeting of Scrutiny Committee was held on 27/28.07.2023, which recommended for invocation of PBG. Recommendation of Scrutiny Committee was brought before the Nominated Authority. The Nominated Authority of the Central Government after deliberating the matter has issued an order on 27.10.2023, referred to as an Appropriation Order against the Bank Guarantee issued on 18.12.2020. The Corporate Debtor filed Writ Petition

No.1416 of 2023 before the Delhi High Court for quashing the decision of Scrutiny Committee taken in its Meeting held on 27/28.07.2023. The Writ Petition was permitted to be withdrawn, on the ground that the matter was pending before the Nominated Authority. The Writ Petition was disposed of as withdrawn.

- (iv) CIRP commenced against the Corporate Debtor by an order dated 01.02.2024 passed by Adjudicating Authority, in which proceedings, Respondent No.1 submitted its claim as an Operational Creditor, for an amount of Rs.12,61,38,960/-.
- (v) On representation submitted by the Corporate Debtor, a letter dated 28.03.2024 was issued by Additional Secretary & Nominated Authority, communicating that a Meeting was held on 18.12.2023 for deliberation on the Dispute Notice dated 02.09.2023, wherein the request of the Corporate Debtor was declined and the decision earlier taken was reiterated. On 05.04.2024 and 10.04.2024, Respondent No.1 called upon the Bank to appropriate an amount of Rs.7,38,37,440/-.
- (vi) After the receipt of the above letter, the Appellant filed an IA No.1710 of 2024 before the Adjudicating Authority

seeking a direction against Indian Bank from acting on the invocation letters dated 05.04.2024 and 10.04.2024. The Application came for consideration before the Adjudicating Authority and Adjudicating Authority took the view that Section 14 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”) does not create a bar on encashment of PBG during moratorium.

(vii) Aggrieved by which order, refusing to put restrain on invocation of PBG, this Appeal has been filed.

3. We have heard Shri Arvind Nayar, learned Senior Counsel appearing for the Appellant and Ms. Shiva Lakshmi, Central Government Standing Counsel for the Respondent.

4. Learned Counsel for the Appellant submits that after the moratorium was imposed by order dated 01.02.2024, admitting the Corporate Debtor into the CIRP, Nominated Authority ought not to have continued any proceedings against the Corporate Debtor and the order passed on 28.03.2024 by Nominated Authority is in contravention of moratorium provisions under Section 14 (1) (a) of the IBC. The Nominated Authority took a decision regarding Appropriation of PBG only on 28.03.2024. The learned Counsel for the Appellant has also relied on the order of Delhi High Court dated 03.11.2023, wherein it was observed that Nominated Authority is yet to accept or reject recommendation made by the Scrutiny Committee. It is submitted

that in view of the order dated 03.11.2023 of the Delhi High Court, Respondent No.1 was precluded to invoke the PBG until a decision is taken on the objections of the Promoters. It is submitted that encashment of PBG is against the interest of the Corporate Debtor. It is further submitted that Respondent No.1 has filed its claim as Operational Creditor in CIRP of the Corporate Debtor. Encashment of PBG would result in preferential transaction to Respondent No.1. It is further submitted that Promoter of the Corporate Debtor has already challenged the order of admission by means of Company Appeal (AT) (Insolvency) No.395 of 2024, which Appeal is pending consideration, wherein interim order has already been passed. The learned Counsel for the Appellant submits that in appropriate case, the Court can always pass an order of injunction to restrain enforcement of PBG. In event such encashment is allowed, it would result in irreparable loss or injustice to the Corporate Debtor.

5. The learned Counsel for the Respondent refuting the submissions of the Appellant submits that in the present case, the Nominated Authority has already taken a decision on 27.10.2023 for Appropriation of PBG of an amount of Rs.7,38,37,440/-. The Writ Petition filed by the Corporate Debtor was not against the order of Appropriation dated 27.10.2023, rather, was against the Minutes of the Scrutiny Committee Meeting dated 27/28.07.2023. The order in Writ Petition dated 03.11.2023, shall not give any benefit to the Corporate Debtor, since before that order, Appropriation order was already passed. The

order dated 28.03.2024 is not an Appropriation Order as sought to be contended by the Appellant. By the said order, the Nominated Authority disposed of the Dispute Notice dated 02.09.2023, which was given by the Corporate Debtor. The order dated 28.03.2024, upheld the earlier decision of Nominated Authority. It is submitted that enforcement of moratorium has no effect on encashment of PBG, which is well settled by several judgments of this Tribunal.

6. Learned Counsel for both the parties have relied on various judgments of the Hon'ble Supreme Court and this Tribunal, which we shall refer to while considering the respective submissions.

7. The order of Adjudicating Authority, which is sought to be challenged, notes the prayers made in IA No.1710 of 2024 in paragraph-2 of the order, which are as follows:

**“2. IA 1710(MB)2024:** This is an application filed for seeking following reliefs:

- a. This Hon'ble Tribunal be pleased to pass an order and direction restraining Respondent No.2 from encashing the Performance Bank Guarantee dated December 18, 2020;
- b. This Hon'ble Tribunal be pleased to pass an order and direction restraining Respondent No.2 from acting on the invocation letters dated April 05, 2024, and April 10, 2024, issued by Respondent No. 1;
- c. This Hon'ble Tribunal be pleased to pass an order quashing the invocation notices issued by Respondent

No.1 for the appropriation of an amount of Rs. 7,38,37,440/- under the PBG;”

8. In paragraph 4 of the order, the Adjudicating Authority took the view that by virtue of Section 14 of the IBC, there is no bar on encashment of PBG during moratorium. The Adjudicating Authority, further held that letter dated 05.04.2024 and 10.04.2024 issued to Indian Bank, calling upon the Bank to encash the PBG is valid and in accordance with provisions of IBC.

9. The first submission, which has been advanced by learned Counsel for the Appellant is that Nominated Authority after the enforcement of moratorium, by order of the Adjudicating Authority dated 01.02.2024 could not have proceeded to take any decision for invocation of PBG.

10. We may first notice the decision taken by the Nominated Authority prior to initiation of CIRP against the Corporate Debtor. The Appellant itself has brought on record the decision dated 27.10.2023 issued by the Nominated Authority to the Appellant as well as to the Branch Manager of Indian Bank. Subject of the letter dated 27.10.2023 is as follows:

“Subject: Appropriation of an amount of Rs.7,38,37,440/- (Rupees Seven Crore Thirty Eight Lakh Thirty Seven Thousand Four Hundred and Forty Only) against Bank Guarantee No.0018220IPG048198 having issue date 18/12/2020 against Show Cause Notice issued to M/s. Indrajit Power Private Limited for non-compliance of ‘Efficiency Parameters’ mentioned in Coal Mines Development and Production Agreement (CMDPA)

executed on 16.03.2015 in reference to Nerad Malegaon located in Maharashtra.”

11. The said decision was taken after the Minutes of Meeting dated 27/28.07.2023 of the Scrutiny Committee, which recommended for invocation of Bank Guarantee. The Scrutiny Committee by Minutes dated 15.08.2023 has placed the recommendation before the Nominated Authority, which was accepted. It is useful to extract paragraph 4 to 10 of the Appropriation Order, which are as follows:

“4. In response to the Show Cause Notices dated 03.09.2021, 01.06.2022 & 05.06.2023, your replies were received by the Office of Nominated Authority on 17.09.2021, 14.07.2022 & 15.06.2023 respectively.

5. The Scrutiny Committee upon careful deliberation placed its recommendation before the Nominated Authority vide Minutes dated 15.08.2023. A copy of the same is enclosed for reference. The said recommendations have been further deliberated upon by the Nominated Authority and the Central Government. The Nominated Authority and the Central Government have accepted the recommendations of the Scrutiny Committee. Further, in terms of *Clause 6.2.1 (d)*, the Nominated Authority has determined that the failure of the Successful Bidder to comply with the Efficiency Parameters mentioned in Table-1 above are ‘Appropriation Events’. The Central Government has also accepted the said decision.

6. Therefore, in view of the clauses referred to in paragraph 1 and 2 above, the Nominated Authority is hereby directing for the following appropriations from the Performance Bank



Guarantee (as it stood on the prescribed due date of completion of milestone):-

S.No.	Milestone No.	Activity	Percentage to be appropriated/ Weightage assigned to the Milestone
1.	17	Scheduled Production	8
2.	17	Scheduled Production	8
3.	17	Scheduled Production	8
		Total	24

Table-2

7. The Performance Security in form of Bank Guarantee as on the due date of completion of the aforementioned 'Efficiency Parameter' amounts to Rs.30,76,56,000. Hon'ble High Court of Delhi in LPA No.145/2020 vide its order dated 08.12.2020 directed that the said Performance Bank Guarantee be split into two parts i.e., 17% and 83%. Accordingly, the PBG was split up into two parts as :-

(a) PBG Part I bearing No. . 0018220IPG04819 for Rs.5,23,01,520/- i.e. 17% of the total PBG and,

(b) PBG Part 2 bearing No.0018220IPG048198 for Rs.25,53,54,480/- i.e., the remaining 8.3% of the total PBG.

As per Table-2 above, the total amount which may be appropriated is Rs.7,38,37,440 i.e., 24% of the total PBG. The appropriation is to be carried out from PBG Part 2 bearing No.0018220IPG048198 for Rs.25,53,54,480/- which is not subject matter of the aforementioned LPA.

8. Accordingly, the Nominated Authority, hereby directs for appropriation of an amount of Rs. Seven Crore Thirty-Eight Lakh

Thirty-Seven Thousand Four Hundred and Forty Only from the Performance Bank Guarantee No.0018220IPG048198 dated 18.12.2020 issued by Indian Bank in reference to the CMDPA.

9. Upon appropriation as mentioned in paragraph 8 above, you are also advised to top-up the Performance Bank Guarantee no. 0018220IPG048198 so as to restore it to its original amount i.e. Rs.25,53,54,480/- after appropriation within fifteen Business Days [15 Business Days] of receipt of this order in compliance of *Clause 6.3.3* of the CMDPA. Failure to do so shall be a 'Termination Event' for the purpose of *Clause 26* in accordance with which the Nominated Authority shall be at liberty to terminate the CMDPA.

10. Attention is invited to Section 27 of the Coal Mines (Special Provisions) Act, 2015 providing for adjudication by the Tribunal constituted under the Coal Bearing Areas (Acquisition and Development) Act, 1957."

12. Thus, the Appropriation Order by the Competent Authority, who is the Nominated Authority had already been passed on 27.10.2023, which order has been brought on record by the Appellant itself as Annexure A-11.

13. Now, we need to notice the order dated 03.11.2023 passed in Writ Petition filed by the Appellant before Delhi High Court. Order dated 03.11.2023 as brought on record at Annexure-12, is as follows:

"1. The Petitioner has approached this Court for quashing the decision taken by the Scrutiny Committee in its Minutes of Meeting held on 27/28.07.2023 whereby the Petitioner has been found not to be in compliance of the Schedule Production/Reaching Peak Rated Capacity for financial Years

2020-21, 2021-22 and 2022-23 for the Nerad Malegaon Coal Mine which had been allotted to the Petitioner.

2. Material on record discloses that the Minutes of Meeting dated 27/28.07.2023 would be placed before the Nominated Authority/Ministry of Coal for its approval. It is stated that the Petitioner had been called for a meeting on 12.10.2022 and because of the fact that the authorized representative of the Petitioner was suffering from liver abscess and was in hospital, the meeting was re-scheduled to 16.11.2023.

3. The Petitioner herein apprehends that the Bank Guarantee given by the Petitioner would be invoked even before the Nominated Authority takes its decision.

4. When this Court suggested to the learned Senior Counsel for the Petitioner that the instant writ petition is premature inasmuch as the matter is still pending before the Nominated Authority, learned Senior Counsel for the Petitioner has graciously accepted the suggestion made by this Court and has sought liberty to withdraw the instant writ petition with liberty to approach this Court in case, the Nominated Authority takes a decision upholding the Minutes of Meeting dated 27/28.07.2023.

5. Permission and liberty, as prayed for, are granted.

6. The writ petition is disposed of as withdrawn, along with pending application(s), if any. It is made clear that this Court has not made any observations on the merits of the case.

7. It is made clear that till a decision is taken by the Nominated Authority, the Bank Guarantee given by the Petitioner shall not be revoked. It is further made clear that no further adjournment shall be sought by the Petitioner before the Nominated Authority. The Nominated Authority would be free to proceed with the matter in accordance with the law without being

influenced by the fact that the instant writ petition has been withdrawn by the Petitioner.

8. In case the Nominated Authority accepts the recommendation made by the Scrutiny Committee in its Minutes of Meeting dated 27/28.07.2023 then four (4) working days' time are granted to the Petitioner to approach this Court by filing an appropriate writ petition. The Respondent No.5/Allahabad Bank (Now India Bank) would abide by the Bank Guarantee from the 5<sup>th</sup> day after the rejection by the Nominated Authority. It is stated by the learned Senior Counsel for the Petitioner, on instructions, that the Bank Guarantee is alive till April, 2024.

9. This Order is not an indicator on the applicability of otherwise of Clause 25.4 which provides that existence of dispute does not affect right of Nominated Authority to appropriate Performance Security or terminate the agreement.”

14. The above order indicate that the Writ Petition was filed against the decision taken by the Scrutiny Committee in its Meeting held on 27/28.07.2023 and not against the Appropriation Order dated 27.10.2023 issued by the Nominated Authority. Before the High Court, it was not brought into the notice of the High Court that Nominated Authority has already taken a decision. In any view of the matter, the Writ Petition was dismissed as withdrawn on the request of the Appellant. The Appellant cannot claim any benefit of the order of the High Court, nor the order of the High Court has any consequence on the Appropriation Order, which was already passed on 27.10.2023. The statement of the learned Counsel for the Appellant that

Nominated Authority ought not to have proceeded after enforcement of moratorium on 01.02.2024, is without any substance.

15. The learned Counsel for the Respondent has placed reliance on two judgments of this Tribunal, where this Tribunal has taken the view that moratorium has no effect on the enforcement of Bank Guarantees. The first judgment relied on, is the judgment of this Tribunal in ***Bharat Aluminium Co. Ltd. vs. J.P. Engineers Pvt. Ltd. through Mr. Sumit Bansal IRP & Anr. – (2021) SCC OnLine NCLAT 57***, wherein in paragraphs 37 and 38, this Tribunal laid down following:

“**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.

**38.** Ld. Adjudicating Authority has not considered the aforesaid amended provision. Therefore, the impugned order is not sustainable in law. Hence, the impugned order is hereby set aside. Resultantly the Respondent No. 2's Application I.A. No. 2572/ND/2020 is dismissed whereas the Appellant's Application I.A. No. 2085/ND/2020 is allowed and declare that the bank guarantee in question can be invoked/encashed even during the moratorium period under section 14 of the IBC against the Corporate Debtor (Respondent No. 1). No order as to costs.”

16. We may also notice the judgment of Hon'ble Supreme Court in ***State Bank of India vs. V. Ramakrishnan and Anr. – (2018) 17 SCC 394***, where the Hon'ble Supreme Court has noticed the Insolvency Law Committee Report dated 26.03.2018, where amendments made in 2018 came for consideration. The Hon'ble Supreme Court in paragraph 30, 31, 32 and 33 laid down following:

“**30.** We now come to the argument that the amendment of 2018, which makes it clear that Section 14(3), is now substituted to read that the provisions of sub-section (1) of Section 14 shall not apply to a surety in a contract of guarantee for corporate debtor. The amended section reads as follows:

“**14. Moratorium.**—(1)-(2)

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

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

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

**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)

**32.** The Committee insofar as the moratorium under Section 14 is concerned, went on to find:

“5.5. Section 14 provides for a moratorium or a stay on institution or continuation of proceeding, suits, etc. against the corporate debtor and its assets. There have been contradicting views on the scope of moratorium regarding its application to third parties affected by the debt of the corporate debtor, like guarantors or sureties. While some courts have taken the view that Section 14 may be interpreted literally to mean that it only restricts actions against the assets of the corporate debtor, a few others have taken an interpretation that the stay applies on enforcement of guarantee as well, if a CIRP is going on against the corporate debtor.”

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“5.7. The Allahabad High Court subsequently took a differing view in *Sanjeev Shriya v. SBI* [*Sanjeev Shriya v. SBI*, 2017 SCC OnLine All 2717 : (2018) 2 All LJ 769 : (2017) 9 ADJ 723] , by applying moratorium to enforcement of guarantee against personal guarantor to the debt. The rationale being that if a CIRP is going on against the corporate debtor, then the debt owed by the corporate debtor is not final till the resolution plan is approved, and thus the liability of the surety would also be unclear. The Court took the view that until debt of the corporate debtor is crystallised, the guarantor's liability may not be triggered. The Committee deliberated and noted that this would mean that surety's liabilities are put on hold if a CIRP is going on against the corporate debtor, and such an interpretation may lead to the contracts of guarantee being infructuous, and not serving the purpose for which they have been entered into.

5.8. In *SBI v. V. Ramakrishnan* [*SBI v. V. Ramakrishnan*, 2018 SCC OnLine Nclat 384] , Nclat took a broad interpretation of

Section 14 and held that it would bar proceedings or actions against sureties. While doing so, it did not refer to any of the above judgments but instead held that proceedings against guarantors would affect the CIRP and may thus be barred by moratorium. The Committee felt that such a broad interpretation of the moratorium may curtail significant rights of the creditor which are intrinsic to a contract of guarantee.

5.9. A contract of guarantee is between the creditor, the principal debtor and the surety, whereunder the creditor has a remedy in relation to his debt against both the principal debtor and the surety (National Project Construction Corpn. Ltd. v. Sadhu and Co. [National Project Construction Corpn. Ltd. v. Sadhu and Co., 1989 SCC OnLine P&H 1069 : AIR 1990 P&H 300] ). The surety here may be a corporate or a natural person and the liability of such person goes as far the liability of the principal debtor. As per Section 128 of the Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor may go against either the principal debtor, or the surety, or both, in no particular sequence (Chokalinga Chettiar v. Dandayuthapani Chettiar [Chokalinga Chettiar v. Dandayuthapani Chettiar, 1928 SCC OnLine Mad 236 : AIR 1928 Mad 1262] ). Though this may be limited by the terms of the contract of guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is joint and several (Bank of Bihar Ltd. v. Damodar Prasad [Bank of Bihar Ltd. v. Damodar Prasad, AIR 1969 SC 297] ). The Committee noted that this characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost importance for the creditor and is the hallmark of a guarantee contract, and the availability of such



remedy is in most cases the basis on which the loan may have been extended.

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.”

**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:”

17. We may also notice the definition of ‘security interest’ as contained in Section 3(31) of the IBC, which clearly means that performance guarantee is not inclusive in the security interest. Section 3(31) is as follows:

“(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, sub-section (3) was amended by Act 26 of 2018, w.e.f. 06.06.2018. Amendment made in sub-section (3) of Section 14 is as follows:

“14(3) The provisions of sub-section (1) shall not apply to —

(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.”

19. Sub-section (3) above clearly provides that provisions of sub-section (1) shall not be applicable on a surety in a contract of guarantee to a Corporate Debtor.

20. In another judgment of this Tribunal in **UCO Bank vs. Sudip Bhattacharya – Company Appeal (AT) (Insolvency) No.335 of 2021** decided on 21.09.2021, this Tribunal in paragraph 8, 9, 10 and 11 has held that Bank Guarantee cannot be held to be assets of the Corporate Debtor.

21. The learned Counsel for the Respondent has also relied on judgment of the Hon'ble Supreme Court in **(2020) 13 SCC 574 – Standard Chartered Bank vs. Heavy Engineering Corporation Limited and Anr.**, where dealing with the precedents on the Bank Guarantee, following was held in paragraph 23:

“**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.”

22. The learned Counsel for the Appellant has placed reliance on judgment of the Hon'ble Supreme Court in **(2007) 8 SCC 110 – Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Co.** on the proposition that Court may pass injunction order to restrain enforcement of Bank Guarantee in cases where encashment would result in irretrievable harm or injustice to the party

concern. The above was a case dealing with law of the Bank Guarantees. We have already noticed the judgment of the Hon'ble Supreme Court in ***Standard Chartered Bank vs. Heavy Engineering Corporation Limited and Anr.*** (supra), where the Hon'ble Supreme Court has laid down that 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. Few exceptions were also noticed in the judgment, i.e. fraud, irretrievable harm or injustice. The present is a case where Show Cause notice was issued to the Appellant and after Show Cause notice, decision was taken by Scrutiny Committee, recommending for invocation. The Nominated Authority after considering the recommendation, facts and circumstances, took the decision to invoke the Bank Guarantee as per the terms of the Agreement. Default on the part of the Corporate Debtor was established, hence, present was not a case where Court ought to have exercised its discretion, restraining the Bank from enforcing the Bank Guarantee. The Adjudicating Authority rightly took the decision to not grant the relief as prayed by the Appellant.

23. We do not find any error in the order of the Adjudicating Authority, refusing the prayer to set aside the letter sent by Respondent No.1 to the Bank for invocation of Bank Guarantee. It is further to be noticed that letters, which were sent to the Bank were all in consequence to the earlier decision taken on 27.10.2023 by the Nominated Authority to invoke the Bank Guarantee, which

was Appropriation Order. Subsequent letters were only follow-up and in consequence to the earlier order and by letter dated 28.03.2024, notice of dispute given by the Corporate Debtor was disposed of, upholding the earlier decision.

24. We do not find any ground to interfere with the order of the Adjudicating Authority in this Appeal. There is no merit in the Appeal. The Appeal is dismissed. Parties to bear their own costs.

**[Justice Ashok Bhushan]  
Chairperson**

**[Arun Baroka]  
Member (Technical)**

**NEW DELHI**

**1<sup>st</sup> July, 2024**

Ashwani