# National Company Law Appellate Tribunal

# Principal Bench, New Delhi

**COMPANY APPEAL (AT) (INSOLVENCY) No. 335 of 2021**

(Arising out of Order dated 29th January, 2021 passed by National Company Law Tribunal, Ahmedabad Bench, Ahmedabad, in I.A. No. 911 of 2020 in C.P.(IB) No.- 418/NCLT/AHM/2018).

**IN THE MATTER OF:**

**UCO Bank**
**Represented by its authorized signatory,**
**Shri Manmeet Vyas**
**FC Branch, Mafatlal Centre,**
**1st Floor Nariman Point**
**Mumbai – 400021** **...Appellant**

**Versus**

**Sudip Bhattacharya**
**Resolution Professional of**
**Reliance Naval & Engineering Ltd.**

**Office at: 903, Queensgate CHS,**
**Hiranandani Estate,**
**Off Ghodbander Road, Thane West,**
**Mumbai, Maharashtra – 400607** **...Respondent**

**Appellant:** **Mr. Pawan Bhushan, Mr. Bhagavath Krishnan and Mr. Srinath Sridevan, Advocates.**

**Respondent:** **Mr. Navin Pahwa, Sr. Advocate alongwith Ms. Naveli Reshamwalla, Advocates.**
**Mr. Dhrupad Vaghan, (RP).**

## J U D G E M E N T

**[Per; Shreesha Merla, Member (T)]**

1. Challenge in this Appeal under Section 61 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as the **'Code'**) is against the Impugned Order dated 29.01.2021 passed by the Learned Adjudicating Authority (National Company Law Tribunal, Ahmedabad Bench) in I.A. No. 911 of 2020 in C.P. (IB) No.- 418/NCLT/AHM/2018 filed by the Resolution Professional of M/s. Reliance Naval and Engineering Ltd. (hereinafter

referred to as the **'Corporate Debtor'**) seeking a direction to the Respondent M/s. UCO Bank (hereinafter referred to as the **'Bank'**) to forthwith refund the amount and deposit the same in the Account of the 'Corporate Debtor' with interest as it forms part an Asset of the 'Corporate Debtor'. The Adjudicating Authority allowed the Application preferred by the 'Corporate Debtor' and observed as follows:-

> *"26. It is noted that Bank Guarantee was issued on 14.07.2O16 for Rs. 3,34,90,458/- in favour of the customer of the Corporate Debtor, which was valid upto 31.08.2019. The Bank Guarantee was invoked by the Customer, Indian Nary on 22.08.2019 for warranty obligations before the commencement of the CIRP date i.e. on 15.01.2020. The amount paid by the Respondent Bank on invocation of Bank Guarantee from its own funds on account of non-availability of Funds in Corporate Debtor's Accounts before the commencement of CIRP amounts to grant of credit facility to the Corporate Debtor before CIRP. The amount retained by the Customer. Indian Nary- by invoking Bank Guarantee was released by Indian Navy on 28.09.2020. The amount was released br. The customer, Indian Nay after the date of commencement of CIRP when the moratorium is in force to the Corporate Debtor.*
>
> *27. As per Section 14 of IB Code and in line with the decision of the Hon'ble NCLAT in the matter of Indian Overseas Bank vs. Mr. Dinkar T. Venkatsubramaniam, Resolution Professional for Amtek Auto Limited, Company Appeal (AT) (Insolvency) No. 267 of 2017, the amount received during the CIRP when the moratorium is in force, is the asset of the Corporate Debtor and RP has to deal with the same as per the provisions of the IB Code. The Respondent is not entitled to adjust the same when the moratorium is in force. If, he has any dues pending from the Corporate Debtor on the date of commencement of CIRP, it is open for him to file his claim before the RP."*

2. **Submissions on behalf of Learned Counsel appearing for the Appellant:**

- In 2016, the 'Corporate Debtor' approached the Appellant seeking an Additional Bank Guarantee Facility as it has entered into an Agreement with the Indian Navy bearing Contract No. COM/0802/SAV/NR-15 dated 13.06.2016 for normal refit of a Ship namely 'INS Savitri' for a consideration of Rs. 33,49,04,579/-. Learned Counsel drew our attention to the salient features of the Agreement namely Clause 3.1 Art. 7 as per which the 'Corporate Debtor' was to furnish a Bank Guarantee through a Public Sector Bank; Clause 3.2 Art. 8 specifies that the term of the contract was for the period of 180 days from 14.07.2016 and Clause 3.3 Art. 12 specifies that the warranty period was upto 15.11.2019.
- It is submitted that on 14.07.2016, a Performance Bank Guarantee was furnished for Rs. 3,34,90,458/- which was valid upto end of August 2019; that on 22.08.2019, the Bank received a communication from Indian Navy stating that it has decided to invoke and encash the Bank Guarantee and sought payment for the same; as the 'Corporate Debtor' account was classified as an NPA, and did not have the sufficient margin money, the Appellant Bank put in its own funds for the purpose of payment to the Indian Navy; on 29.08.2019, the Bank transferred that sum to the Account maintained by the Indian Navy; the warranty period came to an end on 15.11.2019 and during the interregnum period, the Indian Navy did not inform the Appellant

Bank of any issues with the work done by the 'Corporate Debtor' and did not make any claims.

- Vide email dated 19.12.2019, the Appellant Bank requested the Indian Navy to refund the money encashed towards Performance Bank Guarantee and received a reply on 23.12.2019 from the Indian Navy that the 'Corporate Debtor' issued a separate letter dated 27.11.2019 stating that the money is to be transferred to their own account.
- It is submitted that on 15.01.2020, one of the Corporate Debtor's, Creditors i.e. IDBI Bank filed Section 7 Application and CIRP Proceedings began on 15.01.2020 and on 23.01.2020, the IRP wrote to the Appellant stating that the 'Corporate Debtor' is eligible for the refund amount from the Indian Navy.
- It is vehemently contended that since the amounts were transferred from the funds of the Appellant Bank, it cannot be treated as an asset of the 'Corporate Debtor' and the same was communicated to the IRP on 10.02.2020. However, a claim was also lodged before the IRP on 29.01.2020 thereafter there was a series of communication between the IRP and the Appellant Bank on 10.02.2020, 11.02.2020, 04.03.2020 and 03.07.2020. While so on 28.09.2020, the Indian Navy refunded the amount into the Current Account of the 'Corporate Debtor' maintained with the Appellant Bank. On 12.10.2020 and on 29.10.2020 the IRP wrote to the Appellant Bank seeking transfer of the amount to the 'Corporate Debtor's' Account. The Appellant Bank did not accede to the request but appropriated the amounts on the ground that the asset did not belong to the 'Corporate Debtor' but to

the Bank as the 'Corporate Debtor' did not even pay the margin money.

- Learned Counsel strenuously argued that on 22.08.2019, the Government sought for extension of the Bank Guarantee or invocation, but since extension could not be done by the 'Corporate Debtor', the Indian Navy invoked the Bank Guarantee and demanded the sum of Rs. 3.34 Crores. Under the Bank Guarantee, the Appellant Bank had an independent obligation to pay the said sum to the Government and therefore, the payment was made in discharge of this obligation. Learned Counsel relied on the following case laws in support of his contentions:-

    1. ***'Ansal Engineering Projects Ltd.' Vs. 'Tehri Hydro Development Corporation Ltd.' [1996 5 SCC 450]***
    2. ***'AP Pollution Control Board' Vs. 'CCCL Products India Ltd.' [2019 20 SCC 669]***
    3. ***'Indian Overseas Bank' Vs. 'Arvind Kumar' dt. 28.09.2020***

3. **<u>Submissions on behalf of Learned Counsel appearing for the Respondent:</u>**

- The Bank Guarantee issued by the Appellant Bank was valid upto 31.07.2019; there was no margin money exclusively provided by the 'Corporate Debtor' to the Appellant Bank and the same was secured by way of securities; the warranty period expired on 15.11.2019.
- The 'Corporate Debtor' completed the normal refit of 'INS Savitri' and handed over the same to the Indian Navy on 15.09.2018 keeping in

view that the warranty period for the normal refit was only upto 15.11.2019, the 'Corporate Debtor' in the meeting dated 16.07.2019 had requested the Appellant Bank to extend the period of the Bank Guarantee till the end of the warranty period, but the same was not extended by the Appellant Bank and hence the Government invoked and encashed the Bank Guarantee on 29.07.2019.

- Pursuant to the expiry of the warranty period, the 'Corporate Debtor' vide letter dated 27.11.2019 and also the Appellant Bank vide letter dated 19.12.2019 requested the Government for refund of the Bank Guarantee as there were no claims filed during this period.
- Pursuant to the commencement of the CIRP, the IRP vide letter dated 04.03.2019 informed the Bank that the refund amount now forms part of the asset of the 'Corporate Debtor'.
- Vide letter dated 03.07.2020, the 'Corporate Debtor' informed the Appellant Bank that C.P. 418 of 2018 was admitted by the NCLT Adjudicating Authority on 15.01.2020 and Moratorium was declared under Section 14 of the Code.
- It is submitted that vide email dated 28.09.2020, the Appellant Bank confirmed the receipt of the refund amount into designated Account of the 'Corporate Debtor'. The Appellant Bank instead of remitting the amount into the Bank Account of the 'Corporate Debtor', vide email dated 03.11.2020 informed the 'Corporate Debtor' that the amount has been adjusted by them towards dues originally claimed by them under Form-C dated 29.01.2020.

- It is vehemently argued that adjustment of refund amount against the dues is in violation of Section 14 of the Code.
- As per Section 25 read with Section 18(f) of the Code, it is the duty of the Resolution Professional to preserve the asset of the 'Corporate Debtor' including the asset which may or may not be in possession of the 'Corporate Debtor'. The Appellant cannot claim the refund amount as it is stated as a receivable in the books of the 'Corporate Debtor' and the Order of Moratorium under Section 14 of the Code shall be equally applicable on all the stakeholders of the 'Corporate Debtor' including the Appellant.
- The Learned Counsel in support of his contention placed reliance on the following Judgements:-

   I. ***'Bank of India & Ors.' Vs. 'Ferro Alloy Corporation Ltd. through Mr. Buban Madan Resolution Professional' in Company Appeal (AT) (Insolvency) No. 590 of 2020 dated 28.05.2021.***

   II. ***'State Bank of India' Vs. 'Debashish Nanda' in Company Appeal (AT) (Insolvency) No. 49 of 2018 dated 27.04.2018.***

   III. ***Indian Overseas Bank Vs. 'Mr. Dinkar T. Venkatsubramaniam Resolution Professional for Amtek Auto Ltd. in Company Appeal (AT) (Insolvency) No. 267 of 2017 dated 15.11.2017.***

**<u>Assessment:</u>**

4. The brief point which falls for consideration in this Appeal is whether the 'Corporate Debtor' has any right with respect to money received from

reversal of invocation of a Performance Bank Guarantee (which had been invoked prior to the initiation of CIRP), specifically when the margin money was also not deposited by the 'Corporate Debtor'? Can the said refund amount be construed as an asset belonging to the 'Corporate Debtor'?

5. Section 14(1) of the I&B reads as hereunder:-

> ***"14. Moratorium****.—(1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:—*
>
> > *(a) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;*
> > *(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;*
> > *(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);*
> > *(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*
>
> *1[Explanation.—For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]*

*(2) The supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.*

*[1][(2A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified;]*

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

*[3][(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;]*
*(b) a surety in a contract of guarantee to a corporate debtor.].*

*(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:*
*Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium shall cease to have effect from the date of such approval or liquidation order, as the case may be.*

*(Emphasis Supplied)*

6. The Insolvency Law Committee appointed by the Ministry of Corporate Affairs in its report dated 26.03.2018 noted as follows:-

*"(iv) to clear the confusion regarding treatment of assets of guarantors of the corporate debtor vis-à-vis the moratorium on the assets of the corporate debtor,*

*it has been recommended to clarify by way of an explanation that all assets of such guarantors to the corporate debtor shall be outside scope of moratorium imposed under the Code;"*

### *5. MORATORIUM UNDER SECTION 14*

*…………………………………………………………………*

*Moratorium on proceedings against surety to corporate debtor*

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

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

*(Emphasis Supplied)*

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

> ***"3. Definitions**.—In this Code, unless the context otherwise requires,—*
> ……………………………………………………………………
> *(31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:*
>
> *Provided that security interest shall not include a performance guarantee;"*
>
> (Emphasis Supplied)

8. The definition of 'security interest' under the Code includes an interest that has been created in favour of the Secured Creditor by a transaction which secures payment or performance of an obligation, but though it includes performance obligations, the Legislature decided to exclude performance based Guarantees from the definition. The Legislature by carving out an exception for Performance Guarantee under Section 3(31) intended invocation of Performance Bank Guarantee during the Moratorium period. The observations of the Insolvency Law Committee Report, 2018 (reproduced in paras 5.10 and 5.11) specify that *'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 asset of third party like sureties'*. A simple interpretation would mean that the contractual principles of the guarantee are required to be respected even

during the Moratorium period and any alternate interpretation could not have been the intention of the Code as is clear from a plain reading of Section 14.

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

> *"4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary..."*
>
> *"5. It is equally settled law that in terms of the bank guarantee the beneficiary is entitled to invoke the bank guarantee and seek encashment of the amount specified in the bank guarantee. It does not depend upon the result of the decision in the dispute between the parties, in case of the breach.* ***The underlying object is that an irrevocable commitment either in the form of bank guarantee or letters of credit solemnly given by the bank must be honoured.*** *The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties..."*

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

> *"33. It is beyond any cavil that a bank guarantee must be construed on its own terms. It is considered to be a separate transaction.*
>
> *34. If a construction, as was suggested by Mr. Naphade, is to be accepted, it would also be open to a banker to put forward a case that absolute and unequivocal bank guarantee should be read as a conditional one having regard to circumstances*

> *attending thereto. It is, to our mind, impermissible in law."*

11. The intent of the Code was not to terminate Agreements that have created legal rights in favor of third parties without adhering to due process of Law. Such a termination of legally binding Agreements would be in violation of the provisions of Section 30(2)(e). The Hon'ble Supreme Court in a Catena of Judgements has laid down that margin money acquires the character of 'Trust' when it is given against the Bank Guarantee issued to the beneficiary and asset held under 'Trust' cannot be considered as an asset of the 'Corporate Debtor'. *It is significant to mention that in the instant case even the margin money was put in by the Bank and not by the 'Corporate Debtor'.*

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

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

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

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

15. The facts in ***'Bank of India & Ors.' Vs. Bhuban Madan Resolution Professional of Ferro Alloys Corporation Limited', Company Appeal (AT) (Insolvency) No. 590 of 2020,*** relied upon by the Respondent are clearly distinguishable for the following reasons:-

1. The Resolution Plan was duly implemented.
2. The Letter of Credit facility was continued on request of the erstwhile Resolution Professional and the Letter of Credit Bills negotiated by the beneficiary banks were retired by the 'Corporate Debtor'. The amount

was paid by the Company into their cash credit account so that fresh Letters of Credit could be opened to purchase raw materials to keep the Company 'a going concern'. But the banks adjusted the Credit Balance in the Credit Account towards dues after commencement of CIRP.

16. The proposition laid down in ***'Indian Overseas Bank' Vs. Mr. Dinkar T. Venkatsubramaniam Resolution Professional for Amtek Auto Ltd.' Company Appeal (AT) (Insolvency) No. 267 of 2017 dated 15.11.2017,*** is prior to the second amendment made effective from 06.06.2018 and hence is not applicable to the facts of this case. As regarding the facts of ***'State Bank of India' (Supra)*** relied upon by the Respondent Counsel, they are completely difficult and are not remotely connected to a 'Performance Bank Guarantee'.

17. In the instant case, the issue pertains to amounts refunded by reversal of invocation of Performance Bank Guarantee where even the margin money was paid by the Bank and not by the 'Corporate Debtor'.

18. It is a well settled proposition that a Bank Guarantee is an independent and a distinct contract between the Bank and the beneficiary and in the event of any default, the beneficiary would realise the amount under the Bank Guarantee from the Bank and not from the 'Corporate Debtor'. Bank Guarantees are issued for some purpose and for a tenure which automatically gets revoked in fulfilment of such purpose or completion of such specified time. We are of the view that liabilities under a Performance Bank Guarantee cannot be terminated by action of a third

party. A Bank which gives a Performance Guarantee must honour the guarantee according to its terms.

19. To sum up, we are of the considered opinion that the amount refunded by the Indian Navy under the Performance Bank Guarantee is not an asset of the 'Corporate Debtor' for the following reasons:-

1. 'Security Interest' as defined under Section 3(31) of the Code specifically excludes 'Performance Guarantee'.
2. Sub-Section 3 of Section 14 of IBC substituted by the second Amendment Act 26 of 2018 with retrospective effect from 06.06.2018 reads as under:-

> *"26. Sub Section 3 of Section 14 of the IBC substituted by the Insolvency and Bankruptcy Code (second Amendment) Act 26 of 2018 with retrospective effect from 06.06.2018, it reads as under:-*
>
> *In section 14 of the principal Act, for sub-section (3), the following sub-section shall be substituted, namely:—*
>
> *"(3) The provisions of sub-section (1) shall not apply to—*
> *(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;*
> *(b) a surety in a contract of guarantee to a corporate debtor."*
>
> *(Emphasis Supplied)*

Section 14(3)(b) of the Code specifies that sub-Section 14 does not apply to a surety in a Contract of Guarantee to a 'Corporate Debtor'.

3. Termination of legally binding Agreements would be ultra vires to provisions of Section 30(2)(e) of the Code, which reads as follows:-

***"30. Submission of resolution plan–***

*………………………………………………………………*

*(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan –*

*…………………………………………………………………*

*(e) does not contravene any of the provisions of the law for the time being in force;"*

4. On 22.08.2019, (Annexure 6) the Indian Navy had written to the Appellant Bank that the 'Corporate Debtor' was supposed to extend the Performance Bank Guarantee up to 15.11.2019 as per terms and conditions of the said contract but however the 'Corporate Debtor' had failed to extend the same despite repeated reminders and therefore sought encashment of the Guarantee issued by the Appellant Bank. (Annexure-9) specifies the Account details for refund of the Performance Bank Guarantee amount stating as follows:-

*"An amount of Rs. 3,34,90,458/- (Rupees three crore thirty-four lakhs ninety thousand four hundred and fifty-eight only) against PBG No. 1979|GPER000916 was encashed in Aug 19, from UCO Bank, Mumbai view non-submission of extended PBG."*

5. The record shows that the CIRP was initiated on 15.01.2020, the Bank Guarantee was invoked on 29.08.2019 prior to the initiation of CIRP but the money was transferred by the Indian Navy on 28.09.2020 and the revised claim was preferred by the Appellant Bank only on 29.10.2020. Effectively, the money which went out on 28.08.2019 from the Bank was returned on 28.09.2020.

6. Additionally, it is a well settled proposition that Margin Money acquires the character of 'Trust' when it is given against a Performance Bank Guarantee. In the instant case, even the margin money was not paid by the 'Corporate Debtor' but by the Bank.

**Conclusion:**

20. For all the aforenoted reasons, we hold that the amount refunded on reversal of the invocation by the Indian Navy cannot be said to be an asset of the 'Corporate Debtor', under IBC, Performance Guarantees are to be dealt with specifically keeping in view the provisions and exclusions under Section 14(3)(b) and Section 3(31) of the Code. Hence, we hold that there is no violation of Section 14 of the Code as the money appropriated by the Bank is not the asset of the 'Corporate Debtor'.

21. Hence, this Appeal is allowed and the Order Impugned is set aside. No Order as to costs.

**[Justice Anant Bijay Singh]**
**Member (Judicial)**

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

**NEW DELHI**
**21st September, 2021**

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