

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

Company Appeal (AT) (Insolvency) No. 943 of 2024

[Arising out of the Impugned Order dated 24.04.2024 passed by the Adjudicating Authority, National Company Law Tribunal, Ahmedabad Division Bench, Court-I in I.A. No.- 440(AHM) 2023 in C.P.(IB)/ 137(AHM) 2018]

In the matter of:

Indian Overseas Bank

Having its Head Office at:
763, Anna Salai, Chennai-600002

Having one of its ARM branches at:
ARM Branch, Sharad Shopping Centre,
Chinubhai Tower, Opp. Handloom House
Ashram Road, Ahmedabad-380009

...Appellant

Versus

1. Consortium of GSEC Limited and Rakesh Shah

Through its Managing Director: Mr. Rakesh Ramanlal Shah
Having its registered office at:
2nd Floor, Gujarat Chamber's Building,
Ashram Road, Ahmedabad, Gujrat-380009

Also at:

Mr. Rakesh Ramanlal Shah
R/o E-37, Ayojan Nagar Society,
Ahmedabad-380007

...Respondent No.1

2. Mr. Bhuvan Madan

(Erstwhile Resolution Professional)
R/o A-103, Ashok Vihar Phase-3,
Behind Laxmi Bai College,
New Delhi- 110052

...Respondent No.2

Present:

For Appellant : Mr. Mohit Chadha, Mr. Milind Bhaskar, Advocates.

For Respondent : Mr. Malak Bhatt, Ms. Neeha Nagpal, Ms. Soumya Saxena,
Advocates.

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

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 (**'IBC'** in short) by the Appellant arises out of the Order dated 24.04.2024 (hereinafter referred to as **'Impugned Order'**) passed by the Adjudicating Authority (National Company Law Tribunal, Division Bench-I, Ahmedabad) in IA/440(AHM) 2023 in CP(IB)/137(AHM)2018. By the impugned order, the Adjudicating Authority admitted the I.A. No. 440 of 2023 and directed the payment of Rs 1,58,59,294/- by the Appellant Bank to the Successful Resolution Applicant (**"SRA"** in short) towards reversal of the Margin Money. Aggrieved by the impugned order, the present appeal has been preferred by the Appellant bank.

2. The relevant facts which required to be noticed for deciding the present matter before us are as follows:-

- That the Corporate Debtor-Diamond Power and Infrastructure Ltd. (**"DPIL"** in short) had received several credit facilities from the Appellant-Indian Overseas Bank. As per the Terms of Sanction and Loan Agreement executed between the Appellant bank and DPIL for the credit facilities including Bank Guarantee (**"BG"** in short) facility, the DPIL was required to maintain Cash Margin in the form of Term Deposit as one of the conditions for availing BG facility.

- The Appellant issued several BGs in favour of third party beneficiaries on behalf of the Corporate Debtor and undertook to make payment in case of invocation of the said BGs.
- These BGs were admittedly invoked by various beneficiaries and the Appellant had made payments to the beneficiaries in accordance with the terms of the BG facility and while doing so had utilised the Margin Money Term Deposits against the invoked BGs.
- These BGs had been invoked during the period 21.04.2018 to 23.05.2018 by the beneficiaries which is prior to the admission of the Corporate Debtor into the rigours of CIRP.
- The Appellant bank had subsequently filed a Section 7 application against the Corporate Debtor which was admitted by the Adjudicating Authority on 24.08.2018.
- On the initiation of CIRP of the Corporate Debtor, the Appellant submitted its claim to the Resolution Professional (“**RP**” in short) on 05.09.2018. The Appellant bank adjusted the Term Deposits in respect of Margin Money on 27.09.2018 and submitted a revised claim on 09.11.2018. The total amount in the revised Claim Form after adjusting the Margin Money of Rs 1,58,59,294/-, stood at Rs 51,54,93,366/-
- The RP had duly considered the revised claim and taken notice of the deduction/appropriation of the Margin Money by the Appellant bank. The RP had reflected the revised claim amount as the financial claim of the Appellant bank in the Information Memorandum basis which plans were invited.

- The resolution plan of the Corporate Debtor was approved by the CoC on 06.01.2022 in its 23rd meeting with 89.46% vote share. The resolution plan of the SRA-Consortium of GCEC Ltd. and Rakesh Shah was approved by the Adjudicating Authority on 20.06.2022.
- In terms of the plan, the SRA made upfront payment to the creditors and took over the management of DPIL on 17.09.2022 and thereafter undertook an exercise of reconciliation of the books of accounts of DPIL.
- Noticing the deduction of Rs 1,58,59,294/- from the account of DIPL by the Appellant bank purportedly made after the commencement of CIRP, the SRA sought an explanation from the Appellant bank on the alleged unauthorized and wrongful deduction made by them.
- The Appellant bank did not clarify the position to the SRA and informed that as they had submitted their claim to the RP any request for verification of claim forms will be provided only to the RP.
- The SRA thereafter took up the matter with the RP but as no response was received they sent a Legal Notice on 13.02.2023 to the Appellant demanding the reversal of Rs 1,58,59,294/- from the Appellant to the account of the Corporate Debtor.
- Not getting any response to the Legal Notice, the SRA filed IA No. 440 of 2023 before the Adjudicating Authority seeking reversal of the said amount.
- On 24.04.2024, the Adjudicating Authority admitted the IA No. 440 of 2023 directing the reversal of Rs 1,58,59,294/- to the SRA by the Appellant bank.

- Aggrieved by this order, the present appeal has been filed by the Appellant.

3. Making his submissions the Ld. Counsel for the Appellant, Shri Mohit Chadha vehemently contended that after the resolution plan had already been approved by the Adjudicating Authority and the SRA had taken over the management of the DPIL, the SRA has been wrongfully allowed to clawback the Margin Money Term Deposits for BGs though it was no longer the asset of the Corporate Debtor. The Margin Money provided by DPIL was a substratum of the trust that was created for the purpose of the Appellant bank honouring the liability of the BG as and when the guarantee was invoked by the third party beneficiaries. Further the contract between the Appellant and the third party beneficiaries in whose favour the BGs were issued constituted an independent contract in terms of Section 126 of the Indian Contract Act, 1872. The Margin Money no longer remained property of the Corporate Debtor once invocation of the BG was made by the third party beneficiaries. The Margin Money held in form of trust in favour of the third parties therefore stood specifically excluded from the asset of the Corporate Debtor in terms of Section 18 of the IBC. Hence, as the Margin Money did not form part of the corpus of the Corporate Debtor, it could be appropriated any time by the Appellant Bank on the invocation of the BG. It was strenuously contended that the Adjudicating Authority failed to appreciate that the margin money in the form of Term Deposit becomes the property of the Bank the moment the BG is invoked and is therefore not hit by moratorium under Section 14 of IBC. Assailing the impugned order, contention was also made that the SRA cannot claim reversal of the amount since the SRA while submitting the resolution plan had expressly agreed to the claim of the

Appellant which formed part of the Information Memorandum. The plan having been approved by the Adjudicating Authority and not having been challenged, the terms of the plan has become binding upon the SRA. Reversal of the amount would imply modification of the plan which is impermissible and in support of this contention, reliance was placed on the judgment of the Hon'ble Supreme Court in ***Ghanashyam Mishra Vs Edelweiss Asset Reconstruction Company Ltd. (2021) 9 SCC 657.***

4. Refuting the contentions raised by the Appellant, Shri Malak Bhatt, Ld. Counsel for the Respondent submitted that the Appellant bank had wrongfully and unilaterally deducted the Margin Money from the account of DPIL after CIRP proceedings had been initiated and that such deduction from the account of the Corporate Debtor was in contravention of Section 14 of the IBC. It was contended that the unilateral appropriation done by the Appellant was not disclosed to the CoC or the RP and was not reflected in the Information Memorandum basis which they had formulated their resolution plan. Since the Appellant bank had appropriated money which belonged to the Corporate Debtor after the initiation of CIRP proceedings, this sum needed to be reversed and the Adjudicating Authority vide impugned order has correctly directed the reversal of Margin Money in favour of the SRA which decision was also in conformity with the "clean slate theory" enunciated by the Hon'ble Supreme Court in the judgment of ***Ghanashyam Mishra judgement supra.*** Submission was pressed that the Appellant bank had breached its duty as a member of CoC and this wrongful action of the Appellant bank was not in the interest of all the stakeholders and also hindered the effective implementation of the resolution plan. It was also

contended that the Appellant acted in breach of Clause 8.1(x) of the resolution plan which provided that all cash and bank balances including term deposits of the Corporate Debtor shall remain available with the Corporate Debtor. Therefore the wrongful deduction has the potential of disrupting the implementation of the resolution plan besides causing financial hardship to the SRA.

5. We have duly considered the arguments advanced by the Ld. Counsel for the parties and perused the records carefully. Both parties have adverted attention to several judgements of this Tribunal and the Hon'ble Supreme Court which we shall deal with in the succeeding paragraphs.

6. The short point which falls for our consideration in this Appeal is whether in the given factual matrix, the Margin Money can be construed as an asset belonging to the Corporate Debtor and whether the Adjudicating Authority acted within its jurisdiction to order reversal of the Margin Money to the account of the Corporate Debtor by the Appellant bank.

7. When we look at the impugned order, we find that the Adjudicating Authority after adverting attention to the judgments of this Tribunal in **Bank of India Vs Bhuban Madan in CA(AT)(Ins)No. 590 of 2020** and **Bank of Baroda Vs Sundaresh Bhatt in CA(AT)(Ins)No. 635 of 2019** has held that the appropriation of Margin Money by the Appellant bank could not have been done as this sum formed part of "security interest". The Adjudicating Authority directed reversal of Rs 1,58,59,294/- to the Corporate Debtor by the Appellant bank after holding that the Appellant bank had wrongfully appropriated this Margin Money amount from the account of the Corporate Debtor after the

commencement of CIRP when the provisions of moratorium in Section 14 of IBC had come into play. The Adjudicating Authority has further observed that as the resolution plan of SRA had been approved by the Adjudicating Authority, the clean-slate principle propounded by the by Hon'ble Supreme Court in **Ghanashyam Mishra judgment supra** becomes applicable and no withdrawal by the Appellant bank from the account of the Corporate Debtor was therefore permissible after initiation of CIRP proceedings.

8. Having heard the parties and perused the impugned order, we find that reference has been made to certain statutory provisions of the IBC and the Indian Contract Act, 1872. For better appreciation, we would like to commence our analysis by first noticing these statutory provisions.

9. Reference has been made by all the parties including the Adjudicating Authority to the term "Security Interest" in the context of its applicability on the Margin Money in the facts of the present case. The term "security interest" is defined under Section 3(31) of IBC which reads as follows:

3. Definitions

"(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;"

A plain reading of the Proviso to the above definition clause reveals that security interest shall not include a performance guarantee. However, we notice that while on the one hand, the Adjudicating Authority has observed that Margin

Money was part of security interest, the Appellant has taken a contrary stand that in terms of Section 3(31) of the IBC, the BG does not form part of the security interest.

10. At this stage it would be useful to refer to Section 18 of IBC and Explanation thereto. Section 18 of IBC reads as follows:

“18- *The interim resolution professional shall perform the following duties, namely:—*

(a) collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor, including information relating to—

(i) business operations for the previous two years;

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

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

(iv) such other matters as may be specified;

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

(c) constitute a committee of creditors;

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

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

(f) take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with information utility or the depository of securities or any other registry that records the ownership of assets including—

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

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

(iii) tangible assets, whether movable or immovable;

(iv) intangible assets including intellectual property;

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

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

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

Explanation.—For the purposes of this [section], the term “assets” shall not include the following, namely:—

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

- (b) assets of any Indian or foreign subsidiary of the corporate debtor; and*
- (c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.”*

When we look at Explanation to Section 18 above which has been relied upon by the Appellant, it provides in explicit terms that the term “assets” shall not inter alia include assets owned by a third party in possession of the Corporate Debtor held under trust or under contractual arrangements including bailment. In other words, any asset held in trust is not to be construed to be an asset of the Corporate Debtor. Basis this provision, it is the contention of the Appellant that the Margin Money held in the form of trust did not form part of the estate of the Corporate Debtor as the Explanation extracted above specifically excludes assets owned by a third party from being treated as a part of the asset of the Corporate Debtor.

11. We also notice that the Appellant has relied on Section 126 of the Indian Contract Act, 1872 to contend that the Margin Money was held in trust. Section 126 of the Indian Contract Act, 1872 reads as under:

“A contract to perform the promise, or discharge the liability, of a third person in case of his default.”

12. At this juncture, it is also relevant to reproduce Section 14 of IBC which has also been pressed upon by all the parties in support of their respective contentions including the Adjudicating Authority. Section 14 of IBC which deals with moratorium provisions reads as under:

Section 14: Moratorium

14. (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;*
- (d) *The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.*

[Explanation.-For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearances or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period;]

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

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

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

[(a) such transactions, agreements or other arrangements as may be notified⁴ 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.

As to how both the parties have viewed this provision, in order to avoid repetition, we would like to deal with it when we give our findings. However, we would like to notice that the Adjudicating Authority has held that appropriation of Margin Money from the account of the Corporate Debtor after the commencement of CIRP stood hit by the provisions of moratorium which view has been assailed by the Appellant.

13. Now that we have noted the relevant statutory provisions, we now come down to the rival contentions of the parties and how the Adjudicating Authority has dealt with them.

14. It is the case of the Appellant that Margin Money has to be construed as a deposit made by the Corporate Debtor for the benefit of a third party. It was pressed that the Corporate Debtor had deposited the Margin Money with the Appellant bank to secure the interest of the beneficiaries of the BGs. It was stressed that the contract between the Appellant bank and the beneficiary of the BG was an independent and separate contract and this contract of guarantee was a right created on a third party in terms of Section 126 of the Indian Contract Act. The Margin Money in the form of Term Deposits has therefore to be construed as an asset held by the Appellant under trust in favour of a third party i.e. beneficiaries of the BG. Hence, once the BG was invoked by the third party, the Margin Money was lawfully utilised by the Appellant bank towards

honouring the BG and thereafter appropriated, and that being so, the Corporate Debtor cannot lay any claim on the Margin Money as this asset no longer formed part of the estate of the Corporate Debtor. The Appellant bank has not breached law in liquidating the term deposits kept as Margin Money towards the BGs which were invoked much before initiation of CIRP. Further the Margin Money no longer being integral to the corpus of the Corporate Debtor, it was not covered by moratorium and hence could be appropriated any time by the Appellant Bank on the invocation of the BG which invocation had taken place well prior to initiation of CIRP. Assailing the impugned order, it was contended that the BG did not form a part of the security interest and hence the provision of moratorium under Section 14 of IBC did not place any embargo on the Appellant bank to appropriate the Margin Money at a later date.

15. Per contra, it is the case of the SRA that though the invocation of Performance Guarantee did not constitute a security interest under Section 3(31) of IBC and that once the BG was invoked, the Appellant was liable to honour the same, however, in this case as the appropriation took place after the CIRP had commenced on 24.08.2018, it fell during the period of moratorium rendering the appropriation illegal and unauthorised. Contention has also been raised that the appropriation was in breach of Clause 8.1(x) of the approved resolution plan which stipulated that from the “Trigger Date”, all cash and bank balances including term deposits of the Corporate Debtor was to remain available with the Corporate Debtor. The Appellant bank had appropriated the Margin Money on 27.09.2018 after having already submitted their claim on 05.09.2018, such post-CIRP appropriation after claim filing was wrongful and

unauthorised. This deduction was in violation of Section 14 of the IBC and the Adjudicating Authority had therefore correctly directed its reversal. It is also their case that appropriation was done unilaterally and was not disclosed in the Information Memorandum which was inconsistent with the need to maintain transparency thus causing prejudice to the interests of the SRA and impacting the plan implementation process.

16. The first issue before our consideration is whether the Margin Money lying with the Appellant was in the nature of security interest and whether the same could have been appropriated by the Appellant bank post filing of claims and post moratorium having come into play.

17. During the hearing, the Ld. Counsels of both sides relied on various judgements in support of their respective contentions which we propose to keep in mind to guide us in arriving at our finding.

18. Reliance has been placed by the Appellant on the order dated 24.07.2018 of this Tribunal in ***Gail India Ltd. Vs Rajeev Manaadiar in CA(AT)(Ins.) No. 319 of 2018*** which is as reproduced below:

“6. From sub-section (31) of Section 3, it is clear that the ‘security interest’ do not include the ‘Performance Bank Guarantee’, therefore, we hold that the ‘security interest’ mentioned in clause (c) of Section 14(1) do not include the ‘Performance Bank Guarantee’. Thereby the ‘Performance Bank Guarantee’ given by the ‘Corporate Debtor’ in favour of the Appellant- ‘GAIL (India) Ltd.’ is not covered by Section 14. The Appellant- ‘GAIL (India) Ltd.’ is entitled to invoke its ‘Performance Bank Guarantee’ in full or in part.

7. If it is invoked, the Appellant will inform it to the ‘Interim Resolution Professional’ who will maintain the record and make it clear that the ‘Performance Bank Guarantee’ in full or part has been invoked by the

Appellant which should also be brought to the notice of the ‘Resolution Applicant(s)’.”

19. Now we proceed to notice another judgment of this Tribunal dated 28.09.2020 in **Indian Overseas Bank Vs Arvind Kumar, Resolution Professional/Liquidator in CA(AT)(Ins.) No. 558 of 2020** which has been relied upon by the Appellant, wherein it has been held as follows:

“11. Thus, it is clear that ‘Security Interest’ does not include the ‘Performance Bank Guarantee’. The Performance Bank Guarantee is not covered by Section 14 of the Code.

12. It is pertinent to mention that the ‘margin money’ is not a security as has been argued by the Respondent and does not require any registration of charge. Only the assets given by the Company as securities are required to be registered under Section 77 of the Companies Act, 2013.

13. The ‘margin money’ is the contribution on the part of the borrower who seeks ‘Bank Guarantee’. The said margin money remains with the Bank, as long as the Bank Guarantee is alive. If the Bank Guarantee expires without being invoked, then the margin money reverse back to the borrower, and in case the bank guarantee is invoked by the beneficiary, the margin money goes towards payment of bank guarantee to the beneficiary, and nothing remains with the financial institutions, which can be reversed to the Corporate Debtor.

16. In the circumstances, as stated above, we are the considered opinion that Appeal deserves to be partly allowed and the direction of the Adjudicating Authority ‘to release the margin money, i.e. Rs.51,27,591/- kept in fixed deposit for issuance of Bank Guarantee, which was utilized by the invocation of bank guarantee on 27th December 2018 by the beneficiary’ is set aside. No order as to costs.”

20. Another judgment dated 21.07.2021 which has been relied upon by the Appellant is **UCO Bank vs Sudip Bhattacharya, Resolution Professional in CA(AT)(Ins.) No. 335 of 2021** has observed as under:

“11.....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’

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.

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’.....

20. *For all the aforementioned 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. Reliance has been also placed by the Appellant on the judgment of this Tribunal dated 04.10.2021 in **Monitoring Agency of Anush Finlease & Construction Pvt. Ltd Vs SBI in CA(AT)(Ins.) No. 902 of 2020** wherein reference has been made to the judgement of the Hon’ble Apex Court in the case of **Ansal Engineering Projects Ltd. Vs Tehri Hydro Development Corporation Ltd. (1996) 5 SCC 450** wherein the Hon’ble Supreme Court has held as follows:

“4. It is settled law that the bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by 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....”

22. Further reliance has been placed on the judgment of this Tribunal dated 16.09.2022 by the Appellant in ***Punjab National Bank Vs Supriyo Kumar Chaudhuri Resolution Professional in CA(AT)(Ins)No. 657 of 2020***, in which while discussing the implications of Section 14 of IBC, the following observations were made, the relevant extracts of which are as reproduced below:

“10. This Section provides that sub-Section (1) of the IBC shall not apply to ‘a surety in a contract of guarantee to a Corporate Debtor’. It is the case of the Appellant that margin money is not a security and does not fall within a definition of ‘Security Interest’ as ‘no ‘Security Interest’ is created by the ‘Corporate Debtor’ on the margin money. It is submitted by the Appellant that it is the usual practice of the issuing Bank to retain a cash margin ranging from 0% to 25% of the value of the obligation that the Bank assumes in the LC. The margin amount is adjusted in the amount of the bill and the issuing Bank pays it on behalf of the buyer. Upon receipt of the goods in the buyer’s premises, issuing Bank applies on it the usual margin confirming to the terms of cash credit facility that the issuing banker may have extended to the buyer. The issuing Bank is bound to extend from time to time the validity of the period from the LC.

17. A three Member Bench of this Tribunal in ‘Indian Overseas Bank’ Vs. ‘Arvind Kumar’, Comp. App. (AT)(Ins.) No. 558/2020, dated 28.09.2020 has held that ‘margin money’ is not a security and therefore does not require any registration of charge and that margin money is the contribution on the part of the borrower who seeks Bank Guarantee and the said margin money remains with the Bank as long as the Bank Guarantee is alive and in case the Bank Guarantee is invoked by the beneficiary, the margin money goes towards payment of Bank Guarantee to the beneficiary and nothing remains with the Financial

Institution. This principle has attained finality as the Judgement has not been challenged. We are of the view that the same principle ought to be applied to the LCs also. Learned Sr. Counsel Mr. Ramji Srinivasan relied on the Judgement of this Tribunal in 'Bank of Baroda Corporate Financial Services' Vs. 'Sundaresh Bhatt', 2020 SCC OnLine NCLAT 434, by which Order, this Tribunal has observed that the Bank had internally given instructions to appropriate the margin money kept in the form of an FD, subsequent to invocation of Bank Guarantee, on 01.08.2017, on which date, the Section 7 Application was admitted against the 'Corporate Debtor'. The facts of this case are distinguishable from the facts on hand as it was held by this Tribunal in 'Bank of Baroda Corporate Financial Services', (Supra) that the 'Bank was aware regarding initiation of CIRP, but adjusted the margin money without the consent of the CoC/IRP and that the Bank could not have been done so as the FD Accounts were closed on 02.08.2017, subsequent to the Admission of Section 7 Application. It is significant to mention that the Judgement of 'Indian Overseas Bank', (Supra) was rendered subsequent to 'Bank of Baroda Corporate Financial Services', (Supra).

18. Margin money is construed as substratum of a Trust created to pay to the beneficiary to whom Bank Guarantee is given. Once any asset goes into trust by documentation for the benefit of beneficiary, the original owner will not have any right over the said asset unless it is free from the Trust. As we observe that margin money has the character of Trust for the benefit of the beneficiary, it cannot be said to be an asset of the 'Corporate Debtor'. These FDRs cannot be realized by the 'Corporate Debtor' as and when it desires. The margin money is deposited in the FDRs which the 'Corporate Debtor' becomes entitled to only when the Margin Money is free from the obligations of the terms of the LC.

25. The material on record does not establish that any 'Security Interest' was created by the 'Corporate Debtor' with margin money. The provision of Section 14(3)(b) specifically excludes the Application of Section 14 to a 'surety' in a contract of Guarantee to a 'Corporate Debtor'. This Tribunal is of the earnest view that LC is basically akin to a contract of Guarantee, as it a contingent liability of the 'Corporate Debtor' which gets crystallized on the happening of a future event.

26. Both Sections 18 & 36(4) provide that asset held under Trust cannot be considered as an asset of the 'Corporate Debtor'. This Tribunal is of the earnest view that margin money has the character of the Trust for

the benefit of the beneficiary as long as the LC is alive and the same cannot amount to an asset of the 'Corporate Debtor'. Therefore, the principle laid down in 'Shanti Prasad Jain', (Supra) and upheld in the aforementioned 'Reserve Bank of India', (Supra) reinforces that 'the FDs were impressed in the 'Trust' as the same were earmarked for a specific purpose i.e., as a separate and distinct identifiable fund for honouring LCs'.

27. For all the aforementioned reasons, we are of the considered view that margin money can in no manner be said to be a 'Security Interest' as defined under Section 3(31) of the IBC. Section 14(1)(c) prohibits any action to foreclose, recover or ensure any 'Security Interest' created by the 'Corporate Debtor' in respect of its property. As we hold that no 'Security Interest' was created by the 'Corporate Debtor' with respect to the margin money that was deposited by the 'Corporate Debtor Company' towards the opening of the LC in the Appellant Bank, we are of the considered view that the Banks having appropriated this money during the period of Moratorium is justified as we hold that the amount is not an asset of the 'Corporate Debtor'. Therefore, a conjoint reading of Section 3(31) and Section 14 of the Code makes it abundantly clear that margin money is not included as a 'Security' and is not an asset of the Corporate Debtor."

23. Now we come to the two judgments which have been relied upon by the SRA in this regard. Before we peruse these two judgements, we feel that it is pertinent to mention that the Adjudicating Authority has also relied on these two judgements to hold that Margin Money formed part of the security interest and could not have been appropriated from the account of the Corporate Debtor after commencement of CIRP on account of ongoing moratorium.

24. One of the judgements relied upon by the SRA is the judgment of this Tribunal dated 20.02.2020 in **Bank of Baroda Corporate Financial Services Vs Sundaresh Bhatt** in **CA(AT)(Ins.) No. 635 of 2019** wherein it has been held as follows:

"6. Considering the submission made by both the sides, looking into the documents and keeping in view the reasons recorded by the

Adjudicating Authority, it does appear that money which was lying with the Bank as margin money in the Form of 3 FDs in the name of Corporate Debtor were appropriated after the CIRP was initiated and thus the same could not have been done under Section 14 of IBC. What internal instructions Bank gave on 01.08.2017 is not relevant. Admittedly, F.D. Accounts were closed on 02.08.2017 when Moratorium was in force. We do not find any error in the Impugned Order passed by the Adjudicating Authority.”

25. The second judgement on which reliance has been placed by Respondent-SRA is a judgment dated 28.05.2021 in **Bank of India Vs Bhuban Madan** in **CA(AT)(Ins.) No. 590 of 2020** wherein this Tribunal after quoting the provisions of Section 14(1) of the IBC it has observed:

“12. As per Section 17(1)(d) of the I&B Code, the Financial Institutions maintaining the accounts of the ‘Corporate Debtor’ have to act on the instructions of the Interim Resolution Professional in relation to such accounts and furnish all information relating to the ‘Corporate Debtor’. This Tribunal in a catena of Judgements has held that Banks cannot debit any amounts from the account of the ‘Corporate Debtor Company’ after the Order of moratorium, as it amounts to recovery of amount.

13. It was also held that the Banks cannot freeze accounts nor can they prohibit the ‘Corporate Debtor’ from withdrawing the amount as available on the date of moratorium for its day-to-day functioning. Section 14 of the I&B Code overwrites any other provision contrary to the same and any amount due prior to the date of CIRP cannot be appropriated during the moratorium period. It is seen from the record that payments due under the LCs have been made out of the funds of the ‘Corporate Debtor’ as is established from the reduction of liabilities under non-fund based facilities.”

26. It is the contention of the Appellant that the **Sundaresh Bhatt and Bhuban Madan judgement** are not applicable to the facts of this case. It was pointed out that in paragraph 17 of the **Punjab National Bank judgement**, it was categorically held that the **Indian Overseas Bank judgement** had duly taken cognisance of the findings in the **Sundaresh Bhatt judgement** and pointed out how the facts therein was distinguishable. It was contended that in

the **Sundaresh Bhatt matter**, the Bank was aware regarding initiation of CIRP but had adjusted the margin money without the consent of the CoC/IRP which adjustment the Bank could not have been done since the FD accounts were closed subsequent to the admission of Section 7 application.

27. When we look into the facts of the present case, we find that the Margin Money was given by DPIL as part payment to the Appellant to honour the liability of the BG. It was an earmarked deposit maintained with the Appellant Bank exclusively to meet its payment obligations on invocation of BG. On the BG having been invoked by the beneficiaries, payments were made by the Appellant alongwith the Margin Money in exercise of their contractual rights to appropriate the Margin Money amount from the account of DPIL. That the BGs had been invoked between 21.04.2018 and 23.05.2018 which period unambiguously preceded the initiation of CIRP on 24.08.2018 has not been controverted by the SRA. By the time CIRP had commenced, the BGs had already been invoked and the Margin Money was no longer the property or asset of the Corporate Debtor. When the Corporate Debtor was no longer the rightful owner of the Margin Money Term Deposits, the appropriation of the same by the Appellant bank was clearly not hit by moratorium. The appropriation of Margin Money by Appellant Bank was a contractual adjustment arising out of the BG Agreement and did not amount to enforcement of security interest and therefore did not attract Section 14 moratorium. Having said that, we now come to the applicability of the ratio of **Sundaresh Bhatt judgment supra**. In this case, the Fixed Deposits towards Margin Money was both terminated and appropriated by the Bank only after initiation of CIRP as in Para 6 of this judgment, we notice that Margin Money in

the form of Fixed Deposits in the name of the Corporate Debtor was still lying with the bank after initiation of CIRP. This clear distinction has been brought out at para 17 of ***Punjab National Bank judgement supra***. Further since in the facts of ***Bhuban Madan judgement*** also the withdrawal was made after the commencement of CIRP, it is distinct from the present case. We are persuaded to agree that the ratios of ***Sundaresh Bhatt and Bhuban Madan judgments supra*** are not applicable in the facts of this case. The Adjudicating Authority has erroneously relied on these two judgements to wrongly conclude that Margin Money formed part of the security interest on which the provision of moratorium was applicable.

28. Thus, to answer the first issue that we have framed for our consideration, we hold that the judgments relied upon by the Appellant and the common underlying ratio contained therein are applicable to the facts of the present case. Firstly, Margin Money is a contribution on the part of the borrower who seeks BG; secondly, Margin Money as BG becomes part of substratum of trust created to pay to a beneficiary to whom a BG was given and hence such assets held under trust cannot be considered to be the assets of the corporate debtor or said to be a security interest under Section 3(31) of IBC and thirdly, that the provisions of Section 14(1) of IBC are not applicable to a surety in a contract of guarantee to a Corporate Debtor.

29. This brings us to the related issue as to whether the Margin Money could have been appropriated by the Appellant bank post filing of claims and post moratorium having come into play.

30. We have already noticed for the reasons stated above that Margin Money in the given factual matrix does not fall within the definition of 'security interest'. No security interest is created as such by the Corporate Debtor on the Margin Money. The Margin Money in the form of term deposit was a condition precedent for sanction of BGs. Margin Money in this case is the contribution on the part of the borrower seeking Bank Guarantee and the said Margin Money remained with the Bank as long as the Bank Guarantee was alive but once the Bank Guarantee was invoked by the beneficiary, the Margin Money went towards payment of Bank Guarantee to the beneficiary. The Margin Money component was in effect not the asset of the Corporate Debtor anymore. This Margin Money could be utilized by the Appellant Bank against invoked BGs as a matter of right under the Facility Agreement executed with the DPIL. Even if the appropriation of the Margin Money was not carried out by the Appellant Bank concurrently with the invocation of BG, the terms of the Facility Agreement did not impair the right of the Bank to credit unto itself the Margin Money sum at a later point of time. Even if the deduction was not carried out contemporaneously, it did not amount to extinguishment of the Bank's contractual rights to do so subsequently. Once the BG is invoked by the beneficiary, the Margin Money lying with the bank goes towards payment of BG to the beneficiary leaving no scope for reversal of the Margin Money to the borrower as it is no longer part of the corpus of the Corporate Debtor. Thus, the Margin Money not being part of the asset of the Corporate Debtor anymore, the provisions of Section 14 do not become applicable on the Margin Money.

31. Contending that during CIRP period, set-off or appropriation of funds is permissible only when mutual debts arise from the same commercial transaction, reliance was placed by the SRA on the judgment of the Hon'ble Supreme Court in ***Bharti Airtel Ltd. Vs Vijaykumar V. Iyer and Ors. (2024) 4 SCC 668***. We do not find that this judgment is applicable in the facts of this case since present is not a case of claim and counter-claim in the form of set-off or a case unilateral adjustment of unrelated claims. In the present case, the Margin Money had been admittedly liquidated before the initiation of CIRP by the Appellant bank towards honouring the BG. It is also to be noticed that in the present case the Appellant had filed revised claim in Form C and notified the RP about the prior appropriation and adjustment of the Letter of Guarantee margin of Rs 1,58,59,294/- as is seen at page 82-89 of Appeal Paper Book which Margin Money which was already utilised prior to commencement of CIRP.

32. This brings us to the second issue which requires our consideration as to whether the Adjudicating Authority acted within its jurisdiction to order reversal of the Margin Money to the account of the Corporate Debtor by the Appellant bank.

33. It was canvassed by the SRA that once a resolution plan is approved by the Adjudicating Authority, as in the present case, all claims/dues owed to any stakeholder, which are not a part of the resolution plan shall stand extinguished and all claims as provided in the resolution plan shall stand frozen and become binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any Local Authority, guarantors and other stakeholders. In such circumstances, the

Appellant bank could not have appropriated funds from the account of the Corporate Debtor post commencement of CIRP in violation of Section 14 of IBC. It has been contended that the Adjudicating Authority has passed a reasoned order to hold that the no withdrawal by the Appellant bank from the account of the Corporate Debtor was therefore permissible after initiation of CIRP proceedings in terms of the clean-slate principle set out by the Hon'ble Supreme Court in ***Ghanashyam Mishra judgment supra***.

34. Repelling the arguments of the SRA, it has been contended by the Appellant that the reversal of Rs 1,58,59,294/- as directed by the Adjudicating Authority would amount to modification/alteration of the claims already approved under resolution plan which is not permissible as has been held in ***Ghanashyam Mishra judgment supra***. The Appellant while submitting his revised claims had explained the calculation of the claim amount which depicted adjustment of the Margin Money. The revised claim of the Appellant had already been admitted and formed part of the Information Memorandum. This fact of deduction of Margin Money towards BG was therefore very much within the knowledge of the SRA. Further, neither the SRA nor the RP had at any stage raised any dispute on the submission of the revised claim of the Appellant till the approval of the resolution plan the appropriation of the Margin Money was not permissible. Having therefore acquiesced to the treatment of this claim, the SRA is now precluded from disputing it. The resolution plan had already been approved by the CoC and the Adjudicating Authority and not having been challenged, the terms of the resolution plan cannot be now changed. Since the claim of the Appellant now form part of the resolution plan which is already

under implementation, it cannot be disturbed and adjudicated again. The resolution plan had been approved by the Adjudicating Authority on 20.06.2022. Once the resolution plan is approved by the CoC, based on its commercial wisdom, it is not open for judicial review unless it is found to be not in conformity with the mandate of the IBC.

35. The law has been well settled by the Hon'ble Supreme Court in the case of ***Ghanashyam Mishra judgment supra*** that claims which are not part of the resolution plan are considered extinguished. Claims as provided in the resolution plan get frozen and becomes binding on all stake-holders. The relevant excerpts of this judgment are as extracted hereunder:

“68. All these details are required to be contained in the information memorandum so that the resolution applicant is aware as to what are the liabilities that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the corporate debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the adjudicating authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in sub-section (2) of Section 30 is that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is that he should start with fresh slate on the basis of the resolution plan approved.

"86. The legislative intent behind this is, to freeze all the claims so that the resolution applicant starts on a clean slate and is not flung with any surprise claims. If that is permitted, the very calculations on the basis of which the resolution applicant submits its plans, would go haywire and the plan would be unworkable.

87. We have no hesitation to say, that the word "other stakeholders" would squarely cover the Central Government, any State Government or any local authorities. The legislature, noticing that on account of obvious omission, certain tax authorities were not abiding by the mandate of IB

Code and continuing with the proceedings, has brought out the 2019 amendment so as to cure the said mischief. "

"102.1. That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan."

36. It is pertinent to note that in the above judgment, the Hon'ble Apex Court has held that only those claims which are not part of the resolution plan stand extinguished. ***Ghanashyam Mishra judgment supra*** only lays down that SRA cannot be saddled with new claims after the plan is approved, but nowhere suggests extinguishment of claims which already form part of the plan approved by the CoC and Adjudicating Authority. In the present case, the revised claims of the Appellant Bank were reflected in the Information Memorandum after deduction/adjustment of Margin Money amount. The SRA was conscious of this revised claim of the SRA while submitting the resolution plan. Once the resolution plan has been approved by the CoC and Adjudicating Authority, the SRA is bound by the terms of their resolution plan. The SRA has failed to put any material on record to show that the claim of the Appellant is a newly fangled claim which was thrust upon them after the plan was frozen. The SRA cannot be permitted to modify the terms of resolution plan after approval by the Adjudicating Authority.

37. In such circumstances, for the Adjudicating Authority to have directed reversal of Margin Money amount of Rs 1,58,59,294/- by the Appellant bank at a time when their revised claim stood verified, validated and admitted at the time of approval of the plan by both the CoC and Adjudicating Authority tantamount to modification of the terms of resolution plan which is clearly not permissible. In the process, the Adjudicating Authority acted beyond its jurisdiction to order reversal of the Margin Money to the account of the Corporate Debtor by the Appellant bank. The terms of the plan of the SRA already having been approved by the Adjudicating Authority on 20.06.2022 stood crystallised. Such a plan which has attained finality and not challenged is not to be so lightly interfered with by the Adjudicating Authority. The impugned order clearly runs contrary to the spirit and ethos of the ***Ghanashyam Mishra judgment supra*** and cannot be sustained in the eyes of law.

38. In view of the reasons stated above, we find sufficient merit in the Appeal. We allow the Appeal and set aside the impugned order. The directions issued by the impugned order for reversal of an amount of Rs. 1,58,59,294/- which was amount of Margin Money deposited by the Corporate Debtor with the Appellant bank to take care of the Bank Guarantee is also struck down. No order as to costs.

**[Justice Ashok Bhushan]
Chairperson**

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

**Place: New Delhi
Date: 21.08.2025**

Abdul/ Harleen