NATIONAL COMPANY LAW APPELLATE TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT)(INSOLVENCY) NO.759 OF 2020

IN THE MATTER OF:

BHARAT ALUMINIUM CO. LTD

Aluminium Sadan,
Core-6, Scope Office Complex,
7, Lodhi Road, New Delhi – 110003 **...Appellant**

Vs.

1. **M/S J.P. ENGINEERS PVT LTD.**

Through Mr. Sumit Bansal
Interim Resolution Professional
3/8, 2nd Floor,
Asaf Ali Road, New Delhi – 110002.

...Respondent No. 1

2. **ANDHRA BANK**

(Now Merged with Union Bank)
Green Park, Branch,
(Branch Code: 0000162)
R-3, Main Market, Green Park,
New Delhi – 110016 **... Respondent No. 2.**

PRESENT:-

For Appellant:- Ms Ranjana Roy Gawai, Ms Ananya Chug and Ms Vasudha Sen, Advocates
For Respondent:- Mr. Abhishek Garg, Advocate for R1. Mr. PBA Srinivasan, MR AvinashMohapatra, Mr IchchhaKailash, Advocates for R2.

J U D G M E N T

Jarat Kumar Jain. J:

The Appellant 'Bharat Aluminium Company Limited' filed this Appeal against the order dated 31.07.2020 passed by the Adjudicating Authority (National Company Law Tribunal) New Delhi, Bench No. II. Whereby dismissed the Appellant's Application I.A. No. 2085/ND/2020 and allowed the Respondent No. 2'sApplication I.A. No. 2572/ND/2020 and directed the

Appellant not to demand the release of bank guarantee amount from the Respondent No. 2, in view of the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) against the 'M/s J.P. Engineers Private Limited.' (Corporate Debtor) Respondent No. 1.

2. Brief facts of this case are that the Operational Creditor 'M/s Worldwide Metals Pvt. Ltd.' filed Company Petition No. IB-1048/ND/2019 under Section 9 of the IBC for initiation of Corporate Insolvency Resolution Process (CIRP) against the Corporate Debtor 'M/s J.P. Engineers Pvt. Ltd.' The Application was admitted by the Adjudicating Authority vide order dated 26.02.2020 and Mr. Sumit Bansal was appointed as an Interim Resolution Professional (IRP).

3. The Appellant had entered into an Agreement with the Corporate Debtor for Sale and Purchase of Aluminium Products for the period of 01.04.2019 to 31.03.2020. For ensuring the payments the Corporate Debtor had issued a bank guarantee dated 22.04.2019 amounting to Rs. 1,60,000,00/- executed by Andhra Bank Respondent No. 2 (Andhra Bank is now merged with Union Bank of India). Thereafter, the Respondent No. 2 extended the validity of aforesaid bank guarantee till 21.04.2020. The Corporate Debtor defaulted in making of payments, therefore, the Appellant for invoking bank guarantee has written a letter dated 03.03.2020 to the Respondent No. 2 bank and also deposited the original bank guarantee to the concern branch. The Respondent No. 2 sent a reply to the Appellant that they can encash the bank guarantee only after taking approval from the IRP. Thereafter, the Appellant had sent a legal notice on 20.03.2020 to the

Respondent No. 2 seeking encashment of bank guarantee dated 22.04.2019 in favour of the Appellant. The Respondent No. 2 vide its reply dated 27.03.2020 refused to allow the invocation of the bank guarantee on the ground of enforcement of moratorium under Section 14 (1) of the IBC against the Respondent No. 1.

4. The Appellant 'Bharat Aluminium Ltd.' filed an application I.A. No. 2085/ND/ 2020 before the Adjudicating Authority for the following relief:

> (a) Declare that the invocation/encashment of bank guarantee No. 016219/GPR0021dated 22.04.2019 is not covered by Moratorium under Section 14 of the IBC.
> (b) Consequently, direct the respondent bank to encash the bank guarantee
> (c) Pass any other order as this Hon'ble Tribunal may deem fit.

5. The Respondent No. 2 filed an application IA No. 2572/ND/2020 before the Adjudicating Authority for the following relief:-

> (a) Direct the Appellant not to invoke the bank guarantee in view of Section 14 of the IBC imposed on the Respondent No. 1 i.e Corporate Debtor
> (b) Direct the Appellant not to demand the release of bank guarantee amount from the bank in view of section 14 of the IBC
> (c) Pass any order as this Hon'ble Tribunal may deem fit in the interest of justice.

6. Learned Adjudicating Authority by the impugned common order dismissed the Appellant's application whereas allowed the Respondent No. 2's application with the direction to the Appellant not to demand the release of bank guarantee amount from the Respondent No. 2 bank, in view of the moratorium declared under section 14 of the IBC2016 in relation to the Corporate Debtor.

7. Being aggrieved with the impugned order the Appeal has been filed.

8. Learned Counsel for the Appellant submitted that conjoined reading of the proviso to Section 3 (31) and Section 14 of the IBC specifically excludes performance bank guarantees from the ambit of moratorium under Section 14 of the IBC and that the same reasoning would apply to the bank guarantee. Performance bank guarantee is not defined in the IBC however, Regulation 36(B) of the IBBI Regulations (Insolvency Resolution Process for Corporate Persons) Regulations 2016, deals with the performance bank guarantees whereby it can be seen that the performance guarantee is monetary in nature and therefore, the reasoning behind excluding a performance bank guarantee can squarely be applied to bank guarantees as well.

9. It is further submitted that Section 14(3) (b) of the IBC provides that Moratorium will not be applicable 'to a surety in a contract of guarantee to a Corporate Debtor'. Therefore, the Respondent No. 2 bank cannot take advantage of the moratorium that has been imposed upon the assets of the Corporate Debtor. For this purpose, placed reliance on the judgement of Hon'ble Supreme Court in the Case of SBI Vs. V. Rama Krishnan & Ors. (2018) 17 SCC 394.

10. It is also submitted that the legislative intend behind Section 14 of the IBC is only to secure the Assets of the Corporate Debtor and the benefit of moratorium ought not to be extended to third parties i.e. surety, for this purpose, placed reliance on the Para 5.10 and 5.11 of Report of Insolvency Law Committee March, 2018 which specifies that encashment of bank guarantee would not have a significant impact on the debt of the corporate

debtor as the right of the creditor against the corporate debtor is merely sifted to the respondent no. 2 bank, to the extent of payment by the bank.

11. It is submitted that the Adjudicating Authority has failed to deal with the decision of this Appellate Tribunal in the case of GAIL India Ltd. Vs. Rajeev Manandiar & Ors. (2018) SCC Online NCLAT 374 which is relied upon by the Appellant.

12. Learned Counsel for the Appellant submitted that Hon'ble Supreme Court in the case of UP State Sugar Corporations Vs. Sumac International Ltd. in Civil Appeal No. 15357 of 1996, held that whenever irrevocable and unconditional bank guarantee sought to be encashed by the beneficiary, bank is bound to honour the guarantee irrespective of any dispute raised by the customer (at whose instance the bank guarantee was issued) against the beneficiary. Hon'ble Andhra Pradesh High Court in the case of Haryana Telecom Ltd. Vs. Aluminium industries Ltd. (1995) SCC Online AP 721 held that the bank guarantee cannot be said to be the property of the Corporate Debtor simply because it is indirectly going to be affected by enforcement of the said bank guarantee by the beneficiary.

13. Learned Counsel for the Appellant submitted that the Adjudicating Authority has erred in placing reliance on the decision of the Adjudicating Authority (Allahabad Bench) in Nitin Hashmukh Lal Parikh Vs. Madhya Gujrat Vij Company Ltd. &Ors. This decision is rendered by the Allahabad Bench on 09.02.2018 i.e. prior to substitution of sub-Section 3(b) of Section 14 of the IBC. After amendment, Principal Bench of the Tribunal in M/s. Levcon Valves (P) Ltd. v. Energo Engineering Projects Limited in CP (IB)

No. 160(ND) of 2017 dated 24.08.2018 and 28.09.2018 and Gudearth Homes Infracon Pvt. Ltd. And Others v. Veebro Technoplast Pvt. Ltd. in CA No. 580 (PB) of 2017 in CP (IB) No. 159 (PB) of 2017 order dated 06.09.2018 held that invocation of bank guarantee during moratorium is specifically permitted.

14. In such circumstances, even after commencement of the moratorium the bank guarantee can be encashed and the Respondent No. 2 bank is liable to pay the money in its capacity as a surety of the Respondent No. 1. Thus, the impugned order is not sustainable in law and is liable to be set aside.

15. Learned Counsel for the Respondent No. 1 has not filed any Reply Affidavit since the issue in regard to bank guarantee is between the Appellant and Respondent No. 2.

16. Learned Counsel for the Respondent No. 2 submitted that the guarantee in question is a bank guarantee and not a performance guarantee as held by Ld. Adjudicating Authority. The bank guarantee is covered by the moratorium under Section 14 of the IBC thus, enforcing such security interest during the moratorium period would violate the Section 14 of the IBC. The provisions of Section 3(31) of the IBC makes it clears that the guarantee in question falls under the ambit of "any other agreement or arrangement securing payment or performance of any obligation of any person". This Appellate Tribunal in the case of State Bank of India Vs. Debashish Nanda CA (AT) (Ins) No. 49 of 2018 held that Financial Creditor cannot debit any amount from the Corporate Debtor accounts, after the

order of moratorium, as it may amount to recovery in violation of the Section 14 of the IBC. This Appellate Tribunal in the case of Indian Overseas Bank Vs. Mr. Dinker T Venkatsubramaniam Resolution Professional for Amtek Auto Ltd. (CA (AT) (Ins) No. 267 of 2017) held that once moratorium has been declared it is not open to any person including Financial Creditor to recover any amount from the account of the Corporate Debtor. For the same preposition, Learned Counsel for the Respondent No. 2 drew our attention towards the Judgment of this Appellate Tribunal in the case of IRP of Ruchi Soya Industry Ltd. Vs. ICICI Bank Ltd. MA No. 84 of 2018 in CP (IB) No. 1371-1372(MB)/2017.

17. It is also submitted that IBC being a special law prevails on the Indian Contract Act, 1872 which happens to be general law. Thus, the guarantee in question being a bank guarantee will be hit by moratorium under Section 14 of the IBC.

18. It is also submitted that there is difference between the performance bank guarantee and financial bank guarantee. Thus, the intention of the legislature in carving out an exception for the performance bank guarantee only is limited for excluding only the performance bank guarantee from the ambit of moratorium under Section 14 of the IBC. The Bank guarantee in question is a security interest of the Corporate Debtor. Thus, encashing the same would violate the provisions of Section 14 of the IBC and further would frustrate the Corporate Insolvency Resolution Process.

19 It is also submitted that the bank guarantee in question is an independent contract between the Appellant and Respondent No. 2 bank

then the Adjudicating Authority had no jurisdiction to entertain the Appellant's application. The Second amendment of Section 14(3) (b) has no bearing on the Appellant's case. Thus, there is no ground to interfere in the impugned order. The Appeal is liable to be dismissed.

20. After hearing Learned Counsel for the parties, we have perused the record and relevant provisions of IBC.

21. Admittedly the Appellant had entered into an agreement for sale and purchase of aluminium products for the period 01.04.2019 to 31.03.2020 with J.P. Engineering's (Corporate Debtor). For ensuring the payments the Respondent No. 2 issued bank guarantee dated 22.04.2019 for an amount of Rs. 1 Crores 60 Lakhs in favour of the Appellant. The Respondent No. 2 vide letter dated 21.10.2019 extended the period of guarantee till 21.04.2020. The Appellant on 03.03.2020 sent a letter to the Respondent No. 2 for invocation of the bank guarantee.

22. In view of aforesaid admitted facts and the terms and conditions of the guarantee, Ld. Adjudicating Authority rightly held that bank guarantee in question is a financial bank guarantee and not a performance bank guarantee.

23. Now, we have to consider whether the financial bank guarantee can be invoked after issuance of moratorium under Section 14 of the IBC.

24. The Adjudicating Authority held that the bank guarantee does not fall within the purview of the proviso to Section 3(31) of the IBC because a bank guarantee cannot be described as performance bank guarantee. The bank

guarantee falls within the purview of the definition of 'security interest' as defined under section 3(31) of the IBC. Therefore, during the moratorium the bank guarantee cannot be invoked as the same may be prohibited under Section 14(1) (c) of the IBC.

25. Ld. Adjudicating Authority while giving the aforesaid finding placed reliance on the judgment of NCLT Ahmadabad Bench passed in the matter of Nitin Hashkhmukh Lal Parikh (Diamond Power Transformers) Ltd. vs. Madhya Gujarat Vis Company Ltd. & Ors. Wherein 'it is held that moratorium order passed by the Tribunal applies in respect of bank guarantees other than performance bank guarantees furnished by the Corporate Debtor, in respect of its property since it comes within the meaning of security interest'. Therefore, Financial/Operational Creditor is not entitled to invoke bank guarantees other than that comes within the purview of performance guarantee, during moratorium period. Ahmadabad Tribunal, delivered this order on 09.02.2018 whereas with retrospective effect from 06.06.2018 Sub-Section 3 (b) of Section 14 of the IBC has been substituted therefore, in this Order amended provision has not been considered.

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."

27. We noted that Ld. Adjudicating authority in the impugned order has not considered the aforesaid amendment.

28. Learned Counsel for the Respondent No. 2 cited following orders:

(1) Indian Overseas Bank Vs. Mr. Dinker T Venkatsubramaniam NCLAT decided on 15.11.2017
(2) Nitin Hashkhmukh Lal Parikh (Dimond Power Transformers) Ltd. vs. Madhya Gujarat Vis Company Ltd. & Ors. NCLT, Ahmadabad Bench, decided on 09.02.2018
(3) IRP of Ruchi Soya Industry Ltd. Vs. ICICI Bank Ltd. NCLT, Mumbai Bench, decided on 05.06.2018

29. Aforesaid orders have been passed before the amendment therefore, these citations are not helpful to the Respondent No. 2.

30. After substitution of Sub-Section 3(b) the provision of Section 14(1) of the IBC shall not apply to surety in the contract of guarantee to a Corporate Debtor.

31. This amendment has been made on the recommendation of Report of Insolvency Law Committee March, 2018. In para 5.10 & 5.11 of the Report of Insolvency Law Committee specifies 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 the assets of third parties like sureties. In Para 5.11 of the Report of Insolvency Law Committee concluded that Section 14 of the IBC does not intend to bar actions against assets of guarantors to the debts of the Corporate Debtor and recommended that explanation to clarify this may be inserted in Section 14 of the IBC. The scope of moratorium may be restricted to the assets to

the Corporate Debtor only. Pursuant to this Report Legislation has substituted Sub Section 3(b) of Section 14 (With retrospective effect 06.06.2018) by Insolvency and Bankruptcy Code, (Second Amendment) Act, 26 of 2018. The effect of the amendment has been considered by the Hon'ble Supreme Court in the Case of SBI Vs. V. Ramakrishnan & Ors. (2018) 17 SCC 394 read as under:

> 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) xxx xxxxxx
>
> (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 26.03.2018, 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;"
>
> 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." xxx xxxxxx

"5.7 The Allahabad High Court subsequently took a differing view in Sanjeev Shriya v. State Bank of India, 2017 (9) ADJ 723, by applying moratorium to enforcement of guarantee against personal guarantor to the debt. The rationale being that if a CRIP 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 State Bank of India v. V. Ramakrishnan and Veeson Energy Systems, NCLAT, New Delhi, Company Appeal (AT) (Insolvency) No. 213/2017 [Date of decision – 28 February, 2018], the 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, where under the creditor has a remedy in relation to his debt against both the principal debtor and the surety [National Project Construction Corporation Limited v. Sandhu and Co., 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 Indian 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. Dandayunthapani Chattiar, 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 36 and several [Bank of Bihar 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 important 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:

33.1. (i) CIT v. Shelly Products, (2003) 5 SCC 461:

"38. It was submitted that after 1-4-1989, in case the assessment is annulled the assessee is entitled to refund only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee. But before the amendment came into effect the position in law was quite different and that is why the legislature thought it proper to amend the section and insert the proviso. On the other hand learned counsel for the Revenue submitted that the proviso is merely declaratory and does not change the legal position as it existed before the amendment. It was submitted that this Court in CIT v. Chittor Electric Supply Corpn [(1995) 2 SCC 430 : (1995) 212 ITR 404] has held that proviso (a) to Section 240 is declaratory and, therefore, proviso (b) should also be held to be declaratory. In our view that is not the correct position in law. Where the proviso consists of 38 two parts, one part may be declaratory but the other part may not be so. Therefore, merely because one part of the proviso has been held to be declaratory it does not follow that the second part of the proviso is also declaratory. However, the view that we have taken supports the stand of the Revenue that proviso (b) to Section 240 is also declaratory. We have held that even under the unamended Section 240 of the Act, the assessee was only entitled to the refund of tax paid in excess of the tax chargeable on the total income returned by

the assessee. We have held so without taking the aid of the amended provision. It, therefore, follows that proviso (b) to Section 240 is also declaratory. It seeks to clarify the law so as to remove doubts leading to the courts giving conflicting decisions, and in several cases directing the Revenue to refund the entire amount of income tax paid by the assessee where the Revenue was not in a position to frame a fresh assessment. Being clarificatory in nature it must be held to be retrospective, in the facts and circumstances of the case. It is well settled that the legislature may pass a declaratory Act to set aside what the legislature deems to have been a judicial error in the interpretation of statute. It only seeks to clear the meaning of a provision of the principal Act and make explicit that which was already implicit."

33.2 CIT v. Vatika Township, (2015) 1 SCC 1:

"32. Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as "declaratory statutes". The circumstances under which provisions can be termed as "declaratory statutes" are explained by Justice G.P. Singh [Principles of Statutory Interpretation, (13th Edn., Lexis NexisButterworthsWadhwa, Nagpur, 2012)] in the following manner:

"Declaratory statutes"

The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES [W.F. Craies, Craies on Statute Law (7th Edn., Sweet and Maxwell Ltd., 1971)] and approved by the Supreme Court [in Central Bank of India v. Workmen, AIR 1960 SC 12, para 29]: 'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted".' But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have

> meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."
>
> The above summing up is factually based on the judgments of this Court as well as English decisions."

32. Hon'ble Supreme Court in the case V Ramakrishnan (Supra) held that sub-section 3(b) of Section 14 amendment being clarificatory in nature and is retrospective. Section 14 of the IBC refers only to debts due by Corporate Debtors, who are limited liability companies, and it is clear that the vast majority of the cases, personal guarantees are given by Directors who are not in management of the companies. The object of the IBC is not allowed such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why section 14 of the IBC is not applied to them. Also held that contract of guarantee is between the creditor and principal debtor and the surety whereunder the creditor has a remedy in relation to his debt against both the principal debtor and surety. As per Section 128 of the Contract Act, 1872 the liability of surety is coextensive with that of principal debtor and the creditor may go against either principal debtor or surety or both in no particular sequence.

33. We have considered whether the bank guarantee is an asset of Respondent No. 1 (Corporate Debtor).

34. Ld. Counsel for the Appellant has placed reliance on the Judgment of Hon'ble AP High Court in the case of Haryana Telecom Ltd. (Supra) held that:

> "The bank guarantee cannot be said to be the property of the first Respondent (Buyer) simply because it is indirectly going to be affected by enforcement of the said bank guarantee by the writ Appellant"

35. Ld. Counsel for the Appellant also cited the Judgment of Hon'ble Supreme Court in the Case of UP State Sugar Corporation (Supra)in which it is held that:

> "When irrevocable and unconditional bank guarantee payable on demand without demur then, whenever such bank guarantee is sought to be encashed by the beneficiary, bank is bound to honour the bank guarantee irrespective of any dispute raised by the customer (at whose instance the guarantee was issued) against the beneficiary".

36. Ld. Counsel for the Appellant has also cited the Order of this Appellate Tribunal in the Case of Gail India Ltd. (Supra) in this case the Corporate Debtor has issued performance bank guarantee whereas the case in hand is in regard to financial bank guarantee. Therefore, this judgment is not helpful to the Appellant.

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/2020is dismissed whereas the Appellant's Application I.A.No.2085/ND/2020 is allowed and declare that the bank guarantee in question can be invocated/encashed even during the moratorium period under section 14 of the IBC against the Corporate Debtor (Respondent No. 1). No order as to costs.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Kanthi Narahari)
Member (Technical)

New Delhi
26th February, 2021.
SC