NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 745 of 2025

[(Arising out of the Impugned Order dated 19.12.2024 passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi, Bench-III in I.A No.1357/2024 of 2024 in IB-809 (ND)/2021)]

IN THE MATTER OF:

Assistant Commissioner (EPM),
O/o The Principal Commissioner
of Customs (Import),
ICD Tughlakabad, New Delhi-110020
Rep. by Adv. Aakarsh Srivastava,
Standing Counsel for Customs **...Appellant**

Versus

1. **Ms. Shruti Gupta, Liquidator**
M/s. Metalite Eco Future Labs Private Limited
Having its office at:
227, Sharda Niketan, Pitampura
Delhi-110034. **...Respondent No.1**

2. **The Branch Manager,**
Bank of Baroda, 2/10 Ansari Road,
Darya Ganj, Delhi-110002. **...Respondent No.2**

3. **Metalite Eco Future Labs Private Limited**
4417/7, Ansari Road, Daryaganj,
New Delhi-110002 **...Respondent No.3**

Present:

For Appellant	:	Mr. Aakarsh Srivastava, Sr. Standing Counsel, Mr. Utkarsh Srivastava, Mr. Ashish Bansal, Mr. Ankit Kumar, Mr. Dhananjay Parth and Mr. Anand Pandey, Advocates
For Respondent	:	Mr. Rachit Mittal, Mr. Parish Mishra, Mr. Kanishk Raj, Ms. Srishti Agrawal, Mr. Abhishek Sinha, Mr. Shivansh Bansal, Ms. Aayushi Kiran, Ms. Nisha Verma, Advocates for R-1.

Mr. Sougat Sinha, Ms. R. Gayathri Manasa, Mr. Vishal Majumdar and Mr. Anurag Singh, Advocates for R-2.

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

[Per: Arun Baroka, Member (Technical)]

The present appeal is filed against the Impugned Order dated 19.12.2024 passed by the Ld. National Company Law Tribunal, New Delhi Bench in IA No.1357 of 2024 in IB-809(ND)/2021, wherein the Hon'ble Adjudicating Authority has allowed the IA - 1357/2024, thereby directing the Appellant herein to return the original bonds pertaining to the Bank Guarantees and further directing the Manager, Bank of Baroda to immediately remit the amount of the FDR's to the Liquidation Account so that the same could form a part of the Liquidation Estate of the Corporate Debtor.

Brief Facts

2. We note that the Corporate Debtor is a company incorporate on 09.12.2010 under the Companies Act 1956 registered with the Registrar of Companies, Delhi. The Corporate Debtor was involved in the business of research and development in natural sciences, medical sciences, agriculture and engineering & technology.

3. During the year 2014 and 2015, the Corporate Debtor imported some goods and availed benefit of scheme of custom duty exemption floated by Government of India. For availing the said scheme, the Corporate Debtor had executed eight EPCG Bonds with the Appellant for some export obligations to be fulfilled by the Corporate Debtor within prescribed timelines. Further as

per the terms of the aforesaid bond, and on the request of the Corporate Debtor, Bank Guarantee was executed by the Respondent No. 2 in favour of the Appellant for each EPCG Bond. The details of each Bank Guarantees are as follows:

S. No.	B.G. No.	Date	Amount (₹)	Expiry Date
1.	6017IBGIS140064	01.07.2014	15,03,000/-	01.07.2022
2.	6017IBGIS140065	01.07.2014	10,46,000/-	30.06.2016
3.	6017IBGIS140086	22.08.2014	3,52,000/-	22.08.2016
4.	6017IBGIS140087	22.08.2014	16,50,000/-	21.08.2024
5.	6017IBGIS140064	03.09.2014	13,03,128/-	03.09.2016
6.	6017IBGIS140064	02.06.2015	8,70,000/-	01.06.2021
7.	6017IBGIS140064	08.06.2015	3,80,000/-	07.06.2023
8.	6017IBGIS140064	31.07.2015	18,12,000/-	30.07.2017

4. The Corporate Debtor moved an application under section 10 of Insolvency and Bankruptcy Code, 2016 (hereinafter referred as **"IB Code"**) before Hon'ble NCLT, New Delhi. The Ld. NCLT vide its order dated 14.03.2023 admitted the Corporate Debtor into insolvency and appointed Mr. Sunil Kumar Agarwal as IRP. Thereafter, the Ld. NCLT vide order dated 21.11.2023 passed liquidation order against the Corporate Debtor and appointed the Respondent No. 1 as liquidator.

5. The Respondent No. 1 issued public announcement on 07.12.2023, inviting all the stakeholders to file its claim with Respondent No. 1. As per the public announcement, last date of submission of claim was 03.01.2024. The Appellant filed its claim in Form 'C' with the liquidator on 01.02.2024 for an amount of ₹ 1,81,27,632/- and the same was admitted by the Liquidator in full.

6. On 14.02.2024, the Respondent No. 1 issued a letter to the Respondent No. 2 requesting to release the expired Bank Guarantees executed on instruction of the Corporate Debtor and to credit the maturity amount to the liquidation account of the Corporate Debtor. The Liquidator also issued a letter dated 19.02.2024 to the Appellant informing admission of entire claim of the Appellant to the tune of ₹ 1,81,27,632/- and requested the Appellant to issue a letter to Respondent No. 2 for removal of lien. The Respondent No. 2 vide letter dated 29.02.2024 refused to credit of the maturity amount for the reason that the Bank Guarantees are not expired and requested to raise such issue with the Appellant.

7. Thereafter, The Respondent No. 1 filed an application bearing IA No. 1357 of 2024 before Hon'ble NCLT seeking direction against the Appellant to return the original Bank Guarantee to Respondent No. 2 and direction against the Respondent No. 2 to release the amount into liquidation account of the Corporate Debtor.

8. That Hon'ble NCLT vide order dated 19.12.2024 allowed the aforesaid application and directed the Appellant to return the original Bank Guarantee to the Respondent No. 2 and directed Respondent No. 2, to release the maturity amount in the liquidation account of the Corporate Debtor and the relevant parts of the said Order are reproduced hereinbelow:

> " 6. It is ordered as follows:
>
> i. In view of the reasons mentioned above, the IA-1357/2024 stands allowed.

ii. Having regard to the facts and circumstances of the case, we direct the Respondent. 1/Shri Devindra Kumar, Assistant Commissioner, to immediately return the original bonds pertaining to the Bank Guarantees.

iii. We further direct the Respondent no. 2/Manager, Bank of Baroda, to immediately remit the amount of the FDRs to the Liquidation Account so that the same could form part of the Liquidation Estate of the Corporate Debtor.

……"

Submissions of the Appellant

9. The Corporate Debtor moved an application for the insolvency under section 10 of the Code, which was duly admitted and the CIRP (Corporate Insolvency Resolution Process) was initiated. After failure of Form G, as no resolution plan was received, the proceeding of liquidation were initiated against the Corporate Debtor. The Corporate Debtor was ordered to be liquidated by an order of 21.11.2023 and the Respondent No. 1/ Liquidator was appointed by the Ld. NCLT as Liquidator in this case. Consent of the liquidator was filed on 06.12.2023 and a Public Announcement was made on 07.12.2023 in two local newspapers i.e. Financial Express (English) and Jansatta (Hindi) inviting claims from the stakeholders to be submitted latest by 03.01.2024. In response to the Public Announcement, claims were submitted by M/s. Vishnu Traders, M/s. Satya Traders, M/s. Meva Lal Traders, Principal Commissioner of Customs (ICD, Import, Tughlakabad) and M/s. A Periwal & Co Chartered Accountants (Auditor-Related Party). Out of the above, claim of Principal Commissioner of Customs (ICD-Import) Tughlakabad, New Delhi (Appellant herein) was against non-fulfilment of

export obligation against Bonds, those were executed by the Corporate Debtor. The department has Bank Guarantees with Auto-Renewable Clause (against Fixed Deposits of the Corporate Debtor) amounting to ₹ 89,16,128/- (Rupees

10. The Respondent No. 1/Liquidator simultaneously took up the matter with the Department of Customs. Assistant Commissioner of Customs (EPM) expressed his inability to release the Bank Guarantee Bonds in view of the order passed by the Hon'ble NCLAT on 16.10.2023 in the matter of National Small Industries Corporation Limited v/s Prabhakar Kumar (Liquidator).

11. The FDs in the possession of the Bank of Baroda and the Bonds pertaining to the Bank Guarantees in possession of the Department of Customs were earmarked for the specific purpose of ensuring the guarantee agreement remains alive and the guarantor didn't shirk their obligation and liability to pay the debt which is still due to the answering-respondent herein.

12. The Learned Hon'ble NCLT erred by directing for return of Original Bonds pertaining to Bank Guarantees and by directing the Bank (Respondent No 2) to remit the amount of FDRs to the Liquidation Account so that it can become part of Liquidation Estate

13. As per Sections 14, 18 and 36(4) of IBC and Insolvency Committee Report of 2018, these Bonds, Bank Guarantees and FDs cannot be asked to be returned to the Liquidator, nor can it be considered as part of Liquidation Estate, moreso since all the Eight Bank Guarantees were Performance Bank Guarantees (against Fixed Deposits of the Corporate Debtor) amounting to ₹

89,16,128/-. Of these, as per the terms of issue, 5 (five) have auto-renewal clause, and in atleast 3 (three) Bank Guarantees, there is auto-pay clause upon non-renewal.

14. Assets of surety are separate from assets of Corporate Debtor, and proceedings against Corporate Debtor may not be seriously impacted by actions against assets of third parties like sureties.

15. Bank Guarantee is an independent contract between Bank and beneficiary, moreso since it is unconditional to be acted only on demand guarantee.

16. FDs lying with the Bank are not simple FDs but are akin to the underlying margin money for the Bank Guarantees.

17. The Learned NCLT erred in holding that the Bank Guarantees had expired, since 5 (five) have auto-renewal clause, and in at least 3 (three) Bank Guarantees, there is auto-pay clause upon non-renewal.

18. There are various judicial pronouncements in the past on the said issue, which have determined to be in favour of the Appellant. The Appellant relies upon: -

- **Punjab National Bank V/s. Supriyo Kumar Chaudhari and Ors- Company Appeal (AT) (Insolvency) No. 657 of 2020.**
- **Ansal Engineering Projects Ltd V/s. Tehri Hydro Development Corporation Ltd. And Anr. 1996 (5) SCC 450.**

- **Monitoring Agency of Anush Finlease & Construction Private Limited V/s. State Bank Of India and Ors.- Company Appeal (AT) (Insolvency) No. 902 of 2020.**
- **Naresh Kumar Goel Liquidator of B.R. Knitwears Pvt. Ltd. V/s. Indian Overseas Bank & Anr.- Company Appeal (AT) (Insolvency) No. 14 of 2024 & I.A. No. 05 of 2024.**
- **Bharat Aluminium Co. Ltd V/s. M/S J.P. Engineers Pvt Ltd. And Ors- Company Appeal (AT) (Insolvency) No. 759 of 2020.**

19. These are Performance Bank Guarantees, and the FDs lying with the Bank are not simple FDs, but rather are akin to the underlying margin money for the Bank Guarantees. They are for the specific purpose of honouring the Bank Guarantees and are not simple fixed deposits available for liquidation.

20. The Appellant has 8 Bank Guarantees (against Fixed Deposits of the Corporate Debtor) amounting to ₹ 89,16,128/-. Of these, as per the terms of issue, 5 (five) have auto-renewal clause, and in at least 3 (three) Bank Guarantees, there is auto-pay clause upon non-renewal. IA dated 31.01.2025 filed by Bank of Baroda before the Hon'ble NCLT also supports this position. Moreover, upon reading the Terms and conditions of the Bank Guarantees will also affirm this position.

21. In the present case, these are Performance Bank Guarantees, i.e. the Corporate Debtor had imported goods duty free under the condition that they will export and earn foreign exchange. The details of Licences issued to the Corporate Debtor are: -

License No. 0510389140 dated 26.06.2014
License No. 0530162969 dated 26.06.2014
License No. 0510394397 dated 02.06.2015
License No. 0530164813 dated 01.05.2015
License No. 0510394843 dated 08.07.2015
License No. 0530163125 dated 30.07.2014

22. The export obligation discharge period of the aforesaid licenses was till 31.04.2021 and 25.06.2020. Thus, it is clear that the Corporate Debtor/importer has made no attempt to fulfil their commitment to the Appellant, and no Export Obligation Discharge Certificate was issued. Due to this, a staggering amount of ₹ 1,81,27,632/- is payable to the Customs Department as Government dues.

23. Since these Bonds and Bank Guarantees (along with underlying FDs) are not assets of Corporate Debtor, so it would not be a part of Liquidation Estate under Section 36, by virtue of being excluded as per Section 36 (4) of the IBC, and so there can be no question of its distribution under Section 53 of the IBC. More so, because Section 36(4) of IBC states that assets owned by a third party those are in possession of the Corporate Debtor, including assets held in trust for any third party, do not form part of the liquidation estate. Also, as per Explanation to Section 18 of the IBC, the term "assets" shall not include assets owned by a third party in possession of the Corporate Debtor which is being held under trust or under a contractual arrangements.

24. Bank Guarantees are payable on demand without demur, and courts are not to ordinarily interfere with their enforcement. It is also settled law that

bank guarantee is irrevocable and unconditional and payable on demand without demur. Besides it is also settled law that the assets of the surety are separate from those of the Corporate Debtor, and proceedings against the corporate debt 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.

25. The liquidator cannot claim assets held in trust or under independent contractual arrangements such as Bank Guarantees and their underlying margin money/FDs.

26. Respondent No. 1 sought to rely on Regulation 21(a) of Liquidator Regulations, but it does not help her in the present case. Appellant submitted its substantive claim with the Liquidator on 15.12.2023, within thirty days of liquidation on 21.11.2023, however, since the Liquidator informed the Appellant that inadvertently a wrong Form was submitted, later on the correct Claim Form dated 24.01.2024 was submitted. Also, in the correct Claim Form, the Appellant expressly recorded “No” against relinquishment of security. However, the Performance Bank Guarantees and underlying FDs do not form an asset that would form part of the liquidation estate, and thus, there can be no question of its distribution under Section 53 of the IBC.

27. Also, reliance of Respondent No. 1 on Notification 102/2009 dated 11.09.2009 is not proper and does not support her case, as it is an attempt to enter the domain of Customs Act violations, whereas the present case is

limited to the Appellants request of non-return of Bank Guarantees and underlying Margin Money and is to be governed by IBC.

28. It is settled law that as per Sections 14, 18 and 36(4) of IBC and Insolvency Committee Report of 2018, these Bonds, Bank Guarantees and underlying FDs cannot be asked to be returned to the Liquidator, nor can they be considered as part of Liquidation Estate, as these are independent contracts between the Bank and the beneficiary.

29. From reply filed by Respondent No. 1, it can categorically be seen that Respondent No 1 herself is stating that Respondent No.2 did not credit the maturity amount of Bank Guarantees to Respondent No. 1, as the Bank Guarantees had not expired. Thus, the impugned order passed by the Ld. NCLT is liable to be set aside as it was passed on the erroneous presumption that Bank Guarantees have expired, which is admittedly not the case.

30. Thus, it is prayed that the Hon'ble NCLAT be pleased to allow the appeal.

Submissions of Respondent No. 2/Bank of Baroda

31. The aforesaid Bank Guarantee is a Performance Bank Guarantee, a position also rightly observed by the Ld. NCLT vide impugned order dated 19.12.2024.

32. The Respondent No. 2 had issued a letter dated 26.12.2024 to the Appellant, thereby requesting it to return the original Bank Guarantees to the Bank in compliance with the Order dated 19.12.2024. Since the Bank

Guarantees were not returned by the Appellant Department, the Respondent Bank was constrained to file an application bearing I.A. No. 762 of 2025 in CP(IB) No. 809 (ND) of 2021 before the Ld. NCLT, praying for directions to the Appellant Department of Customs to return the original Bank Guarantees to the Bank, and the said Application was dismissed vide Order dated 14.02.2025 of the Ld. Tribunal.

33. Thereafter, the Respondent Bank had even approached the Hon'ble High Court of Delhi by way of a Writ Petition (C) No. 5298 of 2025, praying for directions to the Department of Customs to return the original Bank Guarantee to the Bank. On 25.04.2025, before the Hon'ble High Court, it was submitted by the Counsel for the Appellant Department that they have preferred an appeal before this Hon'ble Tribunal against the Order dated 19.12.2024 and the same is under defect and they will take adequate steps for the listing of the appeal. In view of the submissions made by Appellant herein the Respondent Bank had withdrawn the Writ Petition with liberty left open to take appropriate remedies in accordance with law.

34. On the question of laws, the Respondent No. 2 is *ad idem* with the Appellant. In the matter of **Phoenix ARC Pvt. Ltd. v. Anush Finlease & Construction Pvt. Ltd. [I.A. No. 2075(PB)/2020 in CP(IB) No. 1705(PB)/ 2018]** dated 04.08.2020, the Hon'ble NCLT Principal Bench, Mumbai had referred to the decision and held that:

> "21. These FDRs are given towards margin money against the bank guarantees given to the beneficiary, not as FDRs to be realised by the

corporate debtor as and when it wishes. We must say that as per RBI guidelines and also as per the ratio decided in various judgements, 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. In this case, the bank guarantee being given to Government authority, 100% margin money is deposited in the form of FDRs. In the event the margin money is free from the Bank Guarantee either by discharge or by efflux of time, then the corporate debtor is entitled for release of FDRs."

That the above-mentioned judgement has been also upheld by this **Hon'ble Tribunal in Monitoring Agency of Anush Finlease & Construction Private Limited V/s. State Bank Of India and Ors.- Company Appeal (AT) (Insolvency) No. 902 of 2020**.

35. This Hon'ble Tribunal held in **Indian Overseas Bank Vs. Consortium of GSEC Limited and Rakesh Shah Company Appeal (AT) (Insolvency) No. 943 of 2024**, that:

XXX

"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. Company Appeal (AT) (Insolvency) No. 943 of 2024 Page 23 of 29

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….."

XXX

36. In the above-said judgement, this Hon'ble Tribunal also discussed the following cases:

a) **Gail India Ltd. Vs Rajeev Manaadiar in CA (AT) (Ins.) No. 319 of 2018,**

b) **Indian Overseas Bank Vs Arvind Kumar, Resolution Professional/Liquidator in CA (AT) (Ins.) No. 558 of 2020,**

c) **UCO Bank vs Sudip Bhattacharya, Resolution Professional in CA (AT) (Ins.) No. 335 of 2021,**

d) **Monitoring Agency of Anush Finlease & Construction Pvt. Ltd Vs SBI in CA (AT) (Ins.) No. 902 of 2020.**

e) **Punjab National Bank Vs Supriyo Kumar Chaudhuri Resolution Professional in CA (AT) (Ins) No. 657 of 2020.**

37. The judgement in **Indian Overseas Bank Vs. Consortium of GSEC Limited and Rakesh Shah Company Appeal (AT) (Insolvency) No. 943 of 2024** has also been upheld by Hon'ble Supreme Court of India vide order dated 15.10.2025 in **Consortium of GSEC Limited and Rakesh Shah Vs. in Indian Overseas Bank, Civil Appeal No. 12254 of 2025.**

38. Therefore, in view of the above it is submitted that <u>in case the Bank Guarantees have expired, the margin money becomes free and is liable to be refunded. However, in case Bank Guarantees have not expired, margin money remains as margin money and continues to remain outside the liquidation estate</u>. In relation thereto, the Explanation to Section 18 of the IBC provides:

> "Explanation. —For the purposes of this sub-section, it is hereby clarified that the assets of the corporate debtor 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;"

39. Besides that Section 36(4) of the IBC defines "liquidation estate" and provides

> "(4) The following shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation: — (a) assets owned by a third party which are in possession of the corporate debtor, including— (i) assets held in trust for any third party;"

However, the moot question before this Hon'ble Tribunal is whether the Bank Guarantees have expired or not.

40. The wording of Bank Guarantees coupled with the fact that that the Appellant has not invoked them ought to be considered for deciding whether they have expired or not. Thus, the Respondent No. 2 prays to this Hon'ble Tribunal that the present appeal may be decided on merits.

Submissions of the Respondent No.1 / Liquidator

41. The liquidation proceedings were initiated against the CD (Corporate Debtor) vide order dated 21.11.2023 and the Respondent No. 1 was appointed as Liquidator. The Appellant filed its claim on 15.12.2023 in form 'B' and chose to relinquish its security interest.

42. Appellant on 01.02.2024 filed its claim under Form C amounting to ₹1,81,27,632/-. The Appellant filed the claim against import duty and non-fulfilment of export obligation which was admitted by the Respondent No. I in full. While submitting the aforesaid claim against the import duty, the Appellant chose to relinquish the Bank Guarantee given by the Corporate

Debtor and thus the Appellant will be treated as per waterfall mechanism under Section 53 of the IB Code. However, as per Section 21A of the Liquidation Regulation, relinquishment/non relinquishment of security interest must be informed within 30 days of Liquidation Commencement Date which the Appellant failed to do so. Thus BGs became part of liquidation estate. Important dates and events as follows:

21.11.2023	Liquidation commenced against the CD by Hon'ble NCLT.
15.12.2023	Claim filed by Appellant in Form 'B', however, no intimation regarding relinquishment of security.
20.12.2023	30 days expired (period of relinquishment in terms of Reg. 21A expired. Thereafter security was deemed to be part of liquidation estate).
01.02.2024	Claim filed in Form 'D' and relinquishment of security was claimed after expiry of 30 days.

43. Respondent No. 1/Liquidator issued a letter dated 14.02.2024 to the Respondent No. 2/Bank of Baroda (BoB) for release of expired BGs. The Respondent No. 2/BoB vide letter dated 29.02.2024 informed the Respondent No. 1 that the BGs executed by the Respondent No. 2 in favour of Appellant, have an auto renewal clause thus, not expired. Further the Respondent No. 2 mentioned a letter dated 14.10.2022 issued by the Appellant for renew of

all the BGs, however, the Respondent No. 2 failed to produce any such letter before this Hon'ble Tribunal.

44. The Corporate Debtor had given 8 Bank Guarantees to the Appellant in order to discharge under EPCG Bond. The details of 8 Bank Guarantees are as follows:

S. No.	B.G. No.	Date	Amount (₹)	Expiry Date
1.	6017IBGIS140064	01.07.2014	15,03,000/-	01.07.2022
2.	6017IBGIS140065	01.07.2014	10,46,000/-	30.06.2016
3.	6017IBGIS140086	22.08.2014	3,52,000/-	22.08.2016
4.	6017IBGIS140087	22.08.2014	16,50,000/-	21.08.2024
5.	6017IBGIS140064	03.09.2014	13,03,128/-	03.09.2016
6.	6017IBGIS140064	02.06.2015	8,70,000/-	01.06.2021
7.	6017IBGIS140064	08.06.2015	3,80,000/-	07.06.2023
8.	6017IBGIS140064	31.07.2015	18,12,000/-	30.07.2017

Till filing of the present Application, 7 out of 8 BG had expired and it was never renewed by the Appellant also, there was no auto renewal clause in the BG issued by the Respondent No. 2/BoB. The relevant clause of the BG read as follows:

> "3) That if this bank guarantee is not renewed for the reason what so ever on or before expiry of this Guarantee, the entire amount become forthwith due and payable to the government and the **<u>bank on its own shall pay to the government without any demur.</u>**"

45. Thus, in the event of non-renewal of the BG, the amount of BG reverse back to the Corporate Debtor and as such it became part of the liquidation estate. The Respondent No. 2 failed to produce any document regarding renewal of the BG and as such the Appellant cannot claim the BGs.

46. As per the Notification No. 102/2009-CUSTOM, 96/2009-CUSTOMS both dated 11.09.2009 and 22/2013 CUSTOMS dated 18.04.2013 the EPCG Bond executed by the Corporate Debtor was valid only for a period of six years from the date of execution of the aforesaid Bond. The relevant excerpt extracted is here in below:

> "(6) that the importer executes a bond in such form and for such sum and with such surety or security as may be specified by the Deputy Commissioner of Customs or Assistant Commissioner of Customs binding himself to comply with all the conditions of this notification as well as to fulfill export obligation on Free On Board (FOB) basis equivalent to six times the duty saved on the goods imported as may be specified on the authorization, or for such higher sum as may be fixed or endorsed by the Licensing Authority or Regional Authority in terms of Para 5.10 of the Handbook of Procedures Vol I, issued under para 2.4 of the Foreign Trade Policy, within a period of six years from the date of issue of Authorization, in the following proportions, namely:-
>
> Provided also that spares (including refurbished/reconditioned spares), moulds, dies, jigs, fixtures, tools, refractory for initial lining and catalyst for initial charge, for the existing plant and machinery (imported earlier, under EPCG or otherwise), shall be allowed to be imported under the EPCG scheme subject to an export obligation equivalent to 50% of the normal export obligation prescribed above, to be fulfilled in 6 years reckoned from the date of issue of the Authorization, subject to the condition that the CIF value of import of the above spares etc. will be limited to 10% of the CIF value of the plant and machinery imported under the EPCG authorization or 10% of the book value of the plant and machinery imported earlier otherwise than under EPCG Scheme, as the case may be."

47. All the EPCG Bond was executed by the Corporate Debtor in favour of the Appellant between 2014 to 2015. Admittedly the Appellant did not take any action against the Corporate Debtor in order to realise the amount outstanding against the Corporate Debtor. Also, the Appellant did not take any action for renewal of BGs or encash the BGs.

48. In the matter of Indian **Overseas Bank vs. Arvind Kumar, [Company Appeal (AT) (Insolvency) No. 558 of 2020]**, it was held by the Hon'ble NCLAT:

> "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 towards payment of bank guarantee to the beneficiary and nothing remains with the financial institutions, which can be reversed to the corporate debtor"

49. Also, in the matter of **Phoenix ARC Pvt. Ltd. Vs. Anush Finleash & Construction Pvt. Ltd. [IA No. 2075(PB)/2020 in CP(IB) No. 1705(PB)/2018]** the Ld. NCLT, Principal Bench, New Delhi vide order dated 08.04.2020 held that

> "21. These FDRs are given towards margin money against the bank guarantees given to the beneficiary, not as FDRs to be realised by the corporate debtor as and when it wishes. We must say that as per RBI guidelines and also as per the ratio decided in various judgements, 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 is it is free from the trust. In this case, the bank guarantee being given to Government authority, 100% margin money is deposited in the form of FDRs. In the event the margin money is free from the Bank Guarantee either by discharge or by efflux of time, then the corporate debtor is entitled for release of FDRs."

50. The aforesaid order was challenged before Hon'ble NCLAT in the matter of **Monitoring Agency of Anush Finlease & Constructions Private Limited vs. State Bank of India & Ors. [Company Appeal (AT) (Insolvency) No. 902 of 2020],** and Hon'ble NCLAT confirmed the aforesaid order and held that:

> "35. We are of the considered view that there is no illegality in the impugned order and we hereby affirm the order dated 04.08.2020 passed by the Ld. Adjudicating Authority (National Company Law Tribunal), New Delhi, Principal Bench and Ld. Adjudicating Authority has rightly dismissed the IA-2057(PB)/2020 in (IB)-1705 (PB)/2018. There is no merit in the instant Appeal, the Appeal is hereby dismissed. No order as to costs."

51. The aforesaid BG was given by the Corporate Debtor against the exemption of custom duties to paid on imported goods availed by the Corporate Debtor and Corporate Debtor undertook the export obligation as specified in different notifications issued by Government of India in Ministry of Finance (Department of Revenue) and the same is evident from the demand notice dated 02.01.2025 sent by the Appellant to the Corporate Debtor. (page 137 of the reply by RI) As per the EPCG Bond, in event of failure in performing the export obligation till expiry of the period, the Corporate Debtor was liable

to pay the custom duty along with interest. The relevant clause of the EPCG as follows:

> "4. In the event of failure to fullfill full or part of the export obligations as specified in the said notification and the licence, I/ We the obligor(s) hereby undertake to pay the custom duty but for the exemption and also interest as per applicable rate for per annum thereon forthwith and without any demur of the government"

52. The export obligation discharge period expired in the year 2020 & 2021 and thus the import duty to the tune of ₹ 1,81,27,632/- became outstanding amount against the CD. The relevant para of the Reply of Appellant is as follows:

> "13. It is further submitted that the export obligation discharge period of the said licenses ended in the year 2020 & 2021. Thus, it is clear that the importer has made no attempt to fulfil their commitment to the Respondent. Due to this, a staggering amount of Rs. 1,81,27,632/-along with applicable interest to the Respondent as Government dues."

53. The Appellant did not claim the BGs, since, 2020, as all the BGs had expired, the Appellant could not encash the BGs. Also, the Appellant had failed to send any notice to the bank for the renewal of BGs. Therefore, the amount against the BGs revert back to the Corporate Debtor and became asset of the Corporate Debtor before the insolvency commencement date."

54. Further, the judgment **Punjab National Bank (supra)**, and **Monitoring Agency of Anush Finlease & Construction Pvt. Ltd. (supra)** relied by the Appellant is related to Bank Guarantee against the margin money and not related to the performance of obligations. Further, **Ansal Engineering**

Projects Ltd. (supra) is pertaining to Arbitration Act and not under this IB Code. The FDs lying with the Respondent No. 2 does not akin to margin money. Margin money is a different case altogether which is related to the performance and non-performance of certain obligation under the contract. However, in the present case, the Bank Guarantee was given to secure the payment of the Appellant against custom duty and it is not the performance guarantee. Also, Bank of India versus Nagina Construction does not support the issues of the Appellant as the BGs in that case was not expired but stayed by Ld. District Court.

55. The Respondent No. 1 has already admitted the claim of the Appellant and the Appellant did not intimate the Respondent No.1 regarding non relinquishment of security interest in terms of Regulation 21A of the Liquidation Regulations. Thus, the amount underlying in form of BGs in the Respondent No. 2 Bank is an asset of the Corporate Debtor and part of the liquidation estate and Respondent No. 2 could not have refuse to release the expired BGs.

56. In light of the above facts and circumstances, the Respondent No. 1 humbly prays that the Appellant is without any merit and may be dismissed and order dated 19.12.2024 passed by Ld. NCLT may be uphold.

Analysis and findings

57. We have heard the submissions of both sides and also perused the material on record.

58. The issue which arise for our consideration is whether the Adjudicating Authority can direct for return of Original Bonds pertaining to Bank Guarantees and direct the Bank to remit the amount of FDRs to the Liquidation Account so that it can become part of Liquidation Estate.

59. To begin with we try to find out as to when the appellant filed the relinquishment of its security under the liquidation process regulations. The liquidation proceeding against the Corporate Debtor was initiated on 21.11.2023 and the Appellant filed its claim on 30.01.2024 - which is beyond 30 days of liquidation commencement date. We observe that Section 21A of IBBI (Liquidation Process) Regulation, 2016 (hereinafter referred as **"Liquidation Regulation"**) provides that if a creditor does not take a call on relinquishment/non-relinquishment of security, then after expiry of 30 days, the security shall be deemed to be relinquished by the creditor. The relevant provision of the Liquidation Regulation is as follows:

> **"Regulation 21A: Presumption of security interest.**
> (1) A secured creditor shall inform the liquidator of its decision to relinquish its security interest to the liquidation estate or realise its security interest, as the case may be, in Form C or Form D of Schedule II:
> Provided that, where a secured creditor does not intimate its decision within thirty days from the liquidation commencement date, the assets covered under the security interest shall be presumed to be part of the liquidation estate.
> (2) Where a secured creditor proceeds to realise its security interest, it shall pay –
>
> > (a) as much towards the amount payable under clause (a) and sub-clause (i) of clause (b) of sub-section (1) of section 53, as it would have shared in case it had relinquished the security interest, to the liquidator within ninety days from the liquidation commencement date; and

> (b) the excess of the realised value of the asset, which is subject to security interest, over the amount of his claims admitted, to the liquidator within one hundred and eighty days from the liquidation commencement date:
>
> Provided that where the amount payable under this sub-regulation is not certain by the date the amount is payable under this sub-regulation, the secured creditor shall pay the amount, as estimated by the liquidator:
>
> Provided further that any difference between the amount payable under this sub-regulation and the amount paid under the first proviso shall be made good by the secured creditor or the liquidator, as the case may be, as soon as the amount payable under this sub-regulation is certain and so informed by the liquidator.
>
> (3) Where a secured creditor fails to comply with sub-regulation (2), the asset, which is subject to security interest, shall become part of the liquidation estate.
>
> Explanation- It is hereby clarified that the requirements of this regulation shall apply to the liquidation processes commencing on or after the date of the commencement of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2019.

60. Thus, even though the Appellant in its claim form, chose not to relinquish security, the law forced the Appellant to relinquish its security against the Corporate Debtor. As the creditor did not give its choice of non-relinquishment of security within 30 days, it is presumed that the creditor relinquished its security against the Corporate Debtor.

61. Thus, the security created by the Appellant in the form of BGs stands relinquished by virtue of law.

62. It is noted that all the EPCG Bonds were executed by the Corporate Debtor in favour of the Appellant between 2014 to 2015. The relevant terms of the EPCG Bonds are as follows:

> "Whereas I/We the obligor(s), have imported goods listed in Annexure-I availing customs duty exemption in the terms of the notifications of the Government of India in the Ministry of Finance (Department of revenue) No.102/2009, dated 11/09/2009 (hereinafter referred to as the said notification) against the Advance License No. 0510394397 dated 2.6.2015 (Hereinafter referred to as the said notification) for the import of the goods mentioned therein on the terms and conditions specified in the said notification and license.
>
> Whereas I/We the obligor(s) has / have undertaken to fulfill the export obligation as specified in the said notification and the license and to produce evidence of having so fulfilled the export obligation within 30 days from the expiry of the specified export Obligation period to the satisfaction of the Government.
>
> 4. In the event of failure to fulfil full or part of the export obligations as specified in the said notification and the license I/ We the obligor(s) hereby undertake to pay the customs duly but for the exemption and also interest as per applicable rate for per annum thereon forthwith and without any demur of the government."

63. Liquidator brings to our notice that as per the terms of the Bond executed by the Corporate Debtor, if the Corporate Debtor failed to fulfil the export obligations, then the Corporate Debtor is liable to pay the custom duty along with penal interest. It was also brought to our notice by the liquidator that as per the notification no. 102/2009-CUSTOM, 96/2009 – CUSTOMS both dated 11.09.2009 and 22/2013 – CUSTOMS dated 18.04.2013 the EPCG Bond executed by the Corporate Debtor was valid only for a period of six years from the date of execution of the aforesaid Bond. Thus, the EPCG Bond had

already expired in the year 2020 and 2021 that is before initiation of CIRP against the Corporate Debtor. We also note that after expiry of the EPCG Bond, the Appellant did not take any action against the Corporate Debtor in order to realise the amount outstanding against the Corporate Debtor. Also, the Appellant did not take any action for renewal of BGs or encash the BGs.

64. We also observe that the Bank Guarantees executed by the Respondent No. 2/BoB in favour of the Appellant were never renewed by the Bank. The Respondent No. 2/BoB executed eight different Bank Guarantees in favour of the Appellant alleged to be auto renewed by the Respondent No. 2 itself. The relevant clauses of one of the Bank Guarantees bearing no. 6017IBGIS140064 are as follows:

> "We, Vijaya Bank, further agree that the guarantee herein contained <u>shall remain in full force and effect during the period that would be taken for performance of the said bond and remain shall continue to be enforceable till all the dues of the Dy. Commissioner/Asst. Commissioner of custom, ICD TKD, New Delhi under or by virtue of the said executed bond have been fully paid or the terms and condition of the bond have been fulfilled to</u> the satisfaction of the Dy. Commissioner/Asst. Commissioner of custom, ICD TKD, New Delhi till dt. 30.06.2022 whichever is earlier.
>
> 2. We, Vijaya Bank, further declare that <u>this Bank Guarantee will be valid up to dt. 30.06.2022 and we undertake to renew this guarantee on its own till the matter is settled and fully discharged by the Dy. Commissioner/Asst. Commissioner of Customs, ICD TKD, New Delhi on receipt of this letter</u>.
> 3. That if this Guarantee is not renewed for the reason whatsoever on or before the expiry of this Guarantee the entire amount become forthwith due and payable to Government and the bank of its own shall pay to the government without any demur."

65. The perusal of the above terms of the bank guarantee indicates that that the Respondent No. 2/BoB shall, by its own motion, renew the Bank

Guarantee and if it fails to do so then the Respondent No. 2 is liable to pay the whole by its own. We also note that the bank guarantees were valid up to 30-06-2022 and were not renewed thereafter. Since the Bank Guarantees were never renewed by the Respondent No. 2 after expiry therefore the guarantee expired after the term.

66. We further observe that as per the EPCG Bond, in event of failure in performing the export obligation till expiry of the period, the Corporate Debtor was liable to pay the custom duty along with interest. The export obligation discharge period expired in the year 2020 & 2021 and thus the import duty to the tune of ₹ 1,81,27,632/- became outstanding amount against the Corporate Debtor. We further find that the appellant never claimed the bank guarantee for non-performance of the export obligations of the Corporate Debtor.

67. We observe that the liquidation proceedings were initiated against the CD (Corporate Debtor) vide order dated 21.11.2023; the Appellant filed its claim on 15.12.2023 in form 'B' (₹ 1,81,27,632/- became outstanding amount against the Corporate Debtor) for non-fulfilment of export obligation and in a way chose to relinquish its security interest by filing of claim in Form ‘B’. The Appellant’s claim against import duty and non-fulfilment of export obligation was admitted also by the Respondent No. I in full.

68. However subsequently, the Appellant on 30.01.2024 filed its claim under Form ‘C’ amounting to ₹1,81,27,632/-, which was beyond 30 days.

However, as noted by us herein earlier as per Section 21A of the Liquidation Regulation, relinquishment/non relinquishment of security interest must be informed within 30 days of Liquidation Commencement Date which the Appellant failed to do so. While submitting the aforesaid claim against the import duty, the Appellant chose not to relinquish the security interest (Bank Guarantee) given by the Corporate Debtor. Thus, relinquishment of the charge happens as per law, as Appellant did not intimate regarding non-relinquishment of security interest in terms of Regulation 21A of the Liquidation Regulations within 30 days. Thus the Appellant has to be treated as per waterfall mechanism under Section 53 of the IB Code. Thus, BGs became part of liquidation estate. Thus, in such circumstances wherein the Appellant has not availed of the opportunity of non-relinquishment of its charge and also when such bank guarantee has not been renewed and is lying with respondent No. 2, it has to be released to the Corporate Debtor.

69. It is the stand of Respondent No. 2/Bank of Baroda that “in case the Bank Guarantees have expired, the margin money becomes free and is liable to be refunded. However, in case Bank Guarantees have not expired, margin money remains as margin money and continues to remain outside the liquidation estate.” Respondent No. 2/Bank of Baroda further states that “the moot question before this Hon'ble Tribunal is whether the Bank Guarantees have expired or not.” It further contends that the wording of Bank Guarantees coupled with the fact that that the Appellant has not invoked them ought to be considered for deciding whether they have expired or not. However, in the

facts and circumstances of this case we find that this is not the relevant question which we need to answer. Rather the relevant question before us is whether the Appellant had given the option of non-relinquishment, which in this case it had not - irrespective of the fact whether the guarantees are still subsisting or not. We also note that in the facts and circumstances of the case, the bank guarantees have not been invoked either by the Appellant or auto renewed by the bank itself. Therefore, they have to be released to the account of the company prior to the initiation of the CIRP. The terms and conditions of the guarantee as noted herein earlier indicates that the bank should have auto-renewed it but due to the fact that the Appellant has not opted for non-relinquishment, even if it was auto-renewed by the bank, it would still be part of the liquidation estate under these conditions. Thus, the amount underlying in the form of BGs with the Respondent No. 2 Bank is an asset of the Corporate Debtor and part of the liquidation estate and Respondent No. 2 could not have refused to release the expired BGs.

70. The Appellant has relied on various judgments which are not directly relevant to the present facts and circumstances. The case of **Punjab National Bank versus Supriyo Kumar Chaudhuri & Ors. and Monitoring Agency of Anush Finlease & Construction Pvt. Ltd. Vs State Bank of India (supra)** is related to Bank Guarantee against the margin money and not related to the performance of obligations. The case of **Ansal Engineering Projects Ltd. (supra)** is pertaining to Arbitration Act and not under this IB Code.

71. In the above facts and circumstances, we don't find any infirmity in the orders of the adjudicating authority by which it directed the Respondent No.1/ Assistant Commissioner to return the original bonds pertaining to the Bank Guarantees and also further direction to the Respondent No.2/Manager, Bank of Baroda, to immediately remit the amount of the FDRs to the Liquidation Account so that the same could form part of the Liquidation Estate of the Corporate Debtor.

72. Thus, we dismiss the appeal and all related IAs are also disposed of. No orders as to cost.

[Justice Sharad Kumar Sharma]
Member (Judicial)

[Arun Baroka]
Member (Technical)

[Indevar Pandey]
Member (Technical)

New Delhi.
September 25, 2026.
pawan