

23

**BEFORE THE AJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH
AHMEDABAD**

IA 340/2017 in C.P. (I.B) No. 28/10/NCLT/AHM/2017

Coram: **Hon'ble Mr. BIKKI RAVEENDRA BABU, MEMBER JUDICIAL**
Hon'ble Ms. MANORAMA KUMARI, MEMBER JUDICIAL

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD
BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 09.02.2018**

Name of the Company: Nitin Hasmukhlal Parikh
(Diamond Power Transformers Ltd.)
V/s.
Madhya Gujarat Vij Company Ltd. & Ors.


Section of the Companies Act: Section 19 of the Insolvency and Bankruptcy Code


<u>S.NO.</u>	<u>NAME (CAPITAL LETTERS)</u>	<u>DESIGNATION</u>	<u>REPRESENTATION</u>	<u>SIGNATURE</u>
1.				
2.				

ORDER

None present for RP. None present for Applicant. None present for Respondent.
None present for IOB. None present for UCO in IA 340/2017.

Order pronounced in IA 340/2017 in open court. Vide separate sheets.


MANORAMA KUMARI
MEMBER JUDICIAL


BIKKI RAVEENDRA BABU
MEMBER JUDICIAL

Dated this the 9th day of February, 2018.

**BEFORE ADJUDICATING AUTHORITY
(NATIONAL COMPANY LAW TRIBUNAL)
AHMEDABAD BENCH**

IA No. 340 of 2017

- IN -

C.P. No.(IB) 28/10/NCLT/AHM/2017

In the matter of:

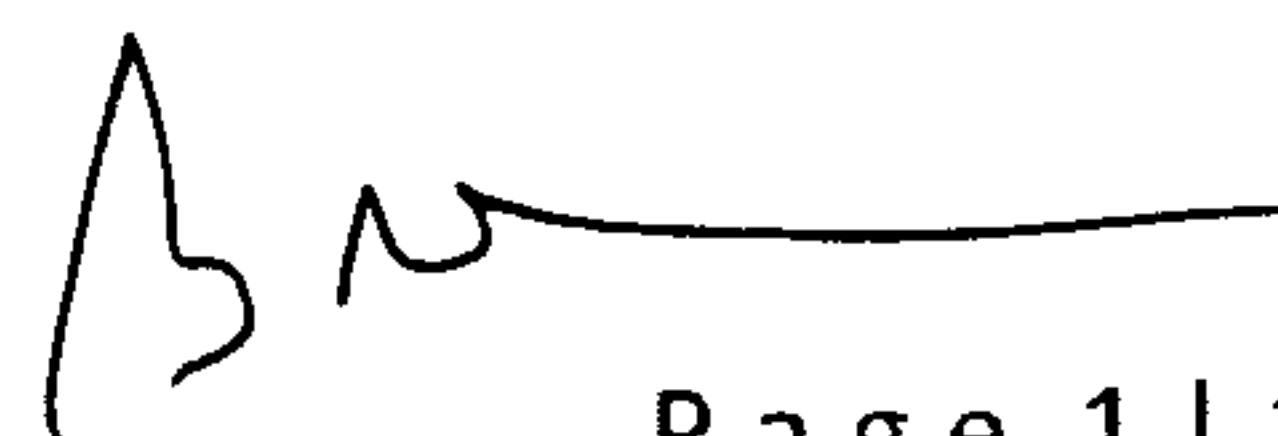
Mr. Nitin Hasmukhlal Parikh
Insolvency Resolution Professional
Of M/s. Diamond Power Transformers Ltd.,
Having Office at Plot No. 101/B/7,
Road No.2, GIDC Estate,
Village-Ranoli, Vadodara-391350 : Applicant.

Versus

1. Madhya Gujarat Vij Company Limited
Registered Office at
Sardar patel Vidhyut Bhavan,
Race Course,
Vadodara-390007
2. The UCO Bank
Mid Corporate Branch,
14-17, Ground Floor, Earth Complex,
Near Hero Honda Showroom,
Akshar Chowk,
Old Padra Road,Vadodara-390020
3. Indian Overseas Bank
Alkapuri Branch,
Darpan Apartment,
RC Dutt Road, Alkapuri,
Vadodara-390007 : Respondents.

Order delivered on 9th February, 2018.

**Coram: Hon'ble Sri Bikki Raveendra Babu, Member (J) – And
Hon'ble Ms. Manorama Kumari, Member (J).**



Appearance:

Mr. Pavan Godiawala, learned Advocate for the Applicant.

Mr. Ritu Raj Meena, learned Advocate for Respondent No.1.

Mr. Pranav Desai, learned Advocate for Respondent No.2 UCO Bank.

Ms. Himani Kini, learned Advocate for Respondent No.3, IOB.

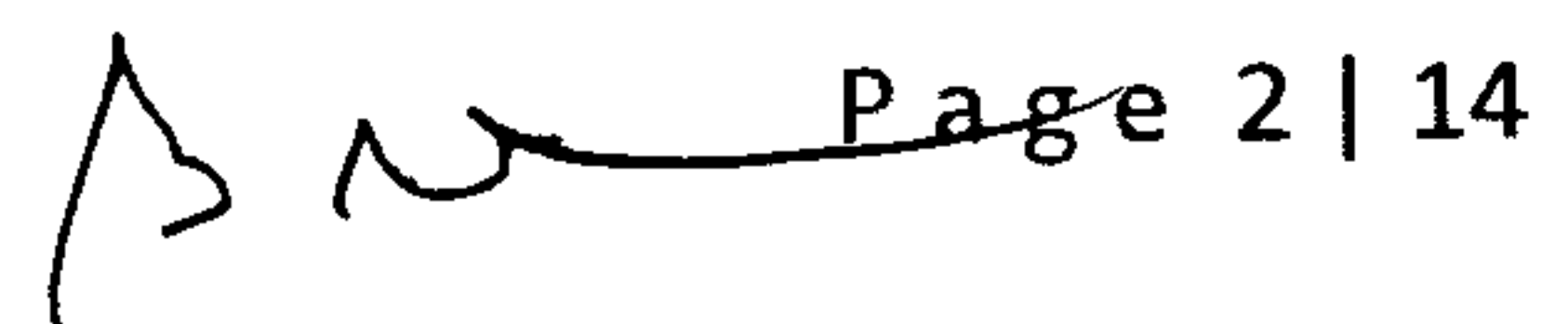
ORDER

[Per: Hon'ble Sri Bikki Raveendra Babu, Member (J).]

1. This Application is filed by Insolvency Resolution Professional against Madhya Gujarat Vij Company Limited, UCO Bank and Indian Overseas Bank praying for the relief to stay the coercive actions, namely invoking the Guarantees, terminating the contract and issuing notices to 'Stop Deal' to the Corporate Debtor, M/s. Diamond Power Transformers Limited and thereby blacklisting the Company till the moratorium period is in operation, and further to direct the Madhya Gujarat Vid Company Limited to restart power supply to the Company.

2. The facts, that are necessary for disposal of this Application, are as follows;

2.1. M/s. M/s. Diamond Power Transformers Limited [hereinafter referred to as the "Corporate Debtor"], through its Director, triggered Corporate Insolvency Resolution Process under Section 10 of the Insolvency and Bankruptcy Code, 2016 ["Code" for short]. This Adjudicating Authority by order dated 6th June, 2017 made in CP (IB) No. 28 of 2017 admitted the Petition filed by the

 Page 2 | 14

Corporate Applicant and imposed moratorium under Section 14 of the Code. This Adjudicating Authority had appointed Mr. Arvind Gaudana as Interim Insolvency Resolution Professional. Thereafter, Mr. Nitin H. Parikh was appointed as 'Resolution Professional' for the purpose of conducting Corporate Insolvency Resolution Process in respect of the Corporate Debtor Company.

2.2. It is stated in this Application that Madhya Gujarat Vij Company Limited [hereinafter referred to as "MGVCL"] is the customer of the Corporate Debtor since last 8 to 10 years. MGVCL used to purchase various types of transformers from the Corporate Debtor.

2.3. The transaction in this Application relates to Eight Acceptance of Tenders (ATs) issued between the years 2011 to 2014 for purchase of various types of Transformers.

2.4. As per the terms and conditions of the Acceptance of Tenders, Corporate Debtor was required to give Bank Guarantees towards Security Deposit and Performance Guarantee. The period allowed for supply is also stated in Acceptance of Tenders. MGVCL filed Special Civil Application No. 14185 of 2017 seeking prayer against UCO Bank for directions to permit to invoke Performance Guarantee.



2.5. It is stated in the Application, that UCO Bank and IOB have not paid the guarantee amount and sought clarification from the Resolution Professional regarding encashment of Bank Guarantee mainly on the ground of moratorium order passed by this Adjudicating Authority under Section 14 of the Code.

3. Section 3, sub-section (31) of the Code defines “Security Interest” as follows;

*(31) “security interest” means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:
Provided that security interest shall not include a performance guarantee;”*

In the above Section, It is clearly laid down that ‘Security Interest’ shall not include ‘Performance Guarantee’.

3.1. It is stated by the Applicant that Performance Guarantees are excluded from the purview of Section 14 of the Code. There are 8 Bank Guarantees, out of them two are given towards Security Deposit of Rs. 95 Lakhs and the remaining Bank Guarantees of Rs. 64 Lakhs are towards Performance Guarantees.



3.2. It is stated by the Applicant that in view of the moratorium granted by this Authority, Security Guarantees cannot be encashed.

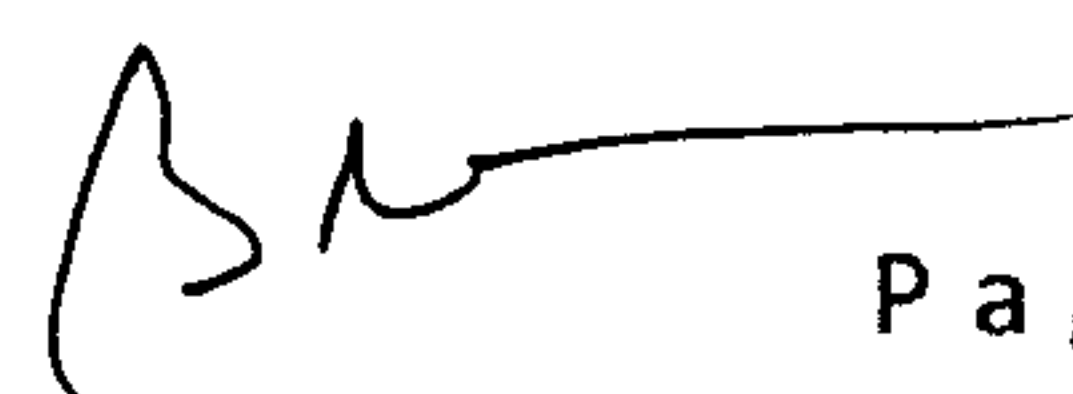
3.3. Coming to Performance Guarantee, it is stated by the Applicant that the question of invoking Performance Bank Guarantees comes only when the Transformer supplied to the MGVCL is not functioning at the site and when the Corporate Debtor refuses to repair it. It is stated that MGVCL used to send the transformers from time to time for repair and the Corporate Debtor used to send back after repair. A total of 33 transformers were sent for repairs and out of it 7 transformers have been repaired and the rest could not be despatched because the final testing was yet to be performed.

3.4. In the month of June 2017, MGVCL has taken a drastic decision for discontinuing power supply to the Company and on account of the same Corporate Debtor could not repair the remaining transformers even though they are willing to repair the transformers. The Company also wrote a letter on 27th July, 2017 indicating its willingness to repair the transformers by 27th August, 2017. The Company could not honour the commitment because of discontinuation of power supply from 28th July, 2017. Out of 6 ATs, in case of 4 ATs not a single transformer is given by MGVCL to the Corporate Debtor for repair and therefore all the 4 Performance Guarantees are required to be kept alive and cannot be encashed or invoked. In case of remaining 2 ATs, 33 transformers were given for

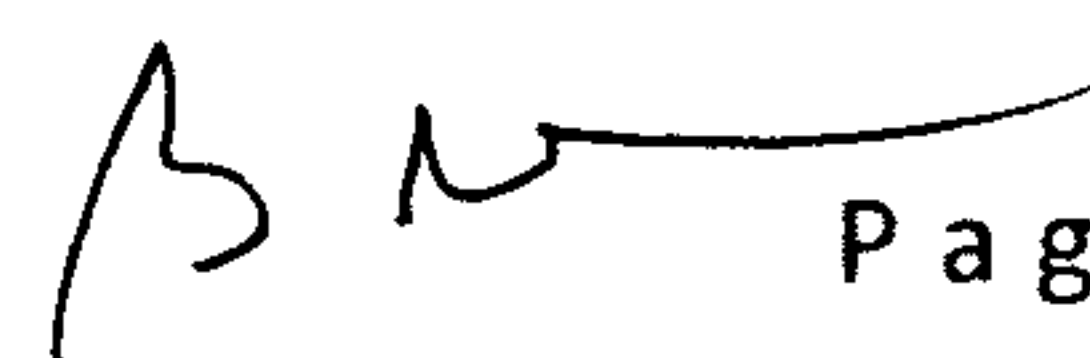


repairs which the Company could not repair because of the reasons stated above. The Applicant denied the allegation that Company failed to supply 799 transformers. It is the case of Applicant that Company supplied 4298 transformers. On 5.8.2017 MGVCL informed the Corporate Debtor stating that against the outstanding dues of the Corporate Debtor for Rs. 1,16,82,235/-, MGVCL has adjusted an amount of Rs. 71,40,434.40 ps. On 4.7.2017, MGVCL addressed letters to UCO Bank and IOB seeking encashment of Bank Guarantee towards Security Deposit/Performance Guarantees issued by Corporate Debtor. The UCO Bank addressed a letter dated 20th June, 2017 to Interim Resolution Professional regarding encashment of Bank Guarantee. MGVCL by letter dated 5.8.2017 informed the Corporate Debtor to Stop Deal all kinds of business with the Corporate Debtor, to recover from the Corporate Debtor the total amount due totalling Rs. 1,16,82,235/-, to encash and forfeit the Bank Guarantees against Security Deposit and Performance Guarantees. In view of the proposed action of the MGVCL the possibility of obtaining a Resolution Plan and placing it before the Committee of Creditors gets nullified.

4. MGVCL (1st Respondent) filed Reply stating that the Bank Guarantee is an independent Guarantee. It is stated that MGVCL has got a right to invoke the Bank Guarantees, in view of decision of the Hon'ble Supreme Court in State Sugar Corporation Vs. Sumac International Ltd., reported in 1997 (1) SCC 568. It is stated that an unconditional Bank Guarantee can be invoked irrespective of the



disputes raised by the customer with notable exceptions such as fraud and irrevocable injustice. It is stated that the Bank giving Guarantee is bound to honour it irrespective of any dispute raised by the customers. It is stated that MGVCL is a Government Company and it is seeking invocation of Bank Guarantee given by the Corporate Debtor. The Corporate Debtor has not come out with any case of fraud or irrevocable injustice. MGVCL is in accordance with the terms of contract decided to invoke the Security Deposit/Performance Bank Guarantees by writing letters to IOB and UCO Bank on 16th June, 2017. On 27th June, 2017 UCO Bank refused to encash the Bank Guarantee on the ground that Interim Resolution Profession advised them not to encash the Bank Guarantee as the matter is sub judice before this Adjudicating Authority. The IOB by letter dated 21.6.2017 informed that Corporate Debtor filed Insolvency Petition before this Adjudicating Authority and the Petition is admitted. MGVCL addressed a letter dated 4th July, 2017 to UCO Bank and IOB explaining the position of law. MGVCL explained all concerned that there is no provision by which Performance Bank Guarantees can be withheld but the Banks have not encashed the Bank Guarantees. The Legislature excluded the Performance Guarantees from the purview of the Code but the Banks refuse to invoke the Performance Guarantees also. It is stated that the Corporate Debtor failed to supply the quantity of transformers as per the order. The MGVCL issued a show cause notice on the Corporate Debtor on 23.1.2017. There was a personal hearing for the Director of the Corporate Debtor on 20th March, 2017

 Page 7 | 14

with the Managing Director of MGVCL. Having noticed the failures of the Corporate Debtor the Company resolved to issue a show cause notice dated 23.1.2017 to Stop Dealing with the Corporate Debtor. It is stated that “Stop Dealing Letter” due to non-performance of contract does not fall within the purview of moratorium under Section 14 of the Code. It is stated that the 1st Respondent filed Special Civil Application before the Hon’ble High Court of Gujarat and therefore the Applicant cannot now invoke the remedy of filing this Application.

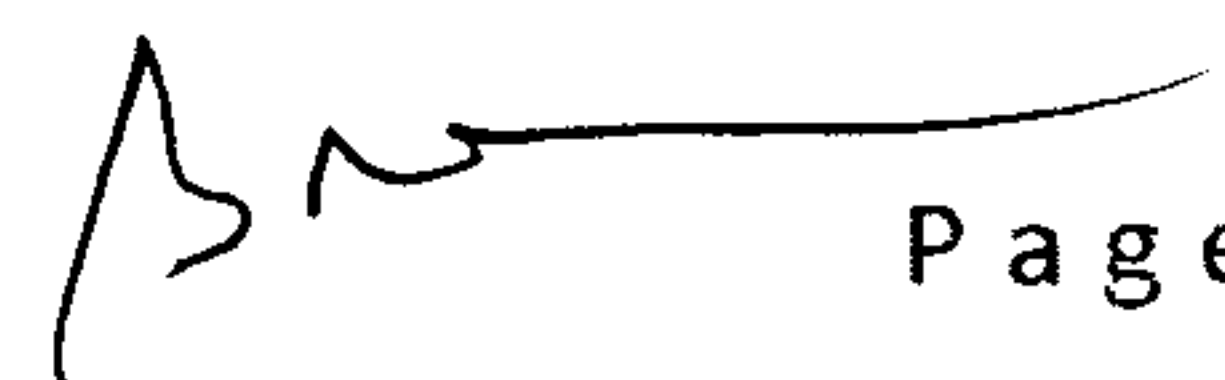
5. Respondent No.2 filed Reply stating that in view of the moratorium order passed by this Tribunal in CP (IB) No. 28 of 2017 under Section 14 of the Code the Respondent could not honour the letters of invocation of Bank Guarantees from MGVCL, PGVCL, UGVCL, and DGVCL. The following are the Guarantees invoked after the commencement of moratorium period;

Sr. No.	Beneficiary	Nature	Number	Validity Period	Amount (in Rs.)
1.	Madhya Gujarat Vij Company Limited (MGVCL)	Performance Guarantee	20311GPER001412	29.10.12 – 23.04.2018	50,57,321.00
			20311GPER001614	04.06.14 – 30.09.2017	30,07,923.53
2	Paschim Gujarat Vij Company Limited (PGVCL)	Performance Guarantee	20311GPER001814	19.06.14 – 19.04.2019	3,52,940.30
			20311GPER003014	Valid upto 27.02.2019	2,71,383.27
3.	Dakshin Gujarat Vij Company Limited (DGVCL)	Performance Guarantee	20311GPER001314	15.05.14 – 30.09.2017	30,18,488.00
			20311GPER001414	15.05.14 – 30.09.2017	1,02,85,188.00
4.	Uttar Gujarat Vij Company Limited	Performance Guarantee	20311GPER003114	28.11.2014- 30.09.2017	8,61,569.00

Chauhan

B N Page 8 | 14

The 2nd Respondent Bank called on the responsible officers attached to beneficiaries UGVCL, PGVCL and MGVCL and informed them that Bank is not refusing payment of Bank Guarantees and asked them to wait till the moratorium period is over; the Bank is on the job of issuing extension of Bank Guarantees to maintain status-quo in respect of claim position till completion of NCLT proceedings. The 2nd Respondent also received notice from the Hon'ble High Court of Gujarat in Special Civil Application filed by the 1st Respondent, MGVCL. The 2nd Respondent Bank has no information about the claim or whether there was any breach in respect of the orders of the MGVCL or not. The Bank required material particulars in case of invocation of guarantees. The Hon'ble Supreme Court in matter of *Gangotri Enterprises v. Union of India* held that "claim for damages is not a crystallised or ascertained amount or a sum due and payable *in presentee*. Therefore, invocation of Bank Guarantee would not be justified on the basis of such claims which are yet to be decided by competent forum. The Hon'ble Supreme Court also further held that Bank Guarantee given for searching the performance of one contract cannot be invoked for claims or disputes in another contract between the same parties. The Bank is in a confused state where there are two conflicting applications one claiming restraint order, another invoking the Bank Guarantee pending NCLT moratorium period. It is said that claim against the Company on performance guarantee is a unsecured claim by any operational creditor during the pendency of insolvency proceedings before NCLT. The Respondent No.2 Bank undertakes to abide by any orders passed by this Tribunal in respect




of the subject matter. Respondent No.3 Bank also filed Reply on the same lines on which the Respondent No.2 Bank has filed.

6. The points, that emerge for determination in this Application, are as follows;

(i) Whether 1st Respondent is entitled to invoke Bank Guarantees during moratorium period;

(ii) Whether Performance Guarantee is a 'Security Interest' or not;

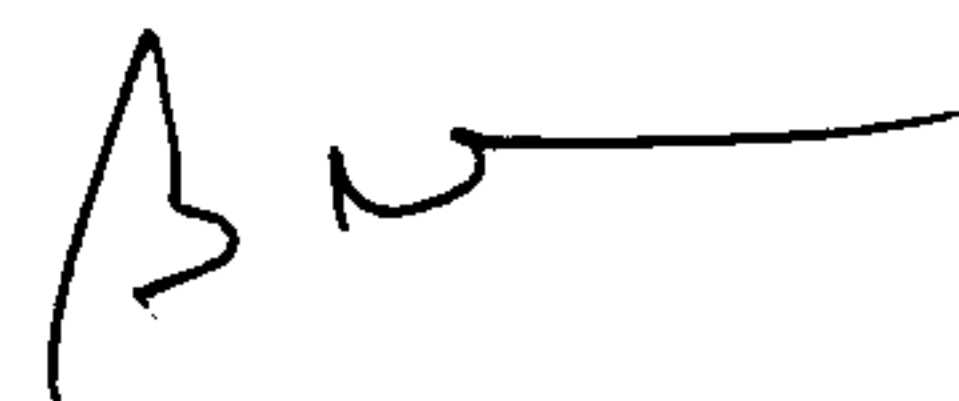
(iii) Whether supply of power to Corporate Debtor can be restarted 

7. Section 3, sub-section 31) defines "Security Interest" as under;

(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;"

This Adjudicating Authority imposed moratorium under Section 13(1)(a) of the Code by order dated 6.6.2017 for the purposes referred to in Section 14. The moratorium order reads as follows;



“17. In view of the commencement of the Insolvency Resolution Process with the admission of this Petition and appointment of the Interim Resolution Professional, this Adjudicating Authority hereby passes the order declaring moratorium under Section 13(1)(a) prohibiting the following as laid down in Section 14 of the Code;

- (i) 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;
- (ii) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
- (iii) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);
- (iv) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

(a) However, the supply of goods and essential services to the corporate debtor shall not be terminated or suspended or interrupted during moratorium period. The moratorium order in respect of (i), (ii), (iii) and (iv) above shall not apply to the transactions notified by the Central Government.

18. The order of moratorium shall be in force from the date of the order till the completion of Corporate Insolvency Resolution Process subject to the Proviso under sub-section (4) of Section 14.”

8. The moratorium imposed is only in respect of the properties of the Corporate Debtor. The moratorium order clearly says that any Security Interest created by the Corporate Debtor cannot be enforced

[Signature]

in respect of the property of the Corporate Debtor during the moratorium period. In the case on hand, the moratorium period was extended for further period of 90 days beyond 180 days as per order dated 1st December, 2017. The 180 days' period had expired on 2.12.2017. Now, it is extended for another period of 90 days.

9. Section 3 (31) clearly says that Performance Guarantees are not included in the Security Interest. What is covered by the order of this Authority under Section 14(1)(c) is the Security Interest. Therefore, the moratorium order passed by this Tribunal is not applicable to the Performance Guarantees given by the Corporate Debtor. Therefore, the Bankers are at liberty to allow the 1st Respondent to encash the Bank Guarantees that are given in respect of Performance Guarantees subject to other objections, if any. If the Applicant has got any other dispute with regard to the invocation of the Performance Guarantees, it is not within the right of the Banker not to allow encashment of Performance Guarantees unless it is shown that fraud has been played in obtaining the Bank Guarantee or in invocation of Bank Guarantee or irrevocable injustice has been caused to company as laid down decision of state sugar Corporation 1997 (1) SCC 568.

10. The moratorium order passed by this Tribunal applies in respect of Bank Guarantees other than Performance Guarantees furnished by the Corporate Debtor in respect of its property since it comes within the meaning of 'security interest'. Therefore, Respondent no. 1 is not entitled to invoke Bank Guarantees other than that comes within the meaning of performance Guarantees, during Moratorium period.



11. Coming to the aspect of disconnection of power supply by the 1st Respondent to the Applicant, it appears that without issuing any notice the power supply was disconnected to the Corporate Debtor. This Tribunal, in I.A. No. 328 of 2017 in CP (IB) No. 53 of 2017 held that Section 14(2) of the Code prevails over Section 56 of the Electricity Act, 2003 during the moratorium period. In that view of the matter, this Adjudicating Authority directed the Dakshin Gujarat Vij Company Limited not to disconnect the power supply to the Corporate Debtor invoking Section 56 of the Electricity Act, 2003 during the moratorium period. This Tribunal further ordered that DGVCL is entitled to make a claim for electricity consumption charges to the Resolution Professional and the Resolution Professional shall deal with the same as per the provisions of the Code, Rules and Regulations. The above said order of this Tribunal has been challenged before the Hon'ble National Company Law Appellate Tribunal. The Hon'ble Appellate Tribunal, in Company Appeal (AT) (Insolvency) No. 334 of 2017 directed M/s. AGB Shipyard Limited and the Resolution Professional to make payment of current electricity charges to DGVCL for the month of December, 2017 within 15 days failing which it will be open to the Appellant to disconnect the electricity. The said Company Appeal is still pending before the Hon'ble Appellate Tribunal. In the case on hand, it appears that the power supply was disconnected to the Corporate Debtor after the declaration of moratorium. Section 14(2) of the Code says, 'the supply of essential goods or services to the Corporate Debtor shall not be terminated or suspended or interrupted during moratorium period. The supply of power is an essential good



and service with reference to the Corporate Debtor. “Essential Supplies” is defined under Regulation 32 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. It says as follows;

“Essential supplies

32. *The essential goods and services referred to in section 14(2) shall mean –*

- (1) electricity;*
- (2) water,*
- (3) telecommunication services; and*
- (4) information technology services,*

to the extent these are not a direct input to the output produced or supplies by the corporate debtor.

Illustration-Water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, and not for generation of hydro-electricity.”

12. Therefore, following the orders passed by this Adjudicating Authority in IA No. 328 of 2017 in CP (IB) No. 53 of 2017 and the interim order dated 15.1.2018 passed by the Hon’ble Appellate Tribunal in Company Appeal (AT) (Insolvency) No. 334 of 2017, the Respondent No.1 MGVCL is hereby directed to continue to supply electricity to the Corporate Debtor provided Applicant has cleared all the electricity consumption charges as on the date of disconnection.

13. The Application stands disposed of accordingly.

Signature:



**Ms. Manorama Kumari,
Member (Judicial)
Adjudicating Authority.**

Rmr..

Signature:



**Sri Bikki Raveendra Babu,
Member (Judicial)
Adjudicating Authority.**