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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO.282 OF 2019
IN
COMPANY PETITION NO.489 OF 2015

Palladian Hotels Private Limited,
having its registered office at Corinthian 17,
Off Arthur Bunder Road, Colaba, Colaba
Causeway, Apollo Bandar, Colaba, Mumbai –
400 005.

...Applicant

IN THE MATTER BETWEEN :

Palladian Hotels Private Limited,
having its registered office at Corinthian 17,
Off Arthur Bunder Road, Colaba, Colaba
Causeway, Apollo Bandar, Colaba, Mumbai –
400 005.

...Petitioner

....Versus....

Hotel Horizon Private Limited,
having its registered office at 37, Juhu Beach,
Mumbai – 400 049.

...Respondent

Mr.Naushad Engineer with Ms.Spenta Havewalla, Murtuza Federal,
Ms.Pauloni Mehta and Ms.Arushi Poddar i/b M/s.Federal & Co. for
the Applicant / Petitioner.

Mr.Shadab Jan with Ms.Komal Khushalani i/b M/s.Crawford Bayley &
Co. for the Ex-Director of the Respondent Company.

CORAM : R.D. DHANUKA, J.
DATE : 2ND JANUARY, 2020.

ORAL JUDGMENT :-

1. By this company application, the applicant seeks an order and direction against the Prothonotary & Senior Master of this Court to encash the bank guarantee and to receive the funds in his account and seeks further direction to release a sum of Rs.38,53,000/- to the applicant within a period of one week from the date of passing of the

order in this application. Some of the relevant facts for the purpose of deciding this application are as under :

2. It is the case of the applicant that on 9th December, 2013 the applicant and the respondent had entered into a Term Sheet whereby the applicant had deposited a sum of Rs.10,53,000/- with the respondent as and by way of security deposit. The said Term Sheet contemplated a final leave and license agreement to be executed between the parties within four months, failing which the Term Sheet shall stand cancelled and the security deposit would have to be refunded to the applicant. The time to execute the final leave and license agreement was extended by letter dated 9th July, 2014 where under a further additional payment of Rs.28,00,000/- was deposited by the applicant with the respondent aggregating to Rs.38,53,000/- towards security deposit. No leave and license agreement was however, finalized even by the extended date.

3. The applicant filed a winding up petition (Company Petition No.489 of 2015) on 6th April, 2015 against the respondent in view of the respondent having failed to return the security deposit with interest to the applicant. On 5th April, 2017, this Court passed an order in the said company petition by consent of parties. The dispute between the parties was referred to arbitration of Ms.Sowmya Srikrishna, a counsel of this Court. The respondent through its counsel undertook to furnish a bank guarantee of a nationalized bank in the name of the Prothonotary & Senior Master of this Court in the

sum of Rs.38,53,000/- initially for a period of one year and for like period if the proceedings were not concluded within a period of one year.

4. The order dated 5th April, 2017 was clarified by this Court to the effect that return of the bank guarantee shall be subject to the out come of the arbitral proceedings and not furnishing of such bank guarantee. It was also made clear that if the bank guarantee was not submitted within the time stipulated in the said order, the company petition would stand revived and admitted without further reference to the Court. On 24th May, 2017, Vacation Bench of this Court extended the time to furnish the bank guarantee till 7th June, 2017.

5. On 5th June, 2017, the respondent furnished a bank guarantee bearing No.15 of 2017 through Indian Bank to the satisfaction of the Prothonotary & Senior of this Court for the sum of Rs.38,53,000/-. The said bank guarantee was an unconditional bank guarantee and was irrevocable. The validity of the said bank guarantee was further extended on 5th May, 2018 till 4th June, 2018. By an order dated 5th June, 2018, learned Prothonotary & Senior Master of this Court directed the respondent to extend the bank guarantee within 60 days prior to its expiry making it clear that in the event of the failure, the bank guarantee would be encashed.

6. On 22nd March, 2019, learned arbitrator made an award allowing the claims made by the applicant and rejected the counter

claim filed by the respondent. Learned arbitrator directed the respondent to pay a sum of Rs.38,53,000/- along with interest at the rate of 14% p.a. from 30th December, 2014 until payment or realization thereof and also to pay costs in the sum of Rs.19,17,547/- with interest at the rate of 7% p.a. from the date of award till payment or realization thereof. Learned arbitrator granted liberty to the applicant to apply to this Court for encashment of the bank guarantee furnished by the respondent. At the time of passing of award, Mr.Vishal Sharma, one of the Director of the respondent company was present on behalf of the respondent and sought stay of the award. Learned arbitrator however, rejected the said application.

7. Some time in the year 2017, during the pendency of the arbitration proceedings, Phoenix ARC Private Limited filed a company petition under section 7 of the Insolvency & Bankruptcy Code, 2016 against the respondent before the National Company Law Tribunal, Mumbai Bench in respect of the alleged default in the sum of Rs.93,86,52,393/- as on 25th September, 2017. By an order dated 29th January, 2019, National Company Law Tribunal, Mumbai Bench admitted the said company petition and passed an order under section 14 of the Insolvency & Bankruptcy Code, 2016 with effect from the date of the said order by prohibiting institution of any suit before any Court of law, transferring / encumbering any of the assets of the debtor etc. The National Company Law Tribunal also appointed Interim Resolution Professional.

8. It is the case of the applicant that the respondent however, did not disclose the said order dated 29th January, 2019 passed by the National Company Law Tribunal before the learned arbitrator. On 25th March, 2019, the applicant through its advocate's letter requested the learned Prothonotary & Senior Master of this Court to direct the Indian Bank to forthwith deposit the amount to the Prothonotary & Senior Master of this Court by demand draft under the said bank guarantee or by pay order in the sum of Rs.38,53,000/- and to hand over the same to the applicant. On 28th March, 2019 when the matter was listed before the learned Prothonotary & Senior Master of this Court, the respondent informed the applicant about the order dated 29th January, 2019 passed by the National Company Law Tribunal and that the respondent was in process of filing an appeal.

9. Learned Prothonotary & Senior Master of this Court accordingly directed the applicant to approach this Court and to obtain appropriate orders. It is the case of the applicant that only on 12th April, 2019 when the applicant took inspection of the papers and proceedings, the applicant was shown the said letter addressed by the respondent to the learned advocate for the respondent. On 12th April, 2019 the applicant through its advocate took inspection of the papers and proceedings. Pursuant to the directions issued by the learned Prothonotary & Senior Master of this Court, the applicant filed this company application on 2nd May, 2019.

10. On 6th September, 2019, this Court granted reliefs in terms of prayer clause (a) of this application and directed the learned Prothonotary & Senior Master of this Court to forthwith encash the said bank guarantee and to invest the said amount in fixed deposit of a nationalized bank initially for a period of one year, to be renewed from time to time unless otherwise ordered. Insofar as prayer clause (b) is concerned, this Court directed Resolution Professional of the respondent company to file affidavit in reply. The respondent did not file any appeal against the order dated 6th September, 2019 passed by this Court allowing interim relief in terms of prayer clause (a) at that stage. On 19th September, 2019 pursuant to the said order dated 6th September, 2019, the learned Prothonotary & Senior Master of this Court directed the Execution Department to take steps forthwith for encashment of the said bank guarantee issued by the Indian Bank and to invest the said amount with the nationalized bank initially for a period of one year to be renewed from time to time.

11. On 20th September, 2019, the Prothonotary & Senior Master of this Court called upon the Indian Bank to forthwith encash the said bank guarantee and to remit the said amount of Rs.38,53,000/- into the account of the Prothonotary & Senior Master of this Court. It is the case of the applicant that since the Indian Bank did not permit encashment of the bank guarantee, the applicant moved this Court again for appropriate directions. On 8th November, 2019, Shri Justice S.J. Kathawalla recorded that the Indian Bank had committed gross breach of the order dated 6th September, 2019 and

continued to breach the said order. This Court directed the Indian Bank to forthwith deposit the sum of Rs.38,53,000/- along with interest, if any, with the Prothonotary & Senior Master of this Court before 3.00 p.m. on 11th November, 2019. On 11th November, 2019, the Indian Bank forwarded a demand draft of Rs.38,80,208/- against the said bank guarantee of Rs.38,53,000/- in favour of the Prothonotary & Senior Master of this Court. On 27th November, 2019, the respondent filed affidavit in reply opposing this application. The applicant filed affidavit in rejoinder.

12. Mr.Naushad Engineer, learned counsel appearing for the applicant invited my attention to various annexures to the company application, affidavit in reply and affidavit in rejoinder in this company application and would submit that pursuant to the order passed by this Court on 5th April, 2017, the issue was referred to arbitration of Ms.Sowmya Srikrishna, advocate. The respondent had rendered an undertaking before this Court to furnish the bank guarantee in the sum of Rs.38,53,000/- in the name of the Prothonotary & Senior Master of this Court within six months from the date of the said order and which bank guarantee was to be initially for a period of one year and for like period if the arbitration proceedings were not concluded within a period of one year. He also invited my attention to an order passed by this Court thereby speaking to the minutes of the said order.

13. It is submitted by the learned counsel that the learned

arbitrator has now already rendered an award rejecting the counter claim filed by the respondent and allowing the claim made by the applicant in the sum of Rs.38,53,000/- with interest at the rate of 14% p.a. from 30th December, 2014 until payment or realization and also costs of Rs.19,17,547/- with interest at the rate of 7% p.a. from the date of award till payment or realization. He submits that when the award was declared, one of the Director of the respondent company was present before the learned arbitrator and had applied for stay of the said award. Learned arbitrator rejected the said application for stay of the award. He submits that the respondent did not disclose about the order passed by the National Company Law Tribunal admitting the company petition against the respondent and passing an order of moratorium under section 14 of the Insolvency & Bankruptcy Code, 2016 even at that stage.

14. Leaned counsel for the applicant invited my attention to the order passed by the Supreme Court on 30th September, 2019 in Civil Appeal No.7673 of 2019 thereby staying the order dated 29th January, 2019 passed by the National Company Law Tribunal until further orders. It is submitted by the learned counsel for the applicant that the order dated 6th September, 2019 passed by this Court in this company application after interpreting the provisions of section 14(3) (b) and section 14(1) of the Insolvency & Bankruptcy Code, 2016, this Court has already granted relief in terms of prayer clause (a) directing the Prothonotary & Senior Master of this Court to encash the said bank guarantee. He submits that the said order holding that

the bank guarantee furnished by the Indian Bank in favour of the Prothonotary & Senior Master of this Court would not enjoy the benefit of moratorium as envisaged under section 14 of the Insolvency & Bankruptcy Code, 2016 has attained finality. The respondent has not challenged the said order passed by this Court.

15. It is submitted that the reliefs sought in this company application by the applicant in respect of the bank guarantee is outside the purview of the order of moratorium under section 14 of the Insolvency & Bankruptcy Code, 2016. He submits that the bank guarantee furnished by the Indian Bank on behalf of the respondent was an independent contract and thus bar under section 14(3) of the Insolvency & Bankruptcy Code, 2016 would not apply to the said bank guarantee and even to the amount lying with the Prothonotary & Senior Master of this Court pursuant to the encashment of the said bank guarantee encashed as per order passed by this Court.

16. Learned counsel placed reliance on section 14(3)(b) of the Insolvency & Bankruptcy Code, 2016 and would submit that a surety is outside the purview of section 14(1) of the Insolvency & Bankruptcy Code, 2016. He relied upon section 126 of the Indian Contract Act, 1872 and would submit that the person who gives the guarantee is called “surety” and the person in respect of whose default the guarantee is given is called the “principal debtor”. He submits that the respondent having furnished the bank guarantee to the petitioner thus section 14(3)(b) of the Insolvency & Bankruptcy

Code, 2016 would not apply to the said bank guarantee or the amount lying upon encashment of the bank guarantee. He submits that in any event the order of moratorium passed by the National Company Law Tribunal has been stayed by the Supreme Court. No order of moratorium passed by the National Company Law Tribunal is in force today and thus even otherwise there is no bar against this Court from granting relief as prayed in the company application i.e. prayer for release of the amount lying deposited with the Prothonotary & Senior Master of this Court.

17. The next submission of the learned counsel for the applicant is that admittedly before the learned arbitrator not only the applicant had made a claim but the respondent had made substantial counter claim. He submits that in view of this position, the arbitration proceedings had not become infructuous or were not stayed even though an order of moratorium was passed by the National Company Law Tribunal. In support of this submission, learned counsel placed reliance on the judgment of the Delhi High Court in case of **SSMP Industries Limited vs. Perkhan Food Processors Pvt. Ltd., 2019 SCC OnLine Del. 9339** and in particular paragraphs 6 to 10. It is submitted by the learned counsel for the applicant that no application has been made by the applicant against any of the assets of the respondent company.

18. Learned counsel for the applicant placed reliance on the judgment of the Andhra Pradesh High Court in case of **Haryana**

Telecom Ltd. vs. Aluminium Industries Limited, (1997) 88 Comp Cas 735 and in particular paragraphs 5 and 6 in support of the submission that an application for encashment of the bank guarantee by the beneficiary under the guarantee is not in execution, distress or lying against the properties of the company. He submits that the principles of law laid down by the Andhra Pradesh High Court in that judgment interpreting section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short “SICA”) has to be extended to the order under section 14(1) of the Insolvency & Bankruptcy Code, 2016.

19. Learned counsel appearing for the respondent on the other hand would submit that the provisions of section 14(3) of the Insolvency & Bankruptcy Code, 2016 has to be read with section 14(1) of the Insolvency & Bankruptcy Code, 2016. He submits that the proceedings were filed before the National Company Law Tribunal against the respondent in which an order under section 14(1) of the Insolvency & Bankruptcy Code, 2016 came to be passed against the respondent. He submits that as a result of the said order of moratorium passed by the National Company Law Tribunal which was in force when the arbitral proceedings were going on and when the arbitral award was rendered, the arbitral proceedings itself would not have been proceeded with. No arbitral award could have been rendered by the learned arbitrator.

20. Learned counsel invited my attention to the prayers in the

company application and would submit that the reliefs sought in the company application are in execution of the arbitral award against the respondent. He submits that since this company application was filed on the date on which the said order of moratorium passed under section 14 of the Insolvency & Bankruptcy Code, 2016 was in force, this company application itself being *non-est* in law, even though those proceedings before the National Company Law Tribunal are stayed by the Supreme Court, no order for enforcement of the award in this company application can be passed by this Court.

21. Learned counsel distinguished the judgment of the Delhi High Court in case of **SSMP Industries Limited** (supra) on the ground that the said judgment had considered the provisions of section 22 of SICA which refers to the properties and not the proceedings or parties and is different than the provisions of section 14 of the Insolvency & Bankruptcy Code, 2016. He has strongly placed reliance on the order passed by the Supreme Court on 23rd August, 2017 in case of **Alchemist Asset Reconstruction Company Limited vs. M/s.Hotel Gaudavan Pvt. Ltd. & Ors.** in Civil Appeal No.16929 of 2017 and would submit that since the moratorium had already come into effect under section 14(1)(a) of the Insolvency & Bankruptcy Code, 2016, all pending suits or proceedings against the respondent were stayed. He submits that in view of the said order of the Supreme Court in case of **Alchemist Asset Reconstruction Company Limited** (supra), the judgment of the Delhi High Court in case of **SSMP Industries Limited** (supra)

would not assist the case of the applicant.

22. Learned counsel placed reliance on the definition of “claim” under section 3(6) of the Insolvency & Bankruptcy Code, 2016 and would submit that the said claim would include even the disputed claim and thus would include even the counter claim. He submits that since the arbitral proceedings could not have been proceeded with before the learned arbitrator, execution of the award cannot be proceeded with. He submits that the bank guarantee issued by the respondent and the amount lying deposited with the learned Prothonotary & Senior Master of this Court now is an asset of the respondent. He submits that the proceedings filed by he respondent under section 34 of the Arbitration & Conciliation Act, 1996 impugning the arbitral award which is sought to be enforced by the applicant is still pending.

23. Learned counsel for the respondent distinguished the judgment of the Andhra Pradesh High Court in case of **Haryana Telecom Limited** (supra) relied upon by the learned counsel for the applicant on the ground that the said judgment was under section 22 of SICA. Insofar as the order passed by Shri Justice K.R. Shriram allowing the relief in terms of prayer clause (a) of this company application is concerned, it is submitted by the learned counsel that by the said order, this Court has only granted an injunction and thus insofar as prayer clause (b) which is also in the nature of relief in execution is concerned, the relief granted in terms of prayer clause

(a) would not assist the applicant.

24. Mr.Naushad Engineer, learned counsel for the applicant in rejoinder submits that the applicant under section 22 of SICA, there was stay not only against the properties only but also against the parties and the proceedings. The provisions of section 22 of SICA are in pari-materia with section 14 of the Insolvency & Bankruptcy Code, 2016. The bank guarantee furnished by the respondent being an independent contract would fall outside the purview of moratorium under section 14(1) of the Insolvency & Bankruptcy Code, 2016.

25. Without prejudice to the rights and contentions of the applicant referred to aforesaid, learned counsel for the applicant on instructions states that there is no stay granted by this Court in the said arbitration petition filed by the respondent under section 34 of the Arbitration & Conciliation Act, 1996 impugning the arbitral award. He submits that his client is ready and willing to render an undertaking without prejudice to its rights and contentions to this Court that if the respondent succeeds in the said arbitration petition and if the arbitral award is set aside, his client would return the amount that would be allowed to be withdrawn with interest at such rate as this Court may direct. Statement is accepted.

REASONS AND CONCLUSION :

26. There is no dispute that before any order was passed by the National Company Law Tribunal under section 14(1) of the

Insolvency & Bankruptcy Code, 2016, the dispute between the parties was already referred to arbitration by an order dated 5th April, 2017 by consent of parties in Company Petition No.489 of 2015. Though National Company Law Tribunal has passed an order on 29th January, 2019 under section 14(1) of the Insolvency & Bankruptcy Code, 2016, the respondent did not inform the learned arbitrator or to the applicant about the said order. Be that as it may, the question that arises for consideration of this Court is whether the bank guarantee furnished by the respondent pursuant to an order passed by this Court on 5th April, 2017 could be encashed or not in view of the order passed by the National Company Law Tribunal under section 14(1) of the Insolvency & Bankruptcy Code, 2016 and thereafter if encashed, the applicant could apply for release of the amount lying with the office of the learned Prothonotary & Senior Master of this Court or not.

27. It is not in dispute that in this company application the applicant had prayed for an order and direction against the learned Prothonotary & Senior Master of this Court to encash the bank guarantee and to receive the funds in his account vide prayer clause (a) of the company application. By prayer clause (b), the applicant has applied for an order and direction against the learned Prothonotary & Senior Master of this Court to encash the bank guarantee and to release the said sum of Rs.38,53,000/- to the applicant from the date of passing of this order on this company application.

28. By an order dated 6th September, 2019 which is much after the order of moratorium under section 14 (1) of the Insolvency & Bankruptcy Code, 2016 by the National Company Law Tribunal, this Court after taking cognizance of the said order dated 29th January, 2019 and after construing sections 14(1) and 14(3)(b) of the Insolvency & Bankruptcy Code, 2016 and after adverting to the judgment of the Supreme Court in case of **State Bank of India vs. V. Ramakrishnan & Ors.** (Civil Appeal No.3595 of 2018 decided on 14th August, 2018 has held that the bank guarantee furnished by the Indian Bank in favour of the learned Prothonotary & Senior Master of this Court would not enjoy the benefit of moratorium as envisaged under section 14 of the Insolvency & Bankruptcy Code, 2016. This Court accordingly held that the learned Prothonotary & Senior Master of this Court was right in invoking the bank guarantee. The said order passed by this Court in this company application allowing encashment of the bank guarantee has not been impugned by the respondent till date.

29. By the said order dated 6th September, 2019, this Court also directed that insofar as prayer clause (b) is concerned, Resolution Professional to file affidavit in reply with a copy to be served upon the applicant's advocate. In my view, the view already taken by this Court that the bank guarantee furnished by the Indian Bank in favour of the learned Prothonotary & Senior of this Court would not enjoy the benefit of the moratorium as envisaged under

section 14 of the Insolvency & Bankruptcy Code, 2016 would apply to prayer clause (b) also. The said view has already attained finality.

30. Under section 126 of the Indian Contract Act, 1872, it is provided that the person who gives the guarantee is called "surety". Under section 14(3)(b) of the Insolvency & Bankruptcy Code, 2016, it is provided that the provision to sub section 1 of section 14 shall not apply to a surety in a contract of guarantee to a corporate debtor. It is thus clear that the respondent was a surety in a contract of guarantee given to the corporate debtor for carrying out the acts set out in section 14(1) of the Insolvency & Bankruptcy Code, 2016. Section 14(1) thus would not apply in the case of surety in a contract of guarantee to a corporate debtor. In my view, the bank guarantee furnished by the respondent in favour of the applicant was an independent transaction and was issued pursuant to a consent order passed by this Court. The said bank guarantee thus encashed was not a step in execution of any arbitral award and thus would not fall under section 14(1) of the Insolvency & Bankruptcy Code, 2016 and was rightly encashed.

31. In view of the fact that the order passed by this Court on 6th September, 2019 in this company application allowing prayer clause (a) thereof directing the learned Prothonotary & Senior Master of this Court to encash the bank guarantee has attained finality, there is no bar against the applicant from seeking release of the said amount encashed by the learned Prothonotary & Senior Master of

this Court lying deposited with the office of the learned Prothonotary & Senior Master of this Court under section 14(1) of the Insolvency & Bankruptcy Code, 2016. This company application thus cannot be considered as an application for execution of the arbitral award.

32. Insofar as the submission of Mr.Engineer, learned counsel for the applicant that since the respondent also had filed the counter claim before the learned arbitrator arising out of the same transaction, section 14(1)(a) of the Insolvency & Bankruptcy Code, 2016 would not prohibit the claim as well as the counter claim is concerned, I do not propose to decide this issue in this company application in view of the fact that the arbitration petition filed under section 34 of the Arbitration & Conciliation Act, 1996 by the respondent impugning the arbitral award is pending before this Court.

33. Insofar as the judgment of the Andhra Pradesh High Court in case of **Haryana Telecom Limited** (supra) relied upon by Mr.Engineer, learned counsel for the applicant is concerned, in my view the provisions of section 22(1) of SICA, 1985 are in pari-materia with section 14(1) of the Insolvency & Bankruptcy Code, 2016. It is held by the Andhra Pradesh High Court in the said judgment that the bank guarantee cannot be said to be the property of the respondent therein simply because it is indirectly going to be affected by enforcement of the said bank guarantee by the appellant. It is held that the proceedings to encash the bank guarantee cannot be said to be covered by the phrase “execution, distress or the like”,

contemplated under section section 22(1) of SICA. In my view, the principles laid down by the Andhra Pradesh High Court in the said judgment can be extended to the facts of this case. I am in respectful agreement with the views expressed by the Andhra Pradesh High Court in the said judgment in case of **Haryana Telecom Limited** (supra).

34. In my view, this company application filed by the applicant for seeking an order of release of the amount encashed by the learned Prothonotary & Senior Master of this Court pursuant to the order passed by this Court which order had attained finality is not an application for execution of the arbitral award against any of the assets of the respondent company. The bar prescribed under section 14(1) of the Insolvency & Bankruptcy Code, 2016 thus even otherwise would not apply to this application. The company application thus filed by the applicant for the reliefs sought therein is maintainable.

35. There is no dispute about the proposition of law canvassed by the learned counsel for the respondent that section 14(3) of the Insolvency & Bankruptcy Code, 2016 has to be read with section 14(1) of the Insolvency & Bankruptcy Code, 2016. However, since the case of the applicant falls under section 14(3)(c) of the Insolvency & Bankruptcy Code, 2016, the company application would clearly fall under an exception carved out under section 14(1) of the Insolvency & Bankruptcy Code, 2016.

36. Insofar as the submission of the learned counsel for the respondent that the company application filed by the applicant during the period when the order of moratorium passed by the National Company Law Tribunal was in force and was thus *non-est* in law, such application filed by the applicant would not revive even though the order passed by the National Company Law Tribunal stands stayed by the Supreme Court is concerned, in my view there is no substance in this submission of the learned counsel for the respondent. This Court has already held that the application filed by the applicant for seeking encashment of the bank guarantee and for release of the amount encashed by the learned Prothonotary & Senior Master of this Court being not in the nature of any execution application, the bank guarantee being an independent contract, this company application is thus being not *non-est* and cannot be dismissed on the ground that the said application was filed when the said order passed by the National Company Law Tribunal was in force.

37. Insofar the submission of the learned counsel for the respondent that the judgment of the Delhi High Court in case of **SSMP Industries Limited** (supra) is contrary to the order passed by the Supreme Court in case of **Alchemist Asset Reconstruction Company Limited** (supra) is concerned, in my view the said order of the Supreme Court would not assist the case of the respondent in view of the fact that the facts before the Supreme Court were

different. In this case the view already taken by this Court by an order dated 6th September, 2019 has attained finality. Be that as it may, this Court has not followed the said judgment of the Delhi High Court in case of **SSMP Industries Limited** (supra) and has kept the said issue open. This Court thus need not decide the issue whether under section 3(6) of the Insolvency & Bankruptcy Code, 2016, the claim would include the disputed claim also and could not have been proceeded with before the learned arbitrator.

38. In my view, the bank guarantee being an independent contract, this application is maintainable for seeking appropriate directions for the release of the amount encashed by the learned Prothonotary & Senior Master of this Court pursuant to an order passed by this Court. The respondent does not dispute that the order passed by this Court permitting encashment of the bank guarantee has not been impugned by the respondent and has attained finality.

39. I am inclined to permit the applicant to render an undertaking before this Court that if the respondent succeeds in the arbitration petition filed by the respondent impugning the arbitral award and if any order for refund of the amount permitted to be withdrawn is passed, the applicant would return the amount with interest at such rate as this Court may permit.

40. I therefore, pass the following order :-

a). Learned Prothonotary & Senior Master of this Court to release the amount already realized upon encashment of the bank guarantee to the applicant within one week from the date of the applicant furnishing an undertaking to the effect that if the respondent succeeds in the arbitration petition filed by the respondent under section 34 of the Arbitration & Conciliation Act, 1996 impugning the arbitral award dated 22nd March, 2019 and if the applicant is directed to return the said amount, the applicant would return the amount with interest at such rate which this Court may direct.

b). Such undertaking shall be furnished by the applicant within two weeks from today. A copy of the undertaking shall be furnished to the respondent's advocate simultaneously.

c). The Company Application No.282 of 2019 is disposed of on aforesaid terms. There shall be no order as to costs.

d). All parties as well as the learned Prothonotary & Senior Master of this Court to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)