IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
COURT - 2

ITEM No.301

C.P. (IB)/355(AHM)2024

Proceedings under Section 95 IBC

IN THE MATTER OF:

Canara Bank ..... **Applicant**
V/s
Mr.Ashok B.Jiwrajka ..... **Respondent**

ITEM No.302

C.P. (IB)/356(AHM)2024

Proceedings under Section 95 IBC

IN THE MATTER OF:

Canara Bank ..... **Applicant**
V/s
Mr.Dilip B.Jiwrajka ..... **Respondent**

ITEM No.303

C.P. (IB)/357(AHM)2024

Proceedings under Section 95 IBC

IN THE MATTER OF:

Canara Bank ..... **Applicant**
V/s
Mr.Surendra B.Jiwrajka ..... **Respondent**

Order delivered on: 07/05/2025

Coram:
Mrs. Chitra Hankare, Hon'ble Member(J)
Dr. Velamur G Venkata Chalapathy, Hon'ble Member(T)

ORDER

The case is listed today for pronouncement of order. The members are dissenting on following points:

(a) Whether Personal Guarantors can be admitted/rejected into PIRP on merits?

The Registry is directed to place the record before the Hon'ble President under Section 419(5) of the Companies Act, 2013 for constitution of appropriate 3rd

Member for his opinion, so that the order in CP(IB) 355 of 2024, CP(IB) 356 of 2024 and CP(IB) 357 of 2024 is rendered in accordance with the opinion of majority..

-Sd-

DR. V. G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

CHITRA HANKARE
MEMBER (JUDICIAL)

BEFORE THE ADJUDICATING AUTHORITY
THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD (COURT - II)

CP(IB) No. 355 of 2024

[Filed under Section 95(1) of the Insolvency & Bankruptcy Code, 2016 read with rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019]

Canara Bank
having its Head Office at 112,
JC Road, Bangalore- 560002
and branch among other places at
Stressed Assets Management Branch
8th Floor, B- Wing, C-14, G Block,
Canara Bank Building, BKC,
Mumbai - 400051. ... Financial Creditor

Versus

Ashok B. Jiwrajka
having its address at
Flat No. 401, Raheja Legend,
Dr. Annie Besant Road, Worli,
Mumbai- 400018. ... Personal Guarantor

CP(IB) No. 356 of 2024

Canara Bank
having its Head Office at 112,
JC Road, Bangalore- 560002
and branch among other places at
Stressed Assets Management Branch
8th Floor, B- Wing, C-14, G Block,
Canara Bank Building, BKC,
Mumbai - 400051. ... Financial Creditor

Versus

Dilip B. Jiwrajka
having its address at
Villa Orb, 15th Floor,
Opp. Manzoni Showroom,
Darabshaw Lane, Off. N.S. R. D.
Mumbai-400006 ... Personal Guarantor

CP(IB) No. 357 of 2024

Canara Bank
having its Head Office at 112,
JC Road, Bangalore- 560002
and branch among other places at
Stressed Assets Management Branch
8th Floor, B- Wing, C-14, G Block,
Canara Bank Building, BKC,
Mumbai - 400051. ... Financial Creditor

Versus

Surendra B. Jiwrajka
having its address at
Villa Orb, 15th Floor,
Opp. Manzoni Showroom,
Darabshaw Lane, Off. N.S. R. D.

Order pronounced on 07.05.2025

CORAM:

MRS. CHITRA HANKARE
HON'BLE MEMBER (JUDICIAL)

DR. V. G. VENKATA CHALAPATHY
HON'BLE MEMBER (TECHNICAL)

Present:

For the Applicant : Mr. Ashok Mishra, Adv.
For the PG : Mr. Saurabh Soparkar, Sr. Adv.
a.w. Mr. Sandip Solanki, Adv.

COMMON JUDGEMENT

Per: Member (Judicial)

1. Since, the factual grounds and the nature of relief sought in all the three petitions are identical only against different respondent guarantor, this Adjudicating Authority is dealing with all the three petitions, in the same common order. Brief facts of the case are as under:

2. Canara Bank and the erstwhile Syndicate Bank are the original Financial Creditors. Syndicate Bank merged into Canara Bank. Therefore, Canara Bank (Financial Creditor) has filed this Application under section 95 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as IBC,2016) read with Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 to initiate Personal Insolvency Resolution Process against Ashok B. Jiwrajka, Dilip B. Jiweajka, Surendra B. Jiwrajka, the Personal

Guarantors of the Corporate Debtor namely Alok Industries Ltd. for default of an amount of Rs.312,61,21,294/-.

3. The applicant stated that on receipt of loan application from the Corporate Debtor Alok Industries Ltd., the Financial Creditor had sanctioned various credit facilities from time to time. The borrower availed various financial assistance from the consortium of lenders. The limits sanctioned under the said credit facilities were renewed or enhanced from time to time by the financial creditor. At the request of corporate debtor Sanction Letters were issued by the Financial Creditors between the years 2005-2016. The applicant stated that State Bank of India was recognized as the leader of the Consortium and the said consortium was referred to as "the SBI Consortium".

4. The amount due to the Corporate Debtor was Rs.1229,15,19,292/- and date of default as mentioned in the application is 27.02.2015. The applicant bank has granted credit facilities to the Corporate Debtor to which the respondents stood as personal guarantors. As a security for the repayment of the said credit facilities with interest, costs, charges and other

expenses payable in respect of credit facilities, deed of Guarantee for overall limit was executed on 11.12.2014 in favour of State Bank of India, Silvassa. On 04.02.2016 and 12.08.2016, deed of Guarantee was executed in favour of SBICAP Trustee Company Limited. To secure the said credit facilities various security documents including mortgage deed dated 27.12.2016 were executed between the applicant and the corporate debtor.

5. On account of defaults in making the payments by Alok Industries Ltd. i.e. Corporate Debtor, the account was classified as Non-Performing Asset ("NPA") on 27.02.2015. Vide Order dated 18.07.2017 Corporate Debtor was admitted into CIRP. Vide Order dated 08.03.2019 the Resolution Plan filed by the Resolution Applicants i.e. Reliance Industries Ltd. and JM Financial Asset Reconstruction Company ("ARC Trust") was approved by this Tribunal.

6. The applicant stated that in the Original Application No.999 of 2019 was filed before the DRT-II at Ahmedabad. The Guarantors through their Written Statement filed on October, 2019 have acknowledged existence of debt, but have denied its

enforceability as per the Resolution Plan approved by this Tribunal. By written statement dated 21.12.2020, similar denial was made by the personal guarantor in another Original Application No. 620 of 2020 filed before the DRT- II at Ahmedabad. The Financial Creditor by its Recall dated 31.07.2019 addressed to the Corporate Debtor requested that the Corporate Debtor to clear the overdue balance in its respective accounts.

7. The applicant has mentioned total outstanding debt including interest and penalties as Rs.1229,15,19,292/- as on 30.09.2024. The applicant stated that the amount in default is Rs.312,61,21,294/-. Date on which debt was due is mentioned as 27.12.2014 and date of default is 27.02.2015 The applicant issued demand notice to guarantor on 17.11.2023 under Rule7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019. The personal guarantors have replied to the demand notice on 29.11.2023. The applicant has also placed NeSL Report of corporate debtor on record.

8. The respondent has filed its reply on 10.12.2024. By way of the same the respondent has raised jurisdictional issue regarding maintainability of the application on the ground that the applicant is not a signatory to the guarantees relied upon by the applicant dated 11.12.2014, 04.02.2016 and 12.08.2016. Only M/s SBICap Trustee Company Limited was entitled to enforce guarantee obligations under the said guarantees. The deed of guarantees dated 04.02.2016 and 12.08.2016 have already been impounded and therefore cannot be relied upon by the Applicant. Alleged default occurred on 27.02.2015 and ended on 27.02.2018. The Petition is filed after a period of nearly 10 years from the alleged date of default and therefore the present suffers from laches and gross delay and is barred under Article 137 of the Limitation Act, 1963 read with Section 238A of the IBC. By the Assignment Agreement dated 05.03.2020, the underlying debt in respect of which the Guarantees were purportedly issued, has been sold and assigned for consideration to a third party almost 4 years prior to filing of this Application. Therefore, the Applicant is no longer a lender to the Principal Borrower and cannot file the present Company Petition. The applicant is

indulging in forum shopping as separate proceedings before DRT is already filed.

9. The respondent stated that the Resolution Plan as part of the Corporate Insolvency Resolution of the Principal Borrower, provided vide clause 1.2 (v) (b), (A) for an amount of Rs.4852,00,00,000/- (Rupees Four Thousand Eight Hundred Fifty-Two Crores only) as the (Financial Creditors Settlement Amount) towards repayment to the Financial Creditors; and (B) an amount of Rs.200,00,00,000/- (Rupees Two Hundred Crores only) to be paid by the ARC Trust (JM Financial Asset Reconstruction Company Limited and JM Finance ARC- March 18 Trust) to the Financial Creditors, for the purchase/assignment of the "Outstanding ARC Debt" as defined in the Resolution Plan. An Assignment Agreement dated 05.03.2020 was executed between the ARC Trust and the Financial Creditors of the Borrower (including the Applicant herein). The Applicant has inter alia executed the Assignment Agreement in favour of the ARC Trust under which, amongst others, the alleged debt/claim, and the underlying securities have been irrevocably and permanently assigned and transferred

to the Resolution Applicants for valuable consideration and accordingly, the Applicant's alleged debt/claim stood settled pursuant to the Assignment Agreement.

10. During the CIRP of the corporate debtor the applicant has voted in favour of the resolution plan. The applicant made claim of Rs.1528,76,17,307/- (Rupees One Thousand Five Hundred Twenty Eight Crores Seventy Six Lakhs Seventeen Thousand Three Hundred Seven only). As per the approved Resolution Plan, an amount of Rs.254,92,71,811/- (Rupees Two Hundred Fifty Four Crores Ninety Two Lakh Seventy One Thousand Eight Hundred Eleven Only) has been paid to the Applicant towards the admitted claim, and the entire balance outstanding debt was assigned for valuable consideration, thereby leaving no outstanding amount payable to the Applicant.

11. The respondent stated that the Applicant and Syndicate Bank separately had issued the No-Objection Certificate ("NOC") vide their emails dated 21.04.2020 and 21.07.2020 respectively pursuant to which Charge Satisfaction Certificates were issued

by the Ministry of Corporate Affairs, stating that the charges of the Principal Borrower have been satisfied.

12. The respondent stated that the Applicant is no longer a lender, and has absolutely no right to recover any amount as on date of filing the Company Petition, or even at the time of issuing the Form B Demand Notice dated 17.11.2023 and further, the creditor-debtor relationship between the Principal Borrower and the Applicant ceased to exist/came to an end simultaneously with the execution of the Assignment Agreement. The respondent had duly responded to the demand notice by its reply dated 29.11.2023 highlighting its objections.

13. The respondent further stated that the Applicant is not a Creditor in law and thus, has no locus to file the captioned Petition against the Respondent, thereby making the Petition defective. In view of the Resolution Plan of the Principal Borrower, the Applicant amongst other Financial Creditors of the Principal Borrower had agreed to receive the Upfront Payment (as defined in the Resolution Plan) towards their claim as filed before the Resolution Professional and assign their balance dues

including any applicable interest thereon as set out in the Form C, to the ARC Trust. Having received payments under the Resolution Plan and also having assigned and sold its outstanding debt to the ARC Trust, the Applicant relinquished its right over the debt/loans previously owed to it by Principal Borrower. The Resolution Applicant has stepped into the shoes of the Applicant in relation to these debts/loans, and hence, the Applicant did not have any legal rights or claims against the Principal Borrower for any dues or amounts. The respondent stated that the present case is a case of assignment of the debt for valuable consideration and not extinguishment of debt. The liability to pay now exists towards the ARC Trust only. There is no provision of law under which two creditors can exist in respect of a single debt.

14. The applicant has filed its rejoinder on 22.01.2025. By way of the same, the applicant has categorically dealt with the objections raised by the respondent on various grounds. The applicant stated that in the resolution plan it has been specifically stated that the personal guarantees of the promoters are excluded from the assignment to the ARC trust. In respect of

the objection that the deed of guarantee filed in the present processing has been impounded by DRT cannot be relied upon in the present proceeding.

15. In respect of the objection that the deed of guarantee dated 11.12.2014, 04.02.2016 and 12.08.2016 is in favour of SBI Cap Trust Company Limited (SBI Cap,) and the applicant not being signatory to the said deed of guarantee cannot file the present company petition, the applicant stated that the Borrower, in terms of the sanction terms, appointed SBI Cap Trustee Ltd. for the benefit of the lenders. All the security created for securing the financial assistance was in favour of the Security Trustee. Hence, the Security Trustee is empowered to exercise the right to invoke the guarantee and have done so by their letter dated 9th April 2019 to protect the interest of the lenders who are beneficiary. The lenders are entitled to enforce their right thereby the Trustees are discharged of their obligations.

16. The applicant has filed additional affidavit on 25.03.2025 for placing further documents on record. The applicant has produced a copy of the Indenture of Mortgage dated 27.12.2016.

The indenture of mortgage was executed by the Corporate Debtor and its group companies which of registered before the office of sub registrar, Vapi. In terms of the Gujarat Stamp Act, the indenture of mortgage being the document chargeable with maximum stamp duty has been considered as the principal document and accordingly maximum stamp duty has been paid in indenture of mortgage and Rs. 200/- stamp duty paid in another document. The applicant stated that this document was not filed before the DRT as resolution plan was approved and this document has no relevancy in those proceeding. Further, as regards impounding the applicant stated that the bank has now decided to file an application to recall this order of the Debts Recovery Tribunal and in the event the same is not recalled, it would request the SBICAP to get the document be adjudicated by the stamp authority and certificate may be obtained that no further stamp duty is payable.

17. The respondent has also filed limited affidavit on 31.03.2025. The respondent stated that the Indenture of Mortgage dated 27.12.2016 was produced by the applicant to controvert the contentions regarding impounding of deeds of guarantee by the

DRT. The Deeds of Guarantee have stood impounded and as on date the Impounding Order has not been challenged by the Financial Creditor and its recall now is also barred by limitation. In fact, the contentions raised by the Financial Creditor in the Additional Affidavit have no relevance in the current proceedings. Under the Assignment Agreement dated 05.03.2020, not only the alleged debt/claim, but even the underlying securities (including the Indenture of Mortgage) have been irrevocably and permanently assigned and transferred to the Resolution Applicants for valuable consideration and accordingly, the Applicant's alleged debt/ claim stood settled pursuant to the Assignment Agreement. By virtue of Clause 3.2.3 of the resolution plan and the provisions of the Code, the Deed of Mortgage no longer stands secured in favour of SBICap Trustee Company Limited (the "Security Trustee") on behalf of the Financial Creditor/Applicant.

18. Heard, learned advocates for both the parties and perused the written submissions alongwith judgments.

19. The respondent has given a chart of dates and events, which is as under:

Sr. No.	Date	Particulars/Events
1.	11.12.2014	Deed of Personal Guarantee for overall limit executed in favour of State Bank of India ('SBI').
2.	04.02.2016 & 12.08.2016	Deeds of Personal Guarantee were executed in favour of SBICap Trustee Company Limited as security trustee for the lenders of the Principal Borrower.
3.	18.07.2017	A Company Petition bearing CP (IB) No. 48/7/NCLT/2017 seeking initiation of CIRP against the Principal Borrower was 1 filed by SBI (being the lead bank of the consortium of lenders of the Principal Borrower) and the same was admitted by this Hon'ble Tribunal vide order dated 18th July, 2017, thereby initiating CIRP against the Principal Borrower.
4.		A Company Petition bearing CP (IB) No. 48/7/NCLT/2017 seeking initiation of CIRP against the Principal Borrower was 1 filed by SBI (being the lead bank of the consortium of lenders of the Principal Borrower) and the same was admitted by this Hon'ble Tribunal vide order dated 18th July, 2017, thereby initiating CIRP against the Principal Borrower.

5.	09.04.2018	SBICAP Trustee issued the notice for invocation of the guarantees dated 4th February, 2016 and 12th August, 2016.
6.	08.03.2019	The Resolution Plan submitted by the Resolution Applicant was approved by the CoC and was thereafter approved by this 1 Hon'ble Tribunal.
7.	30.08.2019	The Resolution Plan submitted by the Resolution Applicant was approved by the CoC and was thereafter approved by this 1 Hon'ble Tribunal.
8.	04.10.2019	Written statement filed on behalf of Personal Guarantors in OA No. 999 wherein the existence of debt as well as the liability to pay were specifically denied interalia on the grounds of limitation and assignment of the underlying debt by Syndicate Bank.
9.	25.10.2019	Vide order dated 25.10.2019 passed in OA 533 of 2019 (EXIM Bank vs Ashok Jiwrajka and Ors), the DRT passed an order directing for impounding of the deeds of guarantee dated 04.02.2016 & 12.08.2016 which were executed without paying sufficient requisite stamp duty.
10.	05.03.2020	Pursuant to the Resolution Plan, the Applicant herein entered into an Assignment Agreement dated 5th March, 2020 ("Assignment Agreement") vide which the balance outstanding loans of the Applicant amounting to Rs. 1147.31 Crores were sold and assigned to the ARC Trust for valuable consideration.

11.	09.09.2020	Original Application being OA 620 of 2020 was filed before the DRT Ahmedabad by Canara Bank.
12.	21.04.2020 & 21.07.2020	Vide emails dated 21st April, 2020 and 21st July, 2020, the Applicant issued the No-objection Certificate stating that the claims of the Applicant as on the Insolvency Commencement Date i.e. 18th July, 2017 stood settled as per the terms of the Resolution Plan and they had no objection to their charges in the index of charges appearing as satisfied in full.
13.	21.12.2020	Written statement filed on behalf of Personal Guarantor in OA No. 620 of 2020 wherein the existence of debt as well as the liability to pay were specifically denied interalia on the grounds that the Deeds of Guarantee stood impounded and therefore, the OA could not have been filed especially considering the fact that the underlying debt stood assigned to the ARC Trust.
14.	18.01.2021	In addition to the Written Statement filed on 21st December, 2020, the Personal Guarantor has filed an IA seeking dismissal of the OA No. 620 of 2020 interalia on the grounds that the 1) the right to recover money under the deeds of guarantee was barred by limitation and 2) the deeds of guarantees stood impounded.
15.	17.02.2021	In addition to the Written Statement filed on 4th October, 2019, the Personal Guarantor has filed an IA seeking dismissal of the OA No. 999 of 2019 interalia on the grounds that the deeds of

		guarantees which formed the basis of the OA stood impounded.
16.	17.11.2023	After a period of 5 years from the invocation of the subject guarantees by SBI Cap Trustee, the Applicant purported to 2 issue a Form B Demand Notice under the Code in respect of the Deed of Guarantee. The date of default as per the Demand Notice as well as the Company Petition is 27th February, 2015 and therefore, it is clearly evident that the present Company Petition was filed after 9 years from the alleged default.
17.	29.11.2023	The Respondent through their Advocates challenged and disputed the validity of the Demand Notice and referred to the Resolution Plan, Assignment Agreement and the No-Objection Certificate. However, the Applicant has filed the captioned Petition after the expiry of the limitation period and without considering and duly dealing with the information supplied by the Respondent.
18.	01.03.2024	A similar application u/s 95 of IBC involving similar facts, filed by Small Industries Development Bank of India. (SIDBI) (CP 135 of 2024- SIDBI vs Ashok Jiwrajka) against the same personal guarantor was dismissed by this Tribunal vide order dated 1st May, 2024 on the following grounds: i. Application was barred by limitation and was not filed within the prescribed period; and ii. Application did not disclose the fact of the

		resolution the debt and the Assignment Agreement despite the Applicant being one of the signatories

20. Undisputed facts are that Corporate Debtor i.e. Alok Industries Limited has obtained loan to which the respondent has given a guarantee. The CD had undergone into CIRP, vide order dated 18.07.2017. Resolution plan submitted by the applicant was approved by CoC and thereafter, by this Tribunal on 08.03.2019. The Syndicate Bank filed OA bearing No. 999 of 2019 before DRT against the guarantors. Wherein, the deed of guarantee was impounded by DRT on 25.10.2019. The applicant thereafter assigned balance outstanding loan to ARC trust on 05.03.2020. The applicant also filed OA No.620 of 2020 before DRT, Ahmedabad.

21. The Ld. Advocate for the applicant submitted that the impounding of document will not affect the filing of the present application. He also submitted that the application is within limitation, as the respondent guarantor filed written statement in OA No. 620 of 2020 wherein he has acknowledged the debt.

According to the applicant, therefore, fresh limitation period starts from the acknowledgement of debt that is from 21.12.2020. He also sought extension of limitation during Covid period by relying upon Suo Motu judgment of the Hon'ble Supreme Court. The Ld. Advocate further submitted that they have invoked guarantee on 17.11.2023. But guarantee was also invoked by SBI Cap Trustee vide letter dated 09.04.2018.

22. The Ld. advocate for the respondent has taken various objections to the application, such as limitation, impounding of guarantee, assignment deed, execution of guarantee, invocation of guarantee etc. Each objection is dealt separately.

Impounding of document

23. In an application bearing OA no.533 of 2019 filed by Exim bank against the guarantor, the DRT by order dated 25.10.2019 directed impounding of deeds of guarantee dated 04.02.2016 and 12.08.2016 which are not having sufficient stamp duty. According to the respondent as the guarantee deed itself is

impounded and sent for adjudication, there is no guarantee that can be relied upon by the applicant.

24. In this context, the applicant had relied upon following judgments:

a. *Hiren Meghji Bharani Vs. Shankheshwar Properties Pvt. Ltd. & Anr., Company Appeal (AT) (Insolvency) No.446 of 2023, NCLAT, Principal Bench, New Delhi*

In which it was held that non-stamping of the document does not render the (CIRP) application filed to be non-maintainable when there exists other material on record to prove existence of default in the payment of the debt. However, this judgment was given in an application under Section 7 of the IBC.

b. *State Bank of India Vs. Gourishankar Poddar, Company Appeal (AT) (Ins.) No. 689 of 2024, NCLAT, Principal Bench, New Delhi*

In this case, issue of revocation of guarantee letter and revival letter which was not signed by respondent no. 2 was involved.

c. *The Chief Controlling Revenue Vs. The Madras Refineries Ltd., AIR 1975 MADRAS 362*

Wherein it is held that "The essence of the matter being that the company borrowed on security in the particular form contemplated by the exemption of Article 27, the principal instrument within the meaning of Section 4 of the Stamp Act, was the mortgage. Even apart from Section 4 of the Act, we would have come to the same conclusion that the principal instrument which attracted stamp duty is the deed of trust and mortgage. In that case, the document shall be chargeable under Article 40 (b). We have, therefore, answered the questions as we have already done, that is to say, the first question is answered in favour of the Revenue and the second question against the respondent."

d. *Jaika Automobiles Private Limited Vs. Joint District Registrar (Class-1) and Anr., 2006(4)BOMCR452*

e. *Mobilox Innivations Private Limited Vs. Kirusa Software Private Limited, AIR 2017 SUPREME COURT 4532*

As facts of all these cases are different the rulings are not applicable.

25. The applicant in additional affidavit dated 25.03.2025 stated that the bank has now decided to file an application for recall of the order of DRT and if it is not recall, they would request SBICap to get the duty adjudicated by Stamp Authority. A certificate to that effect may be obtained that no further stamp duty is payable. However, there is nothing on record to show that they have filed any application for recall of order, or that the Stamp Authority had adjudicated into it. The fact remains that the document is yet to be adjudicated as per order of the DRT. As the sufficient stamp duty is not yet paid even after 5 years of impounding the document. The document cannot be relied upon at this stage.

26. However, presuming that the document as exists is valid, though impounded, we will further discuss the same on other objections.

Acknowledgement & Limitation

27. The date of default as per the petition is 27.02.2015. Hence, it is barred by limitation. The applicant submitted that the PG in

OA No. 999 of 2019 and OA No. 620 of 2020 filed written statement acknowledging the liability. They have also relied upon demand notice dated 17.11.2023.

28. According to PG for the purpose of extension of limitation acknowledgment must be absolute and unconditional and the written submission filed before the DRT cannot be construed as acknowledgement of debt. Wherein the PG has denied the liability and also raised issue on the maintainability of application on various grounds. They have also filed applications for dismissal of OA's. The respondent further submitted that no demand notice have been issued for the deed of guarantee dated 11.12.2014 till date.

29. In this context it is necessary to see the averments made in the written statement filed by the guarantor before DRT. On perusal of written statement (Exhibit-F) Volume-2, it appears that the defendant that is PG denied all the allegations in the original application. The PG also stated that they deny that they have guaranteed the repayment. At application Para 5 (F) it is stated as under:

"With reference to paragraph no. 5.5, at the outset all the content therein is denied in toto. The Defendant Nos. 2 to 4 further deny that they have guaranteed any repayment of dues of the Defendant No. 1. Further, the debt is prior to the CIRP of the Defendant No. 1 and the Applicant's dues of the Defendant No. 1 is settled in accordance with the approved Resolution Plan as a full and final settlement and that the Applicant has also assigned its further debt of the Defendant No. 1 to the ARC Trust under the Assignment Agreement, its confirmation can also be seen on the same. Therefore, once the principal debt has been settled then the question of enforcing the guarantees against the Defendant Nos. 2 to 4 does not arise."

30. They have further stated the applicant enforced deed which he does not possess and have any right in the same. They have also stated that guarantee deed is not sufficiently stamped and it is barred by limitation. At Para. no. 7 (xxx) & (xxxi) the respondent stated as under:

"That the Guarantee Deeds nowhere provides any such liberty to the Applicant to compromise the debt with the Defendant No. 1 and still sue the Guarantor. The Guarantee Deeds assuming without admitting provides for any such exception same would be contrary to law and therefore illegal and void ab initio."

"That the Guarantee Deeds are mainly executed by the lenders to the consortium only in favour of the Defendant No. 7 (as the Lead Bank) and the Defendant No. 33 (as the Security Trustee) herein and not in favour of the Applicant. That unless the Defendant No. 33 herein has been has in its capacity as Trustee been made a co-applicant the Applicant cannot as beneficiary of the Trust have filed the Original Application in accordance with the provisions of the Indian Trust Act, 1882. Therefore, the Original Application itself will not survive and same deserves to be dismissed forthwith."

The respondent finally prayed for disposal of OA. Nowhere in this written statement the guarantor has admitted its liability to pay the debt or acknowledged the debt.

31. In this context, the applicant had relied upon following judgments:

f. *Khan Bahadur Shapoor Fredoom Mazda Vs. Durga Prosad Chamaria and others, 1961 AIR 1236*

Wherein it was held that "The tenor of the letter shows that it is addressed by respondent 2 as mortgagor to respondent 1 as puisne mortgagee, it reminds him of his interest as such mortgagee in the property which would be put up for sale by the first mortgagee, and appeals to him to assist the avoidance of sale, and thus acquire the whole of the mortgagee's interest. It is common ground that no other relationship existed between the parties at the date of this letter, and the only subsisting relationship was that of mortgagee and mortgagor. This letter acknowledges the existence of the said jural relationship and amounts to a clear acknowledgment under art. 19 of the Limitation Act."

This ruling is also relied upon by the respondent.

Further in para. no. 6 it is observed that "The statement on which a plea of acknowledgment is based must relate to a

present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgement must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship."

The observations made are favourable to the respondent.

g. *Anita Goyal Vs. Vistra ITCL (India) Limited and Anr, Company Appeal (AT) (Insolvency) No.2282 of 2024, NCLAT, Principal Bench, New Delhi*

Wherein it was observed that even if the Corporate Debtor is not in CIRP, the insolvency resolution process can be initiated against a personal guarantor.

h. *State Bank of lndia Vs. Nikunj Bothra, C.P. (IB)/262(KB)2022, NCLT, Kolkata Bench*

Wherein it was held that if no CIRP is initiated against principal borrower, the application in respect of respondent PG under Section 95 of IBC is not maintainable. So, also application was held to be not maintainable on the point of limitation. So, these

observations are against the applicant and favouring respondent.

i. In *Tilak Ram and Ors. Vs. Nathu and Ors., AIR 1967 Supreme Court 935*

It was observed that:

"The words used in the acknowledgment must indicate the jural relationship between the parties and it must appear that such a statement is made with the intention of admitting that jural relationship. Such an intention, no doubt, can be inferred by implication from the nature of the admission and need not be in express words."

It was further observed that "The document thus cannot be said to be one made with the intention of admitting the jural relationship between him as the successor-in-title of Dharamdas and the successors-in-title of the said Teja."

It was further observed that "These statements were clearly made for the purpose of describing his own rights which he was selling under this deed. But there is nothing in this document to show that he referred to the said mortgages with the intention of admitting his jural relationship with his mortgagors

and, therefore, of his subsisting liability as the mortgagee thereunder of being redeemed."

It was further observed that "The plaint in suit, the statement as to Parmeshwardas having sold his mortgage rights to the plaintiffs was made with a view to trace their own rights as against the defendants and not with any consciousness or intention to admit the jural relationship between them or to admit the fact of the said mortgages being subsisting at the time when the plaint was filed. The statement in the plaint was made not in relation to the said mortgages but with reference to their own rights under the said deed of sale of mortgage rights in their favour. The fourth document is the written statement in Suit No. 50 of 1903 where the right of the plaintiffs in that suit to redeem has been specifically denied. The statement, therefore, cannot be availed of as an acknowledgment of a subsisting jural relationship or of a subsisting right and a corresponding liability of being redeemed"

The said judgment submitted by the petitioner is against the petitioner and is in favour of respondent as the respondent has

clearly denied their liability to pay the guaranteed amount in their written statement before the DRT, Ahmedabad.

j. *Basant Singh Vs. Janki Singh and Ors., 1967 AIR 341*

In this matter, the Plaintiff tendered in evidence, a plaint, in an earlier suit and relied on an admission made by the defendant with regard to the fact in issue in a later suit. The Hon'ble Supreme Court held all matter in issue as an admission though it is not conclusive.

k. *Chokalinga Chetiiar Vs. Dandayuthapani Chettiar, AIR 1928 MAD 1262*

In which it was held that, in the absence of any express contract between the surety of the creditor, the liability of the surety will be co-extensive with that of the principal debtor. Facts are different. Hence, not applicable.

32. On the same line the applicant has relied upon *Gouri Shankar Jain Vs. Punjab National Bank and Another, W.P. No. 10147 (W) of 2019, Calcutta*

l. On the same line the applicant has relied upon *Industrial Investment Bank of India Ltd. Vs. Bishwanath Jhunjhunwala, Civil Appeal No. 4613 Of 2000, SC*

m. On the same line the applicant has relied upon *Punjab National Bank Vs. State of U.P. and Ors., 2002 (5) SCC 80*

n. On the same line the applicant has relied upon *Maharashtra State Electricity Board, Bombay Vs. Official Liquidator, High Court, Ernakulam, 1982 AIR 1497*

o. On the same line the applicant has relied upon *Rohit Nath @ Rohit Rabindra Nath Vs. Keb Hana Bank Ltd., C.R.P.(PD) No.1289 of 2021, Madras*

p. On the same line the applicant has relied upon *State Bank of India Vs. V. Ramakrishnan & Anr., AIR 2018 SUPREME COURT 3876*

Facts are different hence, these rulings are not applicable.

33. The applicant also relied upon *Suo Motu judgment of the Hon'ble Supreme Court in MA no. 21 of 2022 in MA no.665 of 2021 in SMW (C) no. 3 of 20* for seeking benefit of extension of limitation

available during Covid period. However, the limitation period in this case is expired much prior to covid period, there is no question of extending any benefit to the applicant for covid period.

34. The respondent also relied upon another two judgments (one is cited supra) which are as under:

i. In *River Steamer Co. Mitchell's claim- Court of Appeal in Chancery (1871) L.R. 6 Ch. 822*

In which it was held that "First of all, beyond all question they do not contain an admission of any debt; on the contrary, it appears to me that they deny that there was any debt. The Vice-Chancellor appears to have thought that they amounted to saying, "We admit we owe you a debt, but we have a set-off, which is sufficient to countervail it." Now, even if they did amount to that, I do not think that this would be sufficient to take the case out of the statute; for I think that such an admission would not be one from which a promise to pay could be implied. It is not the admission which takes a case out of the

statute, but the promise to pay, which is implied from an unconditional admission"

"Then, secondly, do they contain any unconditional promise to pay? It appears equally clear to my mind that they do not; for, denying that there was a debt, they plainly mean to say, we do not consider ourselves liable to pay anything."

ii. In *Ghulam Murtaza vs Fasihunnissa Bibi AIR 1935 ALL 129*

It was held that "It is equally necessary that it must be a clear and unambiguous. Acknowledgment specifically admitting liability in respect of the debt sued upon and it must be signed by the party or by his authorised agent. If an admission amounts to such an acknowledgment, then if it is made before the expiry of the period, it is helpful and the suit can be maintained for the recovery of the earlier debt, the time being extended by the acknowledgment."

35. In view of the above facts the notice of invocation dated 17.11.2023 is also barred by limitation. In the judgments relied upon by the applicant regarding liability of surety will be co-extensive to the principal debtor, there is no dispute regarding

this however, it is to be exercised within the period of limitation. So also the applicant relied upon *Tilak Ram and Ors. Vs. Nathu and Ors. supra* it is clearly mentioned that acknowledgement of debt, must show intention of admitting the jural relationship and his subsisting liability which is missing in the written statement filed by the PG (as discussed above). By no stretch of imagination, written statement filed by PG shows acknowledgment of debt. Thus, the application is filed for guarantee dated 11.12.2014 after initiation of CIRP against CD on 18.07.2017 filing was done by applicant before DRT in the year 2019, without any acknowledgment of debt. Many rulings cited by the applicant are against them and favouring respondent. Therefore, this application is clearly barred by limitation.

Assignment of debt

36. The Applicant in its written submissions mentioned that, the applicant relied upon Para no. 2.1.7 and 2.1.10 of deed of assignment dated 05.03.2020. The same is reproduced as under:

"2.1.7 The payment of the Purchase Consideration, over and above the Upfront Payment as per the Resolution Plan, to the Assignors shall constitute full, final and complete discharge of the: obligation of the Assignee with respect to payment of Purchase Consideration for the Assigned Loans and the Assignment stated herein taking effect. The Assignors hereby admit and acknowledge the sufficiency of the Purchase Consideration and that the Assignee and the. Borrower shall not be liable to pay any other amounts to the Assignors for the assignment of the Assigned Loans. It is specifically agreed that this Clause shall not in any manner affect or impair the rights of the relevant Assignor in relation to the Specified Third-Party Security Interest, the Outstanding Trading Dues and for the Existing Promoter Guarantees."

"2.1.10 Upon completion of the assignment, the Assignors shall have no rights or claims against the Borrower (including but not limited to, in relation to any past breaches by the Borrower) and all such claims shall immediately, irrevocably and unconditionally stand extinguished vis-a-vis the Assignors, and all documentation executed in respect of the obligations of the

Borrower towards the Assignors (and all the outstanding negotiable instruments issued by the Borrower in this regard, including demand promissory notes, post-dated cheques, ECS and letters of credit) shall immediately, irrevocably and unconditionally stand assigned/ transferred to the Assignee in accordance with the Resolution Plan. However, all rights and claims of the Assignors in relation the Specified Third-Party Security Interest, the Outstanding Trading Dues and the Existing Promoter Guarantees shall remain in full force and effect."

Ld. Advocate for the applicant argued that even though, they have assigned debt, they can enforce guarantee as the guarantee was excluded from the assignment.

37. As against it, in the written submission filed by the respondent it is stated that pursuant to the execution of the assignment agreement dated 05.03.2020, JMFARC that is the assignee steps into the shoes of the lender. The debt continuing to show in the books of account of Alok Industries Limited as due and payable to the assignee and has not been extinguished. It is further stated that if the contention of the applicant is accepted

it would lead to an anomalous situation wherein a same debt is recovered twice, once by the assignee from Alok Industries Limited as well as by the applicant from the PG. The applicant no longer is lender to the principal borrower and therefore, could not file this company petition.

38. On this point respondent relied upon following judgments:

iii. *Hutchens v. Deauville Investments Pvt. Ltd. (1986) 68 ALR 367*

iv. *Mark Sensing (Aust.) Pvt. Ltd. v. Flammea (2003) VSCA 41*

v. *Langbein v. Mottershead Investments Pvt. Ltd. (2020) FCA 1790*

vi. *Property Builders Pvt. Ltd. v. Adelaide Bank Ltd. (2011) NSWCA 266*

39. The judgments cited by the respondent were also discussed in the case of *Vinit Shroff Vs. Rural Electrification Corporation Limited (2023) IBC Law, 285 HC.* Wherein it was held that the judgment of Hutchens cited supra is not restricted to the particular facts of the case but, is a pronouncement on the general law of surety.

40. It is mentioned in the assignment deed that the guarantee is excluded and also the resolution plan was sanctioned containing the fact of execution of guarantee. It is a common-sense that once the debt is assigned, the assignee has a right to recover the same. The assignee has started recovery by filing petition and also recovered the debt towards full and final settlement from the resolution applicant. Only, he has right to recover remaining debt, if any, as per their settlement. Once the debt is assigned to any person, the assigner has no right to recover it again for itself or on behalf of assignee. Certainly, if both assigner and assignee starts recovery of debt an anomalous situation of recovery of debt twice would arise. Considering this situation, the applicant being no longer lender of CD can file a petition for recovery of any balance amount.

41. Ld. Advocate for the respondent also relied upon order passed by this tribunal against same personal guarantors rejecting the applications which are as under:

vii. Order passed in CP 134 of 2024- SIDBI vs Surendra Jiwrajka

viii. Order passed in CP 135 of 2024- SIDBI vs Ashok Jiwrajka

ix. Order passed in CP 136 of 2024- SIDBI vs Dilip Jiwrajka

42. Considering the facts and discussion made above, petition is not maintainable.

Other miscellaneous objections

43. In the application particulars of guarantor are given by the applicant wherein annual income of guarantor is shown as "not known", then the bank account details of guarantor were mentioned as "not available" then identification number that is Aadhaar card, PAN card etc, mentioned as "not available." Details of loans, assets of guarantor are also shown as blank. Assets including Vehicle, Shares, Jewellery, Policies etc. are also shown as blank. Number of directorship held in the preceding three years marital status etc, also shown as "not known". Whether the guarantor is NRI is shown as "not known." Now question arose that when the applicant is not aware of requisite details of the guarantor than how guarantees were accepted for such a huge amount. At least the applicant

bank should have taken the list of his assets before accepting the guarantee.

44. On the guarantee deed dated 11.12.2014, at the end of the document contains signature of three guarantors only. After, signatures of the guarantors, the document does not bear common seal of company, though at the end the common seal of the company must be affixed in accordance with the Article of association of the company. It also does not bear signatures of witnesses. The guarantee agreement also contains various blanks such as execution of loans to someone, etc. The deed of guarantee dated 04.02.2016 is for SBICap. However, Schedule-3 of the said deed showing details of properties of guarantors is left blank and bears signatures of guarantors only. Then the guarantee deed dated 12.08.2016, Schedule-4 of the said deed regarding details of properties of guarantors is also left blank with only signatures of guarantors. Such type of deeds for a guarantee of hundreds of crores of rupees taken by the bank reflects its suspicious nature. The applicant is also not a signatory to the deeds of guarantee.

45. In view of the same, we pass the following order:

ORDER

CP(IB) Nos. 355, 356 & 357 of 2024 are rejected.

—Sd —

CHITRA HANKARE
MEMBER (JUDICIAL)

Per: Member (Technical)

1. Deed of Guarantee dated 4 Feb 2016 by Guarantor with Security Trustee for the lenders – calls up to execute the guarantee. – Guarantee agreement dated Dec 23, 2014 gets amended, - continuing obligation to the security trustee of secured obligations to all secured parties by obligor. – is a continuing guarantee
2. Para 4 states that any demand given or made by the Security Trustee to the Guarantors shall be conclusive evidence that Guarantor's liability hereunder has accrued and - that demand shall be by way of demand certificate and shall be unconditionally accepted by Guarantors.
3. Obgligor is – Alok Industries - CD

4. This guarantee shall remain and continue in full force and effect until the secured obligations are fully performed to the satisfaction of the lenders and until the final settlement date, notwithstanding any renewals, modifications, ... and guarantors undertake not to revoke till the final settlement date.

5. The liability of guarantors is joint and several.... Shall not be discharged (para 30) by any change in name, constitution ..... (b) any insolvency, liquidation, bankruptcy, winding up or similar situation or proceeding in respect of the obligor which would have effect of suspending or waiving all or any right against guarantors.

6. As per schedule I – Form of demand certificate is specified and in Sch II the Canara Bank (Vijaya bank) is amongst the 26 banks which have acceded to the guarantor facility agreement in favour of the SBI trustee. In terms of this agreement all the other deed of accession to the guarantee facility agreement have been recast to the new guarantee agreement

7. The Form B issued dated 27 12 2023 does not specify the relevant Guarantee Agreement executed and the applicant

cannot invoke a Guarantee which is ceded by all lenders to SBI to SBI trustee.

8. The date of debt due is mentioned as 27 Dec 2014 while the default is stated to have occurred on 27 feb 2015. The Guarantee Document nowhere specifies that the date of default by borrower is date for invocation of guarantee. For a Guarantor, the date of invocation of Guarantee is the date when the Default is triggered for invocation. The guarantee submitted has been signed by the Guarantor with the lenders on 4 Feb 2016 is therefore beyond the due date period. In Para D of the submitted Guarantee Agreement dated 4 Feb 2016 – Para (D) Page (3) lays a condition which is fulfilled by execution of the document where by all the "OUTSTANDING DUES" of all the lenders listed in the document (Schedule II – wherein the applicant is mentioned) as "Acceding Lender" gets extended. The amount of sanction and limits and % wise share of lenders as on date of sanction is mentioned. For a guarantor the amount outstanding is immaterial as this guarantee is a continuing guarantee for all outstanding that stood unpaid by the principal borrower.

9. In Para 2.1 of the agreement the guarantee and its indemnity is explained. This has effectively restricted the execution of this guarantee to "The Guarantors jointly and severally, irrevocably and unconditionally agrees that if at any time default is made by the Borrower in payment of the Principal Sum or any other Outstanding Dues, the Guarantors shall forthwith on demand pay to the Security Trustee (Acting on behalf of and for the benefit of the Lender(s) the whole of such Principal Sum or any other Outstanding Dues and the Guarantors hereby indemnify.....). This document is stated to have been executed on 12 Aug 2016 at Silvasa.

10. It is submitted along with the application, the relevant application submitted by SBI and its associates before this AA for initiation of CIRP upon the CD vide CP IB 48/NCLT/AHM/2017 that the CD had acknowledged the debt on May 31, 2017 vide his letter dated 27 June 2017 and that the Reserve Bank of India had directed the applicant vide its letter dated June 15, 2017 to singly or jointly with the other lenders under the IBC 2017 initiate CIRP. The Directions to insolvency was on the Directive of the Regulator. A copy of the

application was served upon the CD. As per the order passed by this Tribunal vide its order dated 18 July 2017, it accepted the application filed under sub section (5) (a) of Sec 7 of IBC. The order mentions that various documents were enclosed to the application including the Guarantee Facility Agreement.

11. It appears from the documents submitted that the Resolution Plan was approved for Rs 6,252 crores. The approval of resolution plan was restricted to Sec 31 r/w Sec 30(2) of the code. In Para 27 of the order it clearly mentions that Clause No.3.2.3(iii) at Page 19 of Resolution Plan mentions as "Provided however any rights or claims of the financial creditors with respect to existing Promoters Guarantors shall continue against such guarantors". Approval of Resolution Plan does not mean automatic waiver or abetment of any legal proceedings which are pending by or against the company/CD as those are the subject matter ..... The Resolution Plan sanctioned discharges the CD and not the Guarantors.

12. In the submitted Deed of Guarantee dated 12 August 2016, Para 2.1 the "Guarantee and Indemnity" is defined. It mentions that "The Guarantors jointly and

severally,.....(and the Guarantors hereby indemnify, shall indemnify and keep each of the Secured Parties indemnified and harmless at all times against any and all losses, damages, costs, charges, expenses, claims, demands, suits and proceedings of whatsoever nature that any Secured Party may have to incur or suffer.....arising out of the transactions contemplated under this Deed and the Finance Documents".

13. It is a different point as to whether this was appropriately stamped which can be ratified and compounded to regularise the defect of payment of stamp duty by appropriate procedure by the Stamp Authority.

14. Now the question of when the Contract (Renewed on restructuring starts) of the Guarantor with the Lender (Applicant) starts for the purpose of Limitation. The guarantee document as not denied by Respondent has started on 12 August 2016. For the purpose of Limitation of the underlying debt, the Corporate CD is stated to have acknowledged the debt on 27 June 2017. The Lenders (One of them) initiated the CIRP by filing the application under Sec 7 of IBC 2016 on June 29, 2017 which was within the period of limitation for

the purpose of initiation of CIRP against CD. As per the acknowledgment of debt, the application was to be filed before 26 June 2020. The respondent CD appeared before the Tribunal and had no defence and had no funds to pay the debts and hence CIRP was admitted on 18 July 2017. This becomes the trigger of default of a CD who was restructured on a scheme of the regulator and a fresh set of repayment schedule and the guarantor agreement was executed and by law has not repaid the debt and insolvency process has been initiated.

15. The stated Resolution Plan was submitted on 12 April 2018 by the RP and after hearing all the parties and merits of the case, the Resolution Plan was approved on 8th March 2019 and 26th July 2019 (collectively referred to as the Orders). On this date, the CD was revived with approval of resolution plan to continue the operations through the Successful Resolution Plan, however, the Debt due by the CD and its promoters (Directors) were dissolved on that date, notwithstanding the Guarantees issued by any of the respondent/s who were also the promoters or Directors of the CD.

16. If we hypothetically reckon the date of in ability to pay the debt by the CD can be reckoned for the simplicity of invoking the guarantee, the date is 26th July 2019 and within 3 years of limitation (when not specified in the guarantee of its claim period law of limitation sets in) the date of invocation of Guarantee should have been invoked by recalling the unpaid amount by CD on 25 July 2022.

17. Now we move to the Suo Motto benefit arrived through the Hon'ble Supreme Court Order for COVID 19 debts due. Whether the Guarantee also becomes a debt due, and the creditor has to claim the amount and guarantor to pay the amount, the date gets extended from 15.3.2020 till 28 02 2022 and is on the affirmative. The Creditor gains the period to realise his dues after this exclusion period. The exclusion period is reckoned to be 718 days. If we reckon the date from 26th July 2019 (date of approval of resolution plan), this application is filed within limitation. If we reckon the date of approval of resolution plan by CD on 12 April 2018, then the application has not been filed within period of limitation but whether notice was issued to the suspended management who

were not discharged under adjudicated under Sec 31 of IBC 2016. If we reckon the date of admitting the CIRP, being 18 July 2017 there was no notice issued to guarantors or the CD was not declared insolvent or suspended management had opportunity to repay its debt. Further the applicant has submitted the Form D, the date of submission being 25.2.2020 which is authenticated and replied by the respondent as "disputed" on 4.7.2022. Thereby the applicant has established the debt and default on the guarantor within the period of limitation.

18. The PG have borrowed huge debt of the CD and guaranteed in their personal capacity. Under resolution process what is first considered is the debt of the CD and whether the assets could be paid either by CD or suspended management. If there is any action taken before DRT that is a different process under SARFAESI for the mortgaged document which is not the only document signed by the Personal Guarantor who has also given its unlimited and irrevocable guarantee signed after the debt restructuring proposal.

19. A Guarantee is a tri parti agreement or document and can be examined from the provisions of Indian Contract Act. Sec 126 clearly defines the role of the surety whose role is to discharge contingent liability which emanates out of the guarantee document executed on 12 August 2016. It appears that the personal guarantor who has signed the document to enable the restructuring as also a promoter guarantor (terms and conditions of sanction) comes in to pay off from his residual net worth in personal capacity when the principal borrower being the CD and or the suspended management does not pay the liability. Here the liability of PG is an individual liability or an indemnity and at this stage of admission it is to be seen whether the application is maintainable for further adjudication in the matter. Even if there are proceedings before any other authority under SARFAESI Act, it does not discharge the individual liability, unless the guarantor has discharged his liability before that authority.

20. As regards the assignment agreement that can be argued when the matter is heard on the personal insolvency. Full facts of the matter has not been argued, apparently, there is

no relief to the execution of personal guarantee in the agreement, prima facie on examination. It appears in the Para 7.2 (page 192) of the stated agreement signed by various lenders, it states that "The assignee shall reasonably coperate with the assignors and assignors, at the cost of the Assignors for taking any action with respect to realization of outstanding Trade Dues and invocation and or enforcement of the existing promoter guarantees and....."

21. The respondents stating that this application should have been filed by either the SBI Trustee or the Assignee does not seem to be hold good, which can be decided as the applicant has served notices/made party of not only the Personal Guarantor but also all the other lenders.

22. The Tribunal ruled that the limitation period for both the CD and the PG commences from the same date. However, in this matter the signing of the BG has happened after the due date due to restructuring and is hence an exclusively separate contract. Since the underlying Guarantee was issued in favour of all lenders, even though one of the lenders has approached this tribunal with notices to other lenders

including the respondent PG, this matter as this stage cannot be dismissed for being not maintainable on any issue including limitation. On close reading of the guarantee document executed between the parties, it is both a guarantee and an indemnity to the lenders by the Personal Guarantor who have taken a pretext of confirming that they are liable but debt is barred by limitation or it is settled by resolution plan. While, we need not rely on either the mortgage document or the pleadings before another authority like the DRT where the guarantor has accepted that he has executed the guarantee for the liability but states he need not pay on account of various reasons is not the valid evidence to be seen to reckon extension of limitation. Even though it is not produced, one document specifying that the CD had acknowledged the debt on 29 June 2017 and even a balance sheet pertaining to that period, a balance sheet even of subsequent period signed by the RP confirming the balance should be sufficient evidence to be seen whether the CD had acknowledged the Debt and the CIRP was initiated within the period of limitation. In this case CIRP after examining all these aspects has admitted the

application within the limitation period. It appears now the PG/s are trying to wriggle out of their liability on grounds which are not tenable, having indemnified the lenders to restructure the loan, but failed to repay the debt and requires no relief at this stage to deny this application by one of the creditors, who may have come individually, but has made the other lenders a party. It is up to the other lenders to reply to the reply of respondent who has brought in various factors mainly on limitation, approval of resolution plan and the stated assignment to defend the liability arising out of the guarantee.

23. The guarantee on which this application lies is the claim for debt due for repayment prior to execution of this agreement. It is a continuing guarantee, open ended till the debtor has not paid the amount. The date of not paying is subjective and should be only reckoned from evidences, not the date of NPA or date of recall of the principal debt of CD which happened prior and there was a regulatory directed restructuring which failed. In this regard, terms of such regulatory advice for restructuring becomes binding and is to be argued upon by

lenders and the defendant. The CD was given one more opportunity as were the promoters and Directors who subsequently agreed to sign an exclusive guarantee agreement which is before us. When the guarantee period is not specified it runs till the Debtor does not pay and the claim is made. On approval of the resolution plan, Guarantors were not let off of their liability, in fact on this date the debtor was under law declared to be freed of his liability, due to inability to pay after which the guarantee was invoked. Even during moratorium, the creditors may not have filed an application against guarantors or issued a legal notice as the CD was admitted to CIRP. The Date of default arrived for allowing the Lender to proceed/any of his agents/assignee has to be seen from the perspective of what was the type of guarantee signed and its validity for invocation. It is open ended and runs till the attempts on the CD and suspended management are exhausted. Here it could be the sign off, but the guarantee being open ended the limitation could end only after an appropriate period that can be allowed based on the circumstances and the other documents submitted, decided,

adjudicating affirming the liability before the legal authority, which in this case is NCLT. Resolution Plan could be similar to a recovery certificate but it does not absolve a Guarantor from his indemnity/letter of comfort.

24. The PG had not contested the resolution plan on approval, in terms of the IBC provisions, if there was any clause affecting their interest as it appears from the order that the Personal Guarantor could be proceeded against by lenders. There was no appeal before the Hon'ble NCLAT and Honble Supreme Court and in this matter there is no stay granted in favour of the personal guarantor.

25. Copy of Demand Notice was issued by this Lender on 17 November 2023. It is irrelevant if the same has been in whatever form, as the respondent has already appeared, waived notice and replied to the notice. This matter being sub-judice on the point of enforceability of Guarantors liability, or where a large debt is due to be paid only settled up to the assets available of the CD and not the peripheral or remaining liability based on the net worth of guarantors, where there is still a reliance on the Personal guarantors after

pay off of such large debt through resolution process to revive only the CD, the Personal Guarantors still are accountable and liable. The entity with mounted debt has been relieved of its liability to continue as a corporate under new management, but not the guarantors. Since there are various defence points made by respondents to wriggle out from this liability, who have appeared on advance notice, made various submissions including judgments, wherein the other lenders who are made party by the applicant, may have to be heard in the matter, who are legally valid parties who have signed the guarantor agreement and also have disbursed facility to the CD, the application at this stage should be allowed for issue of notices. A guarantee dated 12th August 2016 is preceded by the stated default, which the guarantors have sustained its enforceability by giving a fresh lease of life to enforcement, and hence the debt default on the 27th February 2015 cannot be considered appropriate and we have to go by the circumstances of the case, regulatory action, the insolvency petition and the resolution plan which removed the Suspended Management and installed a new management, releasing all liabilities,

devoid of the liability of personal guarantors. Hence the debt defaulted stands separate from invocation of this guarantee. A continuing guarantee is thus not tailed to original debt, but debt on which the defaulters were declared as no more accountable for further payment of the CD in their official capacity along with CD. Their Personal Guarantee continues, which as per Resolution Plan has reinforced a fresh life on the eventuality of its invocation, the matter should have been appealed before the appropriate authority. It is noted that as per relevant provisions on Personal Insolvency, the Applicant had also filed under Sec 181, before the relevant period (enforced from 1.12.2019 in IBC), the proceedings of which are brought on record which is yet to be adjudicated. Confirmation of balances due to be paid before that tribunal with riders on the clause of limitation may not be a valid prayer/defence for discharge, but this point while noted is not considered exclusively for examining the filing of this application before this tribunal. The suspended management or the personal guarantors on approval of resolution plan seem to have not made any appeal in terms of Sec 61 of IBC 2016.

26. It appears to be otherwise within period of limitation in filing the application, subject to the replies of other lenders to see whether the guarantor was proceeded or relieved in the matter, this application prima facie satisfies Sec 238 A due to the Covid-19 relaxation and deserves to be heard further. Hence, pass following order:

ORDER

1. Applications are allowed.
2. RP be appointed to submit the report making all lenders a party by issuing notices to file their reply. RP to form an opinion and submits report based on the reply of the PG. Since this is a guarantee favouring all financial creditors RPs report to be served on all the lenders who whom the applicant is made party including any other whom RP may identify based on the petitioner/reply.

-Sd-

DR. V.G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)