

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1228 of 2024
& I.A. No. 4411, 4412 of 2024

[Arising out of the Impugned Order dated 22.03.2024 passed by the National Company Law Tribunal, New Delhi Bench (Court-II) in IA-1331/2022 in C.P.(IB) No. 489(PB)/2021]

In the matter of:

Sri Vibu Venkatsubramanian

Aged about 43 years, having its residence at Flat no. 2A, Second floor, Old no. 63, New No. 123, Orcahrd Court, Pasumpon Muthuramlinga, Thevar Road, R.A. Puram, Chennai-600028.

... Appellant

Versus

1. State Bank of India

Having its office at Stressed Assets Management Branch-I, 12th Floor, Jawahar Vyapar Bhavan, STC Building, 1 Tolstoy Marg, Janpath, New Delhi-110001.

Through Resolution Professional

Shri Chanchal Dua

ARCK Resolution Professionals LLP

409, Ansal Bhawan, 16, K.G. Marg
(Connaught Place), New Delhi- 110001.

2. ARCK Resolution Professional LLP

409, Ansal Bhawan, 16, K.G. Marg
(Connaught Place), New Delhi- 110001.

... Respondents

Present:

For Appellant : Ms. Pooja Mehra Saigal, Sr. Advocate with Mr. Ankit Mittal & Mr. Nivesh Dixit, Advocates

**For Respondents : Mr. Bheem Sain Jain, Advocate
Mr. Chanchal Dua, RP in person.**

Mr. Ashish Verma, Mr. Nikhil Thakur, Advocates for R-2

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

[Per: Ajai Das Mehrotra, Member (Technical)]

The Appellant is Personal Guarantor (in short '**PG**') of loan taken by the Corporate Debtor, M/s Global Infonet Distribution Private Ltd. (In short '**GIDPL**'). The present appeal has been filed against the order dated 22.03.2024 of NCLT, Principal Bench, Court-II, New Delhi wherein the report of the Resolution Professional under Section 99 of Insolvency and Bankruptcy Code, 2016 (in short '**IBC, 2016**') filed in CP (IB)-489(PB)/2021 in IA No. 1331 of 2021 recommending initiation of insolvency was taken on record and the insolvency resolution process in respect of the Personal Guarantor/Appellant was instituted with immediate effect.

2. The brief facts of this case as noted in the order dated 22.03.2024 of Ld. NCLT are as under:

i. The main petition CP (IB)-489(PB)/2021 was filed by the State Bank of India (hereinafter referred to as the '**Creditor**') against the Personal Guarantor under Section 95 of IBC, 2016 for initiating insolvency resolution process against the Personal Guarantor.

ii. Vide order dated 23.02.2022, the Adjudicating Authority appointed Shri Chanchal Dua as the Resolution Professional of the Personal Guarantor and directed him to file report under Section 99 of the IBC, 2016.

- iii. The Resolution Professional submitted that the insolvency application is in the requisite form, supported by requisite fee and documents and meets the requirements set out in Section 95 of the IBC, 2016.
- iv. The Corporate Debtor had availed credit/loan facilities to the tune of Rs. 42 crores from the State Bank of India and had executed various loan and security documents on 25.09.2012.
- v. On 06.04.2018, the State Bank of India renewed the credit facilities through fresh sanction letter. The Corporate Debtor admitted its liability by executing a revival letter. Another Financial Creditor, namely, M/s IBM India Pvt. Ltd. filed application under Section 7 of the IBC, 2016 against the Corporate Debtor which was admitted vide order dated 03.03.2020 and Corporate Insolvency Resolution Process (hereinafter referred to as the '**CIRP**') was initiated against the Corporate Debtor, GIDPL.
- vi. A demand notice in Form-B, under Rule 7(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtor) Rules, 2019 was issued by the Financial Creditor, the State Bank of India to the Personal Guarantor in respect of unpaid debt due from M/s GIDPL. Despite receipt of notice dated 24.06.2021, the Personal Guarantor failed to make payment.
- vii. The Ld. NCLT vide the impugned order held that the application under Section 95 of IBC is within limitation and that the Personal Guarantor had agreed that any variation in terms of the agreement of loan will not affect his liability, and that the guarantee is invoked by State Bank of India by issuing notice dated 09.11.2018 under Section 13(2) of SARFAESI Act. The Ld. NCLT held the creditor has been able to establish the 'debt' and 'default' and agreed

with the recommendation of the Resolution Professional for initiating Insolvency Resolution Process against the Personal Guarantor.

3. The Ld. Sr. Counsel for the Appellant in his oral and written submissions has stated as under:

i. The Appellant had executed a Deed of Guarantee dated 25.09.2012, jointly with another person in relation to the facilities granted by State Bank of India vide sanction letter dated 31.07.2012 for an overall limit of Rs. 42 crores and subsequent renewals thereof. The said facilities were governed by an Agreement of Loan dated 25.09.2012. Subsequently, the State Bank of India issued fresh sanction letters dated 20.12.2016 and 06.04.2018 for renewed/enhanced credit facilities to the Corporate Debtor.

ii. The Appellant never provided any fresh personal guarantee nor confirmed/renewed the earlier personal guarantee for these new sanction letters. A fresh sanction letter was issued on 15.02.2017 and the Appellant did not provide any guarantee for the same.

iii. The personal guarantee of the Personal Guarantor was limited to the facilities granted in 2012 and did not extend to the new/renewed facilities. The claim of the Bank against 2012 agreement would be time-barred in the absence of revival letter post 2015 executed by the Appellant.

iv. Since the debt was novated by the subsequent sanction letters replacing the original facilities, any obligation under the prior loan agreements is barred by limitation.

v. The Respondent has resorted to forum-shopping by initiating multiple proceedings against the Corporate Debtor and Personal Guarantor before various forums like the DRT and NCLT.

vi. The Resolution Professional exceeded his brief in recommending insolvency resolution process of the personal guarantor. The Appellant relied upon the decision in the case of *Dilip B. Jiwarajka vs. Union of India & Ors.*, reported in 2023 SCC OnLine SC 1530 and stated that the Resolution Professional's role is limited only to conducting the due diligence and not for rendering only adjudicatory determinations which is a function reserved for the Adjudicating Authority.

vii. It was submitted that the Ld. NCLT has erred in admitting the application of State Bank of India and the recommendation of the Resolution Professional in initiating the insolvency resolution process against the Personal Guarantor.

4. The Ld. Counsel for Respondent (State Bank of India/SBI) in his oral and written submissions stated as under:

i. It is settled legal position of law the liability of a principal debtor and a surety is co-extensive. Further, the guarantor can be separately sued even without suing the principal debtor, as long as the principal debtor is in default. The Respondent relied upon the decision of the Hon'ble Supreme Court in the case of *State Bank of India v. Indexport and Ors.*, reported in 1992(3) SCC 159.

ii. The guarantor's liability depends upon the terms of his contract. A 'continuing guarantee' continues even to the future transactions. In case of continuing guarantee, the guarantor would be bound by the terms and conditions of the agreement executed at the time of entering into the guarantee. The Ld. Counsel relied upon the decision of the Hon'ble Supreme Court in the case of *Sita Ram Gupta v. Punjab National Bank & Ors.*, reported in AIR 2008 SCC 2416.

iii. It is undisputed that a loan facility of Rs. 42 crores was granted to the Corporate Debtor vide sanction letter dated 31.07.2012 by State Bank of India and Rs. 25 crores vide sanction letter dated 13.11.2015 by State Bank of Mysore. Pursuant to these loans, the Appellant had executed deeds of guarantee dated 25.09.2012 and 15.12.2015.

iv. The Appellant, through the said deeds had provided for a continuing, irrevocable and enforceable guarantee. Since the deeds or guarantee dated 25.09.2012 and 15.12.2015 were continuing and irrevocable guarantees, the Appellant cannot revoke or claim discharge on the grounds of novation.

v. The credit facilities were renewed from time to time and do not amount to novation of contract but mere renewal of existing facilities for which the Appellant stood as guarantor. Till the issuance of notice under Section 13(2) of SARFAESI Act, 2002 dated 09.11.2018, the Appellant had neither revoked the guarantee nor had ever claimed discharge from the same.

vi. Even in response to notice under Section 13(2) of SARFAESI Act, 2002 dated 09.11.2018, neither the original borrower nor the Appellant either claimed discharge or novation. The Respondent relied upon the decision of this Tribunal in the case of *SBI v. Gourishankar Poddar & Anr.*, reported in 2024 SCC Online NCLAT 2014.

vii. Qua limitation, it was submitted that the notice under Section 13(2) of SARFAESI Act, 2002 was issued on 09.11.2018 demanding the payments, which triggered default qua Appellant and thus was the cause of action for the purpose of calculation of limitation. The petition under Section 95 of IBC, 2016 was filed on 11.08.2021, and was thus well within the limitation. Further, the Hon'ble Supreme Court in *Suo-Motu Writ Petition (Civil) No(s) of 03/2020 in Re:*

Cognizance for Extension of Limitation had suspended the period of limitation during COVID times.

viii. Considering the above facts, the petition is well within the period of limitation. The Ld. NCLT has rightly admitted the application under Section 95 and has rightly initiated insolvency resolution process against the Personal Guarantor.

5. The Ld. Counsel for the Resolution Professional in his oral and written submissions stated as under:

i. The Ld. NCLT has rightly observed the existence of debt, default, continuing nature of the guarantees and the application being within limitation while admitting the application under Section 95 of IBC, 2016. Both the deeds of guarantees dated 25.09.2012 and 15.12.2015 are 'continuing guarantee' and thus extend to all renewals, extensions and restructuring of the underlying credit facilities, unless expressly revoked in accordance with law.

ii. The Appellant has not placed on record any evidence to show that deeds of guarantee signed were revoked by him at any time. The bank had invoked the guarantees through notice under Section 13(2) of SARFAESI Act, 2002 on 09.11.2018 and the application under Section 95 of IBC, 2016 was filed on 11.08.2021 which is well within the three-years limitation period. With the above submissions, the instant appeal deserves to be dismissed.

6.1 We have heard the Ld. Counsels for the Appellant and Respondents and have perused the records. The Ld. NCLT in its order dated 22.03.2024 has reproduced the deeds of guarantee. We note that as per clause 8 of the Guarantee Deed dated 25.09.2012, it is clear that the guarantee is 'continuing' in nature. The said clause is as under:

“The guarantee herein contained is a continuing one for all amounts advanced by the Bank to the Borrower in respect of or under the aforesaid credit facilities as also for all interest costs and other monies which may from time to time become due and remain unpaid to the Bank thereunder and shall not be determined or in any way be affected by any account or accounts opened or to be opened by the Bank becoming nil or coming into credit at any time or from time to time or by reason of the said account or accounts being closed and fresh account or accounts being opened in respect of fresh facilities being granted within the overall limit sanctioned to the Borrower.”

6.2 The subsequent letters and sanction of State Bank of India were merely renewal of the credit. We note that vide clause 14 of the Guarantee Deed dated 25.09.2012, the guarantors had agreed that any variation made in terms of the Agreement of Loan and/or any of the security documents, including reallocation/interchange of individual limits within the principal sum or variation in the rate of interest, extension of the date for payment will not affect their liability. The said clause is as under:

“The Guarantors hereby agree that notwithstanding any variation made in the terms of the said Agreement of Loan and/or any of the said security documents including reallocation/interchange of the individual limits within the principal sum variation in the rate of interest, extension of the date for payment of the installments. if any, or any composition made between the Bank and Borrower to give time to, or not to sue the Borrower, or the Bank parting with any of the securities given by the Borrower, the Guarantors shall not be released or discharged of their obligation under this Guarantee provided that in the event of any such variation or composition or agreement the liability of the Guarantors shall not

withstanding anything herein contained be deemed to have accrued and the Guarantors shall be deemed to have become liable hereunder on the date or dates on which the Borrower shall become liable to pay the amount/amounts due under the said Agreement of Loan and/or any of the said security documents as a result of such variation or composition or agreement.”

We note that in the present case, the personal guarantee was continuing and was not revoked and that the Personal Guarantor had agreed to continue the guarantee even on variation of the terms of loan. In this background, it shall be relevant to be guided by the decision and observations of the Hon'ble Supreme Court in *H.R. Basavaraj v. Canara bank & Others* reported in 2010 (12) SCC 458 wherein it has been held as under:

“13. An examination of the agreement executed between the appellant Basavaraj (since deceased) and the Bank would clearly show it to be one of a continuing guarantee. Section 129 of the Contract Act, 1872 (hereinafter referred to as "the Act") defines a continuing guarantee as:

"129. 'Continuing guarantee'.- A guarantee which extends to a series of transactions is called a 'continuing guarantee'."

Section 130 of the Act says that:

"130. Revocation of continuing guarantee.- A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor."

14. A reading of the agreement clearly shows that the guarantee was to continue to all future transactions except when the guarantor disclaimed from his liability through a written statement. The deed also clearly mentions that while between the guarantor and borrower, the guarantor is only a surety; yet between the Bank and the guarantor, the surety is the principal debtor and his liability would be coextensive to that of the borrower. Accordingly, the guarantor himself waived off his rights under Chapter 8 of the Act which is conferred on a surety.

15. This Court is in respectful agreement with the decision of the Karnataka High Court in *T. Raju Setty v. Bank of Baroda*³ whereby the High Court held that in surety agreements, the surety can waive his rights available to him under the various provisions of Chapter 8 of the Act. It is in line with long-established precedents that anyone has a right to waive the advantages offered by law provided they have been made for the sole benefit of an individual in his private capacity and does not infringe upon the public rights or public policies. This can be inferred from a reading of Halsbury's Laws of England, Vol. 8, 3rd Edn., at p. 143 which reads as follows:

"248. Contracting out .- As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy." This principle was reiterated in *Lachoo Mal v. Radhey Shyam*."

16. On the principles of continuing guarantee, the position was cleared by a decision of this Court in *Sita Ram Gupta v. Punjab National Bank* whereby it was held that it was not open to a party to revoke a guarantee when he had agreed to it being a continuing one and thus would be bound by the terms and conditions of the agreement executed at the time of entering into the guarantee. In the present facts and circumstances, we, therefore, do not find any difficulty in affirming the concurrent findings of the High Court and of the trial court on the point that the agreement executed for the purpose of a continuing liability despite the variation of terms of the contract and in the absence of a specific written document by Basavaraj (since deceased) revoking the guarantee, the guarantee stands and the legal representatives of the deceased are liable to repay the loan.

17. With regard to the second issue, the learned counsel for the appellants contended that the contract between JKNP, the Bank and the guarantor Basavaraj had been substituted by a fresh contract by which LST was required to liquidate the amount outstanding. The learned counsel based this on two facts mainly. One was the transfer of the loan accounts from JKNP to LST and the other factor was the deposit of amounts by the Receivers appointed by the court in OS No. 4 of 1977 for liquidation of outstanding amounts of money indeed gives rise to substitution by a new contract. The respondents

on the other hand contended that substitution of an old contract by a new one under Section 62 of the Act would require the express consent on behalf of both the parties.

18. Now let us examine Section 62 of the Act which reads as follows:

"62. Effect of novation, rescission and alteration of contract. - If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."

This section gives statutory form to the common law principle of novation. The basic principle behind the concept of novation is the substitution of a contract by a new one only through the consent of both the parties to the same. Such consent may be expressed as in written agreements or implied through their actions or conduct. It was defined thus by the House of Lords in Scarf v. Jardine⁶: (AC p. 351)

" ... that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract."

19. It might be useful at this juncture to turn to the decision of this Court in Lata Construction v. Dr. Rameshchandra Ramniklal Shah whereby this Court held that if the rights under the old contract were kept alive even after the second agreement and rights under the first agreement had not been rescinded, then there was no substitution of contracts and, hence, no novation."

(Emphasis supplied)

6.3 The guarantee has been invoked by State Bank of India by issuing notice under Section 13(2) of SARFAESI Act, 2002 on 09.11.2018 and the present application has been filed on 11.08.2021 i.e. within three-years novation of guarantee and therefore, it is within limitation.

6.4 We also note that the argument that multiple proceedings have been initiated by the Respondent Bank has been correctly dealt with in the order of

Ld. NCLT. As per provisions of Section 238 of IBC, 2016, the Code overrides other laws and there is no bar of filing application under Section 95 of IBC, 2016 during the pendency of the proceedings under the SARFAESI Act, 2002.

6.5 We note that the Ld. NCLT has dealt with all the objections raised by the Appellant and noting that it is the case of 'continuing' guarantee wherein the guarantor has also agreed that any variation in terms of the agreement of loan will not affect his liability, the application deserves admission. We note that all the ingredients for admission of application under Section 95 of IBC, 2016, including, debt, default and existence of continuing valid guarantee, as well as the recommendation of the Resolution Professional certifying meeting of requirements of Section 95, are present in the present case and the application was filed within limitation. We hold that the Ld. NCLT has rightly admitted the application under Section 95 of IBC, 2016. No interference is called for in the order of the Ld. NCLT. The appeal, accordingly, is dismissed. Pending application(s), if any, are also closed. No order as to costs.

**[Justice Mohammad Faiz Alam Khan]
Member (Judicial)**

**[Mr. Ajai Das Mehrotra]
Member (Technical)**

***Place: New Delhi
Dated: 26.02.2026
Ram N.***