



SL. No.8

**NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH
COURT HALL NO: II**

Hearing Through: VC and Physical (Hybrid) Mode

CORAM: SHRI. RAJEEV BHARDWAJ, HON'BLE MEMBER (J)

CORAM: SHRI. SANJAY PURI, - HON'BLE MEMBER (T)

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 03.04.2024 AT 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	Company Petition IB/46/2022
NAME OF THE COMPANY	
NAME OF THE PETITIONER(S)	State Bank of India
NAME OF THE RESPONDENT(S)	P.Venkatachalam
UNDER SECTION	Sec 95

ORDER

Orders pronounced, recorded vide separate sheets. In the result, this petition is allowed.

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)



**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH, COURT – II**

CP (IB) No.46/95/HDB/2022

[Under Section 60(2) and 95 of the Insolvency and Bankruptcy Code, 2016 r/w Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019]

In the matter of:

State Bank of India

Corporate Office:

State Bank Bhawan, Madam Cama Road
Nariman Point, Mumbai
Maharashtra – 400 021

Branch Office:

State Bank of India
5th Floor, Rear Block of HMWSSB Compound
D.No.6-2-915, Khairatabad
Hyderabad – 500 004
called as Stressed Assets Management Branch
Secunderabad.

...Financial Creditor

AND

1. Mr.Padmanabhan Venkatachalam
S/o. H. Padmanabham
Director-cum-Guarantor
42, MIGH, 1st Floor, Vijayanagar Colony
Hyderabad – 500 057

... Respondent No.1/Personal Guarantor

2. M/s. Nawa Engineers & Consultants Pvt. Ltd.
Regd. Office: Unit I, Shed No.D-16
IDA Jeedimetla
Hyderabad – 500 055
Represented by its Liquidator,
Mr. Venkateshwarlu Kari
Flat No.406, Everest Block
Aditya Enclave, 7-1-618
Ameerpet, Besides Mythrivanam
Hyderabad.

... Respondent No.2 / Corporate Debtor



Date of Order: 03.04.2024

CORAM:

Sri Rajeev Bhardwaj, Hon'ble Member (Judicial)
Sri Sanjay Puri, Hon'ble Member (Technical)

Counsel/Parties present:

For the Petitioner : Mr. G. Sanjeeva Reddy, Advocate
For the Respondent 1 : Mr. G. Gopala Krishna &
Mr.J. Basava Raju, Advocates

PER: RAJEEV BHARDWAJ, MEMBER (JUDICIAL)

ORDER

1. This Petition has been filed by State Bank of India, (hereinafter referred to as '**FC/Petitioner**') for initiating the Insolvency Resolution Process against the Personal Guarantor, Mr.Padmanabhan Venkatachalam (hereinafter referred to as '**PG/R1**'), of M/s.Nawa Engineers & Consultants Pvt. Ltd., (hereinafter referred to as '**CD/R2**') under Section 60(2) and Section 95 of the Insolvency and Bankruptcy Code, 2016 r/w Rule 7(2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019.
2. Brief facts, necessary to dispose of the present application, as stated, are that:



- 2.1 The Petitioner advanced various credit facilities to the CD by way of Fund Based and Non-Fund Based to the tune of Rs.21.81 crores, vide Sanction Letter dated 07.12.2016 and this was confirmed by the CD by passing resolution in the meeting of its Board of Directors held on 10.12.2016.
- 2.2 The R2 again approached for sanction/renewal of credit facilities with a total limit of Rs.21.81 crores and it was sanctioned, vide letter dated 19.01.2017.
- 2.3 The PG stood as Guarantor alongwith others for the repayment of the loan and various documents including letters pertaining to declaration, undertaking, link and confirmation of Execution of Guarantee dated 19.01.2017 were executed.
- 2.4 The credit facility was enhanced to Rs.23.31 crores, vide Sanction Letter dated 25.01.2017 and in this regard, Resolution was also passed by R2 in the meeting of the Board of Directors.
- 2.5 Regarding the enhancement of the credit facility to Rs.23.31 crores, R2 executed Supplemental Agreement of Loan-cum-Hypothecation etc. R1 alongwith others also stood as Guarantors by executing Guarantee Agreement dated 25.01.2017.



- 2.6 However, the CD failed to adhere to the terms and conditions of the Agreement and as a result, the account was classified as NPA on 31.03.2017, which was rolled back to 30.09.2014 due to failed restructuring of the account as per the guidelines of the RBI.
- 2.7 On 09.05.2017, notice under Section 13(2) of SARFAESI Act was issued to the CD as well as Personal Guarantors. Thereafter, Legal Notice was issued on 08.12.2017 to them.
- 2.8 Meanwhile, a petition under Section 9 of the IBC was admitted against the CD by the NCLT, Hyderabad and liquidation order was passed on 10.10.2018.
- 2.9 For the recovery of the dues payable by the CD and the Personal Guarantors, O.A. No.377 of 2019 was filed by the FC before the Debt Recovery Tribunal-II, Hyderabad (hereinafter referred to as '**DRT**'), wherein the R1 has admitted his liability by filing written statement.
- 2.10 The Guarantee was invoked by the FC by making a Demand Notice dated 08.10.2021 and therefore he was liable to pay Rs.31,42,37,366.48 as on 30.11.2021.



- 2.11 The PG executed Personal Guarantee Agreements dated 19.01.2017 and 25.01.2017 undertaking the liability to discharge the debt in case of failure of the borrower.
- 2.12 The cause of action arose on 09.05.2017 when demand notice was served on the CD and the Personal Guarantors; when the NCLT, Hyderabad ordered for Liquidation of the CD on 10.10.2018; when OA No.377/2019 was filed against the CD and the PGs; when the Personal Guarantors filed written statement on 26.09.2019 admitting the claim and when the personal guarantee was invoked on 08.10.2021.
3. The R1 vide filing Counter has contended and contested the averments of the petition by making the following submissions:
- 3.1 It is submitted that the present petition is barred by limitation because as per the FC, the guarantee was invoked when the Legal Notice was issued on 08.12.2017 and further when the demand notice under Section 13(2) of the SARFAESI Act was issued on 09.05.2017. Hence, the limitation will not arise from the issue of demand notice dated 08.10.2021.



- 3.2 The FC has also admitted in O.A. No.377/2019 that the account of the CD was classified as NPA on 30.09.2014 and from that date also, the present petition is hit by the limitation.
- 3.3 It is claimed that the documents executed after 30.09.2014 are fabricated and concocted. The alleged Personal Guarantee Agreement dated 25.01.2017 does not speak that the Guarantors have signed the said document and it also clearly shows that the document was antedated.
- 3.4 On account of the pendency of O.A.No.377/2019, the present petition is also not maintainable because of claim against the CD has not been adjudicated or crystallised.
- 3.5 It is submitted that in the CP(IB) No.198/9/HDB/2017 filed by the Operational Creditor, M/s.Bay-Forge Private Limited, it was mentioned that there was a debt of Rs.45 lakhs and the said petition was admitted on 04.07.2017. When the said CP was filed, the CD was running the Company with more than 200 employees and it also used to pay Rs.50 lakhs towards Income Tax etc. Further, the CD also sold the technology i.e. crushing and screening of minerals and hard stones to M/s.Thyssen Krupp Industries India Private Limited



(hereinafter referred to as '**M/s.Thyssen**') for a consideration of Rs.20 crores in the year 2016 and the initial amount of Rs.12.50 crores was received and credited to the loan account of the CD. After the CIRP, the IRP/RP or Liquidator has not taken any steps for recovery of the remaining amount from M/s.Thyssen. It is submitted that the CD is a customer of the FC since 2003 and the credit limit was increased from time to time. Finally, the limit was sanctioned in 2014 to an extent of Rs.45.87 crores and CD has already paid Rs.34,56,64,634/- as on 28.09.2018. The balance amount payable is Rs.11,30,35,366/- and this amount is also in the form of interest. In the letter dated 21.09.2017, the CD was informed that it was eligible under OTS but on account of the admission of the Company Petition, no further steps were taken by the FC. The IRP/RP/Liquidator failed to take steps to negotiate with the FC for OTS. If any such step had been taken, there would not have been much liability. Similarly, if the agreement with M/s. Thyssen was performed, there would not have been any liability.

- 3.6 The PG has also brought to the notice that the property of the CD was taken into possession by the IRP/RP and which is presently in possession of the Liquidator. The market value of the said property is Rs.35 crores and if the Liquidator disposes of the said



property of the CD as a going concern, it will fetch more than Rs.50 crores. Accordingly, the present petition is also pre-mature.

3.7 Similarly, the FC can also not proceed simultaneously against the PG unless there is a decree from the Civil Court or Debt Recovery Tribunal. Even the FC can proceed against the PG only after exhausting the remedy against the CD.

4. In the rejoinder, the Petitioner has reaffirmed and reasserted the contentions put forward in the petition.

4.1 It is clarified that the account of the CD was classified as NPA on 30.04.2017 and the NPA was rolled back to 30.09.2014 as per the guidelines of the RBI because there was re-schedulement of Term Loans. The CD had availed credit facilities by executing various documents on 07.12.2016, 19.01.2017 and 25.01.2017. The cause of action against the Personal Guarantor arose on the invocation of Guarantee Deed and the Demand for Payment was made by issuing a notice dated 09.05.2017 as there is a period of three years from the date of default. On the question of limitation, the Petitioner has relied on the decisions of the Hon'ble Supreme Court in the matter of ***Laxmi Pat Surana versus Union Bank of India & Anr. in***



Civil Appeal No. 2734/2020 and Margaret Lalita Samuel versus Indo Commercial Bank Ltd.

- 4.2 It is averred that the liability of the Guarantor is co-extensive with the CD and this is also clear from the provisions of Section 128 and Section 129 of the Indian Contract Act.
- 4.3 Further, the petitioner has also placed reliance on the decision in Suo Moto Writ Petition (C) No.3/2020 whereby the Covid Period was excluded for counting the limitation.
5. We have heard the Learned Counsels for both sides and perused the record.
6. Undisputedly, FC advanced credit facilities to the CD from time to time w.e.f. 2007 and Mr.Narada Raju, Smt. G. Varalakshmi, Smt. N. Shashi & Shri P. Venkatachalam stood as guarantors. The account of the CD was declared as NPA on 30.09.2014 and when the CD paid substantial amount, the account was regularised and this fact has also been admitted by R1 in para no.7 of the written statement filed in O.A. 377/2019 on 26.09.2019 before the Hon'ble Debt Recovery Tribunal-II, Hyderabad. When the CD after the restructuring of the credit facilities failed to pay the loan amount, the account was again declared as NPA on 09.04.2017.



Thereafter, the FC issued notice under Section 13(2) of the SARFAESI Act on 09.05.2017, legal notice on 08.12.2017 and lastly demand notice dated 08.10.2021 to the CD as well as Personal Guarantors to repay the loan amount. Meanwhile, the FC approached the DRT by filing O.A. No.377/2019 on 08.04.2019 and the proceedings are still pending.

7. The CD was also put into CIRP in CP(IB) No. 198/9/HDB/2017 filed by M/s.Bay-Forge Private Limited under Section 9 of IBC and moratorium was declared on 22.01.2018. Liquidation order was passed on 10.10.2018.
8. The PG has not disputed availing of loan facilities as admitted in para no.6 of the written statement in O.A.No.377/2019 but submitted that the last extension/revision of Loan Agreement was done on 18.07.2013. In para no.3 of the written statement also, R1 had denied that any personal guarantee agreements for the revised loan facilities dated 07.12.2016, 19.01.2017 and 25.01.2017 were executed. About the sanction letter dated 07.12.2016 when the credit facility was revised from Rs.23.81 crores to Rs.21.81 crores, the Board of Directors has also passed resolution on 10.12.2016. Alongwith the Letter dated 07.12.2016, the FC has also sent Annexures I & II to be signed by the PGs and accordingly, the Annexure-II was signed by all the guarantors.



9. Similarly, the Letter of Arrangement dated 19.01.2017 is for the extension of credit facilities of Rs.21.81 crores and this letter was sent alongwith Annexures A & B and accordingly all the personal guarantors signed these documents with the Link letter dated 19.01.2017 and undertaking of the guarantors. The letter about the undertaking of the Guarantors has been signed by the MD on behalf of the CD.
10. The last Letter of Arrangement dated 25.01.2017 was also sent by annexing Annexures A & B to the PGs and the CD. Annexures A & B were to be returned by the PGs and CD which are duly signed by them. Alongwith this letter, the security documents as mentioned at pg. no.5 of the said letter i.e. Agreement of Loan-cum-Hypothecation, Guarantee Agreement, Mortgage Document etc. were also sent for the signature of the guarantors. In view of this, all the PGs including R1 signed Annexures A & B, document about description of the property and also photographs. The Board of Directors of the CD passed resolution on 25.01.2017 approving the loan facilities and requesting the PGs including R1 to furnish the required guarantees and Supplementary Agreement to the FC. Thereupon, the Guarantee Agreement was executed by all the PGs including R1.
11. In the aforesaid background of the case, Learned Counsel for the FC has argued that the liability of the principal debtor and the guarantor is co-extensive and therefore R1 cannot escape from the liability. He has also taken us through various



documents including the Statement of Accounts showing that the amount demanded in the petition is due from the CD as well as PGs.

12. On the question of limitation, it is urged that the limitation starts from the date when the notice under Section 13(2) of the SARFAESI Act was issued on 09.05.2017 and further, when Legal Notice and Demand Notice were served on the CD and PGs. Apart from this, he has relied upon the proceedings pending before the DRT in O.A. No. 377/2019 for excluding the period spent on pursuing such litigation and he has also relied upon the decisions in ***Laxmi Pat Surana versus Union Bank of India & Anr. in Civil Appeal No. 2734/2020*** and ***Margaret Lalita Samuel versus Indo Commercial Bank Ltd.*** to show that the present petition is within limitation period.
13. Per contra, Learned Counsel for the Personal Guarantor vehemently argued that the documents dated 07.12.2016, 19.01.2017 and 25.01.2017 were never executed by R1.
14. In support of his contention, Learned Counsel for the PG has specifically made reference to Guarantee Agreement dated 25.01.2017 which has been written on the stamp paper purchased on 03.02.2017 and further submitted that in some of the documents, date of execution of the Guarantee Agreement has not been mentioned. Therefore, it is claimed



that all the documents are false and ante-dated only to show the liability of the Personal Guarantor.

15. On perusal of the Letters dated 07.12.2016, 19.01.2017 and 25.01.2017, it is clear that the FC has also attached Annexures A & B with the Sanction Letter to be executed by the PGs and the CD. In case of the extension of credit facilities vide letter dated 07.12.2016, all the Personal Guarantors and CD signed the Annexures. Same is the case with the letters dated 19.01.2017 and 25.01.2017. In the letter dated 19.01.2017 and 25.01.2017, there is specific condition No. 'aa' as what the CD and PGs are required to follow. This condition is material in the present context and accordingly it is reproduced below:

“aa) In case of Company being the borrower, the following terms are applicable:

a) A resolution to be passed in a meeting of the Board of Directors of the Company for availing the credit facilities sanctioned by the Bank and a duly certified extract to be submitted to the Bank. The resolution should contain, inter alia, the following particulars:

- i) Acceptance for the Terms & Conditions of the credit facilities sanctioned to the Company.*
- ii) Authority in favour of Directors/Authorised Signatory to execute the security documents for availing the credit facilities sanctioned to the company.*
- iii) Authority in favour of Directors/Authorised Signatory for filing the documents and Form-8 and Form-13 with the Registrar of Companies for creating a charge over the assets of the Company in favour of the Bank.*



- iv) *Affixation of the Company's Common Seal on the security documents and vesting of authority to authenticate such affixation.*
 - v) *Requesting the guarantors to offer their Personal Guarantee/Corporate Guarantee in favour of the Bank for the credit facilities sanctioned to the Company.*
 - vi) *Creation of first charge on the assets of the company in favour of the bank for the credit facilities sanctioned to the Company.*
- b) *The charge over the assets of the Company in respect of the limits sanctioned herein should be registered with the Registrar of Companies within 30 days from the date of execution of documents and filed copies of Form-8 and Form-13, together with receipt should be deposited with us. The Certificate of Registration is to be produced to the Bank within reasonable time for our records.*

16. Similarly, in condition No.'ac', the photographs, site-map of immovable properties with important landmark details etc. were also required to be submitted. Accordingly, the CD as well as PGs have not only supplied duly signed photographs and the details of the property but also link letter stating that the Letter of Arrangement has been submitted to the bank. All these documents have been signed by the PGs as well as the CD. In case of extension of loan facility vide letter dated 25.01.2017, Annexures A & B including Agreement of Loan, Guarantee Agreement, Mortgage Documents etc. were sent to the CD/PGs for doing the needful. The relevant clause of the A & B is reproduced hereunder:

"Requesting the guarantors to offer their Personal Guarantee/Corporate Guarantee in favour of the Bank for the credit facilities sanctioned to the Company".



17. The Board of Directors of the CD also passed resolution on 25.01.2017 whereby all the PGs including R1 were directed to furnish the guarantees to the FC and the relevant portion of the resolution is as follows:

***“FURTHER RESOLVED** to request Shri G. Narada Raju, Smt. G. Varalakshmi, Smt. N. Shashi & Shri. P. Venkatachalam to furnish the required guarantees to the Bank for the various credit facilities granted to the company”.*

18. This condition of the Board Resolution is similar to the Board Resolution dated 10.12.2016. Therefore, various documents relating to the loan were to be signed and the Guarantee Agreement was to be furnished by the PGs and thereafter to be submitted to the Bank. It is on account of such circumstances, it can be inferred that the Personal Guarantor(s) was/were to purchase stamp paper for executing the Guarantee Deed and after getting it typed and signed, it was to be sent to the FC. The CD & PGs have meticulously executed all the documents because the Loan-cum-Hypothecation Agreement etc. was written on the stamp paper purchased in the month of January but the Guarantee Agreement was written on the stamp paper purchased on 03.02.2017. It appears that this was intentionally done in order to get the benefit of such mistake in future. The Bank on its part was required to be meticulous and cautious, but this discrepancy went unnoticed. In these circumstances, the onus is on the R1 as to why the Guarantee Agreement was executed on the stamp paper dated 03.02.2017.



19. Having regard to overall facts and circumstances, it appears that the fraud has been played by the PGs in connivance with the CD, to create an impression of inadmissibility of the documents executed by the FC/PG. The R1 has failed to show as to why the PGs executed the Guarantee Deed on the papers purchased on 03.02.2017. It is also worth noticing that the signatures appearing on the Guarantee Deed have not been denied by the Respondents. The R1 and other Personal Guarantors cannot be allowed to take advantage of their own wrong or fraud to deny the genuineness of the Guarantee Deed and consequences flowing from it by taking recourse to Section 17 of the Indian Stamp Act, which says that -

“All instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution: Provided that nothing in this Section shall apply to the instruments in respect of which Stamp Duty has been paid under Section 10-A”.

20. Hence, the Guarantee Deed executed by the PGs including the R1 is to be treated as executed by them. The relevant clauses of the Guarantee Deed are hereunder:

- i. *The Guarantee is a continuing one for all the amounts advanced to the Borrower(s) under the said facilities as also for all interest, costs, charges, expenses and/or other monies which may from time to time become due and remain unpaid to the Bank thereunder and shall not be determined or be affected by any account/s becoming nil or coming into credit or being closed at any time or by any rephasing of repayment schedules of all or any of the said facilities/limits and/or fresh account/s being opened in respect of fresh/revised facilities granted/being granted to the Borrower(s).*



- ii. *The Guarantor shall forthwith on demand made by the Bank Deposit such sum or security as the Bank may specify for the due fulfilment of their obligations hereunder and the Bank shall have the liberty to sell any security so deposited with the Bank in or towards the satisfaction or non-fulfilment of the said obligations by the Guarantors.*
- iii. *The liability of the Guarantors shall not be determined or discharged owing to any change in the legal status or constitution of the Borrower(s) or the Guarantors or the Bank whether by way of amalgamation, merger, takeover, dissolution, winding up, insolvency, nationalisation or otherwise, howsoever either by operation of law or by act of the parties but shall remain in full force and be valid and enforceable against all the Guarantors including the entities which shall come into existence upon such change or constitution as if they were the parties to these presents since its inception till full discharge of all the obligations or payments hereunder to the Bank.*

21. Even if, for the sake of arguments, the Guarantee Deed dated 25.01.2017 is not believed to be admissible in view of Section 17 of the Indian Stamp Act, the present petition is still within the limitation period.

22. The R1 has denied about the execution of documents dated 07.12.2016, 19.01.2017 and 25.01.2017. However, there are number of documents negating the claim of R1, such as resolutions passed by the Board of Directors on 10.12.2016 and 25.01.2017 approving the revision of credit facilities to the CD and further asking the PGs to execute the Guarantee Deed. It is not only the resolutions passed by the Board of Directors but the Personal Guarantors and the CD have also executed documents other than Guarantee Deed contained in Annexures I & II of the Sanction Letters, which include details



of the properties, three self-attested photographs, PAN details etc. In view of overwhelming documentary evidence, we have no hesitation to say that on the last occasion, R1 admitted the liability of the bank on 25.01.2017.

23. In case of continuing guarantee deed, like in the present case, it is Section 128 of the Contract Act which is applicable. It says that the liability of the surety is co-extensive with the principal debtor, unless it is otherwise provided for by the contract. However, there is difference between the continuing guarantee and ordinary guarantee. This has been aptly explained by the Hon'ble Supreme Court in ***Syndicate Bank versus Channaveerappa Beleri and Ors. (2006) 11 SCC 506*** about the liability attached with these two forms of guarantee in the following manner:

9. A guarantor's liability depends upon the terms of his contract. A 'continuing guarantee' is different from an ordinary guarantee. There is also a difference between a guarantee which stipulates that the guarantor is liable to pay only on a demand by the creditor, and a guarantee which does not contain such a condition. Further, depending on the terms of guarantee, the liability of a guarantor may be limited to a particular sum, instead of the liability being to the same extent as that of the principal debtor. The liability to pay may arise, on the principal debtor and guarantor, at the same time or at different points of time. A claim may be even time-barred against the principal debtor, but still enforceable against the guarantor. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. We have referred to these aspects only to underline the fact that the extent of liability under a guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract.



10. Samuel (supra), no doubt, dealt with a continuing guarantee. But the continuing guarantee considered by it, did not provide that the guarantor shall make payment on demand by the Bank. The continuing guarantee considered by it merely recited that the surety guaranteed to the Bank, the repayment of all money which shall at any time be due to the Bank from the borrower on the general balance of their accounts with the Bank, and that the guarantee shall be a continuing guarantee to an extent of Rs. 10 lakhs. Interpreting the said continuing guarantee, this Court held that so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, the period of limitation could not be said to have commenced running.

24. An agreement between the guarantor and creditor is separate and collateral contract distinct from the contract of debt between the principal debtor and creditor. Here, we also rely upon the judgment of the Hon'ble Supreme Court in ***Ansal Engineering Projects Limited versus Tehri Hydro Development Corporation Limited and Another 1996 (5) SCC 450***, wherein it was held:

4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prime facie established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the Bank, had arisen in performance of the contract or execution of the Works undertaken in furtherance thereof. The Bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.



25. No doubt, the obligation of the guarantor is co-extensive and coterminous with that of the principal borrower to defray the debt, as explained in Section 128 of the Contract Act, but the liability of the principal debtor and surety are separate although arising out of the same transaction and even the liability of surety does not also, in all cases, arise simultaneously. We may profitably refer to the decision of the Hon'ble Supreme Court in ***State Bank of India versus Index Port Registered and Ors(1992) 3 SCC 159***, wherein it was held :

16. "In Halsbury's Laws of England Forth Edition paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for."

17. In Hukamchand Insurance Co Ltd. Versus Bank of Baroda, AIR (1977) Kant 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-à-vis the principal debtor. Venkatachaliah, J. (as His Lordship then was) observed:-

"The question as to the liability of the surety, its extent and the manner of its enforcement has to be decided on first principles as to the nature and incidents of surety ship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."

18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor. so long as the creditor satisfies the court that the principal debtor is in default."



26. On the same issue, Hon'ble Supreme Court in ***Industrial Finance Corporation of India Ltd. versus Cannanore Spinning and Weaving Mills and others (2002) 5 SCC 54*** has observed:

33. "Adverting to the contract of guarantee be it noted that though it is not a contract regarding a primary transaction: but it is an independent transaction containing independent and reciprocal obligations. It is on principal to principal basis and by reason wherefore the Statute has provided both the creditor and the guarantor some relief as specified in this Chapter of Contract Act (between Sections 130 to 141). Section 141 thus involves an issue of a deliberate action on the part of the creditor and not a mere fortuitous situation beyond the control of the creditor. It is in this context strong reliance was placed on a decision of the Privy Council in *China and South Sea Bank Ltd. v. Tan* (1989 (3) All ER 839), wherein Lord Templeman speaking for the Council stated the law as below:- (All ER p. 842 c-h)

"In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgage securities to the surety. If the creditor chose to exercise his power of sale over the mortgage security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor. The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and if the surety decamps abroad the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them.



No creditor could carry on the business of lending if he could become liable to a mortgagee and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock CB in *Watts v. Shuttleworth* (1860) 5 H&N 235 at 247-248: 157 ER 1171 at 1176, it appears to their Lordships that in the present case the creditor did not act injurious to the surety, did not act inconsistent with the rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all."

27. This question was also answered by the Hon'ble Supreme Court in ***Margaret Lalita Samuel versus The Indo Commercial Bank Ltd. AIR 1979 SC 102*** in the following words:

We may first consider the question of limitation. As already mentioned by us, the submission of Shri Bal was that every item of an overdraft account was an independent loan, limitation for the recovery of which was determined by Article 57 of the schedule to the Limitation Act, 1908. Limitation, according to the learned Counsel, started to run from the date of each loan. He relied on *Basante Kumar Mitra v. Chota Nagpur Banking Association Ltd: AIR 1948 Pat 18*, *Brajendra Kishore Ray Chowdhury v. Hindustan Cooperative Insurance Society Ltd. I.L.R.44 Cal. 979* National and Grindlays Bank Ltd. v. *Tikam Chand Daga and Anr. AIR1964Cal358*, and *Uma Shankar Prasad v. Bank of Bihar Ltd. and Anr. A.I.R. 1942 Patna 201*. In our view it is unnecessary for the purposes of the present case to go into the question of the nature of an overdraft account. The present suit is in substance and truth one to enforce the guarantee bond executed by the defendant. In order to ascertain the nature of the liability of the defendant it is necessary to refer to the precise terms of the guarantee bond rather than embark into an enquiry as to the nature of an overdraft account. Exhibit 57 is the guarantee bond executed by the defendant and her husband on 23rd October, 1944. It is addressed to the Indo-Commercial Bank Ltd., Madras, and is in the following terms:

Dear Sirs,

In consideration of your having agreed to allow overdraft accommodation upto Rs. 10,00,000/- (Rupees Ten Lakhs only) to the Modern Hindustan Food Products Ltd., Poona, we, C.B. Samuel and M.L. Samuel, the undersigned do hereby jointly and severally guarantee to you, the Indo-Commercial Bank Limited the repayment of all money, which shall at any time be due to you



from the said Modern Hindustan Food Products Ltd., on the general balance of their accounts with you or on any account whatever (such balances to include all interest, charges, commission and other expenses which you may charge as bankers) and also the due payment at maturity of any promissory note or other negotiable instrument on the security or in respect of which any credit or advance shall be made.

And we hereby declare that this guarantee shall be a continuing guarantee to the extent at any one time for Rs. 10,00,000/- (Rupees Ten Lakhs only) and shall not be considered wholly or partially satisfied by the payment at any one time or at different times of any sums of money due on such general balance of account but shall extend and cover and be a security for every and all further sums at any time due to you thereon. And we further declare that you may grant to the Modern Hindustan Food Products Ltd., any indulgence without discharging our liability.

The guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such a continuing guarantee, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, we do not see how the period of limitation could be said to have commenced running. Limitation would only run from the date of breach, under Article 115 of the schedule to the Limitation Act, 1908. When the Bombay High Court considered the matter in the first instance and held that the suit was not barred by limitation, J.C. Shah, J., speaking for the Court said :

On the plain words of the letters of guarantee it is clear that the defendant undertook to pay any amount which may be due by the Company at the foot of the general balance of its account or any other account whatever. We are not concerned in this case with the period of limitation for the amount repayable by the Company to the bank. We are concerned with the period of limitation for enforcing the liability of the defendant under the surety bond....We hold that the suit to enforce the liability is governed by Article 115 and the cause of action arises when the contract of continuing guarantee is broken, and in the present case we are of the view that so long as the account remained a live account, and there was no refusal on the part of defendant to carry out her obligation, the period of limitation did not commence to run.

We agree with the view expressed by Shah, J. The intention and effect of a continuing guarantee such as the one with which we are concerned in this case was considered by the Judicial Committee of the Privy Council in Wright and Anr. v. New Zealand Farmers Co-operative Association of Canterbury Ltd. [1939]



A.C. 439. The second clause of the guarantee bond in that case was in the following terms:

“This guarantee shall be a continuing guarantee and shall apply to the balance that is now or may at any time hereafter be owing to you by the William Nosworthy and Robert Nosworthy on their current account with you for goods supplied and advances made by you as aforesaid and interest and other charges as

28. Therefore, starting date of limitation in case of continuing guarantee is when it is invoked.
29. The FC issued notice under Section 13(2) of the SARFAESI Act on 09.05.2017, legal notice on 08.12.2017 and again demand notice on 08.10.2021. For the first time, the Personal Guarantors on 09.05.2017 were asked by issuing notice under Section 13(2) of SARFAESI Act to discharge the liability within 60 days from the date of notice. Therefore, the cause of action for the purpose of filing limitation will start from 08.07.2017.
30. The Learned Counsel for R1 has referred to contradiction in para no.4 of the legal notice dated 08.12.2017 wherein no mention has been made of R1. When the legal notice is read in its entirety, it is clear that the Personal Guarantors were asked to repay the outstanding liabilities and if in para no.4 the name of the R1 is missing, it does not affect its legality. Moreover, it is the notice dated 09.05.2017 under Section 13(2) of the SARFAESI Act and not legal notice dated 08.12.2017 which determines the starting point of limitation period.



31. It is also immaterial that for the first time, the account of the CD was declared as NPA on 30.09.2014. Admittedly, the loan account was restructured after the NPA and thereafter the CD has also discharged its some liability. Again, the account was declared NPA on 09.04.2017 and as per the RBI Guidelines, the NPA was rolled back to 30.09.2014 because of failed restructuring policy. The declaration of NPA is not going to have impact on the limitation period because the notice to the Personal Guarantors asking them to pay the loan was given on 09.05.2017. The limitation in case of continuing guarantee will come into operation on the expiry of 60 days from 09.05.2017 while in the ordinary guarantee, it will start when the account was declared NPA on 09.04.2017. The present petition has been filed on 11.01.2022.
32. The time consumed in litigation before the DRT is to be excluded for the purpose of limitation and here, we rely upon the decisions of the Hon'ble Supreme Court in **Sesh Nath Singh and Ors. versus Baidyabati Sheoraphuli Co-operative Bank Ltd. and Ors. (2021)7 SCC 313, Dena Bank (Now Bank of Baroda) versus C. Shivakumar Reddy & Anr. (2021) 10 SCC 330 and Asset Reconstruction Company Ltd. versus Hotel Poonja International Pvt. Ltd. (2021)7 SCC 352**. Here it is relevant to note that proceedings in O.A. No.377 of 2019 are still pending before the DRT.



33. Further, the Covid period i.e. 15.03.2020 till 28.02.2022 is also to be excluded for calculating the limitation in view of the decision in ***Suo Moto Writ Petition (C) No.3/2020***.
34. Thus on both counts i.e. ordinary guarantee and the continuous guarantee, the petition is within limitation period.
35. Besides limitation which is interlinked with other issues, there is no other material point to address as the liability of the PG is proved from the documents on record.
36. The RP in his report dated 25.02.2022 has recommended for initiation of the insolvency resolution process against R1, who filed separate objections to the said report, but submissions are the same which have been taken by him in the counter.

ORDER

1. Therefore, by exercising powers under Section 100 of the Code, we pass the following orders:
 - i. The Petition **CP (IB) No. 46/95/HDB/2022** filed under **the provisions of Section 95 of IBC, 2016** is hereby **admitted**.
2. Consequently, the Insolvency Resolution Process is hereby initiated against the Personal Guarantor, Mr. Padmanabhan Venkatachalam and the moratorium is declared, which begins with effect from the date of admission of the petition



and shall cease to have effect at the end of the period of 180 days, as provided under Section 101 of IBC, 2016. During the interim- moratorium period:

- i. Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
- ii. The creditors shall not initiate any legal action or legal proceedings in respect of any debt;
- iii. the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;
- iv. The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- v. The Resolution Professional i.e. Dr. Ahalada Rao Vummenthala, having Registration No. IBBI/IPA-002/IP-N00074/2017-2018/10172 having office at Flat No.113, Block-B, Sri Datta Sai Commercial Complex, Opp. Sapthagiri Theatre, RTC 'X' Roads, Beside Metro Station, Pillar No.1096/1097, Hyderabad – 500 020 who was appointed vide order dated 16.02.2022 is directed to cause public notice published on behalf of the Adjudicating Authority within 7 days of uploading of this



Order on the website of NCLT, Hyderabad, inviting claims from all creditors, who shall register their claims as provided under Section 103 of the Code within 21 days of such issuance. The notice shall contain the necessary information as provided under Section 102 (2) of IBC, 2016. The publication of notice shall be made in newspapers, one in English and other in vernacular (Telugu) which have wide circulation in the State where the Debtor resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry. One shall be placed on our website by the Registry and the other shall be affixed in the premises of this Adjudicating Authority.

- vi. The Resolution Professional in exercise of the powers conferred under Section 104 shall prepare a list of creditors within 30 days from the date of the notice. The debtor shall prepare, in consultation with the resolution professional, a repayment plan containing a proposal to the creditors for restructuring of his debts or affairs as provided under Section 105 which shall include the provisions for payment of fee to the Resolution Professional. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Adjudicating Authority within a period of 21 days from the last date of submission of claims as provided under Section 106.



- vii. In case the Resolution Professional recommends that a meeting of the creditors is not required to be summoned, he shall record the reasons thereof. If the Resolution Professional is of the opinion that the meeting of creditors should be summoned, he shall specify the details as provided under Section 106 (3). The date of meeting shall not be less than fourteen days or more than 28 days from the date of submission of the Report under Sub-Section (1) of Section 106, for which atleast 14 days' notice to the creditors (as per the list prepared) shall be issued by all modes. Such notice must contain the details as provided under the provisions of Section 107.
- viii. The meeting of the creditors shall be conducted in accordance with the provisions of sections 109, 110 and 111. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 and submit the same to the Authority, copies of which shall be provided to the guarantor and the creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of IBC, 2016.

Sd/-

SANJAY PURI
MEMBER (TECHNICAL)

Sd/-

RAJEEV BHARDWAJ
MEMBER (JUDICIAL)