2021 INSC 297

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

TRANSFERRED CASE (CIVIL) NO. 245/2020

LALIT KUMAR JAIN ….PETITIONER(S)

VERSUS

UNION OF INDIA & ORS. …..RESPONDENT(S)

WITH

W.P.(C) No. 117/2021, W.P.(C) No. 1371/2020, W.P.(C) No. 1420/2020, W.P.(C) No. 1353/2020, T.P.(C) No. 1252/2020, W.P.(C) No. 1276/2020, W.P.(C) No. 1287/2020, T.P.(C) No. 1285/2020, T.P.(C) No. 1325/2020, W.P.(C) No. 1364/2020, T.C.(C) No. 257/2020, W.P.(C) No. 1434/2020, W.P.(C) No. 38/2021, W.P.(C) No. 1419/2020, T.P.(C) No. 1202/2020, T.P.(C) No. 1220/2020, T.P.(C) No. 1203/2020, T.P.(C) No. 1193/2020, T.P.(C) No. 1196/2020, T.P.(C) No. 1289/2020, T.P.(C) No. 1323/2020, T.P.(C) No. 1333/2020, T.P.(C) No. 1292/2020, T.P.(C) No. 1299/2020, T.P.(C) No. 1331/2020, W.P.(C) No. 1342/2020, T.P.(C) No. 1339/2020, W.P.(C) No. 1348/2020, W.P.(C) No. 1344/2020, W.P.(C) No. 1343/2020, T.C.(C) No. 250/2020, T.C.(C) No. 251/2020, T.C.(C) No. 247/2020, T.C.(C) No. 253/2020, T.C.(C) No. 252/2020, T.C.(C) No. 248/2020, T.C.(C) No. 254/2020, T.C.(C) No. 246/2020, T.C.(C) No. 256/2020, T.C.(C) No. 249/2020, T.C.(C) No. 255/2020, W.P.(C) No. 62/2021, W.P.(C) No. 32/2021, W.P.(C) No. 106/2021, W.P.(C) No. 97/2021, W.P.(C) No. 142/2021, W.P.(C) No. 135/2021, W.P.(C) No. 131/2021, W.P.(C) No. 122/2021, W.P.(C) No. 138/2021, W.P.(C) No. 146/2021, W.P.(C) No. 207/2021, W.P.(C) No. 160/2021, W.P.(C) No. 168/2021, W.P.(C) No. 205/2021, W.P.(C) No. 209/2021, W.P.(C) No. 194/2021, W.P.(C) No. 187/2021, W.P.(C) No. 180/2021, W.P.(C) No. 182/2021, W.P.(C) No. 203/2021, W.P.(C) No. 220/2021, W.P.(C) No. 229/2021, W.P.(C) No. 217/2021, W.P.(C) No. 221/2021, W.P.(C) No. 225/2021, W.P.(C) No. 239/2021, W.P.(C) No. 240/2021, W.P.(C) No. 228/2021, W.P.(C) No. 224/2021, W.P.(C) No. 234/2021, W.P.(C) No. 260/2021 and W.P.(C) No. 262/2021, W.P. (C) No. 283/2021.

J U D G M E N T

S. RAVINDRA BHAT, J.

1. This judgment will dispose of common questions of law, which arise in various proceedings preferred under Article 32 of the Constitution of India, as well as transferred cases under Article 139A; those causes were transferred to the file of this court, from various High Courts[1], as they involved interpretation of common questions of law, in relation to provisions of the Insolvency and Bankruptcy Code, 2016 (hereafter "the Code").

I *The Petitions and Common Grievances*

2. The common question which arises in all these cases concerns the *vires* and validity of a notification dated 15.11.2019 issued by the Central Government[2] (hereafter called "the impugned notification"). Other reliefs too have been claimed concerning the validity of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 issued on 15.11.2019. Likewise, the validity of regulations challenged by the Insolvency and Bankruptcy Board of India on 20.11.2019 are also the subject matter of challenge. However, during the course of submissions, learned counsel for the parties stated that the challenge would be confined to the impugned notification.

3. All writ petitioners before the High Courts, arrayed as respondents in the transferred cases before this Court, as well as the petitioners under Article 32 claim to be aggrieved by the impugned notification. At some stage or the other, these petitioners (compendiously termed as "the writ petitioners") had furnished personal guarantees to banks and financial institutions which led to release of advances to various companies which they (the petitioners) were associated with as directors, promoters or in some instances, as chairman or managing directors. In many cases,

1 Madhya Pradesh, Telengana, Delhi, etc.
2S.O. 4126 (E) issued by the Ministry of Corporation Affairs, Central Government

the personal guarantees furnished by the writ petitioners were invoked, and proceedings are pending against companies which they are or were associated with, and the advances for which they furnished bank guarantees. In several cases, recovery proceedings and later insolvency proceedings were initiated. The insolvency proceedings are at different stages and the resolution plans are at the stage of finalization. In a few cases, the resolution plans have not yet been approved by the adjudicating authority and in some cases, the approvals granted are subject to attack before the appellate tribunal.

4. All the writ petitioners challenged the impugned notification as having been issued in excess of the authority conferred upon the Union of India (through the Ministry of Corporate Affairs) which has been arrayed in all these proceedings as parties. The petitioners contend that the power conferred upon the Union under Section 1(3) of the Insolvency and Bankruptcy Code, 2016 (hereafter referred to as "the Code") could not have been resorted to in the manner as to extend the provisions of the Code only as far as they relate to personal guarantors of corporate debtors. The impugned notification brought into force Section 2(e), Section 78 (except with regard to fresh start process), Sections 79, 94-187 (both inclusive); Section 239(2)(g), (h) & (i); Section 239(2)(m) to (zc); Section 239 (2)(zn) to (zs) and Section 249.

5. After publication of the impugned notification, many petitioners were served with demand notices proposing to initiate insolvency proceedings under the Code. These demand notices were based on various counts, including that recovery proceedings were initiated after invocation of the guarantees. This led to initiation of insolvency resolution process under Part-III of the Code against some of the petitioners. The main argument advanced in all these proceedings on behalf of the writ petitioners is that the impugned notification is an exercise of excessive delegation. It is contended that the Central Government has no authority – legislative or statutory – to impose conditions on the enforcement of the Code. It is further contended as a corollary, that the enforcement of Sections 78, 79, 94-187 etc. in terms of the impugned notification of the Code only in relation to personal guarantors is *ultra vires* the powers granted to the Central Government.

6. It is argued that in terms of the proviso to Section 1(3) of the Code, Parliament delegated the power to enforce different provisions of the Code at different points in time to the Central Government. Section1(3) reads as under:

> *"It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:*
> *Provided that different dates may be appointed for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed a reference the commencement of that provision."*

7. The petitioners argue that the power delegated under Section 1(3) is only as regards the point(s) in time when different provisions of the Code can be brought into effect and that it does not permit the Central Government to notify parts of provisions of the Code, or to limit the application of the provisions to certain categories of persons. The impugned notification, however, notified various provisions of the Code *only* in so far as *they relate to personal guarantors to corporate debtors.* It is therefore, *ultra vires* the proviso to Section 1(3) of the Code.

8. It is argued that the provisions of the Code brought into effect by the impugned notification are not in severable, as they do not specifically or separately deal with or govern insolvency proceedings against personal guarantors to corporate debtors. The provisions only deal with individuals and partnership firms. It is urged that from a plain reading of the provisions, it is not possible to carve out a limited application of the provisions only in relation to personal guarantors to corporate debtors. The Central Government's move to enforce Sections 78, 79, 94 to 187, etc. only in relation to personal guarantors to corporate debtors is an exercise of legislative power wholly impermissible in law and amounts to an unconstitutional usurpation of legislative power by the executive. The petitioners argue that the impugned notification, to the extent it brings into force Section 2 (e) of the Code with effect from 01.12.2019 is hit by non-application of mind. It is argued that Section 2(e) of the Code, as amended by Act 8 of 2018, came into force with retrospective effect

from23.11.2017. This is duly noted by this court in the case of *State Bank of India v. V. Ramakrishnan*[3], which observed that:

> *"Though the original Section 2(e) did not come into force at all, the substituted Section 2(e) has come into force w.e.f. 23.11.2017."*

It is urged that this court should, therefore, set aside the impugned notification.

9. The petitioners also attack the impugned notification on the ground that it suffers from non-application of mind, because the Central Government failed to bring into effect Section 243 of the Code, which would have repealed the Presidency Towns Insolvency Act, 1909 ("PTI Act" hereafter) and the Provincial Insolvency Act, 1920 ("PIA" hereafter). Prior to issuance of the impugned notification, insolvency proceedings against an individual could be initiated only in terms of the said two Acts. After enactment of the Code, insolvency proceedings against personal guarantors to corporate debtors would lie before the Adjudicating Authority, in terms of Section 60 of the Code, although they would be governed by the said two Acts. With the enforcement of the impugned provisions, rules and regulations, insolvency proceedings can now be initiated against personal guarantors to corporate debtors under Part III of the Code, and also under the PTI Act and the PIA. Since Section 243 of the Code has not been brought into force, the petitioners contend that the impugned notification has the illogical effect of creating two self-contradictory legal regimes for in solvency proceedings against personal guarantors to corporate debtors.

10. It is urged that the impugned notification is *ultra vires* the provisions of the Code in so far as it notifies provisions of Part III of the Code only in respect of personal guarantors to corporate debtors. Part III of the Code governs "*Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms*". Also, Section 2(g) of the Code defines an individual to mean "*individuals, other than persons referred to in clause (e)*". Section 2 (e) relates to personal guarantors to corporate debtors. A joint reading of Section 2(e) with Section 2(g) and Part III of the Code shows that personal guarantors to corporate debtors are not covered by Part II, which

3(2018) 17 SCC 394

only deals with individuals and partnership firms, and personal guarantors to corporate debtors stand specifically excluded from the definition of individuals. The petitioners also rely on Section 95 of the Code[4], which permits a creditor to invoke insolvency resolution process against an individual only in relation to a partnership debt.

11. Part III of the Code does not contain any provision permitting initiation of the insolvency resolution process (hereafter "IRP") against personal guarantors to corporate debtors. The impugned notification which provides to the contrary, is *ultra vires*. It is further contended that provisions of the Code brought into effect by the impugned notification [Clause (e) of Section 2, Section 78 (except with regard to fresh start process), Section 79, Section 94 to 187 (both inclusive), Clause (g) to Clause (l) of sub-section (2) of Section 239, Clause (m) to (zc) of sub-section (2) of Section 239, Clause (zn) to Clause (zs) of Sub-section (2) of Section 239 and Section 249] when enforced only in respect of personal guarantors to corporate debtors, are manifestly arbitrary; they are also discriminatory because:

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4 *"**95. Application by creditor to initiate insolvency resolution process.***

(1) A creditor may apply either by himself, or jointly with other creditors, or through resolution professional to the Adjudicating Authority for initiating an insolvency resolution process under this section by submitting an application.

(2) A creditor may apply under sub-section (1) in relation to any partnership debt owed to him for initiating an insolvency resolution process against

(a) anyone or more partners of the firm; or
(b) the firm.
(c)

(3) Where an application has been made against one partner in a firm, any other application against another partner in the same firm shall be presented in or transferred to the Adjudicating Authority in which the first mentioned application is pending for adjudication and such Adjudicating Authority may give such directions for consolidating the proceedings under the applications as it thinks just.

(4) An application under sub-section (1)shall be accompanied with details and documents relating to:

(a) the debts owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;
(b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and
(c) relevant evidence of such default or non-repayment of debt.

(5) The creditor shall also provide a copy of the application made under sub-section (1) to the debtor.

(6)The application referred to in sub-section (1) shall be in such form and manner and accompanied by such fee as may be prescribed.

(7)The details and documents required to be submitted under Sub-section (4) shall be such as may be specified."

(i) There is no intelligible differentia or rational basis on which personal guarantors to corporate debtors have been singled out for being covered by the impugned provisions, particularly when the provisions of the Code do not separately apply to one sub-category of individuals, i.e., personal guarantors to corporate debtors. Rather, Part III of the Code does not apply to personal guarantors to corporate debtors at all.

(ii) the provisions of Part III of the Code, which are partly brought into effect by the impugned notification, provide a single procedure for the insolvency resolution process of a personal guarantor, irrespective of whether the creditor is a financial creditor or an operational creditor. Treating financial creditors and operational creditors on an equal footing in Part III of the Code is in contrast to Part II of the Code, which provides different sets of procedures for different classes of creditors.

12. The petitioners rely on *Swiss Ribbons (P.) Ltd. v. Union of India*[5], where this court upheld the difference in procedure for operational creditors and financial creditors on the basis that there are fundamental differences in the nature of loan agreements with financial creditors, from contracts with operational creditors for supplying goods and services. Financial creditors generally lend finance on a term loan or for working capital that enables the corporate debtor to either set up and/or operate its business. On the other hand, contracts with operational creditors are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money.

13. The petitioners argue that the act of clubbing financial creditors and operational creditors in relation to the procedure for insolvency resolution of personal guarantors to corporate debtors amounts to treating unequals equally and amounts to collapsing the classification that is carefully created by Parliament in Part II of the Code. They also argue that the application of Sections 96 and 101 of the Code by the impugned notification results in the illogical consequence of staying insolvency proceedings against the corporate debtor, when insolvency proceedings are initiated

5(2019) 4 SCC 17.

against the personal guarantor. It is pointed out that a combined reading of Sections 99 and100 of the Code shows that the resolution professional, while recommending the approval/rejection of the application, and the Adjudicating Authority while accepting it, do not have to consider whether the underlying debt owed by the corporate debtor to the creditor stands discharged or extinguished.

14. It is argued that the liability of a guarantor is co-extensive with that of the principal debtor (Section 128 of Indian Contract Act, 1872). Further, it is settled law that upon conclusion of insolvency proceedings against a principal debtor, the same amounts to extinction of all claims against the principal debtor, except to the extent admitted in the insolvency resolution process itself. This is clear from Section 31 of the Code, which makes the resolution plan approved by the Adjudicating Authority binding on the corporate debtor, its creditors and guarantors. The petitioners also contend that the impugned notification allows creditors to unjustly enrich themselves by claiming in the insolvency process of the guarantor without accounting for the amount realized by them in the corporate insolvency resolution process of the corporate debtor under Part II of the Code. It is therefore, untenable.

15. It is argued that the impugned notification has resulted in clothing authorities, the Committee of Creditors (CoC) and Resolution Professionals (RPs) with powers beyond the enacted statute. They have defined the term "guarantor" as a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part. The parent statute does not define "guarantor". It is pointed out that though Section 239(1) of the Code empowers the Insolvency Board to make rules to carry out the provisions of the Code, those rules cannot define a term that is not defined in the Code, as it is likely to result in class legislation for one category of guarantors, i.e., personal guarantors to corporate debtors. The impugned notification is therefore *ultra vires* the Code.

II ***Contentions of the Petitioners***

16. Mr. Harish Salve, learned senior counsel appearing on behalf of the petitioners, urged that Section 1(3) of the Code authorizes or empowers the Central Government only to bring provisions of the Code into force on such date by a notification in the

Official Gazette. The proviso to this Section categorically provides that different dates may be appointed for bringing different provisions into force. Section 1(3) is an instance of 'conditional legislation', where the legislature has enacted the law, and the only function assigned to the executive is to bring the law into operation at such time as it may decide. Such legislation is termed as conditional, because the legislature has itself made the law in all its completeness as regards "place, person, laws, powers", leaving nothing for an outside authority to legislate on. Therefore, no element of legislation was left open to the government, and the only function assigned to it being to bring the law into operation at such time as it might decide. The central government has however, by the impugned notification exceeded the power conferred upon it, and has in effect modified the provisions of Part III of the Code, which it was not authorized to do by Parliament. Assuming that such powers were present under Section 1(3) of the Code, it would amount to an unconstitutional delegation of power. It is argued that this court has repeatedly held that in conditional legislation, the law is already complete in all respects, and as such the outside agency i.e., the government, while exercising power under such a provision, cannot legislate or in any manner add or alter the effect of the law already laid down. Reliance is placed on *Delhi Laws Act, 1912, In re v. Part 'C' States (Laws) Act, 1950*[6], *State of Tamil Nadu v. K. Sabanayagam*[7] and *Vasu Dev Singh & Ors. v. Union of India & Ors*[8].The effect of the impugned notification translates into going beyond the power to notify a date when the Code or its provisions should come into force.

17. It is argued that Part III of the Code does not create any distinction between an individual and a personal guarantor to a corporate debtor. Part III provides for *"Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms"*, and thereafter refers to these two categories of persons simply as debtors. The impugned notification in substance modifies the text of the actual sections of Part III, despite the absence of any element of legislation/legislative authority having been conferred upon the Central Government. The words *"only in so far as they relate to personal guaran-*

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6 1951 SCR 747 at paras 39, 42 and 47.
7 (1998) 1 SCC 318 at para 14.
8 (2006) 12 SCC 753 at para 16.

tors to corporate debtors" forming a part of the impugned notification are attempted to be added like a rider to each of the sections mentioned in the impugned notification, clearly rendering such an exercise completely outside the scope and powers conferred under Section 1(3) of the Code.

18. It was argued further by Mr. Salve, that the impugned notification is ex facie in violation of the principles of delegation, inasmuch as the Central Government has effected a classification of individuals- and sought to ensure that insolvency issues of one category of individuals, i.e. personal guarantors to corporate debtors, are considered along with insolvency proceedings of corporate debtors. The distinction between Part II and Part III, the forum and the remedies available to creditors of individuals is no longer available to this category, i.e. personal guarantors, whose insolvency issues are to be now considered along with insolvency process of corporate debtors. It is argued that the power of classification is legislative and that the impugned notification is an instance of the executive acting beyond its jurisdiction. Mr. Salve relied upon observations made by the Privy Council in *R v Burah*[9] that laws cannot be said to empower *general legislative authority,* on the executive, or to exercise power not granted to it under the parent Act.

19. It was argued that the Central Government mistakenly assumed that inclusion of personal guarantors in the definition provisions by amending Section 2 and inserting section 2(e) automatically results in amendment of section 1(3) of the Code. Section 2 provides that the Code applies to the entities enumerated in the various subsections. The amendment of 2018 added that the Code would apply to personal guarantors to corporate debtors. Consequently, when provisions of the Code are brought into force, they would apply to personal guarantors to corporate debtors. The application of a provision depends upon its plain language, and not upon the enumeration of entities to whom the Code applies. The provisions which have been now brought into force by virtue of the impugned notification do not limit themselves to personal guarantors to corporate debtors, but apply generally to individuals and other entities. However, to the extent that it limits their application to personal guarantors alone,

9 1878 (3) App. Cases 889.

through the impugned notification, it is illegal and beyond the powers conferred by Parliament. It was urged that conditional legislation should not be confused with delegation, which is a broader concept allowing the executive to frame rules and flesh out gaps within the broad legislative policy. That exercise is *legislative.* However, conditional legislation only permits the executive government the power to designate the time when the law is to be brought into force, or place or places where it operates, but not which parts of an enactment can apply to which class of persons, without any substantive legislative provision or guidance. The impugned notification has the effect of amending the statutory scheme in the manner it applies them to personal guarantors and is therefore, *ultra vires* the Code.

20. Mr. P.S. Narasimha, learned senior counsel, who argued next, contended further that in several judgments, this court has ruled that conditional legislation is one where a legislative exercise is complete in itself, and the only power and/or function to be delegated to the authority (in this case the Central Government), is to apply the law to a specific area or to determine the time and manner of carrying into effect such law. He cited the decision in *State of Bombay v. Narothamdas Jethabhai*[10] in which this court observed as follows:

> *"……The section does not empower the Provincial Government to enact a law as regards the pecuniary jurisdiction of the new court and it can in no sense be held to be legislation conferring legislative power on the Provincial Government"*

Mr. Narasimha also cited *Sardar Inder Singh v. State of Rajasthan*[11]and *Hamdard Dawakhana v. Union of India*[12] and urged that when legislation is complete, and the executive is left to *apply the law to an area* or determine the time and manner of carrying it out, that is the only permissible task. However, the executive cannot perform its task outside the power granted to it, choosing the subjects to which the law is to apply.

10*State of Bombay v. Narothamdas Jethabai*1951 2 SCR51, at para 37.
111957 SCR 605 at para 10.
121960 (2) SCR 671 at para 28.

21. Mr. Narasimha referred to the previous notifications, bringing into force provisions of the Code on different dates. He submitted that none of them brought into force some provisions for a limited sub-category, or a class of individuals or entities. He referred to one notification dated 30.11.2016 that brought into force certain provisions of Part II of the Code, within which section 2(a) to 2(d) were also notified. However, it was submitted that irrespective of the notification, Part II was brought into force and it applied to every entity contemplated to be in its coverage. Under the notification of 30.11.2016, the inclusion of the four sub categories described in section 2(a) to 2(d) became irrelevant, and Part II of the Code applied uniformly to all categories of persons intended to be covered by it by virtue of the definition of a corporate person under Section 3(7) of the Act. The impugned notification however applies to only a sub-category, namely, personal guarantors to corporate debtors, among a homogeneous class of individuals; therefore, it is an unprecedented exercise of conditional legislation power, clearly *ultra vires* the parent enactment.

22. It was urged that even if it were assumed that the Central Government had the power to issue the impugned notification and bring Part III in force only with respect to personal guarantors to corporate debtors, it is *ultra vires* the objects and purpose of the Code. Reliance was placed on the Statement of Objects and Reasons of the Insolvency and Bankruptcy Code (Amendment) Bill, 2017 in this regard.[13]

23. Learned counsel emphasized that this court has repeatedly clarified that the object of the Code is to ensure a company's revival and continuation by protecting from its management and, as far as feasible, to save it from liquidation, thereby maximizing its value. The Code is a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. Observations in *Swiss Ribbons Pvt. Ltd. and Anr. v. Union of India & Ors.*[14] and *Babulal Vardharji*

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13 *"The Code prescribes for the insolvency resolution and for individuals and partnership firms, which are proposed to be implemented in a phased manner on account of the wider impact of these provisions. In the first phase, the provisions would be extended to personal guarantors of corporate debtors to further strengthen the corporate insolvency resolution process and a clear enabling provision for the purpose has been provided in the Bill."*

14 *Swiss Ribbons Pvt. Ltd. and Anr. vs. Union of India &Ors.*, (2019) 4 SCC 17, at *para 28; Babulal Vardharji Gurjar v. Veer Gurjar Aluminum Industries Pvt. Ltd. and Anr.* (2020) 15 SCC 1, at paras 21, 21.1.

Gurjar v. Veer Gurjar Aluminum Industries Pvt. Ltd. & Anr.[15] are relied upon for this purpose.

24. It was submitted that Parliament undoubtedly amended the Code in 2018, defining "personal guarantor" as a species of individuals to whom the law applied. However, the manner of its application continued to be the same, i.e. to all individuals. Therefore, the resort to conditional legislation power under Section 1(3) to bring into force certain provisions *selectively, in respect of some individuals, i.e. personal guarantors* and not all individuals, is *ultra vires*, and contrary to the power conferred on Parliament. Illustratively, it is pointed out that the application of the law itself is limited- for instance in the case of Section 78 which applies to fresh start of insolvency proceedings- the Code is limited then, in its application to one sub category of individuals (all of whom are covered by the chapter, which is opened by Section 78) i.e., personal guarantors. This selective application is naked classification exercised by the government conferred with conditional legislative powers.

25. It was next argued that Part III of the Code relating to individuals and partnership firms are outlined in various sections of the Act. Of these chapters, I, III to VII, all of which have been notified are operative components of the Code, relatable to individuals and partnership firms. They can certainly be brought into force independently, whenever the executive is of the opinion that it is appropriate to do so. However, Section 2 cannot be used for this purpose, certainly not for bifurcating individuals and partnership firms into subcategories and then to apply Part II provisions exclusively to personal guarantors. It is argued that Section 2 of the Code is not an operative component, but more merely a descriptive component. Counsel argued that the nature of Section 2 is similar to an amendable descriptive component. Elaborating, it was submitted that an amendable descriptive component of an enactment is one that describes the whole or some part of the Act, and was subject to amendment when the Bill was introduced in Parliament in 2017. Section 2, in other words, is descriptive and merely declares the subjects to which the code

15(2020) 15 SCC 1 at paras 21, 21.1.

would apply. It certainly cannot clothe the executive with power to apply the code selectively at its discretion to different subjects.

26. Mr. Sudipto Sarkar, learned senior counsel, adopted the arguments of Mr. Salve. He also relied on the decision of the Federal Court in *Jatindra Nath Gupta v. Province of Bihar*[16], especially the following passage:

> *"The proviso contains the power to extend the Act for a period of one year with modifications, if any. It is one power and not two severable powers. The fact that no modifications were made in the Act when the power was exercised cannot help in determining the true nature of the power. The power to extend the operation of the Act beyond the period mentioned in the Act prima facie is a legislative power. It is for the Legislature to state how long a particular legislation will be in operation. That cannot be left to the discretion of some other body. The power to modify an Act of a Legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power. It is not a power confined to apply the Act subject to any restriction, limitation or proviso (which is the same as an exception) only."*

27. The other counsel, viz. Mr. Rohit Sharma, Ms. Pruthi Gupta, Mr. Rishi Raj Sharma, and Mr. Manish Paliwal too, argued for other petitioners. Pointing to the distinction between provisions in Part II of the Code and those in Part III, it is argued that the procedure for initiation of insolvency resolution against personal guarantors to corporate debtors is the same as in relation to other individuals. The only difference is that the forum to decide this would be the National Company Law Tribunal (NCLT). In all other respects, in terms of Part III, the recovery process for debt realization is identical for personal guarantors to corporate debtors, as in the case of individuals. By separating the process in an artificial manner, and subjecting the insolvency process of personal guarantors who are also individuals, to adjudication by the NCLT, and furthermore, virtually directing that the two proceedings, i.e. in relation to the corporate debtor on the one hand, and the personal guarantor, on the other hand, to be clubbed, is, in effect, a legislative exercise, unsupported by any express provision of the Code. It is also submitted that the object of the Code is to

16(1949-50) 11 FCR 595.

ensure a revival of corporate debtors. On the other hand, if an application against a personal guarantor is admitted, a moratorium under Section 101 of the Code automatically applies. This results in stay of all pending proceedings or legal claims in respect of all debts. Since the debt of the personal guarantor is the same as the debt of the corporate debtor, all pending proceedings, including the corporate insolvency resolution plan initiated against a corporate debtor would be stayed on admission of an application for initiation of the resolution plan against a personal guarantor. This would in fact, amount to treating unequals as equals by a sheer legislative fiat. In other words, argued counsel, the moratorium which would operate in respect of pending resolution plans of corporate debtors, upon the initiation of an application against personal guarantors puts them on the same level, which the statute itself does not permit.

28. It is submitted that by virtue of Section 140 of the Indian Contract Act, a guarantor upon payment or performance of all that he is liable for, is invested with all rights which the creditor had enjoyed against the principal debtor. This provision enables the guarantor to exercise all rights, which the creditor had against the principal debtor, which would include the right to file a resolution plan against the corporate debtor after conclusion of the latter's resolution process. However, by virtue of Section 29A of the Code, promoters of corporate debtors who in most cases are personal guarantors, are barred from filing a resolution plan in the corporate resolution process of the corporate debtor. This places them at a distinct disadvantage as compared with individuals who are not personal guarantors. In this regard, the inability of such personal guarantors to recover amounts from the corporate debtor in the insolvency process, as well as at a later stage, if necessary, to initiate insolvency process, has been affected by virtue of the impugned notification. It was submitted that this court, in *Committee of Creditors of Essar Steel India Ltd. v. Satish Kumar Gupta*[17] , ruled that

> *"Section 31 (1) of the Code makes it clear that once a resolution plan is approved by the Committee of Creditors it shall be binding on all stakeholders ... This is for the reason that this provision*

172019 SCC Online SC 1478.

> *ensures that the successful resolution applicant starts running the business of the corporate debtor on a fresh slate ...*
> *All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate* ".

Counsel therefore argued that an approved resolution plan in respect of a corporate debtor amounts to extinction of all outstanding claims against that debtor; consequently, the liability of the guarantor, which is co-extensive with that of the corporate debtor, would also be extinguished.

29. It was further argued that the resolution plans, duly approved by the Committee of Creditors would propose to extinguish and discharge the liability of the principal borrower to the financial creditor. Therefore, the petitioners' liability as guarantors under the personal guarantee would stand completely discharged. Reliance is placed on the judgment of the Punjab and Haryana High Court in *Kundanlal Dabriwala v. Haryana Financial Corporation*[18] , which ruled that:

> *"on a fair reading of the provisions of the Contract Act, I am inclined to hold that as the liability of the surety is co-extensive with that of the principal debtor, if the latter's liability is scaled down in an amended decree, or otherwise extinguished in whole or in part by statute, the liability of the surety also is pro tanto reduced or extinguished."*

30. Reliance was also placed on the judgment of the National Company Law Appellate Tribunal (NCLAT) in *Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd*[19], where it was held that *"for the same set of debts, claim cannot be filed by same financial creditor in two separate corporate insolvency resolution processes."*

III *Arguments of the Union and other Respondents*

31. Arguing for the Union of India, the Attorney General Mr. K.K. Venugopal submitted that the Code was amended in 2018. It substituted the pre-amended definition in Section 2(e) by introducing three different classes of debtors, which

18(2012) 171 Comp Cas 94.
192019 SCC Online NCLAT 542.

were personal guarantors to corporate debtors [Section 2(e)], partnership firms and proprietorship firms [Section 2 (f)] and individuals [Section 2(g)]. The purpose of splitting the provision and defining three separate categories of debtors was to cover three separate sets of entities. Parliament wanted to deal with personal guarantors [under Section 2(e)], differently from partnership firms and proprietorship firms [under section 2(f),] and individuals other than persons referred to in Section 2 (e) [under Section 2(g)]. The intention was to clearly distinguish personal guarantors to corporate debtors from other individuals. This was because Section 60 of the Code which deals with the adjudicating authority for corporate debtors too was partially amended in 2018. The amendment to Section 60(2) added that it applied to insolvency proceedings or liquidation/bankruptcy of a corporate guarantor or personal guarantor as the case may be, to a corporate debtor. The result of the amendment is that when a corporate debtor faces insolvency proceedings, insolvency of its corporate guarantor too can be triggered. Likewise, *a personal guarantor to a corporate debtor, facing insolvency,* can be subjected to insolvency proceedings. All this is to be resolved and decided by the NCLT. In other words, the amendment by Section 60(2) too achieved a unified adjudication through the same forum for resolution of issues and disputes concerning corporate resolution processes, as well as bankruptcy and insolvency processes in relation to personal guarantors to corporate debtors.

32. It was argued that Parliament felt compelled to separate personal guarantors from other individuals such as partnership firms, proprietorships and individuals. It was felt that if this separation, achieved through the amendment of 2018 were not realized, the insolvency resolution process of corporate debtors would have to be dealt with separately and independently of its promoters, managing directors, and directors who had furnished their personal guarantees to secure debts of corporate debtors. If insolvency resolution proceedings against corporate debtors were continued without this amendment, and without the unification, (of the adjudicatory body) on the default of the corporate debtor to a debt owed to a financial creditor, the entire machinery of the Code relating to the corporate debtor would work itself out, to

the exclusion of personal guarantors. This presented a peculiar problem, in that the resolution applicant, wishing to bid for takeover of the corporate debtor and operate it as a running concern would be faced with a huge liability, and the personal guarantor in most cases would be one of the individuals primarily responsible for the insolvency of the company, but would be out of the resolution process and have to be separately proceeded with. What therefore, has been effectuated by creating an independent provision, by separating personal guarantors of corporate debtors and by the same amendment, placing the personal guarantor's debt before one tribunal/forum namely the NCLT, is that such a forum would apply the procedure in Part III, in regard to personal guarantors for providing repayment of the entire debt for which the guarantee is furnished in the first place. If that debt is not repaid in the Part III, the personal guarantor would not stand discharged, but on the other hand, would himself be forced into bankruptcy proceedings.

33. It was submitted that though the procedure to be adopted by the NCLT and rules of insolvency (in relation to personal guarantors, under Part III of the Code) might be different from that relating to corporate debtors, unifying both processes under one forum enables the adjudicating body to have a clear vision of the extent of debt of the corporate debtor, its available assets and resources, as also the assets and resources of the personal guarantor. This would not have been viable, had the insolvency resolution process of the personal guarantor continued under Part III, before another body. The amendment, and the impugned notification would ensure a more optimal resolution process, as resolution applicants wishing to take over the management of corporate debtors, would ultimately find the process of taking over more attractive; besides, there will be more competition in regard to the bids proposed, and the total debt servicing of the corporate debtor might be lowered if the personal guarantor’s assets are also taken into account to mitigate the corporate debtor’s liabilities. The personal guarantor in such cases, who provides assets which have been charged against the amount advanced to his company would most probably not permit himself to be driven to bankruptcy, and would therefore, be more likely to arrange for payment of monies due from him to obtain a discharge by payment of the

amount outstanding to the bank or other financial creditor. In some cases, the creditor bank may be even prepared to take a haircut or forego the interest amounts so as to enable an equitable settlement of the corporate debt, as well as that of the personal guarantor. This would result in maximizing the value of assets and promoting entrepreneurship, which is one of the main purposes of the Code.

34. The learned Attorney General submitted that the expression "provision" has been defined in Black's Law Dictionary (10th edition at page 1420) as, *"a clause in a statute, contract or other legal instrument"/* He also relied upon the judgment in *Chettian Veettil Amman v. Taluk Land Board*[20] to the effect that:

> *"A provision is therefore a distinct rule or principle of law in a statute which governs the situation covered by it. So an incomplete idea, even though stated in the form of a section of a statute, cannot be said to be a provision for, by its incompleteness, it cannot really be said to provide a whole rule or principle for observance by those concerned. A provision of law cannot therefore be said to exist if it is incomplete, for then it provides nothing."*

He therefore urged that Section 2(e) being complete and distinct is a provision within the meaning of Section 1(3), and the Central government acted *intra vires* to bring it into force, as well as certain provisions in Part III of the code.

35. It was argued that the executive has the power to bring into force any one provision of a statute at different times for different purposes, and that the government can exercise this power to commence a provision for one purpose on one day and for the remaining purposes on a later date. He relied upon the following extract from *Bennion on Statutory Interpretation: A Code* (6th Edition, at page 257):

> *"Where power is given to bring an Act into force by order, it is usual to provide flexibility by enabling different provisions to be brought into force at different times. Furthermore any one provision may be brought into force at different times for different purposes. [..]*
> *Advantages. This method of commencement gives all the advantages of extreme flexibility. Before a new Act is brought into operation, any necessary regulations or other instruments which need to be made under it can be drafted. […]"*

20(1980) 1 SCC 499.

36. The learned Attorney General relied upon two Constitution bench decisions of this Court, which throw light on the power exercised by the Central Government under provisions, which permit notification of provisions bringing into force legislation in phases. The judgments cited were *Basant Kumar Sarkar v. Eagle Rolling Mills Ltd.*[21]and *Bishwambhar Singh v. State of Orissa*[22]. He emphasized that often, when new legislation is introduced, the impact it might have on the subject matter needs to be studied and it would be to the benefit of all that a stage by stage or region by region implementation is adopted. Furthermore the discretion exercised by the executive government is not unfettered.

37. The Attorney General urged that what follows from the above decisions is that Section 1(3) of the IBC has to be interpreted to give flexibility to the Central Government to implement provisions of the Code to meet the objectives of the enactment. He highlighted that the Central Government has in fact been enforcing the provisions of the Code in a phased manner and brought to the Court's notice that the provisions were notified on 10 different dates. It was submitted that the Code brought about a radical change in the existing laws applicable to debtor companies in that a single default by the corporate debtor above a threshold limit prescribed in the Code triggers an insolvency resolution process enabling a creditor to demand repayment. Heavy emphasis is placed by the Code on attempting resolution of the corporate debtor to maximize the value of the company and ensure that it continues as the going concern in the interests of the economy. It was keeping in mind these objectives that the impugned notification was issued appointing 1st of December 2019 as the date on which certain provisions of the IBC were to come into force, only so far as they relate to personal guarantors to corporate debtors. The submission that the impugned notification creates a classification was refuted. He stated that it only brought into force sections in Part III of the Code and Section 2(e) of the Code, from 1st December 2019. From that date, proceedings could be filed against personal guarantors to corporate debtors under the Code. The proceedings would be initiated

21(1964) 6 SCR 913.
221954 SCR 842.

before the NCLT, which would also be seized of resolution proceedings against the corporate debtors.

38. The Attorney General submitted that the Amendment Act brought about a classification after detailed deliberations and in the light of the report of the Working Group on Individual Insolvency, Regarding Strategy and Approach for implementation of Provisions of the Code to Deal with Insolvency of Guarantors to Corporate debtors, and Individuals having business. In this report of 2017, the working group recognized the dynamics and the interwoven connection between the corporate debtor and guarantor, who has extended his personal guarantee.

39. The Attorney General also relied upon the report of the Bankruptcy Law Reforms Committee ("BLRC") tasked with introducing a comprehensive framework for insolvency in bankruptcy. That committee recognized that personal guarantors were a category of entities to whom individual insolvency proceedings applied, and acknowledged the link between them and corporate debtors and found that under a common Code, there could be synchronous resolution. In this regard, paras 3.4.3 and 6.1 of the report of the committee, dated November 2015, were relied upon. [23] He pointed out that the synchronous resolution envisaged by the BLRC is found in the IBC in Section 5(22)and Section 60 (which fall in Part II of the Code), and Section

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23 The said extracts are as follows:

"3.4.3Designof the proposed Code: A unified Code -

The Committee recommends that there be a single Code to resolve insolvency for all companies, limited liability partnerships, partnership firms and individuals.

In order to ensure legal clarity, the Committee recommends that provisions in all existing law that deals with insolvency of registered entities be removed and replaced by this Code.

This has two distinct advantages in improving the insolvency and bankruptcy framework in India. The first is that all the provisions in one Code will allow for higher legal clarity when there arises any question of insolvency or bankruptcy. The second is that a common insolvency and bankruptcy framework for individual and enterprise will enable more coherent policies when the two interact. For example, it is common practice that Indian bank stake a personal guarantee from the firm's promoter when they enter into a loan with the firm. At present, there are a separate set of provisions that guide recovery on the loan to the firm and on the personal guarantee to the promoter. Under a common Code, the resolution can be synchronous, less costly and help more efficient recovery."

"6.1 The applicability of the Code

The Committee considers the following categories of entities to whom the individual insolvency and bankruptcy provisions shall apply:

- *Sole proprietorships where the legal personality of the proprietorship is not different from the individual who owns it.*
- *Personal guarantors*
- *Consumer finance borrowers …."*

179 (which falls in Part III of the Code) and submitted that- *firstly,* the term 'personal guarantors' is defined in Part II of the Code which provides for insolvency resolution and liquidation for corporate persons, Section 5(22) of the IBC defines "personal guarantor" to mean "an individual who is the surety in a contract of guarantee to a corporate debtor". *Secondly,* by reason of Section 60(1), the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons (including corporate debtors and their personal guarantors), shall be the NCLT. Section 60(2) mandates that where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before the NCLT, an application relating to the insolvency resolution or bankruptcy of a personal guarantor of such corporate debtor shall be filed before the NCLT. Section 60(4) vests the NCLT with all powers of the Debt Recovery Tribunal (DRT) as contemplated under Part III of the Code for the purpose of Section 60(2). Thirdly, under Section 179, the DRT is the Adjudicating Authority for insolvency resolution for all other categories of individuals and partnership firms. Section 179 itself is *"subject to Section 60"*. It was argued that common oversight of insolvency processes of the corporate debtor, its corporate guarantor, and personal guarantors, through one forum, under the Code, (which, by reason of Section 238, overrides all other laws), was the objective of the amendment of 2018 and the impugned notification. The learned Attorney General also pointed out to Section 30, which enacts that an Adjudicatory authority approved resolution plan binds all stakeholders. However, at the same time, in the event a resolution plan permits creditors to continue proceedings against the personal guarantor, then such personal guarantors would continue to be liable to discharge the debts owed to the creditor by the corporate debtor, which would be limited of course to the extent of debt that did not get repaid under the resolution plan. The Attorney General also relied on *Embassy Property Developments (P) Ltd. v. State of Karnataka*[24]where this court had examined and dealt with the interplay between Sections 5(22), 60 and 179 of the Code.

24(2020)13 SCC 308.

40. Mr. Tushar Mehta, Solicitor General of India, supported the submissions of the Attorney General. He too stressed that different provisions were brought into force on different dates. He highlighted that Section 1(3) of the Code confers wide powers enabling the Central Government to operationalize the Code in a subject-wise and (not necessarily in a contiguous manner) – particular sections, provisions or parts. He urged that the petitioner's interpretation of the statute is unduly narrow and would result in disrupting the Code. It was argued that Section 2 of the Code is not a definition clause – but rather acts as a lever to provide a mechanism for a phased and limited interpretation of the Code. He underlined, therefore, that Section 2 represents Parliamentary classification as regards classes of debtors who fall under the Code. The Solicitor General pointed out that before the 2018 amendment, Section 2(e) was generic and that the amendment classified three distinct types of entities. The personal guarantors to corporate debtors are no doubt individuals like others, but are in fact at the centre of insolvency of a corporate debtor. He submitted that a predominant reason for the insolvency of corporate debtors invariably is the role played by its directors, etc., who are personal guarantors and are or were, mostly at the helm of affairs of the corporate debtor itself.

41. The Solicitor General submitted that Part-II of the Code applied to all categories of corporate entities who are debtors. By virtue of Section 3(8), the corporate debtor is a corporate or juristic entity that owes a debt to any person. Likewise, the corporate guarantor under Section 3(7) is a corporate person who has stood guarantee to a corporate debtor. Before the impugned notification, proceedings in Part-II were confined to corporate debtors and only another class, i.e. corporate guarantors. Personal guarantors and corporate guarantors formed part of the same class inasmuch as they were guarantors since they had furnished guarantees to corporate debtors to secure their loans. Yet, personal guarantors being individuals were not included in Part-III, for functional and operational purposes. The Solicitor General submitted that Part-II outlines the mechanism involved in regard to insolvency resolution functionally and operationally designed for corporate bodies. This takes into its sweep a resolution professional, committee of creditors as third

parties taking over the debtor and taking crucial decisions for insolvency resolution. This statutory mechanism could not be applied to individuals as there is no question of "take over" of individuals. Individuals, who stand guarantee to corporate debtors and whose liability is co-terminus with such corporate debtors were therefore, outside the field of the Code. This resulted in an anomaly inasmuch as one set of guarantors to corporate debtors, i.e. individuals or personal guarantors were outside the purview of the Code whereas other set of guarantors, i.e. corporate guarantors were subjected to the provisions of the Code and could also be proceeded against in Part-II. As a result, a conscious decision was taken to enforce Part-III and operationalize the mechanism suitably for a class of individuals, i.e. personal guarantors. This decision was implemented through the impugned notification.

42. Apart from reiterating the submission of the Attorney General with regard to the flexibility in respect of notifying parts of the Code on different dates, having regard to the difference in subject matter and those governed by it, the learned Solicitor General also relied upon the decision reported as *J. Mitra and Co. Pvt. Ltd. v. Assistant Controller of Patents*[25]. He relied upon the report of the Working Group of Individual Insolvency (Regarding Strategy and Approach for Implementation of the Provisions of the Insolvency and Bankruptcy Code, 2016) to deal with insolvency of guarantors to corporate debtors and individuals having business, which had highlighted that in the absence of notification of provisions of the Code dealing with insolvency and bankruptcy of personal guarantors to corporate debtors and creditors are unable to effectuate the provisions of the Code and access remedies available under the Code. He submitted that this court has repeatedly held in several decisions that there is no compulsion that all provisions of law or an Act of Parliament or any other legislation should be brought into force at the same time. The legislature in its wisdom may clothe the executive with discretion to bring into force different parts of a statute on different dates, or in respect of different subject matters, or in different areas. Reliance was placed upon *Lalit Narayan Mishra Institute of Economic Development v. State Of Bihar & Ors. Etc*[26] and *Javed & Ors v. State of Haryana*

25(2008) 10 SCC 368.
26(1988) 2 SCC 433.

&Ors[27]. It was submitted that the Central Government, therefore, acted within its rights to confine the enforcement of the provisions of the Code to a class of individuals, i.e., to personal guarantors, without altering the identity and structure of the Code. It was submitted that this is permissible as it is within the larger power of enforcement of the statute, which encompasses the discretion to enforce the law in respect of a definite category, provided that such an act of enforcement would not alter the character of the Code. It was therefore, submitted that the enforcement of parts through the impugned notification – only in respect of personal guarantors in no way alters the identity or character of the Code.

43. The Solicitor General further submitted that the liability of a guarantor is co-extensive, joint and several with that of the principal borrower unless the contrary is provided by the contract. A discharge which a principal borrower may secure by operation of law (for instance on account of winding up or the process under the Code) does not however absolve the surety from its liability. Section 128 of the Indian Contract Act, 1872 ("Contract Act") provides that the liability of a principal debtor and a surety is co-extensive, unless provided to the contrary in the contract. The word *"co-extensive"* is an objective for the word 'extent' and it can relate only to the quantum of the principal debt. The Solicitor General relied on certain decisions in this regard.[28] It is stated that the creditor also has the liberty to proceed against the principal borrower and all sureties simultaneously; in this regard, he cited *Bank of Bihar Ltd. v. Dr. Damodar Prasad & Anr*[29]. It is submitted that no court or co-surety can limit such a right. For this proposition, reliance was placed on *State Bank of India v. Index port Registered*[30]and *Industrial Investment Bank of India v. Biswanath Jhunjhunwala*[31]. Counsel also submitted that a surety cannot alter or defer such a right of the creditor. Hence, until the debt is paid off to the creditor in entirety, the guarantor is not absolved of its joint and several liability to make payment of the amounts outstanding in favour of the creditor.

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27 (2003) 8 SCC 369.
28*Gopilal J Nichani v. Trac Inds. and Components Ltd*, AIR 1978 Mad. 134.
29AIR 1969 (1) SCR 620.
30AIR 1992 SC 1740.
31(2009) 9 SCC 478.

44. The Solicitor General submitted that neither the guarantor's obligations are absolved nor discharged in terms of Sections 133 to 136 of the Indian Contract Act, 1872, on account of release/discharge/composition or variance of contract which a principal borrower may secure by way of *operation of law* for instance as under the Code. The rights of a creditor against a guarantor continue even in the event of bankruptcy or liquidation, stressed the Solicitor General, and relied on *Maharashtra State Electricity Board Bombay v. Official Liquidator, High Court, Ernakulum & Anr.*[32], where this court considered the interplay of Sections 128 and 134 of the Contract Act in the facts of the case. In that case, a company whose advances were secured by a guarantee went into liquidation. The court held that the fact the principal debtor went into liquidation had no effect on the liability of the guarantor, because the discharge secured of the principal borrower was by "operation of law" and involuntary in nature. This was followed in *Punjab National Bank v. State of UP*[33]. This court held that:

> *"In our opinion, the principle of the aforesaid decision of this court is equally applicable in the present case. The right of the appellant to recover money from respondents Nos. 1,2 and 3 who stood guarantors arises out of the terms of the deeds of guarantee which are not in any way superseded or brought to a naught merely because the appellant may not be able to recover money from the principal-borrower. It may here be added that even as a result of the Nationalization Act the liability of the principal-borrower does not come to an end. It is only the mode of recovery which is referred to in the said Act."*

45. To a similar end, the judgment of the Calcutta High Court in *Gouri Shankar Jain v. Punjab National Bank & Anr.*[34] were relied on. It was held that none of the obligations of the surety under Section 133 to 139, 141 and 145 of the Contract Act are discharged on account of admission of a Section 7 application. As such, a discharge is on account of a statute and involuntary in nature. It was also argued that similarly, in terms of Section 31 of the Code, a resolution plan approved by the Adjudicating Authority is binding on all stakeholders including the guarantors, and

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32 1982 (3) SCC 358.
33 (2002) 5 SCC 80.
34 2019 SC Online Cal 7288 at para 34 and 35.

hence, the release/discharge/ composition or variance of contract with the principal borrower in terms of a resolution plan, is "statutorily" presumed to be consented by the guarantors in question. Therefore, by way of approval of a resolution plan, any release/discharge secured by the principal borrower or entering into a composition with the principal borrower (reference to Section 135 of the Contract Act) cannot discharge the guarantor in any manner what so ever. The judgment of this court in *State Bank of India v. V. Ramakrishnan &Ors.*[35] too was relied on, where the court recognized that a guarantor cannot seek a discharge of its liability on account of approval of a resolution plan, and the terms of such a plan can provide for the continuation of the debt of the guarantors. It was submitted that the continuation of a financial creditor's claim against a guarantor would not lead to double recovery of a claim as the financial creditor would be able to recover only the balance debt which remains outstanding and unrecovered from the principal borrower. There are enough safeguards against double recovery as provided under (a) the settled principle of contract law that simultaneous remedy against the co-obligors does not permit the creditor to recover more than the total debt owed to it, and (b) the provisions of the Code itself. The Solicitor General relied on the acknowledged practice, known as, the principle of "double dip" or the notion of dual nature of recovery by a creditor for the same debt from two entities - be it principal borrower and guarantor or co-guarantors or co-debtors. When a primary obligor and a guarantor are liable on account of a single claim, the creditor can assert a claim for the full amount owed against each debtor until the creditor is paid in full (that is it can double dip). This means that in case a portion of debt is recovered from one of the entities, either principal borrower or guarantor, the other would be liable for the unsatisfied amount of the claim, the principal borrower being joint and several with the surety. This principle is opposed to the principle prohibiting "double proof" in which the same debt is pursued against the same estate twice, leading to double payment. This right of double dip of a creditor was spoken of, in recent judgment *PAFCO 2916 INC. C/o Pegasus Aviation Finance Company vs. Kingfisher Airlines Limited*[36], where the decree holders

352018(17) SCC 394.
362016 SCC OnLine Kar 5991.

initiated simultaneous execution proceedings against both the principal debtor and the guarantor on the basis of the same decree, and the Executing Court *suo moto* raised the issue of maintainability to hold that both the execution petitions are not simultaneously maintainable. The High Court of Karnataka disagreed and held that the decree holders cannot be directed to amend their claims in each of the execution petitions to only half the decretal amount. Reliance was also placed on the judgment of the UK Supreme Court in *In Re Kaupthing Singer and Friedlander Ltd. (in administration)*[37].

46. Mr. Rakesh Dwivedi, learned senior counsel, appearing for the State Bank of India, urged that the substance of the petitioners' argument is that Section 1(3) does not empower the Central Government to enforce the provisions of Part III of the Code selectively to personal guarantors of Corporate Debtors only. The petitioners highlight that Part III applies to individuals and partnership firms in a composite manner, and the impugned notification dated 15.11.2019 splits up that unity by enforcing the provisions of Part III only upon personal guarantors of corporate debtors. It is urged that the submission that Section 1(3) does not confer the power of modification on the Central Government is presented by characterizing Section 1(3) as conditional legislation. He submits that Section 1(3) has two distinct dimensions. Parliament firstly conferred on the Central Government not only the power to determine the date on which the Code will come into force, but also empowers it to appoint different dates for different provisions of the Code. It was intended that all the provisions of the Code may not be enforced at once. Given the width of impact and with an eye on the objectives set out in the statement of objects and reasons and preamble, a staggered enforcement was anticipated.

47. Mr. Dwivedi stated that nothing much depends on the characterization of Section 1(3) as conditional or delegated legislation. Even conditional legislation involves a delegation of legislative power to the authority concerned. Under Section 1(3), the Central Government is only a delegate of the Parliament. In some cases,

37 2012 (1) All ER 883 Paras 11, 12, 53-54.

such provisions or provisions of broadly similar nature have been described by this court as conditional legislation, but equally in some cases such a power has been described as delegated legislation by different judges. Reliance was placed on *Delhi Laws Act, 1912, In re v. Part 'C' States (Laws) Act, 1950* (*supra*) and *Lachmi Narain v. Union of India*[38].

48. It was urged that provisions of diverse nature have been characterized as conditional legislation by this court. The cases relied upon by the Petitioners related to a challenge to the validity of legislative provisions on the ground of excessive delegation of legislative power. In *In re Delhi Laws*, the Central Government was expressly empowered to enforce certain laws with *"modifications and restrictions"*. The power of modification was held to be limited to such modifications as did not affect the identity or structure or the essential purpose of the law. This was a departure from the judgment of the Federal Court in *Jatindra Nath*[39]. However, in the case of *Lachmi Narain*, the notification issued by the Government was challenged, and this court held that the real question was whether the delegate acts within the general scope of the affirmative words which give the power, and without violating any express conditions or restrictions by which that power is limited. While *Jatindra Nath* involved extension of the life of a temporary Act, in the *Delhi Laws* case, the power under consideration was to extend the laws of Part C States to Part A States. Later, in *Raghubar Swarup v. State of U.P*[40] , the State Government was conferred power by Section 2 of U.P. Zamindari Abolition and Land Reforms Act, 1951, to extend the Act to other areas in the State. It involved selection of geographical area for applying the law. Similarly, in *Tulsipur Sugar Company*[41], the power was conferred to extend the U.P. Town Areas Act, 1914, to a notified area. Learned senior counsel argued that in *Sardar Inder Singh (supra)*, the power conferred on the executive to extend the life of a temporary Act, even when no outer limit is prescribed, was upheld. In *Bangalore Woollen, Cotton and Silk Mills v. Bangalore*

38(1976) 2 SCC 953, para 49.
39*Jatindra Nath Gupta v. State of Bihar* (1949-1950) 11 FCR 595.
40AIR 1959 SC 909 at p. 913
41(1980) 2 SCC 295.

Corporation[42], the power conferred on the Municipal Corporation to levy octroi on "other articles not specified in the Schedule" was upheld saying that it was more in the nature of conditional legislation. Reliance was also place on *ITC Bhadrachalam v. Mandal Revenue Officer*[43] , where the power to exempt any class of non-agricultural land and was upheld saying:

> *"the power to bring an Act into force as well as the power to grant exemption are both treated, without a doubt, as belonging to the category of conditional legislation".*

Learned counsel therefore urged that the line of demarcation between conditional and delegated legislation at times gets blurred.

49. While judging the validity of the legislations, this Court has examined the sufficiency of the guidance afforded by the legislative policy indicated in the relevant statute. For this, reliance was placed on *Edward Mills v. State of Ajmer*[44].All these establish that diverse provisions apart from those which empower the executive to enforce the Act or provisions of the Act have been characterized as conditional legislation and their validity and scope has been determined in the light of the text, context and purpose of the Act.

50. Learned counsel stated that a schematic, structural and purposive construction of Section 1(3) of the Code needs to be adopted to determine the scope of the power conferred on the Central Government by Section 1(3) of the Code. The Petitioners apply the rule of literal construction and seek to construe Section 1(3) in isolation, without reference to the context, scheme or purpose of the Code. It is submitted that the ambit of Section 1(3) should not be determined by merely applying the doctrine of literal construction. All provisions of the Code, including the enforcement provision should be construed in the context of the entire enactment and the approach should be schematic, structural and purposive. Furthermore, Section 1(3) should not be construed in isolation. It is well settled that a statute has to be read as a whole. The scope of the power under Section 1(3) of the Code cannot be expounded without

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42(1961)3 SCR 698.
43(1996) 6 SCC634.
44(1955) I SCR 735.

taking note of the scheme of the Code and the other related provisions. Counsel relied on the following observations of this court in *State of West Bengal v. Union of India*[45]

> "*In considering the true meaning of words or expression used by the legislature the court must have regard to the aim, object and scope of the statute to be read in its entirety. The court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire Statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."*

51. Legislative intent, it is urged, cannot be gathered by a bare mechanical interpretation of words or mere literal reading. The words are to be read and understood in the context of the scheme of the Act and the purpose or object with which the power is conferred. As Iyer, J. observed in *Chairman Board of Mining Examination v. Ramji*[46] "*to be literal in meaning is to see the skin and miss the soul. The judicial key to construction is the composite perception of the deha and the dehi of the provision"*. This has been followed in *Directorate of Enforcement v. Dipak Mahajan*[47]. Recently too, this court has moved on to accept purposive interpretation of the statute as the correct approach to ascertain legislative intent. If the given words can reasonably bear a construction which effectuates the purpose or object then that construction is to be preferred. In this regard, the decision in *Arcelor Mittal v. Satish Kumar Gupta*[48] and *Swiss Ribbons (supra)* were relied on.

52. Mr. Dwivedi stated that the impugned notification does not modify any provisions of the Code. By enforcing certain provisions of the Code by its seven clauses*" only in so far as they relate to personal guarantors to corporate debtors"*, the notification does not modify any legislative provision. It merely carries out the Parliamentary intention as expressed by the scheme, structure and purpose of the Code. Section 1(3), Section 2, Section 3(23), Section 5(5)(a) and (22), Section 14(3), Section 31(1)and in particular, Section 60 and Section 179 are indicative of the fact that the scheme and structure of the Code involves a parliamentary hybridization and

45(1964) ISCR 371, at para 69.
46 AIR 1977 SC 965 at p. 968.
47(1994) 3 SCC 440.
48(2019) 2 SCC 1, at para 27-29.

legislative fusion of the provisions of Part III, in so far as personal guarantors of corporate debtors are concerned. The object of this hybridization is to empower the NCLT to deal with the insolvency resolution and bankruptcy process of the corporate debtor along with the corporate guarantor and personal guarantor of the corporate debtor. Parliament is conscious of the fact that personal guarantors to corporate debtors are generally promoters or close relatives of corporate debtors, and in many cases, the corporate's indebtedness was due to acts misfeasance and siphoning of funds done by personal guarantors. Apart from this, personal guarantors to corporate debtors have a contractually agreed debt alignment with such debtors. They are coextensively as well as jointly and severally responsible for the same debt. As Parliament created a legislative hybridization, Part III of the Code had to be enforced by the Central Government under Section 1(3) with Parliamentary categorization through Section 2. The unifying of the forum for insolvency resolution/bankruptcy of the corporate debtor along with its personal guarantor is a Parliamentary dispensation and determination. Therefore, Section 1(3) empowers the Central Government to appoint different dates for different provisions.

53. Learned senior counsel highlighted Section 60(1), (2), (3) and (4) and urged that Parliament had merged the provisions of Part III with the process undertaken against the corporate debtors under Part II. The process of Part II and the provisions of Part III were legislatively fused for the purpose of proceedings against personal guarantors along with the corporate debtors. He argued that Section 179, the corresponding provision in Part III, begins by deploying the phrase *"subject to the provisions of Section 60"*. Section 60(4) incorporates the provisions of Part III, in relation to proceedings before the NCLT against personal guarantors. Counsel cited *Western Coalfield Ltd. v. Special Area Development Authority*[49]*; Baleshwar Dayal v. Bank of India*[50], and *Nagpur Improvement Trust v. Vasantrao*[51]. It was submitted that other individuals and partnership firms do not figure in this Parliamentary hybridization/fusion. Sections 2(e) and 2(g) when read together, would indicate that

49(1982) 1SCC 125, paras 3, 17, 18.
50(2016) 1 SCC 444. paras 6-8.
51(2002) 7SCC 657, para 31.

personal guarantors are also individuals. Act 8 of 2018 has brought about a trifurcation of the categories which were comprehended in Section 2(e) as it stood before the amendment. Section 179 also indicates that personal guarantors are individuals and Part III is applicable to them. In fact, it is by operation of the provisions in Chapter III of Part III that personal guarantors get the benefit of interim moratorium [Section 96] and moratorium [Section 101]. Personal guarantors do not get moratorium under Section 14. In this regard, reliance is placed on *V. Ramakrishnan* (*supra*). It is contended that the hybridization achieved by the impugned notification does not create any anomaly or problem in enforcement.

54. It was lastly contended that Section 78 is declaratory and states that Part III applies to individuals and partnership firms. It is made applicable to the various categories of individuals and partnership firms. Both Sections 2 and 78 carry the margin caption of "application". Section 2 commences with *"the provisions of this Code shall apply"* to the six categories and Section 78 also declares that *"Part III shall apply"* to the mentioned categories. Section 2 embraces the whole Code including Section 78 and other provisions enforced by the impugned notification, which clearly appoints the date of enforcement for Section 2(e) and other provisions, and Chapter III of Part III. There is no vivisection or dissection involved in the impugned notification.

55. Mr. K.V. Vishwanathan, learned senior counsel appearing for some respondents, argued that an overall reading of the provisions of the Code would show that personal guarantors to corporate debtors are a distinct class of individuals (by virtue of Section 2 (e) and Section 60); the classification is not achieved through the impugned notification, but by the amending Act of 2018, by Parliament. It is emphasized that the amendment ensured that the same forum (NCLT) deals with insolvency processes of corporate debtors, and also deals with similar issues relating to personal guarantors. The statute permits Part III application by NCLT *in relation to personal guarantors*. All that the impugned notification did was to operationalize these existing provisions of the Code. Learned senior counsel cited *Brij Sundar*

Kapoor v. First Additional Judge[52]to refute the petitioners' argument that the power under Section 1(3) power is a one-time power. He also relied on Section 14 of the General Clauses Act, 1897, which states that any power conferred by any Act or Regulation can be exercised *from time to time.*[53]

56. Mr. Vishwanathan cited *Raghubir Sarup v. State of UP*[54] and urged that the legislature acts within its rights in enacting a law and leaving it to the executive to apply it to different geographical areas at different times, depending upon various considerations. He also relied on *Khargram Panchayat Samiti v. State of West Bengal*[55] and argued that the power to bring into force different provisions, or different parts of a statute, on different dates, having regard to the subject matter, is part of the incidental power conferred by Parliament under Section 1 (3) of the Code.

57. Mr. Ritin Rai, learned senior counsel appearing for some respondents, urged that there is an inter connectedness between corporate debtors and personal guarantors, which was recognized by the 2018 amendment, evidenced by its Statement of Objects and Reasons. He stated that the power under Section 1(3) of the Code has been properly exercised. Mr. Rai submitted that like the impugned notification, another notification was issued on 01-05-2018[56]bringing into effect provisions of the Code in relation to a distinct class, i.e., financial service providers[57]. This was achieved by bringing into force Sections 227 to 229 of the Code. It was submitted that the discretion conferred on the executive, to experiment, and bring into force a legislation in phases, is part of the general pattern of legislative practice and it recognizes that it is not always wise or possible to enforce provisions of a new law, together, at all places, in respect of all that it seeks to cover.

IV The Provisions of the Code and the Impugned Notification

521989 (1) SCC 561.

53***"14. Powers conferred to be exercisable from time to time****—(1) Where, by any Central Act or Regulation made after the commencement of this Act, any power is conferred, then unless a different intention appears that power may be exercised from time to time as occasion requires.*

(2) This section applies also to all Central Acts and Regulations made on or after the fourteenth day of January, 1887."

54AIR 1959 SC 909.

551987 (3) SCC 82.

56SO 1817 (E).

57 Defined separately under Section 2 (17) of the Code.

58. On 28th May, 2016, the Code was published in the official gazette after its passage in Parliament. It has been hailed as a major economic measure, aimed at aligning insolvency laws with international standards. Parliament's previous attempts to ensure recovery of public debt, (through the Recovery of Debts due to Banks or Financial Institutions Act, 1993, hereafter "RDBFI Act") securitization (by the Securitization and Reconstruction and Enforcement of Security Interests Act, 2002 hereafter "SARFESI") deal with certain facets of corporate insolvency. These did not result in the desired consequences. The aim of the Code is to a) promote entrepreneurship and availability of credit; b) ensure the balanced interests of all stakeholders and c) promote time-bound resolution of insolvency in case of corporate persons, partnership firms and individuals.

The relevant provisions of the code are extracted below:

> ***"1. Short title, extent and commencement*** *-*
>
> *(1) This Code may be called the Insolvency and Bankruptcy Code, 2016.*
> *(2) It extends to the whole of India:*
> *Provided that Part III of this Code shall not extend to the State of Jammu and Kashmir.*[58]
> *(3) It shall come into force on such date1 as the Central Government may, by notification in the Official Gazette, appoint:*
>
> *Provided that different dates may be appointed for different provisions of this Code and any reference in any such provision to the commencement of this Code shall be construed as a reference to the commencement of that provision.*
>
> ***2. Application.*** *- The provisions of this Code shall apply to -*
>
> *(a) any company incorporated under the Companies Act, 2013 (18 of 2013) or under any previous company law;*
>
> *(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;*

58 Proviso omitted by the Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Order, 2020 *vide* S.O. 1123(E), dated 18th March 2020 (w.e.f. 18-3-2020).

(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008 (6 of 2009);

(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf;

(e) personal guarantors to corporate debtors;

(f) partnership firms and proprietorship firms; and

(g) individuals, other than persons referred to in clause (e).

3. ***Definitions*** *– In this Code, unless the context otherwise requires, -*
***

(7) "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;
(8) "corporate debtor" means a corporate person who owes a debt to any person;
***

(10) "creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree-holder;
(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;
***
(23) "person" includes—
(a) an individual;
(b) a Hindu Undivided Family;
(c) a company;
(d) a trust;
(e) a partnership;
(f) a limited liability partnership; and
(g) any other entity established under a statute, and includes a person resident outside India;
***

4. ***Application.*** *–*

(1) This Part shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one crore rupees.[59]
Provided that the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.

5. ***Definitions.*** *– In this part, unless the context otherwise requires –*

(1) "Adjudicating Authority", for the purposes of this Part, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013);
***

(5) "corporate applicant" means--
(a) corporate debtor; or
(b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
(d) a person who has the control and supervision over the financial affairs of the corporate debtor;
(5A) "corporate guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor;

***
(22) "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor"

59. Section 13 (Declaration of moratorium and public announcement) provides that the Adjudicating Authority shall (a) declare a moratorium for the purposes referred to under Section 14, (b) cause a public announcement of the initiation of corporate insolvency resolution process and call for the submission of claims under section 15, and (c) appoint an interim resolution professional in the manner as laid down in Section 16. A public announcement is to be made immediately after the appointment of the interim resolution professional. Section 14 (Moratorium) provides that on the insolvency commencement date, the Adjudicating Authority shall declare

59 W.e.f. 01.12.2016 vide Notification No. SO3594(E) dated 30.11.2016.

a moratorium prohibiting (a) the institution or continuation of suits or proceedings against the corporate debtor including execution of a judgment, decree, order, etc; (b) transferring, encumbering alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest; (c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; and (d) recovery of any property by an owner or lessor where such property is occupied by, or in the possession of the corporate debtor. Section 16 provides for the appointment and tenure of an interim resolution professional.

60. The highlight of the Code is the institutional framework it envisions. This framework consists of the regulator (Insolvency and Bankruptcy Board of India) insolvency professionals, information utilities and adjudicatory mechanisms (NCLT and National Company Law Appellate Tribunal-NCLAT). These institutions and structures are aimed at promoting corporate governance and also enable a time bound and formal resolution of insolvency. The major features of the Code include a two-step process -insolvency resolution for corporate debtors where the minimum amount of the default is ₹1,00,00,000/-. Two processes are proposed by the Code: a) Insolvency resolution process (Sections 6 to 32 of the Code) - In this, the creditors play a crucial role in evaluating and ultimately determining whether the debtor's business can be continued and if so, what are the choices for its revival; and b) Liquidation [Sections 33-54 Code] - If revival fails or is not a feasible option, then creditors can resolve to wind up the company. Upon winding up, assets of the debtor are to be distributed.

61. The insolvency resolution process under Section 6 can be initiated by the financial creditor [Section 7 of the Code] or operational creditor [subject to issuing a demand notice to the corporate debtor stating the amount involved in the default, under Section 8, of the Code] against the corporate debtor in the NCLT. Voluntary insolvency proceedings may also be initiated by the defaulting company, its employees or shareholders [Section 10 of the Code]. Once the resolution process begins, for the entire period, a moratorium is ordered by the NCLT on the debtor's

operations. During this period, no judicial proceedings can be initiated. There can also be no enforcement of securities, sale or transfer of assets or termination of essential contracts against the debtor. The next step is appointment of an Interim Resolution Professional under Section16 of the Code. The resolution professional has to work under the broad guidelines of the committee of creditors (or “COC”- in terms of Section 21 of the Code). The CoC includes all the financial creditors of the corporate debtor, except all related parties and operational creditors. Further, Section 22 of the Code provides that the CoC has to appoint the resolution professional. This resolution professional can also be the interim resolution professional. A vote of 75% of the voting share shall determine the decisions of the committee to opt for either a revival or liquidation (Section 30). The decision of the CoC is binding not only on debtors, but also on all the other creditors. Different types of revival plans include fresh finance, sale of assets, haircuts (i.e. acceptance by creditors of amounts lower than what is due to them), change of management etc. The committee should approve the resolution plan forwarded by the creditor. Only upon approval does the resolution professional forward the plan to the adjudicating authority for final approval. The resolution plan has to be approved by the NCLT; while doing so, it can consider objections to the resolution plan by any party interested in voicing such objections (i.e. operational creditors, financial creditors, etc).

62. Section 78(3) of the Code states that the adjudicating authority, for the purpose of Part III (that deals with insolvency Resolution and bankruptcy of individuals and partnership firms) would be the Debt Recovery Tribunal(DRT) that was established under the RDBFI Act. The adjudicating authority for corporate insolvency (companies, LLPs and limited liability entities), on the other hand, is the NCLT. The appeal from the NCLT lies to the National Company Law Appellate Tribunal (NCLAT). The appeal from the DRT lies to the Debt Recovery Appellate Tribunal (DRAT). This court hears appeals from both the NCLAT and the DRAT.

63. The provisions of the Code were brought into force through different notifications issued on different dates.The impugned notification issued in the Gazette of India Extraordinary, by the Ministry of Corporate Affairs, reads as follows:

"NOTIFICATION

New Delhi. the 15th November, 2019

S.O. 4126(E).- ln exercise of the powers conferred by sub-section (3) of section I of the Insolvency and Bankruptcy Code. 2016 (31 of 2016). the Central Government hereby appoints the 1st day of December,2019 as the date on which the following provisions of the said Code only in so far as they relate to personal guarantors to corporate debtors. shall come into force:

(1) clause (e) of section 2;
(2) section 78 (except with regard to fresh start process) and section 79;
(3) sections 94 to 187 (both inclusive);
(4) clause (g) to clause (i) of sub-section (2) of section 239;
(5) clause (m) to clause (zc) of sub-section (2) of section 239;
(6) clause (zn) to clause (zs) of' sub-section (2) of section 240; and
(7) Section 249.

[F. No. 30/21/2018-Insolvency Section]
GYANESHWAR KUMAR SINGH, Jt. Secy."

V Analysis and conclusions

64. The principal ground of attack in all these proceedings has been that the executive government could not have selectively brought into force the Code, and applied some of its provisions to one sub-category of individuals, i.e., personal guarantors to corporate creditors. All the petitioners in unison argued that the impugned notification, in seeking to achieve that end, is *ultra vires.* This argument is premised on the nature and content of Section 1(3), which the petitioners characterize to be *conditional legislation.* Unlike delegated legislation, they say, conditional legislation is a limited power which can be exercised once, in respect of the subject matter or class of subject matters. As long as different dates are designated for bringing into force the enactment, or in relation to different areas, the executive acts

within its powers. However, when it selectively does so, and segregates the subject matter of coverage of the enactment, it indulges in impermissible legislation. Reliance has been placed on several judgments of this court, with respect to the limits of such power- notably the decisions of the Privy Council in *Burah,* of the Federal Court in *Narothamdas Jethabai; In Re Delhi Laws Act, 1912, Jatindranath Gupta, Hamdard Dawakhana, Sabanayagam* and *Vasu Dev Singh.*

65. In *Burah,* the question arose in the context of a law made by the Indian Legislature removing the district of Garo Hills from the jurisdiction of the civil and criminal courts and the law applied to them, and to vest the administration of civil and criminal justice within the same district in such officers as the Lieutenant-Governor of Bengal might appoint for the purpose. By Section 9, the Lt. Governor was empowered from time to time, by notification in the Calcutta Gazette, to extend, *mutatis mutandis*, all or any of the provisions contained in the Act to the Jaintia, Naga and Khasi Hills and to fix the date of application thereof as well. By a notification, the Lt. Governor extended all the provisions, which was challenged by Burah, who was convicted of murder and sentenced to death. The High Court of Calcutta upheld his contention and held that Section 9 of the Act was *ultra vires* the powers of the Indian Legislature as it was a delegate of the Imperial Parliament and as such further delegation was not permissible. The Privy Council overturned that verdict, and held:

> *"Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason he called incomplete; as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem à fortiori to be an act of legislation to bring the law originally into operation by fixing the time for its commencement….."*

It was also observed that:

> *"Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with*

> *general legislative authority, a new legislative Power, not created or authorized by the Councils Act. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case."*

66. The next case cited was *Jatindra Nath Gupta* where the validity of Section 1(3) of the Bihar Maintenance of Public Order Act, 1948 was challenged on the ground that it empowered the Provincial Government to extend the life of the Act for one year with such modification as it could deem fit. The Federal Court held that the power of extension with modification is not a valid delegation of legislative power because it is an essential legislative function which cannot be delegated. The court observed, *inter alia*, that:

> *"The proviso contains the power to extend the Act for a period of one year with modifications, if any. It is one power and not two severable powers. The fact that no modifications were made in the Act when the power was exercised cannot help in determining the true nature of the power. The power to extend the operation of the Act beyond the period mentioned in the Act prima facie is a legislative power. It is for the Legislature to state how long a particular legislation will be in operation. That cannot be left to the discretion of some other body. The power to modify an Act of a Legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power. It is not a power confined to apply the Act subject to any restriction, limitation or proviso (which is the aim as an exception) only. It seems to me therefore that the power contained in the proviso is legislative."*

67. In the case of *In re Delhi Laws Act, 1912,* a reference made under Article 143 of the Constitution, saw a polyvocal court and a plurality of judicial opinion by the seven judge bench of this court. Three provisions were referred for the opinion of this court. Having regard to the majority view, it was held that essential legislative functions could not be delegated, and that the power to repeal an enactment, extended by the Central Government, to a part C state, could not be delegated. The majority's conclusion was that the power of repeal is legislative. The observations in some of the judgments are telling, and are reproduced below. Kania, CJ observed as follows:

> *"53. It is common ground that no law creating such bodies has been passed by the Parliament so far. Article 246 deals with the distribution of legislative powers between the Centre and the States*

but Part 'C' States are outside its operation. Therefore on any subject affecting Part 'C' States, Parliament is the sole and exclusive legislature until it passes an Act creating a legislature or a council in terms of Article 240. Proceeding on the footing that a power of legislation does not carry with it the power of delegation (as claimed by the Attorney-General), the question is whether Section 2 of the Part 'C' States (Laws) Act is valid or not. By that section the Parliament has given power to the Central Government by notification to extend to any part of such State (Part 'C' State), with such restrictions and modifications as it thinks fit, any enactment which is in force in Part A State at the date of the notification. The section although framed on the lines of the Delhi Laws Act and the Ajmer-Merwara Act is restricted in its scope as the executive Government is empowered to extend only an Act which is in force in any of the Part A States. For the reasons I have considered certain parts of the two sections covered by Questions 1 and 2 ultra vires, that part of Section 2 of the Part 'C' States (Laws) Act, 1950, which empowers the Central Government to extend laws passed by any legislature of Part A State, will also be ultra vires. To the extent the Central Legislature or Parliament has passed Acts which are applicable to Part A States, there can be no objection to the Central Government extending, if necessary, the operation of those Acts to the Province of Delhi, because the Parliament is the competent legislature for that Province. To the extent however the section permits the Central Government to extend laws made by any legislature of Part A State to the Province of Delhi, the section is ultra vires."

Mahajan, J had this to say:

"The section does not declare any law but gives the Central Government power to declare what the law shall be. The choice to select any enactment in force in any province at the date of such notification clearly shows that the legislature declared no principles or policies as regards the law to be made on any subject. It may be pointed out that under the Act of 1935 different provinces had the exclusive power of laying down their policies in respect to subjects within their own legislative field. What policy was to be adopted for Delhi, whether that adopted in the province of Punjab or of Bombay, was left to the Central Government. Illustratively, the mischief of such law-making may be pointed out with reference to what happened in pursuance of this section in Ajmer-Merwara. The Bombay Agricultural Debtors' Relief Act, 1947, has been extended under cover of this section to Ajmer-Merwara and under the power of modification by amending the definition of the word

'debtor' the whole policy of the Bombay Act has been altered. Under the Bombay Act a person is a debtor who is indebted and whose annual income from sources other than agricultural and manly labour does not exceed 33 per cent of his total annual income or does not exceed Rs 500, whichever is greater. In the modified statutes "debtor" means an agriculturist who owes a debt, and "agriculturist" means a person who earns his livelihood by agriculture and whose income from such source exceeds 66 per cent of his total income. The outside limit of Rs 500 is removed. The exercise of this power amounts to making a new law by a body which was not in the contemplation of the Constitution and was not authorized to enact any laws. Shortly stated, the question is, could the Indian Legislature under the Act of 1935 enact that the executive could extend to Delhi laws that may be made hereinafter by a legislature in Timbuctoo or Soviet Russia with modifications. The answer would be in the negative because the policy of those laws could never be determined by the law making body entrusted with making laws for Delhi. The Provincial Legislatures in India under the Constitution Act of 1935 qua Delhi constitutionally stood on no better footing than the legislatures of Timbuctoo and Soviet Russia though geographically and politically they were in a different situation.

****

271. *For reasons given for answering Questions 1 and 2 that the enactments mentioned therein are ultra vires the constitution in the particulars stated, this question is also answered similarly. It might, however, be observed that in this case express power to repeal or amend laws already applicable in Part-C States has been conferred on the Central Government. Power to repeal or amend laws is a power which can only be exercised by an authority that has the power to enact laws. It is a power coordinate and coextensive with the power of the legislature itself. In bestowing on the Central Government and clothing it with the same capacity as is possessed by the legislature itself the Parliament has acted unconstitutionally."*

B.K. Mukherjea, J, held as follows:

*"**342.** It will be noticed that the powers conferred by this section upon the Central Government are far in excess of those conferred by the other two legislative provisions, at least in accordance with the interpretation which I have attempted to put upon them. As has*

> *been stated already, it is quite an intelligible policy that so long as a proper legislative machinery is not set up in a particular area, the Parliament might empower an executive authority to introduce laws validly passed by a competent legislature and actually in force in other parts of the country to such area, with each modifications and restrictions as the authority thinks proper, the modifications being limited to local adjustments or changes of a minor character. But this presupposes that there is no existing law on that particular subject actually in force in that territory. If any such law exists and power is given to repeal or abrogate such laws either in whole or in part and substitute in place of the same other laws which are in force in other areas, it would certainly amount to an unwarrantable delegation of legislative powers. To repeal or abrogate an existing law is the exercise of an essential legislative power, and the policy behind such acts must be the policy of the legislature itself. If the legislature invests the executive with the power to determine as to which of the laws in force in a particular territory are useful or proper and if it is given to that authority to replace any of them by laws brought from other provinces with such modifications as it thinks proper, that would be to invest the executive with the determination of the entire legislative policy and not merely of carrying out a policy which the legislature has already laid down. Thus the power of extension, which is contemplated by Section 2 of Part-C States (Laws) Act, includes the power of introducing laws which may be in actual conflict with the laws validly established and already in operation in that territory…."*

68. It is apparent that the legislation which this court had to deal with had virtually granted what was described as a *carte blanche* in regard to whether to extend the provisions of any state Act, if so, which, the power of modification, as well as the power of repeal. The judges were agreed that within the broad remit of delegated legislative power, as long as essential legislative powers were not delegated, the provisions would not be *ultra vires.* However, the power to extend laws that Parliament had not enacted (as it was competent to enact, in respect of Part C states) as well as the power to repeal, was held to be legislative in content. Therefore, the court held such power to be *ultra vires.* This is evident from the following Opinion of the court, recorded as a result of the majority judgment:

> *"OPINION OF THE COURT*

> *357. The Court held by a majority that the provisions contained in Questions 1 and 2 are not ultra vires the legislatures which passed the Act containing those provisions. As regards the section mentioned on Question 3, the first part was held to be intra vires, but the second portion, which is in the following terms:*
> *"provision may be made in any enactment so extended, for the repeal or amendment of any corresponding law (other than a Central Act) which is for the time being applicable to that Part-C State", is ultra vires the Indian Parliament which passed the Act."*

69. In *Narottamdas Jethabhai* (*supra*) three issues were involved; one of them concerned the question of empowering the executive to designate a court to exercise jurisdiction upto ₹ 25,000/-, i.e. Section 4 of the Bombay City Civil Courts Act[60]. The contention successfully raised before the High Court was that once the legislature had conferred jurisdiction upto a pecuniary limit of ₹10,000/- to the City Civil Court, delegating the power to increase that jurisdiction was *ultra vires.* The argument was repelled by a majority of judges (Mahajan, Fazal Ali and B.K. Mukherjea, JJ). Fazal Ali, J stated that

> *"22. It is contended that this section is invalid, because the Provincial Legislature has thereby delegated its legislative powers to the Provincial Government which it cannot do. This contention does not appear to me to be sound. The section itself shows that the Provincial Legislature having exercised its judgment and determined that the New Court should be invested with jurisdiction to try suits and proceedings of a civil nature of a value not exceeding Rs. 25,000, left it to the Provincial Government to determine when the Court should be invested with this larger jurisdiction, for which the limit had been fixed. It is clear that if and when the New Court has to be invested with the larger jurisdiction, that jurisdiction would be due to no other authority than the Provincial Legislature itself and the court would exercise that jurisdiction by virtue of the Act itself. As several of my learned colleagues have pointed out, the case of Queen v. Burah [3 A.C. 889.], the authority of which was not questioned before us, fully covers the contention raised, and the impugned provision is an*

60 *"Subject to the exceptions specified in Section 3, the Provincial Government, may by notification in the Official Gazette, invest the City Civil Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature, arising within the Greater Bombay and of such value not exceeding Rs. 25,000 as may be specified in the notification."*

> *instance of what the Privy Council has designated as conditional legislation, and does not really delegate any legislative power but merely prescribes as to how effect is to be given to what the Legislature has already decided. As the Privy Council has pointed out, legislation conditional on the use of particular powers or on the exercise of a limited discretion entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing, and in many instances it may be highly convenient and desirable."*

Mahajan, J observed as follows:

> *"The fixation of the maximum limit of the court's pecuniary jurisdiction is the result of exercise of legislative will, as without arriving at this judgment it would not have been able to determine the outside limit of the pecuniary jurisdiction of the new court. The policy of the legislature in regard to the pecuniary jurisdiction of the court that was being set up was settled by Sections 3 and 4 of the Act and it was to the effect that initially its pecuniary jurisdiction will be limited to Rs. 10,000 and that in future if circumstances make it desirable - and this was left to the determination of the Provincial Government - it could be given jurisdiction to hear cases up to the value of Rs. 25,000. It was also determined that the extension of the pecuniary jurisdiction of the new court will be subject to the provisions contained in the exceptions to Section 3. I am therefore of the opinion that the learned Chief Justice was not right in saying that the legislative mind was never applied as to the conditions subject to which and as to the amount up to which the new court could have pecuniary jurisdiction. All that was left to the discretion of the Provincial Government was the determination of the circumstances under which the new court would be clothed with enhanced pecuniary jurisdiction. The vital matters of policy having been determined, the actual execution of that policy was left to the Provincial Government and to such conditional legislation no exception could be taken."*

Again, the court upheld the exercise of executive discretion on the ground that there was proper legislative framework and guidance to the government, with respect to conferring jurisdiction upon the City Civil Court, beyond the limit enacted by Section 3, and Section 4 was enacted to achieve that objective.

70. In *Sardar Inder Singh,* the validity of an ordinance which was extended by two notifications was involved. Section 4 of the original ordinance enacted that as long as it (the ordinance) was in force:

> *"no tenant shall be liable to ejectment or dispossession from the whole or a part of his holding in such area on any ground whatsoever."*

The validity of this ordinance, enacted originally in 1949 (and in force for two years), was extended twice, for two years each (by notifications dated June 14, 1951 and June 20, 1953). The Legislative Assembly of Rajasthan was constituted and came into being on March 29, 1952. Till then, the Rajpramukh was vested with legislative authority. On October 15, 1955, a new enactment, the Rajasthan Tenancy Act No. III of 1955 came into force, and the relationship between landlords and tenants was governed by it. Negativing the challenge to the extension of the ordinance, this court ruled, (after considering *Burah*, *In re Delhi Laws Act and Jatindra Nath Gupta*) that:

> *"In the present case, the preamble to the Ordinance clearly recites the state of facts which necessitated the enactment of the law in question, and Section 3 fixed the duration of the Act as two years, on an understanding of the situation as it then existed. At the same time, it conferred a power on the Rajpramukh to extend the life of the Ordinance beyond that period, if the state of affairs then should require it. When such extension is decided by the Rajpramukh and notified, the law that will operate is the law which was enacted by the legislative authority in respect of " place, person, laws, powers ", and it is clearly conditional and not delegated legislation as laid down in The Queen v. Burah ([1878] 5 I.A. 178), and must, in consequence, be held to be valid. It follows that we are unable to agree with the statement of the law in Jatindra Nath Gupta v. The, State of Bihar([1949] F.C.R. 595) that a power to extend the life of an enactment cannot validly be conferred on an outside authority. In this view, the question as to the permissible limits of delegation of legislative authority on which the judgments in In re The Delhi Laws Act, 1912 ([1951] S.C.R. 747), reveal a sharp conflict of opinion does not arise for consideration, and we reserve our opinion thereon.*
>
> *It is next contended that the notification dated June 20, 1953, is bad, because after the Constitution came into force, the*

> *Rajpramukh derived his authority to legislate from Article 385, and that under that Article his authority ceased when the Legislature of the State was constituted, which was in the present case, on March 29, 1952. This argument proceeds on a misconception as to the true character of a notification issued under Section 3 of the Ordinance. It was not an independent piece of legislation such as could be enacted only by the then competent legislative (1).authority of the State, but merely an exercise of a power conferred by a statute which had been previously enacted by the appropriate legislative authority. The exercise of such a power is referable not to the legislative competence of the Rajpramukh but to Ordinance No- IX of 1949, and provided Section 3 is valid, the validity of the notification is co- extensive with that of the Ordinance. If the Ordinance did not come to an end by reason of the fact that the authority of the Rajpramukh to legislate came to an end-and that is not and cannot be disputed-neither did the power to issue a notification which is conferred therein. The true position is that it is in his character as the authority on whom power was conferred under Section 3 of the Ordinance that the Rajpramukh issued the impugned notification, and not as the legislative authority of the State. This objection should accordingly be overruled."*

71. In *Hamdard Dawakhana (supra),* the validity of Section 3(d) of the Drug and Magic Remedies (Objectionable Advertisement) Act, 1954 was in issue. Section 16(1) of that Act conferred power on the government to frame rules, among others, by Section 16(2)(a) *"to specify any disease or condition to which the provisions of Section 3 shall apply"* and by Section 16(2)(b) *"prescribe the manner in which advertisement of articles or things referred to in cl. (c) of sub-s. (1) of Section 14 may be sent confidentially."* The Central Government argued that Section 3(d), which empowered it to notify *"any other disease or condition which maybe specified in the rules made under this Act"* was an instance of conditional legislation. The relevant discussion on conditional legislation, in the judgment, is extracted below:

> *"The distinction between conditional legislation and delegated legislation is this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective; Hampton & Co. v. U.S. (1) and the latter involves delegation of rule making power which constitutionally may be exercised by the administrative agent. This means that the*

> *legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner -of carrying its legislation into effect as also the determination of the area to which it is to extend."*

The court held that the impugned provision was impermissible delegation as it lacked legislative guidance as regards the exercise of executive power:

> *"The question for decision then is, is the delegation constitutional in that the administrative authority has been supplied with proper guidance. In our view the words impugned are vague. Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule. It is not stated what facts or circumstances are to be taken into consideration to include a particular- condition or disease. The power of specifying diseases and conditions as given in s. 3(d) must therefore be held to be going beyond permissible boundaries of valid delegation. As a consequence the Schedule in the rules must be struck down."*

72. In *Sabanayagam* (*supra*) the *vires* of a notification issued under Section 36 of the Payment of Bonus Act, exempting the concerned statutory board from its coverage, was in issue. This court interpreted the notification as one operating from the date of its issue, thus resulting in the application of the Payment of Bonus Act for previous accounting years. As to the nature of the power (to exempt), this court, after considering various previous decisions, held that there are three broad categories of conditional legislation, and elaborated as follows:

> *"In the first category when the Legislature has completed its task of enacting a Statute, the entire superstructure of the legislation is ready but its future applicability to a given area is left to the subjective satisfaction of the delegate who being satisfied about the conditions indicating the ripe time for applying the machinery of the said Act to a given area exercises that power as a delegate of the parent legislative body. Tulsipur Sugar Co. 's case (supra) is an*

illustration on this point. When the Act itself is complete and is enacted to be uniformly applied in future to all those who are to be covered by the sweep of the Act, the Legislature can be said to have completed its task. All that it leaves to the delegate is to apply the same uniformly to a given area indicated by the parent Legislature itself but at an appropriate time. This would be an act of pure and simple conditional legislation depending upon the subjective satisfaction of the delegate as to when the said Act enacted and completed by the parent Legislature is to be made effective. As the parent Legislature itself has laid down a binding course of conduct to be followed by all and sundry to be covered by the sweep of the legislation and as it has to act as a binding rule of conduct within that sweep and on the basis of which all their future actions are to be controlled and guided, it can easily be visualised that of the parent Legislature while it enacted such law was not required to hear the parties likely to be affected by the operation of the Act, is delegate exercising an extremely limited and almost ministerial function as an agent of the principal Legislature applying the Act to the area at an appropriate time is also not supposed and required to hear all those who are likely to be affected in future by the binding code of conduct uniformly laid down to be followed by all within the sweep of the Act as enacted by the parent Legislature.

However, there may be second category of conditional legislations wherein the delegate has to decide whether and under what circumstances a completed Act of the parent legislation which has already come into force is to be partially withdraw from operation in a given area or in given cases so as not to be applicable to a given class of persons who are otherwise admittedly governed by the Act. When such a power by way of conditional legislation is to be exercised by the delegate a question may arise as to how the said power can be exercised. In such an eventuality if the satisfaction regarding the existence of condition precedent to the exercise of such power depends upon pure subjective satisfaction of the delegate and if such an exercise is not required to be based on the prima face proof of factual data for ad against such an exercise and if such an exercise to uniformly apply in future to a given common class of subjects to be governed by such an exercise and when such an exercise is not to be confined to individual cases only, then even in such category of cases while exercising conditional legislative powers the delegate may not be required to have an objective assessment after considering rival versions on the data placed before it for being taken into consideration by it in exercise of such power of conditional legislation. For example if a tariff is

fixed under the Act and exemption power is conferred on the delegate whether to grant full exemption or partial exemption from the tariff rate it may involve such an exercise of conditional legislative function wherein the exercise has to be made by the delegate on its own subjective satisfaction and once that exercise is made whatever exemption is granted or partially granted or partially withdrawn from time to time would be binding on the entire class of persons similarly situated and who will be covered by the seep of such exemptions, partial or whole, and whether granted or withdrawn, wholly or partially, and in exercise of such a power there may be no occasion to hear the parties likely to be affected by such an exercise. For example from a settled tariff say if earlier 30% exemption is granted by the delegate and then reduced to 20% all those who are similarly situated and covered by the sweep of such exemption and its modification cannot be permitted to say in the absence of any statutory provision to that effect that they should be given a hearing before the granted exemption is wholly or partially withdrawn.

In the aforesaid first two categories of cases delegate who exercises conditional legislation acting on its pure subjective satisfaction regarding existence of conditions precedent for exercise of such power may not be required to hear parties likely to be affected by the exercise of such power. Where the delegate proceeds to fill p the details of the legislation for the future - which is part of the integrated action of policy-making for the future, it is part of the future policy and is legislative. But where he merely determines either subjectively or objectively - depending upon the "conditions" imposed in the statute permitting exercise of power by the delegate - there is no legislation involved in the real sense and therefore, in our opinion, applicability of principles of fair play, consultation or natural justice to the extent necessary cannot be said to be foreclosed. Of course, the fact that in such cases of `conditional legislation' these principles are not foreclosed does not necessarily mean that they are always mandated. In a case of purely ministerial function or in a case where no objective conditions are prescribed and the matter is left to the subjective satisfaction of the delegate (as in categories one and two explained above) no such principles of fair play, consultation or natural justice could be attracted. That is because the very nature of the administrative determination does not attract these formalities and not because the determination is legislative in character. There may also be situations where the persons affected are

> *unidentifiable class of persons or where public interest or interests of State etc. preclude observations of such a procedure. (….)"*

73. In another decision, *Vasu Dev Singh*, the court had to decide upon the validity of a notification issued by the Administrator of Chandigarh dated 7.11.2002, directing that the provision of the East Punjab Urban Rent Restriction Act, 1949, (which was extended by Parliament to Chandigarh by the East Punjab Urban Rent Restriction Act (Extension to Chandigarh) Act 1974) was not applicable to buildings and rented lands whose monthly rent exceeded ₹1500. The Administrator justified the notification as an instance of conditional legislation since the power under Section 3 enabled him to exempt provisions of the Act to classes of buildings.[61] This court disagreed with the contention that the exemption was in the exercise of conditional legislative power:

> *"16. We, at the outset, would like to express our disagreement with the contentions raised before us by the learned counsel appearing on behalf of the respondents that the impugned notification is in effect and substance a conditional legislation and not a delegated legislation. The distinction between conditional legislation and delegated legislation is clear and unambiguous. In a conditional legislation the delegatee has to apply the law to an area or to determine the time and manner of carrying it into effect or at such time, as it decides or to understand the rule of legislation, it would be a conditional legislation. The legislature in such a case makes the law, which is complete in all respects but the same is not brought into operation immediately. The enforcement of the law would depend upon the fulfilment of a condition and what is delegated to the executive is the authority to determine by exercising its own judgment as to whether such conditions have been fulfilled and/or the time has come when such legislation should be brought into force. The taking effect of a legislation, therefore, is made dependent upon the determination of such fact or condition by the executive organ of the Government. Delegated legislation, however, involves delegation of rule-making power of legislation and authorises an executive authority to bring in force such an area by reason thereof. The discretion conferred on the executive by way of delegated legislation is much wider. Such power to make rules or regulations, however, must be exercised within the four corners of the Act. Delegated legislation, thus, is a*

61 *"3. Exemptions.—The Central Government may direct that all or any of the provisions of this Act, shall not apply to any particular building or rented land or any class of buildings or rented lands."*

> *device which has been fashioned by the legislature to be exercised in the manner laid down in the legislation itself. By reason of Section 3 of the Act, the Administrator, however, has been empowered to issue a notification whereby and whereunder, an exemption is granted for application of the Act itself."*

After considering a large number of decisions, including those where this court had upheld exemptions issued by different states based on rent, this court concluded that there was insufficient justification for the impugned exemption notification, and that it was *ultra vires* the power conferred upon the Administrator:

> *"150. Moreover, the notification has not been issued for a limited period. It will have, therefore, a permanent effect. Submission of Mr Nariman that having regard to the provisions of the General Clauses Act, the same can be modified, amended at any time and withdrawn, cannot be accepted for more than one reason. Firstly, the respondent proceeded on the basis that the said notification has been issued with a view to give effect to the National Policy i.e. amendments must be carried out until a new Rent Act is enacted. Whether the Act would be enacted or not is a matter of surmises and conjectures. It would be again a matter of legislative policy which was not within the domain of the Administrator. Secondly, the Administrator in following the National Policy proceeded on the basis that the provisions of the Act must ultimately be repealed. When steps are taken to repeal the Act either wholly or in part, the intention becomes clear i.e. the same is not meant to be given a temporary effect. When the repealed provisions are sought to be brought back to the statute-book, it has to be done by way of fresh legislation. (…) What can be done in future by another authority cannot be a ground for upholding an executive act."*

74. A close reading of the decisions cited on behalf of the petitioners would reveal that the power to extend laws has been upheld. As B.K. Mukherjea observed, in *In re Delhi Laws Act, 1912 (supra):*

> *"it is quite an intelligible policy that so long as a proper legislative machinery is not set up in a particular area, the Parliament might empower an executive authority to introduce laws validly passed by a competent legislature and actually in force in other parts of the country to such area, with each modifications and restrictions as the authority thinks proper, the modifications being limited to local adjustments or changes of a minor character."*

Lord Selborne, in *Burah (supra)*held such power to be unexceptionable, saying that

> *"Legislation, conditional on the use of particular powers, or on the executive of a limited discretion, entrusted by the Legislature to persons in whom it places confidence is no uncommon thing; and, in many circumstances, it may be highly convenient"*

In *Jitendra Nath Gupta (supra),* what the Federal Court held objectionable was the conferment of *power to extend provisions of an enactment, beyond its expressed duration or time*:

> *"It is for the Legislature to state how long a particular legislation will be in operation. That cannot be left to the discretion of some other body. The power to modify an Act of a Legislature, without any limitation on the extent of the power of modification, is un-doubtedly a legislative power."*

The plurality of judgments, as well as opinions rendered in *In Re Delhi Laws Act, 1912,* makes that decision a somewhat complex reading. Yet, the final *per curiam* opinion of the court was that the power to extend, modify or repeal enactments of Part C States, in respect of matters which the Parliament had *not directly enacted*, amounted to excessive legislation. Additionally, exception was taken to the power to repeal, being delegated, as it was an essential legislative power.

75. In *Sardar Inder Singh (supra),* the extension of rent restriction ordinances was in question; the court did not apply the rule in *Jatindra Nath Gupta (supra)*, and ultimately held that the true position was that the Rajpramukh *"in his character as the authority on whom power was conferred under Section 3 of the Ordinance that the Rajpramukh issued the impugned notification, and not as the legislative authority of the State."* In *Hamdard Dawakhana (supra),* the argument that Section 3 was conditional legislation was *negatived* and it was held to be an instance of excessive delegation, where Parliament did not indicate any guidance for inclusion of particular instances in the schedule, leaving it to the executive government to decide the issue, in what could be an arbitrary manner. *Vasu Dev Singh (supra)*was a case where the court held that the power to exclude from application of the enactment, based on the

quantum of rent, was premised on the Administrator's opinion that the legislation would be repealed, having regard to a National Policy. Moreover, the notification excluded the application of the Act in relation to premises based on rent and had a permanent character. This court held that the notification was an instance of impermissible legislation by the executive. It is evident that the court ruled in *Jitendra Nath Gupta, In re Delhi Laws Act* and *Vasu Dev Singh* that the exercise of extending an enactment beyond the time of its designated application by the legislature; the power of extension, modification and repeal of laws made by other legislative bodies; and the limiting the application of an enactment based on a quantification (an amount of rent) were legislative exercises, beyond the powers conferred. They *stricto sensu* fall in the category of *"general legislative authority, a new legislative Power, not created or authorized"* by the parent legislation, (*per Burah, supra*). In *Hamdard Dawakhana*, the power to *include* new drugs, was held to be *uncanalized*, i.e. without any legislative guidance. The decision did not involve bringing into force provisions of an enactment, or exclusion, but inclusion within its fold, *without any statutory guidance* on new drugs. The case therefore involved delegated legislation.

76. It would now be useful to analyse some decisions cited by the respondents. In *Bishwambhar Singh (supra)*the power under Section 3(1) of the Orissa Estates Abolition (Amendment) Act, 1952 was involved. The provision enabled the state to declare that an estate had – in terms of notifications issued in that regard- vested in it, free from all encumbrances. This court negatived the challenge to that provision:

> *"77. The long title of the Act and the two preambles which have been quoted above clearly indicate that the object and purpose of the Act is to abolish all the rights, title and interest in land of intermediaries by whatever name known. This is a clear enunciation of the policy which is sought to be implemented by the operative provisions of the Act. Whatever discretion has been vested in the State Government under Section 3 or Section 4 must be exercised in the light of this policy and, therefore, it cannot be said to be an absolute or unfettered discretion, for sooner or later all estates must perforce be abolished. From the very nature of*

> *things a certain amount of discretionary latitude had to be given to the State Government. It would have been a colossal task if the State Government had to take over all the estates at one and the same time. It would have broken down the entire administrative machinery. It could not be possible to collect sufficient staff to take over and discharge the responsibilities. It would be difficult to arrange for the requisite finance all at once. It was, therefore, imperative to confer some discretion on the State Government. It has not been suggested or shown that in practice any discrimination has been made."*

In *Basant Kumar Sarkar (supra)*, the power in question was Section 1(3) of the Employees State Insurance Act, which enabled the government to extend the enactment to establishments. This court negatived that the power was *ultra vires*:

> *"4. The argument is that the power given to the Central Government to apply the provisions of the Act by notification, confers on the Central Government absolute discretion, the exercise of which is not guided by any legislative provision and is, therefore, invalid. The Act does not prescribe any considerations in the light of which the Central Government can proceed to act under Section 1(3) and such un-canalised power conferred on the Central Government must be treated as invalid. We are not impressed by this argument. Section 1(3) is really not an illustration of delegated legislation at all; it is what can be properly described as conditional legislation. The Act has prescribed a self-contained Code in regard to the insurance of the employees covered by it; several remedial measures which the legislature thought it necessary to enforce in regard to such workmen have been specifically dealt with and appropriate provisions have been made to carry out the policy of the Act as laid down in its relevant sections. Section 3(1) of the Act purports to authorise the Central Government to establish a Corporation for the administration of the scheme of Employees' State Insurance by a notification. In other words, when the notification should be issued and in respect of what factories it should be issued, has been left to the discretion of the Central Government and that is precisely what is usually done by conditional legislation. [.....]*
>
> *5. […] In the very nature of things, it would have been impossible for the legislature to decide in what areas and in respect of which factories the Employees' State Insurance Corporation should be established. It is obvious that a scheme of this kind, though very beneficent, could not be introduced in the whole of the country all*

> *at once. Such beneficial measures which need careful experimentation have some times to be adopted by stages and in different phases…"*

77. The next decision cited was *Lachmi Narain (supra)*. Here, the Central Government was empowered by Section 2 of the Part C States (Laws) (Act), 1950 to extend through a notification any enactment in Part A States. The Central Government had issued a Notification in 1951 to extend the provisions of the Bengal Finance (Sales Tax) Act to the then Part C State of Delhi. In 1957, a notification in exercise of this power under Section 2 was issued modifying the earlier notification resulting in withdrawal of certain benefits. In the background of these facts, a three-judge bench of this Court dealing with an argument on whether the power to extend with or without modifications any enactment was conditional or delegated legislation, made the following observations:

> "*49. Before proceeding further, it will be proper to say a few words in regard to the argument that the power conferred by Section 2 of the Laws Act is a power of conditional legislation and not a power of 'delegated' legislation. In our opinion, no useful purpose will be served to pursue this line of argument because the distinction propounded between the two categories of legislative powers makes no difference, in principle. In either case, the person to whom the power is entrusted can do nothing beyond the limits which circumscribe the power; he has to act – to use the words of Lord Selbourne – "within the general scope of the affirmative words which give the power" and without violating any "express conditions or restrictions by which that power is limited". There is no magic in a name. Whether you call it the power of "conditional legislation" as Privy Council called it in Burah's case (supra), or 'ancillary legislation' as the Federal Court termed it in Choitram v. C. I. T., Bihar, or 'subsidiary legislation' as Kania, C. J. Styled it, or whether you camouflage it under the veiling name of 'administrative or quasi-legislative power' – as Professor Cushman and other authorities have done it – necessary for bringing into operation and effect an enactment, the fact remains that it has a content, howsoever small and restricted, of the law-making power itself. There is ample authority in support of the proposition that the power to extend and carry into operation an enactment with necessary modifications and adaptations is in truth and reality in the nature of a power of delegated legislation."*

After these observations, this court held that the power of modification could not have been exercised by the Government in the manner that it did, and observed as follows:

> *"60. The power given by Section 2 exhausts itself on extension of the enactment; it cannot be exercised repeatedly or subsequently to such extension. It can be exercised only one, simultaneously with the extension of the enactment. This is one dimension of the statutory limits which circumscribe the power. The second is that the power cannot be used for the purpose other than that of extension. In the exercise of this power, only such "restrictions and modifications can be validly engrafted in the enactment sought to be extended, which are necessary to bring it into operation and effect in the Union territory. "Modifications" which are not necessary for, or ancillary and subservient to the purpose of extension, are not permissible. And, only such "modifications" can be legitimately necessary for such purpose as are required to adjust, adapt and make the enactment suitable to the peculiar local conditions of the Union territory for carrying it into operation and effect. In the context of the section, the words "restrictions and modifications" do not cover such alterations as involve a change in any essential feature, of the enactment or the legislative policy built into it. This is the third dimension of the limits that circumscribe the power.*
>
> *61. It is true that the word "such restrictions and modifications as it thinks fit" if construed literally and in isolation, appear to give unfettered power of amending and modifying the enactment sought to be extended. Such a wide construction must be eschewed lest the very validity of the section becomes vulnerable on account of the vice of excessive delegation. Moreover, such a construction would be repugnant to the context and the content of the section, read as a whole, and the statutory limits and conditions attaching to the exercise of the power. We must, therefore, confine the scope of the words "restrictions and modifications" to alterations of such a character which keep the inbuilt policy, essence and substance of the enactment sought to be extended, intact, and introduce only such peripheral or insubstantial changes which are appropriate and necessary to adapt and adjust it to the local conditions of the Union territory."*

78. It would be useful at this stage to set out in tabular form, the various dates on which the provisions of the Code were brought into force. The chart is set out below:

SI. No.	Date	S.O.	Provisions brought into force
1.	05.08.2016	S.O. 2618(E)	Sections 188 to 194
2.	19.08.2016	S.O. 2746(E)	Clauses (1), (5), (22), (26), (28) and (37) of section 3, sections 221, 222, 225, 226, 230, 232and 233, sub-section (1) and clause (zd) of sub-section (2) of section 239, sub-section (1) and clause (zt) of sub-section (2) of section 240, sections 241 and 242
3.	01.11.2016	S.O.3355(E)	Clause (2) to clause(4), clause (6) to clause (21), clause (23) to clause (25), clause (27)clause (29) to clause (36) of section 3, sections 196, 197 and 223, clause(ze) to clause (zh),clause (zl) to clause (zm) of sub-section (2) of section 239, clause (a) to clause (zm),clause (zu) to clause (zzzc) of sub-section (2) of section240, section 244, section 246 tosection 248 (both inclusive), sections 250 and 252
4.	15.11.2016	S.O. 3453(E)	Section 199 to section 207 (both inclusive), clause (c)and clause (e) of sub-section (1)of section 208, sub-section (2) of section 208, section 217 to section 220 (both inclusive)sections 251, 253, 254 and 255
5.	Came into force on 01.12.2016 vide S.O. dated 30.11.2016	S.O. 3594(E)	Clause (a) to clause (d) of section 2 (except with regard to voluntary liquidation or Bankruptcy section 4 to section 32 (both inclusive), section 60 to section 77(both inclusive), section 198,section 231, section 236 to section 238 (both inclusive) and clause (a) to clause (f)of sub-section (2)of section 239
6.	S.O. dated 09.12.2016 Came into force on 15.12.2016	S.O. 3687(E)	Section 33 to section 54 (both inclusive)
7.	S.O. dated 30.03.2017; came into force on 01.04.2017	S.O. 1005(E)	Section 59; section 209 to 215 (both inclusive); subsection (1) of section 216; and section 234and section 235
8.	Came into force on 01.04.2017 vide S.O. dated 15.05.2017	S.O. 1570(E)	Clause (a) to clause (d) of section 2 relating to voluntary liquidation or bankruptcy
9.	14.06.2017	S.O. 1910(E)	Section 55 to section 58 (both inclusive)
10.	01.05.2018	S.O. 1817(E)	Section 227 to section 229 (both inclusive)
11.	S.O. dated 15.11.2019 **(impugned notification)** Came into force on 01.12.2019	S.O. 4126(E)	Section 2 (e); section 78 (except with regard to fresh start process) and section 79; Sections 94 to 187 [both inclusive]; Section 239 (2) (g) to (i) ;239 (2) (m) to (zc);Section 240 (2) (zn) to (zs); and section 249 only in so far as they relate to personal guarantors to corporate debtors

79. The above tabular chart reveals that the provisions relating to the Insolvency and Bankruptcy Board of India were brought into force at the earliest point of time, i.e., 05.08.2016. This was to enable the setting up of the regulatory body so that it could commence its task of examining the relevant issues and evolving standards to be embodied in rules and regulations. Thereafter, the notification dated 19.08.2016 brought into force Chapter VII) of Part-IV and some provisions of Part-V – relating to finance, acts, audit and miscellaneous provisions. These were the provisions ancillary to the working of the Board. The next to be brought into force were parts of Sections 196-197 and 223, again which dealt with the Board's functions, its funds etc. as well as Sections 244, 246-248 and 250-252. These were general provisions relating to the provisions that amended various other enactments in terms of the Schedules set out to the Code. The fourth notification dated 15.11.2016 brought into force those provisions relating to insolvency professional agencies and some other provisions which amended other enactments.

80. The notification of 30.11.2016 brought into force certain provisions that had the effect of operationalizing the enactment in respect of four distinct categories, i.e. companies incorporated under the Companies Act, companies governed by special Act, LLPs and other bodies incorporated under any law which the Central Government could by notification specify. These provisions triggered the application of the Code to corporate debtors as well as LLPs and other companies and corporations. Significantly, provisions with regard to voluntary liquidation or bankruptcy were excluded from application by this notification. Those provisions were brought into force by the eighth notification dated 01.04.2017, with effect from 15.05.2017. In the meanwhile, the notification dated 09.12.2016 with effect from 15.12.2016, operationalized Sections 33 to 44 which deal with the liquidation process.

81. It is quite evident that the method adopted by the Central Government to bring into force different provisions of the Act had a specific design: to fulfill the objectives underlying the Code, having regard to its priorities. Plainly, the Central Government was concerned with triggering the insolvency mechanism processes in

relation to corporate persons at the earliest. Therefore, by the first three notifications, the necessary mechanism such as setting up of the regulatory body, provisions relating to its functions, powers and the operationalization of provisions relating to insolvency professionals and agencies were brought into force. These started the mechanism through which insolvency processes were to be carried out and regulated by law. In the next phase, the part of the Code dealing with one of its subjects, i.e., corporate persons [covered by Section 2(a) to 2(d) of the Code] was brought into force. The entire process for conduct of insolvency proceedings and provisions relating to such corporate persons were brought into force. The other notifications brought into force certain consequential provisions, as well as provisions which give overriding effect to the Code (as also the provisions that amend or modify other laws). All these clearly show that the Central Government followed a stage-by-stage process of bringing into force the provisions of the Code, regard being had to the similarities or dissimilarities of the subject matter and those covered by the Code.

82. As discussed in a previous part of this judgment, insolvency proceedings relating to individuals is regulated by Part-III of the Code. Before the amendment of 2018, all individuals (personal guarantors to corporate debtors, partners of firms, partnership firms and other partners as well as individuals who were either partners or personal guarantors to corporate debtors) fell under one descriptive description under the unamended Section 2(e). The unamended Section 60 contemplated that the adjudicating authority in respect of personal guarantors was to be the NCLT. Yet, having regard to the fact that Section 2 brought all three categories of individuals within one umbrella class as it were, it would have been difficult for the Central Government to selectively bring into force the provisions of part –III only in respect of personal guarantors. It was here that the Central Government heeded the reports of expert bodies which recommended that personal guarantors to corporate debtors facing insolvency process should also be involved in proceedings by the same adjudicator and for this, necessary amendments were required. Consequently, the 2018 Amendment Act altered Section 2(e) and subcategorized three categories of individuals, resulting in Sections 2(e), (f) and (g). Given that the earlier notification

of 30.11.2016 had brought the Code into force in relation to entities covered under Section 2(a) to 2(d), the amendment Act of 2018 provided the necessary statutory backing for the Central Government to apply the Code, in such a manner as to achieve the objective of the amendment, i.e. to ensure that adjudicating body dealing with insolvency of corporate debtors also had before it the insolvency proceedings of personal guarantors to such corporate debtors.

83. The amendment of 2018 also altered Section 60 in that insolvency and bankruptcy processes relating to liquidation and bankruptcy in respect of three categories, i.e. corporate debtors, corporate guarantors of corporate debtors and personal guarantors to corporate debtors were to be considered by the same forum, i.e. NCLT.

84. Section 2, i.e., (application provision of the Code, in relation to different entities), as originally enacted, did not contain a separate category of personal guarantors to corporate debtors. Instead, personal guarantors were part of a category or group of individuals, to whom the Code applied (i.e. individuals, proprietorship and partnership firms, *per* Section 2(e) which stated "*partnership firms and individuals*"). The Code envisioned that the insolvency process outlined in provisions of Part III was to apply to them. The Statement of Objects and Reasons for the Amendment Bill of 2017, which eventually metamorphosized into the Amendment Act, stated that the Code provided for insolvency resolution for individuals and partnership firms

> "*which are proposed to be implemented in a phased manner on account of the wider impact of these provisions. In the first phase, the provisions would be extended to personal guarantors of corporate debtors to further strengthen the corporate insolvency resolution process and a clear enabling provision for the purpose has been provided in the Bill."*

85. The amendment introduced Section 2(e) i.e. personal guarantors to corporate debtors, *as a distinct category to whom the Code applied.* Now, the amendment was brought into force retrospectively, on 23 November, 2017. Section 1 of the Amendment Act states:

> *"Section 1. (1) This Act may be called the Insolvency and Bankruptcy Code (Amendment) Act, 2018.*
>
> *(2) It shall be deemed to have come into force on the 23rd day of November, 2017."*

86. In addition to amending Section 2, the same Amendment also amended Section 60(2). Interestingly, though "personal guarantor" was not defined, and fell within the larger rubric of "individual" under the Code, the adjudicating authority for insolvency process and liquidation of corporate persons including corporate debtors and personal guarantors was the NCLT- even under the unamended Code. The amendment of Section 60(2) added a few concepts. This is best understood on a juxtaposition of the unamended and the amended provisions: The unamended Section 60 (2) read as follows:

> *"(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or bankruptcy proceeding of a personal guarantor of the corporate debtor shall be filed before the National Company Law Tribunal."*

The amended Section 60 (2) reads as follows:

> *"(2) Without prejudice to sub-section (1) and notwithstanding anything to the contrary contained in this Code, where a corporate insolvency resolution process or liquidation proceeding of a corporate debtor is pending before a National Company Law Tribunal, an application relating to the insolvency resolution or liquidation or bankruptcy of a corporate guarantor or personal guarantor, as the case may be, of such corporate debtor shall be filed before the National Company Law Tribunal"*

87. The amendment inserted the expression *"or liquidation"* before the words *"or bankruptcy"* and also inserted the expression *"of a corporate guarantor… as the case may be, of"* such corporate debtor. The interpretation of this expression has to be contextual. There is no question of *liquidation* of a personal guarantor, an individual. In such cases, this court has ruled that the principle behind the maxim "*reddendo*

singular singulis" applies. This court had, in *Koteswar Vittal Kamath* v. *K. Rangappa Baliga& Co*[62]quoted *Black's Interpretation of Laws*, to explain the meaning of that maxim:

> *"Where a sentence in a statute contains several antecedents and several consequences, they are to be read distributively, that is to say, each phrase or expression is to be referred to its appropriate object."*

Koteswar Vittal Kamath was concerned with the interpretation of the proviso to Article 304(*b*) of the Constitution of India which provided that:

> *"Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."*

The term "no Bill or amendment" was construed distributively. The Court held

> *"In our opinion, the High Court did not correctly appreciate the position. The language of the proviso cannot be interpreted in the manner accepted by the High Court without doing violence to the rules of construction. If both the words "introduced" or "moved" are held to refer to the Bill, it must necessarily be held that both those words will also refer to the word "amendment". On the face of it, there can be no question of introducing an amendment. Amendments are moved and then, if accepted by the House, incorporated in the Bill before it is passed. There is further an indication in the Constitution itself that wherever a reference is made to a Bill, the only step envisaged is introduction of the Bill. There is no reference to such a step as a Bill being moved. The Articles, of which notice may be taken in this connection, are Articles 109, 114, 117, 198 and 207. In all these articles, whatever prohibition is laid down relates to the introduction of a Bill in the Legislature. There is no reference at any stage to a Bill being moved in a House. The language thus used in the Constitution clearly points to the interpretation that, even in the proviso to Article 304, the word "introduced" refers to the Bill, while the word "moved" refers to the amendment."*

88. Recently, in *Rajendra K. Bhutta v. Maharashtra Housing and Area Development Authority*[63], this principle and *Koteshwar Vittal Kamath* were cited and

62(1969) 1 SCC 255.
63 (2020) 13 SCC 208.

applied. Therefore, it is held that when Section 60(2) alludes to insolvency resolution or bankruptcy, or liquidation of three categories, i.e. corporate debtors, corporate guarantors (to corporate debtors) and personal guarantors (to corporate debtors) they apply distributively, i.e. that insolvency resolution, or liquidation processes apply to corporate debtors and their corporate guarantors, whereas insolvency resolution and bankruptcy processes apply to personal guarantors, (to corporate debtors) who cannot be subjected to liquidation.

89. The case law cited on behalf of the petitioners shows a certain pattern. In many cases (*In re Delhi Laws Act*, *Jitendra Kumar Gupta*) this court had held that the power to extend the law, existing or future, that had not been enacted by the competent legislature, and the power of repeal, as well as the power to extend the life of the law, were instances of *excessive* delegation of legislative power. In *Narottamdas Jethabhai* (*supra*), this court upheld the extension of pecuniary jurisdiction of city civil courts beyond the statutorily prescribed limit, *because* there was a provision enabling it, and the executive confined the exercise of its power to extend the jurisdiction, within the limits enacted. *Hamdard Dawakhana* was an instance of grant of un-canalized power (without legislative guidance) of inclusion in the schedule to the Act, acts falling within its application; it was clearly a case of excessive delegation. In *Lachmi Narain (supra)*, this court held that the power of modification cannot be used at any time, but has to be resorted to initially by the executive, at the time a law is extended and applied. The observations in *Bishwambhar Singh* and *Basant Kumar Sarkar (supra)* reveal that the executive is tasked with implementing the Act in stages, as it *"would have been impossible for the legislature to decide in what areas"* and in respect of what subject matters (in that case, factories and establishments) the provisions can apply. Crucially, it was held that *"a scheme of this kind, though very beneficent, could not be introduced in the whole of the country all at once."*Further, held this court, such provisions may *"need careful experimentation have some times to be adopted by stages and in different phases."*

90. The theme of gradual implementation of law or legal principles, was also spoken about in *Javed v. State of Haryana*[64] by this court, which held that there is no constitutional imperative that a law or policy should be implemented all at once:

> ***"16.*** *A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented at one go. Policies are capable of being implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance."*

Similar observations were made in *Pannalal Bansilal Pitti* v. *State of A.P.*[65] where the court held that imposition of a uniform law, in some areas, or subjects may be counterproductive and contrary to public purpose. *Sabanayagam (supra)* too emphasized discretion to extend an enactment, having regard to the time, area of operation, and its applicability when it was emphasized that such power is *"limited and almost ministerial function as an agent of the principal Legislature applying the Act to the area at an appropriate time"*

91. The close proximity, or inter-relatedness of personal guarantors with corporate debtors, as opposed to individuals and partners in firms was noted by the report of the Working Group, which remarked that it:

> "*recognizes that dynamics, the interwoven connection between the corporate debtor and a guarantor (who has extended his personal guarantee for the corporate debtor) and the partnership firms engaged in business activities may be on distinct footing in reality, and would, therefore, require different treatment, because of economic considerations. Assets of the guarantor would be relevant for the resolution process of the corporate debtor. Between the financial creditor and the corporate debtor, mostly the guarantee would contain a covenant that as between the guarantor and the financial creditor, the guarantor is also a principal debtor, notwithstanding that he is guarantor to a corporate debtor."*
>
> *(Emphasis supplied)*

64(2003) 8 SCC 369.
65(1996) 2 SCC 498.

92. As noticed earlier, Section 60 had previously, under the original Code, designated the NCLT as the adjudicating authority in relation to two categories: corporate debtors and personal guarantors to corporate debtors. The 2018 amendment added another category: corporate guarantors to corporate debtors. The amendment seen in the background of the report, as indeed the scheme of the Code (i.e., Section 2 (e), Section 5 (22), Section 29A, and Section 60), clearly show that all matters that *were likely to impact, or have a bearing on a corporate debtor's insolvency process, were sought to be clubbed together and brought before the same forum.* Section 5 (22) which is found in Part II (insolvency process provisions in respect of corporate debtors) as it was originally, defined personal guarantor to say that it "*means an individual who is the surety in a contract of guarantee to a corporate debtor.*" There are two more provisions relevant for the purpose of this judgment. They are Sections 234 and 235 of the Code; they read as follows:

> *"234. (1) The Central Government may enter into an agreement with the Government of any country outside India for enforcing the provisions of this Code.*
>
> *(2) The Central Government may, by notification in the Official Gazette, direct that the application of provisions of this Code in relation to assets or property of corporate debtor or debtor, including a personal guarantor of a corporate debtor, as the case may be, situated at any place in a country outside India with which reciprocal arrangements have been made, shall be subject to such conditions as may be specified.*
>
> *235. (1) Notwithstanding anything contained in this Code or any law for the time being in force if, in the course of insolvency resolution process, or liquidation or bankruptcy proceedings, as the case may be, under this Code, the resolution professional, liquidator or bankruptcy trustee, as the case may be, is of the opinion that assets of the corporate debtor or debtor, including a personal guarantor of a corporate debtor, are situated in a country outside India with which reciprocal arrangements have been made under section 234, he may make an application to the Adjudicating Authority that evidence or action relating to such assets is required in connection with such process or proceeding.*
>
> *(2) The Adjudicating Authority on receipt of an application under sub-section (1) and, on being satisfied that evidence or action relating to assets under sub-section (1) is required in connection with*

> *insolvency resolution process or liquidation or bankruptcy proceeding, may issue a letter of request to a court or an authority of such country competent to deal with such request."*

93. These two provisions also reveal that the scheme of the Code always contemplated that overseas assets of a corporate debtor or its personal guarantor could be dealt with in an identical manner during insolvency proceedings, including by issuing letters of request to courts or authorities in other countries for the purpose of dealing with such assets located within their jurisdiction.

94. The impugned notification operationalizes the Code so far as it relates to personal guarantors to corporate debtors:

(1) Section 79 pertains to the definitional section for the purposes of insolvency resolution and bankruptcy for individuals before the Adjudicating Authority.

(2) Section 94 to 187 outline the entire structure regarding initiation of the resolution process for individuals before the Adjudicating Authority.

95. The impugned notification authorises the Central Government and the Board to frame rules and regulations on how to allow the pending actions against a personal guarantor to a corporate debtor before the Adjudicating Authority. The intent of the notification, facially, is to allow for pending proceedings to be adjudicated in terms of the Code. Section 243, which provides for the repeal of the personal insolvency laws has not as yet been notified. Section 60(2) prescribes that in the event of an ongoing resolution process or liquidation process against a corporate debtor, an application for resolution process or bankruptcy of the personal guarantor to the corporate debtor shall be filed with the concerned NCLT seized of the resolution process or liquidation. Therefore, the Adjudicating Authority for personal guarantors will be the NCLT, if a parallel resolution process or liquidation process is pending in respect of a corporate debtor for whom the guarantee is given. The same logic prevails, under Section 60(3), when any insolvency or bankruptcy proceeding pending against the

personal guarantor in a court or tribunal and a resolution process or liquidation is initiated against the corporate debtor. Thus if A, an individual is the subject of a resolution process before the DRT and he has furnished a personal guarantee for a debt owed by a company B, in the event a resolution process is initiated against B in an NCLT, the provision results in transferring the proceedings going on against A in the DRT to NCLT.

96. This court in *V. Ramakrishnan (supra)*, noticed why an application under Section 60(2) could not be allowed. At that stage, neither Part III of the Code nor Section 243 had not been notified. This meant that proceedings against personal guarantors stood outside the NCLT and the Code. The *non-obstante* provision under Section 238 gives the Code overriding effect over other prevailing enactments. This is perhaps the *rationale* for not notifying Section 243 as far as personal guarantors to corporate persons are concerned. Section 243(2) saves pending proceedings under the Acts repealed (PIA and PTI Act) to be undertaken in accordance with those enactments. As of now, Section 243 has not been notified. In the event Section 243 is notified and those two Acts repealed, then, the present notification would not have had the effect of covering pending proceedings against individuals, such as personal guarantors in other *forums*, and would bring them under the provisions of the Code pertaining to insolvency and bankruptcy of personal guarantors. The impugned notification, as a consequence of the *non obstante* clause in Section 238, has the result that if any proceeding were to be initiated against personal guarantors it would be under the Code.

97. In the opinion of this court, there was sufficient legislative guidance for the Central Government, before the amendment of 2018 was made effective, to distinguish and classify personal guarantors separately from other individuals. This is evident from Sections 5(22), 60, 234, 235 and unamended Section 60. In *V. Ramakrishnan* (*supra*) this court noted the effect of various provisions of the Code, and how they applied to personal guarantors:

*"**22.** We are afraid that such arguments have to be turned down on a careful reading of the sections relied upon. Section 60 of the Code, in sub-section (1) thereof, refers to insolvency resolution and liquidation for both corporate debtors and personal guarantors, the adjudicating authority for which shall be the National Company Law Tribunal, having territorial jurisdiction over the place where the registered office of the corporate person is located. This sub-section is only important in that it locates the Tribunal which has territorial jurisdiction in insolvency resolution processes against corporate debtors. So far as personal guarantors are concerned, we have seen that Part III has not been brought into force, and neither has Section 243, which repeals the Presidency Towns Insolvency Act, 1909 and the Provincial Insolvency Act, 1920. The net result of this is that so far as individual personal guarantors are concerned, they will continue to be proceeded against under the aforesaid two Insolvency Acts and not under the Code. Indeed, by a Press Release dated 28-8-2017, the Government of India, through the Ministry of Finance, cautioned that Section 243 of the Code, which provides for the repeal of the said enactments, has not been notified till date, and further, that the provisions relating to insolvency resolution and bankruptcy for individuals and partnerships as contained in Part III of the Code are yet to be notified. Hence, it was advised that stakeholders who intend to pursue their insolvency cases may approach the appropriate authority/court under the existing enactments, instead of approaching the Debts Recovery Tribunals.*

***23.** It is for this reason that sub-section (2) of Section 60 speaks of an application relating to the "bankruptcy" of a personal guarantor of a corporate debtor and states that any such bankruptcy proceedings shall be filed only before the National Company Law Tribunal. The argument of the learned counsel on behalf of the respondents that "bankruptcy" would include SARFAESI proceedings must be turned down as "bankruptcy" has reference only to the two Insolvency Acts referred to above. Thus, SARFAESI proceedings against the guarantor can continue under the SARFAESI Act. Similarly, sub-section (3) speaks of a bankruptcy proceeding of a personal guarantor of the corporate debtor pending in any court or tribunal, which shall stand transferred to the adjudicating authority dealing with the insolvency resolution process or liquidation proceedings of such corporate debtor. An "Adjudicating Authority", defined under Section 5(1) of the Code, means the National Company Law Tribunal constituted under the Companies Act, 2013.*

> ***24.*** *The scheme of Sections 60(2) and (3) is thus clear — the moment there is a proceeding against the corporate debtor pending under the 2016 Code, any bankruptcy proceeding against the individual personal guarantor will, if already initiated before the proceeding against the corporate debtor, be transferred to the National Company Law Tribunal or, if initiated after such proceedings had been commenced against the corporate debtor, be filed only in the National Company Law Tribunal. However, the Tribunal is to decide such proceedings only in accordance with the Presidency Towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920, as the case may be. It is clear that sub-section (4), which states that the Tribunal shall be vested with all the powers of the Debts Recovery Tribunal, as contemplated under Part III of this Code, for the purposes of sub-section (2), would not take effect, as the Debts Recovery Tribunal has not yet been empowered to hear bankruptcy proceedings against individuals under Section 179 of the Code, as the said Section has not yet been brought into force. Also, we have seen that Section 249, dealing with the consequential amendment of the Recovery of Debts Act to empower Debts Recovery Tribunals to try such proceedings, has also not been brought into force. It is thus clear that Section 2(e), which was brought into force on 23-11-2017 would, when it refers to the application of the Code to a personal guarantor of a corporate debtor, apply only for the limited purpose contained in Sections 60(2) and (3), as stated hereinabove. This is what is meant by strengthening the Corporate Insolvency Resolution Process in the Statement of Objects of the Amendment Act, 2018."*

98. This court was clearly cognizant of the fact that the amendment, in so far as it inserted Section 2(e) and altered Section 60(2), was aimed at *strengthening* the corporate insolvency process. At the same time, since the Code was not made applicable to individuals (including personal guarantors), the court had no occasion to consider what would be the effect of exercise of power under Section 1(3) of the Code, bringing into force such provisions in relation to personal guarantors.

99. The argument that the insolvency processes, application of moratorium and other provisions are incongruous, and so on, in the opinion of this court, are insubstantial. The insolvency process in relation to *corporate persons* (a compendious term covering all juristic entities which have been described in Sections 2 [a] to [d] of the Code) is entirely different from those relating to individuals; the

former is covered in the provisions of Part II and the latter, by Part III. Section 179, which defines what the Adjudicating authority is for individuals[66] is *"subject to"* Section 60. Section 60(2) is without prejudice to Section 60(1) and *notwithstanding anything to the contrary contained in the Code*, thus giving overriding effect to Section 60(2) as far as it provides that the application relating to insolvency resolution, liquidation or bankruptcy of personal guarantors of such corporate debtors shall be filed before the NCLT where proceedings relating to corporate debtors are pending. Furthermore, Section 60(3) provides for transfer of proceedings relating to personal guarantors to that NCLT which is dealing with the proceedings against corporate debtors. *After* providing for a common adjudicating forum, Section 60(4) vests the NCLT *"with all the powers of the DRT as contemplated under Part III of this Code for the purpose of sub-section (2)"*. Section 60 (4) thus (a) vests all the powers of DRT with NCLT and (b) also vests NCLT with powers under Part III. Parliament therefore merged the provisions of Part III with the process undertaken against the corporate debtors under Part II, for the purpose of Section 60(2), i.e., proceedings against personal guarantors along with corporate debtors. Section 179 is the corresponding provision in Part III. It is *"subject to the provisions of Section 60"*. Section 60 (4) clearly incorporates the provisions of Part III in relation to proceedings before the NCLT against personal guarantors.

100. It is clear from the above analysis that Parliamentary intent was to treat personal guarantors differently from other categories of individuals. The intimate connection between such individuals and corporate entities to whom they stood

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66 *"179. (1) Subject to the provisions of section 60, the Adjudicating Authority, in relation to insolvency matters of individuals and firms shall be the Debt Recovery Tribunal having territorial jurisdiction over the place where the individual debtor actually and voluntarily resides or carries on business or personally works for gain and can entertain an application under this Code regarding such person.*

(2) The Debt Recovery Tribunal shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain or dispose of—

(a) any suit or proceeding by or against the individual debtor;

(b) any claim made by or against the individual debtor;

(c) any question of priorities or any other question whether of law or facts, arising out of or in relation to insolvency and bankruptcy of the individual debtor or firm under this Code.

(3) Notwithstanding anything contained in the Limitation Act, 1963 or in any other law for the time being in force, in computing the period of limitation specified for any suit or application in the name and on behalf of a debtor for which an order of moratorium has been made under this Part, the period during which such moratorium is in place shall be excluded"

guarantee, as well as the possibility of two separate processes being carried on in different forums, with its attendant uncertain outcomes, led to carving out personal guarantors as a separate *species* of individuals, for whom the Adjudicating authority was common with the corporate debtor to whom they had stood guarantee. The fact that the *process of insolvency* in Part III is to be applied to individuals, whereas the process in relation to corporate debtors, set out in Part II is to be applied to such corporate persons, does not lead to incongruity. On the other hand, there appear to be sound reasons why the *forum* for adjudicating insolvency processes – the provisions of which are disparate- is to be common, i.e through the NCLT. As was emphasized during the hearing, the NCLT would be able to consider the whole picture, as it were, about the nature of the assets available, either during the corporate debtor's insolvency process, or even later; this would facilitate the CoC in framing realistic plans, keeping in mind the prospect of realizing some part of the creditors' dues from personal guarantors.

101. In view of the above discussion, it is held that the impugned notification is not an instance of legislative exercise, or amounting to impermissible and selective application of provisions of the Code. There is no compulsion in the Code that it should, at the same time, be made applicable to *all individuals,* (including personal guarantors) or not at all. There is sufficient indication in the Code- by Section 2(e), Section 5(22), Section 60 and Section 179 indicating that personal guarantors, though forming part of the larger grouping of individuals, were to be, in view of their intrinsic connection with corporate debtors, dealt with differently, through the same adjudicatory process and by the same forum (though not insolvency provisions) as such corporate debtors. The notifications under Section 1(3), (issued before the impugned notification was issued) disclose that the Code was brought into force in stages, regard being had to the categories of persons to whom its provisions were to be applied. The impugned notification, similarly *inter alia* makes the provisions of the Code applicable in respect of personal guarantors to corporate debtors, as another such category of persons to whom the Code has been extended. It is held that the

impugned notification was issued within the power granted by Parliament, and in valid exercise of it. The exercise of power in issuing the impugned notification under Section 1(3) is therefore, not *ultra vires;* the notification is valid.

102. The other question which parties had urged before this court was that the impugned notification, by applying the Code to personal guarantors only, takes away the protection afforded by law; reference was made to Sections 128, 133 and 140 of the Contract Act; the petitioners submitted that once a resolution plan is accepted, the corporate debtor is discharged of liability. As a consequence, the guarantor whose liability is co-extensive with the principal debtor, i.e. the corporate debtor, too is discharged of all liabilities. It was urged therefore, that the impugned notification which has the effect of allowing proceedings before the NCLT by applying provisions of Part III of the Code, deprives the guarantors of their valuable substantive rights.

103. Section 31 of the Code, *inter alia,* provides that:

> *"31. (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan."*

The relevant provisions of the Indian Contract Act are extracted below:

> *"**128. Surety's liability**.—The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract.*
>
> ***129. "Continuing guarantee"**.—A guarantee which extends to a series of transactions, is called a "continuing guarantee".*
>
> ***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.*
>
> ***131.Revocation of continuing guarantee by surety's death**.—The death of the surety operates, in the absence of any contract to the*

contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

***133.Discharge of surety by variance in terms of contract**.—Any variance, made without the surety's consent, in the terms of the contract between the principal 1 [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.*

***134.Discharge of surety by release or discharge of principal debtor**.—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.*

****

***140.Rights of surety on payment or performance**.—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.*

***141.Surety's right to benefit of creditor's securities**.—A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."*

104. All creditors and other classes of claimants, including financial and operational creditors, those entitled to statutory dues, workers, etc., who participate in the resolution process, are heard and those in relation to whom the CoC accepts or rejects pleas, are entitled to vent their grievances before the NCLT. *After* considering their submissions and objections, the resolution plan is accepted and approved. This results in finality as to the claims of creditors, and others, *from the company* (i.e. the company which undergoes the insolvency process). The question which the petitioners urge is that in view of this *finality,* their liabilities would be extinguished; they rely on Sections 128, 133 and 140 of the Contract Act to urge that creditors cannot therefore, proceed against them separately.

105. In *Vijay Kumar Jain* v. *Standard Chartered Bank*[67], this court, while dealing with the right of erstwhile directors participating in meetings of Committee of Creditors observed that:

> *"we find that Section 31(1) of the Code would make it clear that such members of the erstwhile Board of Directors, who are often guarantors, are vitally interested in a resolution plan as such resolution plan then binds them. Such plan may scale down the debt of the principal debtor, resulting in scaling down the debt of the guarantor as well, or it may not. The resolution plan may also scale down certain debts and not others, leaving guarantors of the latter kind of debts exposed for the entire amount of the debt. The regulations also make it clear that these persons are vitally interested in resolution plans as they affect them"*

106. The *rationale* for allowing directors to participate in meetings of the CoC is that the directors' liability as personal guarantors persists against the creditors and an approved resolution plan can only lead to a revision of amount or exposure for the entire amount. Any recourse under Section 133 of the Contract Act to discharge the liability of the surety on account of variance in terms of the contract, without her or his consent, stands negated by this court, in *V. Ramakrishnan* where it was observed that the language of Section 31 makes it clear that the approved plan is binding on the guarantor, to avoid any attempt to escape liability under the provisions of the Contract Act. It was observed that:

> *"25. Section 31(1), in fact, makes it clear that the guarantor cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor.…"*

And further that:

> *"26.1 Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is*

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> *why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor — often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor."*

107. In *Committee of Creditors of Essar Steel (I) Ltd. v. Satish Kumar Gupta*[68] (the "*Essar Steel case"*) this court refused to interfere with proceedings initiated to enforce personal guarantees by financial creditors; it was observed as follows:

> *"106. Following this judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394], it is difficult to accept Shri Rohatgi's argument that that part of the resolution plan which states that the claims of the guarantor on account of subrogation shall be extinguished, cannot be applied to the guarantees furnished by the erstwhile Directors of the corporate debtor. So far as the present case is concerned, we hasten to add that we are saying nothing which may affect the pending litigation on account of invocation of these guarantees. However, NCLAT judgment being contrary to Section 31(1) of the Code and this Court's judgment in V. Ramakrishnan case [SBI v. V. Ramakrishnan, (2018) 17 SCC 394], is set aside."*

108. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not *per se* operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability. In *Maharashtra State Electricity Board* (*supra*) the liability of the guarantor (in a case where liability of the principal debtor was discharged under the insolvency law or the company law), was considered. It was held that in view of the unequivocal guarantee, such liability of the guarantor continues and the

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68(2020) 8 SCC 531.

creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act. This court observed as follows:

> *"7. Under the bank guarantee in question the Bank has undertaken to pay the Electricity Board any sum up to Rs 50,000 and in order to realise it all that the Electricity Board has to do is to make a demand. Within forty-eight hours of such demand the Bank has to pay the amount to the Electricity Board which is not under any obligation to prove any default on the part of the Company in liquidation before the amount demanded is paid. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods i.e. the Company in liquidation. The liability is absolute and unconditional. The fact that the Company in liquidation i.e. the principal debtor has gone into liquidation also would not have any effect on the liability of the Bank i.e. the guarantor. Under Section 128 of the Indian Contract Act, the liability of the surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under Section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation proceedings in the case of a company) does not absolve the surety of his liability (see Jagannath Ganeshram Agarwala v. Shivnarayan Bhagirath [AIR 1940 Bom 247; see also In re Fitzgeorge Ex parte Robson [(1905) 1 KB 462])."*

109. This legal position was noticed and approved later in *Industrial Finance Corpn. of India Ltd. v. Cannanore Spg. & Wvg. Mills Ltd.*[69]An earlier decision of three judges, *Punjab National Bank* v. *State of U.P.*[70] pertains to the issues regarding a guarantor and the principal debtor. The court observed as follows:

> *"The appellant had, after Respondent 4's management was taken over by U.P. State Textile Corporation Ltd. (Respondent 3) under the Industries (Development and Regulation) Act, advanced some money to the said Respondent 4. In respect of the advance so made, Respondents 1, 2 and 3 executed deeds of guarantee undertaking to*

69(2002) 5 SCC 54
70(2002) 5 SCC 80

pay the amount due to the bank as guarantors in the event of the principal borrower being unable to pay the same.

Subsequently, Respondent 3 which had taken over the management of Respondent 4 became sick and proceedings were initiated under the Sick Textile Undertakings (Nationalisation) Act, 1974 (for short 'the Act'). The appellant filed suit for recovery against the guarantors and the principal debtor of the amount claimed by it.

The following preliminary issue was, on the pleadings of the parties, framed:

'Whether the claim of the plaintiff is not maintainable in view of the provisions of Act 57 of 1974 as alleged in para 25 of the written statement of Defendant 2?'

The trial court as well as the High Court, both came to the conclusion that in view of the provisions of Section 29 of the Act, the suit of the appellant was not maintainable.

We have gone through the provisions of the said Act and in our opinion the decision of the courts below is not correct. Section 5 of the said Act provides for the owner to be liable for certain prior liabilities and Section 29 states that the said Act will have an overriding effect over all other enactments. This Act only deals with the liabilities of a company which is nationalized and there is no provision therein which in any way affects the liability of a guarantor who is bound by the deed of guarantee executed by it. The High Court has referred to a decision of this Court in Maharashtra SEB v. Official Liquidator, High Court, Ernakulam [(1982) 3 SCC 358 : AIR 1982 SC 1497] where the liability of the guarantor in a case where liability of the principal debtor was discharged under the insolvency law or the company law, was considered. It was held in this case that in view of the unequivocal guarantee such liability of the guarantor continues and the creditor can realize the same from the guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act.

In our opinion, the principle of the aforesaid decision of this Court is equally applicable in the present case. The right of the appellant to recover money from Respondents 1, 2 and 3 who stood guarantors arises out of the terms of the deed of guarantee which are not in any way superseded or brought to a naught merely because the appellant may not be able to recover money from the principal borrower. It may here be added that even as a result of the Nationalisation Act the liability of the principal borrower does not come to an end. It is only the mode of recovery which is referred to in the said Act."

110. In *Kaupthing Singer and Friedlander Ltd. (supra)* the UK Supreme Court reviewed a large number of previous authorities on the concept of double proof, i.e. recovery from guarantors in the context of insolvency proceedings. The court held that:

> *"The function of the rule is not to prevent a double proof of the same debt against two separate estates (that is what insolvency practitioners call "double dip"). The rule prevents a double proof of what is in substance the same debt being made against the same estate, leading to the payment of a double dividend out of one estate. It is for that reason sometimes called the rule against double dividend. In the simplest case of suretyship (where the surety has neither given nor been provided with security, and has an unlimited liability) there is a triangle of rights and liabilities between the principal debtor (PD), the surety (S) and the creditor (C). PD has the primary obligation to C and a secondary obligation to indemnify S if and so far as S discharges PD's liability, but if PD is insolvent S may not enforce that right in competition with C. S has an obligation to C to answer for PD's liability, and the secondary right of obtaining an indemnity from PD. C can (after due notice) proceed against either or both of PD and S. If both PD and S are in insolvent liquidation, C can prove against each for 100p in the pound but may not recover more than 100p in the pound in all."*

111. In view of the above discussion, it is held that approval of a resolution plan does not *ipso facto* discharge a personal guarantor (of a corporate debtor) of her or his liabilities under the contract of guarantee. As held by this court, the release or discharge of a principal borrower from the debt owed by it to its creditor, by an involuntary process, i.e. by operation of law, or due to liquidation or insolvency proceeding, does not absolve the surety/guarantor of his or her liability, which arises out of an independent contract.

112. For the foregoing reasons, it is held that the impugned notification is legal and valid. It is also held that approval of a resolution plan relating to a corporate debtor

does not operate so as to discharge the liabilities of personal guarantors (to corporate debtors). The writ petitions, transferred cases and transfer petitions are accordingly dismissed in the above terms, without order on costs.

…….J
[L. NAGESWARA RAO]

….....J
[S. RAVINDRA BHAT]

New Delhi,
May 21, 2021.