NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 512 of 2024

[Arising out of the Impugned Order dated 01.02.2024 passed by the Adjudicating Authority, National Company Law Tribunal, New Delhi, Bench-II in I.A. No. 5300/ND/2022 in C.P.(IB) No. 491/ND/2022]

In the matter of:

SUBHASH AGGARWAL
S/O OM PRAKASH AGARWAL
HOUSE NO. A-251
SURAJ MAL VIHAR
NEW DELHI 110092

.... Appellant

Versus

1. **STATE BANK OF INDIA**
   STRESSED ASSETS MANAGEMENT BRANCH - I
   12th FLOOR, JAWAHAR VYAPAR BHAWAN,
   STC BUILDING, 1 TOLSTOY MARG,
   JANPATH ROAD, NEW DELHI -1100001

   .... Respondent No.1

2. **MR. VIJENDER SHARMA**
   RESOLUTION PROFESSIONAL
   HAVING IBBI REGISTRATION NO.
   IBBI/IPA-003/IP-N00003/2016-2017/10022
   11, HARGOVIND ENCLAVE,
   3rd FLOOR, VIKAS MARG,
   NEW DELHI - 110092
   Email: vijender@vsa.net.in
   Mob: +91-9810166877

   .... Respondent No.2

Present:

For Appellant : Mr. Abhijeet Sinha, Sr. Advocate with Mr. Arindam Ghose, Mr. Upinder Singh and Ms. Shavanya Bhatnagar, Advocates.

For Respondent : Mr. Bheem Sain Jain, Advocate for R-1.

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('**IBC**' in short) by the Appellant arises out of the Order dated

01.02.2024 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, New Delhi, Bench-II) in I.A. No. 5300/ND/2022 in Company Petition (IB) No. 491/ND/2022. By the impugned order, the Adjudicating Authority has allowed the application filed under Section 95 of the IBC by the Respondent Bank for initiating insolvency resolution of the Appellant-Personal Guarantor. Aggrieved by the impugned order, the present appeal has been preferred by the Appellant-Shri Subhash Aggarwal.

2. The relevant facts of the case which are necessary to be noticed for deciding the matter before us are as outlined below:

- The Appellant-Subhash Aggarwal had joined the Corporate Debtor-M/s J.V. Strips Ltd. as an Executive Director on 01.09.2008.
- During his tenure in the Corporate Debtor company, the Appellant had signed a personal guarantee on 25.08.2009 in favour of State Bank of India-Respondent No.1 for a credit facility of Rs 41.25 Cr. extended to the Corporate Debtor. The Appellant had stood as a guarantor to the tune of Rs 3.84 Cr. only.
- The credit facility was further renewed and enhanced by the Respondent Bank on 07.06.2010 for Rs 47.75 Cr.; on 23.10.2010 for Rs 57.50 Cr.; and on 12.10.2011 for Rs 51 Cr.
- The Appellant purportedly resigned from the Directorship of the Corporate Debtor on 13.02.2012. The resignation letter is claimed to have been uploaded on the website of the Registrar of Companies. However, the

resignation letter was purportedly not communicated to the Respondent Bank.

- Subsequent to the resignation of the Appellant from the Directorship of the Corporate Debtor, the Respondent Bank had renewed the credit facility of the Corporate Debtor for Rs 56.70 Cr. on 05.12.2012 and 11.12.2012. This renewal was accompanied by signing of Supplementary Agreement of Loan dated 11.12.2012 alongwith a Deed of Guarantee.
- Another sanction letter dated 27.01.2014 was issued by the Respondent Bank renewing and enhancing the credit facility for Rs 64.52 Cr. for which a Supplementary Agreement of Loan and a Deed of Guarantee was entered into on 28.01.2014.
- The Respondent Bank further renewed the credit facilities on 15.02.2015 for Rs 70 Cr.; on 16.02.2016 for Rs 64 Cr.; on 20.03.2017 for Rs 64 Cr. and 20.01.2018 for Rs 64 Cr.
- The account of the Corporate Debtor was declared NPA on 25.07.2018.
- The Respondent Bank issued a letter on 21.09.2018 to the Appellant informing that the loan account of the Corporate Debtor had been migrated to the Stressed Assets Management (**"SAM"** in short) Branch.
- The Appellant informed the Respondent Bank on 29.10.2018 that he had resigned from the Directorship of the Corporate Debtor w.e.f. 13.02.2012 and that he had not signed any documents post resignation. The Appellant also sought copies of the letters of renewal and extension of the credit facility after 13.02.2012 including personal guarantee.

- While the Respondent Bank claimed that the documents sought by the Appellant was provided by them on 06.11.2018, the Appellant claimed that he accessed the documents on his own initiative from the website of the Ministry of Corporate Affairs. On finding that his signature was affixed as a guarantor to the credit facilities, which were allegedly not his signature, the Appellant on his own engaged a handwriting expert who submitted a report on 04.11.2018 stating that the signatures of the Appellant on the documents/deeds submitted to the Respondent Bank were forged and fabricated.
- The Appellant thereafter sent a communication on 17.11.2018 to the Respondent Bank denying that he had signed any document on or behalf of the Corporate Debtor company since his resignation therefrom on 13.02.2012.
- The Respondent Bank issued a notice under Section 13(2) of the SARFAESI Act, 2002 on 15.03.2019. The Appellant responded to the said notice on 02.05.2019 denying the execution of any of the loan documents having already resigned from the Corporate Debtor company. The Respondent Bank also filed an OA before the Debt Recovery Tribunal which led to issue of summons to the Appellant.
- The Appellant filed a police complaint on 09.06.2019 against the Corporate Debtor and the Respondent Bank for commission of forgery and fabrication in collusion with each other in the letters of renewal/extension of credit facilities and personal guarantee.

- The Respondent Bank addressed a communication to the Appellant on 16.07.2019 seeking a notarized asset and liability statement to which the Appellant responded on 24.07.2019 stating that having resigned from the Corporate Debtor company and not having signed any loan documents, he was not in a position to provide any such accounts statement.
- On 29.07.2019, the Respondent Bank issued a Loan Recall cum Demand Notice (**"LRDN"** in short) *inter alia* to the Appellant seeking discharge of liabilities to the tune of Rs 68.86 Cr. The Appellant responded on 06.08.2019 reiterating his resignation and the non-signing of any documents by him. This was followed by another communication from the Appellant to the Respondent Bank on 16.09.2019 specifically stating that he had initially given a bank guarantee for Rs 3.84 Cr. which was not renewed and that all subsequent documents carry his forged signature without his approval, consent and authorization.
- The Appellant also filed two complaints on 16.08.2019 and 04.10.2019 with the EOW which were however closed by EOW on 09.10.2020 since the matter was subjudice before DRT.
- On 23.08.2021, the Respondent Bank served a Form-B Demand Notice under Section 95(4)(b) of the IBC upon the Appellant. The Appellant responded to the said notice on 16.09.2021 denying their liability to pay any amount.
- The Respondent Bank thereafter filed the Section 95 application before the Adjudicating Authority seeking initiation of insolvency resolution of the Appellant. The Adjudicating Authority on 28.09.2022 appointed

Respondent No.2 as the Resolution Professional (**"RP"** in short) to file his report under Section 99 of IBC.

- The RP filed the first report on 08.10.2022 in which the RP had stated that it was not in a position to make any recommendation on the acceptance or rejection of the Section 95 application in view of dispute over the genuineness of the signature affixed by the Appellant on the loan documents.
- The Respondent No.1 Bank filed its objections on 14.11.2022 to the first report of the RP. On 14.12.2022, the RP sought liberty from the Adjudicating Authority to file additional report which was allowed by the Adjudicating Authority on the same date. This order of the Adjudicating Authority was not challenged by any party.
- The RP filed IA No. 5300 of 2022 on 19.12.2022 before the Adjudicating Authority to take the additional report on record. The RP in the additional report had recommended initiation of insolvency process against the Appellant. The Appellant had also filed their objections to the additional report of the RP by way of an additional affidavit on 21.02.2023.
- The Adjudicating Authority after hearing the parties passed the impugned order on 01.02.2024 allowing the Section 95 petition filed by Respondent Bank and ordering the insolvency resolution of the Appellant-Personal Guarantor.
- Aggrieved by the impugned order, the present appeal has been filed by the Appellant.

3. Making his submissions, Shri Abhijeet Sinha, Ld. Senior Advocate for Appellant submitted that the Appellant had only signed the Guarantee Deed dated 25.08.2009 for an amount of Rs 3.84 Cr. only and was never a signatory of any facility renewal/enhancement thereafter. Emphatically asserting that the liability of the Appellant was only restricted to the Guarantee Deed of 25.08.2009, it was contended that the non-invocation of the Guarantee Deed of 2009 vitiated the entire insolvency resolution process qua the Appellant. As the Guarantee Deed of 25.08.2009 had not been invoked by the Respondent Bank, no liability stood fastened on the Appellant. It was also denied that the Guarantee Deed of 25.08.2009 was a continuing guarantee. It was contended that Clause 8 of the 2009 Guarantee Deed limited the continuance of the guarantee to the amount mentioned in Clause 1 of the guarantee and did not cover the subsequent facilities extended by the Respondent Bank. Hence the impugned order which held the 2009 Guarantee Deed to be irrevocable and continuing is not sustainable.

4. Submission was pressed that the demand made by the Respondent Bank was by invoking the Guarantee Deed of 28.01.2014 which had not been executed by the Appellant but were forged and fabricated documents submitted by other directors of the Corporate Debtor in collusion with the Respondent Bank. Reliance was placed on the judgment of the Hon'ble High Court of Bombay in ***Narayan Ramchandra Bhagwat Vs Markandya Tukaram AIR 1959 BOM 516*** wherein it was held that if there is a substantial alteration in a contract without the consent of the surety, even if no extra prejudice caused to the surety can be shown, the surety will be discharged. Thus, the Appellant could not have

been bound to do something for which he has not contracted. It was contended that the impugned order also contravened Section 62 of the Indian Contract Act which stipulated that once the parties alter the contract, the original contract need not be performed. Further, Section 133 of the Contract Act discharges a surety for subsequent transactions. It was also vehemently contended that the Appellant had resigned from the Directorship of the Corporate Debtor company on 13.02.2012 and the resignation letter having been filed on the ROC portal, it was a matter of public knowledge. In the present case, if the Respondent Bank did not exercise due diligence on ascertaining the fact that the Appellant had resigned, it cannot hold the Appellant liable for Guarantee Deeds not signed by him. It was also asserted that the fact that these documents carrying the signature of the Appellant post his resignation were forged signatures which fact had also been clearly brought out by the independent report of the handwriting experts. The bonafide of the Appellant is also borne out by the fact that they had filed complaints with the police authorities as well as the EOW about the forged and fabricated documents.

5. Contention was also made that for a Notice to be issued under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019, default must exist on the part of the guarantor prior to issue of Notice. The Appellant stood discharged from the Deed of Guarantee of 2009 on account of the material variations which arose on the execution of the Supplementary Guarantee of 2014. Further without invocation of the Guarantee Deed of 2009, there was no due that could be claimed against the guarantor.

Therefore, since the Deed of Guarantee of 2009 to which the Appellant was a signatory had not been invoked, no default in terms of Section 3(12) of IBC can be said to have occurred.

6. It was further pointed out that the present Section 95 petition was time-barred and not maintainable. Reliance was also placed on the judgment of the Hon'ble Supreme Court in ***Babulal Vardharji Gurjar Vs Veer Gurjar Aluminium Industries Pvt. Ltd. (2020) 15 SCC 1*** in which it has been held that the IBC does not intend to give a new lease of life to time-barred debts. The Deed of Guarantee of 2009 not having been invoked, the period of limitation of three years in terms of Article 137 of the Limitation Act stood surpassed. Further, since the default had occurred on 25.07.2018 which was the date of NPA and the Section 95 application was filed on 26.05.2022, the application was beyond three years and hence time-barred. Attention was adverted to the decision of this Tribunal in ***Jagdish Prasad Sarda Vs Allahabad Bank in CA(AT)(Ins) No. 183 of 2020*** wherein it has been held that the period of limitation commences from the date of declaration of NPA.

7. Submission was also pressed that the report of the RP suffered from a serious infirmity. It has been contended that the RP is not permitted to submit multiple reports. However, in the present case the RP was allowed by the Adjudicating Authority to submit an Additional Report which is not permissible under law. Further, in the Additional Report, the initiation of insolvency process was recommended by the RP against the Appellant which was contrary to the findings in the earlier report. The RP had also wrongly factorised the Guarantee Deed of 2009 when it was neither part of the Demand Notice nor the Section 95

application, which reflects bias on the part of the RP. Moreover, since the Additional Report was filed beyond the statutory period of ten days provided under Section 99 of IBC, this report could not have been considered by the Adjudicating Authority.

8. Refuting the contentions of the Appellant, Shri Bheem Sain Jain, Ld. Counsel representing Respondent No.1-State Bank of India submitted that it is an uncontested fact that the Guarantee Deed of 2009 was signed and executed by the Appellant. It was strenuously contended that the terms of this Guarantee Deed clearly spelt out that the Deed was continuing and irrevocable in nature. It was asserted that under Section 129 of the Contract Act a continuing guarantee is defined as a guarantee which extends to a series of transactions and hence also embraces future transactions. The terms of the Guarantee Deed of 2009 also provided scope for subsequent variations and hence the future variations remained binding on the Appellant.

9. It was vehemently contended that the Appellant had also never communicated to the Respondent Bank regarding his resignation from the Corporate Debtor. In any case, merely because the Appellant had resigned from the Directorship of the Corporate Debtor, that did not automatically absolve the Appellant from discharging his surety obligations. The resignation of the Appellant from the Corporate Debtor company does not by itself lead to revocation of his personal guarantee. It was also added that in terms of Sections 130 and 133 of the Indian Contract Act, any revocation or discharge of guarantee obligations is permissible only for future transactions. Even if it is agreed that the Appellant did not sign or execute any documents after his resignation, the

Appellant nevertheless continued to remain liable to the credit limits granted under the sanction letter dated 12.10.2011 which preceded the resignation. Even this much of admission is sufficient for admission of the Appellant in the insolvency resolution process under IBC. In support of their contention reliance has been placed on the judgment of the Hon'ble Supreme Court in ***Sitaram Gupta Vs Punjab National Bank (2008) 5 SCC 711*** and in ***H.R. Basavaraj Vs Canara Bank (2010) 12 SCC 458*** in which it was held that when a party enters into a guarantee with a bank which is in the nature of continuing guarantee, the guarantee was to continue and remain in operation for all subsequent transactions. The plea taken by the Appellant of novation of contract following the execution of the Supplemental Deed of Guarantee of 2014 was opposed as misconceived.

10. It was also pressed that all the requirements as set out under Section 95 of the IBC read with Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019 had been complied with by the Respondent Bank to initiate insolvency resolution against the Appellant. The LRDN specifically mentioned that the debt became due on 29.07.2019 and was payable before the expiry of seven days i.e. 05.08.2019. Thereafter the Respondent Bank had sent a Demand Notice dated 23.08.2021 in Form-B under Rule 7(1) to the Appellant-Personal Guarantor. The failure of repayment on the part of the Appellant in respect of their guarantee obligation qua the Respondent Bank also not being in dispute, the Adjudicating Authority had committed no error in admitting the Section 95 petition. It was further pointed out that the documents

referred to in Form-B and Form-C were in continuation of the documents executed under the 2009 Guarantee Deed which was continuing in nature. Since the Guarantee Deed of 2009 was the foundational document on which the Supplementary Agreement was resting on, the non-mention of the Guarantee Deed of 2009 did not render the Form-B and Form-C defective.

11. In the present case, as reliance had been placed by the Appellant on the findings of a privately engaged handwriting which could not have been taken as an unimpeachable piece of evidence, the Respondent Bank was well within its rights to object to the Section 99 report initially submitted by the RP basis this private opinion. It was also contended that the Appellant has wrongly questioned the conduct of the RP in the submission of his reports. It was argued that Section 99 of IBC vests the RP with ample powers to seek any further information from any party. There was no statutory embargo on the filing of an Additional Report. The RP had candidly pointed out the constraints faced in tendering his conclusive findings on the genuineness of the signatures on the Supplementary Agreement and related documents and brought the same to the notice of the Adjudicating Authority. In turn, the Adjudicating Authority, in all fairness, had directed the RP to file its additional report and had even given liberty also to the Appellant to file additional reply, which liberty had also been availed by the Appellant. When sufficient opportunity had been given to the Appellant to deal with the Additional Report, the Appellant cannot claim to have suffered from any prejudice on this count.

12. It was further added that Section 95 petition filed by the Respondent Bank against the other three guarantors in respect of the same loan transactions

which stem from the Guarantee Deed of 2009 onwards having been already admitted, the Appellant standing on the same footing as the other three guarantors, cannot be seen to claim any differential treatment.

13. We have duly considered the arguments advanced by the Learned Counsel for the parties and perused the records carefully.

14. It is the case of the Appellant that he had only signed the Guarantee Deed dated 25.08.2009 for an amount of Rs 3.84 Cr. which Guarantee Deed had not been invoked by the Respondent bank. The Section 95 petition on the other hand had been filed by the Respondent Bank on the basis of renewal/enhancement of the credit facility for which a Supplementary Agreement of Loan and a Deed of Guarantee was entered into on 28.01.2014. These documents had not been signed by the Appellant but were forged and fabricated documents submitted by other directors of the Corporate Debtor in collusion with the Respondent Bank. Thus, this Supplementary Agreement could not be made the basis for making a demand on the Appellant who was not party to the Supplementary Agreement. Submission was therefore pressed that the Appellant cannot be held liable for documents not signed by him and could not have been admitted into insolvency resolution for guarantee obligations not consented or given by him. Elaborating further, it was stated that the Appellant had resigned from the Directorship of the Corporate Debtor company on 13.02.2012. Though his resignation was in the public domain as the resignation letter had been filed on the ROC portal, the Respondent Bank had failed to carry out due diligence to check the correctness and authenticity of the signatures affixed on the facility documents and Supplementary Deed of Guarantee. It was further pointed out that the Reserve

Bank of India Rules mandates it necessary for the Bank to obtain the signatures of continuing personal guarantors and satisfy themselves of the authenticity of the signatures while enhancing the credit facilities. In the present case, the Respondent Bank never approached the Appellant to get his signatures on the sanction letters and the Supplementary Deed of Guarantee of 2014. The Respondent Bank, having not exercised due diligence, they cannot hold the Appellant liable for Guarantee Deeds not signed by him. The Appellant also asserted that once he came to know of the forged documents, it had apprised the Respondent Bank and issued several communications about the fact of forgery of their signature and denial of any liability arising out of such forged document. Though the Respondent Bank was fully aware of this mis-representation, yet it had proceeded with issue of notice to the Appellant illegally and arbitrarily. The conduct of the Respondent Bank, it was contended, is an abuse of the process of law.

15. Another related contention pressed by the Appellant is that there was substantial material alteration of the Guarantee Deed of 2009 which alteration had been carried out to the disadvantage of the Appellant-Personal Guarantor and that too without their consent, hence, the Appellant was entitled to claim that their guarantee stood discharged. In support of their contention, reliance has been placed on the judgment of the Hon'ble Supreme Court in ***M.S. Anirudhan Vs Thomco's Bank Ltd., AIR 1963 SC 746*** and in ***Ram Khilona & Ors. Vs Sardar & Ors., AIR 2002 SC 2548*** wherein it was held that the effect of making an alteration in a Deed of Guarantee after its execution without the consent of the party is exactly the same as that of cancelling the deal. In the

present case, it was contended that since the alteration made in the subsequent guarantees were substantially material as it enhanced the guaranteed amount without the consent of the Appellant, the Appellant stood discharged under the Guarantee Deed of 25.08.2009 and Section 95 petition could not have been initiated basis the Guarantee Deed of 25.08.2009.

16. Per contra, it is the contention of the Respondent Bank that the it is an admitted fact that the Guarantee Deed of 2009 was signed and executed by the Appellant. Even if the Appellant's contention that he was not liable for facilities sanctioned after 2012 post his resignation, the liability of the Appellant as a guarantor would undeniably continue to the extent of the amount guaranteed under the Guarantee Deed of 2009. Hence, the liability of the Appellant in respect of the Guarantee Deed of 2009 which was clearly before the resignation of the Appellant was to continue unhindered. It was further contended that the terms of this Guarantee Deed clearly spell out that the Guarantee Deed would remain unaffected by any subsequent variations and that on demand being made, the guarantor was liable to honour the same. Much emphasis was laid on the fact that the Guarantee Deed of 2009 was a continuing guarantee and the same not having been expressly revoked, the Appellant-Personal Guarantor would remain bound by the terms and conditions executed at the time of entering into the guarantee. It was added that prior to the resignation of the Appellant from the Directorship of the Corporate Debtor, there were certain renewals and enhancements of the credit facilities which were also in the nature of variation from the original guarantee amount but had not been objected to by the Appellant. This reinforces the fact that the Appellant was well abreast of the fact

that the terms of the Guarantee Deed of 2009 provided scope for subsequent variations and that the future variations would remain binding on the Appellant. The Appellant had never sent any intimation to the Respondent Bank that personal guarantee given by him to secure the debts of the Corporate Debtor stood withdrawn or revoked consequent upon his resignation. Further the Appellant had not even communicated to the Respondent Bank regarding his resignation from the Corporate Debtor. All these facts and circumstances reinforce the fact that the Appellant has raised the bogey of forged and fabricated documents and variation in the Deed of Guarantee of 2009 amounting to novation of the contract as a specious argument which is more of an afterthought to stave off the admission of Section 95 petition.

17. This brings us to the moot question whether the Deed of Guarantee of 2009 was a continuing and an irrevocable guarantee which argument has been canvassed by the Respondent Bank. To appreciate this issue, we may peruse the terms of the Guarantee Deed of 2009, the relevant excerpts of which are as reproduced below:

> *"1. If at any time default shall be made by the Borrower in payment of the principal sum (not exceeding Rs 41,25,00,000/-) together with interest, costs, charges, expenses and/or other monies for the time being due to the Bank in respect of or under the aforesaid credit facilities or any of them the Guarantors shall forthwith on demand pay to the Bank the whole of such principal sum (not exceeding Rs. 41,25,00,000/-) together with interest, costs, charges, expenses and/ or any other monies as may be then due, to the Bank in respect of the aforesaid credit facilities and shall indemnify and keep indemnified the Bank against all losses of the said principal sum, interest or other monies due and all costs charges and expenses whensoever which the Bank may incur by reason of any default on the part of the Borrower.*
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> **.....**

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

…..

11. The guarantee shall be irrevocable and enforceable against the Guarantors notwithstanding any dispute between the Bank and the Borrower.

12. The Guarantors affirm confirm and declare that any balance confirmation and/or acknowledgment of debt and/or admission of liability given or promise or part payment made by the Borrower or the authorised agent of the Borrower to the Bank shall be deemed to have been made and/or given by or on behalf of the Guarantors themselves and shall be binding upon each of them.

14. The Guarantors hereby agree that notwithstanding any variation made in the terms of the said Agreement of Loan and/or any of the said security documents including reallocation/interchange of the individual limits within the principal sum variation in the rate of interest, extension of the date for payment of the Instalments, if any, or any composition made between the Bank and Borrower to give time to or not to sue the Borrower, or the Bank parting with any of the securities given by the Borrower, the Guarantors shall not be released or discharged of their obligation under this Guarantee provided that in the event of any such variation or composition or agreement the liability of the Guarantor shall notwithstanding anything herein contained be deemed to have accrued and the Guarantors shall be deemed to have become liable hereunder on the date or dates on which the Borrower shall become liable to pay the amount/amounts due under the said Agreement of Loan and/or any of the said security documents as a result of such variation or composition or agreement.

….

18. The Guarantee hereby given is independent and distinct from any security that the Bank has taken or may take in any manner whatsoever whether it be by way of hypothecation pledge and/or mortgage and/or any other charge over goods, movables or other assets and/or any other property movable or immovable and that the Guarantors have not given

this guarantee upon any understanding faith or belief that the 'Bank has taken and/or may hereafter take any or other such security and that notwithstanding the provisions of Sections 140 and 141 of the Indian Contract Act, 1872 or other section of that Act or any other law, the Guarantors will not claim to be discharged to any extent because of the Bank's failure to take any or other such security or in requiring or obtaining any or other such security or losing for any reason whatsoever including reasons attributable to its default and negligence benefit of any or other such security or rights to any or other such security that have been or could have been taken."

(Emphasis supplied)

18. That that the Deed of Guarantee of 2009 was a "continuing" guarantee which was "irrevocable" in nature is evident from a plain reading of Clauses 8 and 11 of the Guarantee Deed. Further when we look at Clause 14 it is amply clear that the terms of the Guarantee Deed of 2009 provided scope for subsequent variations. Thus, when the clauses of Guarantee Deed of 2009 by itself provided that it was to remain unaffected by subsequent variations, the guarantor was liable to honour the variations also on demand being made. Hence the future variations remained binding on the Appellant.

19. We are therefore not inclined to agree with the skewed and selective reading of the clauses by the Appellant that that Clause 8 of the 2009 Guarantee Deed limited the continuance of the guarantee only to the amount mentioned in Clause 1 of the guarantee and that it did not cover the subsequent facilities extended by the Respondent Bank and therefore the Guarantee Deed of 25.08.2009 was not in the nature of a continuing guarantee.

20. Reliance has been placed by the Respondent bank on the judgements of the Hon'ble Supreme Court in ***Sitaram judgment*** and ***Basavraj judgment supra*** to contend that once a guarantee deed has been lawfully entered into, the

terms of the deed of guarantee becomes binding and, therefore, once a party has subscribed to the principles of a continuing guarantee, it was not open for him run counter to the terms and conditions of the agreement executed at the time of entering the guarantee.

21. It may therefore be useful to notice these two judgements and find out their applicability in the facts of the present case. The relevant extracts of the ***Sitaram judgment supra*** are as reproduced below:

> *"7. We have carefully examined the submissions made on behalf of the parties and also the relevant clauses in the agreement of guarantee. In our view, the High Court was perfectly justified in holding that the appellant was liable to pay the decretal amount to the Bank in view of the clause, as mentioned hereinearlier, in the agreement of guarantee itself. The agreement of guarantee clearly provides that the guarantee shall be a continuing guarantee and shall not be considered as cancelled or in any way affected by the fact that at any time, the said accounts may show no liability against the borrower or may even show a credit in his favour but shall continue to be a guarantee and remain in operation in respect of all subsequent transactions. This was an agreement entered into by the appellant with the Bank, which is binding on him. Therefore, the question arises whether the statutory provision under Section 130 of the Act shall override the agreement of guarantee. In our view, the agreement cannot be said to be unlawful nor the parties have alleged that it was unlawful either before the trial court or before the High Court. Let us, therefore, keep in mind that the agreement of guarantee entered into by the appellant with the Bank was lawful.*
>
> *8. The question is whether the appellant, having entered into such an agreement of guarantee with the Bank, had waived his right under the Act. In our view, the High Court has rightly held and we too are of the view that the appellant cannot claim the benefit under Section 130 of the Act because he had waived the benefit by entering into the agreement of guarantee with the Bank. In Lachoo Mal v. Radhey Shyam this Court observed that the general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public principle. In Halsbury's Laws of*

England, Vol. 8, 3rd Edn., it has been stated in Para 248 at p. 143 as under:

> *"248. Contracting out.- As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void."*

9. In Brijendra Nath Bhargava v. Harsh Wardhan it has been observed at p. 461 in para 10 that if a party had given up the advantage he could take of a position of law, it was not open to him to change and say that he could avail of that ground. The same principle has been followed in Bank of India v. O.P. Swarnakar.

10. Keeping this principle in mind, we now look at the clause in the agreement of guarantee, as noted hereinearlier. There cannot be any dispute that the appellant had clearly agreed that the guarantee that he had entered into with the Bank was a continuing guarantee and the same was to continue and remain in operation for all subsequent transactions. Having entered into the agreement in the manner indicated above, in our view, it was, therefore, not open to the appellant to turn around and say that in view of Section 130 of the Act, since the guarantee was revoked before the loan was advanced to Defendants 1 to 4 and 6, he was not liable to pay the decretal amount as a guarantor to the Bank as his guarantee had already stood revoked. In this view of the matter, we are not in a position to accept the submissions of the learned counsel for the appellant and we hold that in view of the nature of guarantee entered into by the appellant with the Bank, the statutory provision under Section 130 of the Act shall not come to his help……"

22. We next come to the ***Basavraj judgment supra*** in which the Hon'ble Apex Court has affirmed the findings of the ***Sitaram judgment,*** the relevant excerpts being as reproduced below:

> *"16. On the principles of continuing guarantee, the position was cleared by a decision of this Court in Sita Ram Gupta v. Punjab National Bank whereby it was held that it was not open to a party to revoke a guarantee*

when he had agreed to it being a continuing one and thus would be bound by the terms and conditions of the agreement executed at the time of entering into the guarantee. In the present facts and circumstances, we, therefore, do not find any difficulty in affirming the concurrent findings of the High Court and of the trial court on the point that the agreement executed for the purpose of a continuing liability despite the variation of terms of the contract and in the absence of a specific written document by Basavaraj (since deceased) revoking the guarantee, the guarantee stands and the legal representatives of the deceased are liable to repay the loan."

23. The ratio of the above two judgements are squarely applicable to the facts of the present case which is premised on a Guarantee Deed hinged on the precepts of a continuing guarantee. Under Section 129 of the Contract Act, a continuing guarantee is defined as a guarantee which extends to a series of transactions and hence also embraces future transactions. The Appellant cannot be seen to reason out that he was not bound by the transactions emanating out of the Guarantee Deed of 2009 as this deed was of a continuing nature and would remain operational even for subsequent transactions. All guarantees after the Guarantee Deed of 2009 were supplemental in nature and would not change the legal status of the Appellant as a Personal Guarantor nor would it extinguish his liability as a guarantor. The plea of novation of contract taken by the Appellant is misconceived as novation of contract can take effect only with the consent of all the parties. No such consent or mutual agreement has been placed on record by the Appellant. The ***Basavraj judgment supra*** has held in no uncertain terms that it was not open to a party to revoke a guarantee when the party had agreed to it being a continuing one and thus would be bound by the terms and conditions of the agreement executed at the time of entering into the guarantee. The plea taken by the Appellant that the ***Sitaram judgment*** and ***Basavraj judgment supra*** are not applicable since those judgments were prior in time to

the promulgation of IBC and because they did not involve any enhancement of credit facilities in the subsequent bank guarantees appears to be misplaced for it fails to explain how and why the settled proposition of law with regard to the principles of continuing guarantee in the above two judgements need not be abided in insolvency resolution under IBC.

24. Having taken notice that the Deed of Guarantee of 2009 was a continuing and irrevocable guarantee, we now proceed to find out if the Deed of Guarantee of 2009 was revoked at the instance of the Appellant post his purported resignation from the Corporate Debtor. At this juncture, we may turn our attention to a letter dated 17.11.2018 addressed by the Appellant to the Respondent bank on hearing that the account of the Corporate Debtor having become NPA had been shifted to SAM Branch. The said letter is as reproduced below:

> *"To, Deputy General Manager,* *17.11.2018*
> *State Bank of India*
>
> *Sub: Stressed Asset Management Migration of Account*
> *J.V. Ships Limited-Total Dues Rs 11.43 Crores (As on :30.O6.2018)*
> *Respected Sir,*
> *This is in response to your Letter No. SAMB-I/CL..II/MJ/1209 dated 06.l1.2018. This is to inform you that I have resigned as a Director of M/s. J V. Strips Limited w.e.f. 03.02.2012. Please find enclosed herewith a copy of Form 32 filed before the Registrar of Companies containing my resignation letter dated 13.02.2012 for your perusal. I would also like to inform you that the enclosed Form 32 containing my resignation letter dated 12.02.2012 was also uploaded on the website of the Registrar of Companies, as required under the Companies Act. I would also like to bring to your notice that since my resignation from M/s J.V. Strips Limited·, I have not signed any document on or behalf of M/s. J. V. Strips Limited in any capacity whatsoever in nature.*

Hence, documents dated 27.01.2014, 28.013.2014, 12.01.2017 and 20.03.2017 as referred by you in your letter under reply are not in my knowledge and the same have not been executed by me.
This is for your information and necessary action.
Regards,

Subhash Aggarwal"

25. When we look at the above letter, we do not find any mention in this letter of the Appellant seeking discharge/release from the guarantee obligations given by the Appellant prior to his purported resignation on 13.02.2012. We also notice that the Appellant has not disputed the signing and execution of renewal and enhancement of facility documents dated 07.06.2010, 23.10.2010 and 12.012.2011 which were all subsequent to the Guarantee Deed of 2009 but prior to his resignation. Thus, even if for arguments sake, we are to agree that the Appellant did not sign or execute any documents after his resignation, the Appellant will nevertheless continue to remain liable to the credit limits granted under the sanction letter dated 12.10.2011. Even this admission is sufficient for admission of the Appellant in the insolvency resolution process under IBC. The liability of the Appellant can willy nilly be fixed with reference to the Deed of Guarantee signed on 25.08.2009. The liability for discharge of the surety prior to resignation remains unaffected and default thereof forms sufficient basis for admission of Section 95 petition. We also notice that even when the account of the Corporate Debtor was classified as NPA on 25.07.2018, the Appellant had admittedly only sought copies of documents of renewal/extension of credit facilities after 13.02.2012 but did not seek documents before the date of resignation. This means that the Appellant did not dispute any of the documents

signed before his purported resignation. Neither did the Appellant claim any discharge or release from his personal guarantee spelt out in the Guarantee Deed of 2009. Neither has any material been placed on record to show that the Respondent Bank had discharged the Appellant of his guarantee obligations.

26. We are aware that the Appellant has placed reliance on the judgment of the Hon'ble High Court of Bombay in ***Narayan Ramchandra Bhagwat judgement supra*** in that if there is any material alteration in a contract without the consent of the surety, the surety will stand discharged. We notice that this legal precept was in the horizon of thinking of the Adjudicating Authority while it considered the implications of Section 133 of the Contract Act. At para 14 to 16 of the impugned order, the Adjudicating Authority held that Section 133 of the Contract Act only discharges a surety for transactions subsequent to the variance and does not discharge a guarantor for transactions entered into prior to the variance. Hence the Appellant's guarantee obligations in terms of the Deed of Guarantee of 25.08.2009 does not get obliterated by any measure.

27. The Adjudicating Authority has thus not committed any error in observing that the Appellant had acknowledged and never disputed the fact that he stood as a Personal Guarantor to the credit facilities granted to the Corporate Debtor on 25.08.2009. Further the Adjudicating Authority has rightly concluded after perusing the loan documents available on the MCA portal that the respondent had signed the loan documents on several occasions before his resignation. We are therefore of the considered view that the Adjudicating Authority has rightly concluded that simply because the Appellant had resigned from the Directorship of the Corporate Debtor, this cannot be sufficient ground leading to revocation

of his personal guarantee or discharge from his surety obligations arising out of the Deed of Guarantee of 2009 which was a continuing guarantee.

28. This brings us to the contention of the Appellant that non-invocation of the Guarantee Deed of 2009 was a substantive error which vitiated the entire insolvency resolution process. The argument canvassed by the Appellant that the Guarantee Deed of 2009 was not invoked is unfounded. When we look at the documents referred to in Form-B and Form-C, we find those documents to be clearly in continuation of documents executed under the 2009 Guarantee Deed. The Guarantee Deed of 2009 being the principal guarantee, on which foundational document, the Supplementary Agreement rested, non-mention of the Guarantee Deed of 2009 did not render the Form-B and Form-C defective. The Demand Notice issued by the Respondent Bank as well as the Section 95 petition both referred to the Supplemental Deed of Guarantee which was based on the continuing Deed of Guarantee of 2009.

29. The grant of loan facilities to the Corporate Debtor by the Respondent Bank and in consideration thereof, the execution of the Deed of Guarantee of 2009 by the Appellant is a factum not in dispute. No material has been placed on record to substantiate discharge of the Appellant in respect of the above guarantee obligation tendered by the Appellant. We also cannot be unmindful of the fact that the Respondent Bank in their objections filed before the Adjudicating Authority on the initial report of the RP filed under Section 99 of IBC had clarified that the Respondent Bank had not been in a position to produce the Guarantee Deed of 2009 as the same was not readily traceable because this account was originally lying with erstwhile State Bank of Bikaner

and Jaipur which later merged with SBI-Respondent Bank w.e.f. 01.04.2017. Merely because the Guarantee Deed of 2009 was not filed with the Section 95 petition but produced subsequently, will not come to the rescue of the Appellant in making out a case for discharge of the guarantee obligations of the Appellant. The failure of repayment on the part of the Appellant in respect of their guarantee obligation qua the Respondent Bank also not being in dispute, the Adjudicating Authority had committed no error in admitting the Section 95 petition.

30. We next come to yet another limb of argument raised by the Appellant that the present petition was time-barred and not maintainable when seen in the context of the Deed of Guarantee of 2009. It was contended that in terms of the Contract Act, once the parties alter the contract, the original contract need not be performed. When the substance of the original agreement is substantially altered, the original agreement no longer can be held to exist. It was submitted that as the Appellant stood discharged from the Deed of Guarantee of 2009 because of the material variations caused thereto on account of the Supplementary Guarantee of 2014, no Section 95 petition could be raised basis default of Deed of Guarantee of 2009 as it would be hit by the period of limitation of three years in terms of Article 137 of the Limitation Act. Attention was also adverted to the decision of this Tribunal in ***Jagdish Prasad Sarda Vs Allahabad Bank in CA(AT)(Ins) No. 183 of 2020*** wherein it has been held that the period of limitation commences from the date of declaration of NPA. Contention had been raised that since the default in the present case had occurred on 25.07.2018 which was the date of NPA, while the Section 95 application was filed on 26.05.2022, it clearly surpassed three years and hence

stood time-barred. Reliance was also placed on the judgment of the Hon'ble Supreme Court in ***Babulal Vardharji judgement supra*** in which it has been held that the IBC does not intend to give a new lease of life to time-barred debts.

31. We have no quarrel with the proposition of law laid down in ***Babulal Vardharji*** case that the IBC cannot be used to give a new lease of life to time-barred debts. Be that as it may, the unilateral and self-serving statement that the debt was time-barred since the Appellant stood discharged from the Deed of Guarantee of 2009 cannot be accepted. The Deed of Guarantee of 2009 was a continuing guarantee and no proof or substantiation of revocation of the same has been placed on record. We are also not amenable to subscribe to the view taken by the Appellant that the debt was time-barred for it was filed beyond the three years period since declaration of NPA. It is well settled law that the date of default cannot be strictly interpreted to be the date of NPA. The date of default in terms of Section 3(12) of the IBC means non-payment of a debt which has become due and payable whether in whole or any part and is not paid by the Corporate Debtor or the guarantor. The expression used is 'default' and not the date of notifying the loan account of the corporate person as NPA. In the present case, the date on which the debt fell due was shown as 29.07.2019 in Form-B and the date of default shown as 05.08.2019. The Section 95 application having been filed on 26.05.2022 fell very much within the three-year period.

32. Yet another contention has been made that the RP is not permitted to submit multiple reports and yet the RP was allowed by the Adjudicating Authority to submit an Additional Report which is not permissible under law. The RP had also taken into account the Guarantee Deed of 2009 when it was not

part of the Section 95 application or the Demand Notice which shows the bias on the part of the RP. Moreover, since the Additional Report was filed beyond the statutory period of ten days provided under Section 99 of IBC, this report could not have been considered by the Adjudicating Authority.

33. Before we return our findings on this aspect, it may be useful to have a look at the interim order of the Adjudicating Authority dated 14.12.2022 allowing the RP to submit the additional report. The said order reads as follows:

14.12.2022

ORDER

IA-5300/2022: Ld. Counsel appearing for the Applicant submits that he wants to file additional report/ documents. The Applicant is permitted to file the same with a copy to the Respondent/Personal Guarantor within one week. The Respondent is also allowed to file additional reply, if any, within 14 days.

List the matter on 19.01.2023.

34. When we glance through the above order and look at the material placed on record, it is clear that the RP in his first report of 08.10.2022 had held that it was not in a position to conclude his report in view of dispute between the Respondent Bank and the Appellant over the authenticity of the signature of the Appellant in loan/guarantee documents which had been executed post the purported resignation of the Appellant from the Corporate Debtor. Permitting the RP to file an Additional Report, in view of the peculiar circumstances having arisen on account of a handwriting expert's report having been commissioned by the Appellant on his own, does not appear to be unreasonable on the part of the Adjudicating Authority. Section 99 of IBC vests the RP with ample powers to seek

any further information from any party. The Adjudicating Authority, in all fairness, had directed the RP to file his additional report within a span of one week and gave liberty also to the Appellant to file additional reply which liberty had also been availed by the Appellant.

35. In such circumstances, it does not appeal to reason for the Appellant to question the submission of the Additional Report. When sufficient opportunity had also been given to the Appellant to deal with the Additional Report, the Appellant cannot claim to have suffered any prejudice on this count. Even the contention that the Additional Report filed by the RP could not have been considered by the Adjudicating Authority as it was beyond the statutory period of 10 days provided under Section 99 of IBC is not tenable since there is no prohibition on the RP to file an Additional Report in continuation of his earlier report. Moreover, the Additional Report was placed with the prior approval of the Adjudicating Authority. Further under Section 100 of IBC, any aggrieved party can produce additional documents before the RP. In the present case, the Appellant had also filed additional documents. Having availed this benefit, they cannot now question the conduct of the RP on this count. Apart from the fact that there was no embargo on the filing of an Additional Report, the Appellant cannot raise this ground at this stage when it did not challenge the order passed by the Adjudicating Authority on 14.12.2022. The contention raised by the Appellant that the RP could not have filed an additional report is a frivolous technical plea which lacks basis.

36. For all the given reasons as discussed above, we are of the view that the Adjudicating Authority committed no error in holding that debt and default is

established beyond doubt in respect of the guarantee given by the Appellant and in ordering the initiation of insolvency resolution of the Appellant. However, to meet the ends of justice, the liability of the Appellant is restricted to Rs 3.84 Cr. in terms of the Deed of Guarantee dated 25.08.2009 which had been entered into prior to his resignation. The impugned order is modified accordingly. The Appeal is disposed of in the above terms. No costs.

[Justice Ashok Bhushan]
Chairperson

[Barun Mitra]
Member (Technical)

Place: New Delhi
Date: 29.10.2025

Abdul/ Harleen