

**W.P. No. 10147 (W) of 2019**  
**IN THE HIGH COURT AT CALCUTTA**  
**Constitutional Writ Jurisdiction**  
**Appellate Side**  
**Gouri Shankar Jain**  
**Vs.**  
**Punjab National Bank & Anr.**

For the Petitioner : Mr. Rupak Ghosh, Advocate  
Mr. Chayan Gupta, Advocate  
Mr. Rittick Chowdhury, Advocate

For the Bank : Mr. Joy Saha, Sr. Advocate  
Mr. Saunak Sengupta, Advocate  
Mr. D. Chakraborty, Advocate

For the Respondent No. 2 : Mr. S. Ojha, Advocate

Hearing concluded on : September 18, 2019

Judgment on : November 13, 2019

**DEBANGSU BASAK, J.:-**

1. The petitioner has sought for a direction upon the bank, which is the first respondent herein, to remove the name of the petitioner from the list of defaulters maintained by Credit Information Bureau (India) Limited (CIBIL) presently known as Trans Union CIBIL Limited.
2. Learned Advocate appearing for the petitioner has submitted that, the petitioner is a guarantor of credit facilities enjoyed by a company, under the name and style of Divya Jyoti Sponge Iron Private Limited, from the first respondent. The company faced

proceedings before the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016. By an order dated March 13, 2018, the National Company Law Tribunal approved a Resolution Plan in respect of the company in such proceedings. By and under such Resolution Plan, the liabilities of the company as against the creditors of the companies were dealt with. According to him, the personal guarantee given by the petitioner stood extinguished upon such Resolution Plan being approved. It is thereafter that, the first respondent issued a notice dated March 26, 2019 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) to the petitioner on the basis of the guarantee. The petitioner thereafter came to learn that, the petitioner was posted with CIBIL for an alleged default of Rs. 12,62,11,278/- towards the first respondent.

3. Learned Advocate appearing for the petitioner has submitted that, with the liability of the company to the first respondent being extinguished by virtue of the Resolution Plan sanctioned by the National Company Law Tribunal, and the resolution applicant paying the first respondent in terms of the Resolution Plan, the guarantee of the petitioner to the first respondent stood extinguished. The liability

of the guarantor is co-extensive with that of the principal debtor. The principal debtor not having any liability to the first respondent, subsequent to the payment in terms of the Resolution Plan, it cannot be said that, the guarantor, that is, the petitioner, has any liability towards the first respondent. In support of such contentions, he has relied upon Sections 135, 139 and 145 of the Contract Act, 1872. According to him, the creditor having made a composition of the debt due from the principal debtor, the same discharged the surety. The composition was made without the consent and approval of the petitioner. In the facts of the present case therefore, the petitioner as the guarantor did not have any liability towards the loan granted by the first respondent to the company. Moreover, the conduct of the first respondent is inconsistent with the right of the petitioner as the guarantor, and that, the same amounts to discharge the liabilities of the petitioner from the contract of guarantee. According to him, the first respondent as the guarantor having agreed and assented to the Resolution Plan before the National Company Law Tribunal, such conduct releases the petitioner from the guarantee. Even if the first respondent had not agreed or assented to the Resolution Plan, then also the Resolution Plan as sanctioned by the National Company Law

Tribunal exercising jurisdiction under the Code of 2016 being binding on the first respondent as a creditor of the company undergoing a resolution process under the Code of 2016, the first respondent cannot claim any amount from the petitioner on the basis of the guarantee. He has relied upon **2012 Volume 171 Company Cases page 94 (Shri Kundanmal Dabriwala v. Haryana Financial Corporation & Anr.)**, **1893 Appeal Cases page 313 (Commercial Bank of Tasmania v. Jones and Anr.)** and **1957 (3) Kay and Johnson page 438 (Webb. Vs. Hewitt)** in support of his contentions. In such circumstances, he has submitted that, the petitioner having been discharged of his liabilities, the first respondent has put the name of the petitioner with CIBIL illegally. Such action should be quashed.

4. Learned Senior Advocate appearing for the first respondent has submitted that, sanction of a Resolution Plan under the Code of 2016, ipso facto does not discharge the liability of a guarantor towards a creditor in respect of a guarantee given by such guarantor to secure the claim of a creditor for the credit facilities advanced by such creditor to the company undergoing the resolution process. He has relied upon Sections 128, 133, 134 and 135 of the Act of 1872 as well

as Sections 2(e), 5(5A), 5(22), 14(3), 30(4), 60(2) and 238 of the Code of 2016 in support of his contentions. He has submitted that, insolvency resolution process can be invoked at the instance of any creditor of a corporate debtor. Such creditor can also be an insignificant operational creditor. Sanction of a Resolution Plan by the National Company Law Tribunal, does not wipe away the liability of a guarantor. He has submitted that, a Resolution Plan can be approved, if, such plan is accepted by the requisite majority of the class of creditors as stipulated under the Code of 2016. In a given case, a creditor may not have agreed to the Resolution Plan but the same may receive the approval of the National Company Law Tribunal since, such Resolution Plan received the consent of the requisite majority of creditors. In such a situation, the dissenting creditor is bound by the Resolution Plan. According to him, the Resolution Plan is an involuntary act on the part of the creditor. Therefore, the Resolution Plan by itself cannot be said to have discharged the contract of guarantee. He has relied upon **1982 Volume 3 Supreme Court Cases page 358 (Maharashtra State Electricity Board Bombay v. Official Liquidator High Court, Ernakulum and Anr.), All India Reporter 1988 Calcutta page 18 (United Bank of India**

**v. Modern Stores (India) Ltd.)** and **All India Reporter 2002 Supreme Court page 1814 (Industrial Finance Corporation of India Ltd. v. Canonnore Blending and Weaving Mills Ltd. and Ors.)** in support of his contentions.

5. Learned Senior Advocate appearing for the first respondent has relied upon a decision of the National Company Appellate Tribunal rendered in **Company Appeal (80) (Insolvency) No. 164 of 2018 (Lalit Mitra and Ors. v. Sharan Bio Medicine and Ors.)** and **2018 Volume 17 Supreme Court Cases page 394 (State Bank of India v. Ramakrishnan & Anr.)** with regard to Section 14 of the Code of 2016 and the liability of a guarantor.

6. Learned Senior Advocate appearing for the first respondent has submitted that, a contract of guarantee is an independent contract. According to him, Section 14(3) of the Code of 2016 provides that, there will be no moratorium in respect of proceedings against a guarantor during the Corporate Insolvency Resolution process of a corporate debtor while a moratorium against a corporate debtor is in operation. He has submitted that, Section 14 (3) of the Code of 2016 embodies the intention of the legislature that, proceedings against the

guarantor for realisation of the entire guaranteed claim irrespective of the outcome of the Corporate Insolvency Resolution process against the corporate debtor is permissible. He has also relied upon Section 60 (2) of the Code of 2016 to submit that, proceedings against guarantors may be instituted even when an Insolvency Resolution process or liquidation process against the corporate debtor is pending before the National Company Law Tribunal. He has submitted that, the provisions of the Code of 2016 or the Resolution Plan sanctioned under the Code of 2016 does not extinguish the liability of the guarantor. According to him, such liability cannot be said to be affected by the sanction of a Resolution Plan. He has relied upon Section 238 of the Code of 2016 in support of such contentions. He has distinguished the authorities cited on behalf of the petitioner.

7. In reply, learned Advocate appearing for the petitioner has distinguished the authorities cited on behalf of the first respondent. He has submitted that, on a conjoint reading of the provisions of the Code of 2016, a Resolution Plan covers a guarantee given by a guarantor for the purpose of securing the loan of the corporate debtor. Once a Resolution Plan is sanctioned by the National Company Law Tribunal under the provisions of the Code of 2016,

then such plan takes care of such guarantee. Such guarantee cannot be enforced dehors the provisions of the Resolution Plan sanctioned under the Code of 2016. In the facts of the present case, according to him, the petitioner is entitled to the reliefs as prayed for.

8. The issues that have fallen for consideration in the present writ petition are as follows:-

(a) Whether the liability of a guarantor of a debt of a corporate debtor stands reduced/extinguished upon an Insolvency Resolution Plan in respect of the corporate debtor, being approved under the Insolvency and Bankruptcy Code, 2016 ?

(b) To what relief or reliefs are the parties entitled to ?

9. The writ petition has been heard after allowing the parties opportunities to file affidavits. The parties were allowed to file affidavits by the order dated July 4, 2019. The time to file affidavit in opposition by the bank was extended on August 1, 2019 on the prayer of the bank. Despite such opportunities being granted, the bank has chosen not to file an affidavit. Learned senior advocate appearing on behalf of the bank has on instructions submitted that, the bank did not want to file any affidavit in opposition and that the

writ petition can be heard and decided on the basis of the writ petition itself.

10. The petitioner was a director of Divya Jyoti Sponge Iron Private Limited. Such company enjoyed credit facilities from various banks including the first respondent herein. Such credit facilities were secured inter alia by the personal guarantee given by the petitioner. The petitioner has given a personal guarantee to the first respondent for due repayment of the credit facilities enjoyed by the company from the first respondent.

11. The first respondent filed an application under section 7 of the Code of 2016 for initiating Corporate Insolvency Resolution process in respect of the company before the National Company Law Tribunal, Kolkata Bench Kolkata being CP (IB) No. 363/KB/2017. Such application was admitted by the National Company Law Tribunal, Kolkata by an order dated August 23, 2017. The National Company Law Tribunal, Kolkata by its order dated August 23, 2017 found the company to have defaulted in payment of a sum of Rs. 29,33,65,793.94 to the first respondent as on June 30, 2012. An Interim Resolution Professional was appointed by the National Company Law Tribunal, Kolkata on such application. Subsequently a

Resolution Professional was appointed by the order dated October 24, 2017 in respect of the company by the National Company Law Tribunal, Kolkata. The Resolution Professional submitted a Resolution Plan in respect of the company with the National Company Law Tribunal, Kolkata, in such proceedings for approval. By an order dated March 13, 2018, the National Company Law Tribunal, Kolkata, approved the Resolution Plan in respect of the company under section 31 (1) of the Code of 2016. The operative portion of such order is as follows: –

..... “Accordingly, the Resolution Plan submitted by CP Ispat Private Limited is hereby approved upon the following directions:

1. It shall be binding on the corporate debtor and its employees, members, creditors, guarantors, and other stakeholders involved in the Resolution Plan.
2. The Resolution Plan of the corporate data shall come into force with immediate effect.
3. The moratorium order passed under Section 14 shall cease to have effect.

4. The Resolution Professional shall forward all records relating to the conduct of the Corporate Insolvency Resolution Process and the Resolution Plan to the Insolvency and Bankruptcy Board of India to be recorded on its data base.

5. A copy of this order is to be forwarded to IBBI.....”

12. The Resolution Plan approved by the National Company Law Tribunal, Kolkata, in respect of the company, envisaged payment of Rs. 34.25 crores to the secured financial creditors against their entire outstanding claim amount of Rs. 76.21 crores in full and final settlement of all the dues. The Court has been informed that, the resolution applicant had paid the secured financial creditors in terms of such Resolution Plan.

13. Some of the relevant terms and conditions of the Resolution Plan in respect of the company as approved by the National Company Law Tribunal, Kolkata by the order dated March 13, 2018 are as follows: -

#### **1.16. Other Terms**

*i.....*

*ii. On receipt of the payment of their dues, the banks/FIs shall satisfy the charge over the assets of the DJSIPL which have been provided as security against the facilities availed from the secured financial lenders, to make the security in line with the restructured loan/facilities;*

**1.17.8** *All encumbrances, charges, security interests etc. created on the assets of the Corporate Debtor from the secured financial creditor shall stand released on the Cut-Off Date*

.....

**1.17.14** *All claims, rights of promoter/promoter group against the Corporate Debtor, unless covered in the Resolution Plan, shall stand irrevocably and unconditionally extinguished*

.....

**1.17.16** *All liabilities in relation of corporate guarantees, indemnities, etc. provided by the Corporate Debtor as on the Cut-off Date shall arise on the same*

14. The Resolution Plan of the company as approved by the National Company Law Tribunal, Kolkata by the order dated March 13, 2018, in respect of the company, does not deal with the personal guarantee

that the petitioner gave to the first respondent in respect of the credit facilities enjoyed by the company from the first respondent. The first respondent as the secured financial creditor received a haircut in respect of its claim as against the company. The first respondent was obliged, in terms of the order dated March 13, 2018, passed by the National Company Law Tribunal, Kolkata, in respect of the Corporate Insolvency Resolution proceedings of the company to accept the haircut, that is to say that, it had to accept a portion of its claim against the company and record the same as full and final payment towards its claim against the company. What is the effect of a secured financial creditor receiving payment of a part of its claim, on full and final settlement basis, in terms of the Resolution Plan approved by the National Company Law Tribunal exercising jurisdiction under the provisions of the Code of 2016 in respect of a corporate debtor on a guarantee given by a guarantor towards due repayment of the liability by the corporate debtor, is a question which has to be answered in the present writ petition. Would the liability of the guarantor of the credit facilities enjoyed by a corporate debtor stand consequently reduced or extinguished, as the case may be, on the secured financial creditor receiving the payments in terms of a Resolution Plan in

respect of a company undergoing a process of Corporate Insolvency Resolution under the provisions of the Code of 2016 ?

15. On a prima facie finding that, the principle that, the liability of the guarantor stood extinguished upon the creditor making a compromise with the principal debtor was applicable, in the facts of the present case, an interim order dated July 4, 2019 was passed in the present writ petition. The first respondent has questioned the applicability of such principle in the facts of the present case.

16. Learned Counsel for the parties have relied upon various provisions of the Contract Act, 1872 as well as the Code of 2016 in support of their respective contentions. The relevant provisions of the Act of 1872 are as follows: –

*“**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.*

.....

***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 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.*

**135.** *Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.—A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.*

.....

**139.** *Discharge of surety by creditor's act or omission impairing surety's eventual remedy.—If the creditor does any act which is inconsistent with the right of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.*

.....

**145.** *Implied promise to indemnify surety.—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is*

*entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.*

The relevant provisions of the Code of 2016 are as follows:-

**“2 (e)** *personal guarantors to corporate debtors;*

**5. (5-A)** *"corporate guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor;*

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

**14. (3)** *The provisions of sub-section (1) shall not apply to—*

*(a) such transaction as may be notified by the Central Government in consultation with any financial regulator;*

*(b) a surety in a contract of guarantee to a corporate debtor.”*

17. The preamble to the Act of 1872 states that the Act of 1872 defines and amends certain parts of the law relating to contracts. The preamble of the Act of 1872 therefore is an indication that, the Act of 1872 does not deal with the entirety of the law relating to contracts.

There are other statutes governing the field of contracts such as the Specific Relief Act, 1963. The Act of 1872 is divided into 11 chapters. The sections under Chapters VII and XI of the Act of 1872 stands repealed. Chapter VIII of the Act of 1872 deals with indemnity and guarantee. The issues raised in the writ petition revolves around a contract of guarantee executed by the petitioner in favour of the first respondent. Although the parties were allowed at least twice to file affidavits, the parties have not placed the contract of guarantee existing between the petitioner and the first respondent on record. The parties however have proceeded on the basis that, the petitioner executed a guarantee, in writing, in favour of the first respondent guaranteeing repayment of the credit facilities enjoyed by the company from the first respondent.

18. Section 126 of the Act of 1872 defines a contract of guarantee to be a contract to perform the promise, or discharge the liability of a third person in case of his default. It goes on to stipulate that, the person who gives the guarantee is called the surety, the person in respect of whose default the guarantee is given is called the principal debtor, and the person to whom the guarantee is given is called the creditor. It recognises that a guarantee can be either oral or written.

In the facts of the present case, although the contract of guarantee has not been produced by the parties, the parties agree that, the petitioner executed a contract of guarantee in writing in favour of the first respondent guaranteeing the due repayment of the credit facilities enjoyed by the company from the first respondent.

19. Section 128 of the Act of 1872 stipulates that, the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract. The onus is on the petitioner to establish that, the contract of guarantee provided anything to diminish the liability of the petitioner under the contract of guarantee excepting the liability of the petitioner being coextensive as that of the company. The petitioner, as noted above, has not produced the contract of guarantee and therefore has failed to establish that, the contract of guarantee contain any stipulation contrary to the liability of the petitioner being coextensive with that of the company.

20. A contract of guarantee, being a contract, is susceptible to discharge. A contract of guarantee would be discharged in any manner in which, a regular contract would stand discharged. In addition thereto, Sections 133 to 139 of the Act of 1872 embody the circumstances under which a contract of guarantee would stand

discharged. The petitioner has relied upon sections 133, 134, 135, and 139 of the Act of 1872 as the grounds on which, the contract of guarantee given by the petitioner in favour of the first respondent, stands discharged. Section 133 of the Act of 1872, stipulates that, any variation, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the security as to the transaction subsequent to the variance. Section 134 of the Act of 1872 lays down that, 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. Section 139 of the Act of 1872 recognises that, if the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety against the principal debtor is thereby impaired, the surety is discharged.

21. The Act of 1872 recognises that, the surety has a right to recover from the principal debtor any sum which the surety paid rightfully under the guarantee. Sections 69, 140 and 145 of the Act of 1872 recognise such principle.

22. The petitioner has contended that, the liability of a guarantor being coextensive with that of the principal debtor, in the facts of the present case, when, the first respondent, as the creditor, accepted the payment under the Resolution Plan as full and final settlement, of the claim of the first respondent against the principal debtor, the liability of the principal debtor stood extinguished and consequently, in view of the provisions of section 128 of the Act of 1872, the liability of the petitioner stood extinguished.

23. In the facts of the present case, the first respondent initiated a Corporate Insolvency Resolution process of the company under section 7 of the Code of 2016 before the National Company Law Tribunal, Kolkata. The Code of 2016 was enacted to consolidate and amend the laws relating to reorganisation and Insolvency Resolution of corporate persons, partnership firms and individuals in a time bound manner. The Code of 2016 was amended in 2018. Prior to the enactment of the Code of 2016, there were various statutes relating to insolvency and bankruptcy of corporate entities, partnership firms and individuals. The Code of 2016 brought the law governing insolvency of corporate persons, partnerships and individuals under one statute. The Code of 2016 is divided into five parts with each part

containing a number of chapters. Section 7 of the Code of 2016 is under Part II which deals with Insolvency Resolution and liquidation for corporate persons, and Chapter II of Part II deals with Corporate Insolvency Resolution process.

24. Right to apply for insolvency does not arise out of a contract between the parties. It is a statutory right. Section 6 of the Code of 2016 specifies the persons who may initiate Corporate Insolvency Resolution process in respect of a corporate debtor. It stipulates that, where a corporate debtor commits default, a financial creditor, an operational creditor or the corporate debtor itself can initiate Corporate Insolvency Resolution process. Therefore, three persons can apply for initiation of Corporate Insolvency Resolution process in respect of a corporate debtor, they being the financial creditor, the operation creditor of the corporate debtor and the corporate debtor itself. In the present case, the first respondent as the secured financial creditor initiated the Corporate Insolvency Resolution process in respect of the company before the National Company Law Tribunal, Kolkata. The prerequisite to make an application under section 7 of the Code of 2016 is the existence of a default by the corporate debtor. The Code of 2016 defines default in Section 3 (12) to

mean non-payment of debt when whole or any part or instalment of amount of debt has become due and payable and is not paid by the debtor or the corporate debtor as the case may be. The Code of 2016 defines debt in Section 3 (11) to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. When the Adjudicating Authority under the provisions of the Code of 2016 receives an application under section 7 thereof, it has to ascertain the existence of a default in respect of the corporate debtor. It may ascertain such existence either from the records of an information utility or on the basis of the evidence furnished by the financial creditor when the Adjudicating Authority is considering an application under section 7 of the Code of 2016.

25. When a financial creditor approaches the Adjudicating Authority under the provisions of the Code of 2016 and applies under section 7 thereof for initiation of Corporate Insolvency Resolution process in respect of a corporate debtor, the financial creditor is trying to recover the defaulted amount from the corporate debtor. It cannot be said that, the financial creditor when it applies under section 7 of the Code of 2016, does so with the view to enter into any compromise or

composition with the corporate debtor in respect of the claim. In a given situation, the Resolution Plan submitted with the resolution professional and accepted by the committee of creditors and ultimately approved by the Adjudicating Authority, may provide for payment of the entirety of the claim of the financial creditor applying for initiation of the Corporate Insolvency Resolution process. In such a situation, no compromise takes place. In a given situation, the financial creditor applying for initiation of the Corporate Insolvency Resolution process may receive a portion of the claim as full and final settlement as against the corporate debtor, in accordance with the Resolution Plan approved under the Code of 2016. In neither of the two situations, can it be said that, the financial creditor entered into a voluntary compromise with the corporate debtor with regard to the quantum of the claim.

26. The Code of 2016 stipulates that, a Resolution Plan in respect of a corporate debt is required to be approved by a vote of not less than 66% of the voting share of the financial creditors. In a given case, the financial creditor applying for initiation of Corporate Insolvency Resolution process in respect of a corporate debtor may be holding more than 66% of the voting share of the financial creditors in respect

of such corporate debtor. In such case, the best available Resolution Plan in respect of the corporate debtor may contemplate payment of a portion of the claim of the financial creditors in full and final settlement. Such Resolution Plan may be approved by the financial creditor in the meeting of the committee of creditors. Would such an approval mean that, the financial creditor entered into a composition with the corporate debtor, thereby impairing the right of the financial creditor to recover the balance amount from the guarantor of the corporate debtor ? In my view, the answer is in the negative.

27. An application under Section 7 of the Code of 2016 once admitted under Section 7(5) thereof has two terminal points for the corporate debtor. The Code of 2016 does not contemplate withdrawal of an application under Section 7 once it is admitted under Section 7(5). The terminal points are, firstly, the approval of a Resolution Plan and secondly, the initiation of liquidation proceeding on a Resolution Plan not being approved. When a financial creditor applies under Section 7 of the Code of 2016 it is exercising a statutory right. The exercise of such statutory right does not depend upon the contractual obligations of the parties bound by the respective contracts between the creditor, principal debtor and the surety. Such contracts cannot

be said to have rescinded, novated, frustrated, modified, altered or affected in any manner, on an application under Section 7 of the Code of 2016 being filed. After its admission under Section 7(5) of the Code of 2016, when an order under Section 14 is passed, then also only the statutory right of a financial institution to proceed under the SARFAESI Act, 2002 remains suspended for a limited period. The existing contracts between the surety, principal debtor and the creditor remains unaffected.

28. The Supreme Court in ***Maharashtra State Electricity Board, Bombay (supra)*** has held that, 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. In such case, the Supreme Court has considered the interplay of sections 128 and 134 of the Act of 1872. In the facts of that case, a company in respect of which a bank issued a guarantee in favour of the Electricity Board, went into liquidation. The Supreme Court has held that, the fact that the company which is the principal debtor has gone into liquidation would not have any effect on the liability of the guarantor.

29. The Division Bench of this Hon'ble Court in **Modern Stores (India) Ltd. (supra)** has considered the interplay of sections 134 and 137 of the Act of 1872. It has applied the ratio laid down in **Maharashtra State Electricity Board, Bombay (supra)**. It has held as follows: –

*“18. Section 134 consists of two parts, The first part of the section speaks that the sureties are discharged by any contract between the creditor and the principal-debtor, by which the principal debtor is released. This part has no application to the present case as in this case there has not been any contract between the plaintiff being the creditor and the defendant No. 1 being the principal-debtor whereby the principal debtor was released.*

*19. The second part of Section 134 is to this effect. The sureties are discharged by any act or omissions of the creditor, legal consequence of which is the discharge of the principal-debtor. In this appeal we are to consider whether there has been any act or omission on the part of the appellant being the creditor and the consequence of such act or omission is the discharge of the defendant No. 1, the principal-debtor. In this case, as it appears that the suit is instituted by the appellant against the principal-debtor, the defendant No. 1 and the other defendants who were the guarantors or the sureties. It is not in dispute that the*

*defendant No. 1 during the pendency of the suit was dissolved. According to the appellant, in view of dissolution of the defendant No. 1 the principal debtor, the appellant chose to proceed against the other guarantors. As stated earlier the learned trial Judge held that as the appellant did not choose to proceed against the principal debtor or had released the principal-debtor, the guarantors were also thereby released. It is settled law that the discharge of the principal-debtor by operation of law does not operate as the discharge of the sureties. It is also held by the Supreme Court in the case of Maharashtra State Electricity Board v. Official Liquidator, reported in AIR 1982 SC 1497 that dissolution of the principal-debtor would not release or discharge the sureties. Further, we are of the view that in the instant case there has not been any act or omission on the part of the appellant in not proceeding against the defendant No. 1 or releasing the defendant No. 1. In the present case the principal debtor, the defendant No. 1 is discharged by operation of law. Therefore, nothing has been done by the appellant, the result of which is discharge or release of the principal-debtor. It is also pointed out by Dr. Banerjee appearing for the appellant, that in each of the agreement it is provided that nothing done or omitted by the appellant in pursuance of any of the powers, provisions, or authorities contained in this guarantee shall in any way, affect or discharge the liability of the surety. It is also settled that if the creditor*

*expressly reserves his remedy against the surety or generally his securities and remedies against persons other than the principal-debtor, then the release of the principal debtor either by act or omission on the part of the creditor or by operation of law will not discharge the surety. As commented upon by Mulla in his Commentaries on the Contract Act, 10th Edition, page 742, the surety's right to indemnify against a principal-debtor is a necessary result of such a reservation. It is also the opinion of the learned Author that if a creditor without ceasing to hold the principal debtor liable, prefers to sue the more solvent of two sureties for the debt, this still more obviously, does not discharge the other Surety.*

**20.** *It will appear from Section 137 of the Contract Act that mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not discharge the surety. Therefore, it appears that mere forbearance on the part of the creditor to sue the principal debtor will not discharge the surety. It has been held by certain decisions that "mere forbearance" to sue may spring from a contract or there may be simple forbearance. If such forbearance springs from a contract that will be a case under Section 135 of the Contract Act but if the plaintiff forbears to sue the principal debtor within the period of limitation that itself would not discharge the surety.*

**21.** *Therefore, in our view, mere omission to sue the principal debtor or to proceed against the principal debtor in the suit will not operate as a discharge of the sureties.”*

30. The Supreme Court in ***Canonnore Spinning and Weaving Mills Ltd (supra)*** has considered discharge of liability of a guarantee under the provisions of section 141 of the Act of 1872. It has held that, a definite volition on the part of the creditor is required to take place for the guarantor to stand discharged in terms of section 141 of the Act of 1872. It has held that, the liability of the guarantor cannot but be stated to be a strict liability and even if the principal debtor is discharged from his liability unless such discharge is through the act of the creditor without consent of the surety/guarantor, the creditor’s right of action against the surety is preserved.

31. ***Commercial Bank of Tasmania (supra)*** has considered a fact situation where, the original debtor was substituted by another debtor. It is after such substitution that, the creditor sought to proceed against the surety of the original debtor. In such factual scenario, the Court has held that, the action by the creditor against the surety is not maintainable since, the novation of debts operates as

a complete release of the original debtor and secondly of the surety. The factual scenario in the present case is different.

32. **Webb (supra)** has recognised that, when, a creditor releases the debtor, he cannot reserve any right against the surety because the debt is gone at law. In an insolvency proceedings initiated by a financial creditor under Section 7 of the Code of 2016, the financial creditor, while applying under Section 7 of the Code of 2016, is not granting any release to the debtor. The financial creditor is exercising a statutory right to recover its debts. The outcome of the proceedings under Section 7 of the Code of 2016 is a product of statute. The financial creditor cannot be said to have voluntarily discharged the principal debtor, in the event, the Resolution Plan sanctioned by the Adjudicating Authority under the Code of 2016, ultimately results in the financial creditor not receiving any part or portion of its claim.

33. **Kundanmal Dabriwala (supra)** has considered a show cause notice issued by a State Financial Corporation, acting under the provisions of the State Financial Corporation Act, 1951, to a surety for the defaults committed by the borrower/principal debtor. In the facts of that case, it was found that, a scheme sanctioned by the Court under Sections 391 and 394 of the Companies Act, 1956 was

binding on the creditors whether such creditors assented to it or not. It has taken note of Section 135 of the Act of 1872 and held that, a contract between the creditor and the principal debtor by which the creditor compounds with the principal debtor, discharges the surety.

34. In the facts of the present case, most respectfully, I am unable to accept and apply the ratio of ***Kundanmal Dabriwala (supra)***. Firstly, ***Kundanmal Dabriwala (supra)*** is not binding precedent upon me. ***Canonnore Spinning and Weaving Mills Ltd (supra)***, ***Maharashtra State Electricity Board, Bombay (supra)*** and ***Modern Stores (India) Ltd. (supra)*** are binding precedents on me. Secondly, the proposition that, as a binding arrangement sanctioned by Court under Section 391 of the Companies Act, 1956 being a deemed and binding contract through operation of law and if it extinguishes the liability of the principal debtor, the same has the effect of preventing the surety from recovering the amount of debt from the debtor and therefore, the creditor cannot recover from the surety, as observed by ***Kundanmal Dabriwala (supra)***, requires consideration. Theoretically, as the liability of the surety is coextensive as that of the principal debtor, the creditor can proceed solely against the surety and recover the liability of the debtor from

the surety. In such a situation, the subsequent reduction of liability of the debtor to the surety, by virtue of a bankruptcy or insolvency proceeding or otherwise, will not require the creditor to refund the amount recovered from the surety on account of the debtor to the surety. Pre bankruptcy and insolvency, the creditor has the right to recover the entire claim against the debtor from the surety. Post the bankruptcy and insolvency proceeding of the debtor, the pre bankruptcy and insolvency right of the creditor does not undergo any metamorphosis on the principle that, such proceedings emanate out of a statutory right and are involuntary in nature.

35. In a proceeding under Section 7 of the Code of 2016, the consent of the surety is immaterial when, the creditor is dealing with the principal debtor in terms of the Code of 2016. Therefore, when, the Adjudicating Authority sanctions a Resolution Plan in respect of the corporate debtor in an application under Section 7 of the Code of 2016, then, the action taken by the creditor in a proceeding under Section 7 of the Code of 2016 is involuntary. The Corporate Debtor in a proceeding under Section 7 of the Code of 2016 may stand discharged of its liability to its creditors. Such discharge being had in a proceeding for bankruptcy and insolvency, the same does not

absolve the surety of the liability as has been held in ***Maharashtra State Electricity Board, Bombay (supra)***. The sanctioned Resolution Plan cannot be construed to be a variation of the terms of the contract between the principal debtor and the creditor, without the consent of the surety, discharging the surety as to transaction subsequent to the variants or at all. Similarly, the action of a financial creditor applying under Section 7 of the Code of 2016 cannot be construed to be an action of creditor in terms of Section 134 of the Act of 1872. When, the financial creditor approaches the National Company Law Tribunal under Section 7 of the Code of 2016, it approaches the Tribunal for the purpose of recovering its claim. An application under Section 7 of the Code of 2016 cannot be construed to be a discharge of the surety in terms of Section 134 of the Act of 1872. On the same analogy, an application under Section 7 of the Code of 2016 cannot be construed to be a discharge of the surety under Section 135 of the Act of 1872. An application under Section 7 of the Code of 2016 and the consequential orders that may be passed under the Code of 2016 cannot also be construed to be a discharge of the surety in terms of Section 139 of the Act of 1872. The implied promise recognised under Section 145 of the Act of 1872 is not

impaired by any order that may be passed under the Code of 2016. As noted above, when, a financial creditor approaches the National Company Law Tribunal under the provisions of the Code of 2016, it does so, in exercise of statutory rights. Contractual obligations between the financial creditor and the surety are not obliterated or modified or suspended by the eventual outcome of such proceeding.

36. The Supreme Court in **V. Ramakrishnan & Anr. (supra)** has considered the issue as to whether Section 14 of the Code of 2016 would apply to a personal guarantor of a corporate debtor. It has held that, Section 14 of the Code of 2016 does not apply to a personal guarantor. It has noted that, the object of the Code of 2016 is not to allow personal guarantors to escape from an independent and coextensive liability. It has held as follows:-

“.....

**20.** *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.*

**21.** *The scheme of Section 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 Debt Recovery Tribunal, as contemplated under Part III of this Code, for the purposes of sub-section (2), would not take effect, as the Debt 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 Debt Recovery Tribunals to try such 22 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 Section 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.*

**22.** *Section 31 of the Act was also strongly relied upon by the Respondents. This Section only states that once a Resolution Plan, as approved by the Committee of Creditors, takes effect, it shall be binding on the corporate debtor as well as the guarantor. This is for the reason that otherwise, under Section 133 of the Indian Contract Act, 1872, any change made to the debt owed by the corporate debtor, without the surety's consent, would relieve the guarantor from payment. 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. This is perhaps the reason that Annexure VI(e) to Form 6 contained in the*

*Rules and Regulation 36(2) referred to above, require information as to personal guarantees that have been given in relation to the debts of the corporate 23 debtor. Far from supporting the stand of the Respondents, it is clear that in point of fact, Section 31 is one more factor in favour of a personal guarantor having to pay for debts due without any moratorium applying to save him.*

**23.** *We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part III. Secondly, the protection of the moratorium under these Sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason. 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 coextensive liability to pay off the entire outstanding debt, which is why 24 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. We may hasten to add that it is open to us to mark the difference in language between Sections 14 and 96 and 101, even though Sections 96 and 101 have not yet been brought into force. This is for the reason, as has been held in **State of Kerala and Ors. v. Mar Appraem Kuri Co. Ltd. and Anr.**, (2012) 7 SCC 106, that a law ‘made’ by the Legislature is a law on the statute book even though it may not have been brought into force. The said judgment states:*

*“79. The proviso to Article 254(2) provides that a law made by the State Legislature with the President's assent shall not prevent Parliament from making at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by a State Legislature. Thus, Parliament need not wait for the law made by the State Legislature with the President's assent to be brought into force as it can repeal, amend, vary or add to the assented State law no sooner it is made or enacted. We see no justification for inhibiting Parliament from repealing, amending or varying any*

*State legislation, which has received the President's assent, overriding within the State's territory, an earlier parliamentary enactment in the concurrent sphere, before it is brought into force. Parliament can repeal, amend, or vary such State law no sooner it is assented to by the President and that it need not wait till such assented-to State law is brought into force. This view finds support in the judgment of this Court in Tulloch [AIR 1964 SC 1284 : (1964) 4 SCR 461] .*

**80.** *Lastly, the definitions of the expressions “laws in force” in Article 13(3)(b) and Article 372(3) Explanation I and “existing law” in Article 366(10) show that the laws in force include laws passed or made by a legislature before the commencement of the Constitution and not repealed, notwithstanding that any such law may not be in operation at all. Thus, the definition of the expression “laws in force” in Article 13(3)(b) and Article 372(3) Explanation I and the definition of the expression “existing law” in Article 366(10) demolish the argument of the State of Kerala that a law has not been made for the purposes of Article 254, unless it is enforced. The expression “existing law” finds place in Article 254. In Edward Mills Co. Ltd. v. State of Ajmer [AIR 1955 SC 25], this Court has held that there is no difference between an “existing law” and a “law in force”.*

**81.** *Applying the tests enumerated hereinabove, we hold that the Kerala Chitties Act, 1975 became void on the making of the Chit Funds Act, 1982 on 19-8-1982, [when it received the assent of the President and got published in the Official Gazette] as the Central 1982 Act intended to cover the entire field with regard to the conduct of the chits and further that the State Finance Act 7 of 2002, introducing Section 4(1)(a) into the State 1975 Act, was void as the State Legislature was denuded of its authority to enact the said Finance Act 7 of 2002, except under Article 254(2), after the 26 (Central) Chit Funds Act, 1982 occupied the entire field as envisaged in Article 254(1) of the Constitution.”*

37. Section 14 of the Code of 2016 does not apply to a personal guarantor. The Code of 2016 does not allow personal guarantors to escape their liability. When an application under Section 7 of the Code of 2016 is admitted by the Adjudicating Authority, the steps taken subsequent thereto flows out of the statute. The two termination points of an application under Section 7 of the Code of 2016, after the admission of such application, do not result in any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor to constitute a discharge of a surety under Section 133 of the Act of 1872.

38. The ratio of ***Canonnore Spinning and Weaving Mills Ltd (supra)***, ***Maharashtra State Electricity Board (supra)*** and ***Modern Stores (India) Ltd. (supra)*** being binding precedents and the factual scenarios obtaining therein being same as that obtaining in the present case, the ratio laid down therein are applied in the facts of the present case.

39. In view of the discussions above, the first issue is answered in the negative and against the writ petitioner. In view of the answer to the first issue being in the negative, no relief can be granted to the writ petitioner.

40. W.P. No. 10147 (W) of 2019 is dismissed. The subsisting interim order stands vacated.

41. Urgent certified website copies of this judgment and order, if applied for, be made available to the parties upon compliance of the requisite formalities.

**[DEBANGSU BASAK, J.]**