

NATIONAL COMPANY LAW TRIBUNAL
JAIPUR BENCH

CORAM: MS. REETA KOHLI,
HON'BLE JUDICIAL MEMBER

MS. KAVITA BHATNAGAR
HON'BLE TECHNICAL MEMBER

IA No. 343/JPR/2024
In CP No. (IB)-19/95(1)/JPR/2021

(Application Under Section 60(5) of the Insolvency and Bankruptcy Code, 2016)

IN THE MATTER OF:

State Bank of India

... Financial Creditor

VERSUS

Mr. Hemant Bohra (PG to CD-Bohra Industries Ltd.)

...Personal Guarantor

AND IN THE MATTER OF:

MEMO OF PARTIES

IA No. 343/JPR/2024

HEMANT KUMAR BOHRA
220, Ashok Nagar,
Udaipur-313001 (Rajasthan)

...Applicant

Versus

MANOHAR LAL VIJ
8/28, WEA, 3rd Floor,
Abdul Aziz Road, Karol Bagh,
New Delhi-110001

...Respondent No. 1



STCI FINANCE LTD.

A/B I-802, A Wing, 8th Floor,
Marathon Innova, Marathon
Nextgen Compound, Off.
Ganpatrao Kadam Marg,
Lower Parel (W), Mumbai - 400013

...Respondent No. 2

BEENA BOHRA

220, Ashok Nagar,
Udaipur - 313001 (Rajasthan)

...Respondent No. 3

PRESENT: -

For the Applicant	:	Akshay Petkar, Adv.
For the Respondent	:	Bhriugu Sharma, Adv. for R-2
		Nausher Kohli, Adv.
		Abhinav Mukhi, Adv.
		Shantanu Tomar, Adv.
		Manisha, Adv.
		Samridhi Sharma, Adv.
		Divya, Adv.
		Ritik Yadav, Adv.
For the RP	:	Abhishek Devgan, Adv.
		Vishal Hirawat, Adv.

Order Pronounced On: - 10.04.2026

ORDER

Per: Ms. Kavita Bhatnagar, Technical Member

1. The instant application has been filed by *Mr. Hemant Kumar Bohra* ("Applicant"), the Personal Guarantor of *Bohra Industries Limited* ("Corporate Debtor"/ "BIL"), under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ("Code") challenging the admission of claim of STCI Finance Limited ("Respondent No. 2"/ "STCI"), to the tune of Rs.

47,37,61,412/- by the Resolution Professional, Mr. Manohar Lal Vij ("Respondent No. 1") in the Insolvency resolution process ("IRP") of the Applicant initiated vide order dated 28.03.2024. The prayer sought by the Applicant is as follows: -

"In light of the above-mentioned facts, grounds and contentions, the Applicant, Mr. Hemant Kumar Bohra humbly prays that this Hon'ble Tribunal be pleased to grant/allow the following relief:

A. Allow the present Application;

B. Pass an Order directing the Resolution Professional, Mr. Manoharlal Vij, to exclude/disallow the claim of Respondent no. 2, STCI Finance Limited;

C. Pass an Order directly that the insolvency resolution process may be stayed during the pendency of the present Application;

D. Pass an Order allowing ex-parte ad-interim relief in terms of Prayer C;

E. In the alternative to prayer B, pass an order directing the Resolution Professional, Mr. Manoharlal Vij, Respondent No. 1 to reduce the claim of Respondent No. 2, STCI Finance Limited to being co-extensive with the claim of STCI Finance Limited qua Bohra Industries Limited i.e. Rs. 24,61,42,101/-;

F. Pass any such order or Direction or grant any such relief which this Hon'ble Tribunal may find just, fair and equitable in the present facts and circumstances."

2. The brief set of facts pertinent to the adjudication of the instant application are as follows: -

2.1 In the year 2017, BIL (Bohra Industries Limited) approached Respondent No. 2 for the grant of a term loan to the tune of Rs.



24,00,00,000/- which was sanctioned by the Respondent No. 2 after execution of a loan agreement on 21.12.2017. In order to secure the loan, the Applicant and Respondent No. 3, the erstwhile promoters of BIL extended their personal guarantee in favour of the Respondent No. 2 by entering into a deed of guarantee on 21.12.2017.

2.2 BIL had two Financial Creditors, State Bank of India and STCI (i.e., Respondent No. 2).

2.3 Owing to the default on the part of BIL, the CIRP of BIL was initiated by the Adjudicating Authority in *CP No. IB-157/7/JPR/2019* vide Order dated 07.08.2019 on an Application filed by Respondent No. 2 under Section 7 of the Code.

2.4 In the abovementioned CIRP of BIL, the Respondent No. 2 had filed a claim of Rs. 24 Crores and during CIRP, Respondent No. 2 withdrew the claim from the CIRP on the premise that it would recover the same from the Corporate Guarantor (i.e., *Bohra Pratishthan Private Limited/BPPL*) and Personal Guarantor, (i.e., the Applicant in the instant IA).

2.5 Following the withdrawal by Respondent No. 2, the Resolution Plan for BIL was submitted by a consortium led by *Mr. Krishna Aggarwal*. This resolution plan was approved by the COC of BIL on 06.10.2020 in its 14th meeting. Thereafter, this Resolution Plan was also approved by the Adjudicating Authority vide order dated 13.10.2021.



- 2.6 Meanwhile, the application bearing *CP No. (IB)-19/95(1)/JPR/2021* was filed under Section 95 of the Code read with Rule 7 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019 by the State Bank of India against the Applicant for the default in repayment of loan amount by the BIL.
- 2.7 The Adjudicating Authority *vide* order dated 16.07.2021 declared interim moratorium and appointed Respondent No. 1 as the Resolution Professional. The Respondent No. 1 collated all claims submitted by the creditors of the Applicant including the claim of Respondent No. 2/STCI dated 24.04.2024 pursuant to the publication of the Public Notice dated 03.04.2024. Based on the claim received, the Respondent No. 1 admitted the claim of Respondent No. 2 to the tune of Rs. 47,37,61,412/-.
- 2.8 The Adjudicating Authority *vide* order dated 16.07.2021 also directed the Respondent No. 1 to file a report under Section 99 of the Code which was filed by Respondent No. 1 through *IA (IBC) No. 232/JPR/2021*.
- 2.9 The Adjudicating Authority, *vide* impugned Admission Order dated 28.03.2024 admitted the application under Section 100 of the Code bearing *CP No. (IB)-19/95(1)/JPR/2021* seeking initiation of Insolvency Resolution Process ('IRP') against the Applicant under Section 95 of the Code, filed by the State Bank of India *via* Respondent No. 1, and ordered the commencement of IRP against the Applicant.



2.10 The Applicant, upon learning of the admission of the claim of Respondent No. 2 to the tune of Rs. 47,37,61,412/- filed the instant IA bearing *IA No. 343/JPR/2024* challenging the amount of claim filed by the Respondent No. 2, which is admitted by the Respondent No. 1

3. It is the case of the Applicant that: -

3.1 Respondent No. 1 has erred in admitting the claim of Respondent No. 2 to the tune of Rs. 47,37,61,412/- (Forty-Seven Crore Thirty-Seven Lakh Sixty-One Thousand Four Hundred Twelve Only) and Respondent No. 2 cannot be permitted to maintain a claim of a sum higher than Rs. 24,69,95,391/- (Twenty-Four Crore Sixty-Nine Lakh Ninety-Five Thousand Three Hundred Ninety-One Only).

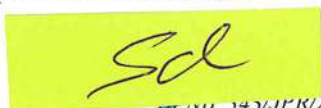
3.2 The claim filed by Respondent No. 2 is on the strength of the deed of guarantee dated 21.12.2017 provided by the Applicant herein along with Respondent No. 3, in respect of the credit facilities of Rs. 24,00,00,000/- (Twenty-Four Crores) i.e., the Loan extended by Respondent No. 2 to BIL.

3.3 The Resolution Plan for BIL submitted by a consortium led by *Mr. Krishna Aggarwal* was supplemented by way of an addendum dated 18.09.2020. The addendum recorded that Respondent No. 2/STCI would be removed from the list of Financial Creditors of BIL. The Resolution Plan further recorded that only the Financial Creditors of BIL would retain the right to recover the residue from the personal guarantor of BIL.



The Applicant's case is that such withdrawal is not a neutral procedural act but has legal consequences; that STCI thereby ceased to be a Financial Creditor in CIRP of BIL and that STCI cannot now re-enter indirectly by lodging a claim in the Guarantor's Insolvency Resolution Process for the same underlying debt. The Applicant further stresses that the STCI withdrew from CIRP of BIL and was not included under the Plan, therefore, STCI is not within the class of Creditors permitted to proceed against guarantors, post-plan approval and thus STCI's claim must be excluded altogether.

- 3.4 Thereafter, the abovementioned resolution plan was also approved by this Hon'ble Tribunal on 13.10.2021 subsequent to the approval by CoC of BIL.
- 3.5 The Order dated 13.10.2021 whereby the Resolution Plan was approved, has attained finality and Respondent No. 2 did not challenge the order dated 13.10.2021 by way of an appeal. Hence, the approved Resolution Plan will supersede any prior right or entitlement.
- 3.6 Following the withdrawal of Respondent No. 2 from the CIRP of BIL, the claim of Respondent No. 2 stood determined. The entitlement of Respondent No. 2 to charge any interest on the sums purportedly due from the Applicant is dependent on its legal entitlement to recover such interest from BIL. The relevant part of the guarantee dated 21.12.2017 is reproduced below:



“Guarantee of Guarantor No. 1 shall be for the purpose of securing the whole of the monies (actual and contingent) and mentioned in Clause 2 hereof (subject to the aggregate principal amount under the said Credit Facility not exceeding Rs. 24,00,00,000/- (Rupees Twenty-Four Crores Only) together with all interest/costs/charges, thereon or on such sum as may be due, at the rate of 12.60% p.a. with monthly rests as the Borrowers shall be liable to pay from time to time under the said Credit Facility and such Additional Interest/Liquidated Damages and other costs as provided in the Loan Agreement payable by the Borrowers under the said Credit Facility, that have accrued or shall accrue due to Lenders at any time before or after the date of demand, all in accordance with the terms and conditions of the Loan Agreement.”

3.7 The Applicant further contends that STCI's admitted claim includes interest allegedly accrued after 15.09.2021. According to the Applicant, once STCI withdrew its claim from the CIRP of BIL and was excluded from the approved plan, it has no legal basis to charge or accrue interest against the principal borrower thereafter, and what is not recoverable from the Principal Borrower cannot be claimed from the Guarantor. Applicant claims that this violates Section 128 of the Indian Contract Act, 1872 and is also contrary to the Guarantee's "ultimate balance" stipulation.

3.8 The Applicant further relies upon the expression "ultimate balance that may become due" stated to appear in the Guarantee Deed and contended during the arguments that the legal import of such expression has been settled by the Hon'ble Supreme Court in **Punjab National Bank Ltd. v.**



Shri Vikram Cotton Mills (1970) 1 SCC 60. The relevant part of the judgment is reproduced below:

“ ...By clause 4 it is expressly stipulated that the bond secured “the ultimate balance” remaining due to the Bank. Therefore, unless and until the ultimate balance is determined no liability on Ranjit Singh to pay the amount arises, and it is common ground that the ultimate balance due is not determined. The suit was for a decree of Rs. 2,56,877/12/6, but the claim against Ranjit Singh could be decreed only for the amount remaining due as the ultimate balance under clause 4 and 5 of the bond.”

The applicant contends that unless the “ultimate balance” is determined the liability does not crystallise and therefore STCI could not have pressed a claim in the present Insolvency Resolution Process and the Resolution Professional/Respondent No.1 should not have admitted it.

3.9 The Applicant objects to the inclusion of the substantial legal expenses/costs amounting to Rs. 2.52 crore and inclusion of CIRP related costs of BPPL within STCI’s claim. The Applicant asserts that there is no decree or adjudication fastening of such costs upon the Applicant, and that these heads are being claimed on STCI. The Applicant contends that the Resolution Professional was bound to verify and should not have mechanically accepted such heads.

3.10 The Applicant also contends that the statement/ledger computations relied upon are not certified under the Banker’s Books Evidence Act, 1891 and thereafter cannot be treated as proof of debt. The Applicant



asserts that the Resolution Professional failed to perform the statutory duty of verification and the admission is arbitrary.

3.11 The question relating to STCI's entitlement to claim any sums from the Applicant was sub-judice before the Hon'ble High Court of Bombay (Commercial Suit No. 90 of 2020, titled '*STCI Finance Ltd. V. Hemant Kumar Bohra and Anr.*').

3.12 During the arguments the Applicant has relied upon the judgment of the Hon'ble NCLAT in the Company Appeal (AT) (Ins.) No. 689 of 2024 with Company Appeal (AT) (Ins.) No. 663 of 2024 titled *State Bank of India v. Gourishankar Poddar and Anr.* The relevant paragraphs of the judgment are reproduced as follows: -

"42. We now take up the second issue relating to variation in terms & conditions of the contract. The Respondent No.1 has submitted that subsequent to 2014 guarantee deed there have been new agreements between CD and appellant and these have led to change in terms and conditions of the contract which therefore attracts Section 133 of the Indian Contract Act. In particular he has invited out attention to revival letter dated 06.02.2016, which was executed by the Corporate Debtor, but which does not have his signature as guarantor in the documents. The counsel for the appellant on the other hand has argued that the Respondent No.1 has explicitly waived his rights under Section 133 of Indian Contract Act of 1872 in terms of 2013 guarantee deed and 2014 guarantee deed.

43. The counsel for appellant has submitted that all the relevant documents and agreements bear reference to the same transaction and there is no variation in the terms and conditions of the agreement between the CD and appellant. Further, in view of Respondent No.1 waiving his rights under Section 133 of the Contracts Act. The relevant clauses of the contract agreement would prevail.



44. We have gone through the relevant clauses 3,14,16 and 26 of 2013 Agreement and clauses 5,13 and 14 of 2014 Guarantee which clearly state that Respondent No.1 would not be discharged of his liabilities even if there is any variation in terms of contract or security documents.

45. In this regard, we have also seen the Judgment of Hon'ble Supreme Court in *BRS Ventures Investments Ltd. v. SREI Infrastructure Finance Ltd. & Anr.* [Civil Appeal No. 4565 of 2021]. The relevant para 14 of the Judgment is extracted below:

"LIABILITY OF GUARANTOR / SURETY

14. As far as the guarantee is concerned, the law is very well settled. The liability of the surety and the principal debtor is co-extensive. The creditor has remedies available to recover the amount payable by the principal borrower by proceeding against both or any of them. The creditor can proceed against the guarantor first without exhausting its remedies against the principal borrower. Chapter VIII of the Contract Act contains provisions regarding indemnity and guarantee. Section 126 is relevant for our purposes, which reads thus:

"126. "Contract of guarantee", "surety", "principal debtor" and "creditor". — A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. 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". A guarantee may be either oral or written."

A surety is also known as a guarantor. Section 128 reads thus:

"128. Surety's liability. — The liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract."

It lays down the fundamental principle that the liability of the surety is co-extensive with that of the principal debtor unless otherwise provided by the contract. Sections 133 to 139 deal with the discharge of surety, which read thus:



“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.

136. Surety not discharged when agreement made with third person to give time to principal debtor. — Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

137. Creditor’s forbearance to sue does not discharge surety. — Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

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 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 himself against the principal debtor is thereby impaired, the surety is discharged.”

Thus, the law provides that if any variance is made without surety’s consent in the terms of the contract between the principal debtor and the creditor, it amounts to discharge of the surety as to the transactions subsequent to the variance. Under the provisions of Section 133, surety can be discharged only when there is a variance made in the terms of the contract between the principal debtor and the creditor. Section 134 contemplates a situation where the



principal debtor is released by a contract between the creditor and the principal debtor. In such a case, the surety is discharged. If by any act or omission on the part of the creditor, the legal consequence of which is the discharge of the principal debtor, the surety stands discharged. Section 135 is based on the same principle on which Section 133 is based. If there is a contract between the creditor and the principal debtor by which the creditor makes a composition or promise with the principal debtor, or gives time to the principal debtor or agrees not to sue the principal debtor, it amounts to discharge of the surety provided the surety has not assented to such a contract. If the creditor contracts with a third party to give time to the principal debtor, and when the principal debtor is not a party to such a contract, the surety is not discharged. Section 137 lays down a settled principle that it is not necessary for the creditor to first sue the principal debtor or adopt a remedy against him. If the creditor omits to do that, unless there is a contract to the contrary, it will not amount to discharge of the surety. This means that without proceeding to recover the debt against the principal debtor, the creditor can proceed against the surety unless there is a contract to the contrary. Even if the creditor discharges one surety, it will not amount to the discharge of the other surety.....”

(Emphasis supplied)

3.13 The Applicant during the arguments has also relied upon the judgment of Hon’ble Supreme Court in **BRS Ventures Investments Ltd. v. SREI Infrastructure Finance Ltd. & Anr.** Civil Appeal No. 4565 of 2021. The relevant paragraph of the Judgment is extracted below:

“26. Now, we turn to the provisions of the IBC. Sub-section (8) of Section 5 defines “financial debt”. Clauses (a) and (i) of sub-section (8) show that the money borrowed against the payment of interest and the amount of any liability in respect of any guarantee for repayment of the loan covered by clause (a) have been put under separate headings. Thus, the liability of the guarantor or surety is a financial



debt, and even the money borrowed against the payment of interest is also a financial debt.

28. Sub-section (2) of Section 60 contemplates separate or simultaneous insolvency proceedings against the corporate debtor and guarantor. Therefore, sub-section (3) of Section 60 provides that if CIRP in respect of the corporate guarantor is pending before an adjudicating authority and if the CIRP against the corporate debtor is pending before another adjudicating authority, CIRP proceedings against the corporate guarantor must be transferred to the adjudicating authority before whom CIRP in respect of the corporate debtor is pending. Thus, consistent with the basic principles of the Contract Act that the liability of the principal borrower and surety is coextensive, the IBC permits separate or simultaneous proceedings to be initiated under Section 7 by a financial creditor against the corporate debtor and the corporate guarantor."

4. Both Respondent No. 1 and Respondent No. 2 in their respective replies have challenged the maintainability of the instant Application under Section 60(5) of the Code filed by the Applicant as the reliefs sought by the Applicant do not fall within the ambit of the Section 60(5) of the Code.
5. As per the Respondents, Section 60(5) starts with a *non- obstante* clause provides for the jurisdiction of the Adjudicating Authority to entertain or dispose of applications, proceedings, claims and any question of priorities or question of law or facts pertaining to the Corporate Debtor or Corporate Person. Since the instant Application pertains to the reconsideration of claim filed in a personal insolvency matter (dealt in Part III of the Code) the same cannot be



filed under Section 60(5) of the Code and is therefore liable to be dismissed in limine.

6. Further, both the Respondent No. 1 and Respondent No. 2, in their respective replies relied upon the judgment of the Hon'ble Supreme Court in the matter of **Lalit Kumar Jain versus Union of India & Ors.** (2021) 9 SCC 321 which observed that the nature and extent of the liability of the guarantor would depend on the terms of the guarantee itself. Relevant extract of the judgement is reproduced hereunder: -

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

108. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability.”

7. The Respondent No. 1, in its reply submitted that: -

- 7.1 The liability of the Applicant in terms of Clause 4 of the Guarantee Deed shall be for the purpose of securing the whole of the credit facility not exceeding Rs. 24,00,00,000/- (Twenty-Four Crores) together with all the interest/costs/charges, thereon or on such sum as may be due, at the rate



of 12.60% p.a. with monthly rests as the borrowers shall be liable to pay from time to time under the said credit facility and such additional interest/liquidated damages and other costs as provided in the loan agreement payable by the borrowers under the said credit facility that have accrued or shall accrue due to lenders at any time before or after the date of demand. Relevant extract of Clause 4 of the Guarantee Deed is reproduced hereunder: -

“4. Guarantee of Guarantor No. 1 shall be for the purpose of securing the whole of the monies (actual and contingent) and mentioned in Clause 2 hereof (subject to the aggregate principal amount under the said credit facility not exceeding Rs 24,00,00,000 (Rupees Twenty Four Crores only) together with all the interest/costs/charges, thereon or on such sum as may be due, at the rate of 12.60% p.a. with monthly rests as the borrowers shall be liable to pay from time to time under the said credit facility and such additional interest/liquidated damages and other costs as provided in the loan agreement payable by the borrowers under the said credit facility that have accrued or shall accrue due to lenders at any time before or after the date of demand all in accordance with the terms and conditions of the loan agreement.”

7.2 The Respondent No.1 relies on the terms of the Guarantee Deed and asserts that the Guarantee is comprehensive and covers the principal facility and interest/cost charges and additional interest/liquidated damages and other costs as per loan agreement, payable before or after the date of demand. The Respondent No. 1, therefore, contends that STCI was entitled to file its claim computed as on the insolvency



commencement date of the Personal Guarantor i.e., 28.03.2024 and the Respondent No. 1 was duty bound to collate and admit such claim upon verification.

7.3 The Respondent No. 1 contests the Applicant's reliance on pendency of proceedings and submits that the Code has overriding effect as per the provision under Section 238 of the Code and that the pendency of Civil Suits does not bar the Insolvency Resolution Process. The Respondent No. 1 asserts that similar objections were earlier raised in response to the Section 95 Petition and were rejected.

7.4 The Respondent No. 1 has denied the allegations of the mechanical admission and asserts that the claim was duly verified with documents and clarifications sought. The Respondent No.1 prays for the dismissal of the Application with exemplary costs and contending that Application is intended to derail and delay the Insolvency Resolution Process.

8. On the other hand, the Respondent No. 2 in its reply has submitted that: -

8.1 The Respondent No. 2 did not withdraw its claim from the CIRP of BIL to pursue its claim "only" against the Corporate Guarantor (i.e., BPPL). The withdrawal of the claim in the CIRP of BIL and pursuing its claim in the CIRP of BPPL was done in view of the dictum of the Hon'ble NCLAT delivered in the matter of *M/s Piramal Enterprises Limited* wherein the Hon'ble NCLAT held that for the same set of debt, a claim



cannot be filed in two separate CIRPs of the Principal Borrower and the Corporate Guarantor.

- 8.2 The Respondent No. 2 had only elected to proceed in one of the CIRP proceedings between BIL and BPPL. The Respondent No. 2 did not relinquish or waive any of its rights against the Guarantors and other liable parties or in any security interest created by the Guarantors including the Applicant and Respondent No. 3 (i.e., *Mrs. Beena Bohra*) under the Guarantee Deed dated 21.12.2017 and mortgage by deposit of title deeds created on 02.01.2018 in favour of the Respondent No. 2.
- 8.3 The Respondent No. 2 asserts that the guarantee is an independent and continuing contract and that the guarantor is liable for amounts due in terms of the guarantee and loan documents, including interest and costs/charges as on the Insolvency Commencement Date of the Personal Guarantor. Respondent No. 2 denies that Applicant can freeze the liability at a 2019 figure.
- 8.4 The Respondent No. 2 further submitted that the Resolution Plan of BIL no-where seeks discharge of any 3rd party (including guarantors) under their respective obligations in respect of the facilities availed by BIL. The approved Resolution Plan specifically provides for continued liability of existing guarantors and other liable parties by stating that “*However, Guarantors existing and Third Parties shall not be relieved/discharged from their liability*”. Second limb of the sentence



that “*financial creditors shall have right to recover residual amount from them*” is a separate and independent aspect which does not limit the scope of first limb. The second limb does not provide that ‘only’ Financial Creditors as mentioned in the then existing list of creditors of BIL can exercise such right. Although, on approval of a resolution plan, the same does not *ipso facto* discharge a corporate debtor of his or her liabilities under the contract of guarantee.

8.5 The Respondent No.2 submitted that the amount of Rs. 24,69,95,391/- which was outstanding up to 07.08.2019 when the claim in the CIRP of BIL was filed, increased to Rs. 49,88,84,148/- as on 28.03.2024 due to recurring interest when the claim was filed during the insolvency of the Applicant (i.e., the personal guarantor). Clause 14 and 18 of the Guarantee Deed specifically provides for a continued liability for the entire amount as the principal borrower.

8.6 In support of his case during the arguments the Respondent No. 2 has referred to the judgement of the Hon’ble NCLAT in the case of **Upkar Kaur v. Mr. Gagan Gulati and Ors.** in Company Appeal (AT) (Ins.) No. 2238 of 2024.

9. The Respondent No. 3 (Ms. Beena Bohra) is a proforma respondent and no reply has been submitted by her.

Analysis and Findings



10. We have considered the entire pleadings, including the Application, the RP's reply, STCI's reply, and heard the Ld. Counsels of the parties. The Applicant seeks exclusion or reduction of STCI's claim from the insolvency resolution process and a stay of the process. Such relief, if granted, would have the effect of eliminating a creditor from the process and would materially alter the composition of creditors. Therefore, the Tribunal must test whether the Applicant has made out a clear case that STCI's claim is legally not maintainable or is clearly non-existent, as distinct from being merely disputed in amount or under certain heads.

10.1 Issue Maintainability.

Respondent No. 1 and Respondent No. 2 object to the Application's citation of Section 60(5). The Applicant has clarified that the Application is traceable to Section 60(2) and the proposition that wrong mention of provision does not defeat power where it exists. This legal position is also supported by the judgment of the Hon'ble Supreme Court in *Pruthviraj Singh Nodhubha Jadeja vs. Jayesh Kumar Chhakaddas Shah & Ors, (2019) 9 SC 533*. In view of the statutory scheme of Section 60(2) in relation to personal guarantors to corporate debtors, and the fact that the Application raises a grievance arising in relation to the ongoing insolvency resolution process of the personal guarantor before this Bench, we hold that the Application cannot be rejected solely on account



of an incorrect citation. Therefore issue 10(i) is held in favour of maintainability.

10.2 Issue— Effect of withdrawal and plan exclusion.

- 10.2.1 This is the Applicant's principal contention. The Applicant argues that STCI withdrew its claim from BIL CIRP on 15.09.2020 and was excluded from the list of financial creditors under the approved plan, therefore it cannot proceed against the guarantor. We are unable to accept this contention in the broad manner in which it has been contended.
- 10.2.2 The withdrawal of a claim from a CIRP is, in essence, an act within the procedural framework of that CIRP. Such withdrawal may have consequences within that CIRP, including that the creditor does not participate further in the distribution or in voting as a financial creditor in that CIRP. However, to treat such withdrawal, by itself, as a complete extinction of the creditor's underlying contractual rights under an independent contract of guarantee against third parties would require clear legal basis, such as an express waiver, discharge, novation, settlement, or any other legally operative instrument releasing the guarantor. In the present case, despite extensive pleadings, no deed of discharge or novation releasing the Applicant from the guarantee is shown to exist on record.
- 10.2.3 The Applicant's plan-based argument, namely that the plan reserved rights against guarantors only for "Financial Creditors" of BIL and since



STCI stood excluded it cannot proceed, also does not automatically lead to a discharge of the guarantor. The resolution plan binds stakeholders in relation to the corporate debtor and its insolvency resolution. The Applicant has not shown an express plan term operating as a discharge of the Applicant's guarantee obligations towards STCI, nor has the Applicant shown that the plan was intended to operate as a release instrument extinguishing third party guarantees held by creditors who had withdrawn claims. This Tribunal cannot infer such release of guarantee by implication from the mere fact of exclusion of a creditor from plan's list of financial creditors in corporate debtor's CIRP.

- 10.2.4 The Respondent No. 1 has placed reliance on *Lalit Kumar Jain v. Union of India, (2021) 9 SCC 321* to contend that sanction of a resolution plan and finality under Section 31 does not per se discharge the guarantor's liability and the nature and extent depends on the guarantee terms. The Applicant attempts to distinguish this by stating that he is not relying merely on plan approval but on withdrawal and plan exclusion. Even accepting the Applicant's factual distinction, the legal difficulty remains: withdrawal/exclusion, without an express release/novation, cannot be treated as extinguishing the independent guarantee contract. The Supreme Court principle relied upon by the RP underscores that guarantor liability flows from the guarantee contract and is not automatically erased by plan approval; that principle, in our view,



supports the conclusion that extinguishment/discharge of a guarantor is not to be lightly inferred and must be shown by clear legal basis.

10.2.5 The Respondent No. 2 has placed reliance on the judgment of the Hon'ble National Company Law Appellate Tribunal in Upkar Kaur, Personal Guarantor to M/s Jagtar Singh & Sons Hydraulics Pvt. Ltd. vs. Gagan Gulati, Resolution Professional. In the said decision, the Appellate Tribunal, while dealing with proceedings under Sections 95 and 100 of the Code, upheld the admission of the application against the personal guarantor by holding that the debt remained subsisting, that issues such as limitation and discharge were not made out, and that the guarantee continued to operate in the absence of any express novation or extinguishment. The Appellate Tribunal thus declined to interfere with the initiation of insolvency proceedings where the material on record demonstrated a continuing liability.

The said judgment supports the broader principle that, at the stage of consideration of insolvency proceedings, the Adjudicating Authority is required to examine whether there exists a legally sustainable debt and default, and whether any legal infirmity is made out. It does not envisage a detailed adjudication of accounts or re-computation of the claim in the manner sought by the Applicant. In the present case, the Applicant is not merely pointing out any error in law or absence of material, but is seeking a re-determination of the quantum and components of the claim of



Respondent No. 2. Such an exercise does not arise at this stage of the insolvency process. Accordingly, the reliance placed on Upkar Kaur in my considered opinion supports, rather than detracts from, the position that no interference is warranted with the claim as collated by the Resolution Professional.

10.2.6 The Applicant has also relied upon the judgment of the Hon'ble NCLAT in State Bank of India v. Gauri Shankar Poddar & Anr., and has specifically referred to the observations contained in paragraphs 42 to 44 thereof to contend that upon approval of a resolution plan in respect of the principal borrower, there is a change in the underlying arrangement which impacts the liability of the guarantor. However, a careful reading of the said decision shows that the Hon'ble Appellate Tribunal, while considering the effect of a resolution plan, has in fact reiterated that the liability of the guarantor does not stand discharged merely on account of such resolution, and that the creditor is entitled to proceed against the guarantor subject to adjustment of amounts realised in the insolvency process. (In this case Respondent No 2 (STCI) had been excluded from Resolution Plan therefore he had not received any amount through it) The observations relied upon by the Applicant cannot be read in isolation so as to suggest that the guarantee stands extinguished or that the creditor's claim becomes liable to be excluded or re-computed on that basis. The principle emerging from the said judgment is to the contrary, namely, that



the liability of the guarantor survives notwithstanding resolution of the principal borrower. The reliance placed by the Applicant on the said judgment is therefore misplaced.

- 10.2.7 The Applicant has also relied upon the judgment of the Hon'ble Supreme Court in *BRS Ventures Investments Ltd. vs. SREI Infrastructure Finance Ltd. & Anr.* However, the said decision was rendered in the context of the effect of payment made under the resolution plan of a corporate guarantor and the consequent right of the financial creditor to proceed against the principal borrower for the balance amount. The Hon'ble Supreme Court held that such payment does not extinguish the liability of the principal borrower except to the extent of the amount actually recovered, and further held that separate proceedings under Section 7 may be maintained against the principal borrower and the corporate guarantor. The principle emerging from the said judgment is thus that a subsequent resolution or payment arrangement in respect of the guarantor does not, by itself, wipe out the subsisting liability under the original transaction. The said judgment, therefore, does not assist the Applicant in contending that the liability in question stood extinguished or became unenforceable merely by reason of subsequent arrangements.
- 10.2.8 The Respondent No. 2 has explained that withdrawal from BIL CIRP was done due to then prevailing NCLAT view in *Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Limited* which was understood to bar pursuing



the same debt in CIRPs of principal borrower and corporate guarantor. The decisive point here is that withdrawal in one insolvency process is an election in that process and is not, by itself, a complete waiver of all remedies against all obligors unless the creditor expressly waives such rights.

10.2.9 For these reasons, we hold that the Applicant has not established that STCI's withdrawal from BIL CIRP and its exclusion from the list of financial creditors under BIL plan, by themselves, extinguish or bar STCI's right to lodge/maintain a claim in the insolvency resolution process of the Personal Guarantor. Issue 10.2 is therefore held against the Applicant.

10.3 Issue – Co-extensive liability and quantum, including interest and costs.

10.3.1 The Applicant's alternative case is that even if STCI can lodge a claim, the admitted quantum is inflated and violates Section 128 of the Contract Act. The Applicant has placed reliance on *B.G. Vasantha v. Corporation Bank*. The proposition that a guarantor's liability is co-extensive with that of the principal debtor is well-known; however, co-extensive liability does not mean that a creditor's claim must be frozen at the figure stated in a particular claim filed in 2019 in the corporate debtor's CIRP. The claim in BIL CIRP was computed as on BIL's insolvency commencement date. The claim in the personal guarantor process is computed as on the personal guarantor insolvency commencement date (28.03.2024). The



Applicant has not been able to demonstrate that the debt stopped accruing in law after a particular date, or that the guarantee contract precludes such accrual, hence it will be not be correct to treat the 2019 figure as an unchangeable ceiling.

10.3.2 The Applicant argues that interest post 15.09.2020 is impermissible because STCI withdrew its claim from BIL CIRP and was excluded from the plan. This contention, at the level of exclusion of the claim from the insolvency process, cannot be accepted on the basis of the terms of the facility documents and guarantee. The present I.A. seeks the extreme relief of exclusion/disallowance of the claim itself, and the Tribunal must be careful not to convert claim collation in insolvency into a full-scale civil adjudication of each head of claim and each period of accrual. The Applicant's objections, in substance, relate to amount and heads (including legal costs), which may be disputed, but they do not establish that the claim is wholly non-existent or that STCI has no subsisting right to lodge a claim at all.

10.3.3 As regards legal expenses/costs, the Applicant has raised serious objections that Rs. 2.51 crores and certain CIRP costs are arbitrarily loaded. These objections, even if assumed to be substantial disputes, again pertain to particular heads and their recoverability. They do not, in the present position justify excluding STCI altogether from the process when the foundational debt/guarantee is not shown to be non-existent.



The insolvency process cannot be stayed or derailed merely because there is dispute as to some heads of computation, unless the admission is patently perverse on the face of record.

- 10.3.4 Therefore, we hold that Issue 10.3 is answered against the Applicant insofar as the prayer for exclusion/rejection/capping at a threshold stage is concerned. We clarify that this order does not purport to finally adjudicate each disputed head as in a civil trial; it only determines whether the Applicant has made out a case to expel STCI's claim from the insolvency process or to mandate a final numerical cap at this interlocutory stage.

10.4 Issue RP's role; verification versus adjudication; "ultimate balance" and certification objections.

- 10.4.1 The Applicant alleges abdication of duty by the RP on the basis that the RP admitted STCI's claim mechanically without strict proof, without certification under the Bankers' Books Evidence Act, and without deciding "ultimate balance" under the guarantee as interpreted by Punjab National Bank Ltd. v. Shri Vikram Cotton Mills (relied upon by the Applicant during the arguments).
- 10.4.2 The Tribunal is conscious that the RP is required to verify claims diligently as per the Code and applicable PG Regulations. However, claim verification in insolvency resolution is not the same as conducting a civil trial. The RP is not conferred adjudicatory powers akin to a civil



court to conclusively decide complex disputes of fact and law involving detailed evidence, cross-examination, and final determination of contractual defences. The Applicant's insistence that the RP must conclusively decide whether withdrawal extinguished rights, whether plan exclusion bars STCI, whether post-withdrawal interest is illegal, whether legal costs are recoverable, and whether "ultimate balance" is determined, would effectively convert claim verification into a full-fledged trial within the insolvency process. Which is a summary proceeding.

11. The Applicant has placed reliance on the judgment of the Hon'ble Supreme Court in Vikram Cotton Mills. The said judgment however does not lay down a proposition that a creditor is precluded from lodging or maintaining a claim in insolvency proceedings unless the "ultimate balance" is first determined by a competent Civil Court. The decision was rendered in the context of adjudication of rights requiring appropriate determination in accordance with law and could be read to mean that insolvency proceedings must await prior Court adjudication in all cases.

- 11.1 The RP has stated that he admitted STCI's claim after receiving claim forms and subsequent clarifications/documents, and has placed the admitted secured/unsecured figures on record. The Applicant disputes the adequacy of verification and the certification of ledger statements. We do not find, on the basis of material placed, that the RP's admission is shown



to be patently perverse or wholly without basis. The Applicant's objections relate to contested heads of computation and legal consequences of earlier steps; such disputes do not ipso facto show illegality or abdication by the RP so as to warrant exclusion of the claim and stay of process.

11.2 The RP is required to collate and verify claims on the basis of the material available as on the insolvency commencement date within a time bound period. While disputes relating to the exact quantum or enforceability may arise and be adjudicated in appropriate proceeding the process of claim collation in IBC cannot be made contingent upon a prior civil decree. To rely on *Vikram Cotton Mills* in such a manner would be inconsistent with scheme and timelines envisaged under the Code.

11.3 The present application seeks *inter alia* exclusion reduction or modification of the claim of Respondent No. 2 at the threshold as well as stay of insolvency process. Further no case is made out for directing such exclusion / disallowance or modification at this stage of insolvency proceedings.

Conclusion and operative order

12. ***Accordingly, I.A. No. 343/JPR/2024 is dismissed.*** The prayer for stay of the insolvency resolution process is also rejected. There shall be no order as to costs.





REETA KOHLI
JUDICIAL MEMBER



KAVITA BHATNAGAR
TECHNICAL MEMBER

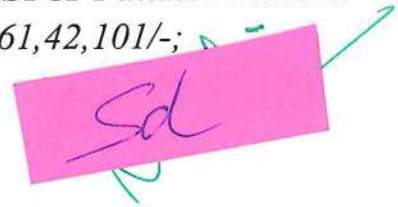
Concurrence Note

Per: Ms. Reeta Kohli, Judicial Member

1. The instant application has been filed by *Mr. Hemant Kumar Bohra* ('Applicant'), the Personal Guarantor of *Bohra Industries Limited* ('BIL'/'Corporate Debtor'), under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 ('the Code') challenging the admission of claim of *STCI Finance Limited* ('Respondent No. 2'/'STCI'), to the tune of Rs. 47,37,61,412/- by the Resolution Professional, *Mr. Manohar Lal Vij* ('Respondent No. 1') in the Insolvency resolution process ('IRP') of the Applicant initiated *vide* order dated 28.03.2024. The prayer sought by the Applicant is as follows: -

"In light of the above-mentioned facts, grounds and contentions, the Applicant, Mr. Hemant Kumar Bohra humbly prays that this Hon'ble Tribunal be pleased to grant/allow the following relief:

- A. Allow the present Application;*
- B. Pass an Order directing the Resolution Professional, Mr. Manoharlal Vij, to exclude/disallow the claim of Respondent no. 2, STCI Finance Limited;*
- C. Pass an Order directly that the insolvency resolution process may be stayed during the pendency of the present Application;*
- D. Pass an Order allowing ex-parte ad-interim relief in terms of Prayer C;*
- E. In the alternative to prayer B, pass an order directing the Resolution Professional, Mr. Manoharlal Vij, Respondent No. 1 to reduce the claim of Respondent No. 2, STCI Finance Limited to being co-extensive with the claim of STCI Finance Limited qua Bohra Industries Limited i.e. Rs. 24,61,42,101/-;*



F. Pass any such order or Direction or grant any such relief which this Hon'ble Tribunal may find just, fair and equitable in the present facts and circumstances."

2. The brief set of facts pertinent to the adjudication of the instant Application are as follows: -

- 2.1 A loan agreement was executed between Respondent No. 2/STCI and BIL ('*Bohra Industries Limited*') for a term loan to the tune of Rs 24,00,00,000/- on 21.12.2017. In order to secure the loan, the Applicant and Respondent No. 3 (namely, *Mrs. Beena Bohra*), the erstwhile promoters of BIL, extended their personal guarantee in favour of the Respondent No. 2 by entering into a deed of guarantee on 21.12.2017.
- 2.2 Owing to the default on the part of BIL, the CIRP was initiated against BIL by the Adjudicating Authority in *CP No. IB-157/7/JPR/2019* vide Order dated 07.08.2019 in a Petition filed by Respondent No. 2/STCI under Section 7 of the Code. Initially, the Respondent No. 2/STCI had filed a claim of Rs. 24 Crores and during the CIRP, Respondent No. 2/STCI withdrew the claim from the CIRP on 15.09.2020.
- 2.3 Following the withdrawal by the Respondent No. 2, the Resolution Plan for BIL was submitted by a consortium led by *Mr. Krishna Aggarwal*. The said Resolution Plan was also approved by the Adjudicating Authority vide order dated 13.10.2021.

- 2.4 Meanwhile, the State Bank of India filed a Petition bearing *CP No. (IB)-19/95(1)/JPR/2021* under Section 95 of the Code read with Rule 7 (2) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019 against the Applicant herein for the default in repayment of loan amount by the BIL.
- 2.5 In the abovementioned Petition under Section 95, the Adjudicating Authority *vide* Order dated 16.07.2021 declared interim moratorium and appointed Respondent No. 1 as the Resolution Professional. Thereafter, the Adjudicating Authority, *vide* impugned Order dated 28.03.2024 admitted the Petition bearing *CP No. (IB)-19/95(1)/JPR/2021* and ordered the commencement of Insolvency Resolution Process against the Applicant. Further, in the said Petition, the Respondent No. 2/STCI filed its claim dated 24.04.2024 based on the strength of the deed of guarantee dated 21.12.2017 in respect of the credit facilities of Rs. 24,00,00,000/-. Consequently, the Respondent No. 1 admitted the claim of Respondent No. 2 to the tune of Rs. 47,37,61,412/-.
- 2.6 The Applicant, upon learning of the admission of the claim of Respondent No. 2 to the tune of Rs. 47,37,61,412/- filed the instant



Application bearing *IA No. 343/JPR/2024* challenging the claim filed by the Respondent No. 2, which is admitted by the Respondent No. 1.

3. After carefully considering the facts and circumstances of the instant case, it is deemed appropriate to form the following issues for adjudicating the instant Application. The issues formed are as follows:-

Issue: *Whether the act of withdrawal of the claim of the FC from the CIRP of the Principal Borrower/Corporate Debtor extinguishes the right of the FC to file any subsequent claim under Section 95 of the Code?*

4. The case of the Applicant is that Respondent No. 2/STCI is no longer a creditor of the Personal Guarantor as it voluntarily withdrew its claim from the CIRP of the Principal Borrower/BIL. Hence, it was submitted that the claim of Respondent No. 2 in the individual Resolution Process of the Personal Guarantor is not maintainable.
5. Given the facts and circumstances of the present Application, it is essential to consider the judgment of the Hon'ble Supreme Court in the case of *Lalit Kumar Jain v. Union of India & Ors.* (2021) 9 SCC 321 wherein it has been held that the nature and extent of the liability of the guarantor would depend on the terms of guarantee itself. The relevant paragraph of the aforementioned judgment is reproduced as follows:-

“108. It is therefore, clear that the sanction of a resolution plan and finality imparted to it by Section 31 does not per se operate as a discharge of the guarantor's liability. As to the nature and extent of the liability, much would depend on the terms of the guarantee itself. However, this court has indicated, time and again, that an

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involuntary act of the principal debtor leading to loss of security, would not absolve a guarantor of its liability."

6. At this juncture, we consider it appropriate to consider the Deed of Guarantee dated 21.12.2017. The relevant paragraphs of the aforementioned Guarantee Deed as executed between the Applicant along with Respondent No. 3 (*Mrs. Beena Bohra*) and the Creditor (i.e., STCI) is reproduced as follows:-

"2. In consideration of STCI having granted/ agreed to grant/ continuing to grant, from time to time, the said Credit Facility in terms of the Loan Agreement to the Borrowers, the Guarantors hereby, irrevocably and unconditionally, jointly and/or severally, guarantee the due repayment by the Borrowers and further irrevocably and unconditionally, jointly and/or severally, guarantee and undertake, to pay to STCI, within 5 (five) Business Days of demand in writing by STCI and without demur, merely upon STCI sending a demand notice requiring payment of, all and every sum and sums of money which are now, or shall at any time be owing by the Borrowers to STCI under the said Credit Facility, together with the applicable interest, and other costs as set forth in the Loan Agreement. Any such demand shall be conclusive as regards the default having been committed by the Borrowers in the repayment of the aforesaid amounts to STCI.

- 3. The Guarantee shall be a continuing guarantee.*
- 4. Guarantee of Guarantor No. 1 shall be for the purpose of securing the whole of the monies (actual and contingent) and mentioned in Clause 2 hereof (subject to the aggregate principal amount under the said Credit Facility not exceeding Rs. 24,00,00,000/- (Rupees Twenty Four Crores Only) together with all interest/costs/charges, thereon or on such sum as may be due, at the rate of 12.60% p.a. with monthly rests as the Borrowers shall be liable to pay from time to time under the said Credit Facility and such Additional Interest/Liquidated Damages and other costs as provided in the Loan Agreement payable by the Borrowers under the said Credit Facility, that have accrued or shall accrue due to Lenders at any time before*

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or after the date of demand, all in accordance with the terms and conditions of the Loan Agreement.

5. ...

6. The Guarantors expressly agree that STCI shall have full discretionary power, without any further consent from the Guarantors and without in any way affecting the Guarantors' liability under this guarantee, to renew the said Credit Facility, and to hold over, interchange the drawing powers under the limits/ sub limits, renew or give up in whole or in part, from time to time, any bills, notes, mortgages, charges, liens or other securities received or to be received from the Borrowers, either alone or jointly with any person or persons or from any other person or persons or bearing the name of the Borrowers. STCI shall be at liberty without in any way affecting the Guarantors' liability under this guarantee to amend / vary any contract or any term or terms of any contract entered into with the Borrowers and/ or to release or discharge or waiver of any obligation of the Borrowers and/ or to do any act or omission and/ or to enter into any composition or compound with or promise to grant time or any other indulgence or not sue, either the Borrowers or any person or persons, liable on any such bills, notes, mortgages, charges, liens, or other securities or any person liable as surety, or collaterally liable for the Borrowers or any other person or persons otherwise liable to STCI.

...

26. This Guarantee shall be additional to any other guarantee for the Borrowers, signed by the Guarantors or any other person that STCI may at any time hold. That the Guarantee hereby given is independent and distinct from any security that SICI has taken / shall take in any manner whatsoever and the Guarantors shall have no right to the benefit of any such security that may be held by STCI until the entire dues to STCI under the said Credit Facility and any other accommodation provided to the Borrowers shall have been satisfied in, full. STCI shall be at liberty and the Guarantors hereby give consent to STCI to vary, change, modify any contract or any term or terms of any contract entered into with the Borrowers or to release or discharge or to do any act or omission the legal consequences of which is to discharge or to enter into any composition or compromise or compound with or promise to

*grant time or any other indulgence or not to sue the Borrowers or any other person/s liable on any such bills, notes, mortgages, charges, liens or other securities or any person/s liable as surety, or collaterally liable for the Borrowers or any and other person/s. Further that notwithstanding the provisions of Sections 140 said 141 of the Indian Contract Act (1872) or any other provisions of the Act or any other law, the Guarantors shall not claim to be discharged on account of STCI's failure to take any security or for losing any security or subrogation of any security for any reason whatsoever, including reasons attributable to STCI's default and negligence and to the operation of law. **The Guarantors specifically waive the Guarantors' rights as a surety available under Section 133, 134, 135 and 139 of the Indian Contract Act or any other law for the time being in force.** The Guarantors agree that he/they shall not be entitled to claim the benefit of any legal consequences of any variation of any contract entered into by the Borrowers with STCI the liability in respect of which is guaranteed by the Guarantors as aforesaid. STCI shall be entitled to retain, realize or otherwise dispose off in such and manner without as STCI may think fit any securities now or hereafter held by STCI any liability to account to the Guarantors for any proportion of such securities or of the proceeds thereof until all moneys due to STCI secured by such securities are fully repaid."*

7. It is of utmost importance to consider an important feature of the said deed whereby the Personal Guarantor has expressly waived the protections available under Sections 133, 134, 135 and 139 of the Indian Contract Act, 1872 which deal with the discharge of the surety's liability. The significance of this clause needs to be understood in the context of the provisions of the Contract Act. The Sections 133, 134, 135 and 139 of the Indian Contract Act, 1872 are reproduced hereunder:-

"133. Discharge of surety by variance in terms of contract.—Any variance, made without the surety's consent, in the terms of the

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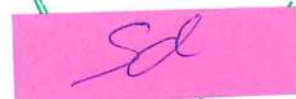
contract between the principal 1 [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

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

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 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 himself against the principal debtor is thereby impaired, the surety is discharged."*

8. Section 133 of the Contract Act contemplates discharge of the surety where, without the surety's consent, a variance is made in the terms of the contract between the creditor and principal debtor. Section 134 contemplates discharge where the principal debtor is released by contract or by an act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. Section 135 deals with composition, promise to give time, or agreement not to sue. Section 139 concerns acts or omissions by the creditor which impair the eventual remedy of the surety.
9. Ordinarily, these provisions may provide a defence to a guarantor in certain situations involving dealings between the creditor and the principal debtor. However, in the present case, the deed itself records that the guarantor



waived these protections. Therefore, even assuming that withdrawal of the creditor's claim from the CIRP of the principal borrower could be characterised as some form of omission, forbearance, or election on the part of the creditor, the Applicant is contractually precluded from contending that such conduct resulted in his discharge. That defence stands foreclosed by the guarantee deed itself. The guarantor, having contractually agreed that acts, omissions, variances, arrangements, release, forbearance or other dealings between the creditor and the principal borrower would not discharge his liability, cannot subsequently invoke those very statutory protections to defeat the Creditor's claim.

10. Keeping in view the fact that the Applicant herein has waived off the rights available to surety under the Indian Contract Act, 1872, and in view of the judgement of Hon'ble Apex Court in *Lalit Kumar Jain* (Supra) emphasising the relevance of Guarantee Deed in determining the right of surety, there is no force in the contention of the Applicant apropos co-extensiveness of the liability. The said position has been upheld by the Hon'ble Supreme Court in *Central Bank of India Vs. C.L. Vimla and Others with M.A. Krishnamurthy Vs. C.L. Vimla and Ors.* (2015) 7 SCC 337 wherein the Apex Court discussed the issue of co-extensive liability of the 'Guarantor' under Section 128 of the Indian Contract Act, 1872 and observed the following:



“13. We are of the opinion that the questions that need to be decided by us are regarding the liability of the guarantor under Section 128 of the Indian Contract Act, 1872. The legislature has succinctly stated that the liability of the guarantor is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. This Court has decided on this question, time and again, in line with the intent of the legislature. In Ram Kishun and Ors. v. State of U.P. and Ors., (2012) 11 SCC 511, this Court has held that

“in view of the provisions of Section 128 of the Contract Act, the liability of the guarantor/surety is co-extensive with that of the debtor.”

The only exception to the nature of the liability of the guarantor is provided in the Section itself, which is only if it stated explicitly to be otherwise in the Contract.

14. In the case of Ram Kishun (supra), this Court has also stated that it is the prerogative of the Creditor alone whether he would move against the principal debtor first or the surety, to realize the loan amount. This Court observed:

“10.....Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as to how he should make the recovery and pursue his remedies against the principal debtor at his instance”.

Thus, we are of the view that in the present case the guarantor cannot escape from her liability as a guarantor for the debt taken by the principal debtor. In the loan agreement, which is the contract before us, there is no clause which shows that the liability of the guarantor is not co-extensive with the principal debtor. Therefore Section 128 of the Indian Contract Act will apply here without any exception.”

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11. Further, since the Applicant waived of the Guarantors' rights as a surety available under Section 133, 134, 135 and 139 of the Indian Contract Act or any other law for the time being in force, it cannot be said that the Respondent No. 2/STCI has no right to recover from the Applicant after voluntary withdrawing from the CIRP of BIL.
12. Besides, the contention of the Applicant that approval of the resolution plan under Section 31 of the Code bars the Creditor (i.e., STCI) from proceeding against the guarantors is not legally tenable. The Hon'ble Supreme Court in the case of *Lalit Kumar Jain* (supra) held that the sanction of a resolution plan and finality imparted to it by Section 31 does no per se operate as a discharge of the guarantor's liability.
13. Moreover, the creditor (i.e., STCI) had filed an affidavit on its behalf before the Adjudicating Authority on 24.04.2024 confirming its withdrawal from the CIRP of the Principal Debtor (i.e., BIL). The relevant portion of the affidavit is reproduced as follows:-

"Short affidavit by STCI finance limited in compliance with directions passed by this hon'ble appellate tribunal on 03.04.2024.

- 1. That STCI Finance Limited ("STCr") has filed a statement dated 21.03.2024 in the present proceedings and the present additional statement is in continuation to the said statement dated 21.03.2024. The contents of the said statement may kindly be read as part of the present additional affidavit also.*
- 2. That STCI confirms that it had withdrawn its claims from the corporate insolvency resolution process of Bohra Industries Limited ("BIL") with effect from 15.09.2020 as mentioned in*

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STCI letter dated 15.09.2020 and STCI shall not claim any amount from BIL in respect of the Corporate Term Loan of Rs. 24 Crore advanced by STCI to BIL under Loan Agreement dated 21.12.2017.

The present affidavit is without prejudice to any of the rights, remedies and contentions of STCI against Bohra Pratisthan Private Limited, Mr. Hemant Bohra, Mrs. Beena Bohra and other liable parties under law and STCI will be entitled to pursue/continue to pursue all its actions in relation to the Loan against the aforesaid persons. ”

14. The Applicant contends that the STCI vide affidavit dated 24.04.2024 confirmed that it had no claim subsisting against Principal Debtor (i.e., BIL) after 15.09.2020. However, the last paragraph of the said affidavit in the most conspicuous terms mentions that the withdrawal of its claim does not extinguishes its rights to pursue the claim against BPPL, Mr. Hemant Bohra, Mrs. Beena Bohra and other liable parties under law.
15. Accordingly, the instant Application is devoid of merit and hence the IA bearing *IA No. 343/JPR/2024 in CP No. (IB)- 19/95(1)/JPR/2021* is rejected and disposed of.


REETA KOHLI
JUDICIAL MEMBER