

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

Hearing Through: VC and Physical (Hybrid) Mode

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

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

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF NATIONAL COMPANY LAW TRIBUNAL,
HYDERABAD BENCH, HELD ON 01.03.2024 AT 10:30 AM**

TRANSFER PETITION NO.	
COMPANY PETITION/APPLICATION NO.	Company Petition IB/288/2021
NAME OF THE COMPANY	
NAME OF THE PETITIONER(S)	State Bank of India
NAME OF THE RESPONDENT(S)	Thota Subbarayudu
UNDER SECTION	95 of IBC

ORDER

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

Sd/-
MEMBER (T)

Sd/-
MEMBER (J)

**IN THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH - II**

CP (IB) No.288/95/HDB/2021

Section 95(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 7(2) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019

In the matter of Mr.Thota Subbarayudu

Between:

State Bank of India,
SAMB Branch,
Kacheguda Station Road,
No.3-2-1, New Bus Station,
1st Floor, TSRTC,
Kacheguda, Hyderabad - 500 027.

....Financial Creditor/Petitioner

AND

Mr. Thota Subbarayudu,
S/o.Mr.T.Subbaramaiah,
Plot No.296, Road No.25,
Jubilee Hills, Hyderabad - 500 033.

....Personal Guarantor/Respondent No.1

M/s.Turbo Machinery Engineering Industries Limited,
Plot No.309, IDA,
Bachupally Miyapur,
Bollaram Road,
Hyderabad - 500 072.

....Corporate Debtor/Respondent No.2

Date of Order:01.03.2024

CORAM:

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

Counsels present:

For the Applicants : Ms.Sarvani Desiraju, Mr. Mohammed
Hayatullah Khan, Advocates
For the Respondents : Mr. Phani Kumar, Advocates

Per: [Rajeev Bhardwaj, Member (Judicial)]

ORDER

1. This application has been filed by State Bank of India (hereinafter referred as Financial Creditor) under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 read with Rule 7(2) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019 to initiate Insolvency Resolution Process against Personal Guarantor, Mr. Thota Subbarayudu (hereinafter referred to as *Personal Guarantor/Respondent No.1*) of M/s.Turbo Machinery Engineering Industries Limited (hereinafter referred as Corporate Debtor).
2. The Corporate Debtor availed credit facilities of Rs. 40,36,00,000/- from the Financial Creditor in the form of a cash credit and non-fund based limits vide sanction letter dated 31.01.2012, which was extended vide letter dated 29.02.2012. The Respondent No.1 stood guarantor for the repayment of the loan and Guarantee Deeds dated 02.03.2010 and 28.02.2012 were executed between the Financial Creditor and Respondent No.1.
 - 2.1 The default in payment of debt occurred on 30.06.2013. Due to non-payment of the loan amount, one of the financial creditors filed CP No.64 of 2017 under Section 7 of the IBC against the Corporate

Debtor which was admitted. Finally, the Corporate Debtor was put into liquidation vide order dated 06.11.2019.

- 2.2 The Financial Creditor received a part payment of loan amount by auction and Rs. 8,17,18,639.87/- was left as principal outstanding amount. Thereafter, demand notice dated 11.08.2021 was issued to the Respondent No.1, but the amount was not paid.
 - 2.3 The Financial Creditor also approached the Debts Recovery Tribunal, Hyderabad by filing OA No.9734 of 2017 regarding the outstanding debt.
3. In reply, the Respondent No.1 has contented and contested the averments made by the applicant.
- 3.1 It is submitted that that Corporate Debtor did not avail the credit facilities of Rs.40,36,00,000/- but only the amount was sanctioned and it is for this reason, the Financial Creditor has not furnished the utility certificate confirming the liability. Further, the amount was also not mentioned in the recovery through e-auction in CP No.64 of 2017.
 - 3.2 The Respondent No.1 has also submitted that the present application is barred by limitation. It is averred that the application under Section 95 of IBC is independent and not supplementary to application under Section 7 of IBC. The date of default of the Corporate Debtor is 26.06.2013 and the Guarantee Agreement was signed in the year 2012.

4. In the rejoinder, the Applicant has reaffirmed and reasserted the contentions put forward in the application.

4.1 It is explained that availing of loan of Rs. 40,36,00,000/- is clear from the sanction letter. Besides, this fact has also been admitted by the Corporate Debtor in OA No.9734 of 2017 filed before the Debts Recovery Tribunal, Hyderabad. The Respondent No.1 has also admitted his signature on the Guarantee Deed. It is further averred that, there is also no need to submit the utility certificate confirming the liability as it was not mandatorily required to be filed at the time of filing of the application.

4.2 On the question of liability of the Personal Guarantor, it is averred that the guarantee is irrevocable and continuing, which is co-extensive with the Corporate Debtor. On account of non-payment of loan amount, the account of Corporate Debtor was classified as Non-Performing Assets (NPA) on 26.01.2013 and therefore the Petition No. 64 of 2017 of IBC under Section 7 of IBC was filed by one of the financial creditors of the Corporate Debtor. The liability of the Respondent No.1 to pay arose from the date of default of payment when the demand notice was issued to him. However, the Respondent No.1 has neither replied to the said demand notice nor denied his liability to pay the same and on this point, reliance has been placed on the decision of the Hon'ble Apex Court in *Syndicate Bank versus Channaveerappa Baleri and others, AIR 2006 SC 1874*.

4.3 Further, the Financial Creditor has received part payments on 15.09.2107, 18.09.2017, 25.06.2021 and 02.07.2021. Accordingly,

the limitation period has been extended for the recovery of the loan amount. In this regard, reliance has been placed on the decision of the Hon'ble Supreme Court of India in *Margaret Lalita Samuel versus Indo Commercial Bank Limited, AIR 1972 SC 102*.

5. We have heard learned counsel for both the parties and have also gone through the entire record.
6. The Financial Creditor vide letter dated 31.01.2012 extended credit facilities in favour of the Corporate Debtor. Perusal of the record reveals that agreement for the overall limit was executed between the parties on 20.04.2006 and deed of guarantee was also executed on the same date. In pursuance of letter dated 31.01.2012, the credit limit was extended from existing 35.40 lakhs to 40.36 lakhs. Supplemental deed of guarantee for increase in overall limit was executed on 28.02.2012 which is at page No. 55-60 of the application. The Financial Creditor filed the memo for placing on record the guarantee deed executed on 20.04.2006.
7. The guarantee deed dated 20.04.2006 is continuing one. Section 128 of the Contract Act says that the liability of the surety is co-extensive with the principal debtor, unless it is otherwise provided for by the contract. However, there is difference between the continuing guarantee and ordinary guarantee. This has been aptly explained by the Hon'ble Supreme Court in *Syndicate Bank versus Channaveerappa Beleri and Ors. (2006) 11 SCC 506* about the liability attached with these two forms of guarantee in the following manner:

9. A guarantor's liability depends upon the terms of his contract. A 'continuing guarantee' is different from an ordinary guarantee. There is also a difference between a guarantee which stipulates that the guarantor is liable to pay only on a

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

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

(Own emphasis)

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

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

bank guarantee. The object behind is to inculcate respect for free flow of commerce and trade and faith in the commercial banking transactions unhedged by pending disputes between the beneficiary and the contractor.

(Own emphasis)

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

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

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

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

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

(Own emphasis)

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

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

"In the present case the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all. If the creditor chose to sue the surety and not pursue any other remedy, the creditor on being paid in full was bound to assign the mortgage securities to the surety. If the creditor chose to exercise his power of sale over the mortgage security he must sell for the current market value but the creditor must decide in his own interest if and when he should sell. The creditor does not become a trustee of the mortgaged securities and the power of sale for the surety unless and until the creditor is paid in full and the surety, having paid the whole of the debt is entitled to a transfer of the mortgaged securities to procure recovery of the whole or part of the sum he has paid to the creditor. The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and if the surety decamps abroad the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagee and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline. Applying the rule as specified by Pollock CB in *Watts v. Shuttleworth* (1860) 5 H&N 235 at 247-248: 157 ER 1171 at 1176, it appears to their Lordships that in the present case the creditor did not act injurious to the surety, did not act inconsistent with the

rights of the surety and the creditor did not omit any act which his duty enjoined him to do. The creditor was not under a duty to exercise his power of sale over the mortgaged securities at any particular time or at all."

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

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

Dear Sirs,

In consideration of your having agreed to allow overdraft accommodation upto Rs. 10,00,000/- (Rupees Ten Lakhs only) to the Modern Hindustan Food Products Ltd., Poona, we, C.B. Samuel and M.L. Samuel, the undersigned do hereby jointly and severally guarantee to you, the Indo-Commercial Bank Limited the repayment of all money, which shall at any time be due to you from the said Modern Hindustan Food Products Ltd., on the general balance of their accounts with you or on any account whatever (such balances to include all interest, charges, commission and other expenses which you may charge as bankers) and also the due payment at maturity of any promissory note or other negotiable instrument on the security or in respect of which any credit or advance shall be made.

And we hereby declare that this guarantee shall be a continuing guarantee to the extent at any one time for Rs. 10,00,000/- (Rupees Ten Lakhs only) and shall not be considered wholly or partially satisfied by the payment at any one time or at different times of any sums of money due on such general balance of account but shall extend and cover and be a security for every and all further sums at any time

due to you thereon. And we further declare that you may grant to the Modern Hindustan Food Products Ltd., any indulgence without discharging our liability.

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

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

We agree with the view expressed by Shah, J. The intention and effect of a continuing guarantee such as the one with which we are concerned in this case was considered by the Judicial Committee of the Privy Council in Wright and Anr. v. New Zealand Farmers Co-operative Association of Canterbury Ltd. [1939] A.C. 439. The second clause of the guarantee bond in that case was in the following terms:

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

12. In Part-III (page No.9) of the application, the date of default is mentioned as on 30.06.2013 and if we calculate limitation from this date when the cause of action arose against the Corporate Debtor, the present application is barred by limitation.
13. Ld. Counsel for the Applicant has submitted that the date of default is extendable in view of the proceedings pending under the SARFAESI Act,

acknowledgment of the debt by the Corporate Debtor by submitting scheme of arrangement under Section 230 of the Companies Act, part payment of the loan amount on 15.09.2017, 18.09.2017 and 25.06.2021 and further exclusion of Covid period with effective from 15.03.2020 to 28.02.2022. In support of her contentions, she has relied upon the following decisions:

- i.Sesh Nath Singh and Ors. versus Baidyabati Sheoraphuli Co-operative Bank Ltd. and Ors. (2021) 7 SCC 313.*
- ii.Kotak Mahindra Bank Limited versus Kew Precision Parts Private Limited and others (2022) 9 Supreme Court Cases 364.*
- iii.Dena Bank (now Bank of Baroda) versus C. Shivakumar Reddy and Anr., Supreme Court.*
- iv.Jose M.M. versus State Bank of India Stressed Assets Management, 2022 SCC OnLine NCLAT 3601.*
- v.Rajendra Narottamdas Sheth and Anr versus Chandra Prakash Jain and Anr, Civil Appeal No.4222 of 2020 (Supreme Court).*
- vi.Tejas Khandhar versus Bank of Baroda, Company Appeal (AT) (Insolvency) No.371 of 2020 (NCLAT).*

14. On the other hand, Ld. Counsel for the Personal Guarantor submitted that the date of default cannot be extended and this application is barred by limitation because three years had already expired when the present application was moved by the Applicant.
15. The argument of the learned counsel for the Applicant that the date of default can be changed, it has been held by the Hon'ble Supreme Court in the case of ***Ramesh Kymal versus Siemens Gamesa Renewable Power Pvt. Ltd., (2021) 3 SCC 224*** that the date of default cannot be changed. It has also been held in the cases of ***Laxmi Pat Surana versus Union Bank of India and Ors.(2021) 8 SCC 48, Babulal Vardharji Gurjar versus***

Veer Gurjar Aluminium Industries Pvt. Ltd. and Ors. (2020) 15 SCC 1, B.K. Educational Services Private Limited versus Parag Gupta and Associates(2019) 11 SCC 633 and Jignesh Shah and Ors. versus Union of India (UOI) and Ors (2019) 10 SCC 75 that the period of limitation would be attracted from the date when the default occurs and not from the date of declaration of NPA. Accordingly, we do not subscribe to the contention of the Applicant.

16. The Judgments in *Kotak Mahindra Bank Limited and Dena Bank (now Bank of Baroda) (supra)* relied upon by the Applicant held that the additional documents can be filed at any stage of the case and similarly pleadings can be amended. However, these decisions do not say that the date of default can be extended, but the documents relating to the scheme of arrangement under Section 230 of the Companies Act or acknowledgment of debt etc., can be looked into for the purpose of extending the period of limitation. Similarly, in *Sesh Nath Singh and Ors. versus Baidyabati Sheoraphuli Co-operative Bank Ltd. and Ors. (supra)*, the Hon'ble Supreme Court held that the period spent for proceedings under SARFAESI Act is to be excluded for the purpose of calculating the limitation period.
17. Once limitation starts, it can be extended only under the Limitation Act. In *Jignesh Shah and another versus Union of India and another (2019) 10 SCC 750*, the Hon'ble Supreme Court has held that "when time begin to run, it can only be extended in the manner prescribed in the Limitation Act". The Law declared by the Hon'ble Supreme Court is explained clearly in Para 21 of the said judgment which read as follows:

"Para 21. The aforesaid judgments correctly hold that a suit for recovery based upon a cause of action that is within limitation cannot in any manner impact the separate and independent remedy of a winding-up proceeding. In law, when time begins to

run. It can only be extended in the manner provided in the Limitation Act. For example, an acknowledgement of liability under section 18 of the Limitation Act would certainly extend the limitation period, but a suit for recovery, which is a separate and independent proceeding distinct from the remedy of winding up would, in no manner, impact the limitation within which the winding-up proceeding is to be filed, by somehow keeping the debt alive for the purpose of the winding-up proceeding".

18. The commencement of the surety's liability is determined by the terms of the contract of guarantee and it pivots on the construction of terms of the bond; however, the parties can agree, that the surety's liability may arise only in a specific contingency. In the decision of the Hon'ble Supreme Court in ***Syndicate Bank versus Channaveerappa Beleri & Ors (2006) 11 SCC 506*** at paragraph 9, it is observed as under:

"9. A guarantor's liability depends upon the terms of his contract. A 'continuing guarantee' is different from an ordinary guarantee. There is also a difference between a guarantee which stipulates that the guarantor is liable to pay only on a demand by the creditor, and a guarantee which does not contain such a condition. Further, depending on the terms of guarantee, the liability of a guarantor may be limited to a particular sum, instead of the liability being to the same Comp. App (AT) (CH) (INS) No. 102 of 2022 Page 31 of 35 extent as that of the principal debtor. The liability to pay may arise, on the principal debtor and guarantor, at the same time or at different points of time. A claim may be even time-barred against the principal debtor, but still enforceable against the guarantor. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. We have referred to these aspects only to underline the fact that the extent of liability under a guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract.

19. The Supreme Court, in the case of ***Kailash Nath Agarwal and others versus Pradeshia Indust. & Inv. Corpn. of U.P. and another, (2003) 4 SCC 305***, while considering the scope of Section 128 of the Indian Contract Act, has held in para 10 of its judgment that considering the clause of guarantee executed by the guarantor in favour of borrower, it shows that the liability of the guarantor was to remain unaffected by the failure of borrower. It further provides that borrower and guarantor are

jointly and severally liable under Section 128 of the Indian Contract Act. It is also well settled that the guarantor cannot be made liable beyond the terms of the agreement [*State of Maharashtra versus M.N. Kaul AIR 1967 SC 1634*].

20. Here, we want to refer the condition Nos.11 and 20 of the Guarantee Deed which are reproduced below:

No.11. The Guarantee shall be irrevocable and enforceable against the Guarantors notwithstanding any dispute between the Bank and the Borrower.

No.20 The Guarantors agree that amount due under or in respect of the aforesaid credit facilities and hereby guaranteed shall be payable to the Bank on the Bank serving the Guarantors with a notice requiring payment of the amount and such notice shall be deemed to have been served on the Guarantors either by actual delivery thereof to the Guarantors or by dispatch thereof by Registered Post of Certificate of posting to the Guarantors address herein given or any other address in India to which the Guarantors may by written intimation given to the Bank or request that communication addressed to the Guarantors be dispatched. Any notice dispatched by the Bank by Registered Post or Certificate of Posting to the address to which it is required to be dispatched under this clause shall be deemed to have been duly served on the Guarantors four days after the date of posting thereof, and shall be sufficient if signed by any officer of the Bank and in proving such service it shall be sufficient if it is established that the envelope containing such notice, communication or demand was properly addressed and put into the post office.

21. As per condition No.20, the guarantee was invoked when notice regarding payment of the amount was served on the guarantor. The demand notice was issued on 26.06.2013 to the Corporate Debtor. But notice was given to the Personal Guarantor on 21.11.2014 which is at page No. 69 of the application. However, a publication notice dated 26.11.2014 was given, demanding the guarantor to pay the liabilities within 80 days from the date of the receipt of notice. Therefore, the Personal Guarantor was to pay the debt up to 14.02.2015. It is then condition No. 20 will come into play. The phrase “on demand” has been explained by the Hon’ble Apex Court in **Margaret Lalita Samuel** case as below:

14. We have to, however, enter a caveat here. When the demand is made by the creditor on the guarantor, under a guarantee which requires a demand, as a condition precedent for the liability of the guarantor, such demand should be for payment of a sum which is legally due and recoverable from the principal debtor. If the debt had already become time-barred against the principal debtor, the question of creditor demanding payment thereafter, for the first time, against the guarantor would not arise. When the demand is made against the guarantor, if the claim is a live claim (that is, a claim which is not barred) against the principal debtor, limitation in respect of the guarantor will run from the date of such demand and refusal/non compliance. Where guarantor becomes liable in pursuance of a demand validly made in time, the creditor can sue the guarantor within three years, even if the claim against the principal debtor gets subsequently time-barred. To clarify the above, the following illustration may be useful:

Let us say that a creditor makes some advances to a borrower between 10.4.1991 and 1.6.1991 and the repayment thereof is guaranteed by the guarantor undertaking to pay on demand by the creditor, under a continuing guarantee dated 1.4.1991. Let us further say a demand is made by the creditor against the guarantor for payment on 1.3.1993. Though the limitation against the principal debtor may expire on 1.6.1994, as the demand was made on 1.3.1993 when the claim was 'live' against the principal debtor, the limitation as against the guarantor would be 3 years from 1.3.1993. On the other hand, if the creditor does not make a demand at all against the guarantor till 1.6.1994 when the claims against the principal debtor get time-barred, any demand against the guarantor made thereafter say on 15.9.1994 would not be valid or enforceable.

(Own emphasis)

22. In the present case, there is specific reference in condition No. 20 when the guarantor shall become liable to pay the debt. The facts are similar to the case in ***Channaveerappa Beleri & Ors*** case supra, wherein Hon'ble Supreme Court had occasion to consider the provisions of Section 128 and 129 of the Contract Act. It has been laid down that the limitation of the guarantor will depend purely on the terms of the contract. It has further been observed in para No. 9 that a claim may be even time-barred against the principal debtor, but still enforceable against the guarantor, thus, clarifying that the extent of liability under a guarantee as also the question as to when the liability of a guarantor will arise, would depend purely on the terms of the contract.

23. There is a limitation period of three years for filing application under Section 95 of IBC. The period of limitation under Article 55 of the Indian Limitation Act, 1963 for enforcing the liability of the Personal Guarantor under the surety bond is three years, when the contract is broken or the breach of the contract occurs. The residuary provision i.e. Article 137 Limitation Act also provides limitation period of three years. Therefore, there is not any difference between both the Articles as far as the starting point of limitation is concerned, which is the date on which cause of action arose i.e.14.02.2015 which will expire on 13.02.2018.
24. Hence, in the present case, the period of limitation starts to run from the date the cause of action would arise with the breaking of the contract for continuing guarantor which would be the date when the guarantee deed was invoked and the guarantor commits breach by not complying with the demand.
25. Before the expiry of the limitation period, the Applicant filed OA No.9734 of 2017 which is still pending for adjudication. Therefore, in view of the decisions in *Sesh Nath Singh and Ors. versus Baidyabati Sheoraphuli Co-operative Bank Ltd. and Ors. (supra)*, the period spent for proceedings under SARFAESI Act is to be excluded for the purpose of calculating the limitation period.
26. Apart from this, the principal debtor has also admitted the liability by submitting the plan for reconstruction of the company under Section 230 of the Companies Act through Mr. T. Venkateswarulu, director of the Corporate Debtor and shareholders of Turbo Machinery Engineering Industries Limited, which is an acknowledgement of debt. The

acknowledgement of debt by the Corporate Debtor during the limitation is also binding on the Personal Guarantor and in this regard, we refer to the condition Nos. 12 and 19 of the guarantee deed.

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

19. The Guarantors agree that any admission or acknowledgement in writing signed by the Borrower of the liability or indebtedness of the Borrower or otherwise in relation to the above mentioned credit facilities and or any part payment as may be made by the Borrower towards the Principal sum hereby guaranteed or any judgement, award or order obtained by the Bank against the Borrower shall be binding on the Guarantors and the Guarantors accept the correctness of any statement of account that may be served on the Borrower which is duly certified by any officer of the Bank and the same shall be binding and conclusive as against the Guarantors also and the Guarantors further agree that in the Borrower making an acknowledgement or making a payment the Borrower shall in addition to his personal capacity be deemed to act as the Guarantors duly authorised agent in that behalf for the purposes of Sections 18 and 19 of the Limitation Act of 1963.

27. The Resolution Professional has also recommended for admission of the present petition against the Personal Guarantor/ Respondent No. 1 as enshrined in Sec. 101(1) of the IBC 2016. Furthermore, the Personal Guarantor has not provided any other points of significance for consideration.
28. In view of the aforesaid discussions, we allow the **CP(IB) No.288/95/HDB/2021**. under the provisions of Section 100 of the Code, 2016 and Insolvency Resolution Process is initiated against Mr. Thota Subbarayudu, the Personal Guarantor, and moratorium is declared in relation to all debts, which begins from the date of admission of the instant petition and shall cease to have effect at the end of the period of

180 days, as provided under Section 101 of the Code, 2016. During the moratorium period-

- a) Any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
- b) The Creditors shall not initiate any legal action or legal proceedings in respect of any debt; and
- c) The debtor shall not transfer, alienate, encumber or dispose of any of her assets or her legal rights or beneficial interest therein;
- d) The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.
- e) The Resolution Professional Shri. Kasi Srinivas, having Registration No. IBBI/IPA-003/IPA-ICAI-N-00237/2019-2020/12840, R/o. Flat No.602, Plot No. 9, Dream Home Vasista, Baraf Bagh Colony, Lower Tankbund, Hyderabad, Telangana- 500029, who was appointed vide order dated 15.11.2021 is directed to cause public notice published on behalf of the Adjudicating Authority within 7 days from the date of uploading of this order on the website of NCLT, Hyderabad, inviting the claims from all creditors, who shall register their claims as provided under Section 103 of the Code within 21 days of such issuance. The notice shall contain the necessary information as provided under Section 102(2) of the Code. The publication of notice shall be made in newspapers, one in English and other in vernacular (Telugu) which

have wide circulation in the State where the Personal Guarantor and CD resides. The Resolution Professional shall furnish two spare copies of the notice to the Registry. One shall be placed on our website by the Registry and the other shall be affixed in the premises of this Adjudicating Authority.

- f) The Resolution Professional in exercise of the powers conferred under the Section 104 shall prepare a list of creditors within 30 days from the date of the notice. The Personal Guarantor shall prepare, in consultation with the Resolution professional, a repayment plan containing a proposal to the creditors for restructuring of her debts or affairs as provided under Section 105 which shall include the provisions for payment of fee to the Resolution Professional. The Resolution Professional shall submit the repayment plan along with his report on the plan to this Adjudicating Authority within a period of 21 days from the last date of submission of claims as provided under Section 106.
- g) In case the Resolution Professional recommends that a meeting of the creditors is not required to be summoned, he shall record the reasons thereof. If the Resolution Professional is of the opinion that the meeting of creditors should be summoned, he shall specify the details as provided under Section 106(3). The date of meeting shall not be less than fourteen days or more than 28 days from the date of submission of the Report under Sub-section (1) of Section 106 of the Code, for which at least 14 days' notice to the creditors (as per the list prepared) shall be issued by all modes. Such notice must

contain the details as provided under the provisions of Section 107 of the Code.

- h) The meeting of the creditors shall be conducted in accordance with the provisions Sections 109, 110 and 111. The Resolution Professional shall prepare a report of the meeting of the creditors on repayment plan with all details as provided under Section 112 and submit the same to the Authority, copies of which shall be provided to the guarantor and the creditors. It is made clear that the Resolution Professional shall perform his functions and duties in compliance with the Code of Conduct provided under Section 208 of the Code.
- i) The Petitioner is directed to communicate this order to the Resolution Professional appointed in the instant Company Petition immediately.

Sd/-

SANJAY PURI
MEMBER (TECHNICAL)

Sd/-

RAJEEV BHARDWAJ
MEMBER (JUDICIAL)

Vinod