

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL**  
**PRINCIPAL BENCH, NEW DELHI**

**COMPANY APPEAL (AT) (INSOLVENCY) NO. 860 of 2021**

(Arising out of the Order dated 07<sup>th</sup> October, 2021 passed by National Company  
Law Tribunal, Court – 5, Mumbai Bench, in CP No.  
952/IBC/NCLT/MB/MAH/2020)

**IN THE MATTER OF:**

**Dilip Ramchandra Mohite**

Sshantanu Villa, 250-B/1A/5 Plot No. 2  
Amrai, Nagala Park, Kolhapur – 416003.

**...Appellant**

**Versus**

**1. Edelweiss Asset Reconstruction Company Ltd.**

Edelweiss House, Off. CST Road,  
Kalina, Mumbai – 400098.

**...Respondent No. 1**

**2. DM Corporation Pvt. Ltd.**

Through its Resolution Professional  
Mohite house, 240/B, Granthorat Marg,  
Kolhapur – 416003.

**...Respondent No. 2**

**Present**

**For Appellant:**                      **Mr. Abhijeet Sinha, Mr. Anuj Tiwari,  
Mr. Saurabh Mishra, Tuhina Misra, Mr. Nikhil  
Anand & Mr. Arun Pal, Advocates.**

**For Respondent No. 1:** **Mr. Punit Singh Bindra & Mr. Sanampreet  
Singh, Advocates for R-1.**

**( J U D G E M E N T )**

**[Per; Shreesha Merla, Member (T)]**

1. Aggrieved by the Impugned Order dated 07.10.2021 in C.P. (IB) No. –  
952/IBC/NCLT/MB/MAH/2020 passed by the Learned Adjudicating Authority  
(National Company Law Tribunal, Court – 5, Mumbai Bench), whereby, the

Adjudicating Authority has Admitted the Petition under Section 7 of the Insolvency and Bankruptcy Code, 2016, (hereinafter referred to as ‘The Code’), ‘Mr. Dilip Ramchandra Mohite’/the Guarantor preferred this Appeal.

2. Facts in brief, are that vide letter dated 28.10.2011, an amount of Rs.45Crores/- was sanctioned to Telsar Construction Private Limited/the Principal Borrower by Abhyudaya Cooperative Bank Ltd./the Assignor Bank towards working capital Term Loan. As per the terms of the Agreement, the Borrowers were required to repay the Term Loan and 60 monthly instalments of Rs.58,82,070/- starting from 15.06.2012. Mr. Dilip Ramchandra Mohite and Mr. Anand Shaktikumar Sancheti were the Personal Guarantor to the Assignor Bank. The ‘Corporate Debtor’/DM Cooperative Private Limited gave a Corporate Guarantee to secure the payment obligations of the Borrower. It is averred that the following security Agreements were executed in favour of the Assignor Bank:

*“a. Deed of simple mortgage executed between Mr. Dilip Ramchandra Mohite, Telsar Construction Pvt. Ltd. and the Assignor Bank on 09.11.2011;*

*b. Declaration cum Undertaking cum Indemnity dated 09.11.2011 executed by Mr. Dilip Ramchandra Mohite;*

*c. Memorandum of Entry of Deposit of Title Deeds/Original Documents dated 18.11.2011;*

*d. Declaration cum Undertaking dated 18.11.2011 executed by the Corporate Debtor for creation of equitable mortgage;*

*e. Declaration dated 30.05.2012 executed by Mr. Dilip Ramchandra Mohite and the Corporate Debtor in respect of continuation of mortgage.”*

3. The account of the Borrower was classified as an NPA on 31.05.2013. The Assignor Bank initiated action under SARFAESI Act, 2002 and filed a Recovery Suit in the Hon'ble DRT Mumbai. Subsequently, the Assignor Bank and the Borrower entered into a Settlement vide consent terms dated 14.02.2014 but the term of the Settlement was not adhered to and a fresh Notice dated 03.03.2015 was issued under Section 13(2) of the SARFAESI Act, 2002, calling upon the Borrower, the Personal Guarantors and the 'Corporate Debtor' jointly and severally to make a payment of Rs.21,93,67,443/- together with future interest and charge payable from 01.03.2015. The Assignor Bank filed MA 17/2015 for issuance of Certificate of Recovery, and Recovery Certificate dated 25.04.2015 for a sum of Rs.23,69,54,603/- was issued along with future interest at 17% per annum. A letter dated 12.03.2018 was addressed to the Assignor Bank by the Borrower informing the Bank that they propose to settle the dues and offered a sum of Rs.16Crores/- as lumpsum Settlement. Subsequently an amount of Rs.8Crores/- was paid. The debt payable under the credit facility was assigned by the Assignor Bank in favour of the 'Financial Creditor' vide Assignment Agreement dated 18.03.2019. Pursuant to the issuance of the Recovery Certificate, vide Order dated 20.06.2019, Hon'ble DRT Mumbai issued a warrant of attachment against the security asset of the Borrower, 'Corporate Debtor' and the Personal Guarantor.

**4. Submissions of the Learned Counsel appearing on behalf of the Appellant:**

- It is submitted by the Learned Sr. Counsel that the subject assigned loan is a Post-Settlement Loan without any reference to the Guarantor Company and therefore is subject to the Terms of Settlement arrived in the year 2018 which was only between the Principal Borrower and the Assignor Bank, for which the Guarantor Company was never a party. Learned Sr. Counsel drew our attention to Clauses 2.3.1 and Clauses 2.3.2 of the Assignment Agreement which reads as follows:

*“Clause 2.2.1- Nothing other than the financial asset as defined under the SARFAESI Act is acquired by the assignee from the Assignor, as per the Agreement.*

*Clause 2.3.2- The Financial assets are assigned by the Assignor to the Assignee on “as is where is”, “as is what is” and “without recourse” basis.”*

It is submitted that any reference to the Appellant is missing and therefore they are not bound by the terms and conditions of the Settlement.

- It is argued that at the stage of 2018 Settlement, in law, a novation without reference to the Guarantor Company has taken place in the Contractual Agreement between the Guarantor Company and the Respondent/Assignor Bank. The legal effect of this novation in a contract of Guarantee in which novation was made without any reference to the Guarantor Company is ‘discharge’ of the Guarantor, subsequent to which, no Insolvency Petition against the Guarantor can be said to be maintainable.

- The Assignee Company with full knowledge of the sequence of events, accepted the assignment of the Post-Settlement Loan on an as is where is basis on 18.03.2019 and therefore at this stage, cannot maintain its claim against the Appellant herein.
- Learned Counsel placed reliance on the Judgement of this Tribunal in '*Amrit Kumar Agrawal*' Vs. '*Tempo Appliances Pvt. Ltd.*', Company Appeal (AT) (Ins.) No.1005/2020 in support of his argument that mere obligation to pay does not bring the liability within the ambit of 'Financial Debt'. The 'debt', along with interest, if any, should be disbursed against consideration for the 'Time Value of Money'. Breach of terms of an Agreement including a Settlement Agreement whereby payment is due does not fall within the ambit of Section 5(8) so as to constitute a 'Financial Debt'. The terms of the 2018 Settlement does not record any disbursement against the 'Time Value of Money' and hence any default under the Settlement Agreement cannot give rise to a 'Financial Debt' under the realm of Code.
- The Assignee Company mentions the 'date of default' as the date mentioned in the 2018 Settlement Agreement but has not chosen to file the letter of the Assignor Bank in which the Banker had accepted discharge of the Corporate Guarantor in their letter dated 28.03.2018 written to the Borrower.

- The claim is ‘barred by Limitation’ as the default arises *qua* the 2018 Settlement to which the Appellant was not made a party and the ‘date of default’ according to the ‘Financial Creditor’ is 30.06.2018 relying upon the second Settlement dated 21.03.2018 and 28.03.2018 for which the Corporate Guarantor/Appellant was never a party. The Recovery Certificate was issued in 2016 and no steps were taken by the Assignor Bank till 2019, which in itself makes the invocation of Guarantee after 2019, as time-barred. There is no ‘acknowledgement of debt’ in terms of Section 18 of the Limitation Act, 1965, to cross the threshold of Limitation.
- The Guarantee *qua* Corporate Guarantor has not been invoked. Merely because the letter dated 12.03.2018 has been assigned by the Appellant which would not bind the discharged Guarantor as such an assumption would be ultra-virus to the concept of separate identities of Companies’ under the Companies Act, 2013. Learned Counsel relied on the Judgement of this Tribunal in ‘*Alok industries Ltd.*’ Vs. ‘*Axis Bank Ltd.*’ Company Appeal (AT) (Ins.) No. 683/2018. Learned Counsel also relied on the Judgement of the Hon’ble Supreme Court in the case of ‘***Balwant Rai Saluja & Anr.***’ Vs. ‘***Air India Ltd. & Ors.***’ (2014) 9 SCC 407, in support of his argument that the Principal Borrower and the Guarantor are distinct legal personalities and placed reliance on paras 70 and 80 which are detailed as hereunder:

“70. The doctrine of “piercing the corporate veil” stands as an exception to the principal that a company

*is a legal entity separate and distinct from its shareholders with its own legal rights and obligations. It seeks to disregard the separate personality of the company and attribute the acts of the company to those who are allegedly in direct control of its operation. The starting point of this doctrine was discussed in the celebrated case of Salmon v. A Salmon & Co. Ltd., [1897] AC 22. Lord Halsbury LC (paragraphs 31 – 33), negating the applicability of this doctrine to the facts of the case, stated that:*

*“...a company must be treated like any other independent person with its rights and liabilities legally appropriate to itself. ... whatever may have been the ideas or schemes of those who brought it into existence.”*

*80. The present facts would not be a fit case to pierce the veil, which as enumerated above, must be exercised sparingly by the Courts. Further, for piercing the veil of incorporation, mere ownership and control is not a sufficient ground. It should be established that the control and impropriety by the Air India resulted in depriving the Appellants – workmen herein of their legal rights.”*

## **5. Submissions of the Learned Counsel appearing on behalf of the**

### **Respondents:**

- It is argued by the Learned Counsel that the Guarantee has been expressly invoked by the original Lender vide letter dated 03.03.2015 and that there is no occasion to invoke the Guarantee once again as the said letter is in compliance with Clauses 2 and 6 of the Terms of Guarantee, reproduced as hereunder:

*“Clause 2-The Guarantors agree that the amount hereby guaranteed shall be due payable by the Guarantors jointly and severally to the Bank two days after demand and without demur merely upon the Bank*

*sending to the Guarantors a demand notice requiring payment of the amount. Any such demand made by the Bank on the Guarantors shall be conclusive as regards the amount claimed therein....”*

*“Clause 6-The Guarantee herein contained shall be enforceable against the Guarantors notwithstanding that no action of any kind has been taken by Bank against the Borrower and an intimation in writing sent to the Borrower and/or Guarantors by the Bank that a default or breach has occurred shall be treated as final and conclusive proof as to the facts stated therein.”*

- It is submitted that since the proceedings before DRT and under the SARFAESI Act, 2002, were initiated against both the ‘Corporate Debtor’ and the Principal Borrower, the Guarantee has always been admitted as having been invoked by the original Lender. It is only on this basis that the Recovery Certificate dated 25.04.2016 has been issued against the Principal Borrower and ‘Corporate Debtor’ jointly. The rights of the parties having been determined by the DRT with regard, the Appellant has estopped from contending that the Guarantee was never invoked.
- The OTS is not a novation of the original date but is only Terms of Settlement offered to the Principal Borrower to discharge their liabilities. The OTS has been signed by the Appellant and the properties which were agreed to be released pursuant to the OTS were properties of the ‘Corporate Debtor’, who was fully aware of the terms thereof. The OTS letter was signed by the Appellant themselves and the Appellant is arrayed as the Managing Director and Promoter of the ‘Corporate Debtor Company’ and as the Promoter and the Director of the Principal Borrower and a Personal

Guarantor. In 2018, when the OTS Settlement was entered into, the original Lender preferred two Applications before the Learned DRT, Mumbai to seek release of various properties of the Principal Borrowers and the ‘Corporate Debtor’. The ‘Corporate Debtor’ who is arrayed as the third defendant in the DRT Proceedings was fully aware of the Terms of the OTS.

- The liability of the Guarantor and the Principal Borrower is coextensive and therefore to contend that Admission on the Principal Borrower would not be treated as Admission on the part of the ‘Corporate Debtor’ is incorrect and contrary to Clauses 3, 5, 6, 9 & 10 of the Agreement. If Limitation *qua* the Principal Borrower is extended then Limitations *qua* the Guarantor is also extended automatically. Learned Counsel placed reliance on the Judgement of the Hon’ble Supreme Court in **‘R. Lilavathi’ Vs. ‘Bank of Baroda & Ors.’, ILR/987 Karnataka 964.**
- Under Clause 9 of the Guarantee Agreement, the Guarantee has been expressly made a continuing Guarantee and therefore as long as debt remains ‘due and payable’ by the Principal Borrower, the period of Limitation for enforcement of the Guarantee also remains alive. Learned Counsel placed reliance on the Judgement of the Hon’ble Supreme Court in **‘Margaret Lalita Samuel’ Vs. ‘Indo Commercial Bank Ltd.’ (1979) 2 SCC 396**, in support of his argument.

- Learned Counsel strenuously contended that under Clause 10 of the Deed of Guarantee; the ‘Corporate Debtor’ has waived its rights under Sections 133, 134, 135, 139 and 141 of the Indian Contract Act, 1872, and therefore the Judgements relied upon by the Appellant have no applicability to the facts of the present case. Even otherwise, the Appellant was a party to the DRT consent terms and the OTS letters and therefore now cannot say that they are not liable to pay the debts.

**Assessment:**

6. The brief point which arises in this Appeal for consideration is whether the Appellant/Guarantor is liable to pay the amount when the Guarantee was initially invoked on 03.03.2015; whether the Learned Adjudicating Authority was justified in admitting the Section 7 Application. It is an admitted fact that the Appellant/Corporate Guarantor agreed to the consent terms and consent Order dated 14.02.2015 was passed by the Hon’ble DRT Mumbai. It is also not in dispute that the Guarantee was invoked on 03.03.2015 under Section 13(2) of the SARFAESI Act, 2002, that the Assignor Bank filed an MA 17/2015 before the DRT for issuance of Recovery Certificate for Rs.25,69,67,959/- against the Principal Borrower and the Guarantors including the Appellant herein; DRT allowed MA 17/2015 and Recovery Certificate was passed for the subject amount on 02.12.2015; on 21.03.2018, the second consent terms/One-Time Settlement was offered by the Borrower and accepted by the Assignor Bank and letter was issued to pay a sum of Rs.16Crore/- payable in 2 instalments of Rs.8Crore/- each.

7. It is the case of the Appellant that there was no reference of the Corporate Guarantor in the second consent terms and therefore they are not liable to pay the amounts. At this juncture, it is relevant to see the Clauses of the Deed of Guarantee which are reproduced as hereunder:

*“Clause 2: Amounts payable by the Borrower has been guaranteed by the Guarantors jointly and severally.*

*Clause 3: Admission or acknowledgement given by the Borrower towards repayment of amounts shall be binding on the Guarantors.*

*Clause 5: Creditor shall be entitled to act as if the Guarantors were and are Principal Debtors for all payments and covenants.*

*Clause 9: Guarantee shall remain in force till all the amounts are paid in full. (Continuing Guarantee).*

*Clause 10: Guarantors’ consent to the Creditor making any variance, change or modification that the Financial Creditor may think fit in terms of the Bank’s contract with the Borrower and the Guarantors shall not be discharged if any arrangement is inconsistent with the Guarantor’s rights and sureties. Further, the Guarantors waive all rights available to Sureties under Section 133, 134, 135, 139 and 141 of the Indian Contract Act.”*

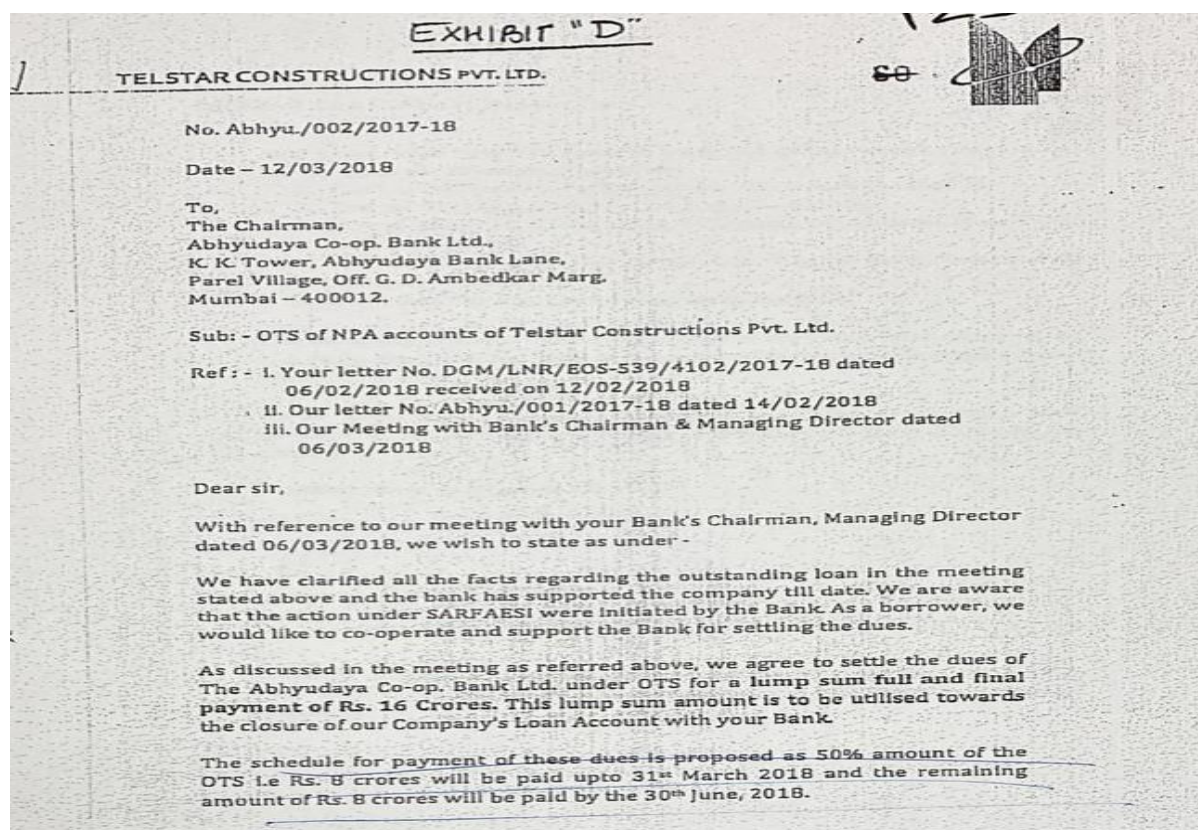
*(Emphasis Supplied)*

8. At this juncture we find it relevant to examine the coextensive liability of the Director and the Principal Borrower as provided for under Section 128 of the Indian Contract Act, 1872, which reads as follows:

*“128. Surety’s liability — The liability of the surety is co- extensive with that of the principal debtor, unless it is otherwise provided by the contract.”*

9. It is also relevant to mention that since 2013, when the proceedings before DRT and SARFAESI Act, 2002, were initiated against the 'Corporate Debtor' and the Principal Borrower, the Guarantee has always been admitted and has been invoked by the Assignor Bank. The aforementioned Clause 3 of the Deed of Guarantee specifies that an acknowledgement in writing by the Principal Borrower is to be treated as an acknowledgement in writing by the Guarantor. It is pertinent to mention that OTS has been signed by the Appellant and the properties which were agreed to be released pursuant to the OTS where properties of the 'Corporate Debtor' which is a direct beneficiary of the OTS as the Appellant is the Managing Director and Promoter of the 'Corporate Debtor', Promoter and Director of the Principal Borrower and the Personal Guarantor as well.

10. At this juncture, we find it fit to reproduce the OTS letter:



124  
61  
TELSTAR CONSTRUCTIONS PVT. LTD.

After payment of 50% OTS amount, we would like to request you to release the charge of our following properties -

1. Flat No. C-1, Sea Face Park, Cumballa Hills, Mumbai - 400036
2. Plot No. 517/A/1, Shivaji Park, Kolhapur - 416001
3. Plot at 250-B/1A/5, Plot No. 2, Sshantanu Villa, Aamrai, Nagala Park, Kolhapur - 416003
4. Plot at 240/B-2, Mohite House, Gen. Thorat Marg, Tarabai Park, Kolhapur - 416003
5. Any Other Plot or property attached by the Bank

The Bank may continue to hold the charge of the Plot located at Survey No, 21A, Hissa No. 3, C. S. No. 3062, at Uchgaon, Dist.- Kolhapur until the payment of full OTS amount.

We sincerely request the Bank to confirm the above so we can proceed further with the OTS and for this act of kindness we shall remain forever grateful.

Thanking you in anticipation.

for Telstar Constructions Pvt. Ltd.

(Dilip Mohite)  
Director

C/C

1. Managing Director, Abhyudaya Co-op. Bank Ltd., Mumbai
2. Dy. General Manager, Legal & Recovery Dept., Abhyudaya Co-op. Bank Ltd., Mumbai

2

TRUE COPY

*Abha Patel*  
for KHAITAN LEGAL ASSOCIATES  
ADVOCATES



(Emphasis Supplied)

11. We are also conscious of the fact that the ‘Corporate Debtor’ was a party to the DRT consent terms and additionally the aforementioned OTS letter signed by the Appellant shows that they were very much a party to the proceedings.

12. We rely on the Judgement of the Hon’ble Supreme Court in **‘H.R. Basavaraj’ Vs. ‘Canara Bank & Ors.’, (2010) 12 SCC 458**, wherein it is observed in paras 14-16, 18 & 19 as follows:

*14. A reading of the agreement clearly shows that the guarantee was to continue to all future transactions except when the guarantor disclaimed from his liability through a written statement. The deed also clearly mentions that while between the guarantor and borrower, the guarantor is only a surety; yet between the Bank and the guarantor, the surety is the principal debtor and his liability would be coextensive to that of the borrower. Accordingly, the guarantor himself waived off his rights under Chapter 8 of the Act which is conferred on a surety.*

*15. This Court is in respectful agreement with the decision of the Karnataka High Court in T. Raju Setty v. Bank of Baroda [AIR 1992 Kant 108] whereby the High Court held that in surety agreements, the surety can waive his rights available to him under the various provisions of Chapter 8 of the Act. It is in line with long-established precedents that anyone has a right to waive the advantages offered by law provided they have been made for the sole benefit of an individual in his private capacity and does not infringe upon the public rights or public policies. This can be inferred from a reading of Halsbury's Laws of England, Vol. 8, 3rd Edn., at p. 143 which reads as follows:*

*“248. Contracting out.—As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an*

*agreement is in the circumstances of the particular case contrary to public policy.”*

*This principle was reiterated in Lachoo Mal v. Radhey Shyam [(1971) 1 SCC 619] .*

16. On the principles of continuing guarantee, the position was cleared by a decision of this Court in Sita Ram Gupta v. Punjab National Bank [(2008) 5 SCC 711] whereby it was held that it was not open to a party to revoke a guarantee when he had agreed to it being a continuing one and thus would be bound by the terms and conditions of the agreement executed at the time of entering into the guarantee. In the present facts and circumstances, we, therefore, do not find any difficulty in affirming the concurrent findings of the High Court and of the trial court on the point that the agreement executed for the purpose of a continuing liability despite the variation of terms of the contract and in the absence of a specific written document by Basavaraj (since deceased) revoking the guarantee, the guarantee stands and the legal representatives of the deceased are liable to repay the loan.

**18.** Now let us examine Section 62 of the Act which reads as follows:

*“62. Effect of novation, rescission and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.”*

*This section gives statutory form to the common law principle of novation. The basic principle behind the concept of novation is the substitution of a contract by a new one only through the consent of both the parties to the same. Such consent may be expressed as in written agreements or implied through their actions or conduct. It was defined thus by the House of Lords in Scarf v. Jardine [(1882) 7 AC 345 : (1881-85) All ER Rep 651 (HL)] : (AC p. 351)*

*“... that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract.”*

19. It might be useful at this juncture to turn to the decision of this Court in *Lata Construction v. Dr. Rameshchandra Ramniklal Shah* [(2000) 1 SCC 586] whereby this Court held that if the rights under the old contract were kept alive even after the second agreement and rights under the first agreement had not been rescinded, then there was no substitution of contracts and, hence, no novation.”

*(Emphasis Supplied)*

13. We also place reliance on the Judgement of the Hon’ble High Court of Karnataka in **‘R. Lilavati’ Vs. ‘Bank of Baroda’, ILR 1987 Karnataka 964’**, wherein it is observed in paras 9 & 10 as follows:

9. So far as the question of limitation is concerned, the Learned Counsel Shri Raghavan argued that the acknowledgment given by the judgment debtors defendants-1 to 3 would not save limitation so far as she was concerned. Normally it is so. But para 4 of the surety bond executed by her reads as:—

*“And for all the purposes of this claim the Principal is empowered to give consent on my/our behalf and any consent given by the Principal shall be deemed to have been given by me/us and shall bind me/us in all respects as if the same had been expressly given by me/us in writing.”*

By this she has constituted defendants-1 to 3 as her agents. Therefore when she has specifically empowered defendants-1 to 3 to give consent, any consent given by defendants-1 to 3 would be binding on her. This is also the principle laid down in *Dorothy Valentine*

*Burnard v. William Douglas Lysnar. [AIR 1929 PC 273.] Therefore though she might not have been personally a party to the acknowledgment she on account of constituting defendants-1 to 3 as her agents, will be bound in law by the acknowledgment given by defendants-1 to 3.*

*10. Further the surety bond says that it is a continuing guarantee. If it is a continuing guarantee, the question of limitation urged now by defendant-4 will not crop up at all. This is the view taken by the Supreme Court in *Mrs. Margaret Lalita Samuel v. Indo Commercial Bank Ltd.* [(1979) 2 SCC 396 : AIR 1979 SC 102.] Therefore, the decree passed by the Court below does not suffer from any illegality.”*

*(Emphasis Supplied)*

**14.** We place reliance on the Judgement of the Hon’ble Supreme Court in **‘Dena Bank (now Bank of Baroda)’ Vs. ‘C. Shivkumar Reddy & Anr.’, (2021) 10 SCC 330**, wherein it is observed in paras 124, 126, 131, 133-136 & 139, as follows:

*“124. The finding of the NCLAT that there was nothing on record to suggest that the ‘Corporate Debtor’ acknowledged the debt within three years and agreed to pay debt is not sustainable in law, in view of the Statement of Accounts/Balance sheets/Financial Statements for the years 2016-2017 and 2017-2018 and the offer of One Time Settlement referred to above including in particular, the offer of One Time Settlement made on 3rd March, 2017.*

*126. In the instant case, Rs.111 lakhs had been paid towards outstanding interest on 28th March, 2014 and the offer of One Time Settlement was within three years thereafter. In any case, NCLAT overlooked the fact that a Certificate of Recovery has been issued in favour of Appellant Bank on 25th May 2017. The Corporate Debtor did not pay dues in terms of the Certificate of Recovery. The Certificate of Recovery in itself gives a*

*fresh cause of action to the Appellant Bank to institute a petition under Section 7 of IBC. The petition under Section 7 IBC was well within three years from 28th March 2014.*

*131. It is not in dispute that the Respondent No.2 is a Corporate Debtor and the Appellant Bank, a Financial Creditor. The question is, whether the petition under Section 7 of the IBC has been instituted within 3 years from the date of default. 'Default' is defined in Section 3(12) to mean "non-payment' of a debt which has become due and payable whether in whole or any part and is not paid by the Corporate Debtor".*

*133. As observed above, the Appellant Bank filed the Petition under Section 7 of the IBC on 12th October 2018. Within three months, the Appellant Bank filed an application in the NCLT, for permission to place additional documents on record including the final judgment and order/decreed dated 27.3.2017 in O.A. 16/2015 and the Recovery Certificate dated 25.5.2017, enabling the Appellant Bank to recover Rs.52 crores odd. The judgment and order/decreed of the DRT and the Recovery Certificate gave a fresh cause of action to the Appellant Bank to initiate a petition under Section 7 of the IBC.*

*134. On or about 5th March 2019, the Appellant Bank filed another application for permission to place on record additional documents including inter alia financial statements, Annual Report etc. of the period from 1st April 2016 to 31st March 2017, and again, from 1st April 2017 to 31st March 2018 and a letter dated 3rd March 2017 proposing a One Time Settlement. This application was also allowed on 6th March 2021. The Adjudicating Authority, took into consideration the new documents and admitted the petition under Section 7 of the IBC.*

*135. Even assuming that documents were brought on record at a later stage, as argued by Mr. Shivshankar, the Adjudicating Authority was not precluded from considering the same. The documents were brought on*

record before any final decision was taken in the Petition under Section 7 of IBC.

136. A final judgment and order/decreed is binding on the judgment debtor. Once a claim fructifies into a final judgment and order/decreed, upon adjudication, and a certificate of Recovery is also issued authorizing the creditor to realize its decretal dues, a fresh right accrues to the creditor to recover the amount of the final judgment and/or order/decreed and/or the amount specified in the Recovery Certificate.

139. Section 18 of the Limitation Act cannot also be construed with pedantic rigidity in relation to proceedings under the IBC. This Court sees no reason why an offer of One Time Settlement of a live claim, made within the period of limitation, should not also be construed as an acknowledgment to attract Section 18 of the Limitation Act. In Gaurav **Hargovindbhai Dave** (supra) cited by Mr. Shivshankar, this Court had no occasion to consider any proposal for one time settlement. Be that as it may, the Balance Sheets and Financial Statements of the Corporate Debtor for 2016-2017, as observed above, constitute acknowledgement of liability which extended the limitation by three years, apart from the fact that a Certificate of Recovery was issued in favour of the Appellant Bank in May 2017. The NCLT rightly admitted the application by its order dated 21st March, 2019.”

(Emphasis Supplied)

15. We also place reliance on the Judgement of the Hon'ble High Court of Karnataka in '**Margaret Lalita Samuel**' Vs. '**Commercial Bank Limited**', (1979) 2 SCC 396, wherein it is observed in para 10 as follows:

**“10. 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 *Basanta Kumar Mitra v. Chota Nagpur Banking Association Ltd.* [AIR 1948 Pat 18 : 18 Com Cas 127] ; *Brojendro Kishore Roy Chowdhury v. Hindustan Cooperative Insurance Society Ltd.* [AIR 1918 Cal 707 : ILR 44 Cal 979 : 39 IC 705] ; *National and Grindlays Bank Ltd. v. Tikam Chand Daga* [AIR 1964 Cal 358] and *Uma Shankar Prasad v. Bank of Bihar Ltd.* [AIR 1942 Pat 201 : 12 Com Cas 35] In our view it is unnecessary for the purposes of the present case to go into the question of the nature of the 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. Ex. 57 is the guarantee bond executed by the defendant and her husband on October 23, 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 up to 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 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.”*

*(Emphasis Supplied)*

16. Keeping in view that the OTS has been signed by the Appellant, Clause 3 of the Deed of Guarantee, and also Clauses 5, 9 & 10 of the Deed of Guarantee, we are of the considered view that having invoked the Guarantee on 03.03.2015, the question of invoking the Guarantee again, as per law, does not arise. Addressing the question of Limitation, we place reliance on the Judgement of the Hon'ble Supreme Court in '*Dena Bank (now Bank of Baroda)*' Vs. '*C. Shivkumar Reddy & Anr.*', (2021) 10 SCC 330, in which the Hon'ble Supreme Court has clearly laid down that on issuance of a Recovery Certificate, fresh cause of action would arise to initiate proceedings under Section 7 of the Code. Further Clauses 9 & 10 of the Deed of Guarantee specify that the Guarantee is a continuing one. We find it a fit case to consider the Recovery Certificate which has been issued by the Hon'ble DRT, Mumbai on 25.04.2016 and the second OTS dated 12.03.2018 and the part payment which has been made on 28.03.2018 read together with the warrant of attachment dated 20.06.2019 and the date of filing of the Petition dated 17.03.2022 we observe that the Section 7 Petition is not 'barred by Limitation'.

17. Keeping in view the terms of the Guarantee Deed and the ratio of the aforementioned Judgements, we are of the earnest view that 'OTS' is not a 'novation' of the original debt but is only to be construed as 'Terms of Settlement' offered and agreed upon by the Borrower to discharge its liability. The Guarantor is a direct beneficiary of the OTS. Having signed and accepted OTS proposal, the

Appellant cannot now turn around and take a stand that the liability is not co-extensive or that the Guarantee was invoked only in 2013. We do not find this argument tenable as we hold that **(a)** it is a continuing Guarantee and **(b)** that it is not required for a continuing Guarantee to be invoked twice in these facts of the matter when the liability is co-extensive.

**18.** For all the aforementioned reasons, this Appeal fails and is accordingly dismissed. No Order as to costs.

**[Justice Anant Bijay Singh]**  
**Member (Judicial)**

**[Ms. Shreesha Merla]**  
**Member (Technical)**

**Principal Bench,**  
**New Delhi**  
**20<sup>th</sup> September, 2022**

*himanshu*