

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT – II)

Item Nos. 209, 210 & 211

IA-3997/2023, IA-2765/2023 in IB-94/ND/2023

IA-4001/2023, IA-2867/2023 in IB-95/ND/2023

IA-4000/2023, IA-2768/2023 in IB-96/ND/2023

IN THE MATTER OF in IB-94/ND/2023:

Indian Bank ... **Applicant/Petitioner**

Versus

Sh. Rohit Singh ... **Respondent**

AND IN THE MATTER OF in IA-3997/2023:

Gaurav Katiyar
(Resolution Professional)
D-32, East of Kailash
New Delhi ... **Applicant**

AND IN THE MATTER OF in IA-2765/2023

Rohit Singh
227/23, Gali No. 1
Ansari Road, Aryapuri
Muzaffar Nagar, U.P.-251002 ... **Applicant**

Versus

Indian Bank (erstwhile Allahabad Bank)
Through Kunwar Jitendra Singh ... **Respondent**

IN THE MATTER OF in IB-95/ND/2023:

Indian Bank ... **Applicant/Petitioner**

Versus

Sh. Arun Singh @ Arun Kumar ... **Respondent**

AND IN THE MATTER OF in IA-4001/2023:

Gaurav Katiyar
(Resolution Professional)
D-32, East of Kailash
New Delhi ... **Applicant**

AND IN THE MATTER OF in IA-2867/2023

**Arun Kumar @ Arun Singh
Libbarhedi, Haridwar
Uttrakhand -247656**

....Applicant

Versus

**Indian Bank (erstwhile Allahabad Bank)
Through Kunwar Jitendra Singh**

....Respondent

IN THE MATTER OF in IB-96/ND/2023:

Indian Bank

... Applicant/Petitioner

Versus

Ms. Brijesh Kumari

... Respondent

AND IN THE MATTER OF in IA-4000/2023:

**Gaurav Katiyar
(Resolution Professional)
D-32, East of Kailash
New Delhi**

...Applicant

AND IN THE MATTER OF in IA-2765/2023

**Brijesh Kumari
227/23, Gali No. 1
Ansari Road, Aryapuri
Muzaffar Nagar, U.P.-251002**

...Applicant

Versus

**Indian Bank (erstwhile Allahabad Bank)
Through Kunwar Jitendra Singh**

...Respondent

Under Section: 95 of IBC, 2016

Order delivered on 04.04.2024

CORAM:

**SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)**

PRESENT:

**For the IRP : Adv. Rishabh Jain
For the Respondent : Adv. Om Pal
For the Applicant : Adv. Atul Mathur**

Hearing Through: VC and Physical (Hybrid) Mode

ORDER

IA-3997/2023 in IB-94/ND/2023, IA-4001/2023 in IB-95/ND/2023, IA-4000/2023 in IB-96/ND/2023:- On 04.03.2024 we passed following order:

“Ld. Counsel appearing for the RP/Applicant IA-3997/2023 could draw our attention to page 90 of CP-(IB)94/ND/2023 to espouse that the erstwhile Allahabad Bank (presently, Indian Bank) had extended the financial facility to the Principal Borrower viz, M/S RGV Infra Pvt. Ltd. herein qua which the Personal Guarantors/Respondents in these applications viz. IB-94/ND/2023, IB-95/ND/2023 & IB-96/ND/2023 stood as Personal Guarantors. The sanction letter dated 21.11.2017 reads thus:

Sanction Letter No.: BR/LJPN/ADV/2017-18/11/544
 Dated: 21.11.2017

ALLAHABAD BANK

ALLAHABAD BANK
 Branch: Lajpat Nagar

Ref. No.: BR/LJPN/ADV/2017-18/11/544

Date: 21.11.2017

SANCTION LETTER

01	Name & Address of the Borrower	M/s RGV Infra Pvt. Ltd. B-9/6243, Vasant Kunj, New Delhi - 110070				
02	Name/s, Net Worth & Address of the Guarantors	Name of the Guarantor	Designation	Date of CR	NW in (Rs./Lacs)	
		Sh. Amit Singh	Director	21.11.2017	0.92	
		Sh. Arun Kumar	Director	21.11.2017	67.25	
		Smt. Brijesh Kumari	Guarantor	21.11.2017	416.00	
	Sh. Rohit Singh	Guarantor	21.11.2017	515.47		
03	Last Sanction Ref. No. and Date	Fresh Connection				
04	Nature of Present proposal (Renewal/Enhancement/Fresh)	Fresh				
05	Purpose of present sanction	Installation of New Plant and Machinery for Mfg. of Crusher Stone, Grit and Dust				
06	Nature of Funded facility and amount of sanction (Rs. in Lacs)	Nature of Funded facility	Existing sanctioned limit	Limit now sanctioned	Margin	Rate of interest p.a.w.m.f.
		Cash Credit	-	125.00	As stated*	MCLR+3.00%
		Term Loan	-	250.00	Min 25% of the project cost	MCLR+3.00%
		* The MCLR prevailing on the date of disbursement will be applicable till the next reset date irrespective of change in the applicable MCLR during the next period. The next reset date is the date year after making the first disbursement.				
07	Nature of Non-Fund Facility and amount of sanction (Rs. in Lacs)	Nature of Facility	Existing Sanctioned Limit	Limit Now sanctioned	Margin	Commission & Exchange
		LC (D.A./D.P.) For purchase of raw materials	-	-		

08	Period of Sanction and due date for next review	20.11.2018 or earlier at the discretion of the Bank
09	Terms of repayment	Cash Credit - 12 Months Term Loan - 84 Monthly Installments of Rs. 4,32,500.00
10	Processing Charge /Up-front fees to be realized	Processing Fee: Rs. 44,500.00 plus GST @18% Documentation Charges: Rs. 17,800.00 plus GST @18% Mortgage Charges: Rs. 22,250.00 plus GST @18% Inspection & Supervision Charges: Rs. 3,560.00 per Quarter + GST applicable Upfront Fee: 1.07% of the Term Loan value plus GST @18%

Sanction Letter No.: **BR/LJPN/ADV/2017-18/11/544**
Dated: 21.11.2017

ALLAHABAD BANK

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11	Security to be Obtained.				
		Particulars	Nature of charge	Date of Valuation	Value in (Rs. /Lacs)
		PRIMARY			
		For Term Loan:			
		A. Exclusive Hypothecation Charge on the Plant and Machinery created out of Bank Loan along with promoters contribution.	Hypo.	As per Quotation	367.11
		B. Exclusive Hypothecation Charge over entire fixed assets, plant and machinery both present and future.		As per ABS as on 31.03.2017	121.50
		For Cash Credit:			
		C. Exclusive Hypothecation Charge over Stocks, Book Debts and other current assets along with movable fixed Assets both present and future.	Hypo.	As per ABS as on 31.03.2017	202.16
					690.70
		COLLATERAL			
		(1) Equitable mortgage of Residential Flat No- 6243, on First Floor, alongwith Scooter Garage, Situated at Sector-B, Pocket-9, Vasant Kunj, New Delhi-110070 with total plinth area 120 Sq.Mt. standing in the name of Smt. Brijesh Kumari w/o Late Sh. Ram Pal.	E.M	22.09.2017 By B D Sharma Associates	225.00 (MV) 180.00 (RV)
(2) Equitable mortgage of Property at H No- 227/23, Arya Puri, Muzaffarnagar, UP admeasuring 305 Sq. Yds. standing in the name of Smt. Brijesh Kumari and Sh. Rohit Singh.	E.M	26.09.2017 By Bhatia and Associates	219.00 (MV) 186.00 (RV)		
		13.10.2017 By Concept Engineers	123.00 (MV) 111.00 (RV)		
(3) Lien over FDR/SB Balance to be kept with bank	Lien	06.11.2017 By Raju Tyagi and Associates	109.50 (MV) 98.52 (RV)		
			25.00		
Total (Market Value)			353.80		
Total Security Value			1044.50		
Our Share %			100%		

Guarantee (Personal/Corporate)

Name of the Guarantor	Date of CR	NW in (Rs./Lacs)
Sh. Amit Singh	21.11.2017	0.92
Sh. Arun Kumar	21.11.2017	67.28
Smt. Brijesh Kumari	21.11.2017	416.05
Sh. Rohit Singh	21.11.2017	515.47

Sanction Letter No.: **BR/LJPN/ADV/2017-18/11/544**

ALLAHABAD BANK

Dated: 21.11.2017

**12 Pre-Disbursement
Conditions & Special
Terms & conditions:**

- 1. The company has to pay/clear their Statutory Liability (Income Tax) for AY 2016-17 and AY 2017-18 before making any disbursement.**
- 2. The one of the Directors of the company Sh. Amit Singh has to file their ITR for last year i.e. AY 2017-18 before disbursement.**
- Processing fees & other charges will be deposited in the account as per sanctioned terms.
- Promoters contribution in terms of margin for purchasing of various plant and machineries will be deposited in their CA A/c maintained with our branch.
- The firm/company has to submit invoices/bills to the extent of the amount already invested with M/s ACM Technomac Projects, Uttarakhand.
- The firm will submit an undertaking in respect of the following: -
 - An undertaking will be obtained from the firm/company to the effect that funds will not be diverted for any other purpose other than for which loans have been extended.
 - The firm/company will not resort to outside borrowings either for expansion/diversification or for new projects, without the prior written consent of the bank.
 - The firm/company will deal exclusively with us and route the entire transaction through our bank.
 - The firm/company will submit an undertaking that CMA discipline will be maintained by them.
 - The firm/company will undertake that it will not obtain any other finance from any other Bank/FI or NBFC without proper permission from our bank in writing.
 - The firm/company shall give an undertaking to the effect that it will not dispose of fixed assets both present and future charged in the bank's favor, without Bank's permission.

13	Post - disbursement conditions:	<ol style="list-style-type: none"> 1. <u>DP on stocks will be assessed to the extent of Rs. 50.00 Lacs only and Book Debts will be considered only of Big Buyers/Established Companies viz. L&T, Afcons etc. only</u> 2. The Firm / Company will submit monthly stock statement and Book-Debt statements within a period of 7 days from the date on which it falls due for submission <u>along with supported Invoices issued in the name of Big Buyers</u>, failing which penal interest of 2% will be charged on the entire outstanding. 3. Additional Interest at 2% over and above normal rate is to be charged for various irregularities as applicable in terms of stipulations made in for specific loan scheme. 4. The entire stocks will be insured for full value under comprehensive risk insurance policy with any IRDA approved insurance company in joint names with the bank at the borrower's cost. 5. Any major change in the management of the company involving transfer of ownership will require prior written permission from the bank. 6. All general terms and conditions as per extant guidelines of GOI/RBI/Bank usually applicable for such type of advance, revised/issued time to time shall be applicable and complied with. 7. The Bank reserves its right to amend the above terms or add others terms as may be deemed necessary by it.
14	Other terms and conditions of the sanction	All usual terms and conditions (as per annexure - A of sanction letter) also are to be complied with without any deviation.
15	Classification of advance	Small Enterprises - Manufacturing


 (Rohit Sharma)
 Manager

CC to: The Deputy General Manager, Zonal Office, New Delhi, for your information, please.

Branch: Lajpat Nagar

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Dated: 21.11.2017

ALLAHABAD BANK

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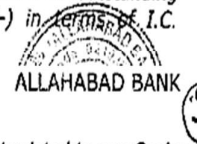
ANNEXURE - 'A'
OTHER TERMS & CONDITIONS OF SANCTION

1. Share of Promoter / Directors / Partners should not be transferred without prior consent of the Bank.
2. No Commission / Exchange should be paid to Guarantors.
3. *The Company will pass resolution under Sec. 193(1)(d) of the Companies Act, 1956. A confirmation under Section 292(5) of the Companies Act would be obtained to the effect that the powers of the directors in respect of borrowing has not been restricted/withdrawn in the General Body Meeting. For creation of mortgage charge over fixed assets necessary resolution under Sec. (1) (a) will be passed in the General Body Meeting. Certified True Copies of the Resolution will be submitted to the Branch.*
4. The entire stocks will be insured for full value under comprehensive risk insurance policy with any unit of GIC in joint names with Bank at the borrower's cost.
5. Before allowing disbursement, the Branch must satisfy itself that there are no prior charge(s) on the Firm's / Company's assets in favour of other Bank(s) and / or Financial Institution(s), either pending for registration and/or registered in the charges register. To ascertain the position the Branch must conduct a search of the Register of charges kept with the ROC at the cost of the Company.
6. The branch will ensure reconciliation of stock/debtors/creditors as per stock statement and actual bank borrowing with those disclosed in Audited Balance sheet of the firm/company. In this connection, please refer to HO IC no.6068 dated 29.07.1999.
7. The Firm / company must confine its entire dealings with us only and will not make any financial arrangement with any other Bank without our prior consent.
8. Stocks and book debts are to be checked periodically at least once in a month at irregular intervals and adverse feature if any, should immediately be brought to the notice of immediate higher authorities under copy to us. In this connection, please refer to HO IC no.6639/ADV/2001/57 dated 06.01.2001.
9. Stocks and Book Debts audit will be conducted in terms of Head Office Instruction Circular No. 6893/ADV/2001-02/23, dated 27.07.2001.
10. Drawing power will not be regulated / calculated on the basis of fully paid for stocks and book debts of age not more than 90 days. For this purpose please refer to HO circular no. 5876 dated 7.01.99.
11. No further investment will be made by the Firm/Company in any subsidiary/Associate concerns ^{Activa} by way of loans and advances or investment in shares without our prior permission in writing.

12. The Bank's charge on the basis of security documents executed should be filed with R.O.C. within the stipulated period of 30 days and registration thereof will be pursued actively.
13. In terms of Head Office Instruction Circular No. 6893 / ADV / 2001-02 / 23, dated 27.07.2001, legal audit should be done.
14. The valuation of stocks will be made at cost or market price or controlled price whichever be the lowest.
15. The company will submit form II and III under quarterly information system wherever applicable (5.00 Crore & above) within the stipulated dates, failing which penal interest of 1% will be charged on the total outstanding for the period of default.
16. Any major change in the management of the firm / company involving transfer of ownership will require prior permission from the Bank.
17. The Bank may recover in part or in full or withdraw/stop financial assistance, at any stage, without any notice or giving any reason for any such purpose whatsoever.
18. This sanction does not vest in any one of the right to claim any damage against the Bank for any reason whatsoever.
19. The immovable properties mortgaged to the Bank will be valued / revalued from time to time in terms of H.O. Instruction Circular No.1193 dated 28.05.1988. Please ensure that the properties mortgaged to the Bank are revalued every alternate year in terms of HO IC no.6567/ADV/2000/45 dated 16.10.2000.
20. The properties mortgaged/to be mortgaged must be visited/verified by the branch and a photograph of the properties must be held in file, in terms of HO IC no. 6567/ADV/2000/45 dated 16.10.2000.
21. As undertaking from the company will be obtained to the effect that they have no outstanding dues towards the small depositors (Depositors of less than Rs.20,000/-) in terms of I.C. 6762/ADV/2000-2001/86, dated 30.03.2001.

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Dated: 21.11.2017



22. The company will submit a certificate to the effect that its directors are not related to any Senior Executive of our Bank, immediately after the end of each financial year.
23. The borrowers must get their accounts audited annually and the audit should be completed within 3 / 4 months from the closing date of last financial year.
24. The borrowers will submit the requisite paper/audited accounts pertaining to the last financial year for next review at least two months before the next annual review of the account which will fall due on ...
25. All legal expenses and other expenses including incidental charges to be incurred during the course of operation of the account and for completion of documentation formalities will be borne by the borrowers.
26. Nameplate/Hypothecation Board of the Bank will be displayed in prominent places at the Godown as also at the Offices / Shop / factory of the borrowers.
27. The branch must ensure that the stocks / book-debts are not hypothecated to any other Bank / Financial institution.
28. All the other terms and conditions applicable to such type of advances, circularized instructions of H.O. / R.O. as well as terms of sanction will be meticulously observed.
29. The firm will undertake not to repay unsecured loans till pendency of Bank Loans.
30. Please obtain an undertaking to the effect that no statutory liability is pending either against the firm or the partners / guarantors.
31. The Branch should visit the unit regularly at irregular intervals to ascertain that the business is running satisfactorily.
32. An Undertaking will be obtained from the Borrower/Firm/Company to the effect that funds will not be diverted for other purposes other than for which loan have been extended. However, in case of company, such undertaking should be supported by Board Resolution.
33. The above terms and conditions shall be subject to modification by the Bank as may be considered necessary at any point of time at the sole discretion of the Bank.
34. "Default declaration clauses"/ "Consent clauses" in terms of H.O. I. C. No. 7532/ADV/2002-03/62 dated 20.11.2002 should be incorporated in the loan documents by the borrowers and guarantors.

Next Review Date	20.11.2018 or earlier at the discretion of the Bank
Risk Grading	SME-3 (Crisis RAM) on the basis of ABS as on 31.03.2017.
Sanctioning Authority	Branch MDA



2. It is seen from Part-III of CP-(IB)/94/ND/2023, the amount of debt was defaulted to be paid, both by the Principal Borrower and the Personal Guarantors. The Part III of the Application reads thus:

PARTICULARS OF DEBT		
1.	Total debt (including any interest or penalties)	Rs. 3,70,60,137/- (Rupees Three Crore Seventy Lakhs Sixty Thousand One Hundred and Thirty Seven Only) As On 25.04.2022
2.	Amount in default	Rs. 3,70,60,137/- (Rupees Three Crore Seventy Lakhs Sixty Thousand One Hundred and Thirty Seven Only) As On 25.04.2022
3.	Date on which debt was due	28.01.2020 (Date of NPA)
4.	Date on which default occurred	28.01.2020 (Date of NPA)
5.	Nature of the debt	1. Cash Credit: Rs. 125 Lakhs 2. Term Loan : Rs 250 Lakhs
6.	Secured debt including particulars of security held, the date of its creation, its estimated value as per the creditor (as applicable)	Rs. 3,70,60,137/- (Rupees Three Crore Seventy Lakhs Sixty Thousand One Hundred and Thirty Seven Only) As On 25.04.2022 Security Provided by Corporate Debtor includes the followings : PRIMARY SECURITY: 1. Exclusive Hypothecation Charge on the Plant and

		<p>Machinery created out of Bank loan along with promoters contribution.</p> <p>2. Exclusive Hypothecation Charge over entire fixed assets, plant and machinery both present and future.</p> <p>3. Exclusive Hypothecation Charge over Stocks, book debts and other current assets alongwith movable fixed assets both present and future.</p> <p>COLLATERAL SECURITY</p> <p>1. Equitable mortgage of residential Flat No 6243, On First Floor, Alongwith Scooter Garage, Situated At Sector-B Pocket 9,Vasant Kunj,New Delhi-110070 With Total Plinth Area 120 Sq Mtr Standing In Name Of Smt Brijesh Kumari W/O Late Ram Pal valued at Rs 230.00 Lakhs as on 17.8.2021.</p> <p>2. Equitable mortgage of H no 227/23,Arya puri, Muzaffarnagar, Uttar Pradesh admeasuring 305 Sq. Yds standing in the name of Smt Brijesh Kumari valued Rs 122.00 Lakhs as on 18.12.2020.</p> <p>3. Guarantees:</p> <p>(i) In capacity of Director Shri Amit Singh</p> <p>(ii) In capacity of Director Shri Arun Singh</p> <p>(iii) Personal Guarantee of Smt Brijesh Kumari</p> <p>(iv) Personal Guarantee of Shri Rohit Singh</p>
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7.	Unsecured debt (as applicable)	-
8.	Details of retention of title arrangements (if any) in respect of goods to which the debt refers (attach a copy)	NA
9.	Details of any mutual credit, mutual debts, or other mutual dealings between the guarantor and the creditor, which may be set-off against the claim (attach proof)	NA
10.	Particulars of an order of a court, tribunal or arbitral panel adjudicating on the default, if any (attach a copy of the order)	NA
11.	Record of default with the information utility, if any (attach a copy)	CRILIC/CIBIL PORTAL
12.	Details of succession certificate, or probate of a will, or letter of administration, or court decree(as may be applicable), under the Indian Succession Act, 1925 (10 of 1925) (attach a copy)	NA
13.	Provision of law, contract or other document under which debt has become due(attach a copy)	Loan Sanction Letter in favour of Corporate Debtor M/s RGV Infra Pvt. Limited Bearing ref. no. BR/LJPN/ADV/2017-18/11/544 dated 21.11.2017
14.	A statement of bank account where	

	deposits are made or credits received normally by the creditor in respect of the debt of the corporate debtor, from the date on which the debt was incurred (attach a copy)	3) Cash Credit A/c no 50410023815 4) Term Loan A/c no. 50424899537
15.	List of documents attached to this application in order to prove the existence of debt and the amount in default	<ul style="list-style-type: none"> • Loan Sanction Letter in favour of Corporate Debtor M/s RGV Infra Pvt. Limited Bearing ref. no. BR/LJPN/ADV/2017-18/11/544 dated 21.11.2017 • Account Statement & Closure Balance : <ul style="list-style-type: none"> i) Cash Credit A/c no 50410023815 ii) Term Loan A/c no. 50424899537. • Guarantee Agreement dated 16th December 2017 executed by the Guarantors Smt Brijesh Kumari & Rohit Singh.
16.	Statement by creditor in respect of excluded debts	<p>I, Kunwar Jeetendra Singh, Chief Manager, Indian Bank SAM Large Branch Delhi, hereby state that the debt(s) for which the insolvency resolution process application is filed does not include any-</p> <ul style="list-style-type: none"> (i) Liability to pay fine imposed by a court or tribunal; (ii) Liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligations; (iii) Liability to pay

		<p>maintenance to any person under any law for the time being in force;</p> <p>(iv) Liability in relation to a student loan;\</p> <p>(v) Any other debt prescribed under section 79(15)(e) of the code.</p>
17.	<p>If you are a secured creditor, tick the applicable box in the right column relating to forfeiture of right to enforce security during the period of repayment plan, which will determine the voting share as per section 110 of the code.</p>	<p>I agree to forfeit my right to enforce my security ----- ----- during the period of repayment plan.</p> <p>I do not agree to forfeit my right to enforce my security --- ----- during the period of the repayment plan.</p>

3. *The Report in terms of the provisions of Section 99 of IBC, 2016 filed by the RP namely, Mr. Gaurav Katiyar is pari-materia in all the three applications.*

4. *At this stage, Mr. Ompal, Ld. Counsel entered appearance virtually and started making submissions. Arguments to continue.*

List on tomorrow i.e. 05.03.2024.”

2. On 05.03.2024, the matter was adjourned for today. Mr. Ompal, Ld. Counsel appearing for the Respondents/Personal Guarantors in all the petitions could draw our attention to Sanction letter dated 21.11.2017, placed on record from page 29 to 33 of the petition filed by the Creditor in terms of the provisions of Section 95 of IBC, 2016 and submitted:-

- (i) The amount of loan was to be reviewed on 20.11.2018 and after the said date, the Respondents did not stand as Guarantor to the Creditor in respect of the Principal Borrower, thus in terms of the provisions of Section 62 of

the Indian Contract Act, 1872, the Personal Guarantor cannot be said to have committed any default.

- (ii) The Creditor had obtained the securities valuing Rs. 6,90,70,000/, while the amount of loan was much lesser, thus, the Respondents here in these petitions cannot be called defaulter.
- (iii) In terms of the provisions of Section 141 of the Indian Contract Act, 1872, a surety is to the benefit of every security which the creditor has against the principal debtor, thus the Respondents are entitled to benefit of the security referred to hereinabove. The Creditor had adjusted the FDR of Rs. 25,70,469/- after the account of the Principal borrower was declared NPA, thus the date of NPA would turn invalid.
- (iv) When the loan was sanctioned in 2017, the statement of account placed on record is only with effect from 10.04.2018, thus the complete statement of account has not been placed on record.
- (v) The interest qua the FDR could not be taken into account while adjusting the amount of FDR.
- (vi) The application is barred by limitation, the Personal Guarantor have obtained an interim injunction from Debt Recovery Tribunal against the Respondents.

3. As far as the issue of the amount of loan being reviewed on 20.11.2018 is concerned, the Ld. Counsel appearing for the RP could draw our attention to the deed of guarantee given by the Respondent in IB-94/ND/2023 and the Respondent in IB-96/ND/2023.

4. As can be seen from Deed of Guarantee, the Guarantors could agree that the Creditor i.e. Bank would be at liberty to reset the applicable MCLR with effect from the date of change in MCLR or after the expiry of each period of 12 months from the date of first disbursement of the loan/credit limit without any further intimation/notice in writing to the Borrower/Guarantor/Mortgagor. It is further pointed out in the Deed that the Bank would be at liberty to reset the spread on the loan/credit limit at the time of review of the credit facility. It has also been provided in the Deed that the Bank/Creditor shall be at liberty to review and publish their Marginal Cost of Funds based Lending Rate (MCLR) at an interval of 1 year/6 months/3 months/1 month/Overnight. In Clause 2 of the Guarantee Deed, it has been specifically stipulated that the Guarantee given by the Guarantors qua the Financial facility of Rs. 3,75,00,000/- would be a continuing guarantee to the Bank, in respect of the Principal Borrower. In clause 6 of the Deed it has been provided that the Bank had absolute discretion to vary, change, realise, modify or abstain from perfecting or enforcing or taking advantage of any decree, securities or contract or other rights or remedies and on such action or claim as mentioned in the deed. The clause also provides that the guarantee shall be in addition to and shall be applicable notwithstanding any change in security (including guarantees) which the bank may now or hereafter hold

from or on account of the Principal shall not be prejudiced or affected by any defect in or irregular exercise of borrowing powers of the Principal debtor. The relevant excerpt of the deed reads thus:

I/we understand and further agree that the

- a) The Bank shall be at liberty to reset the applicable MCLR w.e.f. the date of change in MCLR or after the expiry of each period of2..... (Months) from the date of first disbursement of the loan/credit limit, without any further intimation/notice in writing to the Borrower/Guarantor/Mortgagor. (#Please indicate tick mark () and strike off the other option).
- b) The Bank shall be at liberty to reset the spread on loan/credit limit at the time of review of credit facility.
- c) The Bank shall be at liberty to review and publish their Marginal Cost of Funds based Lending Rate (MCLR) at an interval of 1 Year/6 Months/3 Months/1 Month/Overnight.
- d) Bank shall be charging an amount of Rs. towards commitment charges for the sanction of credit facility. It is understood that the same is non-refundable in spite of the fact of credit facility having not been sanctioned or not been utilized.

2. I/We declare that my/our liability under this guarantee shall be limited and restricted to the sum of Rs. ₹ 25,00,000/- (Rupees only) with interest at the rate aforesaid but subject to such limit shall nevertheless be a Continuing guarantee to the Bank as hereinafter specified for all sums whatsoever which may at any time be or become payable by the principal debtor to the Bank with interest at the rate aforesaid till repayment together with commission, Bank charges, legal and other expenses which the Bank may incur in enforcing or seeking to enforce any security for or obtaining or seeking to obtain payment of all or any part of the money hereby guaranteed or otherwise in respect of the agreement.

3. I/We further declare that this guarantee subject to the provision of clause 2 hereof shall be extended in the event of any acknowledgement of debt and/or part payment of principal amount and/or payment of interest or any part thereof made by the principal debtor within the meaning of Sections 18 and 19 of the Limitation Act, 1963 and such acknowledgement and/or part payment of principal amount or payment of interest shall be deemed to have been made for the principal debtor and also by me/us as agent for and on behalf of the principal debtor and for this purpose this guarantee shall not be treated as discharging me/us from liability under this guarantee but subject to the said clause 2 hereof shall be a continuing guarantee to the Bank.

4. I/We further declare that upon any acknowledgement of debt and/or part payment of the principal amount and/or payment of interest or any part thereof this guarantee shall be deemed to have commenced a fresh starting point for limitation against me/ us from the date of said acknowledgement and/or payment and for that the relation of the principal debtor and guarantor would give rise to an implied authority on the part of the principal debtor to make payment on my/our behalf.

5. I/We agree and undertake that without the Bank's written consent, I/We will not revoke this guarantee and that my/our successors, representatives and assignees will be bound by the terms of this guarantee in the same way in which I/We am/are bound by them and that my/our death or deaths of any or all of us will not ipso-facto operate as revocation of this guarantee so far as regards future transactions or otherwise.

6. This guarantee shall be in addition to & shall be applicable notwithstanding any change in security (including guarantees) which the bank may now or hereafter hold from or on account of the Principal shall not be prejudiced or affected by any defect in or irregular exercise of borrowing powers of the Principal debtor or by force majeure or other cause occasioning default on the part of the Principal debtor and the Bank shall be entitled without discharging me/us from or in any manner affecting my/our liability hereunder at any time and without reference, notice to me/us to refuse further credit to the principal debtor and to vary the said rate of interest or any other terms of the guarantee account or accounts and to grant time or other indulgence (including forbearance to sue) to the Principal and to make commission, compromise or other arrangement with the Principal debtor and to take other securities for the guaranteed account or accounts or any part thereof or for any indebtedness or liability of the Principal debtor and at the Bank's absolute discretion to vary, change, realise, modify or abstain from perfecting or enforcing or taking advantage of any decree, securities or contracts or other rights or remedies and on such action or claim as aforesaid shall not have the effect of releasing me/us from the liability or the rights and remedies of the Bank against me/us and I/We shall have no right to benefit of any security that can be held by the Bank until the claim of the Bank against the Principal debtor in respect of said guaranteed account or transactions shall have been fully satisfied and then in so far only as any such security shall not have been exhausted for the purpose of realising the amount of the claim of the Bank and that my/our liability shall subsist in all cases notwithstanding any incapacity, irregularity or default affecting the guarantee given by me/us.

5. From the aforementioned terms of the deed of agreement it is clear that the liability of the Guarantors was continuing and was to remain operative even after variance of the terms of the loan by the Bank. Besides as can be seen from clause 8 of the Sanction Letter, it is not so that the terms of loan were changed or varied. As per the clause, the Creditor/Bank had discretion to review the loan amount. There is marked difference between the review of the terms of loan and novation/change of the contract. Further, in H.R. Basavaraj v. Canara Bank, (2010) 12 SCC 458, Hon'ble Supreme Court ruled

that if the rights under the old contract were capitalized even after 2 agreement and the terms under the first agreement has not been rescinded then there was no substitution of the contracts and hence no novation. Para 16, 18 and 19 of the judgments reads thus:

“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.”

6. Nevertheless, in the present case, there is not even a changed or new contract as the financial facility remain available to the Principal Borrower, in terms of the original contract only. Thus, we do not find any force in the plea espoused on behalf of the Personal Guarantor/Respondents that after 20.11.2018, the Guarantee Deed furnished by the Guarantors stood extinguished. As far as the provisions of clause 11 of the Sanction Letter, which provides for additional security for an amount of Rs. 6,90,70,000/- is concerned, as can be seen from the provisions of Section 141 of the Indian Contract Act relied upon by the Applicant himself, a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security. In the present case, it is not the case of the Personal Guarantor that the security has been discharged. What the Personal Guarantors have tried to espouse is that the security obtained by the Creditor while sanctioning the loan the Principal Borrower would meet the entire amount of loan, thus the Respondents may not be held liable. The provisions of Section 141 of the Indian Contract Act, 1872 reads thus:

“141. Surety's right to benefit of creditor's securities.—

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.”

7. The provision can be appreciated in better terms by reading Section 146 of the Indian Contract Act, 1872 which provides that where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor. The Section 146 of the Indian Contract Act reads thus:

“146. Co-sureties liable to contribute equally.—

Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.”

8. From the conjoint reading of the provisions of Section 146 and 141 of the Indian Contract Act, 1872, it is clear that the sureties as well as the Principal Borrowers are liable to repay the loan amount and whatever amount has been fully recovered by the Creditors from either the Principal Borrower or the sureties, the same would be adjusted by staking any claim against the remaining Guarantors. In the present case, as can be seen from the provisions 105 of IBC, 2016, while submitting the repayment plan, the Personal Guarantor may take into account all the aspects. Thus, it goes without saying

that at the stage of submitting the repayment plan it would be open to the Personal Guarantors to raise the plea of Section 141 and 146 of the Indian Contract Act. The plea can be of no help to the Applicant at this stage.

9. Regarding the issue of adjustment of the amount of FDR i.e. Rs. 25 lacs plus interest, the representative of the Creditor as also the Ld. Counsel appearing for the RP, categorically submitted that the default has been committed regarding term loan of Rs. 2,50,00,000/- and when there is default in respect of any of the financial facility, the account related to all the financial facilities extended to the Principal Borrower are to be declared NPA.

10. The plea regarding the statement of account on record being from 10.04.2018 and not from the date of sanction of loan is noted only to be rejected as nothing turns out from such submission put forth on behalf of the Personal Guarantor.

11. As far as the issue regarding taking into account the interest, while adjusting the FDR is concerned, again it would be open to the Guarantors to take the plea at the time of submitting the repayment plan. Regarding the plea of limitation, it is forced that the date of NPA is 28.01.2020 and the present petition was preferred on 08.08.2022, thus the same is within the prescribed period of limitation.

12. All the three captioned petitions arises from common transactions, the sanction letter is common, the terms of the deed of guarantee are ***pari-materia*** and the RP through whom these petitions have been filed is one and the same.

13. The RP has filed IA-3997/2023, IA-4001/2023 and IA-4000/2023, recommended that the application filed on behalf of the Creditor under Section 95 of IBC, 2016 deserved to be admitted.

14. In the application filed by him, the RP has enumerated the efforts made by him to give opportunity to the Personal Guarantors to show the evidence of repayment of plan. In para 12 of the application, it has been averred that the requirements set out in Section 95(4) of IBC, 2016 has been set aside.

15. There is averment in para 6 onwards of the application that the efforts were made in terms of the provisions of Section 99(2) of IBC, 2016. Evidence of India para 6 onwards:

6. That in compliance of Section 99(2) of the Code, the RP sent an e-mail on 23.06.2023 to the personal guarantor at the registered e-mail singhrohit22723@rediffmail.com of the principal borrower /corporate debtor, Personal Guarantor to M/s. RGV Infra Private Limited, intimating the appointment of the Resolution Professional along with the copy of order dated 17.05.2023, and requesting for information necessary for preparation of the report under section 99 of the code. Email dated 23.06.2023 sent on singhrohit22723@rediffmail.com got bounced back. A copy of email dated 23.06.2023 sent to Personal Guarantor is annexed herewith as "Annexure-5" .
7. That an intimation letter along with a copy of the order dated 17.05.2023 was also sent to the personal guarantor at his available addresses at H. No. 132, Bhopa Road Dakhini 1, P.S. Mandi Kotwali, Muzaffar Nagar, Uttar Pradesh – 251001, through speed post on 24.06.2023 and which are shown as delivered on 27.06.2023. Original speed post receipt dated 24.06.2023 along with tracking report attached as Annexure 6 .
8. That no response/objection received from personal guarantor in spite of multiple attempts taken from the Resolution Professional and hence the resolution professional is constrained to submit his report without taking into consideration the reply/objections on behalf of the respondent/debtor.

16. In terms of the provisions of Section 95(4) of IBC,2016, an application under sub-section (1) of Section 95 shall be accompanied with the details and

documents relating to the debt owed by the debtor to the creditor or creditors submitting the application for Insolvency Resolution Process as on the date of application, the failure by the debtor to pay the debt within the period of 14 days of the service of notice of demand and the relevant evidence of such default or non-repayment of debt. The sub-section reads thus, Section 95(4):

“(4) An application under sub-section (1) shall be accompanied with details and documents relating to-

(a) the debt s owed by the debtor to the creditor or creditors submitting the application for insolvency resolution process as on the date of application;

(b) the failure by the debtor to pay the debt within a period of fourteen days of the service of the notice of demand; and

(c) relevant evidence of such default or non-repayment of debt.”

17. In the present case, the Ld. Counsel appearing for the RP could draw our attention to the statement of Bank Account to show that the debt owed by the debtor has been reported to be paid. The notice of demand given in Form-B under Rule 7 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 has been enclosed as Annexure 7 to the application filed under Section 95 of IBC, 2016.

18. Ld. Counsel appearing for the Personal Guarantors did not make any effort to show the repayment of loan by the Personal Guarantors of the Principal Borrowers. All the submissions put forth by him are technical in nature. He did not make endeavour to draw our attention to any evidence of electronic transfer of the unpaid amount from the bank account of debtor, evidence of encashment of cheque issued by the debtor or signed acknowledgement by the creditor accepting receipt of dues. Thus, the RP is

justified is submitted with report of affidavit. The provisions of 99(2) of IBC, 2016 reads thus:

“99. Submission of report by resolution professional. –
(2) Where the application has been filed under section 95, the resolution professional may require the debtor to prove repayment of the debt claimed as unpaid by the creditor by furnishing -
(a) evidence of electronic transfer of the unpaid amount from the bank account of the debtor;
(b) evidence of encashment of a cheque issued by the debtor;
or
(c) a signed acknowledgment by the creditor accepting receipt of dues.”

19. In terms of the provisions of Section 100 of IBC, 2016, this Adjudicating Authority shall within 14 days from the date of submission of the report under Section 99 need to pass an order either admitting or rejecting the application referred to in Section 94 or 95 of the Code.

20. We do not find any reason not to accept the recommendation made by the RP to admit the applications. In the wake. **We are accepting the recommendation of RP, and admit the aforementioned applications.**

21. It is made clear that RP shall conduct separate IRP in respect of these Personal Guarantors.

22. It goes without saying that during the IRP, (Insolvency Resolution Process) the RP shall give an opportunity to Personal Guarantors to submit thier repayment plan. Nevertheless, before that the RP shall also carry the exercise in terms of the provisions of Section 100(2) of IBC 2016. For such purpose it would be open to the Respondents separately to appear before RP within 1 week from today.

23. There is no request by the RP for the purpose of conducting negotiation between the debtor and the creditors. As a sequel of admission of the present application, a moratorium shall commence in relation to all the debts of the Respondent. During the moratorium period – (a) any pending legal action or proceedings in respect of any debt qua the Respondent shall be deemed to have been stayed; (b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt qua the Respondent; and (c) the debtors shall not transfer, alienate, encumber or dispose of any of the assets or his legal right or beneficiary interest therein. The moratorium shall cease to have effect at the end of period of 180 days.

24. A public notice shall be issued by the RP within seven days of passing of this order, inviting claim from all creditors within 21 days of such notice. The notice shall include details of the present order, particulars of the Resolution Professional with whom the claims have to be registered and the last date for the submission of the claims. The notice shall be – (a) published in two National Newspapers, one in English and other one Vernacular Language, in circulation in the State where the debtor resides; (b) affixed in the premises of this Adjudicating Authority; and (c) placed on the website of the Adjudicating Authority.

25. We are sanguine that the RP shall discharge all such duties as are incumbent upon him in terms of the provisions of Sections 102, 103, 104, 105, 106 , 107, 108, 112 and 113 of IBC, 2016, with the due deference of the procedure enshrined in Regulations 5, 7, 8, 9, 11, 12, 13, 14, 15 and 17 of IBBI (Insolvency Resolution Process for Personal Guarantor to Corporate

Debtors) Regulations, 2019 and also in terms of the other extent provisions of the aforementioned code/ regulations and/or any other provisions of law applicable to him, in discharge of his duties as RP.

26. A copy of this order along with the copy of the application as also the report of Resolution Professional shall be provided to the Creditor (Applicant), Personal Guarantor (Respondent) and IBBI, by the Registry/Court Master within 7 days from today by email.

27. It goes without saying that whatever amount is paid to the creditor by the principal borrower (corporate debtor) and other guarantors would be deducted from the liability of the Respondent to repay.

28. These IAs are disposed of accordingly. To come up for consideration of Status Report to be filed by RP, within 8 weeks.

IA-2765/2023 in IB-94/ND/2023: The prayer made in the application reads thus:

In view of the aforesaid facts and circumstances it is most respectfully prayed that this Hon'ble Tribunal may graciously be pleased to :-

- A. Allow the present application
- B. Wait for the outcome of the matter Surendra. B. Jiwaraka Vs. Onkara Asset Reconstruction Pvt. Ltd. (SLP No. 016464/2021) and other connected writ petitions, pending for final disposal before the Hon'ble Supreme Court Of India, before taking any decision on the appointment of resolution professional in the present matter'.
- C. Award any other relief(s) which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case in favour of the applicant.

New Delhi

Dated: 28-4-2023 Through

Rohit Singh
Applicant
(Rohit Singh)


The Hon'ble Supreme Court has already decided the SLP No. 016464/2021 (Surendra B. Jiwrajka versus Omkara Assets Reconstruction Private Limited).

This application has become infructuous and disposed of accordingly.

IA-2867/2023 in IB-95/ND/2023: The prayer made in the application reads thus:

In view of the aforesaid facts and circumstances it is most respectfully prayed that this Hon'ble Tribunal may graciously be pleased to :-

- A. Allow the present application
- B. Wait for the outcome of the matter Surendra. B. Jiwarka Vs. Onkara Asset Reconstruction Pvt. Ltd. (SLP No. 016464/2021) and other connected writ petitions, pending for final disposal before the Hon'ble Supreme Court Of India, before taking any decision on the appointment of resolution professional in the present matter.
- C. Award any other relief(s) which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case in favour of the applicant.

New Delhi

Dated: 28-04-2023 Through

Arun Kumar
Applicant
(Arun Kumar @ Arun Singh)

Om Pal
(Om Pal)
Advocate

S.P. Legal & Consultancy Services,
Ch. No.205, Suchet Chambers
1224/5, Nai Wala, Bank Street,
Karol Bagh, New Delhi

The Hon'ble Supreme Court has already decided the SLP No. 016464/2021 (Surendra B. Jiwrajka versus Omkara Assets Reconstruction Private Limited).

This application has become infructuous and disposed of accordingly.

IA-2768/2023 in IB-96/ND/2023: The prayer made in the application reads thus:

In view of the aforesaid facts and circumstances it is most respectfully prayed that this Hon'ble Tribunal may graciously be pleased to :-

- A. Allow the present application
- B. Wait for the outcome of the matter Surendra. B. Jiwarka Vs. Onkara Asset Reconstruction Pvt. Ltd. (SLP No. 016464/2021) and other connected writ petitions, pending for final disposal before the Hon'ble Supreme Court Of India, before taking any decision on the appointment of resolution professional in the present matter.
- C. Award any other relief(s) which this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case in favour of the applicant.

The Hon'ble Supreme Court has already decided the SLP No. 016464/2021 (Surendra B. Jiwarka versus Omkara Assets Reconstruction Private Limited).

This application has become infructuous and disposed of accordingly.

**Sd/-
(SUBRATA KUMAR DASH)
MEMBER (T)**

**Sd/-
(ASHOK KUMAR BHARDWAJ)
MEMBER (J)**

Satya Prakash/Gaurav