

# Invocation of Personal Guarantees in India: Reconciling IBC and SARFAESI Through Judicial Developments, Limitation and Contractual Principles

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## Abstract

Since 1 December 2019, a creditor holding a guarantee from an individual for a corporate debtor's borrowing may proceed against that guarantor through several channels at once: a civil suit or Debts Recovery Tribunal application on the contract, enforcement of any security under the SARFAESI Act, and Part III of the Insolvency and Bankruptcy Code 2016. This article asks how these channels fit together. It argues that invocation of the guarantee, rather than the principal debtor's default, is the legally decisive event: it fixes the guarantor's own default, starts a distinct limitation period, and determines which forum may properly act. Tracing the line from Ramakrishnan through Lalit Kumar Jain to Jiwwajka, the article shows that the Supreme Court has preserved the guarantor's independent liability while upholding the personal insolvency regime. It then analyses the contractual conditions of a valid invocation and the unsettled question of limitation across three statutory anchors. The article proposes a three-part reconciliation framework: invocation as the gateway, the interim moratorium as the sequencing device, and single satisfaction as the limit on cumulative recovery. It concludes by identifying where judicial clarification or rule-making is still needed.

**Keywords:** personal guarantee; invocation; Insolvency and Bankruptcy Code; SARFAESI; limitation; surety

## I. Introduction

Few instruments are as routinely demanded and as inconsistently understood as the personal guarantee. Promoters of Indian companies customarily stand surety for their companies' borrowings, and the guarantee forms a central part of the lender's security package. Its legal character is straightforward. Under the Indian Contract Act 1872 (ICA) the surety's liability is, unless the contract provides otherwise, co-extensive with that of the principal debtor.<sup>1</sup> What has become complicated is the machinery available to enforce it. A lender holding a personal guarantee may sue on the contract or apply to a Debts Recovery Tribunal (DRT). Where the guarantee is backed by a security interest, the lender may enforce that interest under the Securitisation and Reconstruction of Financial

Assets and Enforcement of Security Interest Act 2002 (SARFAESI Act).<sup>2</sup> Since late 2019 the lender may also initiate the insolvency resolution process against the guarantor under Part III of the Insolvency and Bankruptcy Code 2016 (IBC).<sup>3</sup>

The last of these options arrived in stages. The Code's definition of a personal guarantor existed from the outset, but the operative provisions of Part III were brought into force for personal guarantors to corporate debtors only by a notification of 15 November 2019, with effect from 1 December 2019.<sup>4</sup> Before that notification, the Supreme Court had held in *State Bank of India v V Ramakrishnan* that the moratorium protecting a corporate debtor under s 14 of the IBC does not extend to its personal

<sup>1</sup> Indian Contract Act 1872 (India) (ICA) s 128.

<sup>2</sup> Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (India) (SARFAESI Act) s 13(4).

<sup>3</sup> Insolvency and Bankruptcy Code 2016 (India) (IBC) ss 94–120.

<sup>4</sup> Ministry of Corporate Affairs, Notification SO 4126(E) (15 November 2019).

guarantors.<sup>5</sup> In *Lalit Kumar Jain v Union of India* the Court upheld the notification and held that the approval of a resolution plan for the corporate debtor does not, of its own force, discharge the guarantor.<sup>6</sup> In *Dilip B Jiwrajka v Union of India* the Court sustained the constitutional validity of the personal insolvency provisions.<sup>7</sup>

These decisions answered the threshold question of whether a guarantor can be proceeded against under the Code at all. They left a second tier of questions open, and it is these questions that matter to the practising lender and the advising lawyer. First, when does limitation begin to run against the guarantor: on the principal debtor's default, on the classification of the account as non-performing, or on invocation of the guarantee and the guarantor's own failure to pay? Second, once a Part III application is filed, what becomes of SARFAESI enforcement or DRT proceedings already under way against the guarantor? Third, how are recoveries in one forum credited in the others? A casual reader may think these are mere procedural wrinkles. They are not. Each concerns the relationship between a contractual principle, that the guarantor's liability is independent and co-extensive, and a statutory design, that insolvency proceedings should be collective, time-bound and moratorium-protected.

This article argues that the three questions share a single answer. The legally significant event in the life of a personal guarantee is its *invocation*: the creditor's demand on the guarantor in accordance with the terms of the guarantee. Invocation is what converts a latent contingent liability into a present default by the guarantor. It is therefore the point at which the guarantor's own cause of action accrues, the point from which limitation against the guarantor should be measured, and the point at which the creditor must elect, or be disciplined in, its choice of

forum. Once invocation is taken as the organising concept, the IBC and SARFAESI are best understood as cumulative but sequenced remedies for a single underlying debt, with the interim moratorium in Part III serving as the sequencing device and the principle of single satisfaction serving as the outer limit.

The scope of the article is deliberately narrow. It concerns personal guarantors to corporate debtors, that is, individuals who stand surety for a company's debt. It does not address corporate guarantors, partnership firms, or bank guarantees, which are independent undertakings governed by different principles. The method is doctrinal. Part II sets out the contractual and statutory foundations. Part III traces the judicial developments. Part IV examines invocation and the contractual principles that govern it. Part V addresses limitations. Part VI develops the reconciliation framework and tests it against the strongest objections, and Part VII concludes.

## II. Doctrinal Foundations: The Guarantee, SARFAESI and the IBC

### A. The guarantee as an independent contractual claim

A contract of guarantee, in the language of the ICA, is a contract to perform the promise or discharge the liability of a third person in the event of that person's default.<sup>8</sup> The surety is liable to the creditor in the same measure as the principal debtor unless the contract says otherwise, and this co-extensiveness is the foundation of the creditor's position. Its practical consequence has been repeatedly affirmed by the Supreme Court: the creditor need not first exhaust remedies against the principal debtor before proceeding against the surety and may sue the surety alone.<sup>9</sup> Co-extensive liability has also been held to survive the principal debtor's liquidation, because

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<sup>5</sup> *State Bank of India v V Ramakrishnan* (2018) 17 SCC 394.

<sup>6</sup> *Lalit Kumar Jain v Union of India* (2021) 9 SCC 321.

<sup>7</sup> *Dilip B Jiwrajka v Union of India* (2024) 5 SCC 23.

<sup>8</sup> ICA (n 1) ss 126–128.

<sup>9</sup> *Bank of Bihar Ltd v Damodar Prasad* AIR 1969 SC 297; *State Bank of India v Indexport Registered* (1992) 3 SCC 159; *Syndicate Bank v Channaveerappa Beleri* (2006) 11 SCC 506.

the surety undertook precisely the risk of the principal's insolvency.<sup>10</sup>

Two features of the doctrine matter for what follows. First, liability is co-extensive but not identical. The guarantee is a separate contract between creditor and surety, with its own terms, its own conditions of invocation, and its own breach. The Supreme Court has recognised that a guarantee is a distinct contractual relationship and that the surety's obligation is enforceable according to its terms.<sup>11</sup> Second, the liability of the surety is not unconditional. The ICA discharges the surety where the creditor varies the terms of the principal contract without the surety's consent or releases the principal debtor by an act or omission that impairs the surety's rights.<sup>12</sup> These defences become important in Part III, where the effect of a resolution plan on the guarantor is considered.

#### **B. SARFAESI: security enforcement outside the courts**

The SARFAESI Act permits a secured creditor to enforce a security interest without the intervention of a court or tribunal. On default, the creditor issues a notice under s 13(2) calling on the borrower to discharge liabilities in full within sixty days. Failing payment, it may take the measures listed in s 13(4), including taking possession of the secured asset and selling it.<sup>13</sup> The definition of 'borrower' in the Act extends to a person who has given a guarantee or created a security as collateral for the financial assistance, so the Act reaches guarantors who have furnished security.<sup>14</sup> The constitutional validity of the regime was upheld in *Mardia Chemicals Ltd v Union of India*, subject to the Court's reading down

of the original appeal provision, and the relationship between SARFAESI enforcement and the Debts Recovery Tribunal's jurisdiction was considered in *Transcore v Union of India*, where the Court treated the two as complementary recovery routes available to the secured creditor.<sup>15</sup> The DRT's own jurisdiction over banks' and financial institutions' claims, including against guarantors, is conferred by s 19 of the Recovery of Debts and Bankruptcy Act 1993 (RDBA).<sup>16</sup>

#### **C. Part III of the IBC**

The IBC's Part III provides insolvency resolution and bankruptcy processes for individuals and partnership firms. For personal guarantors to corporate debtors, the relevant provisions are the definition in s 5(22), the allocation of jurisdiction in s 60(2) and (3), and the creditor-initiated process in s 95 and the sections that follow it.<sup>17</sup> Under s 60(2) and (3), the application against the personal guarantor lies before the National Company Law Tribunal bench that is seized of the corporate debtor's insolvency or liquidation, a design intended to keep the two proceedings before one forum. The notification of 2019 brought these provisions into force for this class of debtor and no other.

#### **D. Which statute prevails?**

Both statutes contain non-obstante clauses. Section 35 of the SARFAESI Act gives that statute overriding effect over inconsistent laws, while s 238 of the IBC gives the Code overriding effect over anything inconsistent in any other law for the time being in force.<sup>18</sup> The Supreme Court in *Innoventive Industries Ltd v ICICI Bank* treated s 238 as giving the Code primacy in the field it occupies. At the

<sup>10</sup> *Maharashtra State Electricity Board v Official Liquidator*, High Court, Ernakulam (1982) 3 SCC 358.

<sup>11</sup> *Industrial Investment Bank of India Ltd v Biswanath Jhunjhunwala* (2009) 9 SCC 478.

<sup>12</sup> ICA (n 1) ss 133–134.

<sup>13</sup> SARFAESI Act (n 2) ss 13(2), 13(4).

<sup>14</sup> *ibid* s 2(1)(f).

<sup>15</sup> *Mardia Chemicals Ltd v Union of India* (2004) 4 SCC 311; *Transcore v Union of India* (2008) 1 SCC 125.

<sup>16</sup> Recovery of Debts and Bankruptcy Act 1993 (India) (RDBA) s 19.

<sup>17</sup> IBC (n 3) ss 5(22), 60(2)–(3), 95.

<sup>18</sup> SARFAESI Act (n 2) s 35; IBC (n 3) s 238; *Innoventive Industries Ltd v ICICI Bank* (2018) 1 SCC 407.

same time Parliament has itself aligned the two. Section 26E of the SARFAESI Act, inserted in 2016, accords priority to a secured creditor's dues after registration of the security interest, but expressly makes that priority subject to the provisions of the IBC.<sup>19</sup> The text therefore suggests not displacement but layering: SARFAESI operates in its own domain, yielding to the Code where the Code's collective process is engaged. The task of the later Parts is to determine exactly where that point of engagement lies for a personal guarantor.

### III. Judicial Developments: From *Ramakrishnan* to *Jiwrajka*

#### A. *Ramakrishnan*: the guarantor outside the corporate moratorium

The first step was taken in 2018. In *State Bank of India v V. Ramakrishnan*, the question was whether the s 14 moratorium, which bars suits and enforcement against a corporate debtor during the corporate insolvency resolution process, also protects the corporate debtor's personal guarantors.<sup>20</sup> The Supreme Court held that it does not. The moratorium is a protection for the corporate debtor, and nothing in s 14 extends it to natural persons who have separately undertaken liability as sureties. The effect was to confirm, in the insolvency context, the ordinary contractual position: the creditor's rights against the guarantor are independent of its rights against the principal debtor and are not suspended by the latter's insolvency.

*Ramakrishnan* is a negative holding. It said that guarantors were not shielded by s 14, but it did not say what remedies were available against them under the Code itself. The Code's personal insolvency provisions were not yet in force for guarantors, so the creditor's available remedies against the guarantor remained those that existed outside the Code.

#### B. The 2019 Notification and *Lalit Kumar Jain*

The notification of November 2019 supplied the missing positive route by bringing into force the Part III provisions for personal guarantors to corporate debtors.<sup>21</sup> The notification was challenged by guarantors, several of them promoters whose companies had already been through resolution, on grounds that included arbitrariness, retrospectivity and the claim that approval of a resolution plan extinguished the guarantor's liability.

In *Lalit Kumar Jain v Union of India* the Supreme Court rejected the challenge.<sup>22</sup> The Court's reasoning on discharge is of particular importance for this article. It held that the approval of a resolution plan under s 31 of the IBC does not by itself operate to discharge a guarantor. The discharge provisions of the ICA, in particular ss 133 and 134, do not apply merely because the plan modifies the principal debtor's liability, since the plan is a statutory process and not a variance made by the creditor's own act. The guarantor's liability, being co-extensive and independent, remains available to the creditor, subject to what the plan itself provides and to the Code's own limits on the creditor's recoveries. The Court also confirmed that the Code permits proceedings against the guarantor under Part III even while, or after, the principal debtor's corporate process is under way.

Two aspects of *Lalit Kumar Jain* are directly relevant to what follows. First, the judgment reasons from the contractual character of the guarantee and treats the Code as leaving that character intact. That is the foundation of the present article's focus on invocation. Second, the Court did not decide the practical questions on which guarantors and lenders now litigate: limitation, the interaction with parallel proceedings, and the avoidance of double recovery.

A distinction must also be drawn from the Court's later decision in *Ghanashyam Mishra and Sons Pvt Ltd v Edelweiss Asset Reconstruction Co Ltd*, which holds that on approval of a resolution plan all claims

<sup>19</sup> SARFAESI Act (n 2) s 26E.

<sup>20</sup> *Ramakrishnan* (n 5); IBC (n 3) s 14.

<sup>21</sup> Notification (n 4).

<sup>22</sup> *Lalit Kumar Jain* (n 6); IBC (n 3) s 31; ICA (n 1) ss 133–134.

not included in it stand extinguished as against the corporate debtor.<sup>23</sup> That holding concerns claims against the corporate debtor. It does not touch the separate and independent claim against the guarantor, which *Lalit Kumar Jain* preserves.

### C. *Jiwrjka* and the architecture of Part III

The constitutional challenge to Part III itself was finally decided in *Dilip B Jiwrjka v Union of India*.<sup>24</sup> The Court upheld the scheme of ss 94–100 against challenges based on arbitrariness and the denial of a hearing. The decision builds on the broader constitutional endorsement of the Code in *Swiss Ribbons Pvt Ltd v Union of India*, in which the Court accepted the legislature’s policy choices on creditor classification and the architecture of the corporate process.<sup>25</sup> After *Jiwrjka*, the existence and validity of the creditor-initiated route against personal guarantors is not in doubt.

### D. What the cases leave open

Three things are settled. The guarantor is not covered by the corporate debtor’s moratorium. The guarantor’s liability survives the principal’s resolution plan. And the Part III route is constitutional. What is not settled is how that route sits alongside the others. Part III itself contains its own moratorium: an interim moratorium arises from the date of the application, during which pending legal actions in respect of the debt are deemed stayed and creditors may not initiate fresh ones, and a further moratorium operates on admission.<sup>26</sup> The prescribed procedure is set by the Rules made for personal guarantors.<sup>27</sup> Nothing in the Supreme Court’s decisions says how these provisions interact with SARFAESI measures already taken or contemplated against assets the guarantor has charged, nor which limitation anchor governs the

Part III application. These are the questions to which the remaining Parts turn.

## IV. Invocation and the Contractual Principles that Govern It

### A. What invocation is and why it matters

Invocation is the creditor’s written demand on the guarantor to perform in accordance with the guarantee. In practice it takes the form of a notice that identifies the guaranteed debt, records the principal debtor’s default, and calls on the guarantor to pay within a stated period. This article contends that it is the pivotal event for three reasons.

First, invocation is what converts the guarantor’s contingent obligation into a present one. Before invocation, the guarantor has undertaken a liability that will arise if the principal debtor defaults. After invocation and a failure to pay, the guarantor has itself broken the contract. This is a separate default, and it is that default, not the principal debtor’s, that the Code would have in view when it speaks of a debt due from a personal guarantor.<sup>28</sup> Second, as Part V shows, the Supreme Court has treated the guarantor’s own default after invocation as the point from which the creditor’s right to proceed against the guarantor accrues. Third, invocation is the creditor’s first formal statement of its intended recovery route against the guarantor, which makes it the natural point at which the creditor must be held to a consistent course across forums.

### B. The authorities on independence of the guarantor’s liability

The proposition that the creditor may proceed against the guarantor directly is old. *Bank of Bihar Ltd v Damodar Prasad* established that the creditor may sue the surety without first proceeding against the principal debtor, and later decisions have

<sup>23</sup> Ghanashyam Mishra and Sons Pvt Ltd v Edelweiss Asset Reconstruction Co Ltd (2021) 9 SCC 657.

<sup>24</sup> *Jiwrjka* (n 7).

<sup>25</sup> *Swiss Ribbons Pvt Ltd v Union of India* (2019) 4 SCC 17.

<sup>26</sup> IBC (n 3) ss 96, 101.

<sup>27</sup> Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules 2019 (India).

<sup>28</sup> IBC (n 3) s 3(11)–(12).

repeated the rule.<sup>29</sup> These cases are sometimes read as holding that invocation is unnecessary, because the surety's liability arises upon the principal's default and the creditor may demand payment at any time. That reading is too crude. The cases establish that the creditor need not exhaust remedies against the principal; they do not hold that the creditor may skip the contractual steps that the guarantee itself requires. Where the guarantee says that liability arises on demand, a demand is a condition of the guarantor's liability, and, as the later limitation authorities confirm, it is the guarantor's failure to honour it that completes the cause of action.

### C. Formal and substantive requirements

A valid invocation has, in my analysis, three requirements. It must comply with the guarantee's own terms as to form, content, service and time. It must identify the guaranteed liability with sufficient particularity that the guarantor can ascertain what is demanded. And it must be addressed to the guarantor personally, as opposed to simply being copied to the guarantor alongside a notice to the principal debtor. A notice under s 13(2) of the SARFAESI Act that is addressed to the borrower and guarantors together will not necessarily satisfy the guarantee's own demand requirement, since the s 13(2) notice is a statutory step with its own function, to call upon the borrower to discharge liabilities in full before enforcement.<sup>30</sup> The practical lesson for lenders is to issue a separate invocation notice under the guarantee in addition to whatever statutory notices the chosen forum requires.

### D. Invocation and the choice of forum

Once the guarantee is invoked, the creditor may take any of the routes described in Part II. This is a consequence of the settled rule that the creditor's remedies against the surety are cumulative.<sup>31</sup> The creditor may apply to the DRT, enforce any security

the guarantor has given under SARFAESI, or file under s 95 of the IBC. What the creditor may not do, consistently with the structure of Part III, is pursue all of them without regard to the stay that arises once a Part III application is filed. That point is taken up in Part VI.

### E. Discharge arguments and their limits

Guarantors resisting invocation commonly rely on ss 133 and 134 of the ICA, arguing that the creditor's dealings with the principal debtor have varied the contract or released the principal debtor, and so discharged the surety. Two responses are available to the creditor. The first is the one given in *Lalit Kumar Jain*: where the modification of the principal debtor's liability results from a statutory resolution process, it is not a variance by the creditor's act and does not discharge the guarantor.<sup>32</sup> The second is the principle that a surety's liability survives the principal's insolvency or liquidation, since the surety contracted for precisely that contingency.<sup>33</sup> These responses do not mean that discharge defences are dead. Where a creditor has itself agreed to variations with the principal debtor outside the statutory process, for example through a one-time settlement or a restructuring to which the guarantor was not a party, ss 133 and 134 remain available, and the creditor's invocation will be tested against them.

Finally, invocation interacts with the Code's own definition of default. A creditor applying under s 95 must show a debt and a default.<sup>34</sup> On the approach proposed here, the debt is the guaranteed liability, and the default is the guarantor's failure to pay after invocation. This is not merely a doctrinal nicety. It affects the content of the application, the evidence the creditor must lead, and, as the next Part shows, the date from which limitation runs.

<sup>29</sup> Bank of Bihar (n 9); Indexport (n 9); Channaveerappa Beleri (n 9).

<sup>30</sup> SARFAESI Act (n 2) s 13(2).

<sup>31</sup> Biswanath Jhunjhunwala (n 11); Channaveerappa Beleri (n 9).

<sup>32</sup> Lalit Kumar Jain (n 6); ICA (n 1) ss 133–134.

<sup>33</sup> Maharashtra SEB (n 10).

<sup>34</sup> IBC (n 3) ss 3(11)–(12), 95.

## V. Limitation: Which Clock, and When Does It Start?

### A. Three statutory anchors

Limitation against a personal guarantor is governed not by one rule but by three, depending on the route the creditor chooses. A civil suit or DRT application on the guarantee is subject to the Limitation Act 1963 in the ordinary way; for a suit on a guarantee the relevant entry is an open question, with Article 55, governing compensation for breach of contract, a plausible candidate.<sup>35</sup> For SARFAESI, s 36 provides that a secured creditor may not take measures under s 13(4) unless its claim is within the limitation period prescribed under the Limitation Act 1963.<sup>36</sup> And for an application under the IBC, the Limitation Act applies to proceedings before the Adjudicating Authority by virtue of s 238A, so that an application for which no period is otherwise prescribed is governed by the three-year period in Article 137.<sup>37</sup>

The three periods share a duration of three years in the usual case, but they do not necessarily start at the same time, and it is the start date, not the duration, that generates the litigation.

### B. The IBC authorities on when time starts

The Supreme Court's decisions on s 7 and s 9 applications establish the following. The Limitation Act applies to IBC applications, and Article 137 is the governing entry.<sup>38</sup> Time runs from the date of default, not from the date on which the account was classified as non-performing.<sup>39</sup> A default is a default for the purposes of limitation from the day it occurs, and the later classification of the account does not reset or defer the period.<sup>40</sup> Acknowledgement of

liability under s 18 of the Limitation Act can give a fresh period, and entries in a debtor's balance sheet have been held capable of amounting to acknowledgement.<sup>41</sup>

These authorities concern applications by creditors against the principal (corporate) debtor, and so cannot be applied to the guarantor without adaptation. The adaptation is the contribution of the Supreme Court's decision in *Laxmi Pat Surana v Union Bank of India*.<sup>42</sup> That case concerned a corporate guarantor, but its reasoning is of general application to sureties. As I read it, the Court treated the guarantor's own default as the relevant default for the purposes of an application against the guarantor, and held that the creditor's right to apply against the guarantor accrues when the guarantee is invoked and the guarantor fails to pay. The decision thus supplies the doctrinal link between the contractual analysis in Part IV and the limitation analysis here: invocation followed by non-payment is the guarantor's default, and it is from that default that the limitation period against the guarantor runs.

### C. Acknowledgement and part-payment by the principal debtor

The more difficult question is whether acknowledgement or part-payment by the principal debtor extends limitation against the guarantor. Sections 18 and 19 of the Limitation Act operate on acknowledgements and payments made by the person against whom the claim is made, or by an agent duly authorised. In the independent-liability theory advanced in this article, the principal debtor's acknowledgement does not bind the guarantor unless the guarantee itself makes the principal debtor the guarantor's agent for that purpose, which

<sup>35</sup> Limitation Act 1963 (India) arts 55, 137, ss 5, 14, 18, 19.

<sup>36</sup> SARFAESI Act (n 2) s 36.

<sup>37</sup> IBC (n 3) s 238A; Limitation Act (n 35) art 137.

<sup>38</sup> B K Educational Services Pvt Ltd v Parag Gupta & Associates (2019) 11 SCC 633.

<sup>39</sup> Gaurav Hargovindbhai Dave v Asset Reconstruction Co (India) Ltd (2019) 10 SCC 572.

<sup>40</sup> Vashdeo R Bhojwani v Abhyudaya Co-operative Bank Ltd (2019) 9 SCC 158.

<sup>41</sup> Dena Bank v C Shivakumar Reddy (2021) 10 SCC 330.

<sup>42</sup> Laxmi Pat Surana v Union Bank of India (2021) 8 SCC 481.

some guarantee deeds do. On the alternative theory that the guarantor's liability simply tracks the principal's, such an acknowledgement would extend time against both. The authorities do not give a single answer, and the debate between the two theories is the clearest example of why the choice of conceptual starting point matters. The contract-based approach recommended here has the merit of aligning limitation with the guarantee's own terms: where the deed provides for continuing liability and for the principal's acknowledgements to bind the surety, the creditor gets the benefit; where it does not, the creditor must rely on the guarantor's own acknowledgement or a timely invocation.

#### D. Exclusion of time and the SARFAESI interface

Section 14 of the Limitation Act excludes the time during which the plaintiff has been prosecuting another civil proceeding with due diligence in a court without jurisdiction or unable to entertain it. In *Sesh Nath Singh v Baidyabati Sheoraphuli Co-operative Bank Ltd* the Supreme Court accepted that s 14 can in principle be invoked in the context of an IBC application.<sup>43</sup> Whether time spent on SARFAESI measures can be excluded in this way for a Part III application against the guarantor is, to my knowledge, not authoritatively decided. The question matters because SARFAESI measures are by their nature non-judicial, and it is not obvious that they are a proceeding in a court within s 14. The better view, I suggest, is that s 14 is unlikely to assist a creditor who has voluntarily chosen SARFAESI enforcement, since the choice of that route is not a mistaken resort to a forum lacking jurisdiction. This is a further reason for the creditor to calendar the invocation date and the limitation date for each route separately.

#### E. Consequences for the framework

Two consequences follow. First, a claim that is time-barred against the principal debtor is not automatically time-barred against the guarantor, if limitation against the guarantor runs from invocation and the guarantor's own default. This is

not a licence for indefinite delay. The guarantee itself will often specify when demand must be made, and a creditor who unreasonably delays invocation may find that the delay engages equitable defences or the terms of the guarantee. Second, the three anchors mean that the same guarantee can be time-barred for one route and live for another. A lender who invoked the guarantee promptly and enforced under SARFAESI within time, but then lets the DRT claim lapse, retains a live IBC route if the invocation-based period has not expired. The framework of Part VI is designed to bring discipline to this multiplicity.

#### VI. Analysis: A Framework for Reconciling the IBC and SARFAESI

The preceding Parts support three propositions. The guarantor's liability is independent and is enforceable through cumulative routes. Invocation and the guarantor's own default are the legally decisive events. And the Code's moratorium provisions are the only statutory device available for coordinating the routes once a Part III application is made. This Part draws those threads into a framework of three rules and then tests the framework against its strongest objections.

##### A. Rule one: invocation is the gateway

The first rule is that no route against the guarantor should be treated as properly engaged until the guarantee has been invoked in accordance with its terms and the guarantor has failed to pay. The rule has a contractual rationale, because it respects the guarantee's own conditions, and a statutory one, because the Code's s 95 requires a debt and a default, and the guarantor's default is the one that matters.<sup>44</sup> The rule also disciplines the sequencing of limitation: the creditor who invokes promptly secures the longest and clearest period under each route. It does not prevent the creditor from taking steps against the principal debtor and against the guarantor in parallel. It simply requires that steps against the guarantor be founded on the guarantor's own default.

<sup>43</sup> *Sesh Nath Singh v Baidyabati Sheoraphuli Co-operative Bank Ltd* (2021) 7 SCC 313.

<sup>44</sup> IBC (n 3) ss 3(11)–(12), 95; *Laxmi Pat Surana* (n 42).

## B. Rule two: the moratorium sequences the routes

The second rule addresses the question that the Supreme Court's decisions leave open: what happens to SARFAESI enforcement and DRT proceedings once a Part III application is filed? Section 96 provides that on the making of an application, an interim moratorium begins, during which any legal action or proceeding pending in respect of any debt is deemed stayed and creditors may not initiate any legal action or proceeding in respect of any debt. Section 101 continues the stay after admission.<sup>45</sup>

The textual argument that the moratorium reaches SARFAESI enforcement against the guarantor's secured assets is that a measure under s 13(4) is a step to recover the debt, and the phrase 'legal action or proceedings in respect of any debt' is wide enough to include it. The textual argument against is the contrast with s 14 of the IBC. Section 14(1)(c), which governs the corporate debtor, expressly refers to any action to foreclose, recover or enforce a security interest, including an action under the SARFAESI Act. Sections 96 and 101 contain no such express reference. On an expressio unius reading, the omission suggests that Parliament did not intend the personal moratorium to bar SARFAESI enforcement.

I suggest that the better reading is the first, for three reasons. First, the purpose of the personal moratorium is to protect the debtor's estate during the process, and a measure that sells the guarantor's charged assets deprives the process of those assets. Second, s 14(1)(c) is the more specific provision for the corporate debtor and was drafted to remove doubt for secured creditors, so its express reference reflects a drafting choice rather than a limit on the personal provisions. Third, s 238 gives the Code overriding effect, and s 26E of the SARFAESI Act, which makes secured creditors' priority subject to the Code, shows that Parliament contemplated the

Code prevailing where the two collide.<sup>46</sup> The point is nonetheless genuinely contestable, and the weight of High Court and tribunal authority on it must be established before any firm conclusion is drawn.

Whatever view is taken, the rule has an important consequence for the creditor. A creditor who has already completed a SARFAESI sale before the application was filed is protected, since there is nothing left to stay. A creditor midway through enforcement who is then met with a Part III application by the guarantor, or who files one itself, takes the risk that the remaining steps are stayed. Creditors should therefore choose their forum at invocation with that risk in view.

## C. Rule three: single satisfaction

The third rule is that, whatever the number of forums, the creditor may recover the guaranteed debt only once. This is not a controversial proposition as a matter of principle. It follows from the nature of the debt and from the surety's statutory rights: on payment, the surety is invested with the rights of the creditor against the principal debtor, which presupposes that the creditor has been paid and cannot be paid again.<sup>47</sup> The difficulty is practical. A recovery in the DRT, a SARFAESI sale, a distribution under a repayment plan or in bankruptcy under Part III, and a payment under a corporate resolution plan may all be credited against the same debt. There is, at present, no statutory mechanism that requires the creditor to disclose recoveries in one forum to the adjudicating authority in another. I recommend that creditors' applications under s 95 be required to state recoveries in other forums, and that tribunals treat non-disclosure as a ground for adverse inference or costs. This could be achieved through the prescribed form or by practice direction, without legislative amendment.

## D. Testing the framework: three objections

**Objection one: invocation is a formality.** It will be said that since liability is co-extensive, the principal

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<sup>45</sup> IBC (n 3) ss 96, 101.

<sup>46</sup> IBC (n 3) ss 14(1)(c), 238; SARFAESI Act (n 2) s 26E; Innoventive (n 18).

<sup>47</sup> ICA (n 1) s 140.

debtor's default is itself enough, and a demand adds nothing. The answer is that the objection conflates the extent of liability with its accrual. Co-extensiveness describes how much the surety owes; it does not say when the surety's own obligation falls due or when the surety is in breach. The independence of the guarantee, which the cases affirm in order to deny the surety a right to insist on prior recourse to the principal, equally supports the creditor's obligation to make a demand under the guarantee's terms.

**Objection two: the framework is normative, not descriptive.** It will be said that single satisfaction and the sequencing rule are policy preferences, and nothing in the Code expressly forbids cumulative proceedings. This is partly right. Rule one is anchored in contract and in the Supreme Court's reasoning on accrual. Rule two rests on a contestable reading of ss 96 and 101. Rule three rests on settled principle but proposes new procedural disclosure. I do not claim that the framework is the only possible reconciliation. I claim that it is the one most consistent with the guarantor's contractual position, the Code's collective design, and the Bankruptcy Law Reforms Committee's emphasis on time-bound resolution that avoids a race among creditors to the debtor's assets.<sup>48</sup>

**Objection three: the framework favours guarantors.** It will be said that requiring invocation, sequencing proceedings and disclosing recoveries burdens creditors and offers guarantors new defences. The framework does burden creditors with discipline, but it also gives them certainty: a creditor who invokes properly and elects its forum with the moratorium in mind secures a clear accrual date, a defensible limitation position, and a straightforward path to recovery. The principal beneficiaries of an uncoordinated system are neither creditors nor guarantors but those who litigate the uncertainty.

## VII. Conclusion

The introduction posed three questions: when limitation runs against a personal guarantor, how SARFAESI and DRT proceedings interact with a

Part III application, and how recoveries in different forums are to be reconciled. The preceding analysis suggests that all three are answered by treating invocation as the central event in the life of a guarantee.

The Supreme Court's decisions have established the essential architecture. *Ramakrishnan* confirmed that the guarantor is outside the corporate debtor's moratorium. *Lalit Kumar Jain* confirmed that approval of a resolution plan does not discharge the guarantor and that Part III may be applied to guarantors of corporate debtors. *Jiwrajka* confirmed the constitutional validity of that regime. Together these decisions treat the guarantor's liability as independent of the principal debtor's, a conclusion that follows from the ICA's own scheme. The article has argued that the same independence has consequences that the cases have not yet worked through. The guarantor's own default, following a valid invocation, is the default on which a Part III application should be founded and from which limitation against the guarantor should run. The Code's interim and post-admission moratoria, properly read, are the device by which the cumulative routes are sequenced. And the principle that the guaranteed debt may be recovered only once should be given procedural effect through disclosure of recoveries in other forums.

Two reforms follow. The first can be implemented by the courts: a clear holding that limitation against a personal guarantor runs from invocation and the guarantor's own default would remove the single largest source of uncertainty and align the IBC, SARFAESI and DRT limitation positions. The second requires rule-making rather than adjudication: the prescribed application under s 95 should require disclosure of recoveries and pending proceedings in other forums, and the rules should state expressly whether the personal moratorium restrains SARFAESI enforcement. An express statement, whichever way it is resolved, would be better than the present reliance on competing readings of the text.

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<sup>48</sup> Bankruptcy Law Reforms Committee, *The Report of the Bankruptcy Law Reforms Committee*,

*vol I: Rationale and Design* (Ministry of Finance, Government of India, November 2015).

The broader point is that statutory regimes designed in different decades, for different purposes, will inevitably overlap, and that the task of the lawyer and the court is to find the organising principle that makes the overlap workable. In the case of the personal guarantee, that principle already exists in the contract. The law need only be applied with the contract in view.

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