

The tripartite guarantee: structure, strain and the current Indian position

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The contract of guarantee is the most widely executed and least carefully drafted instrument in Indian commercial lending. A sequence of decisions delivered in 2026 has materially altered the position on three questions that recur in every enforcement: what makes an undertaking a guarantee at all, what survives an unconsented variation of the principal contract, and what constitutes a valid invocation.

IN SHORT

- Tripartiteness describes the legal relations that must subsist, not the number of executants on a single instrument; the principal debtor is not a necessary party to the creditor's action.
- A promoter's undertaking to arrange or infuse funds is not a guarantee absent a clear promise to the creditor to discharge the borrower's liability on default.
- Nomenclature is irrelevant in both directions: a document styled a comfort letter may bind, and a document styled a guarantee may not.
- Discharge for unconsented variance is now prospective and calibrated, not absolute; the surety remains liable to the extent originally guaranteed.
- Most guarantee enforcement now fails at the invocation stage rather than on the merits.

I. The trilateral premise

Section 126 of the Indian Contract Act, 1872 constitutes the guarantee as an inherently three-cornered legal arrangement between the creditor, the principal debtor and the surety. The tripartite character is not merely descriptive nomenclature. The entire architecture of Chapter VIII operates by reference to it: Section 127 permits consideration to flow to the principal debtor rather than to the surety; Section 128 renders the surety's liability co-extensive with that of the principal debtor; Sections 133 to 139 discharge the surety by reason of dealings between creditor and principal debtor to which the surety is a stranger in form though a hostage in substance; and Sections 140 and 145 restore the equilibrium through subrogation and implied indemnity.

A considerable volume of contemporary litigation proceeds from a misapprehension of what tripartiteness actually requires.

II. Tripartiteness as architecture, not as an execution formality

The commonest defence advanced by sureties is that the instrument is not tripartite because the principal debtor is not a signatory, or was unaware of the guarantee, and that the contract therefore fails *in limine*. The proposition enjoys some textbook support, it being frequently asserted that a guarantee furnished without the principal debtor's knowledge does not qualify as a valid contract of guarantee.

The judicial position is considerably more pragmatic. In *P.J. Rajappan v. Associated Industries (Pvt.) Ltd.*, the Kerala High Court, while describing the contract of guarantee as a tripartite agreement involving the principal debtor, the surety and the creditor, declined to adopt a hyper-technical approach to execution. Where there is evidence of the guarantor's involvement in the transaction, the mere omission to sign the agreement is not sufficient to displace otherwise acceptable evidence that he guaranteed due performance by the principal debtor, and the court is required to consider all the circumstances concerning the transaction and the relative position of the contracting parties. That approach has been consistently followed, and is reinforced in India by the absence of any Statute-of-Frauds requirement of writing, a guarantee being capable of arising orally or by inference from the course of conduct of the parties.

The Supreme Court has now placed the substantive test beyond argument. In *Canara Bank Overseas Branch v. Archean Industries Private Limited*, 2026 INSC 247, the Court held that a guarantor need not derive any direct benefit from the transaction and that it suffices that the principal debtor receives the benefit; the guarantee constitutes a separate and enforceable contract, and the creditor is entitled to proceed against the principal debtor or the surety, or both, at its discretion. What is required to constitute a valid guarantee is an undertaking or promise to make payment to the creditor upon default of the principal debtor, for a benefit received by the principal debtor.

Tripartiteness, properly understood, therefore describes the legal relations that must subsist between three persons. It does not prescribe the number of executants on a single sheet of paper. That said, the evidentiary burden rests upon the party asserting the guarantee, and well-advised lenders continue to recite the principal debtor's request, to procure its counter-signature or acknowledgment, and to cross-refer the guarantee expressly to the facility documentation.

III. Characterisation: when is an undertaking a guarantee?

This is where 2026 has moved the law most consequentially, and in both directions.

In *UV Asset Reconstruction Company Limited v. Electrosteel Castings Limited*, 2026 INSC 14, decided on 6 January 2026, the erstwhile promoter of the borrower had executed a deed of undertaking, warranty and indemnity, clause 2.2 of which obliged it to arrange infusion of funds in the event the borrower was unable to comply with its financial covenants. The Supreme Court held that an undertaking to arrange or infuse funds into a borrower so as to enable compliance with financial covenants cannot, by itself, be equated with a promise to discharge the borrower's liability to the creditor. Absent a clear and unequivocal promise to discharge the borrower's debt to the creditor upon default, a promoter's contractual undertaking to arrange funding does not amount to a guarantee within the meaning of Section 126, and the Court accordingly concurred with the concurrent findings of the National Company Law Tribunal and the National Company Law Appellate Tribunal that clause 2.2 did not constitute a contract of guarantee and that the promoter could not be treated as a guarantor for the facilities availed by the borrower.

Archean Industries illustrates the converse application of the same principle of substance over form. Examining the communications and documents issued by the defendant, in particular a letter of April 1998 described as a corporate guarantee, the Court found that the documents disclosed a binding undertaking to pay the creditor in the event the vessel owner failed to discharge its liability, and reiterated the three essential elements of a guarantee under Sections 126 to 128: the existence of a principal debt, default by the principal debtor, and a promise by the surety to discharge that liability upon default. The defendant was additionally held to be estopped, having itself acted upon the arrangement by seeking approval from the Reserve Bank of India and instructing its bank to remit the sum. The line of authority commencing with *Phoenix ARC Private Limited v. Ketulbhai Ramubhai Patel*, to the effect that the liability of a surety arises only where there is a clear and unequivocal undertaking to discharge the debt of the principal debtor upon default, therefore cuts in both directions.

PRACTICE POINT

Letters of comfort, keep-well deeds, sponsor support undertakings, shortfall undertakings, non-disposal undertakings and letters of awareness must now be drafted with conscious reference to which side of the *UV ARC* line they are intended to fall. A board ought not to be asked to execute a comfort letter that is in law a guarantee; equally, a lender ought not to accept a document styled a guarantee whose operative covenant promises no more than endeavour, arrangement or infusion.

IV. Co-extensive liability and the creditor's election

The creditor's freedom of election under Section 128 remains substantially unqualified. The principal debtor is not a necessary party to the creditor's action against the surety, the plaintiff being *dominus litis* and entitled to choose whom to sue. The appellate tribunals have applied the same logic under the Insolvency and Bankruptcy Code, 2016, holding that the Code furnishes two independent routes to a financial creditor, namely Section 7 against the corporate debtor and Section 95 against the personal guarantor, and that guarantor proceedings are not rendered contingent upon corporate insolvency; relying upon Section 128 of the Contract Act, creditors need not first exhaust their remedies against the principal borrower and may proceed concurrently with, or directly against, the guarantor. This is continuous with the settled line running through *Bank of Bihar Ltd. v. Damodar Prasad*, *State Bank of India v. Indexport Registered* and *Kailash Nath Agarwal v. Pradeshiya Industrial and Investment Corporation of U.P. Ltd.*

V. Variation without consent: the demise of the all-or-nothing plea

Bhagyalaxmi Co-operative Bank Ltd. v. Babaldas Amtharam Patel (D) through Legal Representatives, 2026 INSC 205, resolves a question of long standing. A Bench of Nagarathna and Ujjal Bhuyan JJ., setting aside the judgment of the High Court of Gujarat, held that a guarantor cannot be held liable for amounts withdrawn by the borrower beyond the sanctioned credit limit without the guarantor's consent, but that the guarantor remains liable for the amount originally guaranteed. Discharge under Section 133 is thus neither absolute nor all-encompassing, but is confined strictly to transactions arising subsequent to the variance. Section 139 was held not to be attracted on the facts, the creditor not having impaired the surety's remedy against the principal debtor, which remained available.

For lenders the discipline required is plain. Enhancements, renewals and restructurings must be supported either by fresh surety consent or by a properly drafted and specifically negotiated consent-to-variation covenant, and strict adherence to sanctioned limits is now a condition of recoverability against sureties. For sureties, the plea of variance yields a calibrated ceiling rather than an escape.

VI. Invocation as a condition precedent: the live fault-line

The most contested question in current practice is whether, and how, a guarantee must be invoked before insolvency proceedings against the guarantor are competent. The tribunals are not speaking with one voice.

On one side of the divide, the National Company Law Appellate Tribunal, by judgment dated 20 March 2026, set aside the admission of a Section 95 application and held that a personal guarantee must first be validly invoked before proceedings under Section 95 can be initiated, a demand notice in Form B not being capable, by itself, of being treated as an invocation of the guarantee. The National Company Law Tribunal, Hyderabad reached the same conclusion in *Bank of Baroda v. Katmula Srinivasa Reddy*, 2026 SCC OnLine NCLT 519, decided on 29 January 2026, in relation to a statutory demand notice in Form B under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, absent separate invocation strictly in accordance with the deed of guarantee. Earlier, the National Company Law Tribunal, Mumbai held that neither the Rule 7(1) notice nor a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 amounted to invocation on the facts before it, the liability of the personal guarantor arising only upon an explicit demand calling upon him to repay the outstanding debt under the deed of guarantee.

On the other side, the appellate position has hardened in favour of substance. In *Mavjibhai Nagarbhai Patel v. State Bank of India* the Appellate Tribunal held that the liability of the guarantor must be read from the deed of guarantee, and that a demand notice under Section 13(2) of the SARFAESI Act, if specifically addressed to the guarantor and demanding payment, constitutes a valid invocation. In *Asha Basantilal Surana v. State Bank of India* the Tribunal observed that the notice was titled as a notice to the guarantor and demanded payment within sixty days, and that the guarantee agreement prescribed no specific form of invocation, a clear demand for payment sufficing. Most recently, in *Ujwal Gupta v. Union Bank of India*, by judgment dated 7 January 2026, the Appellate Tribunal held that whether a guarantee is invoked by a Section 13(2) notice depends upon the terms of the guarantee and the content of the notice, and that a notice clearly demanding payment amounts to a valid invocation; where the deed prescribes no particular mode of invocation, a demand notice under Section 13(2) calling upon the guarantor to discharge the outstanding liability is sufficient, and the mere description of the guarantor as a director rather than as a personal guarantor does not invalidate the invocation or the subsequent proceedings, the tribunal being required to examine the substance of the communication rather than its form or the designation assigned.

The reconciliation is that there is no bright-line rule. Outcomes turn upon the invocation machinery contained in the deed, and upon whether the impugned communication, read as a whole, demands payment from the addressee in his capacity as surety.

PRACTICE POINT

We advise creditors to issue a discrete, dedicated invocation notice conforming strictly to the mode, addressee and service mechanics prescribed by the deed, and only thereafter to issue the statutory notice in Form B, rather than to conflate the two. Guarantors resisting admission should test the invocation before contesting the debt.

VII. The insolvency interface

The foundational proposition established in *Lalit Kumar Jain v. Union of India*, that approval of a resolution plan does not *ipso facto* discharge the personal guarantor, the guarantee being an independent contract and a discharge of the principal debtor by operation of law or through insolvency not operating to release the surety, has been repeatedly reaffirmed and extended. In *UV ARC* the finding that approval of the resolution plan had led to the extinguishment and effacement of the entire debt was read as a finding *qua* the corporate debtor alone, leaving intact rights against third parties in relation to debt secured or guaranteed by them. In *Amit Bhatnagar v. UCO Bank*, decided on 12 May 2026, the Appellate Tribunal held petitions under Section 95 to be fully maintainable, the claims not barred by limitation, and the personal guarantors not discharged by the approval of the resolution plan of the corporate guarantor, the liability of personal guarantors remaining co-extensive with that of the principal debtor and creditors retaining an independent right to recover unpaid balances.

Jurisdiction and threshold are now largely settled. Section 60(2) supplements rather than confines Section 60(1), with the consequence that an application under Section 95 lies before the National Company Law Tribunal even in the absence of a pending corporate insolvency resolution process against the corporate debtor, as held in *State Bank of India v. Mahendra Kumar Jajodia* and affirmed by the Supreme Court; and the Appellate Tribunal has held that the threshold prescribed by Section 4 of the Code applies to proceedings under Section 95 against personal guarantors, so that the minimum default before the Tribunal is one crore rupees. The guarantor's consent is not a prerequisite to the creditor's independent right to file, and the Limitation Act, 1963 applies to such applications. Residence abroad affords no immunity: the National Company Law Tribunal, Chennai has held that the Code draws no distinction founded upon nationality or residence, particularly where the guarantee itself was executed with an Indian address and the corporate debtor was locally based, with Section 235 available as the mechanism by which assets situated outside India may be reached through a foreign court.

Two cautions remain. First, concurrency of proceedings is permissible but double recovery of the same debt is not, and claims lodged in the corporate debtor's resolution and pursued in the guarantor's insolvency must be reconciled against a single quantum of admitted debt. Second, the guarantor's rights of subrogation under Section 140 are frequently attenuated or extinguished by the very resolution that fixes his exposure, a matter on which the guarantor's negotiating position at the plan stage is habitually underestimated.

VIII. Independent guarantees: a different tripartite logic

Bank guarantees and standby instruments are structurally tripartite but doctrinally autonomous, the obligation of the issuing bank being independent of the underlying contract and enforceable irrespective of disputes between the beneficiary and the party at whose instance it was issued. Judicial interference with invocation is permissible only in recognised exceptional cases, namely egregious fraud or irretrievable injustice; special equities have not been treated as a broad equitable ground divorced from that settled threshold, being understood instead as circumstances akin to, or resulting in, irretrievable injustice. A separate and conceptually distinct category arises where the invocation is not in accordance with the terms of the guarantee itself. The party opposing encashment accordingly carries a heavy burden, and in our experience the most productive line of resistance is almost invariably non-conforming invocation rather than the merits of the underlying dispute.

IX. Structuring and drafting: what we test for

- Whether the operative covenant promises payment to the creditor upon default, or merely endeavour, arrangement, infusion or support.
- Whether the instrument is in law a guarantee, an indemnity or a pledge, and whether that characterisation has been consciously chosen rather than inherited from a precedent.
- Recitation of the principal debtor's request, and evidence that consideration moved to or for the benefit of the principal debtor.
- A precisely drafted invocation clause specifying mode, addressee, address, capacity and deemed-service mechanics.
- Whether the guarantee is a continuing guarantee within Section 129, together with the revocation and notice mechanics under Sections 130 and 131.
- Express consent to variation, restructuring, grant of time, composition, release of co-sureties and release or loss of security, so as to displace the operation of Sections 133 to 141 to the extent permissible in law.
- The limitation trigger, and whether the cause of action against the surety is framed to arise upon demand rather than upon the principal debtor's default.
- Corporate authorisations under Sections 179, 180, 185, 186 and 188 of the Companies Act, 2013, and the implications of the Foreign Exchange Management Act, 1999 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 for cross-border and listed-entity guarantees.
- Stamp duty and consequent admissibility, assessed instrument-specifically and State-specifically.
- Waiver of subrogation, subordination of the surety's claims, and the interaction of those waivers with Sections 140 and 141.

X. Our view

The direction of travel in 2026 is coherent even where the individual decisions appear to pull apart. Courts and tribunals are increasingly indifferent to nomenclature and increasingly attentive to the operative promise. They will not manufacture a guarantee out of a support undertaking, and they will not release a guarantor who has in substance promised to pay. The burden has correspondingly shifted onto the quality of drafting at the origination stage and onto procedural rigour at the enforcement stage. Most guarantee disputes we encounter are lost not on principle but on the invocation letter.

This note reflects the position as at September 2026 and is intended for general information only. It does not constitute legal advice and should not be relied upon in relation to any specific transaction, instrument or dispute. ANSV Associates would be pleased to advise on the application of these principles to particular facts.

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