

IN THE NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD
DIVISION BENCH
COURT - 1

ITEM No.301 - CP(IB)/91(AHM)2024
With
ITEM No. 302 – IA/448(AHM)2024

Order under Section 94 IBC

IN THE MATTER OF:

JAYANTILAL TRIKAMBHAI VAGHELA
Vs
THE SOUTH INDIAN BANK LIMITED & Anr.

.....Applicant

.....Respondent

Order delivered on: 04/06/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Mr. Sameer Kakar, Hon'ble Member(T)

PRESENT:

For the Applicant :
For the Respondent :

ORDER

The case is fixed for pronouncement of the order. The order is pronounced in the open court, vide separate sheet.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
NATIONAL COMPANY LAW TRIBUNAL,
DIVISION BENCH – I, AHMEDABAD**

**I.A. No.448(AHM) 2024
and
CP/IB/91/AHM/2024**

Filed under Section 94 of the Insolvency & Bankruptcy Code, 2016

*In the matter of **Mr. Jayantilal Trikambhai Vaghela***

Ms. Jayantibhai Trikambhai Vaghela,
Address: Plot/House No. 29, Suryangar Society,
A K Road, Surat, Gujarat, 395008.

... Applicant

VERSUS

1. The South Indian Bank Limited,

Having its Head Office at:
SIB House,
T B Road, PB No. 28,
Mission Quarters,
Thrissur- 680001

Ahmedabad Regional Office:
4th Floor, Sakar VII,
Nehru Bridge Junction,
Ashram Road, Navrangpura,
Ahmedabad- 380009.

...Respondent No.1

2. M/s Saloni Silk Mills Private Limited,

Shop No. J/437, 4th Floor,
Japan Market, Opp. Linear House Bus Stop,
Ring Road, Surat- 395002.

...Respondent No. 2

Order pronounced on: 04.06.2024

CORAM:

Mr. SHAMMI KHAN, HON'BLE MEMBER (JUDICIAL)
Mr. SAMEER KAKAR, HON'BLE MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant/RP : Mr. Vinod Kumar Shah, PCS
For the Respondent/FC : Mr. Sneh R purohit, Adv.
For PG : Mr. Kuldeep Adesara, Adv.
For CD : Mr. Chirag Shah, Adv.

ORDER

1. The Present Application is filed on 15.02.2024 under Section 94(1) of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC, 2016") r/w Rule 6 (1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Bankruptcy Process for Personal Guarantors to Corporate Debtor) Rules, 2019 to initiate the Insolvency Resolution Process (hereinafter referred to as "IR Process") against the Applicant/Debtor who is the Personal Guarantor of **M/s Saloni Silk Mills Private Limited** for a default amount of **Rs.2,37,97,773.13ps** in relation to the credit facility extended by the Respondent Bank namely the **South Indian Bank Limited**.
2. The brief facts of case are that on 11.05.2012 the Corporate Debtor **M/s Saloni Silk Mills Private Limited** availed CCOL Facility of Rs.2,00,00,000/- for Working Capital from Respondent Bank for which the Applicant executed Deed of

Guarantee in favour of Respondent Bank which is annexed as **Annexure-D** with the application. The CCOL Facility was renewed from Rs.2,00,00,000/- to Rs.1,90,00,000/- vide Sanction letter dated 28.03.2013. Thereafter, vide Sanction Letter dated 10.03.2016 the CCOL Facility was enhanced from Rs.1,90,00,000/- to Rs.2,40,00,000/- for which the Applicant again executed Deed of Guarantee on 28.03.2016 in favour of Respondent Bank.

3. Further, the Respondent bank again renewed aforementioned CCOL Facility on 05.09.2017, on 27.06.2019, on 30.06.2020 and granted following financial assistance/facilities to the Corporate Debtor as stated above:

Nature of facility	Limit(Rs.)	Date of Document	Balance as on 29/07/2021 (Rs.)
CCOL- (A/C No. 0650083000000010)	1,90,00,000	27/06/2019	1,98,39,542.06
ECLGS- (A/C No. 0650656000000030)	38,00,000	30/06/2020	39,58,249.07
Total			2,37,97,773.13

4. However, after availing the aforesaid Credit Facility, the Corporate Debtor failed to maintain financial discipline as per terms and conditions of the loan agreement due to which loan account became irregular. Consequently, the said account of the Corporate Debtor was classified as NPA on 29.05.2021 and recalled by Respondent Bank through Demand Notice dated 30.07.2021 issued U/s 13(2) of the S.A.R.F.A.E.S.I. Act, 2002 demanding an amount of Rs. 2,37,97,773.13 ps. to the Respondent No. 2 along with other personal guarantors, which is annexed as **Annexure-F** with the application.

5. The said notice issued by the bank to the corporate debtor and applicant along with other personal guarantors provides the following:

“Further, please note that in the event of your failure to discharge the liability in full within 60 (Sixty) days from the date of receipt of this notice and the Bank takes any action under Section 13 (4) of the Act, you shall be liable to pay to the Bank all costs, charges and expenses incurred by the Bank in that connection. In case the dues to the Bank are not fully satisfied with the sale proceeds of the secured assets, the

Bank shall proceed for recovery of the balance from all of you personally and from other persons liable to the Bank.”

6. The respondent bank has filed an affidavit in reply filled on 05/04/2024 bearing dairy no. D2922, in which following contentions are raised by the respondent bank:
 - i. That, the present application is filled with malicious intention, for a reason that the applicant had filed an application under section 94 bearing number CP(IB)/81/2023 which was dismissed as defective through order dated 21/12/2023 and the applicant has again filled this present application under section 94. That this repeated filling of applications under section 94 of IBC by the applicant is a deliberate attempt to obstruct and derail the recovery proceedings under taken by the respondent bank.
 - ii. That the applicant had filled a reply dated 09/09/2021 to the notice issued under section 13(2). In which the applicant had denied the liability to pay a sum of Rs. 2,37,97,773.13/-. However, in the present application the applicant had showed Rs. 2,37,97,773.13/- as the

total amount of debt. Hence it shows that the application is filled with an ulterior motive as, on one side the applicant is showing that there is no default and on the other side the applicant is filling insolvency petition for defaulting in payment of debt.

iii. That, in the case of **Vijyaben Rasikbhai Thumar (Personal Guarantor) V/S Premraj Ramratan Laddha Liquidator of the corporate debtor (CP(IB)/720AHM/2022)** the Hon'ble Tribunal held that:-

“The aforementioned judgment relied upon by the applicant is not applicable in the present case as in the present case no document is annexed with the application which suggests that guarantee is invoked by the respondent bank. Mere filing of the original application before DRT does not tantamount to invoking the guarantee as neither debt nor liability against the applicant as guarantor has been either adjudicated or crystalized.”

“Therefore, by looking at the facts of the present case and relying on the decision of the Hon'ble NCLAT supra we are of the view that the present application is filed

without any cause and is premature. Hence, CP/IB/72/AHM/2022 stands dismissed with liberty.”

- iv. That similarly in the current case the bank had only taken possession of the mortgaged properties that were held as a security interest and to recover a part of loan amount. However no steps had been taken by the bank to invoke guarantee or recover any amount from the applicant. Thus, since no substantial steps had been taken by the present respondent against the applicant for recovery of any outstanding dues and the guarantee of the applicant had not been invoked, there is no sufficient ground to admit/allow the application filed u/s 94 for initiating the CIRP against the applicant. Accordingly the application may be dismissed.
- v. That in view of the absence of such provision, it is quite clear that there is a conscious decision on the part of the legislature to ensure absolute independence of the process of resolution of debts of an individual and his bankruptcy proceedings thereto.

7. The Resolution professional has submitted his report under section 99 of IBC through IA/448/2024 on 11/03/2024 bearing diary number E702. In the said report the Resolution Professional has recommended the following along with the grounds for the same.

“6. Recommendation: That in view of the above stated facts and circumstances, as well as analysis of the RP based on the examination of material available on record, the RP recommends that present Application under section 94 of the Code filed by the guarantor Jayantilal Trikambhai Vaghela, be admitted under Section 100 of the Code and Insolvency Resolution Process be commenced against Jayantilal Trikambhai Vaghela, Personal Guarantors to M/s Saloni Silk Mills Private Limited.”

The grounds on which the recommendation for acceptance of the application filled by applicant u/s 94 are:

- “a) That the Application filed by the Guarantor satisfies the requirement as set out in Section 94 of the Code.*
- b) That the Corporate Debtor, M / s Saloni Silk Mills Private Limited, has committed default in repayment of Loan Facility granted by the Creditor 'The South Indian Bank Limited'.*
- c) That Jayantilal Trikambhai Vaghela, Personal Guarantor to M / s Saloni Silk Mills Private Limited has also committed default in repayment of Loan Facility demanded by the Creditor 'The South Indian Bank Limited'.*
- d) The personal guarantee has been invoked by The South Indian Bank Limited.*
- e) That Jayantilal Trikambhai Vaghela, has not denied the existence of debt.*

f) That, in light of the above, it is just and equitable that insolvency resolution process be initiated against Jayantilal Trikambhai Vaghela, Personal Guarantors to M / s Saloni Silk Mills Private Limited under the orders and directions of this Hon'ble Tribunal.”

8. The Applicant has filed copy of the Notice which refers to Demand Notices dated 30/07/2021 issued to the Corporate Debtor by the Respondent Bank U/s 13(2) of SARFAESI Act, 2002 which is annexed as **Annexure-F** with the application.
9. On perusal of the notice issued by the Respondent Bank it is observed that said notice was issued intimating only for the purpose of enforcing security interest created by Corporate Debtor and not to invoke any Personal Guarantee.
10. The learned Counsel for the Applicant may be right in his submission that by virtue of Demand Notice dated 30/07/2021 issued U/s 13(2) of the SARFAESI Act, 2002, the Applicant was also asked to make the payment of dues. But there is neither anything on record to show that any other notice has not been issued by Respondent Bank to the Applicant in the capacity of Personal Guarantor to invoke

the Personal Guarantee nor any steps have been taken by the Respondent Bank to recover the dues from the Applicant by sale of her personal assets except secured asset.

11. The Hon'ble NCLAT in its decision in the matter of **Amanjyot Singh Vs. Navneet Kumar Jain & Ors.** (Company Appeal (AT) (Insolvency) No. 961 of 2022) has upheld the view taken by NCLT, Delhi dismissing an application filed by the Appellant under section 94. The relevant para of the said order is reproduced below:-

“7. Notice under Section 13, sub-section (2) is issued by the Bank for enforcing the security interest. Section 13, sub-section (1) and (2) of the SARFAESI Act is as follows:-

"13. Enforcement of security interest.--(1)
Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) *Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is*

classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

Provided that—

- (i) the requirement of classification of secured debt as non-performing asset under this subsection shall not apply to a borrower who has raised funds through issue of debt securities; and*
- (ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of Company Appeal (AT) (Insolvency) No. 961 of 2022 6 security documents executed in favour of the debenture trustee."*

8. *The definition of 'borrower' given in SARFAESI Act under Section-2 (f) is wide enough to include a Guarantor also. Section 13 is for enforcement of security interest. The borrower within the meaning of Section 13, sub-section (2) shall obviously include the Guarantor also.*

12. *We, thus, are satisfied that foundation which was laid down by the Appellant for initiating the CIRP against the Appellant, was not sufficient to admit Section 94 Application and initiate the CIRP against*

the Appellant. We may further notice that Section 10 Application against the Corporate Debtor has already been admitted and CIRP against the Corporate Debtor had been initiated. The case taken up by the Bank being categorical and clear that **no steps have been taken by the Bank against the Appellant, there is no cause for the Appellant to pray for initiation of CIRP against the Appellant – the Personal Guarantor.** We, thus, do not find any good ground to interfere with the impugned order in this Appeal. The Appeal is accordingly dismissed. No costs.”

12. The Applicant has attached the copy of O.A. No.869 of 2022 filed by The South Indian Bank Limited under section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993. However, mere filing of such application for recovery against Principal Borrower and other Guarantors under section 19 of RDB Act does not amount to invocation of guarantee. As it is the case of the Applicant that the said O.A. is pending adjudication of debt and liability against the Applicant and till date no recovery certificate is issued by Debt Recovery Tribunal, Ahmedabad.
13. The Applicant has also attempted to distinguish the judgment of Hon’ble NCLAT in the matter of **Amanjyot**

Singh Vs. Navneet Kumar Jain & Ors. It is submitted by the Applicant that the default is evidenced by the original application filed by the Banks before the Debt Recovery Tribunal (DRT) Ahmedabad against the corporate debtor and guarantors, inclusive of the petitioner herein. As per the ruling of the Honorable Supreme Court in Civil Appeal No. 23988 of 2017, ***B.K. Education Service Pvt. Ltd. Vs Parag Gupta and Associates***, the date of default of a financial debt of the bank Coincides with the classification of the debt as Non-Performing Asset (NPA).

14. The Applicant, being a guarantor, assumes co-extensive liability with the borrower upon the account becoming NPA. Hence, the filing of the original application before the DRT tantamount to invoking the guarantee, thus establishing the default of the petitioner. Further, filing of the original application before the DRT, signifies the invocation of the guarantee.
15. The aforementioned Judgment relied upon by the Applicant is not applicable in the present case as in the present case no document is annexed with the application which

suggests that guarantee is invoked by the Respondent Bank. Mere filing of original application before the DRT not tantamount to invoking the guarantee as neither debt nor liability against the Applicant as guarantor has been either adjudicated or crystalized.

16. Therefore, by looking at the facts of the present case and relying on the decision of Hon'ble NCLAT *supra* we are of the view that the present application is filed without any cause and is premature. Hence, **CP/IB/91/AHM/2024** stands dismissed.
17. In view of the above, **I.A. No.448 of 2024** is also hereby rejected and are disposed of.

-Sd-

SAMEER KAKAR
MEMBER (TECHNICAL)
RS

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)