

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

Company Appeal (AT) (Insolvency) No. 455 of 2025

[Arising out of the Impugned Order dated 09.12.2024 passed by the Adjudicating Authority, National Company Law Tribunal, Mumbai Bench in I.A. No. 925(MB)2024 in C.P.(IB) No.05(MB)2023]

In the matter of:

SYED SIRAJIS SALIKIN KHADRI

PERSONAL GUARANTOR

(INFRA DREDGE SERVICES PRIVATE LIMITED)

Room No.1101/2, B-Wing,

Mount Everest Building,

Near IMAX Adlabs, 9 Bhakti Park,

Wadala East, Mumbai-400037

...Appellant

Versus

(i) EDELWEISS ASSET RECONSTRUCTION COMPANY LIMITED,

Through Secretary

Edelweiss House, off C.S.T. Road,

Kalina, Mumbai -400098.

...Respondent No.1

(ii) NITIN OM KOTHARI

Resolution Professional,

5A/301 Alica Nagar, Lokhandwala Township,

Kandivali (E), Mumbai 400101

...Respondent No.2

Present:

For Appellant : Mr. Krishnendu Dutta, Sr. Advocate.

For Respondent : Mr. Rohit Gupta, Ms. Aakash Lodha, Advocates for R1.

J U D G M E N T

(Hybrid Mode)

Per: Barun Mitra, Member (Technical)

The present appeal filed under Section 61 of Insolvency and Bankruptcy Code 2016 ('IBC' in short) by the Appellant arises out of the Order dated

09.12.2024 (hereinafter referred to as '**Impugned Order**') passed by the Adjudicating Authority (National Company Law Tribunal, Mumbai Bench-IV) in I.A. No.925(MB)2024 in C.P.(IB) No.05(MB)2023. By the impugned order, the Adjudicating Authority allowed the intervention application filed by Edelweiss Asset Reconstruction Company Ltd.-Financial Creditor to intervene in the main CP No. 05/2023 and which impugned order also dismissed the CP No. 05/2023. Aggrieved by the impugned order, the present appeal has been preferred by the Appellant who is Director of the Corporate Debtor- Infra Dredge Services Pvt. Ltd.

2. Coming to the factual matrix of the present matter, the Corporate Debtor had obtained loan facility from Bank of India amounting to Rs 52.32 Cr. The Appellant was a personal guarantor towards the aforementioned loan. The Appellant had mortgaged his residential property as security towards the loan availed by the Corporate Debtor and entered into a Deed of Guarantee as a personal guarantor towards the said loan. The Corporate Debtor and the Appellant faced several difficulties in repaying the loan. The default in making repayments occurred on 31.03.2011 which eventually led to declaration of the Corporate Debtor's account as NPA on 30.06.2011. The Bank of India initiated SARFAESI proceedings and issued a Demand Notice under Section 13(2) of the SARFAESI Act and took symbolic possession of the secured assets on 18.12.2012. The said loan together with underlying securities were subsequently assigned by Bank of India to the Respondent No.1-Edelweiss Asset Reconstruction Company Ltd. The Respondent No.1 filed a Section 7 petition against the Corporate Debtor which was admitted leading to initiation of CIRP of

the Corporate Debtor. The Appellant has claimed that it had defaulted as a personal guarantor to the aforementioned debt and hence was entitled to exercise his statutory remedy under Section 94 of IBC. The Appellant filed CP No. 05/2023 for initiation of insolvency resolution proceedings in exercise of statutory remedy available under Section 94(1) of the IBC read with Rule 6(1) of the Insolvency and Bankruptcy (Application for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 for restructuring their debt on the basis of a repayment plan submitted by them. CP No. 05/2023 was listed for hearing before the Adjudicating Authority on 10.01.2023. On 22.02.2023, the Appellant was directed by the Adjudicating Authority to intimate all other creditors of the Section 94 proceedings initiated by them which was complied with on 28.03.2023. When the CP No. 05/2023 was pending at the stage of Section 100, an Intervention Application No. 925 of 2024 was filed by the Respondent No.1 seeking intervention in CP No. 05/2023 and disposal thereof on the ground that the purpose behind filing the proceedings under Section 94 of the IBC by the Appellant was to gain benefit of moratorium and to stall the recovery proceedings initiated by the Respondent No. 1. Aggrieved by the impugned order, the present appeal has been preferred.

3. We have heard Shri Krishnendu Dutta, Ld. Senior Counsel for the Appellant and Shri Rohit Gupta, Ld. Counsel representing the Respondent No.1.

4. Making his submissions Ld. Sr. Counsel for the Appellant submitted that when CP No. 05/2023 came up for hearing before the Adjudicating Authority on 09.12.2024, the Appellant had not filed their reply to the Intervention Application No. 925 of 2024 filed by Respondent No.1. Moreover, when the report filed by the

Resolution Professional (“**RP**” in short) under Section 99 of IBC was yet to be heard and orders under Section 100 of the IBC were yet to be passed, no Intervention Application could have been entertained by the Adjudicating Authority. The principles of natural justice were also violated by the Adjudicating Authority as the Appellant was not allowed opportunity to respond to the Intervention Application before passing the impugned order dismissing the Section 94 petition. It was strenuously contended that the dismissal of Section 94 petition was premature since the report of the RP did not contain any adverse findings. The impugned order could not have been passed in the absence of taking note of the finding in the report filed by the RP under Section 99 of the IBC. Holding that the summary rejection of the Section 94 petition by allowing an Intervention Application at pre-admission stage was procedurally irregular, it is the contention of the Appellant that the impugned order was therefore both procedurally and legally unsustainable.

5. It was also asserted that the Adjudicating Authority had failed to provide any reasoned order under Section 100(4) of the IBC which alone empowers dismissal of a Section 94 petition for fraudulent intent. Assailing the impugned order, it is the contention of the Appellant that mere initiation of proceedings under SARFAESI Act cannot be the basis for arriving at a finding that the Section 94 petition was filed with an intention to defraud the creditors. The right to file Section 94 application cannot be denied on the ground that SARFAESI proceedings were initiated prior to filing of Section 94 application. It was erroneous on the part of the Adjudicating Authority to come to the conclusion that the Section 94 application had been filed with an intent other than

insolvency resolution. It was thus contended that the impugned order was flawed.

6. It is the case of the Appellant that Section 94 of the IBC is a statutory provision which entitles an individual to file an application for initiation of PIRP when an individual has committed a default. In the present case since it is admitted by the Appellant that a default had occurred on their part and that being so, their right under Section 94 which is available to a personal guarantor/individual cannot be taken away on the ground that SARFAESI proceedings had been initiated prior to filing of Section 94. Proceedings under SARFAESI Act by itself constituted a proof that the Appellant had committed a default. Hence, SARFAESI proceedings by itself cannot be construed as an ineligibility on the part of the personal guarantor to file Section 94 application. The Appellant was therefore entitled to exercise their statutory right under Section 94 of IBC to submit a repayment plan. Reliance was placed by the Appellant on the judgement of this Tribunal in **Getz Cables Pvt. Ltd. Vs State Bank of India and Anr.** in **CA(AT)(Ins.) No. 1953 of 2024** wherein it held that the right under Section 94 given to a personal guarantor/individual cannot be taken away only on the ground that SARFAESI proceedings have been initiated prior to filing of Section 94 application.

7. It has also been contended by the Appellant that following the dismissal of the Section 94 petition, coercive recovery measures were initiated by Respondent No.1 against the Appellant including a possession notice issued under SARFAESI Act. Hence, the Appellant has filed IA No. 2059 of 2025 before this Tribunal seeking protection from coercive recovery action as this was likely to

cause irreparable harm in view of senior citizenship status of the Appellant having age-related adverse health conditions besides his need to discharge other familial obligations including wedding in the family. It was submitted that the Appellant was willing to repay the outstanding debt subject to being protected from coercive steps of dispossession from the subject residential premises.

8. Refuting the allegations and contentions raised by the Appellant, Shri Rohit Gupta, Ld. Counsel for Respondent No.1. submitted that the Appellant had initiated multiple legal proceedings during last ten years primarily to delay the attempts made by the Respondent No.1 to recover the outstanding loan amounts due to them by initiating SARFAESI proceedings. It was also asserted that the Appellant had made several false promises to repay the outstanding amount and also given undertaking to sell the immovable property to clear their outstanding dues. However, they had persistently failed to honour their commitment. It was further argued that the Appellant has sought to invoke the provisions of Section 94 of IBC not for purpose of genuine insolvency resolution but with the intent of invoking moratorium so as to frustrate enforcement action of recovery proceedings against them. The present Section 94 petition has been filed with the intent of wriggling out of their obligations to repay the debt. This appeal was a clear instance of the abuse of process of law and hence the Adjudicating Authority rightly dismissed the CP No. 05/2023 after entertaining their Intervention application. It was submitted by the Respondent No. 1 that since the Appellant had wilfully and repetitively failed to honour its commitment to repay the debt or vacate the residential property, it did not wish to retract from the taking steps to take actual possession of the security asset.

9. We have duly considered the arguments advanced by the Learned Counsel for both the parties and perused the records carefully.

10. The moot question before us for our consideration is whether in the given facts and circumstances, the Adjudicating Authority was correct in concluding that the initiation of SARFAESI proceedings was sufficient basis to hold that the Section 94 application has been resorted to by the Appellant for putting a spanner in the recovery proceedings initiated by the Respondent No.1 and therefore deserved to be dismissed.

11. For a proper appreciation of the issue at hand, it may be useful at this stage to go through the chronological sequence of events right from initiation of the SARFAESI proceedings to the initiation of Section 94 petition. When we see the material placed on record, we notice that it is an admitted fact that the Corporate Debtor had failed to discharge their repayment obligations and their account was classified as a NPA way back in 30.06.2011. The Appellant as personal guarantor had also duly acknowledged the outstanding debt as early as on 13.08.2012 and had made part payment towards the loan in 2018. The debt liability is also acknowledged in the financial statements of the Corporate Debtor for the FY-2017-18. It is also an undisputed fact that a demand notice had been issued under the SARFAESI Act by the original Lender-Bank of India on 06.08.2012.

12. The Bank of India initiated recovery measures under SARFAESI Act following which the present Appellant had filed Securitisation Applications (“SA” in short) challenging the recovery measures taken by the Bank of India. The

present Appellant had filed these SAs before the DRT to prevent the Bank of India and later the Respondent No.1 from taking physical possession of the security asset. Coming to the SAs filed by the Appellant before the DRT, we notice that 1st S.A. was filed on 17.12.2012 which was disposed of on 12.04.2013. The 2nd S.A. was filed on 31.07.2013 which was disposed of on 02.05.2018. The 3rd S.A. was disposed of by the DRT on 30.08.2018 directing the Appellant to vacate the suit flats on 07.09.2018 and hand over the possession to the secured creditor. The Appellant had given an undertaking on 30.08.2018 to the DRT to handover possession of the subject residential premise within seven days but did not ensure compliance. Instead of handing over possession, the Appellant filed a Writ Petition before the Hon'ble High Court of Bombay and a plea was taken that they had found a buyer for the secured asset. The Hon'ble High Court of Bombay on 04.12.2019 allowed the Appellant to make payment to the Respondent No.1 either by themselves or through the buyer of the secured asset within twelve weeks and that in the event of default, the Respondent No.1 would be entitled to take possession of the subject residential premise and sell the same to release their dues. However, there was again a breach of commitment made before the Hon'ble High Court of Bombay by the Appellant. When the fourth S.A. filed by the Appellant was heard, the DRT in its Order of 07.12.2022, captured the conduct of the Appellant over the last 10 years seeking to frustrate the action on the part of the Creditor under the SARFAESI Act and observed that: *"..... the borrowers or the applicant left no stone unturned to delay or protract or frustrate the secured creditor's action and measures under the SARFAESI Act read with the Rules. The applicant's conduct aims to wilfully misuse and abuse easy access to the justice administration system. Complying with the court's order and*

undertaking is fundamental to litigation to achieve fairness between the parties. The borrowers have failed the test of judicial scrutiny for repetitive breaches of the court's order or multiple non-compliance with the undertakings." The DRT also directed the Appellant to comply with the Court's order and undertaking given by them from time to time.

13. When we look at the impugned order, we find that the Adjudicating Authority at para 5 thereof has exhaustively listed out the details of the multiple legal proceedings initiated by the Appellant before various Courts/Tribunals/Forums. This leaves no doubt in our mind that each time physical possession of the secured residential premises was sought to be taken by the Respondent No.1 by following the due process laid down under the SARFAESI Act, the Appellant tried to circumvent the possession notice and stall/defer these proceedings by initiating some legal proceeding or the other. This pattern of conduct of the Appellant underlines an entrenched pattern of evasion of recovery proceeding on one pretext or the other.

14. This now brings us to the filing of the Section 94 application on 03.12.2022 and its timing. We notice that Section 94 application was filed by the Appellant within weeks after the issue of a possession notice upon them on 11.11.2022 by the Respondent No.1. When after the 4th SA was disposed of, the Appellant realised that it had failed to secure any further relief from the DRT and that dispossession from the subject residential premises was imminent that the present Section 94 petition was filed on 03.12.2022 and a communication sent on 06.12.2022 to the Respondent No.1 to hold its hand from taking over possession of the residential premises on account of moratorium. This letter of

06.12.2022 clearly reveals the intention of the Appellant to stall the recovery proceedings by taking undue benefit of the moratorium provisions. Filing of the Section 94 application at this juncture leaves no room for doubt in our mind that these proceedings were not initiated with the intent of genuine insolvency resolution but as a tool to obstruct lawful recovery of enforcement with the manifest intent of the Appellant being to seek refuge under the moratorium provision under Section 96 of the IBC in an effort to prevent enforcement of possession of the secured residential premises.

15. At this stage we advert our attention to the ***Getz Cable judgment supra*** on which the Appellant has placed their reliance. We have no quarrel with the proposition of law laid down in ***Getz Cable judgment supra*** that the right under Section 94 given to a personal guarantor/individual cannot be taken away only on the ground that SARFAESI proceedings have been initiated prior to filing of Section 94 application. Be that as it may, it is pertinent to notice that the said judgement has also observed that the Adjudicating Authority has to decide each case depending on the specific and individual facts of each case.

16. This is a case clearly where the Appellant on one excuse the other has all along tried to delay the handing over of the security to the Respondent No.1. We find that steps under SARFAESI Act have been pending since 2012. The Appellant has consistently misused the benevolent indulgence afforded by various adjudicatory forums to the Appellant in the past to resolve the matter. Each time the Appellant got relief from the court it slept over its commitment to either handover the subject residential premises to the Respondent No.1 or to make payment by selling the said property to clear the outstanding debt. The

present Section 94 proceedings have been filed 13 years after symbolic possession had been taken by the Bank of India on 10.12.2012. We notice that when the SARFAESI proceedings were on the verge of completion and all manoeuvres adopted by the Appellant to stall and delay the recovery proceedings having come to a naught, the Appellant now sought to wriggle out of this situation by resorting to filing of the Section 94 application. In view of the persistent lack of good faith displayed by the Appellant, the Adjudicating Authority cannot be said to be wrong in concluding that the Appellant on having received the possession notice once again from the Respondent No.1 has again tried to dodge the said notice by filing a Section 94 application. Hence, the reliance placed by the Appellant on the judgment in **Getz Cables judgment supra** is misplaced. The facts of the present case and that of **Getz Cables supra** are distinguishable. In the matter of **Getz Cables supra**, the insolvency proceedings under Section 94 of IBC was instituted immediately after initiation of SARFAESI proceedings. In comparison to the close proximity between the SARFAESI proceedings and filing of Section 94 petition in **Getz Cables judgment supra**, in the present case there is a yawning time-gap of more than a decade between the SARFAESI and Section 94 proceedings. In the present case, the SARFAESI proceedings have been going on since 2012 and the Appellant has unleashed a chain of litigations which have been doggedly and relentlessly pursued in various courts of law to derail the recovery proceedings. Section 94 proceedings have been initiated by the Appellant more or less coinciding with the issue of possession notice dated 11.11.2022 by Respondent No.1. The present Section 94 application is clearly yet another salvo on the part of the Appellant to stall the recovery by taking advantage of moratorium. This

clearly shows that the Appellant has been ceaselessly orchestrating litigative proceedings and embroiled the Respondent No.1 in these proceedings clearly to subvert the recovery proceedings initiated against them and not for the purpose of the insolvency resolution. In the given fact situation, we are inclined to agree with the findings returned by the Adjudicating Authority that the Appellant had approached the Adjudicating Authority by filing the Section 94 application with an intent other than insolvency resolution.

17. The questioning of the jurisdiction of the Adjudicating Authority by the Appellant to examine the maintainability and bonafide of an application under Section 94 at the stage of Section 100 lacks substance. Since the report under Section 99 of the IBC had already been filed by the RP, nothing prevented the Adjudicating Authority to hear the matter and pass orders under Section 100 of the IBC while also entertaining the Intervention Application of Respondent No.1. This brings us to the contention of the Appellant of violation of the principle of natural justice by the Adjudicating Authority as the Appellant did not get an opportunity to file their response to the Intervention Application of the Respondent No.1. When we look at the material on record, we find that the Adjudicating Authority by its order dated 27.03.2024 had allowed four weeks' time to the Appellant to file their response. The matter was fixed for hearing on four dates viz. 08.05.2024, 25.06.2024, 03.09.2024 and 25.10.2024. However, no reply was filed by the Appellant. The contention of the Appellant in this regard is unsupported by record and therefore lacks credulity.

18. For the forgoing reasons, we find no merit in the Appeal. The Appeal stands dismissed. All IAs stand closed. No costs.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

**Place: New Delhi
Date: 25.04.2025**

Abdul/Harleen