

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.961 of 2022

(Arising out of Order dated 23.05.2022 passed by the Adjudicating Authority (National Company Law Tribunal), New Delhi Bench Bench-II in IA-4356/2022 in (IB)957 (PB)/2020)

IN THE MATTER OF:

Amanjyot Singh
8004, DLF Phase-IV,
Gurugram, Haryana.

.... Appellant

Vs

1. Navneet Kumar Jain,
Resolution Professional,
Flat No.2D, OCS Apartments
Mayur Vihar Extn., Phase I,
Delhi – 110091.
2. Arun Chadha
Resolution Professional of
Gulati Retail India Ltd.
727, Brahmapuri, Meerut,
Uttar Pradesh – 250002.
3. Punjab & Sind Bank
Gurugram Road, Gurugram.
4. ICICI Bank Ltd.
Qutub Plaza Market,
DLF, Phase I, Gurugram.

.... Respondents

Present:

For Appellant: Mr. Rajesh Bohra and S.Bohra, Advocates.

For Respondents: Mr. Amit Sharma and Mr. Navneet Kumar Jain, Advocates for R-1

Mr. Gautam, Advocate for R-2

J U D G M E N T

ASHOK BHUSHAN, J.

This Appeal has been filed by the Appellant, a Guarantor of the Corporate Debtor, challenging the order dated 23.05.2022 passed by the

National Company Law Tribunal, New Delhi Bench-II dismissing an Application filed by the Appellant under Section 94 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**Code**”) relying on the report submitted by the Resolution Professional (“**RP**”).

2. Brief facts of the case necessary to be noted for deciding this Appeal are:

- (i) The Corporate Debtor – M/s. Gulati Retail India Ltd. had obtained financial facilities from Punjab & Sind Bank and ICICI Bank Ltd. The Appellant was one of the Personal Guarantor of the financial facilities extended by Punjab & Sind Bank.
- (ii) Punjab & Sind Bank issued a notice under Section 13, sub-section (2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “**SARFAESI Act**”) on 04.10.2013 to the Corporate Debtor and Guarantors. One of the Guarantor Smt. Inderjit Kaur Bagga had created equitable mortgage in respect of immovable property situated at Faridabad to secure the dues of the Bank. The notice called upon all the noticee to jointly and severally make the payment and discharge the full liability amounting to Rs.28343314.56/- with interest with effect from 01.10.2013. The Bank sold the mortgaged properties and recovered part of loan.
- (iii) The Corporate Debtor filed an Application under Section 10 being IB-1154(ND) 2019 before the Adjudicating Authority for

initiation Corporate Insolvency Resolution Process (“**CIRP**”), which was admitted on 30.07.2019.

- (iv) The Appellant, who was Guarantor of the Corporate Debtor filed an Application under Section 94 of the Code to initiate CIRP, on which (IB)-957(ND) 2020 was registered. The Appellant’s case was that he having committed default in making the payment in response to the notice dated 04.10.2013 issued by Punjab & Sind Bank under Section 13, sub-section (2) of the SARFAESI Act, Section 10 Application deserved to be admitted.
- (v) The Adjudicating Authority appointed Resolution Professional (“**RP**”) and called for a report. The report was submitted by the RP. The RP in his report recommended rejection of the Application, Adjudicating Authority rejected the Application filed under Section 94 by the impugned order. The Adjudicating Authority took the view that Applicant has not produced any other document except the notice dated 04.10.2013 that guarantee has been invoked against the Applicant for recovery of the amount.

3. Shri Rajesh Bohra, learned Counsel for the Appellant challenging the order, submits that view taken by the Adjudicating Authority that guarantee has not been invoked against the Appellant is erroneous. Notice dated 04.10.2013 issued by the Bank under Section 13, sub-section (2) of the SARFAESI Act was addressed to all Personal Guarantors including the

Appellant, hence the guarantee stood invoked. He submits that the notice clearly mentions that addressee Nos.1 to 6 jointly and severally liable to make payment and discharge full liabilities. Hence, the default was committed by the Appellant.

4. The learned Counsel appearing for the Bank submits that notice under Section 13(2) relied by the Appellant was notice for enforcing the security interest, which was mortgaged, i.e., the immovable property, mortgaged by Smt. Inderjit Kaur Bagga, whose properties were mentioned in the notice under Section 13(2). The mortgaged properties were auctioned and part of the amount was recovered. The learned Counsel for the Bank submits that no steps have been taken by the Bank for invoking the guarantee or for recovery of any amount from the Appellant. Hence, the Application filed by the Appellant under Section 94 has been rightly rejected.

5. We have considered the submission of learned Counsel for the parties and have perused the record.

6. The notice dated 04.10.2013, which is the basis of the default as claimed by the Appellant has been filed along with Section 94 Application. The notice is addressed to M/s Gulati Retails India Ltd., the Corporate Debtor and 5 others persons. The Appellant is mentioned at Sl. No.3 and Smt. Inderjit Kaur Bagga is mentioned at Sl. No.6. It is useful to extract the relevant part of the notice, which is as follows:

“2. That you addressee No.1 Executed the various loaning documents in respect of the above loan facilities on 27-04-2012 and also agreed to pay the

rate of interest at the rate of 14.25 (Base Rate plus 4%) per cent per annum which monthly rests and as per guidelines of the bank from time to time, in respect of the above facilities.

3. *That you addressee No.2 To 6 stood as guarantor(s) for addressee No.1 in consideration of the above said loan facilities and executed the deed of continuing guarantees on 27-04-2012 of addressee(s) No.2 to No.6 is co-extensive and continuing with addressee No.1 and you all are jointly and severally liable to pay the dues including interest, costs and other usual bank charges to the bank.*
4. *That you addressee NO 6 created equitable mortgage in respect of immovable property i.e. 250 P, Sector-21/B, Urban Estate, Faridabad Bearing to secure the dues of the bank, in consideration of the above said loan facilities to addressee No.1*

The details of the property mortgaged is as under:

- (a) Name of the mortgagor : addressee No.6, Smt. Inderjit Kaur Bagga W/o Sh. J.S. Bagga*
- (b) Mortgagee : Punjab & Sind Bank, Gurudwara Road; Gurgaon.*
- (c) Sum secured: Rs.275.00 lacs (Rs. Two Crores Seventy Five Lacs only).*
- (d) Rate of Interest 14.25% p.a.*
- (e) Details of property mortgage: House No.250-P, Sector-21/B, Faridabad (Haryana).*
- (f) Details of title deed(s) Sale Deed No.15794 Dt. 31-01-2011 Regd. At Office of Sub-Registrar, Faridabad.”*

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 sub-section 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*

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. The Bank has filed a reply in this Appeal and the Bank’s categorical case in the Appeal is that Bank has not initiated any proceedings against the Appellant for recovery of its balance amount. In paragraphs 11 and 12 of the reply, following has been stated:

11. *The said notice u/s 13 (2) was issued by PSB to enforce the security interest on the mortgaged property given by addressee no.6. The said notice has not invoked guarantee against any guarantor except addressee no.6. This notice is a statutory requirement to intimate borrowers/ guarantor about the default and invoking the security interest and it has nothing to do with invocation of guarantee.*

12. *That section 13 of the SARFAESI Act, 2002 is a very elaborate section and contains all steps which are required to be taken by a financial institution and therefore, it was just a procedural compliance of provision of sub-section (3) of Section 13 of SARFAESI Act, 2002 read with rule 11 of SARFAESI Rules, 2002. Further, mere issuing of notice u/s 13(2) under SARFAESI Act cannot be treated as invoking of guarantee. The debtor here*

failed to provide any documents vide which the PSB bank had sought the balance amount of Rs.76.48 lacs from the guarantor after adjusting the recovery of proceeds received from realization of mortgaged immovable property. Debtor has not submitted any notice for invocation of personal guarantee of Mr. Amanjyot Singh Gulati.”

9. The learned Counsel for the Appellant may be right in his submission that by virtue of notice issued under Section 13, sub-section (2) dated 04.10.2013, the Appellant was also asked to make the payment of dues, but the undisputed fact is that apart from notice dated 04.10.2013, no steps have been taken by the Bank to recover any dues from the Appellant. The default, if any, committed by the Appellant was in October 2013, when notice was received by the Appellant. When we come to the order passed by the Adjudicating Authority, it is relevant to notice that in the report submitted by the RP, applicability of the Limitation Act was also noticed. In paragraph 3 at Item No.6, following was reported by the RP:

“6. **Applicability of Limitation Act:** *The Notice dated 4th October, 2013 issued by Punjab and Sindh Bank (PSB) under SARFAESI Act, 2002. Thereafter, no other notice has been issued by PSB to the Personal Guarantor. A guarantor is liable to pay if the principal debtor defaults. **The creditor has to enforce the guarantee within the limitation period stipulated under the limitation act. As per article 55 of limitation act 1963, the time-limit of 36 months would be reckoned from the date the guarantee***

contract is breached. *The breach of contract occurs if the payment is not made or refused ‘on-demand’.*”

10. The RP came to the conclusion that the Bank has not invoked the guarantee.

11. In its reply, the Bank has submitted that although after sale of the mortgaged asset, part of the facility was realized, but no steps have been taken by the Bank against the Appellant for recovery of any dues. The notice, which is the basis of the Application, was issued on 04.10.2013. Nine years have been passed from issuance of the notice and no steps have been taken by the Bank so far for recovery of any amount from the Appellant. Default, which is claimed by the Appellant, at best can be said to be a technical default and when substantially, no steps have been taken by the Bank and the Bank’s categorical case is that guarantee of the Appellant has not been invoked, it is the Bank, who after invoking the guarantee shall proceed against the Appellant.

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.

**[Justice Ashok Bhushan]
Chairperson**

**[Kanthi Narahari]
Member (Technical)**

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

NEW DELHI

5th January, 2023

Ashwani