NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH-II

(IB) 957 (PB)/2020
IA/4356/2021

IN THE MATTER OF:

AMANJYOT SINGH GULATI ....APPLICANT

VERSUS

MR. ARUN CHADHA, RESOLUTION PROFESSIONAL,
OF GULATI RETAIL INDIA LIMTED & ORS.
727, BRAHMAPURI, MEERUT, UTTAR PRADESH-250002
.... RESPONDENT NO. 1

PUNJAB & SINDH BANK
GURUGRAM ROAD, GURUGRAM ....RESPONDENT NO. 2

ICICI BANK LTD.
QUTUB PLAZA MARKET
DLF, PHASE-1, GURUGRAM ....RESPONDENT NO. 3

AND
IN THE MATTER OF
MR. NAVNEET KUMAR JAIN
FLAT NO: 2D, OCS APARTMENTS,
MAYUR VIHAR EXTN, PHASE-1,
DELHI-110091 ....RP OF APPLICANT

SECTION: U/S 99 of IBC, 2016

Order delivered on: 23.05.2022

CORAM:
MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)
MR. L. N. GUPTA, MEMBER (TECHNICAL)

Present-

For the Applicant: Adv. Rajesh Bohra, Adv. Sangeeta Bohra

For the Resolution Professional: Navneet Kumar Jain, RP and Adv. Amit Sharma

For the Respondent No. 3: Adv. Gautam Singhal and Adv. Rajat Chaudhary

ORDER

AS PER MR. ABNI RANJAN KUMAR SINHA, MEMBER (JUDICIAL)

1. The present application has been filed under Section 99 of the Insolvency & Bankruptcy Code, 2016, (hereinafter referred to as the "Code"), by the Resolution Professional of the Applicant, praying the following:-

   a) *To exclude the time period from 31.08.2021 to 07.09.2021 (7 days) for the purpose of calculation of various time lines within IBC, 2016 read with relevant rules and regulations and allow the RP to file his report till 17.11.2021;*

   b) *To Reject the application filed u/s 94 of IBC, 2016 by Mr. Amanjyot Singh Gulati, Guarantor/ Debtor on the basis of recommendations made by the Resolution Professional in his report.*

   c) *To take on record the report of resolution Professional filed under section 99 of Insolvency Bankruptcy Code, 2016.*

   d) *To fix the Professional fee of the RP and direct the applicant/ Debtor to pay the professional fee and expenses within fixed time period.*

   e) *To direct the applicant to pay fee advance money to RP to meet the expenses along with 50% amount of fee as may be fixed by this Hon'ble Bench.*

   f) *To issue such other order/directions as this Hon'ble Bench may deem fit and proper in the facts and circumstances of the case.*

2. The facts mentioned in the application, in brief, are as follows:

i. That the application u/s 94 of the Code has been filed by Mr. Amanjyot Singh Gulati and this Bench, vide order dt. 31.08.2021, had appointed the Resolution Professional and directed him to file his report u/s 99(7) of the Code.

ii. That the Resolution Professional had received the copy of the order on 07.09.2021 and was not able to file the report within 10 days of the date of order. Therefore, a prayer has been made to exclude the period of 7 days and allow the RP to file his report by 17.09.2021. The RP further prays for fixing the amount of professional fee and a direction to the Applicant for payment of the same.

iii. That the scanned copy of the Synopsis of the Report is reproduced hereunder:

SYNOPSIS OF REPORT

S.No.	Particulars
1.	The applicant doesn't fall under the eligibility criteria of Personal Guarantor as the personal guarantee has not been invoked. Point no. 14 of Part-I of Form A is incorrect.
2.	The RP, vide his email dated 09.09.2021, had requested the personal guarantor to visit RP's office and to provide following documents: a) List of all bank accounts (individually or joint). b) Statements for all the bank accounts from 01.04.2018 to till date. c) Income Tax returns from AY 2019-20 onwards. d) Copy Deed of continuing guarantee dated as executed by you. e) Audited/signed Financials (P&L and Balance sheet) on the date of signing of deed of continuing guarantee

	f) Assets owned as on the date of execution of Deed of continuing Guarantee g) Letter invoking the guarantee Personal Guarantor/ Debtor however, visited the RP's office on 13.09.2021 and provided following documents: a) Bank statement of Axis Bank account no. 912010052301312 from 01.04.2018 onwards, b) Computation of Income for AY 2012-13, 13-14 & 20-21 (unsigned) c) Sarfaesi Notice issued by Allahabad Bank in the matter of Gulati Export House (Partnership firm in which personal guarantor is partner) which is not connected with the present case matter. d) Proof of his illness e) ITR for AY 2019-20 along with computation of income on.
3.	The applicant has submitted incomplete application. The proof of payment of application fee of Rs 2000/- has not been provided along with Form A. However, same has been considered paid on the basis of order passed by this Hon'ble bench.
4.	Based on the documents submitted by the Personal Guarantor/ Debtor along with the application and reply of the Personal Guarantor/ Debtor in response to the emails of RP, the application does not satisfy the condition of section 94. Accordingly, recommendations are made for rejection of the application filed u/s 94 of IBC, 2016.

3. The Resolution Professional has also filed its written submissions and the scanned copy of which is reproduced hereunder:

1. That this Hon'ble Bench, Adjudicating Authority vide its **order dated 31.08.2021 (Received on 07.09.2021)** appointed the undersigned Mr. Navneet Kumar Jain as Resolution Professional and directed him to file his report u/s 99(7) of Insolvency and Bankruptcy Code, 2016 in the case no Case No. CP(IB)-957(ND)2020.

2. The guarantor had relied on the notice dated 04.10.2013 issued to Corporate Debtor u/s 13(2) of SARFAESI Act by Punjab and Sind Bank (PSB) in which the applicant was arrayed as addressee no. 3. The notice was issued to communicate all addressees therein regarding bank's decision to enforce its security interest on the mortgaged property no. 250-P, Sector-21/B, Faridabad, in the name of **Mrs. Inderjit Kaur Bagga w/o Shri. J S Bagga, another guarantor.**

3. 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 guaranty. It is humbly submitted that the bank can invoke the guarantee only after the sale of mortgaged assets for the balance amount due and payable by the guarantors. Since, the bank has not invoked the guarantee the application is not maintainable.

4. That the applicant/ debtor have failed to provide any documents to show that the PSB bank had sought any due and balance amount from the guarantor after adjustment of sales proceeds. Therefore, the condition of default u/s 94(1) of IBC, 2016 is not satisfied. Since, there is not document provided by the guarantor to show the invocation of guarantee and demand by the bank for payment of balance due and payable amount, therefore, the application is not maintainable.

5. Further, a clarification vide file no. 2/5/2016-Recovert on procedure for invoking of guarantee in case the borrower company defaults, was issued by Ministry of Finance, Department of Financial Service to all public sector banks. The ministry at Point no. 4(c) has stated that if the guarantor has not created any security interest over his property but owns property and other assets in the application for recovery filed before the DRT, the bank should move an application before DRT for attachment and sale of such property u/s 19(12) to (18) of the RDDB & FI Act, 1993. Since, the bank has not invoked the guarantee and filed the application before the DRT, no default has been made by the guarantor and therefore, the application is not maintainable. The copy of circular is enclosed as **Annexure-1.**

6. <u>**Applicability of Limitation Act:**</u> 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. <u>**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.**</u> The breach of contract occurs if the payment is not made or refused 'on-demand'.

7. In <u>Deepak Bhandari Vs Himachal Pradesh State Industrial Development Corporation Limited (Respondent) [Civil appeal no.1019/2014 in Supreme Court],</u> the court held that, the right to sue under a contract of indemnity or guarantee would principally arise when the indemnifier or the guarantor fails to pay the money claimed from it and not from the time when the <u>'Recall Notice'</u> is served. The Hon'ble Supreme Court, at para no. 21 had clearly held that the limitation period for recovery of the balance amount would start only after adjusting the proceeds from the sale of assets of the Borrower as only then would the Respondent be in a position to determine the Appellant's final liability as to whether there is a shortfall or excess amount realized from the sales proceeds. Since, in the present case, there is no information available about the due amount,

if any, after the sales proceeds of mortgaged assets and the bank has not invoked the guarantee or demanded any amount from the guarantor, therefore, the present application is not maintainable. The copy of the judgment passes by Hon'ble Supreme court is enclosed as **Annexure-2.**

8. As per Rule 3(e) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 **"guarantor"** means a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part. The relevant definition of guarantor in rule 3(e) is reproduced herein below:

> *"guarantor" means a debtor who is a personal guarantor to a corporate debtor and in respect of whom guarantee has been invoked by the creditor and remains unpaid in full or part;*

Since, the bank has not invoked the guarantee till date, therefore, the applicant is not in default. Hence, the applicant u/s 94 filed by the guarantor is not maintainable.

9. In the above mentioned circumstances, it is respectfully prayed to this Hon'ble bench to reject the application filed by the guarantor u/s 94 of IBC, 2016

4. The Applicant too has filed his written submissions and the scanned copy of which is reproduced hereunder:

1. The Petitioner/Applicant is one of the guarantors of the Corporate Debtor, M/s Gulati Retail (India) Ltd. and has filed the Petition bearing CP No. (IB)-957(ND) 2020 under Section 94 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as **"the Code"**) read with Rule 6(1) of Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtor) Rules, 2019 before this Hon'ble Authority. Section 94 of the Code provides:

> *"94. (1) A debtor who commits a default may apply, either personally or through a resolution professional, to the Adjudicating Authority for initiating the insolvency resolution process, by submitting an application.*
> *(2) Where the debtor is a partner of a firm, such debtor shall not apply under this Chapter to the Adjudicating Authority in respect of the firm unless all or a majority of the partners of the firm file the application jointly.*
> *(3) An application under sub-section (1) shall be submitted only in respect of debts which are not excluded debts.*
> *(4) A debtor shall not be entitled to make an application under sub-section (1) if he is—*
> *(a) an undischarged bankrupt;*
> *(b) undergoing a fresh start process;*
> *(c) undergoing an insolvency resolution process; or*
> *(d) undergoing a bankruptcy process.*
> *(5) A debtor shall not be eligible to apply under sub-section (1) if an application under this Chapter has been admitted in respect of the debtor during the period of twelve months preceding the date of submission of the application under this section.*
> *(6) The application referred to in sub-section (1) shall be in such form and manner and accompanied with such fee as may be prescribed."*

2. In view of default occurred by the Corporate Debtor, one of the secured financial creditors namely Punjab & Sind Bank (**"PSB"**) has invoked the personal guarantee extended by all guarantors including the Petitioner/Applicant being guarantor of the Corporate Debtor and issued the Notice dated 04.10.2013 under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to Corporate Debtor as well as to the Petitioner/Applicant (**Addressee no. 3**) and other personal guarantors (***Refer Page no. 22 of Petition***).

3. In para 3 of above notice, it is clearly stated that "*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.*" (***Refer Page no. 23 of Petition***)

4. PSB vide above notice, called upon the Corporate Debtor and all personal guarantors including the Petitioner/Applicant to make the payment & discharge in full liabilities amounting to Rs. 28343314.56. The relevant portion is being reproduced hereinbelow:

   "*Therefore, by virtue of this notice, hereby call upon all of you i.e. addresses No. 1 to 6 jointly and severally to make the payment & discharge in full liabilities amounting to Rs. 28343314.56 as per details mentioned above in para No. 4(h), with interest w.e.f. 01-10-2013 with monthly rests to the bank within 60 days from the receipt of this notice, failing which the bank shall be constrained to take measures under the provisions of chapter III of securitization and reconstruction of financial assets and enforcement of security interest Act 2002, for recovery of above secured dues and in that case you will be jointly and severally liable to pay for all cost and other expenses arising there from.*" (***Refer Page no. 24 of Petition***)

5. In the present case, the default has already been committed by the Petitioner/Applicant qua creditors including PSB and accordingly, he has filed the Petition u/s 94 of the Code before this Hon'ble Authority to initiate the Insolvency Resolution Process and as such, the Petition bearing CP No. (IB)-957(ND) 2020 may kindly be admitted by this Hon'ble Authority.

5. We have heard the Learned Counsel appearing for the RP as well as the Applicant and perused the averments made in the RP's Report and the written submissions filed by the RP as well as the Applicant.

6. The Learned Counsel appearing for the RP submitted that since the personal guarantee was not invoked, therefore, there is no debt which is due and payable by the applicant. He further submitted that the applicant has placed reliance upon the SARFAESI notice issued under Section 13(2) of the SARFAESI Act. He further submitted that the said notice was issued for the purpose of releasing from the property of the Shrimati Inderjit Kaur Bagga and not from the property of the applicant. Whereas the contention of the applicant is that since the general notice was issued on 04th October, 2013, therefore, it would be presumed that the guarantee was invoked. At this juncture, we would like to peruse the SARFAESI notice dated 4th October, 2013 placed at page 22 of the application, and the scanned copy of the same is reproduced below: -

ANNEXURE - 4
ANNEXURE - 4

PUNJAB & SIND BANK
(A Govt. of India Undertaking)

ZONAL OFFICE- III
BO: GURUDWARA ROAD
GURGAON

Dated: 04-10-2013

Regd. A/D Speed-Post

1. M/s GULATI RETAIL INDIA LTD.
Director-SH.MANMOHAN SINGH GULATI
177,Udyog Vihar Phase-1,Gurgaon-122001
Also at---F-65, RAJOURI GARDEN,NEW DELHI-110027

2. SH.MANMOHAN SINGH GULATI S/O SH.PRITHI PAL SINGH GULATI
A-31/6, DLF PHASE-1,Behind Bristol Hotel
GURGAON-122001
Also at-F-66,RAJOURI GARDEN, NEW DELHI-110027

3. SH.AMAN JYOT SINGH GULATI S/O SH.MANMOHAN SINGH GULATI
A-31/6 ,DLF PHASE-1,Behind Bristol Hotel
GURGAON-122001
Also at---F-66, RAJOURI GARDEN,NEW DELHI-110027

4. SH.PRITHI PAL SINGH GULATI S/O LATE HARBANS SINGH GULATI
A-31/6, DLF PHASE-1,Behind Bristol Hotel
GURGAON-122001
Also at---F-66, RAJOURI GARDEN, NEW DELHI-110027

5. SMT.RAJ PREET KAUR GULATI W/O SH.MANMOHAN SINGH GULATI
A-31/6, DLF PHASE-1, Behind Bristol Hotel
GURGAON-122001
Also at---F-66, RAJOURI GARDEN, NEW DELHI-110027

6. SMT. INDERJIT KAUR BAGGA W/O SH.J.S.BAGGA
M-104, Greater Kailash-1
New Delhi -110048

RE: NOTICE UNDER SECTION 13(2) OF SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT 2002.

Dear Sir/Madam,

1. That you addressee(s) No. 1 doing the business of Retail Trading of ladies garments requested the bank for financial assistance and upon the request the bank sanctioned and allowed the following facilities to you in the month of APRIL-2012.

For GULATI RETAIL INDIA LTD
DIRECTOR

For PUNJAB & SIND BANK

For GULATI RETAIL INDIA LTD
DIRECTOR

The details of facility –CC HYP LIMIT OF RS.275.00 LACS (Rs.Two Crores Seventy Five Lacs only)

The above loan facilities was duly secured by way of hypothecation of Stock of ladies garments & Current Assets of the Company & the same was also secured by way of equitable mortgage of immovable property i.e. Plot No.250P Sector-21 B,Urban Estate, FARIDABAD belonging to addressee No 5 SMT.INDERJIT KAUR BAGGA W/O SH.J.S.BAGGA

Detail of Charge-

i) Charge on stock of ladies garments, current assets & Book-Debts of the Co.

ii) Charge on immovable property No.250-P, SECTOR-21/B, FARIDABAD in the name of SMT.INDERJIT KAUR BAGGA W/O SH.J.S.BAGGA

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 with 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 5 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 the property mortgage: HOUSE NO.250-P,SECTOR-21/B,FARIDABAD (HARYANA)

(f) Details of the title deed(s) SALE-DEED NO.15794 DT.31-01-2011 Regd.at office of Sub-Registrar,Faridabad

(g) Property bounded as:-

West: Road
East: Plot No.265-P
North: Plot No.-251
South: Road

For GULATI RETAIL INDIA LTD.

DIRECTOR

For PUNJAB & SIND BANK

For GULATI RETAIL INDIA LTD.

DIRECTOR

(IB) 957 (PB)/2020
IA/4536/2021

79

(h) Present sum of Rs.28343314.56 (Rs two crores eighty three lacs forty three thousand three hundred fourteen & paise fifty six only) including interest charged upto 30-09-2013 + future interest thereafter + other charges thereon.

5. That you agreed to pay the additional interest at the rate of 2 Per cent per annum over and above the normal agreed rate of interest with monthly rests, in case of default in terms and conditions of the sanction and loaning documents.

6. The above said account was classified as non-performing assets on 30-09-2013 within the definition of section 2(o) of Act, 2002.

7. That my bank maintains the regular books of account and now a sum of Rs 28343314.56(inclusive of interest upto 30-09-2013) in your Cash-Credit account is legally due and recoverable from you above named addressees and you all are jointly and severally liable to pay the above said dues to the bank with interest cost and other usual bank charges till the date of payment in full.

8. That the rate of interest varies from time to time as per internal guidelines of the bank and the present rate of interest is 14.25 per cent per annum with monthly rests as per the Reserve Bank of India directives.

9. That you have defaulted in the repayment of the dues of the bank which is secured as mentioned above.

Therefore, by virtue of this legal notice, hereby call upon all of you i.e. addressees No. 1 to 6 jointly and severally to make the payment & discharge in full liabilities amounting to Rs 28343314.56 as per details mentioned above in para No. 4(h), with interest w.e.f. 01-10-2013 with monthly rests, to the bank within 60 days from the receipt of this notice, failing which the bank shall be constrained to take measures under the provisions of chapter III of securitization and reconstruction of financial assets and enforcement of security interest Act 2002, for recovery of above secured dues and in that case you will be jointly and severally liable to pay for all cost and other expenses arising there from.

Please note that the copy of this notice has been retained in our office.

Thanking you,

Yours Sincerely,

Punjab & Sind Bank

For PUNJAB & SIND BANK

(Authorized Officer)

For GULATI RETAIL INDIA LTD.

DIRECTOR

For GULATI RETAIL INDIA LTD.

DIRECTOR

7. On perusal of the notice referred to Supra, it is seen that a specific averment has been made that assessee no.-6, Shrimati Inderjit Kaur Bagga has created equitable mortgage in respect of the immovable property shown in the notice and by that notice, the Punjab and Sindh Bank has shown their intention to take possession of that property belonging to the assessee

no.-6 namely Shrimati Inderjit Kaur Bagga and not the property of this applicant. Therefore, in our considered view the guarantee was not invoked by the Punjab and Sindh Bank vide notice dated 04th October, 2013 against this applicant. Apart from this document, the applicant has not produced or placed any other document to show that guarantee was invoked against the applicant too for the recovery of the amount. Of course, the CIRP against the principal borrower is admitted but in our considered view, it does not mean that the guarantee has been invoked against this guarantor too.

8. Under such circumstances, we agree with the report submitted by the RP that the present application is not maintainable as the guarantee has not been invoked in respect of the property of this applicant, rather it was invoked in respect of property of Shrimati Inderjit Kaur Bagga.

9. In sequel to the above, we are of the considered view that the present application is not maintainable. Accordingly, the same is **dismissed.**

-Sd- -Sd- 23-05-2022

(L. N. GUPTA)
Member (T)

ABNI RANJAN KUMAR SINHA
Member (J)