

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

ITEM No.303
CP(IB)/99(AHM)2024

Order under Section 94 IBC

IN THE MATTER OF:

Kishorbhai Bhaturbhai Dhameliya
Vs
State Bank of India & Ors.

.....Applicant

.....Respondent

Order delivered on 04/03/2024

Coram:

Mr. Shammi Khan, Hon'ble Member(J)
Dr. V.G. Venkata Chalapathy, 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-
DR. V.G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-
SHAMMI KHAN
MEMBER (JUDICIAL)

**BEFORE THE ADJUDICATING AUTHORITY
THE NATIONAL COMPANY LAW TRIBUNAL,
SPECIAL BENCH, COURT- I, AHMEDABAD**

CP/IB/99/AHM/2024

(Filed under Section 94 of the Insolvency & Bankruptcy Code, 2016 read with Rule 6 of the IB (AAA for IRP for PGCD) Rules, 2019)

*In the matter of **Mr. Kishorbhai Bhaturbhai Dhameliya***

Kishorbhai Bhaturbhai Dhameliya,
802-Indra, Rajhans Swapna,
Varachha Road, Sarthana Jakatnaka
Sarthana, Surat-395006.

... Applicant

VERSUS

1. State Bank of India

Having its Head office at:
Stressed Assets Recovery Branch,
Administrative Office Building,
2nd Floor, Nilambaug Circle,
Bhavnagar, Gujarat-364001.

2. M/s Gajanand Ginning & Pressing Private Limited,

Opp. T.C.D. Farm, Palitana Road,
Talaja, Distt. Bhavnagar,
Gujarat-364140.

...Respondents

Order pronounced on : 04.03.2024

CORAM:

MR. SHAMMI KHAN, MEMBER (JUDICIAL)

DR. V.G. VENKATA CHALAPATHY, MEMBER (TECHNICAL)

APPEARANCE:

For the Applicant : Mr. Kuldeep Adesara, Advocate

ORDER

1. This application has been filed under Section 94(1) of the Insolvency and Bankruptcy Code, 2016 by the Applicant/Personal Guarantor to initiate insolvency resolution process in terms of Rule 6 of the IB (AAA for IRP for PGCD) Rules, 2019.
2. The present application is filed by Kishorbhai Bhaturbhai Dhameliya who is stated to be a guarantor to the Corporate Debtor - M/s Gajanand Ginning & Pressing Private Limited. On perusal of the application it is observed that the Deed of Guarantee is not annexed to the present application.
3. However, the Applicant has filed copy of the Demand Notice dated 08.08.2023 issued by the Respondent/State Bank of India U/s 13(2) of the SARFAESI Act, 2002 and Possession Notice dated 06.12.2023 issued U/s 13(4) of SARFAESI Act, 2002 read with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 which are annexed as **Annexure-D to G** with the application.

4. On perusal of these notices issued by the Respondent/State Bank of India, it is observed that said notices are issued only for the purpose of enforcing security interest and not to invoke any Personal Guarantee.
5. The learned Counsel for the Applicant may be right in his submission that by virtue of Demand Notice dated 08.08.2023 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 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 personal assets except secured assets.
6. 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.*

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 Company Appeal (AT) (Insolvency) No. 961 of 2022 8 contract is breached. The breach of contract occurs if the payment is not made or refused 'on- demand'."

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.”

7. In the present case no document is annexed with the application which suggests that guarantee is invoked by the Respondent Bank. 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/99/AHM/2024** stands dismissed.

-Sd-

DR. V.G. VENKATA CHALAPATHY
MEMBER (TECHNICAL)

-Sd-

SHAMMI KHAN
MEMBER (JUDICIAL)

Arati-LRA