IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH (COURT – II)

Item No. 203
(IB)-393(PB)/2023
IA-6411/2023, IA-1820/2024

IN THE MATTER OF:
Seema Malhotra **... Applicant/Personal Guarantor**

AND IN THE MATTER OF IA No. 1820/2024:
Kotak Mahindra Bank Limited
Reg. Office at:
27BKC, C 27, G Block,
Bandra Kurla Complex, Bandra (E),
Mumbai- 400051 **... Applicant/ Financial Creditor**

Versus

Mrs. Seema Malhotra
R/o House No. 9-A, Rose Enclave, College Road,
Civil Lines, Ludhiana
Punjab-141001 **... Respondent/ Personal Guarantor**

Under Section: 94(1) r/w 65 of IBC, 2016

Order delivered on 08.11.2024

CORAM:
SH. ASHOK KUMAR BHARDWAJ, HON'BLE MEMBER (J)
SH. SUBRATA KUMAR DASH, HON'BLE MEMBER (T)

PRESENT:

For the Applicant	:	Mr. Abhishek Anand, Karan Kohli, Ishaan Dhingra, Advs in IA-1820/2024. Adv. Anubhav Mehrotra for Ms. Rita Khanna
For the SBI	:	Adv PBA Srinivasan, Adv Aanchal Pundir, Adv Sumit Swami, Adv Srishti Bansal
For the PG	:	Mr. Ayandeb Mitra, Adv. and Mr. Anshit Aggarwal, Adv.

Hearing Through: VC and Physical (Hybrid) Mode

ORDER

IA-1820/2024: The present application has been preferred by Kotak Mahindra Bank Ltd. The prayers made in the captioned application read thus:

a) *Allow the present Application;*
b) *Pass consequential directions under Section 65 of the Code against the Respondent/ Personal Guarantor for fraudulent initiation of individual insolvency resolution process of the Personal Guarantor;*
c) *During the pendency of the present application, grant ex-parte ad-interim stay on the proceedings in Company Petition (IB) No. 393 (PB) of 2023 filed by the Respondent.*
d) *Pass such other or further order/ order(s) as may be deemed fit and proper in the facts and circumstances of the instant case.*

2. The Applicant Bank in the captioned I.A. had extended certain financial facility to M/s Stan Autos Private Limited qua which Ms. Seema Malhotra i.e. Applicant in CP(IB) No. 393/(PB)/2023 stood as Personal Guarantor. The Applicant Bank could allege that the PG has not preferred the CP(IB) No. 393/(PB)/2023 with bona fide intention and object, but has resorted to the insolvency process only with ulterior motives and at a belated stage when she could anticipate that her available assets were to be appropriated in terms of the provisions of the SARFAESI Act, 2002, the proceedings under which were initiated by the Applicant Bank.

3. In his submission, the Ld. Counsel for the Applicant Bank submitted that one can be called to have initiated the proceedings under Section 94 of IBC, 2016 in terms of the proper spirit of the code if he or she filed the application under Section 94 (ibid) within reasonable period after either the invocation of the bank guarantee or the account of the debtor being declared as an NPA or when the financial facility is recalled. According to him, when the proceedings under Section 94 (ibid) are initiated after a considerable gap of the loan amount of the Principal Borrower being declared NPA, say like three years as in the present case, then one cannot avoid to have a semblance that the Applicant/PG has not acted bonafidely, fairly, and honestly offered its assets and properties for the creditors to whom he or she owed the debt as guarantors. According to him, Section 94 of the Code is available to such Personal Guarantors who reasonably believe that now he or she has turned insolvent and that there is no other option available to him or her, but to seek resolution of its insolvency and take shelter of Chapter III to V of IBC, 2016.

4. To espouse that in the present case, the steps taken by the PG under Section 94 of the Code are not bona fide, the Ld. Counsel for the Applicant Bank could give a list of dates viz. **29.11.2020** i.e., the date on which the account of Principal Borrower/ Corporate Debtor was declared as NPA, **13.09.2021** i.e., the date on which the personal guarantee was invoked, **23.09.2021** i.e., the date on which the Applicant Bank issued statutory notice under Section 13(2) of SARFAESI Act, **12.10.2021** i.e., the date on which the Applicant Bank preferred application before Debt Recovery Tribunal by way of O.A. No. 867 of 2021, **29.12.2021** i.e., the date on which the symbolic possession of the mortgaged property was taken over by the Applicant Bank, **17.01.2022** i.e., the date on which the Hon'ble Punjab and Haryana High Court granted an interim stay on the proceedings instituted qua the PG under the SARFAESI Act, **27.03.2023** i.e., the date on which the Hon'ble Supreme Court in SLP(C) No. 17335 of 2022 reversed the interim order passed by the Hon'ble Punjab and Haryana High Court, **11.04.2023** i.e., the date on which the Hon'ble Punjab and Haryana High Court disposed of CWP 873 of 2022, **06.07.2023** i.e., the date on which the District Magistrate passed the order for physical possession of the property, 02.02.2023 i.e., the date on which the application under Section 94 of IBC, 2016 was preferred which was kept under objection, **10.07.2023** i.e., the date on which the application was first listed before the Bench, but was re-notified to **11.07.2023**. On 11.07.2023, the hearing could be deferred on account of pendency of various petitions before the Hon'ble Supreme Court in which the vires of Section 94/95 of IBC, 2016, were under challenge. The Applicant has given the aforesaid factual position in para 6.1 to 6.33 of the application, which reads thus:

> 6.1 That in the month of July 2018, the Corporate Debtor, authorized dealer of Maruti Suzuki India Limited, approached the Applicant Bank for availing credit facilities for their business and the Applicant Bank was pleased to sanction the same *vide* Sanction Letter dated 03.07.2018. The credit facilities extended to the Corporate Debtor were secured by guarantees executed by Mr. Anil Kumar Malhotra, Mr. Raghav Malhotra and Mrs. Seema Malhotra, the Respondent/ Personal Guarantor herein in the capacity of being Director of the Corporate Debtor (hereinafter collectively referred as '**Guarantors**'). The various types of credit facilities extended to the Corporate Debtor were as follows:

Lender	Facility	Sanctioned Amount (in Crores)
Kotak Mahindra Bank Limited (Applicant)	Working Capital Limit	Rs. 13.50
	Dropline Overdraft ('**DLOD**') Limit	Rs. 13.50
	Total Funded	Rs. 13.50
	Total Exposure	Rs. 13.50

> Copy of Sanction Letter dated 03.07.2018 bearing Ref No.: RBG/CV/NTB/18-19/00116/86450 is annexed herewith and marked as **ANNEXURE-A-3.**

6.2 That various documents were executed between the Applicant Bank, Corporate Debtor and its guarantors (including the Respondent herein) in relation to the above-mentioned credit facility availed by the Corporate Debtor on 03.07.2018, inter alia, Guarantee Deed was executed by Anil Kumar Malhotra, Raghav Malhotra and Seema Malhotra dated 10.07.2018 regarding the same credit facility. Copy of the Deed of Guarantee dated 10.07.2018 executed between the Applicant Bank and Anil Kumar Malhotra, Raghav Malhotra and Seema Malhotra is annexed herein and marked as **ANNEXURE A-4**. Further a declaration was executed by Anil Malhotra and Seema Malhotra with regard to mortgaged properties situated in Punjab. Copy of Declaration dated 10.07.2018 executed by Anil Malhotra and Seema Malhotra with regard to mortgaged properties situated in Punjab is annexed herein and marked as **ANNEXURE A-5**.

6.3 That Kotak Mahindra Prime Limited, in whose favour the charge was created for the collateral property (as mentioned in the Sanction Letter dated 03.07.2018), *vide* Pari-Passu Letter dated 14.12.2018 confirmed to the Applicant Bank that the charge created by the Corporate Debtor over the immovable properties owned by the Guarantors, which have been held as collateral for the above-mentioned credit facilities, shall now rank pari – passu with the charge created by the Corporate Debtor for the facilities sanctioned to them by the Applicant Bank. Copy of Pari-Passu Letter dated 14.12.2018 issued by Kotak Mahindra Prime Limited to Applicant Bank is annexed herewith and marked as **ANNEXURE A-6.**

6.4 That thereafter, in the month of December, 2018, the Corporate Debtor had approached the Applicant Bank once again to grant them one time conditional working capital demand loan ('WCDL') worth Rs. 3 Crores. The said request was approved by the Applicant Bank and another Sanction Letter dated 31.12.2018 was executed for this credit facility granted, whereby the tenure was mentioned to be from 31.12.2018 to 28.02.2019.

6.5 The above-mentioned facilities were secured by guarantees executed by Respondent along with other guarantors as per the terms and conditions enumerated in the Sanction Letter dated 31.12.2018. That various documents were executed between the Applicant Bank, Corporate Debtor and its guarantors (including the Respondent herein) in relation to the above-mentioned credit facility availed by the Corporate Debtor on 31.12.2018. Copy of Sanction Letter dated 31.12.2018 bearing Ref No.: RBG/CV/ADH/18-19/00175/101853 is annexed herewith and marked as **ANNEXURE A-7**. Further a Deed of Guarantee dated 04.01.2019 executed by Anil Malhotra, Seema Malhotra and Raghav Malhotra in this regard. Copy of Guarantee Deed dated 04.01.2019 executed by Anil Malhotra, Seema Malhotra and Raghav Malhotra is annexed herewith and marked as **ANNEXURE A-8**.

6.6 That thereafter, in the month of March 2019, Corporate Debtor approached the Applicant Bank for enhancement/renewal of financial facilities provided by the Applicant Bank. That honouring the request made by the Corporate Debtor, Applicant Bank enhanced the financial facilities as per Sanction Letter dated 04.03.2019 details whereof are provided as under:

S. No.	Nature of Facilities	Revised Limits (in Crores)
1.	Working Capital Limit	Rs. 13.50
1.1	Dropline Overdraft	Rs. 13.50
1.2	WCDL	Rs. 3.00
	Total Funded	Rs. 16.50
	Total Exposure	**Rs. 16.50**

6.7 That various documents were executed between the Applicant Bank, Corporate Debtor and its guarantors (including the Respondent herein) in relation to the above-mentioned credit facility availed by the Corporate Debtor on 04.03.2019. Sanction Letter dated 04.03.2019 bearing Ref No. RBG/CV/ENH/18-19/00044/112331 has been annexed herewith and marked as **ANNEXURE A-9**.

6.8 That thereafter, in the month of April 2019, Corporate Debtor once again approached the Applicant Bank for enhancement/renewal of financial facilities provided by the Applicant Bank. That acceding to the request made by the Corporate Debtor, Applicant Bank enhanced the financial facilities as per Sanction Letter dated 30.04.2019 details whereof are provided as under:

S. No.	Nature of Facilities	Revised Limits (In Crores)
1.	Working Capital Limit	Rs. 12.1844
1.1	Dropline Overdraft	Rs. 9.1844
1.2	Conditional WCDL-I	Rs. 0.00
1.3	Conditional WCDL-II	Rs. 3.00
	Total Funded	Rs. 12.1844
	Total Exposure	**Rs. 12.1844**

Copy of Sanction Letter dated 30.04.2019 is annexed herewith and marked as **ANNEXURE A-10.**

6.9 That the abovementioned financial facilities were secured by personal guarantees executed by Respondent and other guarantors in favor of the Applicant Bank. It is further submitted that the abovementioned facility was secured by collateral as mentioned in the previous facility.

6.10 That thereafter, in the month of May, 2019, Corporate Debtor once again approached the Applicant Bank for enhancement/renewal of financial facilities provided by the Applicant Bank. That preceding to the request made by the Corporate Debtor, Applicant Bank enhanced the financial facilities as per Sanction Letter dated 02.05.2019 details whereof are provided as under:

S. No.	Nature of Facilities	Revised Limits (In Crores)
1.	Working Capital Limit	Rs. 15.2330
1.1	Dropline Overdraft	Rs. 12.2330
1.2	Conditional WCDL-I	Rs. 0.00
1.3	Conditional WCDL-II	Rs. 3.00
	Total Funded	Rs. 15.2330
	Total Exposure	Rs. **15.2330**

6.11 That the abovementioned financial facilities were secured by personal guarantees executed by Respondent and other guarantors in favor of the Applicant Bank. It is further submitted that the abovementioned facility was secured by collateral as mentioned in the previous facility.

6.12 The above-mentioned facilities were secured by guarantees executed by Respondent along with other guarantors as per the terms and conditions enumerated in the Sanction Letter dated 02.05.2019. That various documents were executed between the Applicant Bank, Corporate Debtor and its guarantors (including the Respondent herein) in relation to the above-mentioned credit facility availed by the Corporate Debtor on 02.05.2019. Sanction Letter dated 02.05.2019 bearing Ref No. RBG/CV/ENH/18-19/00044/112331 is annexed herewith and marked as **ANNEXURE A-11**. A supplement to the principal Guarantee Deed was executed by Anil Malhotra, Seema Malhotra and Raghav Malhotra on 02.05.2019. Copy of Confirmation cum Supplement to Principal Guarantee Deed executed by Anil Malhotra, Seema Malhotra and Raghav Malhotra dated 02.05.2019 is annexed herewith and marked as **ANNEXURE A-12**.

6.13 That the above-mentioned credit facilities were secured by collateral as mentioned below on '*first and pari-passu*' basis, shared with Kotak Mahindra Prime Limited ('KMPL'):

i. **Property owned by Mr. Anil Malhotra**

Commercial property at Property No.B-29 -30/3-A, Khasra No. 27//23 – 27//24- 34//2- 34//3- 34//4- 34//8, 34//2-3-4-7-8, Khata No. 139/168-140/169- 141/170- 142/171- 143/172- 149/180, 141/166-142/167-143/168-144/169- 145/170- 146/171- 150/181 SherpurKhurd, Tehsil and Distt Ludhiana, 141003 Punjab.

ii. **Property owned by Mr. Anil Malhotra**

Commercial property at Property No. B-29 -30/3-A, Khasra No. 27//23 – 24 34//2- 3-7-4-8-9, Khata No. 141/166- 142/167- 143/168- 169- 170- 171 150/181 Jamabandi 1999-2000, SherpurKhurd, Tehsil and Distt Ludhiana, 141003 Punjab.

iii. **Property owned by Mr. Anil Malhotra and Mrs. SeemaMalhotra**

Commercial property at KhewatKhatauni No. 139/168, 140/169, 141/170, 142/171, 143/172, 144/173, Killa No. 27//23, 24, 34//2, 34//7, 34//3, 34//4, Jamabandi 2005.2005, Hadbast no. 157, SherpurKhurd, Tehsil and Distt Ludhiana, 141003 Punjab.

6.14 That due to persistent default on behalf of the Corporate Debtor, their Account was classified as Non-Performing Assets ('**NPA**') on 29.11.2020 in accordance with the RBI Guidelines on breach of terms & conditions/ Non-serving of Instalments/ Interest, over dues etc.

6.15 That, subsequent to such persistent default, Applicant Bank was forced to initiate legal proceedings against the Corporate Debtor and the Guarantors. The Applicant Bank issued a 'Loan Recall Notice cum Invocation of the Guarantees' dated 13.09.2021 to the guarantors, including the Respondent/ Personal Guarantor, thereby calling upon them to repay the outstanding dues in the manner stated there in. However, the default on part of the Corporate Debtor and the Respondent/ Personal Guarantor still continued even after the issuance if such Notice. Copy of the Loan Recall Notice cum Invocation of the Guarantees' dated 13.09.2021 has been annexed herein and marked as **ANNEXURE A-13.**

INITATION OF PROCEEDINGS UNDER SARFAESI ACT 2002 AND SUBSEQUENT ACTS OF THE RESPONDENT HEREIN IN ORDER TO DERAIL THE SAID PROCEEDINGS:

6.16 That the Applicant Bank through its Authorized Officer, further issued a Statutory Demand Notice on 23.09.2021 to Corporate Debtor u/s 13 (2) of the SARFAESI Act 2002 and called upon the Corporate Debtor and the guarantors to make payment for a sum of Rs. 12,32,21,584.34/- (Rupees Twelve Crore Thirty-Two Lacs Twenty-One Thousand Five Hundred Eighty Four and Paise Thirty Four Only) due as on 31.08.2021 together with further interest and other charges thereon at the contractual rates till actual payment and / or realization thereof within 60 days from the date of receipt of the said Demand Notice. Copy of Statutory Demand Notice dated 23.09.2021 along with proof of delivery of Registered Post/Speed Post is annexed herewith and marked as **ANNEXURE A-14 (COLLY)**.

6.17 That the Corporate Debtor and the Guarantors failed to repay the amount which was lawfully demanded by the Applicant Bank, resultantly, the Applicant Bank filed an Original Application being OA No. 867/2021 on 12.10.2021 before the Hon'ble Debt Recovery Tribunal - I Delhi Bench which was subsequently transferred to Debt Recovery Tribunal - II vide TA No. 585/2022. Through such proceedings, the Applicant Bank had claimed a total amount of Rs. 12,32,21,584.34/- (Rupees Twelve Crore Thirty-Two Lacs Twenty-One Thousand Five Hundred Eighty-Four and Paise Thirty Four Only) against the Corporate Debtor. It is submitted that the said T.A. 585 of 2022 is *sub-judice* before the Hon'ble Debt Recovery Tribunal - II, New Delhi. Copy of OA No. 867/2021 filed on 12.10.2021 before the Debt Recovery Tribunal - I Delhi Bench is annexed herewith and marked as **ANNEXURE A-15.**

6.18 That subsequently, the Applicant Bank took symbolic possession of the below mentioned mortgaged property on 29.12.2021:

i. All that piece and parcel of the land bearing M.C. no. B-29/30/3-A, measuring 600 sq. yards, comprised In khasra no. 27//23, 27//24, 34//2, 34//3, 34//4, 34//8, 34//2-3-4-7-8, khata 139//168, 140,169-141/170, 142/171, 143/172- 149/180, 141/166, 142/167, 143/168, 144/169, 145/170, 146/171-150/181 situated in village Sherpur Khurd, Tehsil & District Ludhiana, property by Sh. Anil Malhotra together with all building structure thereon and building structures as may be erected or constructed thereupon any time from after the date of respective mortgages and all additions thereto and all fixtures and furniture and plant and machineries attached to the earth or permanently fastened to anything attached to the earth or permanently fastened to anything attached to the earth both present and future.

ii. All that piece and parcel of the property being commercial property at M.C. no. B- 29/30/3-A, comprised in khasra no. 27//23-24- 34//2, 3-7-4-8-9, khata no. 141/166- 142/167,-143/168- 169-170- 171- 150/181, jamabndi -1999-2000, situated in village Sherpur Khurd, Tehsil & District Ludhiana141003, property owned by Sh. Anil Malhotra, together with all building structure thereon and building structures as may be erected or constructed thereupon any time from after the date of respective mortgages and all additions thereto and all fixtures and furniture and plant and machineries attached to the earth or permanently fastened to anything attached to the earth or permanently fastened to anything attached to the earth both present and future.

iii. All that piece and parcel of Property being commercial property at Khewat khatauni No. 139/168, 140/169, 141/170, 142/171, 143/172, 144/173 bearing KillaNo. 27//23, 24, 34//2, 34//7, 34//3, 34//4 jamabandi 2005-2005 hadbast 157 situated at Village Sherpur Khurd, Tehsil and Distt. Ludhiana, 141003 Punjab property owned by Sh. Anil Malhotra and Smt. Seema Malhotra. together with all building structure thereon and building structures as may be erected or constructed thereupon any time from after the date of respective mortgages and all additions thereto and all fixtures and furniture and plant and machineries attached to the earth or permanently fastened to anything attached to the earth or permanently fastened to anything attached to the earth both present and future.

6.19 That subsequent to filing of the above-mentioned Application at Debt Recovery Tribunal, Mr. Anil Malhotra being one of the Guarantors of the Corporate Debtor had filed a Writ Petition before Hon'ble Punjab and Haryana High Court being C.W.P. 873 of 2022 against the proceedings initiated by the Applicant Bank herein under the SARFAESI Act, 2002, with a sole motive to derail the SARFAESI proceedings initiated by the Applicant Bank. It is submitted that vide Order dated 17.01.2022, the Hon'ble High Court inadvertently granted interim stay on institution of any further proceedings in view of the Demand Notice issued by the Applicant Bank under Section 13(2) of the SARFAESI Act, 2002 and the Possession Notice dated 29.12.2021 against the Petitioner therein in view of the mortgaged properties. Copy of Order dated 17.01.2022 passed by Hon'ble Punjab and Haryana High Court is annexed herewith and marked as **ANNEXURE A-16**.

6.20 That, in view of the interim stay granted by Hon'ble Punjab and Haryana High Court vide its Order dated 17.01.2022, the Applicant Bank filed a Special Leave Petition before Hon'ble Supreme Court of India bearing no. ***SLP (C) 17335 of 2022 titled as 'Authorised Officer Kotak Mahindra Bank vs. Anil Kumar Malhotra and another'***. The Hon'ble Supreme Court vide Order dated 27.03.2023 in the above-mentioned SLP, was pleased to set aside the said order dated 17.01.2022 passed by Hon'ble Punjab and Haryana High Court in C.W.P. 873 of 2022. The Hon'ble Supreme Court vide the said order noted that if the guarantor was aggrieved by an order passed under Section 13(2) of the SARFAESI Act, 2002, the guarantor had an alternate remedy under the provisions of the said Act and accordingly order dated 17.01.2022 passed by Hon'ble Punjab and Haryana High Court in C.W.P. 873 of 2022 was set aside. The relevant paragraphs of the Order dated 27.03.2023 passed by Hon'ble Supreme Court in SLP (C) 17335 of 2022 are reproduced below for ready reference:

> ***"3. This appeal takes exception to the judgment and order dated 17.01.2022 passed by the High Court of Punjab and Haryana at Chandigarh in CWP No. 873 of 2022.***
>
> *4. We are of the considered view that the High Court was not justified in passing the impugned judgment and order.*
>
> *5. The impugned judgment and order has the effect of scuttling the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.*
>
> ***6. If the appellant was aggrieved by an order passed under Section 13(2) of the the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the appellant had an alternate remedy under the provisions of the said Act.***
>
> ***7. In that view of the matter, the impugned judgment and order passed by the High Court is quashed and set aside and the appeal is allowed.***
>
> *9. Pending applications, if any, stand disposed of."*

Copy of Order dated 27.03.2023 passed by Hon'ble Supreme Court in SLP (C) 17335 of 2022 is annexed herewith and marked as **ANNEXURE A-17.**

6.21 It is submitted that in view of the above-mentioned order dated 27.03.2023 passed by Hon'ble Supreme Court in SLP (C) 17335 of 2022, Hon'ble High Court of Punjab and Haryana was pleased to dispose off Writ Petition bearing No. CWP 873 of 2022 *vide* order dated 11.04.2023. The relevant paragraphs of the said Order are reproduced below for ready reference:

"3. Accordingly, the writ petition is disposed of relegating the petitioner to avail of his alternative remedy before the Tribunal in terms of the order of the Apex Court.

4. This Court had been approached with a categorical averment made in paragraph 25 of the petition that there was no Presiding Officer in the Debt Recovery Tribunal, Chandigarh.

5. In such circumstances, if an appropriate application under Section 17 of the Act is filed within a period of 02 weeks from today, the Tribunal shall hear the case on merits."

Copy of final Order dated 11.04.2023 passed by the Hon'ble Punjab and Haryana High Court is annexed herewith and marked as **ANNEXURE A-18**.

6.22 That it is submitted that after the above mentioned Order dated 11.04.2023 passed by the Hon'ble Punjab and Haryana High Court, Anil Kumar Malhotra, one of the Guarantor, had filed a Securitization Application bearing SA No. 89/2023, on 23.04.2023 before DRT-III Chandigarh . It is pertinent to note that Mr. Anil Kumar Malhotra, one of the Guarantors, the Applicant therein has been adopting dillydallying tactics in the said Application, which is evident from the Order sheets of the said Application. That vide Order dated 30.06.2023, the Applicant was given 10 days' time to file their rejoinder, however on 18.07.2023, the Applicant therein sought additional time to file the said rejoinder, further on 30.09.2023, the Applicant therein once again sought additional time to file the said rejoinder. Further, on 03.11.2023, 22.12.2023 and 03.02.2024 the Applicant therein have been seeking time from Hon'ble DRT-III Chandigarh for arguments and the same is now listed on 13.08.2024 for argument. It becomes abundantly clear from the Orders of SA No. 89/2023, that the personal guarantors' intention has never been to conclude the proceedings however, their only aim is to derail the said proceedings and harass the Applicant Bank. That Copy of

Order dated 30.06.2023, 18.07.2023, 30.09.2023, 03.11.2023, 22.12.2023 and 03.02.2024 in SA No. 89/2023 passed by Hon'ble DRT III, Chandigarh have been annexed herewith and marked as **ANNEXURE A-19 (COLLY)**.

6.23 That it is to be noted that in the meantime, the Hon'ble Adjudicating Authority had ordered on 11.04.2023 that the Corporate Debtor be liquidated in terms of section 33(2) of the Code read with sub-clauses (i), (ii) and (iii) of sub section (1). Copy of Order dated 11.04.2023 passed by the Hon'ble Adjudicating Authority in CP (IB) No.52(PB)/2021 is annexed herewith and marked as **ANNEXURE A-20**.

6.24 That as a result of the above-mentioned orders, the proceedings initiated by the Applicant Bank against the Respondent/ Personal Guarantor is *sub-judice*, and OA No. 867/2021 initially filed at Debt Recovery Tribunal - I Delhi , which was later transferred to Debt Recovery Tribunal - II vide TA No. 585/2022, is listed now listed on 14.06.2024 before Debt Recovery Tribunal - II. Copy of order dated 29.01.2024 in TA No. 585/2022 at Debt Recovery Tribunal – II has been annexed herein and marked as **ANNEXURE A-21.**

6.25 That in the meantime, the Applicant Bank along with one Kotak Mahindra Prime filed joint Application bearing No. 6213-16 dated 03.04.2023, before the District Magistrate Ludhiana under section 14 of SARFAESI Act to take physical possession of the property of the Respondent along with other Personal Guarantors. The said Application was allowed vide order dated 06.07.2023 and accordingly taking of physical possession of the property was scheduled by concerned Executive Magistrate (Tehsildar) on 16.10.2024. The Respondent herein made several attempts to derail the said action and in furtherance of the same ulterior motive, filed the present company petition, bearing number CP (IB) / 393 (PB) / 2023 in order to take undue advantage of the moratorium envisaged under Section 96 of the Code. Due to filing of the said Company Petition, the Applicant Bank could not get the physical possession of the property due to operation of Section 96 of the Code. Copy of the Order dated 06.07.2023 passed by District Magistrate in 6213-16 along with the translated copy is annexed herein and marked as **ANNEXURE A-22 (COLLY)**.

6.26 That subsequent to the above-mentioned Order dated 06.07.2023 passed by District Magistrate in 6213-16, Ld. Tehsildar, on 16.08.2023 issued a Notice for Possession bearing number 3077-78, whereby Ld. Tehsildar ordered for possession of the subject property on 16.10.2023. Copy of the Notice of Possession bearing number 3077-78 issued by Ld. Tehsildar, on 16.08.2023 along with the translated copy is annexed herewith and marked as **ANNEXURE A-23 (COLLY)**.

6.27 That is it pertinent to note herein that in the meantime, the present Company Petition was filed by the Respondent/ Personal Guarantor under Section 94 of the Code. Further with the sole motive to derail the above-mentioned action for taking possession, the Respondent herein sent a representation to the District Magistrate on 16.10.2023, i.e., the date when such possession was ordered, informing the District Magistrate and the Applicant Bank about the filing of the present Company Petition under Section 94 of the Code, on 02.06.2023, which at that time was bearing diary number 04988/023. That vide the said representation, the Respondent/ Personal Guarantor informed the District Magistrate and the Applicant Bank that due to filing of the said Company Petition under Section 94 of the Code and subsequent operation of moratorium under Section 96 of the Code, the possession of the subject properties cannot be taken. Copy of representation sent by the Respondent herein to the District Magistrate and the Applicant Bank is annexed herewith and marked as **ANNEXURE A-24**.

6.28 That during the pendency of the said SA No. 89/2023, and after issuance of the above-mentioned Notice of Possession dated 16.08.2023, the Respondent herein, on 16.11.2023, filed another writ petition bearing CWP 25989/2023 titled as 'Seema Malhotra Vs District Magistrate Ludhiana and Ors.' with a prayer to direct the Applicant Bank herein, to comply with the mandatory statutory provisions of Section 96 of the Code and against the Order passed by the District Magistrate pertaining to the possession of the property under Section SARFAESI Act 2002. It is to be noted that SA No. 89/2023 was already pending before Hon'ble DRT-III Chandigarh, which was not disclosed to the Hon'ble High Court of Punjab and Haryana, wherein the possession of property is already challenged and no further steps have been taken by the Bank post the same. However, the Respondent herein, inspite of being aware of the above-mentioned SA No.

89/2023, filed this writ petition bearing CWP No. 25989/2023 with a sole motive to derail the proceedings. The Hon'ble High Court of Punjab and Haryana, vide its order dated 14.12.2023 disposed the matter as infructuous. Copy of final Order dated 14.12.2023 passed by the Hon'ble Punjab and Haryana High Court is annexed herewith and marked as **ANNEXURE A-25.**

6.29 That it is imperative to be note that another Company Petition under Section 95 of the Code bearing diary number 0404114011172023, titled as '*Rita Khanna v. Anil Kumar Malhotra*' was also filed against one of the Personal Guarantors, namely, Mr. Anil Kumar Malhotra, spouse of Respondent herein, by one Rita Khanna on 03.04.2023, however the same has been kept in defects till date in order to take undue advantage of the moratorium envisaged under Section 96 of the Code. It is to be noted that the Respondent herein has failed to reveal the above-mentioned Application in the present Section 94 Petition.

6.30 That subsequent to filing of the above-mentioned Company Petition under Section 95 of the Code, Mr. Anil Kumar Malhotra, Respondent's spouse, filed objections under Section 14 of the SARFAESI Act 2002, whereby it was stated by Mr. Anil Kumar Malhotra that due to filing of the above-mentioned Company Petition under Section 95, titled as *Rita Khanna v. Anil Kumar Malhotra*', no proceedings against Mr. Anil Kumar Malhotra could be continued due to operation of moratorium under Section 96 of the Code. Copy of objections filed under Section 14 of the SARFAESI Act 2002 by Mr. Anil Kumar Malhotra against the Applicant Bank is annexed herewith and marked as **ANNEXURE A-26.**

6.31 That it is further submitted that the Applicant Bank had issued notice under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtor), Rules, 2019 dated 23.05.2023, but the same was withdrawn due to typographical error in the Notice and a fresh Notice was issued on 06.06.2023, however the petition under section 95 of the Code was not filed by the Applicant Bank.

6.32 That the Respondent/ Personal Guarantor along with other guarantors failed to adhere to the financial obligation of repayment after availing the said credit facilities despite repeated requests and demands raised by the Applicant Bank to regularize and adjust the accounts. That as on 28.03.2024, having regard to all the debit and credit entries in the accounts, the Respondent/ Personal Guarantor along with other guarantors are liable to make payments of **Rs. 22,21,04,494.94/-** (Rupees Twenty Two Crore Twenty One Lakhs Four Thousand Four Hundred Ninety Four and Paisa Ninety Four Only) to the Applicant Bank as of 28.03.2024. Copy of Statement of Account of the Corporate Debtor and Respondent is annexed herein and marked as **ANNEXURE A-27**.

6.33 That it is pertinent to note that the Respondent/ Personal Guarantor instead of honouring their financial obligation to regularize and adjust the accounts maintained with the Applicant Bank, are aiming to take undue advantage of the interim moratorium enumerated under Section 96 of the Code, by filing the present Company Petition bearing no. CP (IB)-393(PB)/2023 u/s 94 of the Code on 02/06/2023.

5. The Ld. Counsel for State Bank of India who has preferred a separate application not listed before the Bench, could support various arguments raised by Mr. Abhishek Anand, Ld. Counsel for the Applicant Bank. To buttress his plea, he made reference to Part-IV of the application preferred by the PG under Section 94 of IBC, 2016. He contended that in the application there is an admission that the proceedings were instituted only after the creditors had initiated action for recovery of their debt. The relevant excerpt of the application reads thus: -

		13. Still further, Financial Creditor issued a demand notice dated 23.09.21 u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, claiming Rs. 12,32,21,584.34 which was to be paid within 60 days from the receipt of such demand notice, however, the said amount is still lying unpaid till date. Copy of notice is **ANNEXURE A-68.**
		14. That further, the Financial Creditor issued possession Notice under Section 13(4) of the Securitisation Act, 2002 dated 29.12.21, copy of which is **ANNEXURE A-69**.
		15. One of the guarantor had preferred a writ petition bearing no. CWP-873 of 2022 titled as Anil Kumar Malhotra vs State of Punjab & Ors. before Hon'ble Punjab and Haryana High Court, challenging the illegal and arbitrary proceedings being carried out by the bank, in which stay had been granted on 17.01.2022 and dispossession of the mortgaged property was stayed. However, the same came to be dismissed on 11.04.2023 by Hon'ble High Court on account of interim order being vacated by the Hon'ble Apex Court, with liberty to avail alternate remedy in law. Copy of the order dated 11.04.2023 is **ANNEXURE A-70.**
		16. That apart from the Securitisation Action, the Financial Creditor has also filed an Original Application under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 bearing OA No.867 of 2021 (now TA No. 585/2022) titled as

			Kotak Mahindra Bank Ltd vs M/s Stan Autos Private Limited., which is now pending for 05.06.2023. Copy of OA sans Annexures alongwith the last order is attached as **ANNEXURE A-71.** The said creditor has issued notice under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution process of Personal Guarantors to Corporate Debtor) Rules, 2019 seeking to initiate proceedings under Section 95 IBC. Copy of the said notice dated 23.5.23 is **Annexure A-71A.** That the applicant has realised that Financial Creditor has filed certain cases under Section 138 of the Negotiable Instruments Act. The details of the same is already Annexed as ANNEXURE A-55.
			It is sapposite to state herein that the Personal guarantor/Applicant currently has no means to pay off the debt as can be fortified from the Statement of Affairs, which is attached as **ANNEXURE A-56.** Contents of statement of affairs be read as part of the present pleadings. The applicant is hopeful to settle the claims of creditors through repayment plan to the extent applicant has the capacity to pay off the creditors for which repayment plan would be drawn up in terms of Section 105 IBC.

6. Having referred to the aforementioned averments made in the application, the Ld. Counsel for SBI espoused that the Applicant/ PG in CP(IB) No.393/(PB)/2023 herself admitted that she could invoke the provisions of Section 94(1) of IBC, 2016 only because the Applicant Bank in the captioned application i.e. IA-1820/2024 could initiate the proceedings against her under the SARFAESI Act, 2002. He further submitted that the PG instituted proceedings only to earn the benefit of moratorium qua other proceedings and not thus, was not bona fide.

7. It is the contention put forth by the Ld. Counsel for the Applicant Bank as also Ld. Counsel for SBI that sufficient funds are not available with the Applicant, and thus, she may not be in position to offer any repayment plan and that the present proceeding instituted by her is only a moonshine defence to escape her liabilities.

8. The Ld. Counsel appearing for the PG contended that the IBC provides for an insolvency resolution mechanism for a PG and that such mechanism can be resorted to only in such circumstances where the PG is insolvent and is not in a position to discharge her debt/liabilities. In his submissions, it is not the object and intent of Chapter III of IBC, 2016 that the PG should be in a position to discharge the entire amount of debt. According to him, could the PG be in such a position, she could have discharged the liability and there could be no occasion or reason for her to seek the remedy under the provisions of Chapter III to V of the Code. The Ld. Counsel for the PG would also contend that the IBC nowhere provides that a PG cannot resort to the process under Section 94 of IBC, 2016, where the proceedings are pending against her. In his submission, the Code provides for moratorium under Section 96 & 101 of the Code only because it envisages that there may be legal action or pending proceedings against the PG.

9. The Ld. Counsel for the PG also contended that the Applicant Bank could issue a demand notice in terms of the provisions of Rule 7 of IBBI (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019, thus the bank itself had intention to resort to the process under IBC, 2016. Therefore, it has no moral grounds or locus to question the proceedings instituted by the PG. It is submitted that the objection raised by Kotak Mahindra Bank at this stage are premature.

10. We heard the Ld. Counsels for the parties and perused the record. Indubitably, as per her own admission, the total assets available with Applicant in CP(IB) No. 393/PB/2023 are much less than the amount of liability. The relevant excerpts of the particulars of guarantor including the details of assets as given in Part-I of the application reads thus: -

11.	List of assets of guarantor and immediate family as on the application date. Note: This	**Immovable**	**Description**	**Estimated Value**	**Excluded asset or not**
		List of Assets of Applicant is attached herewith as	1. ½ share in House (Villa) No. 260, measuring	Rs. 2,00,00,000/-	-NA-

	will include all assets of guarantor, irrespective of them being excluded assets. Please mention which assets may be excluded assets.	**ANNEXURE A-9.**	779.50 sq. yds. Situated at Lake Shore Drive, East Lake Village, IREO Waterfront, Ludhiana, Punjab, vide sale deed bearing Vasika No. 335 dated 22.05.16. [Mortgaged with HDFC Bank] [Copy of Title Deed alongwith translation is **ANNEXURE A-10]**		-
			2. Share in Residential Building bearing MC No.B-XX-81/11/3 (9A/11D)	Rs. 3,33,33,333/-	-

			built on area measuring 930 Sq. Yards, and Residential building built on plot admeasuring 550.50 Sq. Yards bearing no.B-XX-79/9/1, situated at Mahal Bhagat, Locality known as Bachint Lane, Near Sant Nagar, Civil Lines, Tehsil and District Ludhiana, vide sale deed bearing Vasika No. 886 dated 10.04.08 and Sale Deed bearing		

			Vasika No. 4431 dated 04.06.2010. [Hypothecated with SBI] [Hypothecated with SBI] [Copy of Title Deed alongwith translation is **ANNEXURE A-11 (Colly)**]		
			3. ½ share in Workshop at Plot measuring 480 sq. yds., situated at Sherpur Khurd, Hadbast No. 175, District Ludhiana, vide sale deed	Rs. 2,00,00,000/-	

			bearing Vasika No. 6194 dated 16.06.2011. [Hypothecated with Kotak Mahindra Bank Limted & Kotak Mahindra Prime Limited] [Copy of Title Deed alongwith translation is **ANNEXURE A-12]**		
			4. Commercial Space measuring 66 sq. yds. Situated at Sherpur Khurd, Tehsil & District	Rs. 7,00,000/-	-

			Ludhiana, vide Sale Deed bearing Vasika No. 4455 dated 04.06.2010. Hypothecated with SBI] [Copy of Title Deed alongwith translation is **ANNEXURE A-13]**			
			5. Property measuring 863.5 sq yds (out of total 2363.5 sq. yds.) situated at Sahnewal Kalan-1, Tehsil & District Ludhiana, vide Sale Deed bearing Vasika No. 10190	Rs. 20,00,000/-	-	Seema

			dated 11.10.10. Hypothecated with SBI] [Copy of Title Deed alongwith translation Is **ANNEXURE A-14]**		
		Movable	**Description**	**Estimated Value**	**Excluded asset or not**
		Vehicles	NIL	-NA-	-NA-
		Shares in listed companies	NIL	-NA-	-NA-
		Shares in other companies	1. 10,20,000 shares in Stan Fincap Pvt Ltd. [Copy of Balance Sheet for FY 2021-22 is **ANNEXURE A-15**	Rs. 1,02,00,000 /-	-NA-

Seema M.

			2. 1 share in Stan Motors Pvt. Ltd. [Copy of Balance Sheet for FY 2021-22 is **ANNEXURE A-16]**	Rs. 10/-	
		Life Insurance Policy	NIL	-NA-	-NA-
		Jewellery	NIL	-NA-	-NA-
		Pension Policy	NIL	-NA-	-NA-
		Investments in Mutual Funds	NIL	-NA-	-NA-
		Investment in other funds	Equity Shares including Gold Bond 2016 [Share Holding Valuation as on 29.05.23 is	Rs. 1,55,358/-	-NA-

			ANNEXURE A-17]		
		Investment In Partnerships and other business concerns	NIL	-NA-	-NA-
		Any other movable property	No other asset apart fsom mentioned in List of Assets (Annexure A-9)		

11. In compliance of this court's order dated 18.10.2024, the PG filed an additional affidavit on 23.10.2024 enclosing therewith a list of her assets. The said list of assets read thus: -

LIST OF ASSETS OF SEEMA MALHOTRA

S.no	Particulars of Property	Estimated Market Value
1.	Share in Residential Building bearing MC No. B-XX-81/11/3 (9A/11D) built on area measuring 930 Sq. Yards, and Residential building built on plot admeasuring 550.50 Sq. Yards bearing no. B-XX-79/9/1, situated at Mahal Bhagat, Locality known as Bachint Lane, Near Sant Nagar, Civil Lines, Tehsil and District Ludhiana, vide sale deed bearing Vasika No. 886 dated 10.04.08 and Sale Deed bearing Vasika No. 4431 dated 04.06.2010. [Hypothecated with SBI]	Rs. 3,33,33,333/- (Rupees Three Crore Thirty-Three Lakhs Thirty-Three Thousand Three Hundred Thirty-Three)
2.	½ share in Workshop at Plot measuring 480 sq. yds., situated at Sherpur Khurd, Hadbast No. 175, District Ludhiana, vide sale deed bearing Vasika No. 6194 dated 16.06.2011. [Hypothecated with Kotak Mahindra Bank Limited & Kotak Mahindra Prime Limited]	Rs. 2,00,00,000/- (Rupees Two Crore)
3.	Showroom measuring 66 sq. yds. Situated at Sherpur Khurd, Tehsil & District Ludhiana, vide Sale Deed bearing Vasika No. 4455 dated 04.06.2010. [Hypothecated with SBI]	Rs. 7,00,000/- (Rupees Seven Lakhs)
4.	Property measuring 863.5 sq yds (out of total 2363.5 sq. yds.) situated at Sahnewal Kalan-1, Tehsil & District Ludhiana, vide Sale Deed bearing Vasika No. 10190 dated 11.10.10. [Hypothecated with SBI]	Rs. 20,00,000/- (Rupees Twenty Lakhs)

12. As has been noted hereinabove, there is a wide gap between the assets owned by the Applicant and the liability that she has to discharge. Nevertheless, the gap between the assets owned by a PG and the liability she owes to discharge can be no ground to take a view that the provisions of Chapter III to V of IBC, 2016 cannot be invoked.

13. The pending proceedings against the PG may also be no ground to arrive to take a view that the proceedings initiated under Section 94 of IBC, 2016, are with ulterior motive. In fact, both Section 96 & 101 of the Code envisage that there might be proceedings pending against the guarantor qua the amount of debt defaulted to be paid. It is only for this reason that both the provisions provide for moratorium qua the pending proceedings. The difference between 96 & 101 is only that when Section 96 provides for moratorium only qua the debt payable by the guarantor, Section 101 also provides for moratorium qua the assets, legal rights and beneficial interests of the guarantor. The provisions of Section 96 & 101 of the Code read thus: -

> *“**96. Interim moratorium.**—(1) When an application is filed under section 94 or section 95—*
>
> > *(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and*
> > *(b) during the interim-moratorium period—*
> >
> > > *(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and*
> > > *(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.*
>
> *(2) Where the application has been made in relation to a firm, the Interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.*
>
> *(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.”*

*"**101. Moratorium.—** (1) When the application is admitted under section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.*

(2) During the moratorium period—

(a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

(b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and

(c) the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;

(3) Where an order admitting the application under section 96 has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm.

(4) The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator."

14. In view of the aforementioned, we are of the considered view that merely because certain debt recovery proceedings are pending against the PG, it cannot be held that the proceedings invoked by her under Section 94 of IBC, 2016 is with any ulterior motive or for exterior reasons.

15. We may also be not oblivious of the fact that the provisions of Section 94 (4 & 5) of the Code provides for certain circumstances on prevalence of which, the guarantor may not be eligible to file application under Section 94(1) of the Code. The provisions of Section 94 (4 & 5) of the Code reads thus: -

*"**94. Application by debtor to initiate insolvency resolution process.—***
[…]
(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."

16. Nevertheless, the Tribunal cannot turn a blind eye towards the abuse of process of Section 94 of IBC, 2016, when the factual position so indicates. In the present case, what is tremulous is that having filed the application on 02.02.2023, the guarantor did not take steps for listing the same for quite some time knowing fully well that the IRP is a time-bound process. Besides, when the account of Principal Borrower was declared NPA on 29.11.2020 and the Applicant had sufficient idea about her financial situation i.e. the assets owned by her and her liability to discharge the debts, in all fairness she could have resorted to the provisions of Section 94 of IBC, 2016, at least within reasonable period after 13.09.2021 i.e., the date on which the personal guarantee was invoked. However, she could resort to the process only on 02.02.2023, that too only for the purpose of keeping the application pending without getting the same listed immediately. Still, we could have given Applicant/ PG the benefit of judgment of Hon'ble Supreme Court of India in the matter of ***Dilip B Jiwrajka vs. Union of India & Ors.*** [WPC No. 1281 of 2021] if the petition had been preferred after the delivery of the said judgment. The aforesaid judgment of *Dilip B Jiwrajka (supra)* was pronounced on 09.11.2023, but before that judgment, the Applicant had preferred the application on 02.02.2023. Thus, it is not so that in view of the pendency of the proceedings before Hon'ble Supreme Court in aforementioned case, the Applicant did not wish to resort to the process under Section 94(1) of IBC,

2016. It is noticed that on 11.07.2023, the Applicant herself sought an adjournment on the ground that the challenge to validity of Section 94 & 95 of IBC, 2016 was pending before the Hon'ble Supreme Court. The order dated 11.07.2023 reads thus: -

> *"Mr. Vishal Ganda, Ld. Counsel on behalf of the Applicant-Corporate Debtor/ Personal Guarantor has appeared through VC.*
>
> *The Hon'ble Supreme Court is already seized of the matters u/s 94, 95 of the IBC, 2016 in the proceedings in the case of Sanjay Singal & Anr. v. Union of India & Ors. (Writ Petition(s) (Civil) No.(s). 510/2022) & Ashok Pranjivan Bosmiya v. Union of India & Ors. (Writ Petition (Civil) No. 705/2022 and the next date of hearing in the Hon'ble Supreme Court has been fixed on 18.07.2023.*
>
> *Similar orders have been passed in several other applications which have been listed before us in the past and the next date of hearing on these applications has been fixed for 19.07.2023 by this Tribunal.*
>
> *Accordingly, list this matter on 19.07.2023."*

17. When the Applicant/ PG was conscious that the provisions of Section 94 of IBC, 2016 was under challenge before the Hon'ble Supreme Court, her act of instituting the application under Section 94 of IBC, 2016 and then keeping the same pending without getting it listed and then persuading this Tribunal for adjournment on 11.07.2023 by drawing attention to the challenge pending before the Hon'ble Supreme Court clearly indicates that her object and intent was not to see resolution of her insolvency alone, but to earn the benefit of moratorium. We are also unable to appreciate that why and how after issuance of notice under Section 13(2) of SARFAESI Act, 2002, the Applicant/ PG did not deem it appropriate to realise that her condition was such that she had turned insolvent and that it was appropriate for her to resort to steps in the direction. On the contrary, she resorted to all such remedies which she could resort to in order to avoid the attachment/possession of her properties. It is seen that the notice under Section 13(2) of SARFAESI Act, 2002 was issued on 23.09.2021, the original application before DRT was filed on 12.10.2021 and the symbolic possession of the mortgaged property was taken on 29.12.2021, still the Applicant/ PG preferred the petition under Section 94 of IBC, 2016 only on 02.02.2023 that too just to keep the same under defects. It would also not be gainsaid that the Corporate Debtors and the Personal Guarantors may prefer to resort to the processes under Section 10 & 94 of the Code respectively only after taking all such prior steps to adjust their assets and properties here and there and then resort to proceedings under the Code just to get a clean chit under Chapter III to V of the Code.

18. Further, any PG should not resort to the proceedings under the Code on the ground that he or she is not liable to repay the defaulted debt but should only submit that whether he or she would offer a repayment plan or that he or she has no means to repay the defaulted debt on account of insolvency. Therefore, the proceedings under Section 94 of the Code should not be resorted to as caveat or safety net or guard against the recovery proceedings. Any view contrary to the above position would result in giving PGs a tool to scuttle the recovery proceedings pending against her.

19. In view of the aforementioned, it is viewed that the proceedings instituted under Section 94 of IBC, 2016 can be perceived as bona fide only in such circumstances, where after invocation of personal guarantee, the guarantor is unable to discharge the debt and resort to the process, without further questioning the invocation of guarantee. In such cases, where the guarantor resort to all possible remedies against the acts of the creditor to recover the debt and defend themselves to possible extent, it may be presumed that the PG believes and asserts that he or she is not insolvent and has legal right to oppose the claim of the debt by the creditors. Only when the guarantor fairly believes that her or she has liabilities to discharge and that he or she is not in a financial position to discharge the same and has turned insolvent, that the proceedings under Section 94 of IBC, 2016 can be initiated and an RP in terms of the provisions of Section 97 of IBC, 2016 may be appointed.

20. In view of the aforementioned, we are persuaded to accept the plea raised in IA-1820/2024 by the Applicant Bank and allow the IA. Ordered accordingly.

21. <u>IB-393(PB)2023:</u> In view of the order passed in IA-1820/2024, the IB-393(PB)2023 is dismissed as otiose and IA-6411/2023 is disposed of.

-Sd-	**-Sd-**
(SUBRATA KUMAR DASH) **MEMBER (T)**	**(ASHOK KUMAR BHARDWAJ)** **MEMBER (J)**

Upasana/ Atul Raj