



2023:KER:71553

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE N. NAGARESH

FRIDAY, THE 17<sup>TH</sup> DAY OF NOVEMBER 2023/26<sup>TH</sup> KARTHIKA, 1945

WP(C) NO. 31502 OF 2023

PETITIONER:

JENY THANKACHAN,  
AGED 43 YEARS

BY ADVS.  
SHAJI CHIRAYATH  
JIJI M. VARKEY  
M.K.SAFEELA BEEVI  
SAVITHA GANAPATHIYATAN  
M.M. SHAJAHAN

RESPONDENTS:

- 1 UNION OF INDIA,  
MINISTRY OF FINANCE DEPARTMENT OF FINANCIAL  
SERVICES, 3RD FLOOR, JEEVAN DEEP BUILDING,  
SANSAD MARG, NEW DELHI REPRESENTED BY ITS  
FINANCE SECRETARY, PIN - 110001
- 2 AJUDICATING AUTHORITY,  
NATIONAL COMPANY LAW TRIBUNAL, KOCHI BENCH,  
COMPANY BHAVAN, BMC (PO),  
ERNAKULAM, PIN - 682021
- 3 HAWKING TECHNOLOGIES INDIA LLP,  
14/43A, AVANUR(PO), THRISSUR DISTRICT  
REPRESENTED BY ITS DESIGNATED PARTNER,  
PIN - 680541



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4       INDUSIND BANK LIMITED,  
          NO. 25, STEEPLE REACH, A BLOCK, THIRD FLOOR,  
          CATHEDRAL ROAD, GOPALAPURAM, CHENNAI,  
          REPRESENTED BY ITS ASSISTANT VICE PRESIDENT &  
          AUTHORIZED OFFICER,  
          MR. V. M DIVAKARAN, PIN - 600096

          BY SRI.S. MANU, DSGI  
          SRI.RENJITH R, SC

          THIS WRIT PETITION (CIVIL) HAVING COME UP FOR  
          ADMISSION ON 17.11.2023, THE COURT ON THE SAME DAY  
          DELIVERED THE FOLLOWING:



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**CR**

**N. NAGARESH, J.**

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*Dated this the 17<sup>th</sup> day of November, 2023*

**J U D G M E N T**

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The petitioner who is a sleeping partner in the 3<sup>rd</sup> respondent-Limited Liability Partnership Firm, seeks to declare that the provisions of the Insolvency and Bankruptcy Code, 2016 shall have overriding effect over the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, since insolvency resolution and bankruptcy for individuals and Partnership Firms have come into force with effect from 15.11.2019 by virtue of Ext.P3 Notification.



2. The petitioner states that he holds 20% share in the 3<sup>rd</sup> respondent-Limited Liability Partnership as contemplated under Section 23(4) of the Limited Liability Partnership Act, 2008. The petitioner submits that by virtue of Ext.P3 Government Order dated 15.11.2019, the provisions under Sections 78, 79 and 94 to 187 of Insolvency and Bankruptcy Code, 2016 (IBC 2016) came into force with effect from 15.11.2019. In order to redress his grievances relating to the partnership, the petitioner initiated insolvency resolution process under Section 94 of the IBC 2016 before the adjudicating authority / National Company Law Tribunal, Kochi Bench. According to the petitioner, the NCLT has accepted Ext.P4 application submitted by the petitioner and has assigned Diary No.1386/2023 dated 23.08.2023 to the application.

3. The petitioner states that he initiated Ext.P4 insolvency proceedings as the 5<sup>th</sup> respondent-Bank resorted to coercive proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of



Security Interest Act, 2002. The Bank filed Miscellaneous Case No.372/2023 on the files of the Chief Judicial Magistrate, invoking Section 14 of the Act, 2002. The petitioner would submit that along with Ext.P5 MC, the 6<sup>th</sup> respondent has not filed an affidavit in accordance with proviso to the Section 14(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Chief Judicial Magistrate, without ascertaining the maintainability of Ext.P5 MC, has passed Ext.P6 order dated 30.06.2022 allowing Ext.P5 MC.

4. Though the petitioner submitted Ext.P7 affidavit dated 15.07.2019 before the Chief Judicial Magistrate and intimated about the proceedings pending before the NCLT, the proceedings pursuant to Ext.P6 order has not been suspended.

5. The petitioner submits that any action to foreclose, recover or enforce any security interest under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 shall be deemed



to have been stayed and any legal action or proceedings in respect of any debt shall be deemed to have been stayed as per Section 96(b) of the IBC 2016, on the petitioner filing an application under Section 94 of the IBC 2016 before the NCLT. The petitioner would further argue that he has not executed any loan agreement with the 4<sup>th</sup> respondent-Bank. The property proceeded against by the Bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is joint family property of the petitioner, of which half share is not liable to be proceeded against pursuant to Ext.P6 order. However, the Advocate Commissioner filed an interim report before the Chief Judicial Magistrate intimating that she requires more police force since the petitioner has intimated that IBC proceedings are in force.

6. The counsel for the petitioner reiterated that the provisions of IBC 2016 shall have overriding effect over the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by virtue of



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Section 238 of the Code. Since insolvency resolution and bankruptcy for individuals and Partnership Firms came into force with effect from 15.11.2019 as per Ext.P3 Notification, steps pursuant to securitisation proceedings under the Act, 2002 cannot legally go ahead.

7. The counsel for the petitioner further argued that the attitude of the Chief Judicial Magistrate goes against Section 94 of the IBC 2016 and the Chief Judicial Magistrate ought to have found that any action to foreclose, recover or enforce any security interest under the Act, 2002 shall be deemed to have been stayed and any legal action or proceedings in respect of any debt shall also be deemed to have been stayed in view of Section 96(b) of the IBC 2016.

8. Standing Counsel representing the 4<sup>th</sup> respondent-Bank resisted the writ petition. On behalf of the Bank, the Standing Counsel submitted that the question of law raised by the petitioner has already been considered by the Hon'ble Apex Court in ***State Bank of India v. B. Ramakrishnan*** [2018 17 SCC 394]. The Apex Court has held that the



question whether the moratorium mentioned in the IBC on admission of insolvency petition would apply to the personal guarantor of a corporate debtor and answered that the moratorium will not be extended to the personal guarantor of the corporate debtor. In the present case, the writ petitioner is the personal guarantor of the 3<sup>rd</sup> respondent-Corporate debtor.

9. The Standing Counsel further pointed out that the application stated to have been filed by the petitioner under Section 94 of the IBC 2016 has not been admitted by the NCLT. The application has not been assigned a regular case number by the Tribunal. Therefore, the petitioner cannot contend that there is a deemed moratorium even for the corporate debtor. The writ petition is therefore liable to be dismissed, contended the Standing Counsel representing the Bank.

10. I have heard Sri. Shaji Chirayath, learned counsel for the petitioner, Sri. S. Manu, the learned Deputy Solicitor General of India representing the 1<sup>st</sup> respondent and





Sri. Renjith R., the learned Standing Counsel appearing for the 4<sup>th</sup> respondent-Bank.

11. The pleadings in the writ petition would disclose that the 3<sup>rd</sup> respondent-LLP of which the petitioner is a Partner approached the 4<sup>th</sup> respondent-Bank and availed a loan of ₹65,10,000/-. The LLP defaulted in repayment of the loan and the account of the partnership was rendered NPA on 31.10.2022. Thereafter, the Bank initiated Section 13 proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and issued Section 13(2) notice to the borrower and to the petitioner, the petitioner being a guarantor.

12. The Bank approached the Chief Judicial Magistrate under Section 14(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Chief Judicial Magistrate passed Ext.P6 order dated 30.05.2023 appointing an Advocate Commissioner to assist the Bank to take possession of the petition schedule property, as per Ext.P6



order dated 30.05.2023.

13. The petitioner, at this stage, filed Ext.P4 application dated 21.08.2022 for insolvency resolution process invoking Section 94 of the IBC 2016 before the NCLT. The NCLT has assigned a Diary Number to the application submitted by the petitioner. The petitioner urged that since the petitioner has invoked Section 94 of the IBC 2016, the 4<sup>th</sup> respondent-Bank and the Chief Judicial Magistrate cannot go ahead with the proceedings under the Securitisation Act.

14. The petitioner is a guarantor to the financial advance taken by the 3<sup>rd</sup> respondent-LLP. The Bank has invoked the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Bank approached the Chief Judicial Magistrate under Section 14 of the Act, 2002 to take possession of the secured assets provided by the petitioner. The Chief Judicial Magistrate has passed Ext.P6 order appointing an Advocate Commissioner to assist the Bank to



take possession of the petition schedule property. Thereupon, the petitioner invoked Section 94 of the IBC 2016 seeking to initiate Insolvency Resolution Process.

15. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has been enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest. When the petitioner defaulted in repaying the financial advances made by the 1<sup>st</sup> respondent-Bank, the Bank has invoked the provisions of Sections 13 and 14 of the Act, 2002 and initiated recovery proceedings. It is thereafter the petitioner initiated Insolvency Resolution Process under Section 94 of the IBC 2016 before the National Company Law Tribunal, which is the adjudicating authority. Part III Chapter III of the IBC 2016 provides for Insolvency Resolution Process for individuals and partnership firms. The Government of India, Ministry of Corporate Affairs, as per Ext.P3 Notification dated 15.11.2019, appointed the 1<sup>st</sup> day of December, 2019 as the date on which Sections 94 to 187 of the IBC 2016 shall come



into force.

16. Section 94 of the IBC 2016 reads as follows:-

**94. Application by debtor to initiate insolvency resolution process -**

(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.



The petitioner being a debtor who has committed a default is entitled to apply either personally or through a resolution professional to the adjudicating authority for initiating the Insolvency Resolution Process, by submitting an application.

17. Section 96 of the IBC 2016 provides for interim moratorium. Section 96 reads as follows:-

**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.



Therefore, it is evident that when an application is filed under Section 94, an interim moratorium shall commence on the date of the application in respect to all the debts and shall cease to have effect on the date of admission of such application.

18. Once an application for Insolvency Resolution Process is admitted, Section 101 will come into play and a moratorium will commence in relation to all the debts and shall cease to have effect at the end of the period of 180 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. Section 101 provides that during the moratorium period, any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed.

19. The argument of the petitioner is that the petitioner has filed Ext.P4 application invoking Section 94 of the IBC 2016 on 21.08.2023 and therefore as contemplated by Section 96(1)(b)(i), any legal action or proceeding pending in



respect of any debt shall be deemed to have been stayed. As a consequence, the proceedings initiated by the 1<sup>st</sup> respondent-Bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 shall stand stayed in view of the statutory mandate of Section 96(1)(b)(i).

20. Section 14 of the IBC 2016 relates to moratorium which will come into play in the corporate Insolvency Resolution Processes initiated by Financial Creditors, Operational Creditors and by Corporate Applicants. Section 14 contemplates that the adjudicating authority shall by order declare moratorium for prohibiting the institution of suits or continuation of pending suits or proceedings against the corporate debtor. Under Section 14, an order of declaration of moratorium by the adjudicating authority is necessary.

21. However, in the Insolvency Resolution Processes under Part III Chapter III relating to individuals and partnership firms, the interim moratorium under Section 96 and moratorium under Section 101 are automatic by



operation of law and is not dependent on any declaration of moratorium by the adjudicating authority.

22. The petitioner would state that he has filed Ext.P4 application before the National Company Law Tribunal, Kochi Bench on 21.08.2023. It is an admitted position that the said Ext.P4 Company Petition (IBC) has not been admitted to files by the Tribunal so far. The issue arising in this writ petition is whether the filing of Ext.P4 by the petitioner would by itself result in an interim moratorium as contemplated under Section 96(1)(b)(i).

23. The operation of interim and final moratorium under Sections 96 and 101 of the IBC 2016 have serious repercussions. Legal actions and proceedings pending against the debtor will be deemed to have been stayed and the creditors of the debtor will not be able to initiate any legal action proceeding in respect of any debt of the debtor., once an application is filed. Therefore, the provisions of Sections 96 and 101 will have to be strictly construed.





24. Therefore, for an interim or final moratorium under Section 96 to come into force, the application filed by the debtor should be complete in all respects and without any procedural defects. In the case of the petitioner herein, the petitioner has only uploaded Ext.P4 application, which by itself cannot be treated as filing of an application as contemplated by Section 96.

25. In view of the serious consequences that will follow on filing of an application under Section 96 by a debtor, on the creditors who will be disabled and disentitled from initiating or proceeding with any debt recovery legal mechanism, Section 96 should be construed strictly. Mere uploading of an application under Section 96 of the IBC 2016 cannot be taken as filing of an application. The filing of an application as contemplated under Section 96 should be defectless and devoid of any procedural lapses. Only when an application is filed without any defects and satisfying the statutory procedural requirements of filing and only when the adjudicating authority numbers the application, there can be



a legal and acceptable filing of application.

26. In the case of the petitioner, admittedly the NCLT has not treated the application as a valid application by assigning regular case number to the application. As long as the petitioner's application is not duly numbered by the NCLT, the interim moratorium contemplated under Section 96(1)(b)(i) cannot come into operation. Therefore, the petitioner is not entitled to contend that the respondents cannot go ahead with the securitisation proceedings.

27. The argument of the petitioner that the IBC 2016 shall have overriding effect over the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 cannot be of any avail to the petitioner. It is true that in view of Section 238 of the IBC 2016, the IBC 2016 will have overriding effect. But, Section 238 of the IBC 2016 cannot oust the operation of the Act, 2002 for the reason that the IBC 2016 and the Act, 2002 operate in different fields. Therefore, unless there is any repugnancy between the provisions of the IBC 2016 and the



provisions of the Act, 2002, there is no question of IBC 2016 overriding the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in totality.

28. The petitioner is not entitled to urge the overriding effect of IBC 2016 based on the facts of the case for yet another reason. As far as the proceedings under the Act, 2002 initiated by the Bank, the petitioner has been proceeded against in his capacity as guarantor to the financial advance by the LLP. In the judgment in ***State Bank of India v. Ramakrishnan and another*** [(2018) 17 SCC 394], the Apex Court has held that the protective provisions of IBC 2016 are not applicable to a personal guarantor of a corporate debtor. The securitisation proceedings against personal guarantors of corporate debtors can continue under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Therefore, initiation of a Section 94 (IBC 2016) proceedings by a Partner of an LLP in his capacity as a guarantor, cannot be



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averted to the proceedings initiated by the Bank against the petitioner, but in his capacity as a guarantor, under the Act, 2002.

The writ petition is therefore devoid of any merit and the same is dismissed.

Sd/-

**N. NAGARESH, JUDGE**

aks/16.11.2023

APPENDIX OF WP (C) 31502/2023

## PETITIONER'S EXHIBITS

- Exhibit 1 COPY OF THE CERTIFICATE OF INCORPORATION DATED 09TH AUGUST 2017 ISSUED BY THE REGISTRAR OF COMPANIES, KERALA
- Exhibit P2 COPY OF THE LLP AGREEMENT DATED 10TH AUGUST 2017
- Exhibit P3 COPY OF THE SAID GOVERNMENT ORDER DATED 15TH NOVEMBER 2019 UNDER INSOLVENCY AND BANKRUPTCY CODE 2016 NOTIFYING OPERATIONALITY OF SECTION 78, 79 AND SECTION 94 TO 187 IS
- Exhibit P4 COPY OF THE COMPANY PETITION (IBC) DATED 21ST AUGUST 2023 ON THE FILES OF NATIONAL COMPANY LAW TRIBUNAL, KOCHI BENCH
- Exhibit P5 COPY OF THE MISCELLANEOUS CASE NO. 373 OF 2023 DATED 17TH MAY 2023 ON THE FILES OF THE CHIEF JUDICIAL MAGISTRATE, THRISSUR
- Exhibit P6 COPY OF THE ORDER DATED 30TH MAY 2023 IN MISCELLANEOUS CASE NO. 372 OF 2023 ON THE FILES OF THE CHIEF JUDICIAL MAGISTRATE, THRISSUR
- Exhibit P7 COPY OF THE AFFIDAVIT DATED 15/09/2023 FILED BY THE PETITIONER HEREIN INTIMATING THE CHIEF JUDICIAL MAGISTRATE, IN RESPECT OF THE PROCEEDINGS ARE PENDING BEFORE THE NATIONAL COMPANY TRIBUNAL, KOCHI-BENCH
- Exhibit P8 COPY OF THE SAID INTERIM REPORT DATED 18/09/2023 FILED ADVOCATE COMMISSIONER IN MISCELLANEOUS CASE NO. 372 OF 2023 ON THE FILES OF THE CHIEF JUDICIAL MAGISTRATE, THRISSUR