

**In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 23 of 2021

**Ayan Mallick and another
Vs.
State Bank of India and others**

For the petitioners : Mr. Sabyasachi Choudhury,
Mr. Sanwal Tibrewal,
Ms. Sutapa Saha

For SBI : Mr. Smtuti Mishra,
Mr. Ashim Rout

Hearing concluded on : 25.02.2021

Judgment on : 04.03.2021

The Court:

1. The petitioners are the erstwhile Directors of a company, M/s. A K Power Industries Private Limited. The company took loan from the respondent no.1-bank and subsequently failed to repay the same. The loans were secured by primary and collateral securities and equitable mortgage of immovable properties standing in the name of the petitioners, as well as by the guarantee of the petitioners. At the behest of the respondent no.1-bank, forensic audit was carried out into the affairs of the company in April, 2019. Pursuant to the forensic report placed before the members of

the joint lenders' meeting held on May 10, 2019, the respondent no.1 declared the account of the company as a 'No Fraud Account'.

2. Subsequently, the company forwarded an One-Time Settlement proposal, which was accepted by the respondent no.1-bank.
3. In the interregnum, Corporate Insolvency Resolution Process (CIRP) was commenced in respect of the company by an order dated October 1, 2019 passed by the National Company Law Tribunal, Kolkata Bench.
4. During pendency of the CIRP, respondent no.1 issued a notice on November 4, 2019 calling upon the company and the petitioners to show-cause and make submissions in writing within 30 days from the date of receipt of the letter as to why their names should not be included in the list of Wilful Defaulters as per the relevant Reserve Bank of India (RBI) guidelines.
5. The petitioners replied to such notice. Subsequently, several letters were issued to the petitioners as well as the company, asking the petitioners and the company to appear before the Wilful Defaulter Identification Committee for personal hearing. Such notices dated March 17, 2020, March 23, 2020, July 18, 2020, July 27, 2020, August 6, 2020, October 28, 2020 and December 7, 2020 have been annexed to the writ petition.
6. In the present writ petition, the petitioners challenge the notice dated August 6, 2020 (wrongfully described in portions of the writ petition and the prayer portion as "August 8, 2020").

7. Learned counsel appearing for the petitioners argues that in view of the prior commencement of CIRP under the Insolvency and Bankruptcy Code, 2016 (IBC), the Identification Committee had no authority to issue the show-cause notice dated November 4, 2019 and the subsequent notices for personal hearing pursuant thereto.
8. Learned counsel for the petitioners argues that, in view of the moratorium envisaged in Section 14 of the IBC, the proceeding for declaration of Wilful Defaulter did not lie against the company. Since the notices to the petitioners were all issued in their capacity as Directors of the company, such notices were also not tenable in the eye of law. It is argued that, as per the scheme of the IBC, the 'unit' (here, the company), if the subject-matter of a CIRP, its Directors, acting in that capacity, would also not be prosecuted in any legal proceeding before any authority, including the Identification Committee. It is illogical, learned counsel submits, that if all proceedings against the company itself are arrested by virtue of Section 14 of the IBC, the Committee could continue to proceed against the petitioners in the capacity of Directors of the company.
9. By relying on the show-cause notice dated November 4, 2019, learned counsel appearing for the petitioners contends that the notice was addressed not only to the company but the present petitioners and the other Directors of the company. All allegations in the show-cause notice

were against the company and, as such, the impugned notices are bad in law.

- 10.** Learned counsel appearing for the respondent-bank, on the other hand, contends that the writ petition is premature, since the petitioners have not yet given a representation before the Wilful Defaulter Identification Committee, despite having received the show-cause. The petitioners are evading personal appearance before the Committee, which is evident from the several letters issued to the petitioners. It is argued that all points taken in the writ petition can very well be contended by the petitioners before the Identification Committee itself and the writ petition is, thus, not maintainable.
- 11.** That apart, learned counsel for the respondent no.1 argues, the RBI guidelines dated July 1, 2015, read with Section 14 of the IBC, do not envisage any moratorium against the Directors of a company.
- 12.** Learned counsel further argues that the IBC was enacted after the RBI guidelines were issued in 2015 and the provisions of the IBC are in addition to, and not in derogation of, the RBI guidelines. It is submitted that the two complement each other and do not operate in mutual contradiction.
- 13.** Upon hearing learned counsel for both sides, it is relevant to look into the scope of the relevant provisions of the IBC vis-à-vis the RBI guidelines dated July 1, 2015.

- 14.** Section 14 of the IBC lays down provisions regarding moratorium and cover, inter alia, the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority, as well as any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Sub-section (3) of Section 14 excludes the application of the provisions of Section 14(1) to transactions as may be notified by the Central Government in consultation with any financial regulator and a surety in a contract of guarantee to a corporate debtor.
- 15.** Sections 17 and 18 of the IBC respectively set out the management of affairs of corporate debtor by interim resolution professional and duties of interim resolution professional. The said two sections indicate the scope of measures to be taken by the interim resolution professional with regard to the corporate debtor. Section 20 provides for the management of operations of corporate debtor as a going concern by the interim resolution professional.
- 16.** The RBI guidelines dated July 1, 2015 indicate the consequences of declaration of a corporate debtor as Wilful Defaulter, on the said debtor.

- 17.** Clause 3(a) of the RBI guidelines indicates that the evidence of wilful default on the part of not only the borrowing company but its promoter/whole-time Directors at the relevant time should be examined by a Committee. Sub-clause (b) of Clause 3 stipulates that if the Committee concludes that an event of wilful default has occurred, it shall issue a show-cause notice to the borrower and the promoter/whole-time Director and call for their submissions. Upon considering such submissions, the Committee may issue an order recording the fact of wilful default. An opportunity has to be given to the borrower and the promoter/whole-time Director for a personal hearing if the Committee feels it necessary. Sub-clause (c) provides for a reconsideration of the decision by a Review Committee.
- 18.** Clause 2.4 of the RBI guidelines provides for a monitoring of the end-use of funds in respect of the borrower. Clause 2.5 provides for the penal measures which can be initiated by the banks and the financial institutions against the Wilful Defaulters. Such measures include debarment of the borrower (including their entrepreneurs/promoters) under certain circumstances, from institutional finance from scheduled commercial banks, financial institutions etc. for floating new ventures for a period of five years from the date of removal of their names from the list of Wilful Defaulters. Legal process against the borrowers/guarantors and

foreclosure for recovery of dues should be initiated expeditiously under the said clause. Other financial measures are also contemplated therein.

- 19.** Clause 4.1 of the 2015 guidelines mention the JPC recommendations regarding criminal action against the Wilful Defaulters, which also includes close monitoring of the end-use of funds. In Clause 4.2(i), such monitoring of the end-use of funds has been elaborated further.
- 20.** The purpose of the Master Circular containing the RBI guidelines of 2015, as mentioned therein, is to put in place a system to disseminate credit information pertaining to Wilful Defaulters for cautioning banks and financial institutions so as to ensure that further bank finance is not made available to them.
- 21.** Thus, it is evident from the aforesaid provisions of the 2015 Circular that the measures contemplated therein will have a direct detrimental effect on the scope of functioning of the resolution professional as envisaged under the IBC.
- 22.** The moratorium stipulated in Section 14 of the IBC has to be read in the context of the scope of operation of the resolution professional. Read in conjunction, the provisions of the IBC indicate that Section 14(1), Clauses (a) and (c) contemplate an arrest of all proceedings not only before courts of law and tribunals but before other authorities as well. Although, strictly speaking, the declaration of Wilful Defaulter dealt with in the RBI guidelines is not an action to foreclose, recover or enforce any

security interest created by the corporate debtor, the effect of such a declaration is to interdict and conflict with the functioning of the resolution professional within the scope of the IBC. Thus, the continuance of proceedings for declaration of Wilful Defaulter in respect of the borrowing company must be construed to fall within the purview of the moratorium provided in Section 14 of the IBC.

- 23.** The Directors of the company, however, stand on a different footing.
- 24.** Section 17(1) clearly provides that the management of the affairs of the corporate debtor shall vest in the interim resolution professional and the powers of the Board of Directors of the said debtor shall stand suspended and be exercised by the interim resolution professional. The scope of functioning of the interim resolution professionals are clearly laid down in Sections 17, 18 and 20 of the IBC. Section 23 provides the mode of conduct of Corporate Insolvency Resolution Process by the resolution professional. The duties of the resolution professionals are delineated in Section 25 of the IBC.
- 25.** It is clear from the said provisions that the Directors are shut out from having any role in the functioning of the corporate debtor-company from the inception of the CIRP. As such, the present petitioners, in the capacity of Directors of the borrower company, cannot interfere in the functioning of the company at all. On the other hand, the steps taken against the Directors, even in their capacity as Directors, such as

publication of their names in the list of Wilful Defaulters and the like, do not affect the CIRP at all, since the Directors have no truck with the company from the moment of inception of the CIRP.

- 26.** However attractive the petitioners' argument regarding the Directors being also immune from proceedings under the moratorium envisaged in Section 14 of the IBC, since such proceedings against the unit itself are arrested, may seem at the first blush, the same has an inherent fallacy.
- 27.** Section 14 of the IBC contemplates a moratorium in respect of all proceedings against the corporate debtor, for the obvious reason that the continuance of other proceedings may lead to conflicting decisions vis-à-vis the management of the corporate debtor by the resolution professional. However, such immunity cannot be extended to Directors in view of their interference with the affairs of the company being negated by the provisions of the IBC itself during CIRP.
- 28.** Hence, whatever may be the consequence of declaration of the Directors, even in the capacity of Directors of the company, as Wilful Defaulters, the same does not interfere with the CIRP in any manner in view of the prior dissociation of the Directors from the affairs of the company at the commencement of the CIRP.
- 29.** Thus, the petitioners cannot claim immunity under Section 14 of the IBC, being not covered by the moratorium contemplated therein,

although the company itself is covered by such moratorium for the reasons discussed above.

- 30.** That apart, although neither the show-cause notice nor the notices for personal hearing indicated specifically that the petitioners were also being invited to show-cause on their liability as guarantors of the company, it is an admitted position, appearing from the pleadings of the writ petition itself, that the petitioners are also guarantors. Section 14(3)(b) of the IBC excludes a surety in a contract of guarantee to a corporate debtor from the moratorium stipulated in Section 14(1). As such, even in the capacity of guarantors, the petitioners are liable to be prosecuted, bereft of the benefit of such moratorium.
- 31.** In proceedings for declaration of Wilful Defaulter, the corporate veil has to be lifted in order to examine the role of the Directors in the alleged actions of the corporate debtor-company which lead to the proposed declaration of Wilful Defaulter.
- 32.** In the circumstances considered above, the petitioners cannot take advantage of Section 14 of the IBC merely on the ground of being at par with the corporate debtor, which itself is covered by the said section. Adopting the doctrine of piercing the corporate veil, particularly in view of the contemplation of the RBI guidelines being to promote public policy and advance public interest, the Directors cannot claim to be at par with

their company as far as the moratorium under Section 14 of the IBC is concerned.

33. Thus, the writ petition fails.

34. WPO No.23 of 2021 is dismissed on contest, without any order as to costs.

35. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)