

OD-1

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

WPO/374/2023

SURESH KUMAR PATNI AND ORS.
Vs
BANK OF BARODA AND ANR.

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 14th June, 2023

Appearance:

Mr. Rupak Ghosh, Adv.

Mr. Debjyoti Saha, Adv.

Mr. Vishwarup Acharyya, Adv.

...for the petitioners

Mr. Siddhartha Chatterjee, Adv.

Ms. Jayanti Chowdhury, Adv.

Ms. Sutapa Dutta, Adv.

Ms. M. Chowdhury, Adv.

Ms. R. Seal, Adv.

Ms. S. Mitra, Adv.

...for the respondent bank

The Court:- Learned counsel for the petitioners contends that the issuance of show cause notice by the Wilful Defaulter Identification Committee, which has been impugned herein, was patently without jurisdiction and non-maintainable. It is argued that in view of the pendency of an application under Section 95 of the Insolvency and Bankruptcy Code, 2016, read in the context of Section 96 thereof, there is an operative moratorium in respect of the debt in question, in connection with which the petitioners are sought to be declared to be wilful defaulters.

That apart, it is argued that a CIRP (Corporate Insolvency Resolution Process) was undertaken with regard to the corporate debtor and culminated in the approval of a resolution plan.

In view of the debt itself being thus resolved, that cannot be any further subsisting cause of action for declaration of wilful defaulter against the petitioners, who were merely a guarantors in respect of the same debt.

Moreover, a proceeding under Section 66 of the IBC had been initiated previously by the Resolution Professional, which culminated in favour of the petitioners. As such, the issuance of the show cause notice on the premises of the said debt is not maintainable at this juncture.

That apart, learned counsel argues that even on merits, the show cause has not disclosed any credible case against the petitioners for the purpose of declaration of wilful defaulter.

The above arguments are controverted by learned counsel for the respondent authorities. Learned counsel submits that the scope of operation of Sections 14 and 96 are different. Whereas Section 14 refers to the legal actions in respect of the corporate debtor, Section 96 speaks about legal actions or proceedings in respect of any 'debt'.

It is submitted that a Coordinate Bench of this Court, in the judgment of *Adarsh Jhunjhunwala Vs. State of Bank of India and Another* reported at (2021) SCC Online Cal 3351, has already decided the issue. In terms of the ratio laid down herein, a moratorium under Section 96 is not sufficient to stall a show cause notice or a proceeding under the Master Circular of the RBI for the purpose of identification of a wilful defaulter.

Learned counsel also cites a judgment of a learned Single Judge of the Gujrat High Court (Ahmedabad Bench), which relied, *inter alia*, on the judgment of Adarsh Jhunjhunwala and held in same tune.

Learned counsel argues that the scope of operation of Section 96 is entirely different from a declaration of wilful defaulter proceeding. As such, the pendency of the one would not be a deterrent to a proceeding for declaration of wilful defaulter.

That apart, it is argued that the scope of operation of Section 66 of the IBC is on an entirely different footing than a wilful defaulter declaration. Learned counsel places the respective provisions for elaborating his arguments.

Even at the first blush, it is clear that the moratorium under Section 96 of the IBC refers to the 'debt' and not the 'corporate debtor'.

Although learned counsel for the petitioners has argued that the debt being resolved upon the resolution plan being accepted with regard to the corporate debtor, the proceeding for identification of wilful defaulter cannot survive or be initiated, the interpretation sought to be lent in the observations of the learned Single Judge in *Adarsh Jhunjhunwala*, following the judgment of the Supreme Court in *SBI Vs. Ramakrishnan* is somewhat different from that sought to be portrayed by the petitioner.

In the said judgment of the Supreme Court reported at (2018) 17 SCC 394, the Supreme Court proceeded to hold that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to personal guarantor. An application filed under Part-III an interim moratorium or moratorium becomes applicable. The Supreme Court observed that first and foremost this is a separate moratorium applicable separately in the case of personal guarantors against whom insolvency resolution processes may be initiated under Part-III. Secondly, the protection of the moratorium under the

said Section, it was held, is far better than that of Section 14. The difference in language was also cited to be a reason for the difference between said sections.

However, in paragraph 14 of the judgment of the learned Single Judge, while interpreting the judgment of the Supreme Court, it has been observed that the very purpose of separation of corporate insolvency under Part-II of the IBC from individual insolvency under Part-III must be understood to be separate and distinct and that they aim to achieve different ends. The principles applied in corporate insolvency cannot be applied to personal insolvency.

Such elaboration of the purpose of the distinction as held by the learned Coordinate Bench, with respect, is well within the periphery of sound logic and is accepted by this Court as well. The distinction sought to be drawn by the Supreme Court between a moratorium under Section 14 and that under Section 96 has no relevance in the present context.

The distinction sought to be drawn between said Sections is apparently between the legal proceedings against the 'corporate debtor' and legal action and proceeding in respect of a 'debt'.

Learned counsel for the respondents is justified in contenting that the purpose of Section 96 may be gathered from the Repayment Plan envisaged in Section 105 of IBC.

The latter Section clearly stipulates a scheme of repayment, which would, obviously, be frustrated if any legal action or proceeding in respect of the same debt culminates in an order or is visited with an interim order in the meantime.

The entire scheme of the IBC itself indicates the combined political will not only to consolidate the laws related to insolvency, reorganization and

liquidation/bankruptcy of all the persons including companies, individuals etc. under one statutory umbrella, but also for the time-bound resolution of defaults and seamless implementation of liquidation/bankruptcy and maximizing asset value as well as to encourage resolution as the first resort for recovery.

However, the purpose of the Master Circular of the RBI for identification of wilful defaulters is on a somewhat different footing. The latter is not for the purpose of providing an infrastructure for resolution of a debt or to facilitate recovery.

On the other hand, whereas the moratorium contemplated in Section 14 with respect to the corporate debtor itself facilitates a resolution of the debt and ensures that the business of the corporate debtor can thrive again, in respect of the Master Circular, the specific purpose is to identify wilful defaulters for the purpose of alerting bankers, financial institutions and other financial and commercial entities, which might have transactions in the corporate sphere, with regard to the dealings of certain persons who fall within the purview of the said Circular.

As such, the interim moratorium contemplated in Section 96 of IBC is rather for the purpose of protecting the debt in order to facilitate the ultimate scheme, that is, repayment plan within the contemplation of Section 105. However, mere protection of the debt or the corporate debtor cannot be equivalent to giving unnecessary and unwarranted protection to persons who are guilty of wilful default under the Master Circular of the RBI.

Insofar as Section 96 is concerned, the same concerns itself with the 'debt'. Section 14, on the other hand, speaks about the corporate 'debtor'. Thus, the Sections respectively seek to protect each of the said entities.

However, the declaration of wilful defaulter is not to save or protect either of the two but to raise an alert in the banking system and the commercial sector of the country, so that persons having commercial transactions become aware of the fact that certain persons are Wilful Defaulters. As such, a guarantor, who stands on co-extensive footing with the debtor, cannot be absolved from a wilful defaulter proceeding at the inception, merely by citing the pendency of a proceeding under Section 96 of the IBC.

Insofar as Section 66 of the IBC is concerned, it is evident from the said Section itself that the area sought to be covered thereby is entirely distinct and different from a wilful defaulter proceeding. The provisions of Section 66 deal with fraudulent trading or wrongful trading and provide that if during the Corporate Insolvency Resolution Process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to default creditors of the corporate debtors or for any fraudulent purpose, the Adjudicating Authority, may on the application of the Resolution Professional, pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit. Such adjudication by an adjudicating authority on the anvil of Section 66 is different in respect of yardsticks and tests from a Wilful Defaulter declaration under the Master Circular of the RBI. The yardsticks and tests stipulated in the Master Circular

are more extensive and a shade different from those stipulated in Section 66 and, as such, parallel carriage and/or disposal of the two proceedings is not barred by the law.

A decision in a proceeding under Section 66 of the IBC does not influence or affect in any manner an independent consideration of Wilful Defaulter identification within the purview of the Master Circular.

In view of the above discussions, there is no reason for this Court to interfere, particularly in view of the fact that the present proceeding for declaration of wilful defaulter is yet at an inchoate stage and ought not to be disrupted at the stage of issuance of show cause, since the petitioners have ample opportunity to participate in the hearing fixed by the identification committee and, thereafter, if aggrieved by the said decision, to move the review committee with further rejoinder(s).

Hence, WPO/374/2023 is dismissed without any order as to costs.

However, since affidavits have not been invited, it is deemed that none of the allegations made by the parties against each other in the writ petition or in connection therewith are admitted by the other side.

No order as to costs.

(SABYASACHI BHATTACHARYYA, J.)