IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	**19.06.2024**
Pronounced on	**03.07.2024**

CORAM :

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

W.P.No.19572 of 2021 and
W.M.P.No.20858 of 2021

Regan Infrastructure and Services Private Limited,
Represented by Resolution Professional,
Ms.Renuka Devi Rangaswamy ...Petitioner

-Vs-

The State Bank of India,
Represented by its Chairman/General Manager,
Willful Defaulter Identification Committee-II,
Stressed Assets Management Branch,
Red Cross Buildings, 32, Red Cross Road,
Egmore, Chennai-600 008. ...Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records leading up to the passing of the impugned declaration dated 23.06.2021 vide Meeting No.2021-22/03 and Agenda Item No.4353 passed by the Respondent and quash the same.

For petitioner : Mr.J.Sivanandaraaj
Senior Counsel for
M/s.Riddhima Ssharma

For respondent : Mr.M.L.Ganesh,

ORDER

This writ petition has been filed challenging the declaration dated 23.06.2021 on the file of the respondent thereby proposed to declare the petitioner as willful defaulter and included the petitioner's name in the Credit Information Company list as willful defaulter.

2. The petitioner company is represented by its Resolution Professional who is appointed by the National Company Law Tribunal, Chennai Bench by order dated 19.02.2020. She is in-charge for the affairs of the petitioner's company. The petitioner provides comprehensive operations and maintenance services that facilitates the functioning of windmills to generate wind energy. The petitioner has been banking with the Respondent Bank for its capital facilities of Cash Credit and Bank Guarantees for its business development. So far, the petitioner had availed loan to tune of Rs.40,00,00,000/- from the respondent. Due to various reasons, the

petitioner was not able to honour its obligation to the respondent. Therefore, the account of the petitioner was declared as non-performing assets on 17.10.2018. The respondent approached the Debt Recovery Tribunal-I, Chennai under the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 in O.A.No.447 of 2019. While being so, the petitioner opted for One Time Settlement and accordingly a Joint Memo of Compromise was entered between the petitioner and the respondent on 12.11.2019. Accordingly, if the petitioner committed any default, the respondent can recover the entire amount claimed before the Debt Recovery Tribunal, Chennai. While being so, one of the creditor i.e., M/s.SB Aditya Power Projects Private Limited filed an application under Section 9 of Insolvency and Bankruptcy Code, 2016 (hereinafter called as 'IBC') before National Company Law Tribunal (hereinafter called as 'NCLT') to initiate Corporate Insolvency Resolution Process against the petitioner company on the ground that the petitioner committed default in payment for the services rendered by M/s.SB Aditya Power Projects Private Limited. The NCLT ordered for initiation of Corporate Insolvency Resolution Process (CIRP) against the petitioner company. Thereafter, in terms of Section 9(5) of IBC, Moratorium as envisaged under Section 14 of IBC should be followed in relation to the petitioner company. In which, resolution professional was appointed as Interim Resolution Professional and the same was also confirmed by the Committee of Creditors (hereinafter called as CoC).

2.1. Thereafter, the respondent made claim for a sum of Rs.32,49,90,041.36/- before the Resolution Professional (hereinafter called as RP), since the petitioner committed default in paying the loan amount as per the Joint Compromise memo. The respondent moved application under section 19(25) of the Recovery of Money Under the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (hereinafter called as 'RDDBFI Act'), claiming the entire amount and also prayed for issuance of Debt Recovery Certificate (DRC). Further, the respondent issued show cause notice to the petitioner dated 16.10.2020 stating that as to why the petitioner should not be included in the list of willful defaulters as per the guidelines issued by the Reserve Bank of India. After giving the opportunity of hearing, the petitioner company was declared as willful defaulter.

3. Mr.J.Sivanandaraaj, the learned senior counsel appearing for the petitioner submitted that the respondent ought not to be declared the petitioner as willful defaulter, without taking into consideration that Section 14 of IBC is operational as per the order of NCLT. It prohibits initiation or continuance of all proceedings against the Corporate Debtor before any Court or Authority. Therefore, the respondent cannot initiate any proceedings as against the petitioner company as a willful defaulter that too during the moratorium period. Section 238 of IBC has an overriding effect on other laws and as such the respondent has no jurisdiction to declare the petitioner as willful defaulter.

3.1. He further submitted that as per sections 17, 18 and 25 of IBC which set out the duties of interim resolution professional. The aim of 2015 RBI Master Circular is that measures have a detrimental effect on the scope and working of the resolution professional. The resolution professional is to make sure that the corporate debtor is revived. The above said provisions contemplate arrest of all proceedings before Court of law, tribunal and also before other authorities. In support of his contention, he also relied upon the judgement of the Hon'ble High Court of Calcutta in the case of ***Ayan Mallick and another vs State Bank of India and others*** reported in ***2021 SCC online Cal 463,*** the relevant portion of the said judgment is extracted hereunder:

> *"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.*
>
> *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 Willful 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 Willful 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.

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 Willful 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 Willful 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.

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."*

3.2. He further submitted that while pending writ petition, in view of the Interim Order passed by this Court dated 06.10.2021, the petitioner filed application before the Review Committee. Further, the Review Committee also confirmed the order passed by the Respondent by an order dated 23.06.2022. Even then, the writ petition is very much maintainable and this Court can mold the relief by considering the subsequent events. In support of his contention the learned Senior Counsel appearing for the petitioner relied upon the Judgment in the case of ***Kedar Nath Agrawal (dead) and another vs Dhanraji Devi (dead) by Lrs and another*** reported in ***2004 (8) SCC 76***, in which the basic rights of the parties should be determined on the basis of the date of institution of the suit or proceeding and the suit/action should be tried at all stages on the cause of action as it existed at the commencement of the suit/action. This, however, does not mean that events happening after institution of suit/proceeding, cannot be considered at all. It is the power and duty of the Court to consider changed circumstances. Therefore, the subsequent events inter alia can be considered on the circumstances that the relief claimed originally has by the reason of subsequent change of circumstances become inappropriate or it is necessary to take notice of subsequent events in order to shorten litigation or it is necessary to do so in order to render complete justice between the parties. He also relied upon the Judgment in the case of ***Om Prakash Gupta vs Ranbir B.Goyal*** reported in ***2002 (2) SCC 256***, in which the Hon'ble Supreme Court of India also reiterated the same circumstances.

4. The respondent filed counter and revealed that this writ petition has been filed as against the order passed by the Willful Defaulter Identification Committee after issuance of show cause notice and giving opportunity of hearings on several occasions. On receipt of the show cause notice, the petitioner had sent response to the respondent stating that the

object of IBC itself is to provide an opportunity for distressed Debtors for revival, which is in true spirit was followed by the NCLT and appointed her as resolution professional. When she was taking consistent effort to promote the revival of the petitioner company, the respondent is being a member of the committee of Creditors is acting adverse to the interests of the petitioner. However, the petitioner failed to appear for personal hearing, though the petitioner was given opportunity on several occasions. The specific contention of the petitioner is that the declaration of the petitioner as willful defaulter is clear violation of the provisions under section 14 of IBC. When the proceedings for declaration of Willful defaulter didn't lie against the company. Since it prohibits initiation or continuance of all proceedings against the Corporate Debtor before any Court or Authority. It is relevant to extract provisions under section 14 of IBC.

"14. Moratorium - (1) Subject to provisions of sub-sections (2) and (3), on the insolvency commencement date, the Adjudicating Authority shall by order declare moratorium for prohibiting all of the following, namely:-

(a) 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;

(b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) 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 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

Explanation : For the purposes of this sub-section, it is hereby clarified that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license, permit, registration, quota, concession, clearances or a similar grant or right during the moratorium period.

(2) The supply of essential goods or service to the

corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.

(2-A) Where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor has not paid dues arising from such supply during the moratorium period or in such circumstances as may be specified.

(3) The provisions of sub-section (1) shall not apply to

(a) such transactions, agreements or other arrangements as may be notified by the Central Government in consultation with any financial sector regulator or any other authority;

(b) a surety in a contract of guarantee to a corporate debtor.

(4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:

Provided that where at any time during the corporate insolvency resolution process period, if the Adjudicating Authority approves the resolution plan under sub-section (1) of Section 31 or passes an order for liquidation of corporate debtor under section 33, the moratorium *shall cease to have effect from the date of such approval or liquidation order, as the case may be."*

5. Regarding moratorium inter alia in respect of 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 to foreclose or enforce any security interest created by the Corporate debtor in respect of its property including any action under the SARFAESI Act. Whereas the guidelines issued by the 2015 RBI Master Circular says about the consequences of the declaration of corporate debtors as willful defaulter and as to put in place a system to disseminate credit information pertaining to willful defaulters for cautioning banks and financial institution so as to ensure that further bank finance is not made available to them. However, it will attract the detrimental effect on the scope of functioning of resolution professional as envisaged under the IBC. Further, the declaration of willful defaulter as per the RBI guidelines, though is not an action to foreclose, recover or enforce any security interest created by the corporate debtor, the declaration of willful defaulter is to interdict and conflict with the functioning of the resolution professional within the scope of the IBC.

Therefore, declaration in respect of the borrowing company must be construed to fall within the purview of moratorium provided under section 14 of IBC as held by the Hon'ble High Court of Calcutta. However, it will not be applicable to the Directors of company, since they are standing on a different footing.

6. Further, Section 14(2) of IBC says that the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period. Further, section 2(A) of IBC says that the resolution professional where the interim resolution professional or resolution professional, as the case may be, considers the supply of goods or services which are critical to protect and preserve the value of the corporate debtor and manage the operations of such corporate debtor as a going concern, then the supply of such goods or services shall not be terminated, suspended or interrupted during the period of moratorium, except where such corporate debtor failed to pay dues arising out of such supply. Sections 17 and 18 of IBC says about the management of affairs of corporate debtor by interim resolution professional and dues.

Therefore, the declaration of the corporate debtor as willful debtor is nothing to do with the affairs and duties of resolution professional. Therefore, the resolution professionals can act in accordance with the provisions under sections 17 and 18 and no where it provides the resolution professional can seek financial access from the financial institutions. Therefore the declaration of willful defaulter of the corporate debtors will not affect the management affairs of corporate debtors and duties of the interim resolution professionals.

7. Further, the apprehension of the resolution professional is that if the corporate debtor company is declared as willful defaulter it will spoil the reputation and goodwill of the company and would also stand as an impediment to potential buyers from proposing a Resolution Plan to revive/ take over the Corporate Debtor company. In fact, already the resolution professional had received many resolution plans from the interested persons. Further, if the resolution plan is approved and 3rd party has taken over the affairs of the Corporate Debtor Company as a going concern, the respondent will take steps, if any representation from the successful resolution

applicant, to declassify/remove corporate debtor company from the list of willful defaulters in terms of Clause 5.5.2 of the respondent Circular dated 11.08.2021. The Clause 5.5.2 of the respondent circular says that in cases where resolution plan has been approved, the branches should submit their recommendation for declassification/removal of company (non-individual borrowers) as Willful defaulter for approval by the Willful Defaulter Identification Committee based on the facts of each case. The order issued by the Identification Committee will be reviewed by Review Committee and the order will become final only after it is reviewed/confirmed by the Review Committee.

8. However, the promoter/guarantor of the company shall continue to be in the list of willful defaulters until he/she becomes eligible for removal from the willful default list on account of compromise/settlement of Bank's dues. Thus, it is clear that if resolution plan is approved by any 3rd party and on taking over the affairs of the corporate debtor company, the corporate debtor company can very well make a request to remove from the willful defaulters list. Further in view of the interim order passed by this

Court, the petitioner filed review before the Willful Defaulters Review Committee. The Willful Defaulter Identification Committee also passed an order dated 23.06.2022. Though, this Court can mold the relief by considering the subsequent events, this court cannot find any infirmity or illegality in the declaration of the petitioner company as willful defaulter dated 23.06.2021. Therefore, the contention raised by the petitioner cannot be countenanced and the writ petition is liable to be dismissed. Accordingly, this writ petition is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

03.07.2024

Index : Yes/No
Speaking/Non-Speaking order
Neutral Citation : Yes/No
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G.K.ILANTHIRAIYAN,J.
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To

The Chairman/General Manager,
The State Bank of India,
Willful Defaulter Identification Committee-II,
Stressed Assets Management Branch,
Red Cross Buildings, 32, Red Cross Road,
Egmore, Chennai-600 008.

W.P.No.19572 of 2021

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