IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.07.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY

C.R.P.(PD) No.1289 of 2021

Rohit Nath @ Rohit Rabindra Nath .. Petitioner

Vs.

KEB Hana Bank Ltd
No.29, Bannari Amman Towers,
4th Floor, Dr.Radhakrishnan Road,
Mylapore, Chennai 4 .. Respondent

Prayer: Civil revision petition filed to strike-off the proceedings in IBC SR No.2643 of 2020 resulting in consequential order dated 22.10.2020 pending on the file of the Debts Recovery Tribunal-II, Chennai.

For Petitioner : Ms.Iyengar Shubaranjani Ananth

For Respondent : Mr.P.Vinod Kumar

ORDER

(Made by the Hon'ble Chief Justice)

There is no merit in the petition and the entire exercise has been a complete waste of time by an admitted defaulter who tends to

believe that it is a right of an Indian citizen to obtain a loan in the name of a corporate entity and not show up at the time of repayment.

2. A yarn is sought to be spun out by referring to judgments which are utterly irrelevant in the context, provisions of the erstwhile Companies Act, 1956 and the salutary principle that all matters pertaining to a single transaction should be consolidated and taken up by one adjudicatory forum. Every trick to throw wool over the Court's eyes is resorted to in an irreverent attempt to prey on the Court's perceived ignorance of the tenets of corporate law.

3. Shorn of the irrelevant and the rubbish, the main issue involved is whether an individual, in his capacity as a guarantor in connection with credit facilities granted by a bank or financial institution to a corporate entity, may be proceeded against by way of insolvency proceedings under Section 95(1) of the Insolvency and Bankruptcy Code, 2016 before an appropriate Debts Recovery Tribunal.

4. In this case, a notice was issued on February 18, 2020 by the respondent bank under Rule 7(1) of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process of Personal Guarantors to Corporate Debtors) Rules, 2019. The notice was in accordance with Form B prescribed in the said Rules of 2019. The notice was addressed to the petitioner. It indicated the total quantum outstanding and appended all documents in support of the details set out in the prescribed form. To boot, the notice enclosed copies of the deeds of personal guarantee dated July 27, 2016, October 26, 2016, February 21, 2017 and June 5, 2017 and, in addition, other documents and deeds of indemnity.

5. In its fourth paragraph, the notice required the noticee "to unconditionally pay the unpaid debt in full within fourteen days from the receipt of this letter ...". Over the next few words in the said paragraph, the issuing bank put the noticee on notice that appropriate "insolvency resolution process, under the Code" would be initiated against the noticee.

6. Rule 7 of the said Rules of 2019 provides for an application by a creditor in certain circumstances. The entirety of the such Rule must be seen:

> "7. Application by creditor: - (1) A demand notice under clause (b) of sub-section (4) of section 95 shall be served on the guarantor demanding payment of the amount of default, in Form B.
>
> (2) The application under sub-section (1) of section 95 shall be submitted in Form C, along with a fee of two thousand rupees.
>
> (3) The creditor shall serve forthwith a copy of the application referred to in sub-rule (2) to the guarantor and the corporate debtor for whom the guarantor is a personal guarantor.
>
> (4) In case of a joint application, the creditors may nominate one amongst themselves to act on behalf of all the creditors."

7. As is evident from the first sub-rule, the notice is to be issued in Form B which is prescribed as a part of the Rules. There is no dispute that the prescribed form was adhered to. Again, it is self-evident that the noticee was aware of the intent and purpose of the notice and what the relevant notice obliged the noticee to do. True to the conduct of an Indian defaulter, the noticee responded with a

settlement suggestion. Indeed, the response to the notice was of such quality that the petitioner herein has been ashamed to include it as a part of the disclosed documents. However, what has been included with the documents filed is the bank's response of February 18, 2020 to the petitioner's earlier offer of settlement. The bank's response of February 18, 2020 in such regard refers to the meagre payment that had been made by the borrower and reiterated the bank's stand to proceed against the borrower, the guarantor and the secured assets.

8. It is in such circumstances that the insolvency proceedings came to be instituted before the Debts Recovery Tribunal, Chennai and it was filed as per Form C in accordance with the requirement of Rule 7(2) of the said Rules of 2019.

9. Rule 3 of the said Rules of 2019 is the definitions provision for the said Rules. The expression "Adjudicating Authority" has been defined as follows:

"3.Definitions.-(1) In these rules, unless the context otherwise requires, -

(a) "Adjudicating Authority" means -

(i) for the purpose of section 60, the National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 (18 of 2013); or

(ii) in cases other than sub-clause (i), the Debt Recovery Tribunal established under sub-section (1-A) of section 3 of the Recovery of Debts and Bankruptcy Act, 1993 (51 of 1993);

(b) ..."

10. Since such rules of Rules, 2019 had been notified upon being published in the Gazette of India on November 15, 2019, there can be no doubt that the Adjudicating Authority in respect of a guarantor who has furnished a personal guarantee in connection with credit facilities obtained by a corporate entity, would be the appropriate Debts Recovery Tribunal.

11. The statutory source of authority for carrying such application to the Debts Recovery Tribunal is found in Section 95 of the Code of 2016. Section 95 is included in Chapter III of Part III of

the Code. Part III of the Code is intituled "Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms". The first Chapter in such Part contains the preliminary provisions including the definitions section. The second Chapter of such Part carries the heading "Fresh Start Process" and begins with Section 80, the first sub-section whereof envisages that a debtor, who is unable to pay his debt and fulfils the conditions specified in the provision, would be entitled to make an application for a fresh start for discharge of his qualifying debt under such Chapter. Chapter III of Part III of the said Code begins with Section 94. Section 94(1) permits a debtor who commits a default to apply personally or through a resolution professional to the adjudicating authority for initiating an insolvency resolution process. Section 95 of the Code pertains to applications by creditors to initiate the insolvency resolution process. Indeed, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) has been rechristened as Recovery of Debts and Bankruptcy Act possibly because the Debts Recovery Tribunal now also takes up insolvency and bankruptcy matters.

12. Section 79(1) of the Code defines the expression

"Adjudicating Authority" wherever such expression appears in Part III of the Code:

> "79. Definitions.
>
> In this Part, unless the context otherwise requires, -
>
> (1) "Adjudicating Authority" means the Debt Recovery Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);
>
> (2) ...."

Thus, a creditor may apply to the jurisdictional Debts Recovery Tribunal for initiating an insolvency resolution process against appropriate persons under Section 95 of the Code. Section 60 of the Code, which is included in Part II thereof, identifies the adjudicatory authority in relation to insolvency resolution and liquidation for corporate persons. Section 60(1) of the Code mandates that insolvency resolution and liquidation for corporate persons, including corporate debtors and personal guarantors, may be brought before the National Company Law Tribunal having territorial jurisdiction over the places where the registered office of the corporate person is located. However, a "corporate debtor" is defined in Section 3(8) of the Code to mean a corporate person who owes a debt to any person

and a "corporate person", in turn, is defined in Section 3(7) of the Code to mean a company, a limited liability partnership firm or any person incorporated with limited liability under any law for the time being in force but not including any financial service provider.

13. Thus, by no stretch of imagination, may a human individual, whether as a guarantor or otherwise, be seen to be a corporate debtor or a corporate person within the definitions ascribed to such expressions in the Code.

14. Section 95(1) of the Code read with Section 79(1) thereof permits a creditor to apply to any Debts Recovery Tribunal for initiating an insolvency resolution process under such provision. "Debtor" is defined in the inclusive definition in Part III of the Code as including a judgment-debtor.

15. Section 95(1) of the Code, in its ordinary form, allows a creditor to initiate an insolvency resolution process. It does not specify as to who the debtor may be. The petitioner relies on Section 95(2) of the Code which covers partnership debts and conceives of an

insolvency resolution process being initiated against a partnership firm or any one or more partners of the firm. The attempt of the petitioner is to restrict the operation of Section 95(1) – and, thus, the entirety of Section 95 of the Code – to matters pertaining to partnership debts and against the concerned partnership firm or any one or more of its partners. The proverbial red herring is in play.

16. Such a construction cannot be given. If Section 95 were to be confined to only partnership debts or construed to permit insolvency resolution processes to be initiated only against the relevant firms or their partners, it would render sub-section (1) redundant. The most rudimentary tenets of statutory interpretation do not permit any provision, and especially an independent provision as contained in a whole sub-section, to be regarded otiose, unless there are obvious compelling reasons.

17. The petitioner seeks to send the Court on a wild goose chase by seeking to take advantage of the perceived anomaly upon the Code, like the Companies Act, 2013, being notified and implemented in stages. That Section 95(1) of the Code applies to any

debtor, other than debtors against whom an insolvency resolution process may be initiated under other specific provisions, is apparent.

18. The construction as suggested by the petitioner would also be impermissible, inter alia, in the light of Section 94 which permits an individual debtor to initiate an insolvency resolution process and the use of the general word 'debtor' therein, without it being confined to certain classes of persons or partners of partnership firms. Indeed, Section 243 of the Code, which has not yet been notified, repeals the Presidency Towns Insolvency Act, 1909 and Provincial Insolvency Act, 1920. The contemplated repeal of such statutes, read with the avowed object of the Code, makes the position abundantly clear and completely beyond doubt.

19. The long title of the Code indicates that it is, "an act to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner...". When a statute proclaims to be the consolidating and amending enactment, it is a complete Code unto itself and all matters pertaining to the subjects included would

be governed by such Code. The three classes of persons indicated to be governed by the Code are corporate persons, partnership firms and individuals.

20. In addition, Section 2 of the Code indicates how the provisions of the Code would operate in respect of the several classes of persons to which the Code applies. One such class is covered by Clause (e) pertaining to personal guarantors to corporate debtors. Section 2 of the Code was notified with effect from November 1, 2016 and Clause (e) has been enforced with effect from December 1, 2019 insofar as it relates to personal guarantors to corporate debtors vide S.O. 4126(E) dated November 15, 2019. The said Rules of 2019 were also given effect to around the same time.

21. Thus, notwithstanding it still being permissible to carry a personal insolvency case under the 1909 or 1920 statute, whichever is applicable, insolvency proceedings against guarantors to corporate debtors may not be carried under the statutes of 1909 or 1920 notwithstanding Section 243 of the Code not having been notified. That is because of the overriding operation of the Code under Section

238 thereof and Section 2(c) of the Code having been notified. There are other indicators in the body of the Code that point to the Debts Recovery Tribunal being an appropriate authority as in the present case. Section 179 of the Code, for instance, identifies the adjudicating authority for entertaining insolvency proceedings pertaining to individuals and partnership firms. Sub-section (1) of such provision mandates that subject to Section 60 of the Code, the adjudicating authority in relation to insolvency matters pertaining to individuals and firms shall be the Debts Recovery Tribunal having territorial jurisdiction.

22. The text of Section 60(2) discloses that Section 60 of the Code would apply to an individual only if there is a corporate insolvency resolution process pertaining to the corporate entity which is the principal debtor, that has been filed or commenced. In other words, in case of company 'A' being the principal debtor and an individual 'P' the guarantor promising repayment of the credit facilities obtained by 'A', if a corporate insolvency resolution process is initiated under the provisions of the Code pertaining to company 'A', the insolvency resolution process pertaining to guarantor 'P'

would per force be before the same adjudicating authority, viz., the National Company Law Tribunal. But, where there is no corporate insolvency resolution process initiated in respect of company 'A', insolvency proceedings pertaining to guarantor 'P' must necessarily be carried only to the jurisdictional Debts Recovery Tribunal and not to any other forum. To repeat, the provisions of the Acts of 1909 and 1920 will have no manner of application to guarantors who have furnished guarantees in connection with credit facilities obtained by corporate entities.

23. In any event, in view of Section 128 of the Contract Act, 1872 the liability of a guarantor is co-extensive with that of the principal-debtor, unless it is otherwise provided by the contract. The petitioner does not claim that there is any agreement or clause present in any agreement that obliges the creditor-bank to exhaust its remedies against the concerned corporate entity before proceeding against the guarantor. The rule as embodied in Section 128 of the Act of 1872 will apply in equal measure to a guarantor who has furnished a guarantee in connection with any credit facilities obtained by a corporate entity.

24. Accordingly, the petition is found to be completely devoid of merit and nothing but a kite-flying exercise to waste time and dodge the inevitable. For all of the petitioner's efforts, the petitioner will pay costs assessed at Rs.50,000/- (Rupees Fifty Thousand only) to the respondent bank which the respondent bank will be entitled to recover in course of the insolvency resolution process initiated before the appropriate Debts Recovery Tribunal.

C.R.P.No.1259 of 2021 is dismissed. CMP No.10079 of 2021 is closed.

(S.B., CJ.) (S.K.R., J.)
28.07.2021

Index : Yes

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To:

The Debts Recovery Tribunal-II, Chennai.

THE HON'BLE CHIEF JUSTICE
AND
SENTHILKUMAR RAMAMOORTHY, J.

(kpl)

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