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WPO 1548 of 2021
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

ADARSH JHUNJHUNJWALA
VERSUS
STATE BANK OF INDIA & ANR.

BEFORE:
The Hon'ble JUSTICE RAJASEKHAR MANTHA
Date : 24th December,2021.

APPEARANCE:
Mr. Rajarshi Dutta,Adv.
Mr. V.V.V. Sastry,Adv.
Mr. Tridib Bose,Adv.

Mr. Om Narayan Rai,Adv.

The Court :- The writ petitioner seeks intervention of this Court with an order dated 18th October, 2021 passed by the Reviewing Authority under the Wilful Dafaulter proceedings of the State Bank of India. The bank has already communicated the order to RBI and CIBIL and other sites.

The brief facts are, inter alia, that M/s. one JVL Agro Industries Ltd was a constituent of the bank and enjoyed diverse credit facilities. The petitioner and his family admittedly controlled the majority shareholding in the JVL Agro Industries Ltd. The latter was accustomed to act as per wishes and dictates of the petitioner. He is also a promoter/ director and was the main person behind the corporate debtor, M/s. JVL Agro Industries Ltd.

Insolvency proceedings, being CP (IB) No. 223/ALD/2018 came to be instituted under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC)

against M/s. JVL. The resolution plan failed and the company was directed to be wound up.

The bank issued a show-cause to the petitioner under the Wilful Defaulter Guidelines on 7th November, 2019. During the pendency of the said proceedings, an application under Section 95 of the IBC, being C.P No. (IB) 58/ALD/2021 was filed by the Bank against the writ petitioner around 4th October, 2021. Thereafter the final order of the review committee was passed on18th October, 2021 declaring him a willful defaulter.

The writ petitioner submits that he is entitled to stay of the aforesaid order 18th October, 2021, in view of the moratorium under Section 96 of the 2016 Act. Reliance is placed upon a decision dated **4.3.2021** of Co-ordinate Bench in **Ayan Mallick & Anr. vs. SBI** being **WPO No. 23 of 2021**, particularly in paragraph 22 thereof.

It is further argued that if the order of the Review Committee is at large or given effect to, it would defeat the object and purpose of the IBC proceedings against him. The efforts of the writ petitioner to square off the debt would stand seriously hampered and this would be counter productive for the bank as well.

Mr. Om Narayan Rai, learned Counsel appearing for the State Bank of India submits that firstly, proceedings under wilful defaulter guidelines are not those that are covered under the moratorium under Section 96 of the Act. It is submitted that moratorium in Sectioin 96 operates only against the “debt” of a respondent co-obligant. In Ayan Mallick decision (supra) the scope of a moratorium under Section 14 of the IBC was being considered. A moratorium

under Section 14 applies to a "corporate debtor", as opposed to a moratorium under Section 96 which is against the "debt".

Reliance is placed on a decision of the Supreme Court in the case of **SBI vs. V. Ramakrishnan & Ors.** reported in **(2018) 17 SCC 394**. Paragraph 26 is placed where the distinction between a moratorium under Section 96 and the moratorium under Section 14 have been clearly indicated. Therefore, the petitioner cannot get the benefit of the decision of the Ayan Mallick in the facts of the case. The distinction between the two categories of moratorium and was not subject matter of the said decision.

It is further submitted that given their object and purpose, Wilful Defaulter Proceedings, have got nothing to do with the recovery of debt. Reference is made to a decision of this Court in **Suresh Kumar Patni & Ors. vs. SBI reported** in **AIR 2021 Calcutta 249**, particularly paragraphs 25,26 and 29 thereof.

In reply, Mr. Rajarshi Dutta, learned Counsel appearing for the petitioner would refer to paragraphs 18 and 20 of the **Ramkrishnan decision (supra)** where it was held that a guarantor co-obligant is not entitled to the benefit of the moratorium. It is submitted that the said judgment cannot be applied in the instant case since it was rendered at the time when the Part III of the IBC 2016 was not notified.

This Court has carefully considered the rival contentions of the parties. The argument that the bank having instituted proceedings under the wilful defaulter guidelines could not and/or should have instituted proceedings

under Section 95 of the IBC is fallacious. There is, in fact, no bar to proceed parallelly under the two laws. The purpose of the two proceedings is completely different. It is essentially for a creditor to take a call when and what proceedings it wants to take against a borrower constituent.

Let us now address the moot question whether the scope of Moratorium U/s. 14 is the same as Section 96 of the IBC. Sections 14 and 96 of the IBC are set out hereinbelow:-

> "***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-
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> (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;
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> (b) transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
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> (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);
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> (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.
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> (2) 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.
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> (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.
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> (4) The order of moratorium shall have effect from the date of such order till the completion of the corporate insolvency resolution process:
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> 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."

> "***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."

A plain reading of the two Sections would clearly indicate that the Moratorium U/s. 14 aims at protecting the "Corporate Debtor" and none else. The object and purpose is to protect the image of the juristic person to enable smooth passage of a Resolution Plan. The value of the Corporate Debtor must be protected and kept away from the acts and omissions of its promoters and shareholders. This would make the CD more attractive and would generate more interest in prospective suitors. The distinction between the two Sections has been dealt with in the decision of the Supreme Court in the case of **SBI Vs. Ramakrishnan** reported in **(2018) 17 SCC 394** Paragraphs **20, 26, 26(1) and 26(2)** are set out herein below.

> **"20.** Section 14 refers to four matters that may be prohibited once the moratorium comes into effect. In each of the matters referred to, be it institution or continuation of proceedings, the transferring, encumbering or alienating of assets, action to recover security interest, or recovery of property by an owner which is in possession of the corporate debtor, what is conspicuous by its absence is any mention of the personal guarantor. Indeed, the corporate debtor and the corporate debtor alone is referred to in the said section. A plain reading of the said section, therefore, leads to the conclusion that the moratorium referred to in Section 14 can have no manner of application to personal guarantors of a corporate debtor.

26. We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a personal guarantor. When an application is filed *under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. (Emphasis added)* 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 these sections is far greater than that of Section 14 in that pending legal proceedings in respect of the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 is for a reason.

26.1. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases, personal guarantees are given by Directors who are in management of the companies. The object of the Code is not to allow such guarantors to escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However, insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them. And such guarantors may be complete strangers to the debtor — often it could be a personal friend. It is for this reason that the moratorium mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.

26.2. We may hasten to add that it is open to us to mark the difference in language between Sections 14 and 96 and 101, even though Sections 96 and 101 have not yet been brought into force. This is for the reason, as has been held in *State of Kerala* v. *Mar Appraem Kuri Co. Ltd.* [*State of Kerala* v. *Mar Appraem Kuri Co. Ltd.*, (2012) 7 SCC 106 : (2012) 4 SCC (Civ) 69] , that a law "made" by the legislature is a law on the statute book even though it may not have been brought into force. The said judgment states : (SCC pp. 141-42, paras 79-81)

"*79.* The proviso to Article 254(2) provides that a law *made* by the State Legislature with the President's assent shall not prevent Parliament from *making* at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so *made* by a State Legislature. Thus, Parliament need not wait for the law made by the State Legislature with the President's assent to be brought into force as it can repeal, amend, vary or add to the assented State law no sooner it is made or enacted. We see no justification for inhibiting Parliament from repealing, amending or varying any State legislation, which has received the President's assent, overriding within the State's territory, an earlier parliamentary enactment in the concurrent sphere, *before it is brought into force*. Parliament can repeal, amend, or vary such State law no sooner it is assented to by the President and that it need not wait till such assented-to State law is brought into force. This view finds support in the judgment of this Court in *Tulloch* [*State of Orissa* v. *M.A. Tulloch & Co.*, AIR 1964 SC 1284 : (1964) 4 SCR 461] .

> *80*. Lastly, the definitions of the expressions "*laws in force*" in Article 13(3)(*b*) and Article 372(3) Explanation I and "existing law" in Article 366(10) show that the laws in force include laws passed or *made* by a legislature before the commencement of the Constitution and not repealed, notwithstanding that any such law may not be in operation at all. Thus, the definition of the expression "laws in force" in Article 13(3)(*b*) and Article 372(3) Explanation I and the definition of the expression "existing law" in Article 366(10) demolish the argument of the State of Kerala that a law has not been *made* for the purposes of Article 254, unless it is enforced. The expression "existing law" finds place in Article 254. In *Edward Mills Co. Ltd.* v. *State of Ajmer* [*Edward Mills Co. Ltd.* v. *State of Ajmer*, AIR 1955 SC 25] , this Court has held that there is no difference between an "existing law" and a "law in force".
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> *81*. Applying the tests enumerated hereinabove, we hold that the Kerala Chitties Act, 1975 became void on the making of the Chit Funds Act, 1982 on 19-8-1982, (when it received the assent of the President and got published in the Official Gazette) as the Central 1982 Act intended to cover the entire field with regard to the conduct of the chits and *further* that the State Finance Act 7 of 2002, introducing Section 4(1)(*a*) into the State 1975 Act, was void as the State Legislature was denuded of its authority to enact the said Finance Act 7 of 2002, except under Article 254(2), after the (Central) Chit Funds Act, 1982 occupied the entire field as envisaged in Article 254(1) of the Constitution."
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> (emphasis in original)

The very purpose of separation of corporate insolvency under Part II of the IBC from individual insolvency under Part III must be understood. They are separate and distinct and aim to achieve different ends. The principles applied the incorporate insolvency cannot be applied to personal insolvency. It is essentially for this purpose that this Legislature has applied the moratorium under Section 14 to the corporate debtor as a whole and moratorium under Section 96 is restictively applied only to the debt. The object and purpose of a moratorium is to invite resolution applicants for revival of corporate debtors under Part II. Under Part III however the purpose of moratorium is to facilitate repayment/resolution of the debt to all categories of debtors.

The object and purpose of the Master Circular for willful default is dissemination credit information of the willful defaulter so that other lenders are cautioned and do not lend any further money. It is also aim at preventing further fraud and loss of public money. A willful defaulter proceeding is not for recovery of debt. The repayment of debt will not ipso facto extinguish the default. This has to be assist and applied in the facts of the instant case. Like a moratorium is under the IBC is not aimed at letting a wrong doer to get away as held by the Supreme Court in the case of **Manish Kumar vs. Union of India** reported in **2021 SCC OnLine page 38**.

In the backdrop of the above this Court is inclined to accept the argument of Mr. Rai for the bank that the moratorium in respect of debt is restricted to proceedings of recovery of any debt against the respondent "in person". This is in harmony with dicta at paragraph 20 in the Ramakrishnan Case (supra). To stay wilful defaulter proceedings, criminal proceeding or quasi criminal proceeding under any Moratorium under Section 96 would defeat the object and purpose of the part III of the IBC. Stay of such collateral proceedings would also result in putting a premium on the impropriety and illegality for which the proceedings under Section 95 are initiated. The argument of Mr. Rajarshi Dutta that the continuation of the wilful defaulter proceedings would seriously hamper and impede his client's ability to make good repay or come up with; a scheme to satisfy creditors is fallacious. Such stay would also amount to permitting a wrong doer to commit a further wrongs

for the purpose of remedying an existing wrong. All lenders are required to be put on notice of the willful default who to prevent further erosion of public finances. The observation in Para 22 do not apply in this instant case as have not been applied in the conclusion of the said decision. It appears to this Court that the Ramakrishnan decision has not been placed before the Coordinate Bench in the Ayan Mallick case (supra). As already stated earlier any moratorium under the IBC cannot permit a wrong doer to continue to such doing.

This Court in the Patni decision (supra) has addressed the right/responsibility of the bank to take criminal action against a defaulter borrower who has been identified as a defaulting borrower. The purpose behind the said clause 4.3 of the wilful defaulter guidelines, as dealt with in the Patni decision (supra) is essentially to put the public at large on notice of the financial conduct of the petitioner. Paragraph 61 of the decision of the Supreme Court reported in (2013) 7 SCC 369 is set out hereinbelow.

> **"61.** We do not also find any force in the submission of Mr Bhaskar P. Gupta that the Master Circular has penal consequences and, therefore, has to be literally and strictly construed. Clause 4.3 of the Master Circular, which contemplates criminal action by banks/financial institutions, is extracted hereinbelow:
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> > "**4.3. *Criminal action by banks/financial institutions***.—It is essential to recognise that there is scope even under the exiting legislations to initiate criminal action against wilful defaulters depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the Penal Code, 1860 (IPC), 1860. Banks/Fls are, therefore, advised to seriously and promptly consider initiating criminal action against wilful defaulters or wrong certification by borrowers, wherever considered necessary, based on the facts and circumstances of each case under the above provisions of IPC to comply with our instructions and the recommendations of JPC.

> It should also be ensured that the penal provisions are used effectively and determinedly but after careful consideration and due caution. Towards this end, banks/Fls are advised to put in place a transparent mechanism, with the approval of their Board, for initiating criminal proceedings based on the facts of individual case."
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> All that the aforesaid Clause 4.3 of the Master Circular states is that there is scope even under the exiting legislations to initiate criminal action against wilful defaulters depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the Penal Code, 1860 and the banks and financial institutions are strictly advised to seriously and promptly consider initiating criminal action based on the facts and circumstances of each case under the above provisions of IPC. Thus, the Master Circular by itself does not have penal consequences, whereas Sections 403 and 415 IPC have penal consequences. The provisions of Sections 403 and 415 IPC obviously have to be strictly construed as these are penal provisions and will get attracted depending on the facts and circumstances of each case, but the provisions of the Master Circular need not be strictly construed. As we have held, the Master Circular has to be construed not literally but in its context and the words used in the definition of "wilful defaulter" in the Master Circular have to draw their meaning from the context in which the Master Circular has been issued."

The same is more of a responsibility and obligation than a right. Recovery proceedings or proceedings under Section 96 of the IBC, 2016, or the borrower's success therein, would not absolve the borrower who has been found to be a wilful defaulter. The willful defaulter proceedings only aims at dissemination of information. The bank's responsibility to institute criminal proceedings would also be interfered with if the arguments of the petitioners are accepted.

For the reasons stated hereinabove, this Court is not inclined to entertain the writ petition.

WPO 1548 of 2021 shall stand dismissed.

There shall however be no order as to costs.

Before parting with the case, this Court wishes to record appreciation for the spirited efforts and skillful arguments of Mr. Rajarshi Dutta, Mr. V. V. V. Sastry and Mr. Tridib Bose, learned Advocates for the petitioner.

(RAJASEKHAR MANTHA, J.)

S.Chandra