

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.NAGARESH

WEDNESDAY, THE 16<sup>TH</sup> DAY OF FEBRUARY 2022/27TH MAGHA, 1943

WP(C) NO. 3081 OF 2022

PETITIONERS:

- 1      JOHN ZACHARIAH  
         AGED 56 YEARS  
         MARIKUDIYIL HOUSE, PAZHANGANAD,  
         KIZHAKKAMBALAM, ERNAKULAM 683101
- 2      MRS REENA PAUL  
         MARIKUDIYIL HOUSE, PAZHANGANAD,  
         KIZHAKKAMBALAM, ERNAKULAM 683101
- 3      MRS ANNU MATHEW  
         MARIKUDIYIL HOUSE, PAZHANGANAD,  
         KIZHAKKAMBALAM, ERNAKULAM 683101
- 4      MR MATHEW JOHN  
         MARIKUDIYIL HOUSE, PAZHANGANAD,  
         KIZHAKKAMBALAM, ERNAKULAM 683101
- 5      MR K.G PAUL  
         HOUSE NO. D-31, ANNA NAGAR (EAST),  
         CHENNAI 600 102

BY ADVS.

G.HARIKUMAR (GOPINATHAN NAIR)

AKHIL SURESH

RESPONDENTS:

- 1      UNION OF INDIA  
         MINISTRY OF CORPORATE AFFAIRS, LOK NAYIK BHAVAN,  
         3RD FLOOR, C WING, KHAN MARKET,  
         NEW DELHI 110 003 REPRESENTED BY ITS SECRETARY
- 2      NATIONAL COMPANY LAW TRIBUNAL  
         KOCHI BENCH, COMPANY LAW BHAVAN BMC ROAD,  
         THRIKKAKARA P.S, KAKKANAD, KOCHI 682 021

3        J M FINANCIAL ASSET RECONSTRUCTION COMPANY  
         LIMITED  
         7TH FLOOR, CNERGY, APPASAHEB MARATHE MARG,  
         PRABHADEVI, MUMBAI 400 025

SRI.S.MANU, ASGI

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR  
ADMISSION ON 16.02.2022, THE COURT ON THE SAME DAY  
DELIVERED THE FOLLOWING:

**N. NAGARESH, J.**

.....  
W.P.(C) No.3081 of 2022  
.....

*Dated this the 16<sup>th</sup> day of February, 2022*

**J U D G M E N T**

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The petitioners are personal Guarantors to the Corporate Debtor Unitek Power Solutions India Limited. The petitioners seek to quash Ext.P11 Order of the National Company Law Tribunal, Kochi Bench. The petitioners further seek to adjudicate CP(IBC)13/KOB/2021, CP(IBC)/14/KOB/2021, CP(IBC)/15/KOB/2021, CP(IBC)/16/KOB/2021, CP(IBC)/17/KOB/2021, CP(IBC)/19/KOB/2021 *de novo* after considering the submissions made by the petitioners in their counter affidavit.

2. The petitioners state that the Corporate Debtor availed certain financial facilities from the Federal Bank Limited. The facilities were secured by the 1<sup>st</sup> petitioner

executing several agreements of guarantee. The agreement of guarantee executed by the 1<sup>st</sup> petitioner stated that the liability shall not exceed a sum of ₹18 Crores. The Corporate Debtor failed to service its debts. By a registered assignment agreement, the financial assets of the Corporate Debtor along with all the rights, title, interest and underlying security interest, were assigned by the Federal Bank Limited to the 3<sup>rd</sup> respondent, which is an asset reconstruction company.

3. Consequently, the 3<sup>rd</sup> respondent became a secured creditor to the Corporate Debtor. The 3<sup>rd</sup> respondent filed application under Section 7 of the Insolvency and Bankruptcy Code as CP/91/IB/2018 before the National Company Law Tribunal, Chennai. The said CP was allowed. The petitioners state that the applications filed before the NCLT against the personal guarantor were *prima facie* not maintainable since the claims were barred by limitation. According to the petitioners, by 23.06.2015, the claim against the Company stands extinguished in law. Without considering the same, the NCLT admitted the

application filed by the 3<sup>rd</sup> respondent.

4. The order of the Tribunal was challenged by the Corporate Debtor filing OP(C) No.268 of 2019 before this Court. This Court dismissed the said OP(C) as per order dated 25.09.2019. Though the Corporate Debtor raised the ground of limitation, this Court held that the Corporate Debtor had at no point of time raised the question of limitation before the NCLT, Chennai. Subsequently, the NCLT, as per Ext.P7 order dated 06.12.2019, directed liquidation of the Corporate Debtor.

5. The 3<sup>rd</sup> respondent had filed application under Section 95(1) of the Insolvency and Bankruptcy Code against the petitioners herein before the NCLT, Kochi Bench for initiating insolvency resolution process. Petitioners 1, 2, 4, 5 and 6 filed their counter affidavit. The petitioners submitted before the Tribunal that one of the respondents, Susan Zachariah, passed away even before filing of the applications against the Corporate Debtor. Without considering the submissions made by the petitioners, the NCLT passed

Ext.P11 order dated 27.09.2021 and appointed an Insolvency Resolution Professional.

6. The petitioners challenge Ext.P11 order. The petitioners state that the impugned Ext.P11 order demonstrates clear non-application of mind. This is evident from the fact that proceedings were initiated against a dead person. The petitioners further contended that the principles of *audi alteram partem* were violated by the Tribunal. The petitioners submit that the proceedings against the personal guarantors are not maintainable in law as the claim is clearly barred by the law of limitation. Furthermore, the personal guarantee was limited to an amount of ₹18 Crores.

7. The petitioners challenge Sections 95, 97, 99 and 100 of the Insolvency and Bankruptcy Code as arbitrary, discriminatory and violative of Article 14 of the Constitution of India. According to the petitioners, the procedure prescribed thereunder confers on the Resolution Professional the powers of a judicial authority and the role of the Tribunal is reduced to a mere rubber stamp. The net result is that legal

issues on the claims will have to be addressed solely before the Resolution Professional who is not even a judicial authority.

8. The Assistant Solicitor General of India, who appeared for the 1<sup>st</sup> respondent, submitted that writ petition is not maintainable against Ext.P11 order of the National Company Law Tribunal since the IBC and Companies Act, 2013 provide for efficacious alternative remedy.

9. I have heard the learned counsel for the petitioners and the learned Assistant Solicitor General of India representing the 1<sup>st</sup> respondent.

10. The prime arguments of the petitioners are based on non-application of mind by the National Company Law Tribunal and the law of limitation. Section 61 of the Insolvency and Bankruptcy Code provides that notwithstanding anything to the contrary contained under the Companies Act 2013, any person aggrieved by the order of the Adjudicating Authority under this part may prefer an appeal to the National Company Law Appellate Tribunal. The

petitioners, therefore, have an efficacious alternate remedy. The proceedings under challenge are under the Insolvency and Bankruptcy Code. When the Code itself provides for an appellate remedy, this Court would not be justified in adjudicating on the sustainability of the order passed by the NCLT in writ proceedings.

11. The learned counsel for the petitioners would urge that constitutionality of Sections 95, 97, 99 and 100 of the Insolvency and Bankruptcy Code is under challenge and therefore, this Court would be justified in exercising its jurisdiction under Article 226 of the Constitution of India. The petitioners would contend that Sections 95, 97, 99 and 100 of the Insolvency and Bankruptcy Code are unconstitutional for the reason that the procedure prescribed thereunder confers on the Resolution Professional the powers of a judicial authority and the role of the Tribunal is reduced to a mere rubber stamp. The statute does not provide a fair opportunity to the Debtors/Personal Guarantors to have a fair adjudication. Sections 95 and 100 leave no scope for any



adjudication by the Tribunal, contend the petitioners.

12. Sections 95, 97, 99 and 100 are included in Chapter III, Part III of the IBC under the head Insolvency Resolution Process (IRP). Sections 94 and 95 deal with the applications by debtor and creditor respectively to initiate Insolvency Resolution Process. As per Section 95, a Creditor may apply to the Adjudicating Authority to initiate IRP. As per Section 97, the Adjudicating Authority may direct the Board to nominate a Resolution Professional. The Adjudicating Authority is the appointing authority in respect of Resolution Professional.

13. Section 99 requires the Resolution Professional to submit a recommendation either to approve or reject the application to initiate IRP. The Resolution Professional has to give reasons in support of his recommendations. The Adjudicating Authority, under Section 100, is to decide whether to admit or reject the application for IRP. From a reading of Chapter III, Part III of the IBC, it is obvious that in the matter of initiating an IRP, the role of the Resolution

Professional is limited to making appropriate recommendations to the Adjudicating Authority.

14. The Resolution Professional is required to give reasons in support of his recommendations. The Adjudicating Authority is the body which takes final decision in the matter. The Adjudicating Authority is not bound by the recommendation made by the Resolution Professional. In fact, a reading of other provisions in the IBC would make it abundantly clear that in the matter of issuing public notices inviting claims from the creditors and approving or rejecting repayment plan as also in passing Discharge Order, it is the Adjudicating Authority, who is the decision making authority, even though the Adjudicating Authority may not be justified in interfering with commercial wisdom of the Committee of Creditors.

15. The Hon'ble Apex Court has held in ***Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta and others*** [(2021) 7 SCC 209] that merely because a duty has been imposed on Resolution Professional, it does not mean that the jurisdiction

of NCLT is circumscribed. The argument of the petitioners that the role of Adjudicating Authority is reduced to that of a rubber stamp under the context of Sections 95, 97, 99 and 100 of the IBC, is hence not factually correct. This Court finds no illegality or unconstitutionality in Sections 95, 97, 99 or 100 of the IBC.

The writ petition therefore fails and it is accordingly dismissed. However, the petitioners are granted one month's time from today to approach the NCLAT, Chennai for redressal of their grievances. The implementation of Ext.P11 should stand deferred for a period of one month.

Sd/-  
**N. NAGARESH, JUDGE**

aks/15.02.2022

APPENDIX OF WP(C) 3081/2022

PETITIONER'S EXHIBITS

Exhibit P1	A TRUE COPY OF AGREEMENT OF GUARANTEE DATED 27-02-2010
Exhibit P2	A TRUE COPY OF ASSIGNMENT AGREEMENT REGISTERED AS DOCUMENT NO. 1405/2013 OF CENTRAL CHENNAI SRO, DATED 26-03-2013
Exhibit P3	A TRUE COPY OF ORDER OF THE NATIONAL COMPANY LAW TRIBUNAL, CHENNAI IN IB NO. CP /91/1B/2018 DATED 1-1-2019
Exhibit P4	A TRUE COPY OF THE AFFIDAVIT DATED 09-07-2018
Exhibit P5	A TRUE COPY OF ORDER IN OP(C) NO. 268 OF 2019 DATED 25-09-2019
Exhibit P6	A TRUE COPY OF ORDER OF THE SUPREME COURT IN SLP NO 26294/2019 DATED 13-11-2019
Exhibit P7	A TRUE COPY OF ORDER OF LIQUIDATION PASSED BY THE NCLT KOCHI BENCH DATED 6-12-2019 IN MA 33/KOB/2019
Exhibit P8(A)	A TRUE COPY OF THE APPLICATION FILED AGAINST THE 1ST PETITIONER NUMBERED AS S CP(IBC)/13/KOB/2021 WITHOUT ANNEXURES
Exhibit P8(B)	A TRUE COPY OF THE APPLICATION FILED AGAINST THE 2ND PETITIONER NUMBERED AS CP(IBC)/15/KOB/2021 WITHOUT ANNEXURES
Exhibit P8 C	A TRUE COPY OF THE APPLICATION FILED AGAINST THE 3RD PETITIONER NUMBERED AS CP(IBC)/16/KOB/2021 WITHOUT ANNEXURES
Exhibit P8 D	A TRUE COPY OF THE APPLICATION FILED AGAINST THE 4TH PETITIONER NUMBERED AS CP(IBC)/17/KOB/2021 WITHOUT ANNEXURES
Exhibit P8 E	A TRUE COPY OF THE APPLICATION FILED AGAINST THE 5TH PETITIONER NUMBERED AS CP(IBC)/19/KOB/2021 WITHOUT ANNEXURES

Exhibit P9 A	A TRUE COPY OF COUNTER AFFIDAVIT FILED BY THE 1ST PETITIONER TO THE INSOLVENCY APPLICATIONS FILED UNDER SECTION 95(1)
Exhibit P9B	A TRUE COPY OF COUNTER AFFIDAVIT FILED BY THE 2ND PETITIONER TO THE INSOLVENCY APPLICATIONS FILED UNDER SECTION 95(1)
Exhibit P9C	A TRUE COPY OF COUNTER AFFIDAVIT FILED BY THE 3RD PETITIONER TO THE INSOLVENCY APPLICATIONS FILED UNDER SECTION 95(1)
Exhibit P9D	A TRUE COPY OF COUNTER AFFIDAVIT FILED BY THE 4TH PETITIONER TO THE INSOLVENCY APPLICATIONS FILED UNDER SECTION 95(1)
Exhibit P9E	A TRUE COPY OF COUNTER AFFIDAVIT FILED BY THE 5TH PETITIONER TO THE INSOLVENCY APPLICATIONS FILED UNDER SECTION 95(1)
Exhibit P10	A TRUE COPY OF DEATH CERTIFICATE OF THE SUSAN ZACHARIAH DATED 11-08-2021
Exhibit P11	A TRUE COPY OF IMPUGNED ORDER PASSED BY THE 2ND RESPONDENT IN CP (IBC)13/KOB/2021/CP(IBC)/14/KOB/2021/C F(IBC)/15/KOB/2021,CP(IBC)/16/KOB/2021 / CP(IBC)/17/KOB/2021,CP(IBC)/19/KOB/2021 DATED 27-09-2021 DATED 11-08-2021
Exhibit P12	A TRUE COPY OF INTERIM ORDER DATED 15-11-2021 IN WRIT PETITION (CIVIL) NO. 25290/2021 PASSED BY THIS HON'BLE COURT
Exhibit P13	A TRUE COPY OF IA NO. 01/2022 IN WRIT PETITION (CIVIL) NO. 25290/2021 FILED BEFORE THIS HON'BLE COURT.
Exhibit P14	A TRUE COPY OF THE JUDGMENT DATED 05-01-2022 IN WRIT PETITION (CIVIL) NO. 25290/2021 PASSED BY THIS HON'BLE COURT