



20 November 2023

***Subject: Judgment<sup>1</sup> dated 16<sup>th</sup> November 2023 of Hon'ble Kerala High Court Jeny Thankachan vs. Union of India & Ors. [W.P.(C) No.31502 of 2023]***

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***Brief Facts:***

FC initiated proceedings against the Writ Petitioner, (Personal Guarantor to CD) under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFESI Act) to take possession of the secured assets of the said guarantor. Subsequently, the personal guarantor filed an application on 21.08.2022 for insolvency resolution process under section 94 of the Code before the Adjudicating Authority(AA), Kochi bench, wherein only diary number was assigned to the application. On being aggrieved by the further action taken by the of Bank (FC), the said personal guarantor filed writ petition before Hon'ble HC seeking to stay the recovery proceeding under SARFAESI Act in view of section 96(b) of Code.

***Issues Before Hon'ble High Court:***

Whether the filing of application with procedural defects by the personal guarantor to CD would invoke an interim moratorium as contemplated under section 96(1)(b)(i) of the Code?

***Findings & Observations of the Hon'ble High Court:***

- While dismissing the WP Hon'ble High Court observed that for invoking interim moratorium under section 96 of the Code, the application filed by the debtor should be complete in all respects and without any procedural defects. It also noted that AA has not treated the application as a valid application, because a regular case number has not been allotted to the application.
- Hon'ble HC clarified that in the instant case, the personal guarantor to CD has only uploaded application, which by itself cannot be treated as filing of an application for the purpose of section 96 of the Code. HC observed that *"Mere uploading of an application under Section 96 of the IBC 2016 cannot be taken as filing of an application. The filing of an application as contemplated under Section 96 should be defectless and devoid of any procedural lapses. Only when an application is filed without any defects and satisfying the statutory procedural requirements of filing and only when the adjudicating authority numbers the application, there can be a legal and acceptable filing of application."*
- Further, HC observed that interim moratorium under section 96 and final moratorium under section 101 of the Code need to construed strictly because the legal actions and proceedings pending against the debtor will be deemed to have been stayed and the creditors of the debtor will

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not be able to initiate any legal action / proceeding in respect of any debt of the debtor., once an application is filed.