

John Jacob vs Anil Davidson,

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SooperKanoon Citation : sooperkanoon.com/1355603

Court : Kerala

Decided On : Jun-15-2023

Judge : Honourable the Chief Justice Mr.S.V.N.Bhatti,Honourable Mr.Justice Basant Balaji

Appeal No. : WA/806/2023

Appellant : John Jacob

Respondent : Anil Davidson,

Judgement :

:1:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE THE CHIEF JUSTICE MR.S.V.N.BHATTI & THE HONOURABLE MR.JUSTICE BASANT BALAJI THURSDAY, THE 15TH DAY OF JUNE 2023 / 25TH JYAISHTA, 1945 WA NO. 806 OF 2023 WP(C) 19827/2022 OF HIGH COURT OF KERALA APPELLANT/S:

1 JOHN JACOB,AGED 31 YEARS S/O JACOB SAMSON, RESIDING AT TC 95/1580(3) NANDANAM, PADINJATTIL LANE, MEDICAL

COLLEGE P.O., THIRUVANANTHAPURAM, PIN - 695011 2 SAMUEL JACOB,AGED 31 YEARS S/O JACOB SAMSON, RESIDING AT TC 95/1580(3) NANDANAM, PADINJATTIL LANE, MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM, PIN - 695011 BY ADVS.P.MARTIN JOSE P.PRIJITH,THOMAS P.KURUVILLA R.GITHESH,AJAY BEN JOSE,MANJUNATH MENON, SACHIN JACOB AMBAT ANNA LINDA EDEN,HARIKRISHNAN S. S.SREEKUMAR (SR.)

RESPONDENT/S:

1 ANIL DAVIDSON,TC 3/159, JIJU NIVAS, PARUTHIPPARA, MUTTADA P.O., THIRUVANATHAPURAM, PIN - 695025 2 ANITHA EAPEN ABRAHAM,TC 3/159, JIJU NIVAS, PARUTHIPPARA, MUTTADA P.O., THIRUVANATHAPURAM, PIN - 3 MR. K.PARAMESWARAN NAIR (REG NO. IBBI/IPA-001/IP-P01773/2019-2020/12702) INTERIM RESOLUTION PROFESSIONAL IN CP(IB)/05/KOB/2021 PENDING BEFORE NCLT, KOCHI BENCH RESIDING AT 37/1736 E, KRIPASAGARAM, KMRUALI ROAD, KADAVANTHARA,ERNAKULAM, KERALA, PIN - 682020 BY ADVS. :2: L.MOHANAN VINOD PV D.REETHA(K/1069/2003) C.ANCHALA(K/000717/2016) M/S.INDIALAW(FM-3)

OTHER PRESENT: LIGEY ANTONY - R1 AND R2 THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 15.06.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: :3:

JUDGMENT

(Dated this the 15th day of June 2023) Basant Balaji J.,

The unsuccessful petitioners in W.P.(C) No.19827 of 2022 are the appellants. The petitioners filed the Writ petition to set aside E.P.No.14 of 2017 in C.C. No.84 of 2016 pending before the Kerala State Consumer Redressal Commission, Thiruvananthapuram (for short the State Commission) and for a further direction to recall the non-bailable warrant

issued against the petitioners.

2. The case narrative is already excerpted in the

judgment of the learned Single Judge, and therefore, it is not

repeated here. By the impugned judgment, the learned Single Judge dismissed the writ petition.

3. The question to be considered in this Writ Appeal is whether the learned Single judge was correct in dismissing the Writ Petition and, further, a question whether during the

:4: pendency of the proceedings under The Insolvency and Bankruptcy Code, 2016 (for short the Code 2016) in respect of the company M/s.Samson and Sons Builders and Developers Pvt. Ltd. (for short the Company), can the Commission execute the award against the company as well as the Managing Director of the company. Respondent Nos.1 and 2 have filed C.C. No.84 of 2016 against the Company, represented by its Director as the first opposite party and the Managing Director of the company,

as the 2nd opposite party. The State Commission, by judgment

dated 2.12.2016, passed a judgment as follows: In the result, complaint is allowed in part. Opposite parties are directed to pay to the complainants Rs.25,50,000/-, with interest at the rate of 12% per annum from the respective date of payment. As interest is awarded at the rate of 12% per annum no separate compensation is awarded.

4. On 17.3.2017, E.A. No.14/2017 was filed for executing the award of the Commission. On 1.1.2018, the

:5: appellants filed E.A.No.1 of 2018 in E.P. No.14 of 2017 with a prayer to dismiss the execution application filed under Section 27 of the

Consumer Protection Act, 1986 (for short the Act) with an option to the decree-holder to file an application under Section 25 of the Act, if he so desires. The State Commission, by order dated 25.7.2019, dismissed E.A. No.1 of 2018. The petitioners challenge the original order of the State Commission dated 2.12.2016 and the order in E.A.No.1 of 2018 dated 25.7.2019, before the National Consumer Disputes Redressal Commission, New Delhi (for short the National Commission). The National Commission on 29.8.2019 dismissed the appeal filed by the petitioners. Aggrieved by the

order of the National Commission, the petitioners approached

the Apex Court with Special Leave Petition Nos.28016- special leave petition as withdrawn to enable the petitioners to explore the possibility of settlement with the respondents. In the

:6: meanwhile, a corporate creditor of the company filed CP(IB)/05/KOB/2021 under Section 9(6) of the Code 2016, read with Rule 6 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 (for short the Rules 2016) stating that the total debt of the corporate debtor to the corporate debtor is Rs.1,34,36,943/-. The National Company Law Tribunal, Kochi bench, by order dated 3.11.2021, admitted the application under Section 9(5) of the Code 2016 and declared a moratorium under Section 14(1) of the Code 2016.

5. The contention raised by the appellants is that when

proceedings under the Code are initiated, and order section 14(1) of the Code 2016 is passed, there is a total prohibition that the institution of suits and 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. According to the counsel for the appellants, the execution petition pending before the State

:7: Commission cannot be proceeded, and the issuance of a non- bailable warrant to the appellants is illegal.

6. The counsel for the respondents, Smt.Lijey Antony

argues that the appellants have approached this court by filing W.P.(C) No.10924 of 2022 for the same reliefs, and this court, by judgment dated 23.5.2022, closed the Writ Petition on the submission of the counsel for the appellants that they have already approached the State Commission and therefore, no orders are necessary. Therefore, this Writ Petition filed with the same prayers as that in W.P.(C) No.10924 of 2022 and by adding a different prayer to issue a direction to the 3rd respondent to conduct E.P.No.14 of 2017 in C.C.No.84 of 2016 pending before the State Commission on behalf of the corporate debtor under section 17 of the Code is hit by the principles of res- judicata. The proceedings under Section 27 of the Consumer Protection Act, 1986 went up to the Honble Supreme Court, and the orders have been confirmed. Therefore the petitioners

:8: are precluded from invoking Section 27 of the Act 1986 again before this court. She further argues that all proceedings right from State Commission till the Apex court have been concluded on 2.12.2019, and the moratorium declared by the National Company Law Tribunal is after 3.11.2021 and; therefore, the appellants cannot contend that the moratorium applies to the appellants.

7. The counsel for the appellants relied on the judgment

of the Supreme Court in Shekhar Resorts Limited (M/s.) (Unit Hotel Orient Taj) v. Union of India (2023 KHC 6008) and also a decision a division bench of this court in Kuriakose v. P.K.V. Group Industries (2002 KHC 440).

8. In the decision reported in Sekhar Resorts Limited

(supra), the question passed was, during a moratorium period, the company being a corporate debtor, was precluded from approaching the tax authorities for settlement of dues under the scheme, which was beneficial for the appellants. The

:9: court held that when proceedings are initiated under the Code 2016, there is a total prohibition from making any payments for the dues of the company during the moratorium period, and once the moratorium was lifted, the company approached the authorities for payment. But it was refused on the ground that the scheme period is over. The Apex Court held that the appellant was not able to deposit a settlement amount at the appropriate time due to legal impediments and the bar to make the payment of the settlement amount in view of the moratorium under the Code 2016. As far as the present case is concerned, the moratorium applies only to the company and not to the Managing Director. Therefore, the above-mentioned decision does not apply to this cases facts.

9. As far as the decision in Kuriakose (supra) is

concerned, it was held that for the company's liability, the property belonging to the Managing Director cannot be proceeded against. The facts of the case reveal that a suit was

: 10 : filed for the realisation of amounts from a Private Limited Company by Jikku Chit Fund (P) Ltd., a company incorporated under the Indian Companies Act. In the said case, the attachment was made to a schedule of properties belonging to the Managing Director for the companys debts. The learned Sub Judge took the view that under Section 322 of the Indian Companies Act, the liability of the Director is unlimited and hence, the property can be attached. The Managing Director filed a claim petition. This court held that the executing court

could proceed against the Managing Director of the judgment

debtor company only if it concluded that the Managing Director was personally liable to discharge the decretal amount. It was also held that since the defendant is the company alone, the liabilities are on the company, not the person. Therefore,

the appeal was allowed and held that the company alone is liable for the amount. In the case in hand, it can be seen that the company and the Managing Directors were made as the parties before the

: 11 : State Commission, and the judgment was delivered in favour of the complainant to recover the amounts from the opposite party. Therefore, the Managing Director is also liable for payment of

the amount. The facts of this case are also different from the facts

in Kuriakose(supra). Therefore, the judgment does not apply to the facts of this case.

10. From the perusal of the judgment of the State

Commission, it can be seen that the company is made as the first opposite party and the Managing Director as the second opposite party. The State Commission, by judgment dated 2.12.2016, allowed the complaint in part and directed the opposite parties to the complainants Rs.25,50,000/- with interest at the rate of 12% per annum. So, the company, as well as the Managing Director, are bound by the decision of the State Commission independently. The appellants filed E.A.No.1 of 2018 for dismissing the execution petition. The said petition was also dismissed by the State Commission, which was taken before the

: 12 : National Commission, as well as the Apex Court, and the same was confirmed, leaving no room for the appellants to agitate again before this court. As stated above, the Managing Director was a party to the proceedings before State Commission, National Commission, and the Apex Court in an independent capacity. The moratorium under Section 14 of the Code 2016 prohibits the institution of suits or continuation of suits, including execution of any judgment or decree or order against the corporate debtor alone. For an understanding of a Corporate debtor, the definition of corporate person and corporate debtor is extracted below: "S.3(7) corporate person" means a company as defined in clause (20) of

section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause

(n) of sub-section (1) of section 2 of the Limited Liability

Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider;

S.3(8) "corporate debtor" means a corporate person who owes a debt to any person; : 13 : Thus, it can be seen that the corporate debtor is the company which is the first opposite party alone. The second opposite party is the Managing Director in an another capacity. The execution proceedings are initiated against the company and the Managing Director independently. Therefore, the bar under section 14 of the Code 2016 is only against the first opposite party being a corporate debtor, and it cannot be against the second opposite party, who is the Managing Director in another capacity. The learned Single Judge rightly held that the Director was made as a party to the proceedings separately; therefore, there is no bar in proceeding against the Director. The learned Single Judge had relied on the judgment of the Apex Court in Nag Leathers

(P) Ltd. V. Dynamic Marketing Partnership [(2022) 2 SCC

271] and held that merely because the address shown is that of the company, it cannot be said that the second opposite party is personally arrayed as a party. Therefore, the State Commission is well within its powers and duty bound to execute the decree

: 14 : against the second opposite party. We have considered the arguments advanced by the appellants and the respondents and scanned through the Code 2016 and the Consumer Protection Act. We are of the considered opinion that the prohibition under section 13 of the

Code 2016 cannot be used as a shield to resist the execution proceedings against the appellants as the prohibition is only against the corporate debtors, and the appellants cannot be brought down under the definition of corporate debtors. Therefore, we confirm the judgment of the learned Single Judge and dismiss the Writ Appeal. SD/- S.V.N.BHATTI,
CHIEF JUSTICE

SD/- BASANT BALAJI, JUDGE d/ : 15 : APPENDIX OF WA 806/2023
PETITIONER ANNEXURES Annexure -I TRUE COPY OF ORDER DATED 26-04-
2023 IN I.A(IBC)/157/KOB/2023 IN C.P(IB)/5/KOB/2021, OF NATIONAL
COMPANY LAW TRIBUNAL, KOCHI BENCH

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