
[2025] 173 taxmann.com 341 (Madhya Pradesh)[03-03-2025]

IBC : Since, in definition of 'corporate debtor', proprietorship firm is not included and, thus, in instant case in respect of proprietorship firms availing financial facilities from respondent bank, no application under section 94 was liable to be entertained even at instance of personal guarantor

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[2025] 173 taxmann.com 341 (Madhya Pradesh)

HIGH COURT OF MADHYA PRADESH

Ramesh Kothari

v.

State of Madhya Pradesh

VIVEK RUSIA AND PREM NARAYAN SINGH, JJ.

WRIT PETITION NO. 7687 OF 2025

MARCH 3, 2025

Section 94, read with section 3(8), of the Insolvency and Bankruptcy Code, 2016, read with section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Individual/firm's insolvency resolution process - Application by debtor - Petitioner stood as a guarantor to a loan advanced by respondent-bank to borrowers - On default in repayment, bank initiated recovery proceedings under Section 14 of SARFAESI - In compliance of order passed by District Magistrate for taking possession of mortgaged property with help of Tehsildar, Tehsildar issued a notice to borrowers as well as petitioner for taking possession of mortgaged property - Petitioner approached NCLT by way of petition under section 94 - In order to protect possession of secured asset, petitioner also filed instant writ seeking direction to respondents to stop recovery of possession during pendency of insolvency proceedings before DRT- It was noted that in definition of 'corporate debtor', proprietorship firm is not included - Whether since, borrowers were sole partnership firms, no application under section 94 was liable to be entertained even at instance of petitioner - Held, yes - Whether even otherwise, now stage of consideration of representation was over - Held, yes - Whether District Magistrate had already passed an order hence, become a functus officio - Held, yes - Whether Tehsildar who had issued a notice did not enjoy any adjudication power to consider objection / representation of petitioner - Held yes - Whether in view of above, instant Writ Petition was totally misconceived and was to be dismissed - Held, yes [Para 7 and 8]

FACTS

- The borrowers, i.e. 'R' and 'K' availed the financial facilities from the Bank. The petitioner was an owner of the subject property which was mortgaged as a collateral security against the financial facility availed by borrowers.
- The Bank classified the account as Non-Performing Asset and thereafter, initiated the recovery proceedings under Section 14 of SARFAESI Act. The Bank approached the Sub Divisional Magistrate in order to seek the assistance to secure the possession of the mortgaged property of the petitioner. The Additional Collector passed an order for taking possession with the help of Tehsildar. In compliance of the aforesaid order, the Tehsildar issued a notice to the borrower as well as petitioner for taking possession on 27.02.2025.

- Before the said date, the petitioner approached the NCLT by way of petition under Section 94 of IBC, 2016. Now, in order to protect the possession of the secured asset, the petitioner had approached writ Court by way of instant petition seeking direction to the respondents to stop the recovery of possession during the pendency of the insolvency proceedings before the DRT.

HELD

- Section 94 of IBC, 2016 gives remedy to 'debtor' only to either apply personally or through a resolution professional (RP) to the Adjudicating Authority for initiating the insolvency resolution process. Section 3(8) of IBC, 2016 defines 'corporate debtor' which means a corporate person who owes a debt to any person and "corporate person" is defined in sub-section (7) of Section 3, it means a company under the Companies Act, 2013, a limited liability partnership under the Limited Liability Partnership Act, 2008 or any other person incorporated with limited liability under any law. Therefore, in this definition the proprietorship firm is not included. The borrowers, i.e. 'R' and 'S' are sole partnership firms, thus, in respect of these two firms, no application under Section 94 is liable to be entertained even at the instance of the present petitioner. (Para 7)
- Even otherwise, now stage of consideration of the representation is over. The Additional District Magistrate has already passed an order hence, become a functus officio. The Tehsildar who has issued a notice does not enjoy any adjudication power to consider the objection / representation of the petitioner. (Para 8)
- In view of the above, instant Writ Petition is totally misconceived and hereby dismissed. (Para 9)

Amit Agrawal, Sr. Adv. and **Utkarsh Joshi**, Adv. for the Petitioner. **Bhuwan Gautam**, Govt. Adv. for the Respondent.

ORDER

Vivek Rusia, J.- Petitioner has filed the present petition seeking direction to the respondents to consider the representation regarding the pending petition under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred as "IBC, 2016") before the National Company Law Tribunal, Indore (hereinafter referred as "NCLT").

2. The petitioner is an owner of the property situated at House No.437-B, Katju Nagar, Ratlam, M.P. The aforesaid property was mortgaged as a collateral security against the financial facility availed by M/s Rainbow Sales and M/s Kothari Enterprises from respondents No.4 & 5.

3. The M/s Rainbow Sales and M/s Kothari Enterprises are sole proprietorship firm owned by Chetan Kothari and Angoorbala Kothari respectively. They availed the financial facilities from the Axis Bank in the form of SBB overdraft facility of Rs.23,00,000/- and Rs. 49,10,680/-respectively. The Axis Bank classified the account as Non-Performing Asset on 30.08.2023 and thereafter, initiated the recovery proceedings under Section 14 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as "SARFAESI Act"). The Axis Bank approached the Sub Divisional Magistrate in order to seek the assistance to secure the possession of the mortgaged property of the petitioner. *Vide* order dated 28.06.2024, the Additional Collector passed an order for taking possession with the help of Tehsildar. In compliance of the aforesaid order, the Tehsildar Ratlam issued a notice to the borrower as well as Chetan Kothari and Ramesh Kothari i.e. petitioner for taking possession on 27.02.2025.

4. Before the said date, the petitioner approached the NCLT, Indore by way of petition under Section 94 of IBC, 2016. Now, in order to protect the possession of the secured asset, the petitioner has approached this Court by way of this petition seeking direction to the respondents to stop the recovery of possession during the pendency of the insolvency proceedings before the DRT.

5. Shri Amit Agrawal, learned senior counsel appearing for the petitioner submits that by virtue of Section 96(1)(b)(i) of IBC, 2016 after filing an application under Section 94 of IBC, 2016 an interimmoratorium 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 during the interim-moratorium period any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed. The creditors of the debt shall not initiate any legal action or proceeding in respect of the debt.

6. Shri Agrawal, learned senior counsel further submits that the definition of debtor under Section 3(8) of IBC, 2016 does not explicitly define the term debtor as applicable to the individual or sole partnership firm, but by way of statutory interpretations, the definition of debtor under other law the individual and partnership firm or sole proprietorship firm can be included in it hence, the present petitioner who is a personal guarantor to sole proprietorship firm is hereby covered under the broader scope of term debtor.

Heard.

7. We are unable to accept the aforesaid submission. Section 94 of IBC, 2016 gives remedy to „debtor' only to either apply personally or through a resolution professional (RP) to the Adjudicating Authority for initiating the insolvency resolution process. Section 3(8) of IBC, 2016 defines "corporate debtor" which means a corporate person who owes a debt to any person and "corporate person" is defined in sub-section (7) of Section 3, it means a company under the Companies Act, 2013, a limited liability partnership under the Limited Liability Partnership Act, 2008 or any other person incorporated with limited liability under any law. Therefore, in this definition the proprietorship firm is not included. The M/s Rainbow Sales and M/s Kothari Enterprises are sole partnership firms, thus, in respect of these two firms, no application under Section 94 is liable to be entertained even at the instance of the present petitioner.

8. Even otherwise, now stage of consideration of the representation is over. The Additional District Magistrate has already passed an order hence, become a functus officio. The Tehsildar who has issued a notice does not enjoy any adjudication power to consider the objection / representation of the petitioner.

9. In view of the above, this Writ Petition is totally misconceived and hereby dismissed.

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