

**BEFORE THE HONOURABLE HIGH COURT OF KERALA AT
ERNAKULAM**

Writ Appeal. No.

of 2024

In

W.P. (C) No. 41576 of 2023

(Against the Judgment dated 24-10-2024 of this Honourable Court in
WP. (C) No.41576 /2023)

P.K KRISHNA KUMAR & ANR : Appellants/ Petitioners

Vs.

INDUSIND BANK & ORS : Respondents/Respondents

SYNOPSIS

The impugned Judgment suffers from factual and legal errors, apparent on the face of it, warranting a review thereof.

The appellant is the Proprietor of M/s. Powerplus Power Unit, Eda Kochi, which had availed of credit facilities from the 1st respondent's branch at M.G Road, Ernakulam District. Being an MSME-borrower, registered under the MSMED Act, 2006, the petitioner's micro enterprise was entitled to the benefits under the various statutory notifications and circulars issued by the MSME Ministry and the Reserve Bank of India, to ensure that a viable unit is given a full opportunity to revive and continue, instead of being a victim of hasty coercive recovery proceedings and closure of the enterprise. Respondents 1 to 3, without complying with the mandatory Exts. P3, and P4 statutory notifications/circulars issued by the central government and the Reserve Bank of India, has hastily initiated recovery proceedings against the petitioner's enterprise, under the SARFAESI Act. The illegal actions of respondents 1 to 3, are in gross violation of the fundamental rights of the petitioner under Articles 14, 19, 21, and 300 A of the Constitution.

This Hon'ble Court, This Court by its judgment dated 24.10.2024 dismissed the writ petition on the sole ground that the Petitioner had

approached this Court on two or three occasions earlier, but in none of those occasions was the protection in terms of the notification sought, and that the Appellants/ Petitioners cannot be permitted to take a new plea. The said findings suffer from apparent factual and legal errors on the face of the record. Hence, this Writ Appeal.

Chronology of Dates and Events:

06.01.2022 – Classification of the petitioner's account as a Non-Performing Assets (NPA)

04.04.2022 – Issuance of demand-notice u/s. 13(2), SARFAESI Act.

13.07.2022 – Issuance of possession notice u/s. 13(4)

03.03.2023 - Addl. CJM, Ernakulam has passed an order in MC 1113/2022 and Appointed Advocate Commissioner to take the physical possession of Petitioner's property.

04.09.2023- Hon'ble High Court disposed the WP(C) 15055 of 2023 petitioner had filed against the CJM's Order by invoking the jurisdiction under Article 226.

16.10.2023- Hon'ble High Court protected the Petitioner against the dispossession for a period of one week in WP (C) 31724 of 2023

24-10-2024: Judgment of this Honourable Court in WP. (C) No.41576 /2023

Acts, Regulations and Authorities to be cited:

Micro Small and Medium Enterprises (Development) Act, 2006

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Dated this the 28th day of October, 2024.

MARIA NEDUMPARA

Counsel for the Appellants

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APPELLANTS/PETITIONERS:-

1. P.K KRISHNA KUMAR
Managing Partner, M/s Powerplus Power Unit
22/1486, Puthalath Krishnakripa,
Palluruthy, Eda Kochi, Pin-682010

2. KALADEVI KRISHNA KUMAR
Partner, M/s Powerplus Power Unit
22/1486, Puthalath Krishnakripa,
Palluruthy, Eda Kochi, Pin-682010

Vs

RESPONDENTS/RESPONDENTS:-

1. INDUSLND BANK,
Represented By its Branch Manager,
Gowrinarayan, 1st floor, Opp. Jayalakshmi Silks,
M G Road, Cochin- 682035
2. THE BOARD OF DIRECTORS OF THE INDUSLND BANK
Represented by its Managing Director,
IndusInd Bank Limited, 2401 Gen. Thimmayya Road (Cantonment),
Pune-411 001
3. AUTHORISED OFFICER & CHIEF MANAGER,
IndusInd Bank, Gowrinarayan, 1st floor, Opp. Jayalakshmi Silks,

M G Road, Cochin- 682035

4. UNION OF INDIA

Represented by Secretary,
Ministry of Micro Small & Medium Enterprises
Udyog Bhawan, Rafi Marg
New Delhi – 110 011.

5. SECRETARY, DEPT. OF BANKING,

Ministry of Financial Services
Government of India
3rd Floor, Jeevan Deep Building
Sansad Marg, New Delhi - 110 001.

6. RESERVE BANK OF INDIA,

Represented by its Governor
Central Office Building
Shahed Bhagat Singh Road
Mumbai – 400 001.

7. STATE OF KERALA, Represented by its

Chief Secretary, Government Secretariat
Thiruvananthapuram – 695 001

8. ADV. BONIFUS P.A

Advocate Commissioner appointed in MC No.1113/2022
Said Mohammad Complex, C.P. Ummer Road,
Ernakulam - 682035

9. STATION HOUSE OFFICER,

Palluruthy Police Station,
PS, Palluruthy PO, Kochi
PIN- 682006

The address for service of notices and processes on the appellant is that of his counsel, Maria Nedumpara, Advocates, Room No. 806, 8th Floor, KHCAA Chambers, High Court Campus, Kochi - 682 031.

The addresses of service of notices and processes on the respondents are that as shown above.

**MEMORANDUM OF WRIT APPEAL FILED UNDER SECTION 5 OF
THE KERALA HIGH COURT ACT**

Statement of Facts

1. It is a fundamental principle of law that a court can bind the parties by its decision, even an erroneous one, for jurisdiction means the freedom to err on facts. However, no court has the freedom or the jurisdiction to err on law. The doctrine of res judicata has application on only disputed questions of fact or evidence, not on law. It is a universal, undeniable principle of law that there is no estoppel against law.
2. It is well settled in law that where a court has erred on law or acted contrary to the fundamental principles of judicial procedure, failed to observe natural justice, etc. such an order or judgement is a nullity. It can be sought to be corrected by all means, namely, indirect and collateral proceedings, review, appeal, even a suit.
3. The instant invoked the jurisdiction of Appellants/ Petitioners his Court under Article 226 seeking a writ in the nature of certiorari, prohibition, as also, many a declaration. The core of the plea of the Petitioner was that the he being an MSME, is entitled to the protection in terms of the notification dated 29.5.2015, that the rights and obligations inter se arising out of the MSMED Act could only be adjudicated by a civil court, to the exclusion of all other courts, and the recovery action under the SARFAESI Act is rendered void ab initio. The Petitioner therefore, is entitled to a writ in the nature of prohibition restraining the prohibiting the Respondents from continuing the illegal recovery action, so too, a mandamus to put the clock back and extend him the

benefit of the notification. It is profitable to extract the prayers sought in the writ petition as infra.

- (a) *declare that the Petitioner is an MSME within the meaning of the MSMED Act of 2006 and Ext. P3/notification issued by the Central Government under Section 9 thereof, as also the circulars and guidelines issued by the Reserve Bank of India under Section 10 thereof, which provides for a mechanism of resolution of stress and that no proceedings for recovery under the SARFAESI Act, RDB Act or the IBC will lie, in as much as the MSMED Act being a special law qua the aforesaid Acts, and a later law in relation to the RDB Act and the SARFAESI Act, its provisions will prevail over the aforesaid enactments;*
- (b) *declare that the MSME Act in so far as it has not created a special forum/tribunals to enforce the inter-se rights and obligations/remedies, which it has created in addition to those rights/obligations/remedies recognized by the common law, the jurisdiction of the Civil Court is not ousted, for it is impossible to oust the jurisdiction of the Civil Court without providing for an alternative forum/tribunal to adjudicate the inter se disputes between parties who are governed by the Act;*
- (c) *to declare that the entire proceedings at the hands of the Respondent no.3, Authorised Officer of the IndusInd Bank and the Addl. Chief Judicial Magistrate, Ernakulam, under Section 13(2), 13(4) and 14 of the SARFAESI and the Security Interest (Enforcement) Rules are illegal and void and to grant a consequential writ in the nature of certiorari or any other appropriate writ or order quashing and setting aside the same;*
- (d) *to issue a writ in the nature of certiorari or any other appropriate writ or order or direction calling for the entire records and proceedings at the hands of the Authorized Officer as well as the Addl. Chief Judicial Magistrate, Ernakulam, leading to the order dated 03.03.2023 at the*

hands of the Addl. CJM, Ernakulam, as also, of the Advocate Commissioner in furtherance thereof, and to quash and set aside the same as being without jurisdiction, in violation of fundamental principles of judicial procedure and most importantly, being in violation of Articles 14, 19 and 21 of the Constitution;

- (e) to issue a writ in the nature of mandamus, nay, certiorarified mandamus or any other appropriate writ or order directing Respondent no. 1, Board of directors of the IndusInd Bank to constitute a committee for the resolution of the stress of the unit of the instant Petitioner, an MSME as contemplated in paragraph 2 of the notification dated 29.5.2015 issued under the MSMED Act, and further to direct the Committee to resolve the stress in accordance with the said notification and such other relevant notifications/regulations framed by the RBI;*
- (f) in furtherance to prayer (d) above, to issue a writ in the nature of prohibition restraining and prohibiting the Respondent Bank from initiating or continuing any measures for recovery under any other law and in particular, the SARFAESI Act and the rules made thereunder, and the Recovery of Debts and Bankruptcy Act;*
- (g) declare that the Petitioner is entitled to be compensated by respondent Nos. 1 to 3 for the loss and injury, which it has suffered on account of the gross breach of trust, culpable negligence, and malicious and tortious action at the hands of the respondent-bank and its officers, which loss and injury far exceeds the very claim of the Bank as against the petitioner, and therefore, no amount is due to the Respondents 1 to 3 by the petitioner, and the Respondents 1 to 3 have no enforceable rights as against the petitioner;*
- (h) declare that the guidelines and notifications issued by the Reserve Bank of India from time to time empowering the bank and financial institutions to declare a borrower as a wilful defaulter is without authority of law and further that the Plaintiffs, nay a borrower is not liable to the declared as a wilful defaulter except by authority of an*

act of Parliament or statutory instrument having the force of law, and that the Petitioner is not liable to be declared as a willful defaulter and further that his previous credit rating is liable to be restored;

- (i) grant a perpetual mandatory and prohibitory injunction restraining and prohibiting respondent Nos. 1 to 3, their agent, servants, officers, representatives and/or anyone from taking any action for recovery under any law whatsoever in respect of the properties referred to in the notice issued under Section 13(2) of the SARFAESI Act, or in any manner interfere with the Petitioner's peaceful possession and enjoyment of the said properties;*
- (j) Grant such other reliefs which are appropriate and incidental to this proceeding and which this Hon'ble Court deems fit and proper.*

4. This Court by its judgment dated 24.10.2024 dismissed the writ petition on the sole ground that the Petitioner had approached this Court on two or three occasions earlier, but in none of those occasions was the protection in terms of the notification sought, and that the Appellants/ Petitioners cannot be permitted to take a new plea.
5. The Respondent Bank filed a counter affidavit and the Petitioner filed a reply affidavit.
6. The Ld. Single judge in his judgment was pleased to record the contention of the Petitioner, namely, that he is entitled to the protection of the notification dated 29.5.2015 which is mandatory and binding and creates rights, if not primary rights, at least secondary rights, falling in the realm of vested rights. There is no estoppel, waiver or res judicata against a statutory right.
7. The Petitioner did not raise it on earlier occasions because of his financial illiteracy, an undeniable truth when it comes to MSMEs which the Legislature and the RBI took notice of in enacting the notification and the various circulars. That is precisely the reason why the notification mandates the banks and financial institutions to identify

incipient stress and prohibits it from even classifying the account as NPA. There is no need for the MSMEs to apply or bring its incipient stress to the notice of the bank concerned. The Petitioner came to know about the full scope and ambit of the protection only belatedly, and the moment he came to be aware of it, he invoked the jurisdiction of this Court.

8. It is not the Appellants/ Petitioners MSME who is at fault, but the Board of directors of the IndusInd Bank, the RBI and the senior officials of the bank. By acting in violation of the notification, the bank and its officials have rendered themselves liable to be removed under Section 36AA of the Banking Regulations Act. This Court was dutybound to make the Bank and its officials accountable for this failure, so too, even the RBI and the Ministries of MSME and Banking. Instead of punishing the Bank and its officials who acted contrary to law, this Hon'ble Court in its judgment has chosen to penalize a hapless MSME. To repeat, the error which the Court made here is not an error in ascertaining the facts or in appreciating the evidence. It is not an error with which the court can bind the parties like holding $1+1=0$. This is a pure failure to give effect to give effect to the notification.
9. The judgment of this Court is the misconception of the doctrine of res judicata. For the doctrine to apply there must be decision on merits, namely, on disputed questions of fact or evidence. In the earlier judgments, the rights emanating from the notification were not even raised, let alone decided. For the previous litigation to constitute the bar or res judicata, all the following conditions ought to be satisfied.
 - a. Cause of action must be the same
 - b. Parties must be same
 - c. There must be decision on merits
 - d. The court should have jurisdiction

- e. And the court should have followed the fundamental principles of judicial procedure

The cause of action in the earlier proceedings and the current proceedings are different because the evidence and law relied upon in the earlier proceedings and the present case are different. The parties in the earlier proceedings and the current proceedings are different. In the earlier proceedings, the protection which the Appellants/ Petitioners claimed under the MSMED Act was not finally and conclusively decided. Therefore, this Court went wrong in holding that the earlier proceedings constitute a bar. A court is a creation of law, its servant, and is duty bound to act in accordance with law. It cannot bind the parties before it by an erroneous decision on law. To repeat, on facts it undoubtedly can.

Aggrieved by the Judgment dated 22-08-2023 of this Honourable Court in O.P. (Crl) No. 288/2023, this Writ Appeal is filed on the following among other grounds:

Grounds

- A. The judgment of this Court dated 24.10.2024 is vitiated by errors apparent on the face of record and is thus one rendered void ab initio. It is the duty of the court to recall an order which is a nullity, in violation of a statutory provision, ex debito justitiae. 'Actus curiae neminem gravabit', no man shall suffer because of the mistake of a court. The Supreme Court in Antulay's case even set aside a judgment of the 5-judge constitution bench in its anxiety to undo the error of the court. A judgment of court which is a nullity constitute no res judicata and can be challenged by either direct or collateral proceedings (Kiran Singh, Antulay, Mafatlal).
- B. To make what is manifest, all the more clear, the impugned judgment is bad for two reasons, declining the protection under the notification holding that the earlier proceedings instituted

by the Petitioner constitutes a bar, res judicata, which is undoubtedly an error on law, not on facts. Secondly, the judgment is a nullity because the judgment while holding that the notification is binding denied it on the ground that the Petitioner did not raise it on earlier occasions, failing to notice that a claim based on law can always be raised, even at the stage of execution, for there is no estoppel against law.

- C. 'Iura novit curia' is a fundamental principle of law. There is no need to plea law, for the Court is presumed to know the law. The inability of the Appellants/ Petitioners a financially illiterate MSME, to plead the benefit under the notification does in law constitute a bar and cannot be reason to deny him what the Parliament in its wisdom has ordained. The Court should have taken notice of the plea that the notification has been flagrantly flouted with impunity by all banks and financial institutions in this country and the Court ought to have taken the case at hand as an opportunity come down heavily on the bank and direct RBI and the Government of India to take appropriate action.
- D. The unkindest cut of all was that this Court failed to notice that in the Writ Petition, the Petitioner has sought many a declaratory remedy and dismissing the same without issuing notice to the Central and State Governments, RBI, etc. would lead to multiplicity of proceedings, for the Petitioner, a poor MSME would be forced to institute fresh proceedings the moment a new cause of action arises, namely, putting the property to sale, etc.

In light of the above grounds and other grounds to be submitted at the time of hearing, it is most humbly prayed that this Hon'ble Court may be pleased to consider granting the following prayers:

PRAYER

- a. Set aside the order dated 23-10-2024 of this Honourable Court in IA No.1/2024 in WP(Civil) No. 30885 /2024

Interim relief sought for

For the reasons stated in the Writ Appeal, it is most humbly prayed that this Hon'ble Court may be pleased to Stay all further proceedings initiated by the Respondent Bank under the SARFAESI and/or any other law; pending final disposal of the above Writ Appeal in the interest of justice.

VALUATION

A Court fee of Rs.100/- is paid herewith under Schedule II Article 3(iii)(A)(2)(c) of the Kerala Court Fees and Suits Valuation Act.

Dated this the 28th day of October, 2024.

MARIA NEDUMPARA
Counsel for the Appellant