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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 5004/2016 and CM APPL. 20900/2016**

BIJAY MADAN THR POWER OF ATTORNEY SONAL MADAN
..... Petitioner

Through: Mr. Dattatray Vyas, Advocate with
Ms. Sonal Madan in person.

versus

PUNJAB NATIONAL BANK Respondent

Through: Mr. S.N. Relan, Advocate with
Mr. Abhinav Thareja, Advocate

+ **W.P.(C) 5012/2016 and CM APPL. 20917/2016**

SONAL MADAN Petitioner

Through: Mr. Dattatray Vyas, Advocate with
petitioner in person.

versus

PUNJAB NATIONAL BANK Respondent

Through: Mr. S.N. Relan, Advocate with
Mr. Abhinav Thareja, Advocate

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

ORDER

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17.01.2017

1. The petitioners herein (husband and wife) who are Directors of M/s Skan Cables & Wires Pvt. Ltd. (hereinafter referred to as 'the company') have filed these petitions praying *inter alia* for issuance of a writ of mandamus, for quashing the letter dated 15.01.2016, issued by the

respondent/Bank, calling upon them to regularise their accounts, failing which the Bank shall publish their photographs in the newspapers, declaring them as wilful defaulters. The petitioners also seek quashing of the letter dated 14.03.2016, issued by the respondent/Bank, declaring them as wilful defaulters.

2. As the facts of both the cases are stated to be common, with the consent of the counsels for the parties, both the petitions are being disposed of by a common order. Before considering the submissions made by learned counsel for the petitioners, it is deemed appropriate to briefly refer to the relevant facts that culminated in issuance of the impugned letters dated 15.01.2016 and 14.03.2016 by the respondent/Bank.

3. As per the averments made in the petitions in the year 2008-09, the company had approached the respondent/Bank, for financial assistance. The respondent/Bank had granted various facilities to the company and to secure its interest, the petitioners had offered to mortgage four immovable properties with the respondent/Bank. Due to the general recession in the market and other circumstances, the petitioners could not adhere to the repayment schedule fixed by the respondent/Bank and resultantly, on 29.06.2010, the company was classified as NPA. On 01.07.2010, the respondent/Bank issued a notice to the petitioners under Section 13(2) of the SARFAESI Act, seeking an amount of Rs.1523.46 lacs. On 28.10.2010, the respondent/Bank proceeded to take over the physical possession of three out of four of the immovable properties that were offered by the petitioners as security.

4. On 20.06.2011, the company approached the respondent/Bank offering to repay the entire liability within a period of three months and

sought permission to sell the mortgaged properties. Though it is the stand of the petitioners that the proposals of a One Time Settlement made by the company to the respondent/Bank were turned down, counsel for the respondent/Bank disputes the said submission and states that the petitioners were accommodated time and again and the One Time Settlement proposals made by them were accepted but each time, the company had failed to adhere to the proposals and had committed defaults.

5. On 29.06.2011, the respondent/Bank informed the petitioners through an e-mail, of its intention to take further measures to recover its outstanding dues. It is the submission of the counsel for the respondent/Bank that as on date, the company owes the Bank a sum of Rs.24,80,18,027.92 paise, which figure is however disputed as incorrect by learned counsel for the petitioners. The petitioners claim that they had promptly responded to the e-mail dated 29.06.2011 sent by the respondent/Bank and had sought permission to make an offer of a One Time Settlement proposal and they had also held discussions with the Bank officers but nothing concrete had materialised.

6. Between the years 2013-2016, the three immovable properties owned by the petitioners were auctioned by the respondent/Bank and the sale proceeds of Rs.9.13 crore were adjusted against the outstanding dues. On 22.02.2013, the respondent/Bank filed O.A. No.35/2013 before the DRT-III, Delhi for recovering the remaining outstanding amounts from the petitioners alongwith interest. It is not out of place to mention here that aggrieved by the action of the respondent/Bank of auctioning the three immovable properties, the petitioners had challenged the same before the DRT-I, Chandigarh, which petition was dismissed in the year 2015 and the appeal

filed by them against the said rejection order was also dismissed by the DRAT in March, 2016.

7. On 03.01.2014, the respondent/Bank issued a notice to the petitioners, calling upon them to show cause as to why should they not be declared as wilful defaulters. A perusal of the records reveals that the petitioners did not file any reply to the aforesaid notice to show cause, nor is there any averment made in the petition to the said effect.

8. On 03.03.2014, the Grievance Redressal Committee constituted by the respondent/Bank held a meeting, which was attended by Shri Bijay Madan, the petitioner in W.P.(C) 5004/2016. Taking note of the explanation offered by the said petitioner on the proposal to declare him and his wife as wilful defaulters, the Committee decided to defer the matter, while calling upon him to come forward with a concrete action plan for settlement of the Bank's dues within one week and thereafter meet the Field General Manager or the General Manager, Headquarters Office of the Bank.

9. The next relevant date is 02.07.2015, when a meeting of the Committee for Identification of Wilful Defaulters constituted by the respondent/Bank, took place. In the said meeting, Ms. Sonal Madan, the petitioner in W.P.(C) 5012/2016 was present. After hearing the said petitioner and noting that the borrowers had not complied with the commitments made in the meeting dated 03.03.2014, the company and the petitioners as the Directors thereof, were declared as wilful defaulters. This was followed by issuance of the impugned notice dated 15.01.2016, addressed by the respondent/Bank to the petitioners, once again calling upon them to regularise their accounts within 30 days from the date of receipt of the said notice, failing which they were cautioned that the Bank will have no

option but to publish their photographs in the newspapers, declaring them as wilful defaulters. The said notice mentioned that on the date of issuance, a sum of Rs.22,43,64,507/- plus interest, cost etc. was payable by the petitioners minus the recovered amount, which has not been specified therein.

10. On 14.03.2016, the impugned order came to be passed by the respondent/Bank stating *inter alia* as below:-

“Dear Sir/Madam,

Reg: M/s Skan Cables & Wires Pvt. Ltd. – Declaration as Wilful Defaulter

As you are aware, your company has been availing various credit facilities from the bank and the account has since been classified as Non Performing Asset (NPA) w.e.f. 29.06.2010.

2. The company has committed the following events of default within the meaning of RBI guidelines on Wilful Defaulters:

“You have defaulted in meeting its payment/repayment obligations to the Bank even when you have the capacity to honour the said obligations.”

3. The Committee for Identification of Wilful Defaulters constituted by the bank has identified your company as a Wilful Defaulter and a show cause notice to this effect was sent to you.

4. Your company did not respond to the said notice within the stipulated time mentioned in the notice. It is clear that your company did not have anything to justify the event of default and hence the Committee decided to declare your company as a wilful defaulter in terms of RBI guidelines.

OR

The submission made by your company in response to the said notice was not acceptable to the bank and you were given an

opportunity to represent either personally or through your authorised person, before the Committee for Identification of Wilful Defaulters. The Committee was not satisfied with the submissions made on your behalf and Committee reached to the conclusion that the company has committed event of default as mentioned therein above.

5. In view of the above facts, the Special Committee of Board of the bank in its meeting approved the decision of the Committee and accordingly declared the company as a wilful defaulter.

6. As per RBI guidelines, the details of the company as well as of the Directors will be forwarded to the Credit Information Agencies and you will not be eligible for any additional finance from the Banks/FIs. The bank will also be considering filing of criminal case against the company as well as its Directors and you will be responsible for the consequences thereof.

You are once again called upon to take immediate steps for resolution of the account.”

11. Aggrieved by the notice dated 15.01.2016 and the letter dated 14.03.2016, the petitioners have filed the present petitions.

12. Learned counsel for the petitioners submits that the impugned letter dated 14.03.2016 shows a complete non-application of mind on the part of the respondent/Bank as they have failed to furnish the grounds for declaring the petitioners as wilful defaulters and instead, taken alternate grounds in para 4, without stating as to which of the two grounds applies to the facts of the case.

13. Learned counsel for the petitioners also refers to the Master Circular on Wilful Defaulters dated 01.07.2014 (hereinafter referred to as ‘the Circular’) enclosed with a letter dated 01.07.2015, circulated by the RBI to

all Scheduled Commercial Banks and Financial Institutions (Annexure P-20) and states that Clause 2.1.3 of the said Circular that describes 'wilful default' and refers to four different events which could have occurred on wilful default. He contends that the respondent/Bank has miserably failed to adhere to the mechanism laid down by the RBI in the said Circular for identification of wilful defaulters.

14. Per contra, Mr.S.N.Relan, learned counsel for the respondent/Bank opposes the present petition on the ground that the Bank had granted repeated opportunities to the petitioners and the company to make good the defaults and regularise their accounts but they had miserably failed to do so. They were also permitted to propose a One Time Settlement, which they did on three occasions, but each time, the petitioners had defaulted, leaving the Bank with no other option but to auction the three immovable properties offered as security. He further states that the meeting of the Grievance Redressal Committee held on 03.03.2014 was duly attended by Shri Bijay Madan and that of the Committee for Identification of Wilful Defaulters held on 2.7.2015, was attended by Ms.Sonal Madan and it was in their presence that it was decided to declare them and the company as wilful defaulters, in terms of the RBI guidelines.

15. The Court has heard the arguments advanced by learned counsels for the parties and carefully perused the documents on record, particularly the Master Circular on Wilful Defaulters dated 1.7.2014 issued by the RBI, on which both the parties have placed reliance.

16. Clause 2.1.3 of the Master Circular, which deals with wilful default, is reproduced hereinbelow for ready reference:-

“2.1.3 **Wilful Default**: A 'wilful default' would be deemed to

have occurred if any of the following events is noted:

- (a) The unit has defaulted in meeting its payment/repayment obligations to the lender even when it has the capacity to honour the said obligations.
- (b) The unit has defaulted in meeting its payment/repayment obligations to the lender and has not utilised the finance from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purposes.
- (c) The unit has defaulted in meeting its payment/repayment obligations to the lender and has siphoned off the funds so that the funds have not been utilised for the specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.
- (d) The unit has defaulted in meeting its payment/repayment obligations to the lender and has also disposed off or removed the movable fixed assets or immovable property given for the purpose of securing a term loan without the knowledge of the bank/lender.

The identification of the wilful default should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/incidents. The default to be categorised as wilful must be intentional/deliberate and calculated”

17. Clause 3 of the Master Circular that prescribes the mechanism for identification of Wilful Defaulters is also relevant and is reproduced hereinbelow:-

“3. Mechanism for identification of Wilful Defaulters

The mechanism referred to in paragraph 2.5 above should generally include the following:

- (a) The evidence of wilful default on the part of the borrowing company and its promoter/whole-time director at the relevant

time should be examined by a Committee headed by an Executive Director or equivalent and consisting of two other senior officers of the rank of GM/DGM.

(b) If the Committee concludes that an event of wilful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the promoter/whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of wilful default and the reasons for the same. An opportunity should be given to the borrower and the promoter/whole-time director for a personal hearing if the Committee feels such an opportunity is necessary.

(c) The Order of the Committee should be reviewed by another Committee headed by the Chairman/Chairman & Managing Director or the Managing Director & Chief Executive Officer/CEOs and consisting, in addition, to two independent directors/non-executive directors of the bank and the Order shall become final only after it is confirmed by the said Review Committee. However, if the Identification Committee does not pass an Order declaring a borrower as a wilful defaulter, then the Review Committee need not be set up to review such decisions.”

18. Clause 2.1.3 of the Master Circular refers to the events that could occur for a wilful default to happen. The said Clause stipulates that the entire track record of the borrower must be examined for identification of wilful default and such a default ought to be intentional, deliberate and calculated. Clause 3 prescribes a mechanism for identification of wilful defaulters and requires the Banks to constitute two tier system; firstly an Identification Committee must be established, headed by the Executive Director or equivalent and consisting of two other senior officers of the rank of GM/DGM to examine the evidence of wilful default on the part of the

borrower company and its promoter/whole-time director. On examining the available evidence, if the said Committee arrives at a conclusion that an event of wilful default has taken place, it is required to issue a notice to show cause to the borrower company and its promoter/whole-time director, calling for a response/explanation. Only after an opportunity is granted to the addressee of the notice to show cause and a personal hearing is given to them, can the Committee arrive at any conclusion about the wilful default. As a safety measure, a second and higher tier has been directed to be constituted by the RBI, described as the Review Committee. The Review Committee must be headed by the Chairman/Chairman & Managing Director/Managing Director & Chief Executive Officer/CEOs of the Bank and include two independent directors/non-executive directors. Once the Identification Committee passes an order, declaring the borrower as a wilful defaulter, the Review Committee is expected to examine the said order and only if satisfied with the decision taken, confirm the same.

19. It is the contention of the learned counsel for the petitioners that the respondent/Bank has not followed the prescribed mechanism for identification of wilful defaulters inasmuch as the Identification Committee required to be constituted by the Bank did not grant a hearing to the petitioners and bypassing the said Committee, the second tier, i.e., the Review Committee, given the nomenclature of a Grievance Redressal Committee by the respondent/Bank, had granted a hearing to them on 03.03.2014.

20. The records reveal that the meeting of the Grievance Redressal Committee was held on 03.03.2014, whereas the Committee for Identification of Wilful Defaulter held a meeting thereafter, on 02.07.2015.

Thus, there was no scope of the Review Committee scrutinizing the order of the Identification Committee, as stipulated in Clause 3(b) and (c) of the Master Circular for the simple reason that by the date the Grievance Redressal Committee held a meeting on 3.3.2014, the Identification Committee had not even assembled to examine if the petitioners were wilful defaulters as contemplated under Clause 2.1.3 of the Circular. Evidently, the respondent/Bank has reversed the entire procedure laid down by the RBI by putting the cart before the horse.

21. Learned counsel for the respondent/Bank does not dispute the fact that the petitioners were not afforded a hearing by the Identification Committee before an order came to be passed by the Grievance Redressal Committee on 03.03.2014. It is however, a different matter that the Grievance Redressal Committee did not pass any adverse orders against the petitioners on 3.3.2014 and had only deferred the matter to enable them to come up with an action plan for settling the Bank's dues. Thereafter, the respondent/Bank stayed its hands for over one year till July, 2015 when the Identification Committee held a meeting on 02.07.2015, which was attended by Ms. Sonal Madan, the petitioner in W.P.(C) 5012/2016.

22. The glaring flaw in the procedure followed by the respondent/Bank, which is apparent from a perusal of the minutes of the meeting of the Identification Committee held on 02.07.2015, is that once the said Committee arrived at a conclusion that the petitioners and the company were wilful defaulters, then the said order was mandatorily required to be reviewed by another Committee described in Clause 3(c) of the Circular, as the Review Committee, headed by the Chairman/Chairman and Managing Director or the Managing Director and CEO and consisting in addition, of

two independent Directors of the Bank. Only after they had satisfied themselves that the decision of the Identification Committee was justified, was the said order to be confirmed.

23. Admittedly, the order dated 02.07.2015 passed by the Identification Committee was never placed before the Review Committee. In such circumstances, it has to be held that the respondent/Bank has followed the procedure laid down in Clause 3 (c) of the Master Circular more in breach and it could not have issued the impugned notices dated 15.01.2016 and 14.03.2016 on the recommendations of the Identification Committee.

24. The aforesaid oversight on the part of the respondent/Bank in failing to adhere to the mechanism laid down by the RBI in the Master Circular for identification of wilful defaulters, goes to the root of the matter and is considered as a sufficient ground for quashing and setting aside the impugned communications dated 15.01.2016 and 14.03.2016. Even otherwise, the impugned communication dated 14.03.2016 is legally unsustainable because the respondent/Bank has failed to apply its mind while issuing the said letter. In para 4 of the said notice, the respondent/Bank has listed alternate grounds for holding the petitioners as wilful defaulters, without clarifying as to which of the two grounds has been invoked, based on which the Identification Committee had declared them as wilful defaulters.

25. As a result, the present petitions succeed and the impugned notices dated 15.01.2016 and 14.03.2016 are quashed and set aside. The clock is set back to 02.07.2015, the date on which the Identification Committee had held a meeting and declared the petitioners and the company as wilful defaulters. The respondent/Bank is directed to place the decision of the Identification

Committee before the Review Committee, for being reviewed, as per the procedure prescribed in the Master Circular circulated by the RBI. Only after the Review Committee examines the orders passed by the Identification Committee, shall it proceed to pass appropriate orders, under written intimation to the petitioners. If the petitioners are aggrieved by the orders that may be passed, they shall be entitled to seek the remedies, as may be available to them in law.

26. The petitions are disposed of alongwith the pending applications, while leaving the parties to bear their own costs.

HIMA KOHLI, J

JANUARY 17, 2017

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