

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.2072 OF 2018

M/s. Kanchan Motors and Others

...Petitioners

vs.

Bank of India and Others

...Respondents

Mr. Nakul Jain a/w. Mr. Mayank Bagla and Mr. Durgesh Kulkarni
I/b. Mr. Jainish Jain, for the Petitioners

Ms. Purnima Pandit, for Respondent Nos. 1 and 5.

**CORAM : SHANTANU KEMKAR &
N. W. SAMBRE, JJ.**

DATE : JULY 12, 2018

ORDER

. Parties through their counsel.

2. Rule.

3. With consent heard and finally disposed of.

4. The Petitioners claim that they are in the business of selling and purchasing of Tata Vehicles motorship. They availed credit facilities from the first Respondent Bank of India (for short "the Bank"). The case of the Petitioners is that due to unavoidable circumstances, they could not make the repayment of the

outstanding dues of the Bank. In the circumstances, the Respondent Bank had issued a notice to the Petitioners on 16th November, 2017 calling upon the Petitioners to pay outstanding amount of Rs. 2,62,28,830/-. Thereafter, in pursuance of it the Bank had filed Original Application before Debt Recovery Tribunal at Mumbai (in short D.R.T.) which is pending before the D.R.T.

5. During the pendency of the said matter before D.R.T., the Chief Manager of the Bank issued a show cause notice dated 29th December, 2017 to the Petitioners intimating their intention to initiate proceeding for declaring the Petitioners as “Willful Defaulter”. On receipt of the said notice, the Petitioners submitted their reply dated 29th January, 2018 stating therein as to why the action of declaring the Petitioners as Willful Defaulter is not warranted and that as to why the Petitioners will not come within the purview of “Willful Defaulter” as provided under the RBI Guidelines. The Petitioners also requested for providing of an opportunity of personal hearing.

6. According to Petitioners without considering the said reply dated 29th January, 2018 and without giving any opportunity

of personal hearing to the Petitioners, the Identification Committee of the Bank vide order dated 9th March, 2018 declared the Petitioners as the “Willful Defaulter”. The said order was confirmed by the Review Committee of the Bank (Fifth Respondent) vide order dated 20th April, 2018 (Exhibit “B”). Feeling aggrieved by both the orders the Petitioners have filed this Petition under Article 226 of the Constitution of India.

7. Mr. Nakul Jain, the learned counsel for the Petitioners has argued that the impugned order dated 9th March, 2018 passed by the Identification Committee as also the order dated 20th April, 2018 passed by the Review Committee are in contravention to the procedure prescribed by the Reserve Bank of India vide Master Circular dated 1st July, 2015. He submits that before passing impugned order declaring the Petitioners as Wilful Defaulter, a show cause notice was required to have been issued to the Petitioners and after considering the Petitioners' submissions, the order recording the fact of wilful default committed by the Petitioners by giving reasons for the same could have been passed. He also submits that it was also necessary for the Identification Committee to have given an opportunity to the Petitioners for

personal hearing before passing such order. The said procedural requirement which is in consonance with the principles of natural justice having not been fulfilled by the Identification Committee, the order of the Identification Committee deserves to be set aside. He further submits with even while confirming the said order of the Identification Committee, the Review Committee has not applied its mind as no reasons have been disclosed as to why the order of the Identification needs to be confirmed by rejecting the Petitioners submissions which were made by the Petitioners vide their reply dated 29th January, 2018. The learned counsel for the Petitioners also submits that the copy of the order of Identification was not supplied to the Petitioners in spite of a written application to that effect was made on 15th June, 2018 (Exhibit "C"). He submits that the stand taken by the Respondents in the reply of the Petition that it is not necessary to supply the copy of order of Identification is also unsustainable as in the absence of copy of the said order, the Petitioners are not able to know the reasons for rejection of grounds raised by them in their reply dated 29th January, 2018 as also as to why they have denied the opportunity of personal hearing. The learned counsel for the Petitioners has referred to the order of Review Committee to show that the same is a non

speaking order and has been passed mechanically without considering the reply of the Petitioners. In the circumstances, he submits that both the orders being violative of the principles of natural justice and are being passed in violation of the Master Circular dated 1st July, 2015, they deserve to be quashed.

8. On the other hand, Ms. Purnima Pandit, the learned counsel for the Respondents have supported the decision of the Identification Committee as also the Review Committee. She submits that copy of the order of Review Committee has been served upon the Petitioners and as such there was no necessity to supply copy of the order of Identification Committee. She argued that the order of Review Committee is a reasoned order which needs no interference.

9. We have considered the submissions made by the learned counsel for the parties and we have also gone through the averments made in the Petition, the reply and the impugned order.

10. In order to appreciate the contentions raised by the parties, it would be appropriate to refer few clauses of the Master

Circular on Willful Defaulter dated 1st July, 2018 issued by the Reserve Bank of India.

11. Clause 2.1.3 of the Master Circular in regard to the guidelines on Wilful Default reads thus:

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 willful 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.

12. Clause 3 deals with mechanism for identification of Wilful Defaulter of which relevant portion is extracted, which read thus:

“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/ CEO's 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.”

13. Clause 2.5 of the Master Circular deals with “Penal Measures” which should be initiated by the banks against wilful defaulter identified as per the definition indicated at Clause 2.1.3. Clause 2.5 read thus:

“The following measures should be initiated by the banks and FIs against the wilful defaulters identified as per the definition indicated at paragraph 2.1.3 above.

(a) No additional facilities should be granted by any bank/ FI to the listed wilful defaulters. In addition, such companies (including their entrepreneurs/ promoters) where banks/ FIs have identified siphoning / diversion of funds, misrepresentation, falsification of accounts and fraudulent transactions should be debarred from institutional finance from the scheduled commercial banks, Financial

Institutions, NBFCs, for floating new ventures for a period of 5 years from the date of removal of their name from the list of wilful defaulters as published/ disseminated by RBI/CICs.

(b) The legal process, wherever warranted, against the borrowers/ guarantors and foreclosure for recovery of dues should be initiated expeditiously. The leaders may initiate criminal proceedings against wilful defaulters, wherever necessary.

(c) Wherever possible, the banks and Fis should adopt a proactive approach for a change of management of the wilfully defaulting borrower unit.

(d) A covenant in the loan agreements, with the companies to which the banks / Fis have given funded/ non-funded credit facility, should be incorporated by the banks/ Fis to the effect that the borrowing company should not induct on its board a

person whose name appears in the list of Wilful Defaulters and that in case, such a person is found to be on its board, it would take expeditious and effective steps for removal of the person from its board.

It would be imperative on the part of the banks and Fis to put in place a transparent mechanism for the entire process so that the penal provisions are not misused and the scope of such discretionary powers are kept to the barest minimum. It should also be ensured that a solitary or isolated instance is not made the basis for imposing the penal action.”

14. On the close scrutiny of the aforesaid provisions of Master Circular, it is clear that the consequences of declaring any lender as wilful defaulter are serious in nature. It is also clear that for declaring a lender to be wilful defaulter specific finding is required to have been recorded in terms of Clause 2.1.3 (a) to (d) as the case may be. The Master Circular also provides a mechanism

to be adopted for identifying the wilful defaulter. It includes, availability of evidence of wilful default on the part of borrowing company and its promoter/ whole-time director which needs to be examined by the Identification Committee. If the Committee concludes that an event of wilful default has occurred, it is obligatory on the part of Identification Committee to issue a show cause notice to the concerned borrower and the promoter/ whole-time director calling from their submissions and after considering their submissions as may be received, an order recording the fact of wilful default has to be passed after giving reasons for the same. It is also incumbent upon the Identification Committee to give an opportunity of personal hearing to borrower & promoter / whole-time director if it feels that such opportunity is necessary. The said order of the Committee needs to be reviewed by another Committee (Review Committee) as per Clause 3(c) of the Master Circular.

15. Examining the present matter on the touch stone of the aforesaid provisions, we find that the Respondent Bank has failed to comply with the aforesaid mechanism provided under the Master Circular. It is clear from the record that in response to the notice issued by the Bank informing the Petitioners about their

intentions to proceed against them for declaring them as willful defaulter and giving last chance to deposit outstanding amounts, the Petitioners have submitted a detailed reply dated 29th January, 2018 giving reasons as to why such proceeding cannot be initiated. However, it appears that thereafter the Identification Committee has passed an order on 9th March, 2018 recording that the Petitioners have committed wilfull default. It is also an admitted fact that the copy of the order dated 9th March, 2018 was not supplied to the Petitioners even though a written request for the same was made. Moreover, in the stand of the Bank in reply to the Petition, it is stated that is not necessary to supply the copy of the order of the Identification Committee to the Petitioners.

16. In the circumstances, in our considered view the Respondents while declaring the Petitioners as wilful defaulter have violated the provisions contained in the Master Circular and have also acted in violation of the principles of natural justice. The impugned action which is penal in nature has been taken causing serious implication on the Petitioners without following the basis principles of natural justice. The impugned order of Review Committee as is clear from a bare reading of it, is a non speaking

order as the operative part of the order of Review Committee which contains the reasons reads thus:

“The Review Committee has examined and reviewed the proceedings initiated order and the findings of the Identification Committee and found that they are in order and confirmed that you have committed the following willful default:-

(Reasons) The unit has defaulted reasons in meeting its payment / repayment obligation to the lender and has not utilized the finance from lender even when it has capacity to honour the said obligations.”

This according to our considered view the order of the Review Committee cannot be termed as reasoned order and as such it cannot be sustained.

17. We are also of the considered view that the Respondent Bank cannot be allowed to say that it is not necessary for them to supply copy of the order passed by the Identification Committee. As would be clear from Clause 3(b) of the Master Circular the

Identification Committee has to record reasons while passing the order of recording the fact of commission of wilful default as also to assign valid reasons as to whether it is necessary to give the borrower and the the promoter/whole time director the opportunity of personal hearing. This requirement whether has been complied with or not could have been examined only if the said order was brought on record. But strangely in reply the Bank has taken a stand that the order dated 9th March, 2018 passed by the Identification Committee is the internal order and it is not supposed to be served upon the Petitioners. It is also stated by the Respondents in the reply that no question arises of serving the order dated 9th March, 2018 on the Petitioners and that the order dated 9th March, 2018 is the preliminary internal order and after its finalization by Review Committee, it is conveyed to the Petitioners. Thus from the stand taken by the Respondents, it is clear that they have neither supplied copy of the order passed by the Identification Committee to the Petitioners nor according to them it was necessary. It is also very strange that the said order has not even been brought on record by the Bank to deny the Petitioners' contention that their grounds raised through reply dated 29th January, 2018 to show cause notice against proposed

declaration of wilful defaulter have not been considered and that as to why the Petitioners were denied the opportunity of being heard.

18. In our considered view the stand of the Bank that they are not obliged to furnish copy of the order passed by the Identification Committee cannot be sustained. Such stand if accepted would give rise to arbitrary exercise of powers as the Identification Committee may give complete go by to the requirement of assigning reasons for declaring a party as Wilful Defaulter and also requirement of giving reasons as to why opportunity of personal hearing would not be necessary.

19. In the present case, as already observed even the order of Review Committee is bereft of any reasons for arriving at the conclusion that, "the Petitioners have defaulted in meeting its payment/ repayment obligation to the lender even when it has capacity to honour the said obligation.

20. Having regard to the aforesaid in our considered view failure to supply the reasons by the Identification Committee of recording the fact that the Petitioners are in wilful default and as to why they need not be given an opportunity of hearing when in their

reply dated 29th January, 2018 the Petitioners have raised various grounds opposing the proposed action of declaring them willful defaulter and sought opportunity of personal hearing cannot be said to be justified. Similarly absence of reasons in the order of Review Committee also amounts to denial of justice. It is now well settled that reasons are the live links between the minds of the decision taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity to objectivity right to reason is an indispensable part of sound judicial system. The rational is that the affected party can know why the decision has gone against him. One of the statutory requirement of the natural justice is spelling out reasons for the order made, in other words a speaking order. Even in respect of administrative order the giving of reasons is one of the fundamentals of good administration.

21. In the circumstances, we set aside the impugned orders by which the Petitioners have been declared wilful defaulter. However, the Respondents are at liberty to take fresh steps against the Petitioners if they are so advised keeping in view the observations as above and complying the procedure as provided in

the Master Circular dated 1st July, 2015 issued by Reserve Bank of India.

22. With the aforesaid liberty, the Petition is allowed.

(N.W. SAMBRE, J.)

(SHANTANU KEMKAR, J.)