**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

CWP-11730-2017 (O&M)
Date of decision : 06.08.2018

M/s Vinod Cotton Corporation and others

...Petitioner(s)

Versus

State Bank of Patiala and others

...Respondent(s)

**CORAM: HON'BLE MR. JUSTICE JITENDRA CHAUHAN**

Present: Mr. P.S. Bhinder, Advocate,
for Mr. Naresh Jain, Advocate,
for the petitioners.

Mr. Rakesh Gupta, Advocate,
for the respondents.

**JITENDRA CHAUHAN, J.**

The petitioners, *inter alia*, seek issuance of a writ in the nature of Certiorari, for quashing letter dated 06.03.2017 (Annexure P-7) issued by respondent No.3.

While issuing notice of motion on 25.05.2017, this Court noticed as under:-

> *"The petitioners, through instant writ petition, seek quashing of letter dated 06.03.2017 Annexure P-7 issued by respondent No.3 by virtue of which the names of the petitioners have been forwarded to the Credit Information Companies for inclusion of the name of the petitioners in Willful Defaulters list. It is claimed that prejudicial order has been passed without opportunity of hearing.*

> *On asking of the Court, learned counsel for the petitioners informs that the proceedings under SARFAESI Act have already been launched against the petitioners which proceedings are being contested in accordance with the procedure without prejudice to the rights of the parties in the litigation under any other Act or SARFAESI Act.*
>
> *Learned counsel for the petitioners submits that declaration of a party as willful defaulter is independent of the proceedings initiated on account of defaults under the SARFAESI Act.*
>
> *Notice of motion to the respondents only in context to the validity of order Annexure P-7 which is claimed to be in violation of rules of natural justice by the petitioners, for 16.08.2017.*
>
> *Notice regarding stay also for said date."*

It is the case of the respondents that the petitioner-firm obtained financial facilities from the bank and subsequently it transpired that the petitioner sold all the hypothecated stocks to the extent of ₹ 17.67 crore without making corresponding deposits with the bank, which amounts to diversion of funds as per the Reserve Bank of India's guidelines. As per Master Circular dated 01.07.2015 (Annexure R-1), one who is guilty of diversion of funds can be declared as wilful defaulter. The solitary grouse of the petitioner is that impugned letter (Annexure P-7) by virtue of which the names of the petitioners have been forwarded to the Credit Information Companies for inclusion of the name of the petitioners in Wilful Defaulters' list, has been issued without opportunity of hearing. Before delving further, it would be apposite to notice the relevant provisions as contained in the

Master Circular (Annexure R-1). Clause 2.1.3 which defines wilful default, and Clause 2.2 which defines the diversion of funds, read as under:-

> ***"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.*
>
> ***2.2 Diversion and siphoning of funds***
>
> *2.2.1 Diversion of Funds: The term 'diversion of funds' referred to at paragraph 2.1.3(b) above,*

*should be construed to include any one of the undernoted occurrences: (a) utilisation of short-term working capital funds for long-term purposes not in conformity with the terms of sanction;*

*(b) deploying borrowed funds for purposes / activities or creation of assets other than those for which the loan was sanctioned;*

*(c) transferring borrowed funds to the subsidiaries / Group companies or other corporates by whatever modalities;*

*(d) routing of funds through any bank other than the lender bank or members of consortium without prior permission of the lender;*

*(e) investment in other companies by way of acquiring equities / debt instruments without approval of lenders;*

*(f) shortfall in deployment of funds vis-à-vis the amounts disbursed / drawn and the difference not being accounted for.*

*2.2.2 Siphoning of Funds: The term 'siphoning of funds', referred to at paragraph 2.1.3(c) above, should be construed to occur if any funds borrowed from banks / FIs are utilised for purposes unrelated to the operations of the borrower, to the detriment of the financial health of the entity or of the lender. The decision as to whether a 5 particular instance amounts to siphoning of funds would have to be a judgment of the lenders based on objective facts and circumstances of the case."*

The mechanism for identification of wilful defaulter is provided in Clause 3, which reads thus:-

***"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 / wholetime 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.*

*(d) xxxxxx*

*(e) xxxxxx"*

The respondents have placed on record the minutes of meeting of the Committee for Identification of Wilful Defaulters held on 31.08.2016 (Annexure R-2) wherein, the case of the petitioners was considered as Agenda Item No.Y-16-17/02-45 and after finding a prima facie case against the petitioners, it was decided to issue a show-cause notice (Annexure R-3) to the petitioners for having diverted funds to the extent of ₹ 17.67 crore. The petitioners, though filed a detailed reply dated 08.10.2016 (Annexure R-4), but did not address to the issue of diversion of funds in question. The petitioners were further given a notice regarding personal hearing before the Committee for 15.11.2016 (Annexure P-5), however, for the reasons best known to them, they did not appear before the Committee. Thereafter, the case of the petitioners was again considered on 15.11.2016 vide agenda item No.Y-16-17/01-45 and it was specifically recorded in the minutes that despite having been afforded opportunity of hearing, the petitioners did not appear before the Committee. The Committee, after duly considering the show-cause notice, the reply and the representation moved by the borrower, recorded that there was no justifiable reason given by the petitioners for diversion of funds and it recommended to include the name of the petitioners in the list of wilful defaulters. Further, as required under the master circular, the decision of the committee was considered by the Review Committee in its meeting held on 16.12.2016 (Annexure R-6), headed by the Managing Director of the Bank. The case of the petitioners was considered as Item No.RC-41 (2016-17) by the Review Committee and after detailed deliberations, the decision of the first Committee was approved by recording specific reasons.

Thus, from the facts and circumstances narrated above, it emerges that the respondents have followed the due procedure prescribed in the Master Circular dated 01.07.2015 (Annexure R-1) before recommending the names of the petitioners to be added in the list of wilful defaulters. No fault can be found with the impugned letter dated 06.03.2017 (Annexure P-7) issued by respondent No.3.

In view of the above discussion, this Court is of the considered opinion that the instant petition is devoid of any merit and the same is, hereby, dismissed.

**06.08.2018** **(JITENDRA CHAUHAN)**
***atulsethi*** **JUDGE**

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|---|---|---|
| Whether speaking / reasoned : | Yes | No |
| Whether Reportable : | Yes | No |