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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.08.2019

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THE HON'BLE MR.JUSTICE P.D.AUDIKESSAVALU

W.P. Nos. 13699 and 21416 of 2019
and

W.M.P. Nos. 13759, 13762, 20616 and 20619 of 2019

Shankar Varadharajan ... Petitioner in W.P. No. 13699 of 2019

Padmavathy Suresh ... Petitioner in W.P. No. 21416 of 2019

-vs-

1. State Bank of India,
Stressed Assets Management Branch,
32, Montieth Road, Egmore,
Chennai - 600 008,
Rep. by its Deputy General Manager.
... First Respondent in W.P.No.13699/19
Respondent in WP.21416/19
2. Reserve Bank of India,
16, Rajaji Salai,
Fort Glacis,
Chennai - 600 001.
... Second Respondent in W.P. No. 13699 of 2019

Prayer in W.P. No. 13699 of 2019:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the impugned order of the First Respondent bearing No. SAMB/CHE/CLO-I/43 dated 10.04.2019, quash the same.

Prayer in W.P. No. 21416 of 2019:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the impugned order of the Respondent bearing No. SAMB/CHE/CLO-I/43 dated 10.04.2019, quash the same.



For Petitioner :Mr. R. Palaniandavan (in both W.P.s)

For Respondent :Mr. M.L. Ganesh (for R1 in WP.No.13699/19)
Mr.M.L.Ganesh for Respondent in WP.21416/19

Mr. C. Mohan for M/s. King and Patridge
(for R2 in W.P. No. 13699 of 2019)

C O M M O N O R D E R

Heard Mr. R. Palaniandavan, Learned Counsel for the Petitioners, Mr. M.L. Ganesh, Learned Standing Counsel for the First Respondent in W.P. No. 13699 of 2019 and Respondent in W.P. No. 21416 of 2019 and Mr. C. Mohan of M/s. King & Patridge, Learned Counsel for the Second Respondent in W.P. No. 13699 of 2019 and perused the materials place on record, apart from the pleadings of the parties.

2. State Bank of India at his Corporate Accounts Group Branch at Chennai (hereinafter referred to as the 'Bank' for brevity) had extended credit facilities to M/s. Winwind Power Energy Private Limited (hereinafter referred to as the 'Company' for brevity), which were renewed/enhanced from time to time. Show cause notice dated 03.10.2016 was issued by the Bank to the Company as well as the Petitioners, apart from certain other persons, calling upon them to make submission in writing within 30 days from its receipt as to why their names should not be included in the list of Wilful Defaulters as per the guidelines of the Reserve Bank of India in the master circular DBR. No. CID. BC. 22/20.16.003/2015-16 dated 01.07.2015. The Company through its Advocate has sent replies dated 02.11.2016 and 28.11.2016 to that show cause notice. The Petitioners through the same Advocate submitted an explanation dated 26.10.2016 contending inter alia that they had been appointed as Directors of the Company on 14.01.2015 and 30.03.2015 respectively, after the loan availed had been classified as non-performing asset with effect from 26.11.2013 and as they were not borrower, co-borrower or guarantor in respect of the loan availed and had not associated with the Company until 2015, there was no basis for issuance of such show cause notice to them. After the receipt of the aforesaid replies from the Company and the Petitioners, the Bank had issued notices dated 16.08.2017, 01.09.2017, 09.10.2018 and 18.12.2018 to them to avail the opportunity of personal hearing before the Wilful Defaulter Identification Committee (hereinafter referred to as the 'Identification Committee' for brevity) on 28.08.2017, 22.09.2017, 26.10.2018 and 27.12.2018 respectively, but neither the Company nor the Petitioners



appeared on any of those hearings. The Identification Committee of the Bank by proceedings dated 27.12.2018 considered the submissions received from the Company through its Advocate and concluded that the name of the Company and the Petitioners as its Directors will be included in the list of Wilful Defaulters, which decision was approved by the Review Committee of Wilful Defaulters (hereinafter referred to as the 'Review Committee' for brevity) in the proceedings No. RCWD Minutes/06/2018-19 dated 12.02.2019 and the same was communicated to the Petitioners by order No. SAMB/CHE/CLO-I/43 dated 10.04.2019, which is challenged by the Petitioners in these Writ Petitions.

3. It is strenuously urged by the Learned Counsel for the Petitioners that though the Petitioners had not availed the opportunity of personal hearing before the Identification Committee, the impugned decision of the Identification Committee confirmed by the Review Committee has not considered the specific objections raised by the Petitioners in their reply dated 26.10.2016 sent through their Advocate and that the opportunity of personal hearing had not been given by the Review Committee while approving the decision taken by the Identification Committee. In this regard, reliance is placed on the decision of the Hon'ble Supreme Court of India in State Bank of India -vs- Jah Developers [(2019) 6 SCC 787].

4. Learned Counsel for the First Respondent submits that the Petitioners, who did not availed the opportunity of personal hearing before the Identification Committee, cannot be heard to complain of any prejudice caused by the impugned proceedings. It is further contended that the decision of the Hon'ble Supreme Court of India in State Bank of India -vs- Jah Developers [(2019) 6 SCC 787], which was delivered on 08.05.2019, after the impugned order had been communicated to the Petitioners by order dated 10.04.2019, cannot have application to these cases.

5. Before proceeding to examine validity of the impugned proceedings, it would be necessary to reproduce clause (3) of the Circular DBR. No. CID. BC. 22/20.16.003/2015-16 dated 01.07.2015 issued by the Reserve Bank of India pertaining to the mechanism of identification of Wilful Defaulters, as under:-

"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



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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) As regard a non-promoter / non-whole time director, it should be kept in mind that Section 2(60) of the Companies Act, 2013 defines an officer who is in default to mean only the following categories of directors:

(i) whole-time director

(ii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iii) every director, in respect of a contravention of any of the provisions of Companies Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings and who has not objected to the same, or where such contravention had taken place with his consent or connivance.

Therefore, except in very rare cases, a non-whole time director should not be considered as a wilful defaulter unless it is conclusively established that:

I. he was aware of the fact of wilful default by the borrower by virtue of any proceedings recorded in the minutes of meeting of the Board or a Committee of the Board and has not recorded his objection to the same in the Minutes; or,





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Para 2.1.3 would only relate to the individual facts of each case. What has typically to be discovered is whether a unit has defaulted in making its payment obligations even when it has the capacity to honour the said obligations; or that it has borrowed funds which are diverted for other purposes, or siphoned off funds so that the funds have not been utilised for the specific purpose for which the finance was made available. Whether a default is intentional, deliberate, and calculated is again a question of fact which the lender may put to the borrower in a show-cause notice to elicit the borrower's submissions on the same. However, we are of the view that Article 19 (1)(g) is attracted in the facts of the present case as the moment a person is declared to be a wilful defaulter, the impact on its fundamental right to carry on business is direct and immediate. This is for the reason that no additional facilities can be granted by any bank/financial institutions, and entrepreneurs/promoters would be barred from institutional finance for five years. Banks/financial institutions can even change the management of the wilful defaulter, and a promoter/director of a wilful defaulter cannot be made promoter or director of any other borrower company. Equally, under Section 29-A of the Insolvency and Bankruptcy Code, 2016, a wilful defaulter cannot even apply to be a resolution applicant. Given these drastic consequences, it is clear that the Revised Circular, being in public interest, must be construed reasonably...."

As emphasized in the aforesaid ruling, the declaration of a person as 'Wilful Defaulter' of a Company, which has failed to repay the dues from a Bank in terms of the aforesaid circular DBR. No. CID. BC. 22/20.16.003/2015-16 dated 01.07.2015 issued by the Reserve Bank of India has drastic consequences and has to be construed reasonably. This would mean that while declaring a person as 'Wilful Defaulter' along with the Company in which he is a Promoter or Director or had guaranteed the loan availed by it, his contributory role in that regard would necessarily have to be independently examined. At this juncture, it would be useful to refer to the relevant portions from the decision of the Hon'ble Supreme Court of India in S.M.S. Pharmaceuticals Limited -vs- Neeta Bhalla [(2005) 8 SCC 89], while dealing with the liability of the Director of a Company for an offence committed under Section 141 of the Negotiable Instruments Act, 1881, which is extracted below:-

"8. The officers responsible for conducting the



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affairs of companies are generally referred to as directors, managers, secretaries, managing directors, etc. What is required to be considered is: Is it sufficient to simply state in a complaint that a particular person was a director of the company at the time the offence was committed and nothing more is required to be said. For this, it may be worthwhile to notice the role of a director in a company. The word "director" is defined in Section 2(13) of the Companies Act, 1956 as under:

"2. (13) 'director' includes any person occupying the position of director, by whatever name called;"

There is a whole chapter in the Companies Act on directors, which is Chapter II. Sections 291 to 293 refer to the powers of the Board of Directors. A perusal of these provisions shows that what a Board of Directors is empowered to do in relation to a particular company depends upon the roles and functions assigned to directors as per the memorandum and articles of association of the company. There is nothing which suggests that simply by being a director in a company, one is supposed to discharge particular functions on behalf of a company. It happens that a person may be a director in a company but he may not know anything about the day-to-day functioning of the company. As a director he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of a company. It may be that a Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of the company who may be made responsible for the day-to-day functions of the company. These are matters which form part of resolutions of the Board of Directors of a company. Nothing is oral. What emerges from this is that the role of a director in a company is a question of fact depending on the peculiar facts in each case. There is no universal rule that a director of a company is in charge of its everyday affairs. We have discussed about the position of a director in a company in order to illustrate the point that there is no magic as such in a particular word, be it director, manager or secretary. It all depends upon the respective roles assigned to the officers in a company. A company may have managers or secretaries for different departments, which means, it may have more than one manager or secretary. These officers may also be authorised to issue cheques under their signatures with respect to



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affairs of their respective departments. Will it be possible to prosecute a secretary of Department B regarding a cheque issued by the secretary of Department A which is dishonoured? The secretary of Department B may not be knowing anything about issuance of the cheque in question. Therefore, mere use of a particular designation of an officer without more, may not be enough by way of an averment in a complaint. When the requirement in Section 141, which extends the liability to officers of a company, is that such a person should be in charge of and responsible to the company for conduct of business of the company, how can a person be subjected to liability of criminal prosecution without it being averred in the complaint that he satisfies those requirements. Not every person connected with a company is made liable under Section 141. Liability is cast on persons who may have something to do with the transaction complained of. A person who is in charge of and responsible for conduct of business of a company would naturally know why the cheque in question was issued and why it got dishonoured.

9. The position of a managing director or a joint managing director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence.

10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

"Who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc."

What is required is that the persons who are sought to be made criminally liable under Section 141 should be,



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at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every director, manager or secretary in a company is liable"..., etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

11. A reference to sub-section (2) of Section 141 fortifies the above reasoning because sub-section (2) envisages direct involvement of any director, manager, secretary or other officer of a company in the commission of an offence. This section operates when in a trial it is proved that the offence has been committed with the consent or connivance or is attributable to neglect on the part of any of the holders of these offices in a company. In such a case, such persons are to be held liable. Provision has been made for directors, managers, secretaries and other officers of a company to cover them in cases of their proved involvement.

12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the



part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable."

The aforesaid views expressed in the context of the complaint under Section 141 of the Negotiable Instruments Act, 1881, would equally apply while fastening liability on a person as Promoter or Director or guarantor of a Company while declaring them as 'Wilful Defaulter' under the aforesaid circular DBR. No. CID. BC. 22/20.16.003/2015-16 dated 01.07.2015 issued by the Reserve Bank of India.

6. In the light of the aforesaid legal position, it could be seen from the proceedings dated 27.12.2018 of the Identification Committee of the Bank that what had been actually examined was only the submissions received from the Company through its Advocate on 02.11.2016 and 28.11.2016, but the specific contentions made on behalf of the Petitioners in their reply dated 26.10.2016 through the same Advocate had not even been taken into account. A perusal of the subsequent minutes of the Reviewing Committee of the Bank reflects that the decision of the Identification Committee had been simply confirmed without assigning any separate reasons. The resultant inference that has to be drawn is that the impugned proceedings in entirety are obviously vitiated insofar as it relates to the classification of the Petitioners as Wilful Defaulters for the borrowings made by the Company.

7. In respect of the other contention raised on behalf of the Petitioners that there has been non-compliance of the procedure envisaged in the circulars dated 01.07.2013 and 01.07.2015 issued by the Reserve Bank of India, the construction made by the Hon'ble Supreme Court of India in State Bank of India -vs- Jah Developers Private Limited [(2019) 6 SCC 787], requires to be noticed, and the same is follows:-

"24.This being so, and given the fact that Para 3 of the Master Circular dated 1-7-2013 permitted the borrower to make a representation within 15 days of the preliminary decision of the First Committee, we are of the view that first and foremost, the Committee comprising of the Executive Director and two other senior officials, being the First Committee, after following Para 3(b) of the Revised Circular dated 1-7-2015, must give its order to the borrower as soon as it is made. The borrower can then represent against such order within a period of 15 days to the Review



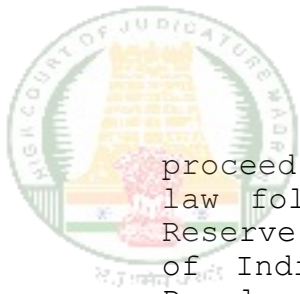
"8. Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of



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law, was imported and applied for the first time in L.C. Golak Nath v. State of Punjab [AIR 1967 SC 1643] . In Managing Director, ECIL v. B. Karunakar [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See Ashok Kumar Gupta v. State of U.P. [(1997) 5 SCC 201 : 1997 SCC (L&S) 1299] and Baburam v. C.C. Jacob [(1999) 3 SCC 362 : 1999 SCC (L&S) 682 : 1999 SCC (Cri) 433] .) It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs...."

9. In the light of the aforesaid findings, the question that now remains to be considered is what should be the relief that the Petitioners would be entitled. It is now well settled that a procedural error per se cannot exonerate the alleged wrong doer and the proper recourse would be to carry out the exercise from the stage at which the fault has been noticed. In the present case, the Identification Committee had not considered the contentions raised in the reply dated 26.10.2016 submitted by the Petitioners and resultantly, the matter would have to be placed again before the Identification Committee for fresh consideration. Though the Petitioners had failed to avail the opportunity before the Identification Committee despite earlier notices, it would subserve the interests of justice if another opportunity of personal hearing is afforded to them. However, it is hastened to clarify here that if the Petitioners fail to avail the same again, it shall be open to the Identification Committee to proceed further in the matter accordingly thereafter. It is needless to add here that the matter shall



proceed for further decision on merits and in accordance with law following the procedure in the relevant circulars of the Reserve Bank of India as laid down by the Hon'ble Supreme Court of India in the decision in State Bank of India -vs- Jah Developers Private Limited [(2019) 6 SCC 787], uninhibited and uninfluenced by the impugned proceedings, which stand set aside. At the risk of repetition, it must also be clarified here that the benefit of this order would enure only insofar as the Petitioner is concerned, and that the impugned proceedings would remain intact in respect of the Company and other persons, who have not challenged the same, are concerned.

10. In the upshot, the order dated 10.04.2019 passed by the Bank insofar it relates to the Petitioners are concerned, is set aside and the matter is remitted for fresh consideration to the Identification Committee to proceed further in the manner indicated supra. The Writ Petitions are ordered on the aforesaid terms. Consequently, connected Miscellaneous Petitions are closed. No costs.

Sd/-
Assistant Registrar (CS-IV)

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Sub Assistant Registrar

vjt
To

1. The Deputy General Manager,
State Bank of India,
Stressed Assets Management Branch,
32, Montieth Road, Egmore,
Chennai - 600 008,
2. The Chairman,
Reserve Bank of India,
16, Rajaji Salai,
Fort Glacis,
Chennai - 600 001.

+2cc to Mr.R.Palaniandavan, Advocate SR.74897, 74733/19
+1cc to Mr.M.L.Ganesh, Advocate SR.75794/19
+1cc to M/s.King & Partridge, Advocate SR.74707

W.P. Nos. 13699 and 21416 of 2019

RJI (CO)
CB(07/01/2020)