BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Reserved on : 16.04.2019
Pronounced on : 04.06.2019
CORAM:
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
W.P.(MD)No.24505 of 2018
and
W.M.P.(MD)Nos.5240 of 2019 and 22214 of 2018

1. K.S.M.Educational Trust,
   Represented by its Managing Trustee
   M.Subramaniam,
   No.10, Mambazha Salai,
   Srirangam, Trichy-620 006.

2. M.Subramaniam,
   Trustee

3. S.Nirmala,
   Trustee ... Petitioners

Vs.

1. The Reserve Bank of India,
   Department of Banking Regulation,
   13th Floor, Central Office Building,
   Mumbai-400 001.

2. The Executive Director,
   Committee of Executives on Wilful Defaulters,
   Bank of Baroda, Baroda Corporate Centre,
   Court-26, Government-Block,
   Bandra Kurla Complex,
   Bandra (E), Mumbai.

3. The Assistant General Manager,
   Bank of Baroda,
   Zonal Stressed Asset Recovery Branch,
   1st Floor, 74, Thiyagaraya Road,
   T-Nagar, Chennai-600 017.

4. The Branch Manager,
   Bank of Baroda,
   Manachanallur Branch,
   No.5, Edumalai Road,
   Trichy-621 005. ... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the notice made in BOB:ZOSARB:21:212, dated 01.12.2018, passed by the third respondent and consequently, direct the third respondent to permit the petitioners to engage the services of a Lawyer or Chartered Accountant or Consultant of their choice to represent them before the second respondent committee.

For Petitioners : M/s.J.Anandhavalli
For R3 & R4 : Mr.K.Govindarajan

ORDER

The first petitioner is a registered trust. The other petitioners are its trustees. They had availed credit facility from the fourth respondent Bank. According to the fourth respondent Bank, the account had become a Non-Performing asset. They had initiated recovery proceedings under SARFAESI Act. The petitioners have independently questioned the same before the DRT, Madurai. In the meanwhile, the fourth respondent Bank issued a show cause notice dated 18.09.2018 declaring the writ petitioner Trust as a willful defaulter. The petitioners herein submitted their reply dated 05.10.2018 requesting a personal meeting along with their Advocate/Chartered Accountant/Consultant to represent their case before the Committee. The petitioners' request for appearing before the Committee with their Lawyer/Chattered Accountant/Consultant, was rejected vide communication dated 01.12.2018. This is under challenge in this writ petition.

2.Heard the learned counsel on either side.

3.The Reserve Bank of India had issued a Master Circular dated 01.07.2014 " to put in place a system to disseminate credit information pertaining to wilful defaulters for cautioning Bank and financial Institutions so as to ensure that further Bank finance is not made available to them". The first circular was issued on 01.07.2014. It was updated on 01.07.2015. The Circular has evolved a mechanism for identification of wilful defaulters.

(a) The evidence of wilful defaulters on the part of the borrowing company and its promoter/whole time director at the relevant time has to be examined by a committed headed by an Executive Director or equivalent and consisting of two other senior officers of the ranks of the GM/DGM.

(b) If the committee concludes that an event of wilful defaulter has occurred, it shall issue a show cause notice to the concerned borrower and the promotor/whole time director and call for their submissions and after consideration of 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 promotor/whole-time director for a personal hearing, if the Committee feels such an opportunity is necessary.

4.Now the question is when such a personal hearing is given whether the borrower is entitled to be represented by their Lawyer/ Chartered Accountant/Consultant. While the Bombay and Calcutta High

Courts have held that there is no right of legal representation, the Delhi High Court has taken a contrary view.

5.I heard extensive arguments on either side and the matter was reserved for orders on 16.04.2019. In the meanwhile, the Hon'ble Supreme Court had answered the issue in ***Civil Appeal No.4776 of 2019 (State Bank of India Vs. M/S. JAH DEVELOPERS PVT. LTD. & ORS)*** on 08.05.2019. Paragraph No.21 of the said decision reads as under.

"21. Given the above conspectus of case law, we are of the view that there is no right to be represented by a lawyer in the in-house proceedings contained in paragraph 3 of the Revised Circular dated 01.07.2015, as it is clear that the events of wilful default as mentioned in paragraph 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 29A 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. This being so, and given the fact that paragraph 3 of the Master Circular dated 01.07.2013 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 paragraph 3(b) of the Revised Circular dated 01.07.2015, 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 Committee. Such written representation can be a full representation on facts and law (if any). The Review Committee must then pass a

reasoned order on such representation which must then be served on the borrower. Given the fact that the earlier Master Circular dated 01.07.2013 itself considered such steps to be reasonable, we incorporate all these steps into the Revised Circular dated 01.07.2015."

6.Since the Hon'ble Supreme Court has authoritatively answered the issue raised in this writ petition, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

sd/
Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar

To
1. The Reserve Bank of India,
Department of Banking Regulation,
13th Floor, Central Office Building,
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Manachanallur Branch,
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Trichy-621 005.

+1 CC to MR.K.GOVINDARAJAN, Advocate (SR-66978[F] dated 06/06/2019)
+1 CC to M/s.J.ANANDHAVALLI, Advocate (SR-66786[F] dated 04/06/2019)

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