BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 24.07.2020
CORAM
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
W.P.(MD)No.16555 of 2019
and
W.M.P.(MD)Nos.13203 and 13204 of 2019

1.K.S.M.Educational Trust,
represented by its Managing Trustee,
M.Subramaniam,
N.10, Mambazha Salai,
Srirangam, Trichy-620 006.

2.M.Subramaniam
3.S.Nirmala ... 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 Willful 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 Senior Branch Manager,
Bank of Baroda,
Manachanallur Branch,
No.5, Edumalai Road,
Trichy-621 005. ... Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records of the fourth respondent dated 18.09.2018 vide Manach/Recy/55/23 and quash the same.

For Petitioner : Ms.J.Anandhavalli
For Respondent : Mr.Srinath Sridevan
2 to 4 for Mr.M.Govindarajan

ORDER

Heard Ms.J.Anandhavalli, learned counsel for the petitioner and Mr.Srinath Sridevan, learned Counsel for the respondents.

2.This writ petition has been filed questioning the show cause notice dated 18.09.2018 issued by the Senior Branch Manager, Bank of Baroda, Manachallur Branch, Trichy/fourth respondent herein wherein the response of the writ petitioners had been invited as regards the intention of the Bank to declare the writ petitioners as wilful defaulters.

3.The third respondent has filed counter affidavit controverting the writ petitioners' stand. The learned counsel appearing for the Bank states that the counter filed by the third respondent is adopted by the fourth respondent also.

4.The case was listed before me on 20.07.2020 and it was adjourned to 22.07.2020. On 22.07.2020, the learned counsel appearing for the petitioners filed a memo, which reads as follows:-

> *"On instructions from the petitioners this memo is filed. It is respectfully submitted that the Hon'ble Judge has appeared against the third petitioner on behalf of Mr.Prasanna Vinoth. Counsel on record in C.R.P.(MD) No.2289 of 2012, which is related to a Trust viz., ADS Educational Trust, Trichy, in which also the third petitioner is a Managing Trustee. When this Hon'ble Court heard the petitioners case in the earlier writ petition in W.P.No.24505 of 2018, this could not be brought to the notice of this Court as the same was not noted then."*

5.I specifically asked the learned counsel for the petitioners as to whether the petitioners are demanding my recusal from this case. The learned counsel for the petitioners states that the petitioners are asking for my recusal for the reasons set out in the said memo.

6. I must straightaway observe that it is open to any litigant to ask for recusal. But then, it is eventually the call of the concerned Judge. The writ petitioners state that one Mr.M.Subramaniam filed C.R.P.(PD)(MD)No.2269 of 2012 before this Court and that I had led the counsel on record for respondents 1 and 2. The cause title of the said civil revision petition reads thus:-

C.R.P.(PD)(MD)No.2269 of 2020

M.Subramaniam ...Petitioner

Vs.

1.ADS Educational Trust,
By its Managing Trustee,
T.S.Raja,
Plot No.1, Church Colony,

Puthur, Trichy-620 017.
2.T.S.Raja
3.R.V.Prasanna ..Respondents

7. KSM Educational Trust is not a party to the said revision proceedings. The learned counsel for the petitioners would state that the trustees of KSM Educational Trust were also involved in the other Trust. But it is beyond dispute that the cause of action which is the subject matter of the present writ proceedings has absolutely nothing to do with the aforesaid revision proceedings. I therefore, come to the conclusion that the apprehension expressed by the writ petitioners is unfounded. The principles regarding recusal have been set out in a number of decisions. It has been held by the Hon'ble Supreme Court that to seek recusal, the litigant must have reasonable apprehension. If the apprehension is inherently unreasonable, then the Judge would not be serving the cause of justice by recusing himself. Therefore, after considering the objections expressed by the petitioners, I have no hesitation to reject the same. I made it clear to the learned counsel that I intended to consider the matter on merits.

8.The learned counsel for the petitioners raised as many as three contentions. Her foremost contention is that the show cause notice has been issued by the fourth respondent who lacks jurisdiction to issue the same. She drew my attention to the relevant Clause set out in the Master Circular of the Reserve Bank of India dated 01.07.2015. Clause 3(a) and 3(b) of the said Master Circular reads as follows:-

> *"3.Mechanism for identification of Wilful Defaulters.*
>
> *The transport mechanism referred to in paragraph 2.5 (d) 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 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."*

9. The learned counsel for the petitioners argues that it is the committee referred to in Clause 3(a) of the Circular which alone could have issued the show cause notice and the fourth respondent, who is mere by a Senior Branch Manger could not have the jurisdiction to do so. She would also point out that the

petitioners had subsequently, offered to settle the entire dues. In fact, offer for one time settlement was made and was also accepted. Therefore, in view of the subsequent developments, the impugned show cause notice should be treated as having been superseded.

10.She also would contend that the respondent Bank is incorrect in alleging that the petitioners have not shown their *bona fides*. The learned counsel for the petitioners would vehemently argue that a sum of Rs.78.00 lakhs was in fact paid by the petitioners herein. It was also credited to the said account. The core argument advanced by the learned counsel for the petitioners is that the show cause notice has serious consequences and affects the petitioners' rights. She filed her notes of submissions and reiterated all the contentions set out therein. She also highlighted the fact that even though the petitioners challenged the show cause notice issued by the fourth respondent, the fourth has not chosen to file any specific counter affidavit. She therefore, contended that the fourth respondent could not take shelter behind the stand taken by the third respondent herein. She also pointed out that there is nothing on record to indicate that the show cause notice was issued by following the directions of the Committee as contemplated under Clause 3(a) of the Master Circular issued by the Reserve Bank of India.

11.The learned counsel for the respondent Bank controverted all the aforesaid contentions raised by the learned counsel appearing for the writ petitioners. He placed particular reliance on the decisions of the Hon'ble Supreme Court reported in ***(2019) 6 SCC 787 [State Bank of India vs. Jah Developers Pvt., Ltd., and others] and (2006) 12 SCC 28 [Union of India vs. Kunisetty Satyanarayana].*** He also stated that the writ petitioners had not adhered to the terms of the one time settlement and that therefore, the one time settlement stood rescinded.

12.I carefully considered the rival contentions. It is necessary to have a look at the sequence of the litigations instituted by the writ petitioners herein. What is under challenge in this writ petition is that the show cause notice dated 18.09.2018 issued by the Senior Branch Manager of Manachanallur Branch of Bank of Baroda. The writ petition was filed on 16.07.2019. It is relevant to note here that even before filing of the present writ petition, the writ petitioners had filed W.P.(MD)No.24505 of 2018 in December, 2018. In the earlier writ petition, notice made in BOB:ZOSARB:21:212, dated 01.12.2018 was put to challenge. Notice dated 01.12.2018 had been issued by the Committee as contemplated in Clause 3(a) of the Master Circular of the Reserve Bank of India. Interim order was granted in W.P.(MD)No.24505 of 2018. But in view of the judgment of the Hon'ble Supreme Court reported in ***(2019) 6 SCC 787 [State Bank of India vs. Jah Developers Pvt., Ltd., and others]***, the said writ petition was dismissed on 04.06.2019. The issue raised in W.P.(MD)No.24505 of 2018 was the entitlement of the writ petitioners to be represented by their advisors (Advocate or Chartered Accountant) before the said Committee.

13.I cannot appreciate the conduct of the writ petitioners. Nothing prevented the writ petitioners from challenging the impugned show cause notice when they filed W.P.(MD)No.24505 of 2018. Instead of paying installment-dues promptly, the petitioners have been filing writ petitions in installments. Even that is not in the correct sequence. After challenging the subsequent notice issued by the Committee, they challenge the earlier notice issued by the fourth respondent herein.

14.As rightly contended by the learned counsel appearing for the Bank, what is under challenge is a mere show cause notice. The show cause notice by itself does not determine the rights of the parties. Therefore, as held by the Hon'ble Supreme Court in the decision reported in ***(2006) 12 SCC 28 [Union of India vs. Kunisetty Satyanarayana]***, normally a writ petition challenging the show cause notice is not maintainable.

15.What I have to see is whether the case on hand will fall within any exceptional circumstance. I am not able to agree with the contentions of the learned counsel for the petitioners that the impugned show chase notice has been issued by the authority, who lacks jurisdiction. This Court has to go by the terms of the show cause notice. The show cause notice reads that it has been sent as per the directions of the Committee of Executives on Willful Defaulters. Therefore, I have no hesitation to reject the contention raised by the learned counsel for the petitioners. The show cause notice was issued on 18.09.2018. The writ petition itself came to be filed only on 16.07.2019. There is absolutely no explanation for the delay occasioned in filing this writ petition.

16.As rightly pointed by the learned counsel for the Bank, whether the writ petitioners are willful defaulters or not is a question of fact. This could be determined only by the aforesaid Committee. It is not a matter that can be decided by this Court by exercising jurisdiction under Article 226 of the Constitution of India. The above point is well settled and has been summarised in paragraph 21 of the judgment of the Hon'ble Supreme Court in ***(2019) 6 SCC 787 [State Bank of India vs. Jah Developers Pvt., Ltd., and others]***, which reads as follows:-

> *"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 ve 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. The impugned judgment is, therefore, set aside, and the appeals are allowed in terms of our judgment. We thank the learned Amicus Curiae, Shri Parag Tripathi, for his valuable assistance to this Court.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 MasterCircular dated 01.07.2013 itself considered such steps to be reasonable, we incorporate all these steps into the Revised Circular dated 01.07.2015. The impugned judgment is, therefore, set aside, and the appeals are allowed in terms of our judgment. We thank the learned Amicus Curiae, Shri Parag Tripathi, for his valuable assistance to this Court."*

17.If the petitioner is aggrieved by the decision of the Committee, the petitioners can still go before the Review Committee within the time stipulated. I do not find any merit in the contentions of the learned counsel for the petitioners that the subsequent developments have rendered the impugned order infructuous. The learned counsel for the petitioners would contend that the petitioners have shown their *bona fides* by making substantial payments and that the petitioners cannot be viewed as willful defaulters in view of their subsequent conduct. There is some controversy in this regard between two parties. The stand taken by the Bank is that the one time settlement offered to the petitioners no longer holds good.

18.I hold that no purpose will be served in conducting an investigation in this regard. The dismissal of this writ petition is not going to put the petitioners in a worse condition. The petitioners themselves are aware of this fact. The fourth respondent cannot do anything on his own. It is the Committee that has to take a call in the matter and that is why the Committee issued the notice. The stand of the petitioners herein was not that the very institution of the proceedings is illegal. The relief they wanted before this Court was that they should be represented by their advocates and Chartered Accountant to project their case before the Committee. Having taken such a stand, the petitioners cannot later question the validity of the impugned show cause notice.

19.The petitioners are borrowers. They have to clear their liability by repaying the same. But of course they may be facing certain commercial difficulties. This should be sorted out across the table. I find no ground to interfere.

20.This writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (Crl Side)

// True Copy //

/ /2020
Sub Assistant Registrar(CS)

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Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

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

+1 CC to M/s.J. ANANDHAVALLI, Advocate (SR-13243[F] dated 27/07/2020)

W.P.(MD)No.16555 of 2019
24.07.2020

KK(24.08.2020) 8P 3C