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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 29.07.2020

+ W.P.(C) 3136/2020 & CM APPL.10898/2020

DINESH BAHADUR SINGH

..... Petitioner

Through Manik Dogra, Mr.Dushyant
Manocha, Ms.Ananya Ghosh,
Mr.Dhruv Pande and Mr.Brian Henry
Moses, Advs.

versus

BANK OF MAHARASHTRA

..... Respondent

Through Mr.Vinod Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. This hearing is conducted through video conferencing.
2. This writ petition is filed by the petitioners seeking the following reliefs:

“a) Issue a writ of certiorari quashing the Impugned Notice dated 07.09.2019 as well as the consequent Impugned Proceedings and the decision dated 13.02.2020 taken by the Respondent to declare the Petitioners as Wilful Defaulters under the Master Circular;

b) Issue a writ of Mandamus or any other appropriate writ, order, or direction in the nature thereof, restraining the Respondent from reporting the names of the Petitioners to the Reserve Bank of India, credit rating agencies or any other third party as “wilful defaulters” under the Master Circular;

In the alternative, assuming that the Respondent has already reported the names of the Petitioners to the Reserve

Bank of India, credit rating agencies or any other third party as “wilful defaulters”, issue a writ of Mandamus or any other appropriate writ, order, or direction in the nature thereof directing the Respondent to cause deletion of their names from the list of “wilful defaulters” maintained by the Reserve Bank of India, credit rating agencies and any other third party, as the case may be;

c) Issue a writ of Mandamus or any other appropriate writ, order, or direction in the nature thereof, restraining the Respondent from publishing the names of the Petitioners and/or their photographs as “wilful defaulters” on its website or otherwise on public domain;

In the alternative, assuming that the Respondent has already done so, to issue a writ of Mandamus or any other appropriate writ, order, or direction in the nature thereof, directing the Respondent to delete the names of the Petitioners and/or their photographs as “wilful defaulters” from their website and public domain and to ensure publication of corrective statements withdrawing any such publication already made.”

3. The case of the petitioners is that they are erstwhile promoters-directors of Energo, a company incorporated under the Companies Act, 1956. The respondent bank had advanced credit facilities to Energo. Due to extraneous circumstance resulting in decline in the whole sector, the said company Energo faced a liquidity crunch. The said company is now in liquidation pursuant to an order dated 21.08.2018 passed by the National Law Company Tribunal (*hereinafter referred to as the ‘NCLT’*).

4. On 07.09.2019, the respondent bank issued a notice to Energo and the petitioners to show cause why the petitioners should not be declared as wilful defaulters.

5. The grievance of the petitioners was that the respondent bank was not giving access to the underlying documents to the petitioners. The petitioners were constrained to file the writ petition being W.P.(C) No.11577/2019 challenging the notice. A direction was passed in the writ petition dated 01.11.2019 that the respondent bank will furnish all such documents on which they seek to place reliance.

6. It is the grievance of the petitioners that all the documents relied upon by the respondent in the notice in question have not been supplied to the petitioners. However, on 13.11.2019, a notice was received by the petitioners asking the petitioners to appear for a personal hearing on 29.11.2019. It is strongly urged that despite several attempts and a request to the liquidator also for certain documents, complete details were not provided to the petitioners. The petitioners on 29.11.2019, appeared for the personal hearing. The petitioners brought to the notice of the persons present the order dated 01.11.2019 of this court and the fact that the same has not been complied with. It was also pointed out that in the absence of the information sought the petitioners were constrained to respond to the allegations only at a generic level. Thereafter, the petitioners received a communication dated 16.03.2020 stating that the account in question has been declared as wilful defaulter and the names of the petitioners have been reported to RBI and published on the bank's website.

7. The respondent has filed a counter affidavit. In his counter affidavit, the respondent has stressed that all specific demands raised for the documents have been duly complied with and that the respondent has complied with the order of this court dated 01.11.2019 in W.P.(C) 11577/2019. It is further stated that it is admitted by the petitioners that they

have received transaction review audit report of Grant Thornton. Further additional/deficit documents have been received by the petitioners from the liquidator, receipt of which has been confirmed by the petitioners by the letter dated 02.12.2019.

8. I have heard the learned counsel for the parties.

9. Learned counsel for the petitioners has strongly urged that the respondent has not complied with the Master Circular on Wilful Defaulters dated 01.07.2015, and the directions given by the Supreme Court in the case of *State Bank of India v. M/s Jah Developers Pvt. Ltd. & Ors., 2019 (6) SCC 787*.

10. Learned counsel for the respondent however states that the respondent bank has complied with the legal position as stated by the Supreme Court in *State Bank of India v. M/s Jah Developers Pvt. Ltd. & Ors.* (supra). It has also been stressed by the learned counsel for the respondent that the observations of the Supreme Court in the afore-noted judgment pertain to the Master Circular dated 01.07.2013, which circular has been revised on 01.07.2015 and the respondent has complied with the circular of 01.07.2015.

11. In this context reference may be had to the RBI Master Circular dated 01.07.2015. The said circular prescribes the following procedures for declaring a borrower as a wilful defaulter:

“3.Mechanism for identification of Wilful Defaulters

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(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 / 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.

xxxxx.”

12. Similarly, the Supreme Court in *State Bank of India v. M/s Jah Developers Pvt. Ltd. & Ors.*(supra) held as follows:

“24. 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. 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."

13. What would follow is as noted above by the Supreme Court in the afore-noted judgment of *State Bank of India v. M/s Jah Developers Pvt. Ltd. & Ors.*(supra), the First Committee after following para 3(a) and (b) of the said Circular dated 01.07.2015 must serve its order on the borrower as soon as it is made. The borrower then has an opportunity to make a representation against such an order within 15 days to the Review Committee. The said representation to the Review Committee can be a full representation on the facts and law. The Review Committee must then pass a reasoned order on such representation which would then be served on the borrower. The Supreme Court incorporated all these steps into the revised Master Circular dated 01.07.2015. The plea of the learned counsel for the respondent claiming that the said judgment of the Supreme Court does not deal with the Circular dated 01.07.2015, is clearly incorrect.

14. In the present case, a perusal of the impugned order dated 16.03.2020 shows that it simply says as follows:

“1. That you have failed to adhere to the terms and conditions of the sanction and defaulted in repayment of dues. Accordingly your captioned account has been declared as Wilful Defaulter on 13.02.2020 as per RBI Guidelines.

2. That your names as wilful defaulters are reported to RBI and also published on our Bank’s website.

3. That our Bank having the right to publish your (wilful defaulters’) photographs in public domain has published the photographs.”

15. A perusal of the above order dated 16.03.2020 shows that it is

communicated by the DGM. It is presumably passed by the Review Committee. Procedure adopted by the respondent is wholly contrary to the mandate stated by the Supreme Court in the above noted judgment. Firstly, it is not a reasoned order. Secondly, the order of the First Committee was never communicated to the petitioners. The net result is that the petitioners never had an opportunity to make a representation against the order of the First Committee to the Review Committee. There is clear non-compliance of the directions of the Supreme Court as noted in the judgment of *State Bank of India v. M/s Jah Developers Pvt. Ltd. & Ors.*(supra).

16. The afore-noted impugned order dated 16.03.2020 is clearly illegal and *non-est* and contrary to the legal position. The same is accordingly struck down. Consequently, any consequential steps taken by the respondent declaring the petitioners as a wilful defaulter including putting their names on the net or communication to RBI would automatically stand withdrawn.

17. It is clarified that the respondent bank is free to serve a copy of the order of the First Committee to the petitioners. Once the petitioners receive a copy of the order of the First Committee, they are free to make a detailed representation on facts and law within 15 days of receipt of the same to the Review Committee. Thereafter, the Review Committee is free to consider the said representation and deal with the same as per law by passing an appropriate speaking order.

18. Nothing further survives in the present petition. The same is accordingly disposed of. All pending applications, if any, are also disposed of.

JAYANT NATH, J.

JULY 29, 2020/v