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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.08.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

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

W.P.No.12103 of 2020

Senthil Arumugasamy

.. Petitioner

Vs.

1. The Deputy General Manager,
The State Bank of India Stressed Assets
Management Branch, Avinashi Road,
Coimbatore.

2. CIBIL Corporation Office,
One India Bulls, 19th Floor, Tower 2A-2B,
Senapathibapa Marg, Elphinstone Road,
Mumbai 400 013.

.. Respondents

Prayer: Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari calling for the records of the 1st Respondent contained in its impugned order bearing SAMB / CBE / CLO III / 431 dated 09.08.2019 and to quash the same as arbitrary unjust and illegal.

For Petitioner : Ms.Ananda Gomathy

For Respondents : Mr.S.Sethuraman
for 1st respondent

No appearance for 2nd respondent

ORDER

(Made by the Hon'ble Chief Justice)

The erstwhile managing director of a company, that has now gone into liquidation pursuant to an order passed by the National Company Law Tribunal, questions the propriety of an order dated August 09, 2019 passed by the State Bank of India branding him as a wilful defaulter within the meaning of the expression in the Master Circular issued by the Reserve Bank of India on July 01, 2015.



2. The principal ground urged by the petitioner is that there does not appear to be any consideration of the petitioner's representation and no application of mind by the Review Committee of the bank.

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3. A notice was issued on May 10, 2018 by the State Bank of India to several directors of the borrower company which had obtained credit facilities in connection with its business. Though the copy notice appearing at page 184 of the papers filed by the petitioner pertains to another then director of the relevant company, there is no dispute that the contents of the individual notices issued to the several directors were the same. In essence, the relevant notice claimed that the erstwhile State Bank of Travancore, which had since merged into the State Bank of India, as a part of a consortium of banks, had granted credit facilities to company Senthil Paper and Boards Pvt. Ltd and the loan account had been classified as a non-performing asset with effect from March 31, 2017. The notice then proceeded to state as follows:

"... The Wilful Defaulter Identification Committee in the Bank, (hereinafter referred to as "Committee") has examined the conduct of the account and utilisation of credit facilities (availed from our Bank) and has concluded that the acts/events of wilful default as detailed in the Annexure have been committed by you."

The Annexure to the notice indicated that criteria 2.1.3.a and 2.2.1.d of the Master Circular were attracted because of the events of default described therein. The notice called upon the relevant director "to show cause and make submissions in writing within 30 days from the date of receipt of this letter as to why your name should not be included in the list of wilful defaulters ...".

4. There is no dispute that a written reply was issued to such notice by the petitioner herein, whereupon the Identification Committee of the bank proceeded to consider the same and concluded that, inter alia, the petitioner was liable to be labelled as a wilful defaulter. The reasons furnished by the Identification Committee for holding against the petitioner on the first count were that the company had not given any specific reply to the charge of insufficient credit against sales in the relevant account; that the company has not substantiated its claim for having repaid Rs.120 crore; and, that the funds generated from the sales proceeds had not been used by the company for reducing the outstanding loan. As to the second count of charge, the Identification Committee held that the company accepted that it had maintained a current account with Indian Bank and that it routed transactions through such account. As such, the Identification Committee perceived that



there was a wilful default on the part of the borrower since funds had been routed through a bank other than the lender bank without its permission. The petitioner, as an executive or working director of the borrower company, was perceived to be a wilful defaulter as being responsible for the borrower company's conduct of its affairs. It appears that minutes were drawn of the meeting of the Identification Committee and such minutes were forwarded to the Review Committee. Two members of the Review Committee of the bank appeared to have signed the attendance sheet, so to say, and accepted the Identification Committee's findings.

5. Upon such procedure being adopted by the State Bank, the impugned order came to be issued on August 09, 2019 to the effect that, inter alia, the petitioner had been found to be a wilful defaulter by the Identification Committee of the bank on December 29, 2018, which was confirmed by the Review Committee on March 19, 2019, and the petitioner's name was being forwarded to the Credit Information Companies. The bank also reserved its right to publish the petitioner's photograph in newspapers informing the public that the petitioner has been declared as a wilful defaulter. In due course, such photograph came to be published in at least one newspaper.

6. The petitioner refers to the Master Circular of July 01, 2015 and the procedure laid down thereunder as to the mechanism for identification of wilful defaulters. The entire matter is covered by paragraph 3 of the Master Circular. The step-by-step process indicates the following in sub-paragraphs (a), (b) and (c) thereof pertaining to the procedure to be adopted:

"(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 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



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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..."

9. The petitioner has also brought a Single Bench judgment of the Calcutta High Court reported at (2015) 1 CompLJ 197 (Cal) (Santanu Ghosh v. The State Bank of India) where, in the context of the previous Master Circular of July 01, 2011, the Court had observed that in the light of the serious consequences that visited a person labelled as a wilful defaulter, the adjudication undertaken at the two stages by a bank had to be serious and due reasons in support of the decision had to be furnished since the ultimate decision was justiciable. Paragraphs 5 to 9, 12, 20 and 21 of the report have been placed. It may do well to notice the following passage from the report:

"8. The process of adjudication culminating in a person being labelled as a wilful defaulter - and the virtual rendition of the defaulter as a pariah in the financial and commercial world - has to be fair and transparent. The decision finding a person to be a wilful defaulter is justiciable. It is imperative, therefore, that the decision be informed by reasons for both the defaulter to be made aware of the conduct for which he stands condemned and for the forum sitting in judicial review over the decision to appreciate the application of the mind to the matter in the process of adjudication. Since the master circular expressly requires the preliminary committee to cite reasons for a person to be recommended to be branded as a wilful defaulter and since the preliminary committee is also obliged by the circular to furnish requisite evidence in support of its opinion, it would defy logic that the Grievance Redressal Committee, which is bound to consider a representation of a would-be defaulter and also give him a hearing, is seen to be invested with



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12. Since the ground urged by the bank goes to the authority of this court to receive the petition and make any order thereon, it is such aspect of the matter which needs to be dealt with first. It is utterly absurd to suggest that an individual will suffer the stigma of being branded as a wilful defaulter - albeit in connection with a transaction pertaining to a corporate entity - but such individual will not have any remedy available; not even to pay off the debt due, to get rid of the tag. Upon an individual being declared as wilful defaulter, whether by virtue of his independent conduct or as a consequence of his relationship with the borrower that may have committed the wilful default, it entails the virtual civil death of the person in the sense that the individual no longer qualifies to obtain any credit facilities, he cannot be a director of any company, he cannot apply with any resolution plan under the IBC and, in the financial circles, no other will touch him with a barge-pole. It is ridiculous to suggest that despite such punishment visiting an individual upon such individual being



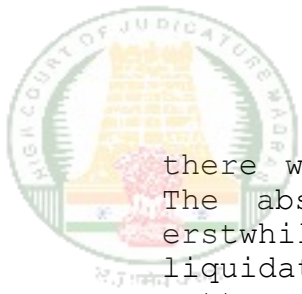
branded as a wilful defaulter, merely because the wilful default may have been committed by a corporate entity which has gone into liquidation, the individual has to continue to wear the tag till his actual death.

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13. The bank in this case appears to have missed the wood for the trees. As the expression suggests, "wilful default" has two limbs to it: first a default; and, the default being wilful. As to what would entail being regarded as wilful default is indicated in the Master Circular of July 01, 2015. For instance, a loan may be obtained by a borrower and diverted for use other than the purpose for which the loan was obtained. However if, upon it being pointed out by the lender that the loan had been used for a different purpose, the borrower promptly returns the money, there would be no default; and, as a logical consequence, there can be no wilful default. Similarly, as in the present case, the sales proceeds may be diverted by the borrower or the sales proceeds may have been parked in another account with a separate bank without the permission of the lending bank. If, say, the anomaly had been pointed out at the outset, and the borrower corrected itself, there would have been no case of wilful default.

14. As to individuals associated with corporate entities, when the borrower is a corporate entity and the borrower is seen to have committed any wilful default, certain categories of officers of the borrower are deemed to be parties to the act of wilful default on the part of borrower by virtue of the Master Circular. Even otherwise, since a corporate entity functions only through the human agencies that control it, the mens rea aspect of the wilful default has to be attributed to the human agencies responsible for conducting the activities of the corporate entity. It is in such light that promoter directors, executive directors and managing directors of corporate borrowers are branded as wilful defaulters along with the borrower as per the said Master Circular.

15. When a human individual is declared as a wilful defaulter, there are several things that no longer remain open for such person to indulge in. While reasonable restrictions can be imposed on an individual, even as recognised in Article 19(g) of the Constitution, if the individual does not have recourse to a remedy, even to atone for his mistakes and undo the same, it would not pass muster. Irrespective of the association of the individual with a corporate borrower or the severance of such association by operation of law or otherwise, as long as the wilful defaulter tag fastens to a human individual, he must be seen to have a right to complain against the same to have his conduct vindicated. At any rate, he must have a chance to undo the wrong, even if that implies paying the entire debt whereupon



there would be no default and, thus no wilful default either. The absurd submission made on behalf of the bank that an erstwhile director of a corporate debtor which has gone into liquidation has no right to approach any authority when the matter complained of pertains to the corporate debtor, has to be rejected out of hand since the consequence of the order is suffered by the human agency, irrespective of what its effect may have been on the corporate debtor. The petitioner, as the erstwhile managing director of a company which has gone into liquidation, is entitled to take steps to have his name cleared.

16. In any event, the reliance on Section 33(5) of the Code is completely inapposite in the present context as it pertains to a separate class of matters and, even if the petitioner herein is permitted to approach the bank again to clear the petitioner's name, that would not amount to a suit or proceeding by or on behalf of the corporate debtor within the meaning of the relevant words used in the provision. There are myriad reasons an individual may cite to suggest that he may not be held responsible for the affairs of a company he was associated with; or such individual may even justify the conduct of the company.

17. As far as the impugned order dated August 09, 2019 is concerned, the same cries to be set aside as being completely bereft of reasons and not revealing any element of adjudication. Indeed, even the terse recording of the minutes of the meeting of the Identification Committee may be accepted, though the defence which was sought to be made out by the petitioner - or, indeed, the borrower - is not indicated therein. However, it is evident from the minutes that no satisfactory explanation was furnished by the borrower as to why the sales proceeds had not been reflected in the relevant account or why a separate account had been opened with Indian Bank to deposit the sales proceeds without the permission of the lending bank.

18. It is fairly submitted on behalf of the petitioner that though the decision impugned here of August 09, 2019 was communicated after the judgment in Jah Developers was delivered on May 08, 2019, it was only the communication which was dated August 09, 2019, since the decision of the Identification Committee was taken late in 2018 and the Review Committee's decision was rendered in March 2019. However, nothing turns on the fact that the decision in this case may have been taken prior to the judgment in Jah Developers or may only have been communicated after such judgment was pronounced. The dictum in Jah Developers has more to do with the seriousness that has to be attached to the decision-making process before an individual is declared to be a wilful defaulter than modifying the procedure prospectively. The dictum in Jah Developers has to be



seen to imply that the procedure under the Master Circular ought always to have been as indicated in the judgment. The jurisprudence in such regard has been consistent for decades. Just as an appellant has a chance to point out the perceived errors in the order that is impugned and a delinquent in service law has an opportunity to deal with the findings rendered by the inquiry officer if the disciplinary authority, prima facie, agrees, therewith, the findings of an Identification Committee have, per force, to be permitted to be questioned by a person proposed to be declared as a wilful defaulter for the Review Committee to look into the same.

19. It is the same sentiment which is expressed in the Calcutta judgment cited by the petitioner. When the Master Circular required a lesser committee of a bank to consider the matter and a further committee comprising more experienced and senior officials of the bank to assess the same thereafter, the Master Circular must be understood to imply that both committees would delve into the matter and the Review Committee would make an independent assessment. At the same time, it must be accepted that when appellate orders are passed affirming the orders under appeal, they may not involve any elaborate discussion or may even adopt the reasons furnished in the impugned order. However, the appellate order must also indicate the independent application of mind of the appellate authority; or else it would not qualify to be the discharge of any adjudicatory function. And, any meaningful reading of the Master Circular makes it obvious that the Review Committee referred to therein is tasked with the duty of adjudicating the matter; at least assessing the veracity of the findings of the Identification Committee.

20. In the present case, the Review Committee may have endorsed the view of the Identification Committee by expending a few lines. But the manner in which the Review Committee approached the matter appears to be somewhat offensive and in derogation of the responsibility conferred on it by the Master Circular. The short initials of the two officials may as well have been obtained while they were half-way out the door. There is nothing to indicate that any more mind was applied to the matters in issue or the assessment was undertaken with any degree of seriousness.

21. The perfunctory manner in which the Review Committee purported to consider the matter and deal with the same leaves a lot to be decided and cannot be accepted.

22. As to the other aspect of the bank's submission and its reference to its circular of August 01, 2019, the less said the better. For a start, it is an internal advisory to its officials and has no other value or effect. While the bank is perfectly



justified to issue circulars to its officials, to the extent that the relevant document deviated from the contents of the Master Circular of July 01, 2015, the same cannot be condoned. As to what circumstances constitute the commission of an event that may be seen to be an act of wilful default has to be as per the Master Circular issued by the Reserve Bank and only the words of the circular; and not on the basis of any expanded or contracted meaning ascribed to it in any internal document that may be circulated by the State Bank. The value of the document dated August 01, 2019 is no more than any submission on law contained in an affidavit filed on behalf of the bank as the Court has to consider only the Master Circular, its wording and its effect to assess the present matter.

23. Since the Review Committee of the State Bank in this case does not appear to have applied its mind while assessing the correctness of the opinion rendered by the Identification Committee, the declaration of the petitioner as a wilful defaulter cannot be sustained and the same is set aside.

24. However, only so much of what has been done, that goes against the grain of the Master Circular, requires to be undone since the initial steps had been duly taken and there does not appear to be any anomaly therein. Accordingly, the order impugned dated August 09, 2019 is set aside along with the decision of the Review Committee of March 16, 2019. The matter will now return to the position where the Identification Committee had considered the petitioner's defence and had rendered its view as reflected from the minutes of the meeting dated December 29, 2018. In view of the dictum in *Jah Developers*, it is the opinion of the Identification Committee that has now to be forwarded to the petitioner for the petitioner to be entitled to make a further representation against the same. The Review Committee will consider the further representation of the petitioner against the opinion rendered by the Identification Committee and pass a reasoned order after affording the petitioner an opportunity of hearing. Thus, it will be open to the State Bank to forward the views of the Identification Committee to the petitioner together with a further notice for the petitioner to make a representation against such views for the Review Committee to consider the same.

25. W.P.No.12103 of 2020 is disposed of by setting aside the order impugned dated August 09, 2019 declaring the petitioner as a wilful defaulter as aforesaid and by requiring the directions indicated above to be followed.

26. After this order is made, it is submitted on behalf of the State Bank that since the view expressed by the Identification Committee at its meeting held on December 29,



2018 has already been communicated to the petitioner, the matter can be resumed from such stage and some time may be afforded to the petitioner to make a further representation against such opinion for the Review Committee to consider both the opinion and the petitioner's representation against the same in the light of the dictum in Jah Developers.

27. In view of such suggestion, the petitioner is afforded four weeks from date to make a written representation dealing with the opinion rendered by the Identification Committee. It will be open to the petitioner to seek a personal hearing, if so advised, before the Review Committee. The Review Committee, will thereupon, consider the petitioner's representation against the opinion of the Identification Committee and afford the petitioner an opportunity of hearing, if sought, before passing a reasoned order within eight weeks of the receipt of the petitioner's written representation.

There will be no order as to costs. WMP Nos.14840 to 14842 of 2020 are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

kpl

To

The Deputy General Manager,
The State Bank of India Stressed Assets
Management Branch, Avinashi Road,
Coimbatore.

+lcc to Mr.S.Sethuraman, Advocate, S.R.No.40700

W.P.No.12103 of 2020

SJ(CO)
HS(18/08/2021)