IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.10.2021

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WRIT PETITION NO. 14209 OF 2021
AND
WMP. NO. 15093 OF 2021

Kanumuru Rama Devi

.. Petitioner

Versus

State Bank of India
represented by Deputy General Manager
Stressed Assets Management Branch
No.32, Red Cross Building
Indian Red Cross Society
Egmore, Chennai - 600 008

Also at
12th Floor, State Bank Bhavan
Madame Cama Road
Nariman Point
Mumbai - 400 021.

.. Respondent

Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Mandamus directing the respondent to furnish a copy of the resolution passed by the Fraud Identification Group, Stressed Asset Resolution Group of the respondent dated 21.02.2020 to the petitioner.

For Petitioner : Mr.M.S.Krishnan,
Senior Advocate
for Mr.Anirudh Krishnan

For Respondent : Mr.M.L.Ganesh

ORDER

The petitioner has filed this writ petition seeking to issue a Writ of Mandamus directing the respondent to furnish to her a copy of the resolution passed by the Fraud Identification Group, Stressed Asset Resolution Group of the respondent dated 21.02.2020.

2. The petitioner would state that she was a Director of a company called Ind Barath Power Gencom Limited (in short, 'the Company') until 13.11.2019. The said company is registered under the Companies Act, 1956 and is a special purpose vehicle, which owns coal powered energy generating plant situated at Tuticorin, Tamil Nadu with a capacity of 189 Mega Watt. During the course of it's business, the company entered into various loan agreements with the respondent bank as well as other banks and financial institutions. According to the petitioner, TANGEDCO, with whom the company entered into various agreements, has failed to honour it's repayment commitment, as a result of which, the petitioner's company could not honour their commitments in repaying the loan amount to the banks and other financial institutions. While so, one of the lenders - Axis Bank Limited approached the National Company Law Tribunal, Hyderabad with a Petition in CP (IB) No.187/7/HDB/2019 under Section 7 of The Insolvency and Bankruptcy Code, 2016. By order dated 13.11.2019, a Resolution Professional was appointed and consequently, the petitioner ceased to be a Director of the company. Subsequently, the Tribunal constituted a committee of creditors for the purpose of regulating and managing the affairs of the company. The committee has also commissioned a forensic audit to be conducted by M/s. BDO India LLP and the firm has also filed an auditing report dated 24.07.2020.

3. The grievance of the petitioner is that the copy of the resolution passed by the fraud identification group, SARG dated 21.02.2020 and the auditing report dated 24.07.2020 have been furnished to the creditors, from whom the company borrowed loan, however, the same were not furnished to the petitioner. It is further stated by the petitioner that on the basis of the said resolution as well as the auditing report, the proceedings under Section 43 read with Section 66 of the The Insolvency and Bankruptcy Code, 2016 have been initiated, which is pending before the NCLT, Hyderabad. However, the petitioner has not

been arrayed as a party to such proceedings. While so, on 06.01.2021, the petitioner received a notice from the respondent calling upon her to show cause as to why she should not be included in the list of wilful defaulters. The said notice dated 06.01.2021 was issued on the basis of the resolution dated 21.02.2020 and the auditing report dated 24.07.2020, however, copies of the same were not furnished to the petitioner, while issuing such notice by the respondent. Aggrieved by the notice dated 06.01.2021, the petitioner, along with her husband, has filed Writ Petitions bearing Nos. 636 and 639 of 2021 before the High Court of Telengana at Hyderabad, which, by order dated 24.02.2021, directed the respondent to permit the petitioner to have an inspection of the relevant documents and to take extracts of the same.

4. The petitioner further averred that in the meantime, on the basis of the complaint given by the respondent on 23.03.2021, a first information report was registered against the petitioner by the Central Bureau of Investigation on 24.03.2021 for the offences punishable under Sections 120-B read with 420, 467, 468 and 471 of the Indian Penal Code and Sections 13 (2) read with 13 (1) (d) of The Prevention of Corruption Act, 1988. Here again, the complaint was given against the petitioner on the strength of the resolution passed by the fraud identification group, as well as the forensic audit report carried out by the consortium of banks, however, the copies of the same have not been furnished to her. The petitioner has therefore, come forward with this writ petition for the aforesaid relief.

5. A counter affidavit has been filed by the respondent, inter alia stating that the petitioner has been following forum shopping with regard to the case at hand. She along with her husband Raghu Rama Krishna Raju have already filed two writ petitions in WP Nos. 636 and 639 of 2021 before the High Court of Telangana at Hyderabad. By order dated 24.02.2021, they were permitted to approach the respondent and inspect the relevant documents and to take extract of the same and thereafter, furnish their explanation. Pursuant to the same, the petitioner sent a representation on 04.06.2021 to furnish copy of the resolution passed by the fraud identification committee, Stressed Asset group dated 14.09.2020. According to the respondent, the declaration of the borrower as fraud is as

per the extant guidelines of the Reserve Bank of India and the said guidelines do not provide for sharing a copy of the resolution with the borrower; if it is furnished, it will jeopardize the criminal case pending before the learned Special Judge for CBI Cases (Banks and Financial Institutions) Chennai, as the petitioner is arrayed as an accused in the criminal proceedings filed by the Central Bureau of Investigation and there is every possibility of the petitioner tampering the evidence; and that, upon the appearance of the petitioner before the Criminal Court, she will be produced with all the documents relied on by the prosecution. It is also submitted that the borrower company represented by its directors had opened current account with another bank outside the consortium without the knowledge, information and permission of the lender banks and they had failed to route the sale proceeds to Trust and Retention Account, but routed Rs.472.79 crores as received from TANGEDCO through Canara Bank Account; and only a sum of Rs.62.43 crores was subsequently transferred to TRA and Rs.233.86 crores was utilised as operational expenses, repayment of loan of Rs.108.05 crores and Rs.68.45 crores were transferred to related parties, which are nothing but preferential transactions to cheat the lender banks. With these averments, the respondent sought to dismiss this writ petition.

6. The learned senior counsel for the petitioner would vociferously contend that various proceedings have been initiated against the petitioner on the strength of the resolution passed by the fraud identification group, SARG, and the forensic auditing report, however, copies of the same have not been furnished to her; and such action of the respondent is not only against the principles of natural justice, but also infringing the fundamental rights guaranteed to the petitioner under Articles 14 and 21 of The Constitution of India. According to the learned senior counsel, when the respondent relies upon certain documentary evidence against the petitioner, it is incumbent on the part of the respondent to furnish copies of those documents to her. However, various proceedings have been initiated against the petitioner in utter secrecy and she is clueless as to how to contest those vexatious proceedings in the absence of such documents. The learned senior counsel therefore submitted that the respondent cannot rely upon those documents without furnishing copies of the same to the petitioner to initiate various proceedings against her inter

alia to declare her as one of the defaulters. To substantiate his submissions, the learned senior counsel referred to the following decisions: (i)SBI v. Jah Developers (P) Limited [(2019) 6 SCC 787]; and (ii)Rajesh Agarwal v. Reserve Bank of India [2021 (2) ALD 290]. Stating so, the learned senior counsel prayed that appropriate direction be issued to the respondent to furnish a copy of the resolution passed by the Fraud Identification Group, Stressed Asset Resolution Group dated 21.02.2020 before proceeding further against the petitioner.

7. On the other hand, the learned counsel for the respondent Bank, by placing reliance on the counter affidavit filed, would contend that the respondent bank declared the loan account of the petitioner's company as fraud in terms of the RBI guidelines and based on forensic auditor's report. If the petitioner is having valid defence, the same can be placed before the trial court. Instead of facing the criminal proceedings, the petitioner and other co-accused are indulging in filing vexatious proceedings before the High court of Telangana at Hyderabad as well as this court under the guise of non-supply of resolution copy. In support of the said contention, the learned counsel produced a copy of the order dated 24.02.2021 passed by the High Court of Telangana in WP.Nos.636 and 639 of 2021, filed by the petitioner and her husband. The learned counsel also pointed out various fraudulent transactions done by the petitioner's company, besides fabricating books of accounts, entries, vouchers and financial statements, in order to make unlawful enrichment at the cost of public money. Adding further, the learned counsel submitted that as against the order passed by the High Court of Telangana at Hyderabad in Rajesh Agarwal's case, the Bank filed SLP. (C)No.3931 of 2021 before the supreme court and by order, dated 15.04.2021, the order of the High Court of Telangana, insofar as it observed that a personal hearing be given, was stayed. Thus, according to the learned counsel, the petitioner is not entitled for any relief in this writ petition.

8. Heard the learned senior counsel for the petitioner and the learned counsel for the respondent bank.

9. Admittedly, the company, in which the petitioner was one of the Directors, has committed default in payment of loan amount. One of the lenders of the company namely Axis Bank

Limited has approached National Company Law Tribunal, Hyderabad by filing a Petition in CP (IB) No.187/7/HDB/2019 under Section 7 of The Insolvency and Bankruptcy Code, 2016. By order dated 13.11.2019, the Tribunal appointed a Resolution Professional, as a result of which, the petitioner ceased to be a director of the company. Thereafter, as per the direction of the Tribunal, a committee of creditors was constituted for the purpose of regulating and managing the affairs of the company. The said committee commissioned a forensic audit by M/s.BDO India LLP, which filed a report dated 24.07.2020. It is on the strength of the resolution passed by the fraud identification group and the audit report, various proceedings have been initiated against the petitioner, one of which is the issuance of show cause notice dated 06.01.2021, calling upon her to explain as to why she be not declared as a defaulter. Pursuant to the same, the petitioner sought to furnish copies of those documents so as to enable her to submit an explanation. However, the respondent failed to furnish the same, on the ground that it will prejudice the on-going criminal proceedings initiated against the petitioner. Therefore, this writ petition.

10. According to the learned senior counsel for the petitioner, the notice dated 06.01.2021 issued to the petitioner calling upon her to submit explanation as to why her name be not included in the list of wilful defaulters, is on the basis of the resolution dated 21.02.2020 passed by the fraud identification group and the audit report dated 24.07.2020, however copies of which were not furnished to the petitioner, thereby depriving her to submit an effective explanation. Such course adopted by the respondent is arbitrary, illegal and violative of the principles of natural justice. In this regard, the learned senior counsel drew the attention of this court to the decisions relied on by him.

11. In the first case in SBI v. Jah Developers (P) Ltd (cited supra), the supreme court was of the view that 'Article 19(1)(g) is attracted, 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'. For better appreciation, the relevant passage of the said decision is extracted below:

"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."

12. In the second decision of the High court of Telangana at Hyderabad in Rajesh Agarwal's case (cited supra), wherein, it was held that "considering the grave civil consequences and penal action, which would be followed as a result of classifying a borrower as 'a fraudulent borrower' or 'a holder of a fraudulent account', it is imperative that principles of natural justice must be read into clauses 8.9.4 and 89.9.5 of the Master Circular" and accordingly, the writ petition was allowed, with the following directions and the terms:

> 70.1. Firstly, the principle of audi alteram partem, part of the principles of natural justice, is to be read in Clause 8.9.4 and 8.9.5 of the Master Circular.
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> 70.2. Secondly, the decision, dated 15.02.2019, passed by the JLF, and the resolution dated 31.07.2019, passed by the FIC are, hereby, set aside.
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> 70.3. Thirdly, the JLF is directed to give an opportunity of hearing by furnishing

copies of both the Reports, namely the Forensic Auditor Report, dated 06.04.2018 and the subsequent Report submitted by Dr. K.V. Srinivas, IRP, to the petitioner, and to the OL.

70.4. Fourthly, the JLF is directed to give an opportunity of personal hearing both to the petitioner and to the OL before taking any decision on the issue whether the account should be classified as 'fraud' or not?

70.5. Fifthly, after the JLF has taken its decision, the FIC is directed to pass its resolution whether the decision of the JLF should be confirmed or not?

70.6. Lastly, the said exercise shall be carried out by the JLF within a period of three months from the date of receipt of the certified copy of this judgment. Furthermore, the subsequent exercise by FIC shall be carried out within two months from the date of the decision of the JLF.

13. On the other hand, the learned counsel for the respondent submitted that the order of the High Court of Telangana at Hyderabad in Rajesh Agarwal's case was put to challenge by the Bank before the supreme court in Special Leave to Appeal (C) No.3931 of 2021 and an interim order was obtained in their favour on 15.04.2021. However, a reading of the said order would disclose that the supreme court has stayed the order of the High Court of Telangana at Hyderabad relating to grant of personal hearing, alone. As such, the order passed in Rajesh Agarwal's case will hold good, as far as the claim of copies are concerned.

14. It is also evident that the petitioner along with her husband, has already filed Writ Petition Nos. 636 and 639 of 2021 before the High Court of Telangana at Hyderabad, for declaring the notices dated 06.01.2021 issued by the respondent, summoning the petitioners to appear for personal hearing, without providing any show cause notice and relevant documents/material as illegal, arbitrary, ultra vires to the RBI circular dated 01.07.2015, violative to the principles of natural justice and to set aside the same. By order dated 24.02.2021, following the earlier order dated 10.02.2021 passed

in WP.No.15758 of 2020 and batch, the said writ petitions were disposed of, permitting the petitioners to approach the respondents / Banks on any working day, within a reasonable period of time, preferably within two weeks for inspection of Forensic Audit Report and further directing the respondent / Bank to permit the petitioners to inspect the relevant documents and to take extracts of the same and within four weeks thereafter, the petitioners should furnish their explanations. According to the learned counsel for the respondent, as directed by the High court of Telangana at Hyderabad, the petitioner did not approach the respondent in time requesting to issue the said copies, which has been stoutly refuted on the side of the petitioner.

15. Therefore, taking note of the fact that the petitioner has already been directed to approach the respondent authority for having the necessary copies connected to the proceedings initiated against the petitioner and also following the decisions of the supreme court as well as the High court of Telangana at Hyderabad, this court is inclined to direct the respondent to permit the petitioner for inspection of the forensic audit report and other relevant documents, within a period of two weeks from the date of receipt of a copy of this order, and furnish the required documents, which are not confidential, if not furnished earlier. On receipt of the same, the petitioner shall submit her explanation to the respondent, within a period of two weeks. If the petitioner fails to avail this opportunity, it is open to the respondent to proceed further, in the manner known to law.

16. This writ petition is disposed of, on the above terms. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

// True Copy //

Sub Assistant Registrar

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To

The Deputy General Manager
State Bank of India
Stressed Assets Management Branch
No.32, Red Cross Building
Indian Red Cross Society
Egmore, Chennai - 600 008

The Deputy General Manager
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+1cc to Mr.Anirudh Krishnan, Advocate, S.R.No.55713

WP No. 14209 of 2021

NK(CO)
RLP(15/11/2021)