



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.08.2021

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and
THE HONOURABLE MRS.JUSTICE T.V.THAMILSELVI

W.P.No.17983 of 2019
and
W.M.P.Nos.17394 & 17395 of 2019

- 1.M/s.Leo Primecomp Private Limited
Represented by its Authorized Signatory
Mr.A.Balakumar
Flat No.61 & 62, Lakshmi Nagar
Kandanchavadi, Chennai - 600 096.
- 2.A.Balakumar
S/o.Mr.D.Aiyulu Reddiar
- 3.A.Vasudevan
S/o.Mr.D.Aiyulu Reddiar
- 4.M/s.Emmkay Metal Finishers
Represented by its Partners B.Manohari & V.Kalpna
No.166, Developed Plots
Industrial Estate
Perungudi, Chennai - 600 096. ...Petitioners

-VS-

- 1.State Bank of India
Stressed Assets Management Branch
"Red Cross Buildings", No.32, Montieth Road,
Egmore, Chennai - 600 028.
- 2.Reserve Bank of India
16, Rajaji Salai, Fort Glacis, Chennai
Tamil Nadu 600 001. ...Respondents

Prayer : Petition filed under Article 226 of Constitution of India for issuance of Writ of Certiorari calling for the records relating to the 1st respondent's order dated SAMB/CHE/CLO-1/1910 dated 13.03.2019 and quash the same.



WEB COPY

For Petitioners : Mr.Sathish Parasaran, Senior Counsel
for Ms.Harshini Jothiraman
For Respondents : Mr.Suresh, for R1
Mr.C.Mohan, for R2

O R D E R

(Order of the Court was delivered by N.KIRUBAKARAN, J)

The petitioners have challenged the first respondent's letter dated 13.03.2019 by which it is informed that the identification committee and the review committee meeting held on 29.11.2018 and on 04.01.2019 had declared the petitioners as wilful defaulter.

2.The case of the petitioners is that the first petitioner has availed credit facilities from the first respondent and the same has been renewed and enhanced from time to time. The first petitioner was repaying the loan diligently without any default. However, due to recession in the power sector, the first petitioner suffered a setback in the business. Therefore, the first petitioner was declared as NPA. Even after declaring the first petitioner as NPA, the first petitioner continued to pay the loans by way of bank arrangement on the receivables.

3.When things stand so, the first respondent served notice on 10.08.2017 to the first petitioner calling upon the petitioner to show cause as to why the first petitioner's name should not be included in the list of wilful defaulters as per clause 1.1.3(b), 2.2.1(a) and 2.2.1(d) of Master Circular of the second respondent alleging,

(1).The first petitioner purchased fixed assets worth Rs.27.56 Crores in the financial year 2011- 12 and Rs.33.27 Crores in the financial year 2012 - 13 without bringing in matching long term funds which is not in conformity with the terms of sanction.

(2).The proceeds from the sales of inventory and realisation of receivables were not fully routed through loan account, whereas the company was routing funds through current account with other banks, which is without the approval of the lender banks.

4.The first petitioner sent a reply on 08.09.2017 stating that there has been no routing of funds through other accounts. The Indian Bank account has been in operation since 2001 and the same has been operated with the purpose of getting duty drawback and other Government funds. The long term assets had been



purchased using Fixed Deposit margin money by closing the Fixed Deposits.

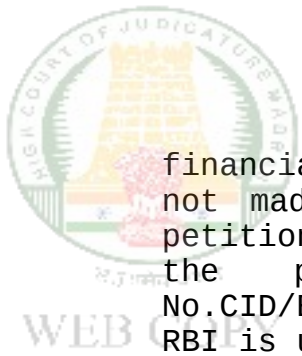
5. Thereafter, on 29.05.2018, the first respondent issued a letter calling upon the first petitioner/Company to attend the personal hearing before the Wilful Defaulter Identification Committee which was replied through a communication dated 06.06.2018 and the Company sought for rescheduling of personal hearing to some other date. The first respondent issued another show cause notice dated 23.07.2018 to the Guarantors through letter dated 21.08.2018 and 22.11.2018. The Company explained as to why it should not be declared as Wilful defaulter. The petitioner nos.2 and 3 appeared before the Wilful Defaulter Identification Committee for personal hearing on 29.11.2018.

6. After personal hearing, the first respondent sent a notice dated 13.03.2019 which informed the Company that the Identification Committee and the Review Committee had meetings on 29.11.2018 and 04.01.2019 respectively which declared the Company as Wilful Defaulter. The said impugned letter is challenged before this Court on various grounds including violation of principles of natural justice for not giving opportunity to put forth the case of the petitioners.

7. Heard Mr. Satish Parasaran, learned Senior Counsel for the petitioners, Mr. Suresh, learned counsel for R1 and Mr. C. Mohan, learned counsel for R2.

8. The facts of the case would reveal that the first petitioner has availed loan from the first respondent and other petitioners are guarantors. Since there is a default in the repayment, the first petitioner was declared as NPA with effect from 14.03.2014. It is evident from the Counter Affidavit filed by the first respondent that the first respondent had already filed an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 against the first petitioner before the NCLT and the said petition was admitted and the IRP was appointed vide order dated 24.07.2019. In continuation to NCLT proceedings, the first respondent also filed recovery application before the DRT against the petitioner in O.A.No.29 of 2017 to recover the outstanding amount of Rs.111,16,59,703/- as on 12.01.2017 and the Original Application was allowed and the recovery certificate was issued on 21.12.2018.

9. The first respondent initiated proceedings to declare the petitioner as Wilful Defaulter as per the Master Circular (Revised) dated 01.07.2015 issued by the second respondent to put in place a system to disseminate the credit information pertaining to Wilful Defaulters for cautioning the banks and



financial institutions to ensure that further bank finances is not made available to them. In that process only, the first petitioner was issued notice and the replies were received from the petitioners. Clause 3 of the Circular DBR No.CID/BC/22/20.16.003/2015-16 dated 01.07.2015 issued by the RBI is usefully extracted hereunder:

"3.Mechanism for identification of Wilful Defaulters

The mechanism referred to in paragraph 2.5 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 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.

(d) As regard a non-promoter / non-whole time director, it should be kept in mind that Section 2(60) of the Companies Act, 2013 defines an officer who is in default to mean only the following categories of directors:

(i) whole-time director

(ii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if not director is so specified;



(iii) every director, in respect of a contravention of any of the provisions of Companies Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings and who has not objected to the same, or where such contravention had taken place with his consent or connivance.

Therefore, except in very rare cases, a non-whole time director should not be considered as a wilful defaulter unless it is conclusively established that:

I. he was aware of the fact of wilful default by the borrower by virtue of any proceedings recorded in the minutes of meeting of the Board or a Committee of the Board and has not recorded his objection to the same in the Minutes; or;

II. the wilful default had taken place with his consent or connivance.

The above exception will however not apply to a promoter director even if not a whole time director.

(iv) As a non-time measure, Banks / FIs, while reporting details of wilful defaulters to the Credit Information Companies may thus remove the names of non-whole time directors (nominee directors / independent directors) in respect of whom they already do not have information about their complicity in the default / wilful default of the borrowing company. However, the names of promoter directors, even if not whole time directors, on the board of the wilful defaulting companies cannot be removed from the existing list of wilful defaulters.

(e) A similar process as detailed in sub-paragraphs (a) to (c) above should be followed when identifying a non-promoter / non-whole time director as a wilful defaulter."

10. The Identification Committee gave a personal hearing on 29.11.2018 to the petitioner, but the decision of the Identification Committee has not been communicated to the petitioner. However, it seems that the Identification Committee had sent its decision to the Review Committee which confirmed the decision of the Identification Committee declaring the first petitioner as Wilful Defaulter.

11. This Court finds force in the argument of Mr. Satish Parasaran, learned Senior Counsel appearing on behalf of the petitioners that when an opportunity of personal hearing is given, the petitioner should be put on notice or communicated with the decision taken by the Identification Committee. In this case, no decision has been communicated to the petitioner after personal hearing and it was directly sent to the Review Committee which also confirmed the decision of the



12. The issue is squarely covered by the judgment of the Hon'ble Apex Court in the case of State Bank of India v. Jah Developers Private Limited and other reported in (2019) 6 SCC 787, in which it has been held that the Committee must give its order to the borrower following Paragraph 3(b) of the Master Circular (Revised) dated 01.07.2015 and the borrower can represent against such order within a period of 15 days to the Review Committee and on such written representation, the Review Committee must pass a seasoned order which must be served upon the borrower. Paragraph 24 of the judgment is usefully extracted hereunder:

es.ecourts.gov.in/hcservices/



senior officials, being the First Committee, after following Para 3(b) of the Revised Circular dated 1-7-2015, 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 1-7-2013 itself considered such steps to be reasonable, we incorporate all these steps into the Revised Circular dated 1-7-2015. The impugned judgment [SBI v. Jah Developers (P) Ltd., LPA No. 113 of 2015 sub nom Punjab National Bank v. Kingfisher Airlines Ltd., 2015 SCC OnLine Del 14128 : (2016) 154 DRJ 164] , [Kingfisher Airlines Ltd. v. Union of India, 2015 SCC OnLine Bom 6075 : (2016) 2 Mah LJ 838] 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."

From the above, it is clear that the decision of the Identification Committee should be communicated to the borrower whereas in this case, though the Identification Committee gave a personal hearing to the petitioner, the decision of the Identification Committee was not made known or served upon the petitioner which violates the principles of natural justice. Without serving the decision to the petitioner, the decision was forwarded to the Review Committee for approval and the Review Committee approved the decision of the Identification Committee declaring the petitioner as Wilful Defaulter.

13. Without informing or communicating the decision of the Identification Committee, it seems that the Review Committee also approved the decision of the Identification committee. Even before the Review Committee, no opportunity was given to the petitioner which would also amount to violation of the principles of natural justice. As per the judgment of the Hon'ble Apex Court in the case of State Bank of India v. Jah Developers Private Limited and other reported in (2019) 6 SCC 787, the petitioner should have been put on notice about the decision taken by the Identification Committee, so as to enable the first petitioner/Company and other petitioners viz., guarantors to put forth their submissions against the decision of the Identification committee to the Review Committee. Therefore, the decision taken by the Identification Committee as well as the Review Committee suffer for violation of the principles of natural justice.



14. Even though it is contended that the decision of both the Committees have not been challenged and only the communication dated 13.03.2019 by which the Company was informed about the decision of the Identification Committee as well as the Review Committee has been challenged, it is to be noted that it is the specific case of the petitioner that neither the decision of the Identification Committee nor the decision of the Review Committee has been informed to the petitioners and only through the impugned notice, it has been informed. In any event, this Court sets aside the decision of the Identification Committee dated 29.11.2018 and the decision of the Review Committee dated 04.01.2019 as it is in violation of the principles of natural justice as well as the decision of Hon'ble Apex Court in the case of State Bank of India v. Jah Developers Private Limited and other reported in (2019) 6 SCC 787 and remand the matter to the Identification Committee for fresh consideration. The Committee shall follow the procedures as contemplated by the Hon'ble Apex Court and take fresh decision on merits and in accordance with law in line with the Master Circular (Revised) issued by the Reserve Bank of India.

The Writ Petition is allowed with the above directions. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar

pgp
To

1.State Bank of India

Stressed Assets Management Branch

"Red Cross Buildings", No.32, Montieth Road,
Egmore, Chennai - 600 028.

2.Reserve Bank of India

16, Rajaji Salai, Fort Glacis, Chennai, Tamil Nadu 600 001.

+1CC to M/s.Harshini Jothiraman, Advocate, SR.No. 38000

+1CC to M/s.Vaishnavi Subramaniyan, Advocate, SR.No. 38108

+1CC to M/s.King & Partridge, Advocate, SR.No. 37875

+1CC to M/s.Shivakumar & Suresh, Advocate, SR.No. 38630

W.P.No.17983 of 2019

SMI(CO)

B.VC (30/09/2021) (11/10/2021)