

24.03.2022.
Court No.13
Item Nos. 35 & 36
ap

**W.P.A. No. 4080 of 2022
(Through Video Conference)**

**Akhilesh Kotia
Versus
Reserve Bank of India & Ors.
And
W.P.A. No. 4172 of 2022
(Through Video Conference)**

**Akhilesh Kotia
Versus
Reserve Bank of India & Ors.**

Mr. Jishnu Chowdhury,
Mr. Aritra Basu,
Ms. Namrata Basu.

...For the petitioner.

Mr. Om Narayan Rai,
Mr. Saikat Ray Chowdhury.

...For the Allahabad Bank.

Affidavit-of-service filed in Court today be taken
on record.

The writ petitioner challenges a show-cause
notice issued by the Allahabad Bank's Identification
Committee of Willful Defaulters dated 2nd June 2018,
and a subsequent Order of the Review Committee of
Willful Defaulters dated 21st February 2022, holding
that the petitioner is a willful defaulter.

The principal grounds on which willful default
has been alleged, and found against the petitioner by
the Identification Committee is as follows : –

*(a) The account was under sole banking
arrangement. Entire sale proceeds were
supposed to be routed through the account
maintained with us. To the contrary, as per
information on record, the company maintained*

account with Axis bank, and routed transaction through that bank as well.

(b) Moreover, proceeds of the same of the Non-LC bills which were purchased by our branch, were routed through A/C. No. 914020039582573 of Axis Bank Limited, Kolkata Main Branch, violating the self-liquidating nature of IBD account. Thus, it is a case of diversion of fund.

(c) As per sanction letter No. BR/MARSON/2014-15/21 dated 31.12.2014, it was stipulated vide point no 9 of general terms and condition "No further investment will be made by way of loans and advances or investment in share without our prior permission". But contrary to the same the company without taking permission from the bank, has made a fresh investment of Rs.27.63 Cr. During FY 2015-16 in fully paid up equity share in M/s. Marson Power Ltd., a group/associate concerns, against pre-tax profit of Rs.3.44 Cr. As on 31.03.2016 (cash profit of Rs.6.55 Cr.). It is diversion of short term fund to long term purpose, adversely affecting the working capital of the company, which subsequently resulted poor cash flow and account was finally categorized as NPA on 22.10.2017 w.e.f. 31.12.2014.

(d) Above acts of the company tantamount to diversion of funds.

The writ petitioner, by a communication dated 25th June 2018, in reply to the show-cause notice, has admitted at paragraph 3 as follows:

"3. Please note that due to your ineffective and unprofessional services which caused great hindrance in running day to day transactions, my clients were constrained to open an account with Axis Bank Limited, Kolkata Main Branch, being Account No. 914020039582573 primarily for the online payment of statutory dues like payment of TDS, GST etc. Due to non-cooperation of Bank at various stages some of Banking transactions both incoming and outgoing were routed through Axis bank and which was under your knowledge. With regards to the allegation of diversion of fund received against some Non-LC backed bills, my clients are in a position to confirm that no money was diverted for any personal use or otherwise from the sale proceeds and it was solely done for the benefit of the Company and the said action

was taken by my clients for saving the Company from closure.”

The Review Committee in its resolution taken in a meeting held on 2nd February, 2022, has resolved and confirmed the decision of the Identification Committee as follows:

“RESOLVED that the Review Committee for Willful Defaulters Note dated 28.12.2021 on the orders passed by Willful Defaulter Screening Committee for declaring the following accounts/persons as willful defaulters as per RBI Master Circular No. RBI/2015-16/100 DBR No. CID.BC.22/20.16.003/2015-16 dt. 01.07.2015

1.
2. Ex-Directors Mr. Akhilesh Kotia of M/s. MARSONS Ltd. as Willful Defaulters.
3.
4.
5.
6.
7.
8.

for the reasons mentioned in the note, be and is hereby”

It is submitted by the Counsel for the petitioner that non-application of mind is writ large in the order of the Review committee.

Admittedly, the actual interpretation of the Guidelines of the Reserve Bank of India for willful defaulters has been dealt with by the Hon’ble Supreme Court in the case of **Kotak Mahindra Bank Vs. Hindustan National Glass & Industries Ltd.** reported in **(2013) 7 SCC 369**. Therein, the Apex Court has termed the Review Committee’s decision as a confirming and/or second committee decision. It is in fact, neither a review nor an appeal.

In essence, the order declaring a person as willful defaulter takes effect only after the Review Committee finds as such. The order of the first Identification Committee is at best a preliminary finding. If this be the importance of the role of the Review Committee, this Court is extremely baffled and shocked at the lackadaisical manner in which the Review Committee has declared the petitioner to be a willful defaulter. It is concerning to note that in a single page, as many as 8 persons have been mechanically declared as willful defaulters.

There is only a casual and lethargic reference to the order of the Identification Committee. The Review Committee has not bothered to discuss, even briefly, the findings of the first Identification Committee. The Review Committee does not appear to have deliberated, as to why it needs to confirm and accept the proposals of the first Identification Committee.

There is thus, some merit in the petitioner's argument that there appears to be a total non-application of mind on the part of the Review Committee, in passing the impugned order.

Mr. Om Narayan Rai, counsel for the Bank has laboured for long to defend the indefensible. He has first placed reliance on the findings of the Identification/ Screening Committee and the prima facie admission of the writ petitioner to the show-

cause issued by the Identification Committee. The writ petitioner is stated to have admitted that he has routed and diverted transactions of the principal borrower through the Axis Bank Ltd. It is also argued that the writ petitioner was at all material times aware of its obligation not to transact through any Bank or financial institution. Reference in this regard is made to the sanction letter duly accepted by resolution of the principal debtor. It is indeed an admitted position that the petitioner and his family members had full and complete control of the principal debtor M/s. Marsons Limited.

It is argued, that the petitioner cannot therefore, feign ignorance of its responsibility and obligations towards the Bank. It is also argued that the prior knowledge of the bank of such routing of transactions through Axis bank Limited would not be sufficient to absolve the petitioner of the rigours of the Guidelines of the Reserve Bank of India.

It does appear that the Allahabad Bank may have knowledge of such routing of transactions of the principal debtor through the Axis Bank Ltd. However, as to whether there has been a waiver or acquiescence by the Bank has not been discussed or addressed. Mr. Rai submits that this argument was not raised by the petitioner.

Be that as it may, the object and purpose of the aforesaid discussions is to determine whether there was application of mind by both the Identification Committee as well as the Review Committee while passing the draconian order that declared the petitioner as a willful defaulter. No such application of mind is apparent or evident from the orders of the review committee.

Useful reference may be made to the decision of the Hon'ble Supreme Court of India in the case of ***National Highway Authority of India & Ors. – Vs. – Madhukar Kumar & Ors.*** reported in **2021 SCC OnLine SC 791**, cited by Mr. Rai for the Bank.

Mr. Rai has taken great pains to place in detail the second part of paragraph 66 of the said decision to support his argument that the culpability and guilt of the petitioner under the Willful Defaulter Guidelines of the Reserve Bank of India can be easily culled out from other parts of the pleadings and documents on record. According to him, in such situations, a Court should not interfere with the order of the Authorities even if it is devoid of reasons. It is equally important, as fairly placed by Mr. Rai, to notice the second half of paragraph 65 of the said judgment.

Paragraphs 65 and 66 of the said judgment are set out hereinbelow:

“65. Persons, who may have a right or an interest, would know, what are the reasons which impelled

the Administrator to take a particular decision. Judicial review, in India, which encompasses the wide contours of public interest litigation as well, would receive immeasurable assistance, if the reasons for particular decisions, are articulated to the extent possible. The giving of reasons also has a disciplining effect on the Administrator. This is for the reason that the reasons would capture the thought process, which culminated in the decision and it would help the Administrator steer clear of the vices of illegality, irrationality and also disproportionality. Reasons could help establish application of mind. Conversely, the absence of reasons may unerringly point to non-application of mind. The duty to act fairly, may require reasons to be recorded but the said duty, though there is a general duty on all state players to act fairly, may have its underpinnings, ultimately in legal rights.

66. It is one thing to say that there should be reasons, which persuaded the Administrator to take a particular decision and a different thing to find that the reasons must be incorporated in a decision. The question, relating to duty to communicate such a decision, would arise to be considered in different situations, having regard to the impact, which it, in law, produces. In fact, the second *proviso* to Rule 17 of the Rules, provides not only for there being reasons, but the reasons for refusal to permit barricades, must be communicated. If the law provides for a duty to record reasons in writing, undoubtedly, it must be followed and it would amount to the violation of the Statute, if it were not followed. Even if, there is no duty to record reasons or support an order with reasons, there cannot be any doubt that, for every decision, there would be and there must be, a reason. The Constitution does not contemplate any Public Authority, exercising power with caprice or without any rationale. *But here again, in the absence of the duty to record reasons, the court is not to be clothed with power to strike down administrative action for the mere reason that no reasons are to be found recorded. In certain situations, the reason for a particular decision, may be gleaned from the pleadings of the Authority, when the matter is tested in a court. From the materials, including the file noting's, which are made available, the court may conclude that there were reasons and the action was not illegal or arbitrary. From admitted facts, the court may conclude that there was sufficient justification, and the mere absence of reasons, would not be sufficient to invalidate the action of the Public Authority. Thus, reasons may, in certain situations, have to be recorded in the order. In other contexts, it would suffice that the reasons are to be found in the files. The court may, when there is no duty to record reasons, support an*

administrative decision, with reference to the pleadings aided by materials.” (emphasis applied)

Mr. Rai has also referred to the decision of the Hon’ble Supreme Court of India in the case of **Chairman, State Bank of India & Another – Vs. – M. J. James** reported in **(2022) 2 Supreme Court Cases 301**. Indeed the law as it stands has been extracted in paragraph 31 thereof.

“31. In *State of U.P. v. Sudhir Kumar Singh* [*State of U.P. v. Sudhir Kumar Singh*, (2021) 19 SCC 706 : 2020 SCC OnLine SC 847] referring to the aforesaid cases and several other decisions of this Court, the law was crystallised as under : (SCC para 42)

“42. An analysis of the aforesaid judgments thus reveals:

42.1. Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

42.2. Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

42.3. No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

42.4. In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

42.5. The “prejudice” exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of

prejudice flowing from the non-observance of natural justice.”

The observations of the Hon’ble Supreme Court of India in this regard, are in the context of prejudice theory propounded by the Apex Court itself in the case of **State Bank of Patiala – Vs. – S. K. Sharma** reported in **(1996) 3 SCC 1669**. The said two decisions have been rendered in the context of Service law.

The mandate on an Administrative Authority to disclose reasons have been very succinctly discussed by the Hon’ble Supreme Court of India in the aforesaid paragraph 65 of the **National Highways decision (Supra)**. The purpose behind setting out the reasons cannot be over emphasized if one applies this dicta to the instant case. Simply put, the order has far too serious civil consequences to permit the Administrative authority to pass orders casually or not to give reasons. This is the fundamental principle. What is carved out in paragraph 66 thereof and paragraph 31 of the **SBI Vs MJ James decision (Supra)** is an exception. In the facts and circumstances of the case, and given the drastic consequences of being declared a willful defaulter the exceptions may not be applied and are not attracted in the instant case.

The consequences of a person being declared a ‘willful defaulter’ has been discussed and dealt with by

the Hon'ble Supreme Court of India in the decision of ***State Bank of India – Vs. – Jha Developers*** reported in **(2019) 6 SCC 787**. Paragraph 24 of the said judgment is set out hereinbelow:

“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 Para 3 of the Revised Circular dated 1-7-2015, as it is clear that the events of willful default as mentioned in Para 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 willful 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 willful defaulter, and a promoter/director of a willful defaulter cannot be made promoter or director of any other borrower company. Equally, under Section 29-A of the Insolvency and Bankruptcy Code, 2016, a willful 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 Para 3 of the Master Circular dated 1-7-2013 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 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.”

In the backdrop of the drastic consequences being visited upon the writ petitioner, the laid back and casual attitude of the Review Committee to pass the order in a *ipse dixit* manner, without setting out any reasons whatsoever, makes the case a rather glaring instance of non-application of mind, and calls for interference by the Writ Court. The conduct of the Review Committee, as discussed hereinabove in passing the aforesaid order, appears to be reflective of the casual manner in which the loan account has been monitored by the Bank.

Particular reference to paragraph 42.5 of the **SBI Vs. James decision (supra)** to draw support for the casual order of the Review Committee, in the instant case may be slightly misplaced for the reasons already stated hereinabove.

For the reasons stated above, the impugned Resolution of the Review Committee dated 2nd February, 2022 in so far as the writ petitioner is concerned, shall stand set aside. Consequently, the

order dated 24th February, 2022 shall also stand set aside. The matter is remanded back for being revisited by the Review Committee. Reasons must be given by the reviewing committee for any decision, either confirming or rejecting the order of the Identification Committee.

The instant writ petition is allowed and disposed of.

It is made clear that this Court has not entered into or pronounced upon any of the merits of the case that the Allahabad Bank might have, as against the writ petitioner, on the question of willful default.

There will be no order as to costs.

All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)