In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.O. No. 340 of 2022

Kaustuv Ray
Vs.
IDBI Bank and others

For the petitioner	:	Mr. Subhankar Nag, Mr. Deep Basu, Mr. Avishek Guha, Ms. Ratnadipa Sarkar, Mr. Avimanyu Roy Chowdhury
For the respondent nos.1 to 3	:	Mr. Kausik De, Mr. Chayan Gupta, Mr. Roshan Pathak, Ms. Mohini Majumdar
Hearing concluded on	:	14.03.2022
Judgment on	:	21.03.2022

Sabyasachi Bhattacharyya, J:-

1. The present writ petition has been filed, challenging a notice dated June 16, 2021 sent to the petitioner to show cause as to why the petitioner should not be declared as a willful defaulter under the RBI Master Circular dated July 1, 2014.

2. Learned counsel for the petitioner contends that the impugned notice was drawn in the form of a demand notice instead of a proper show-cause notice. It is submitted that the said notice was issued in contravention of Clause 3, sub-clauses (a) and (b) of the RBI Master Circular.

3. Whereas the said sub-Clauses provide that the evidence of willful default should be examined by a committee, in the present case, there was no such independent application of mind by the Wilful Defaulter (WD) Committee for issuance of the show-cause notice. The said notice was a verbatim reproduction of a Transaction Audit Report (TAR) filed in connection with a Corporate Insolvency Resolution Proceeding (CIRP) under the Insolvency and Bankruptcy Code, 2016 (for short, "the IBC").

4. By comparing the respective Clauses of the two documents, learned counsel reiterates the above contention.

5. It is argued that the respondent-bank has sought to furnish additional reasons and bases for issuance of the impugned notice in its affidavit-in-opposition, although such reasons/relevant documents were neither referred to nor disclosed in the impugned show-cause notice itself.

6. By placing the relevant Clauses of the TAR, learned counsel argues that the same contained clear disclaimer to the effect that the report was only to be used in its entirety, and for the purpose stated in the report, not in parts, and in conjunction with the relevant documents referred to therein. The scope of work was clarified to be not equivalent to an audit conducted in accordance with generally accepted auditing standards, an examination of internal controls or other attestation or review services or services to perform, agreed upon procedures in accordance with the standards established by the Institute of Chartered Accountants of India (ICAI).

7. Given the nature of the assignment, it was stipulated in the disclaimer, the procedures followed might not comprehend all matters relating to company that might be pertinent or necessary to the client's evaluation. The authors of the TAR further mentioned that their verification cannot be relied upon to reveal all material issues (known and/or unknown) which may have an impact on the opinion of the Resolution Professional.

8. The report further mentioned that the authors thereof did not independently verify all matters discussed and consequently, have relied on certain explanations and representations provided by the management and the Resolution Professional of the company. Further, they had not received any books of accounts, records, supporting documents from the company. The audit was admittedly based on the limited information and explanations to the extent made available to the authors by the company, the Resolution Professional and from the sources indicated elsewhere in this report.

9. The said disclaimer further stipulated that the report had been prepared solely for the purpose of providing selected information on a confidential basis on which it was issued and should not be used for any other purpose without the authors' consent in writing. Most importantly, the report admittedly did not contain any comments or feedback from the suspended directors as the same had not been provided.

10. It is, thus, contended by the petitioner that the said TAR could not be relied on as the sole basis, as done by the WD Committee, for the purpose of sending a show-cause notice to the petitioner.

11. The CBI charge-sheet, TAR Report, balance sheet and other documents produced by the respondent-bank in the present writ petition were never made available to the petitioner at the relevant juncture.

12. Learned counsel places reliance on the following judgments in support of his submissions:

i) *State Bank of India Vs. Jah Developers Private Limited and others*, reported at *(2019) 6 SCC 787*;

ii) *Maheswary Ispat Ltd. & ors. Vs. State Bank of Patiala & ors.*, reported at *2013 SCC OnLine (Cal) 19428*;

iii) *Gouri Prasad Goenka Vs. State Bank of India*, reported at *2021 SCC OnLine (Cal) 1942*;

13. Learned counsel appearing for the respondent seeks to distinguish *Jah Developers Private Limited* (supra) on the ground that the issue in the said report was only whether an advocate can appear before the WD Committee. The ratio relied on by the petitioner was not even *obiter dictum* in the matter.

14. It is further contended that *Maheswary Ispat Ltd.* (supra) was preferred against a final adjudication of the WD Committee. However, in the present case, a show-cause has merely been issued and hence the challenge is premature.

15. As regards *Gouri Prasad Goenka* (supra), it is argued that the facts of the said case are distinguishable insofar as the allegations of the WD Committee had been challenged in the said case, whereas no such challenge has been preferred in the present writ petition.

16. It is further submitted that the TAR was merely quoted in the show-cause notice insofar as the chart appearing therein was concerned. However, the attending circumstances had also been considered, as reflected from the show-cause notice.

17. Upon hearing learned counsel for the parties, it is observed that in *Maheswary Ispat Ltd.* (supra), the writ petition had been preferred against a final decision branding the writ petitioners as "willful defaulters" and upon their names having been brandished on the CIBIL and other websites without following the procedure laid down under the RBI Master Circular. As distinguished from the said case, the present writ petition has thrown a challenge at the stage of show-cause itself. In the present case the petitioner has a remedy to approach with a representation before the Willful Defaulter Committee. Moreover, even if the petitioner is branded as a Willful Defaulter by the WD Committee, there is scope of further review by the Review Committee headed by the Chairman/Chairman and Managing Director or the Managing Director and Chief Executive Officer/C.E.O.s and two independent Directors/Non-Executive Directors of the bank before the order becomes final upon confirmation by the Review Committee.

18. Hence, at the nascent stage of mere issuance of a show cause notice, the petitioner's challenge is premature.

19. The judgment rendered in *Gouri Prasad Goenka* (supra) is binding to such extent.

20. Insofar as *Jah Developers Private Limited* (supra) is concerned, the Supreme Court laid down the procedure for a Willful Defaulter Committee to take a decision within the purview of Clause 3 of the RBI Master Circular dated July 1, 2014 (updated as on January 7, 2015). However, since a show-cause notice has been issued to the petitioner in the present case under Clause 3(b) of the Master Circular, the petitioner still has the opportunity of making a representation before the Willful Defaulter Committee (First Committee) in reply to the said show-cause notice and, thereafter, to be heard/represented before the Review Committee. Such written representation, as per *Jah Developers Private Limited* (supra), can be a full representation on facts and law (if any).

21. Hence, it is reiterated that it would be premature for the writ court to adjudicate the issues involved, since such an adjudication would tantamount to prejudging the issues prior to the those being decided even at the first instance by the WD Committee.

22. Insofar as the veracity of the allegations made in the show-cause notice is concerned, although the documents relied on in the show-cause notice were not handed over to the petitioner in order to enable the petitioner to give a complete representation before the Willful Defaulter (First) Committee, the relevant documents have been handed over to the writ petitioner in connection with the present writ petition, thereby mitigating such issue. In the RBI Master Circular and/or *Jah Developers Private Limited* (supra) it was contemplated that a prior hearing has to be given to the person sought to be declared as a willful defaulter.

23. The only requirement as per Clause 3(a) of the RBI Master Circular is that the First Committee has to examine the evidence of willful default to conclude *prima facie* whether the accused is a Wilful Defaulter for the purpose of issuance of a show cause notice to that effect. Although the petitioner has raised an arguable question as to whether the show-cause notice itself was sufficient, since the documents on which the First Committee came to such conclusion were not disclosed therewith, such requirement is not a mandate of the RBI Master Circular, as interpreted in *Jah Developers Private Limited* (supra), but a mere technicality to enable the petitioner to make a proper representation on all the allegations before the WD Committee.

24. Since all the documents on which the respondents allegedly relied on have been disclosed in the respondents' affidavit-in-opposition and disclosed in the present writ petition, there is nothing to prevent the petitioner from making a complete representation on all facets of the allegations of Willful Defaulter, including the question of validity of the show-cause notice.

25. As regards the argument of the petitioner as to whether the TAR was sufficient for the committee to issue a show-cause notice against the petitioner, it is evident from the materials-on-record that, although the show-cause notice quoted substantial portions of the said report, the opinion formed by the committee was only a *prima facie* and tentative conclusion for the purpose of giving an opportunity of representation to the petitioner on the allegations. The report (TAR), definitely, is one of the components of the entire body of circumstantial evidence relied on by the respondents and, as such, the writ petition cannot be entertained on the sole ground that extensive portions of the TAR were quoted in the show cause notice.

26. The show cause notice in the present case was sufficient to pass muster, insofar as adherence to the RBI Master Circular is concerned.

27. In such view of the matter, W.P.O. No.340 of 2022 is dismissed, thereby granting the petitioner liberty to approach the Willful Defaulter Committee with his representation on the show-cause notice impugned in the present writ petition, within 15 (fifteen) days hence (taking the relevant date of commencement of such period to be today, in view of pendency of the writ petition in the meantime).

28. If such a representation is given, the Willful Defaulter Committee (First Committee) shall consider the same in proper perspective and render a decision on the issue as to whether the petitioner is a 'Willful Defaulter' thereafter. Needless to say, it will be open to the petitioner, in the event the decision of the First Committee goes against the petitioner, to give an adequate representation, if necessary, to the Review Committee thereafter as well.

29. There will be no order as to costs.

30. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)