IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Original Side)

Reserved on: 04.03.2022
Pronounced on: 11.03.2022

(Through Video Conference)

APOT No. 121 of 2021
With
WPO 233 of 2021
IA NO: G.A. 2 of 2021

State Bank of India and Another

...Appellants

-Vs-

Visa Steel Limited and Others

...Respondents

With

APOT No. 111 of 2021
With
IA NO: G.A. 1 of 2021

Visa Steel Limited and Others

...Appellants

-Vs-

State Bank of India and Another

...Respondents

Present:-

Mr. Ashim Kumar Rout, Advocate
... for the appellants in APOT 121 of 2021 and respondents in APOT 111 of 2021

Mr. Sabyasachi Chowdhury, Advocate
... for the respondents in APOT 121 of 2021 and appellants in APOT 111 of 2021

**Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE**

**THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE**

<u>Prakash Shrivastava, CJ:</u>

1. These appeals are directed against the order of the learned Single Judge dated 09th of July, 2021 passed in WPO 233 of 2021 whereby the writ petitioner has been granted an opportunity to appear before the Review Committee. APOT 111 of 2021 is at the instance of the writ petitioner whereas APOT 121 of 2021 is at the instance of the bank.

2. The writ petition was filed challenging the decision of the Wilful Defaulter Committee of the bank dated 09th of April, 2021. The case of the writ petitioner before the learned Single Judge was that the petitioner No. 1 had availed certain credit facilities from the consortium of lenders including the appellant bank and the other two petitioners are the personal guarantors and directors of the petitioner No. 1. Proceedings were initiated before Wilful Defaulter Committee, and show-cause notices were issued which were replied by the writ petitioner and thereafter the notice of personal hearing dated 14th of October, 2020 and 28th of October, 2020 were issued which were also replied by the writ petitioner. A fresh show-cause notice dated 09th of March, 2021 was issued and thereafter on 22nd of March, 2021 a notice of personal hearing was given which was replied by the writ petitioners. The opportunity of personal hearing could not be availed by the petitioner and the Willful Defaulter Committee had taken the decision dated 09th of June, 2021 declaring the writ petitioner as willful defaulter. Aggrieved with the same they had approached the writ Court.

3. The order of the learned Single Judge records the submission of the bank that the writ petitioners can avail the personal hearing before the

Review Committee accordingly the writ petition has been disposed of giving an opportunity to the writ petitioner to appear before the Review Committee.

4. Submission of the learned Counsel for the bank is that the Master Circular of the RBI does not provide for any opportunity of hearing before the Review Committee, therefore, no such direction could have been issued by the learned Single Judge. He has also disputed the statement made by the Counsel for the bank before the learned Single Judge in this regard. Further submission has been made that an opportunity of hearing was given to the writ petitioners before the defaulter Committee which was not availed, therefore, they are not entitled for any further indulgence.

5. Learned Counsel for the writ petitioner has also questioned the order of the learned Single Judge by submitting that notice of personal hearing was given during the second wave of COVID Pandemic and the writ petitioner being the senior citizen could not avail it and their prayer for joining virtually from their home was not allowed. He further submits that declaring as wilful defaulter has serious consequences and that order of learned Single Judge giving opportunity of hearing before the Review Committee takes away right of the petitioner to convince the Defaulter Identification Committee. He submits that the writ petitioners are entitled to hearing before the Defaulter Identification Committee. He has also submitted that the Defaulter Identification Committee had passed the order mechanically and that the main issue about the decision of the join vendors raised by the writ petitioner in the reply to the show-cause notice has been completely sidetracked by the Committee.

6. We have heard the learned Counsel for the parties and perused the records. The Master Circular of the RBI dated 01st of July, 2014 on wilful

defaulter provides for mechanism for identification of wilful defaulter as under:

> “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.”

7. In terms of the aforesaid if the Defaulter Identification Committee feels that an opportunity of hearing is necessary then it is required to give such opportunity to the borrower and the promoter or whole-time director. In the present case the very fact that the Committee had issued the notice

for personal hearing to the writ petitioners makes it clear the Committee was of the opinion that an opportunity of hearing was necessary.

8. Declaring a person wilful defaulter has serious consequences. Hon'ble Supreme Court in the matter of **State Bank of India vs. Jah Developers Private Limited and Others, (2019) 6 SCC 787** has held as under:

> "**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 wilful 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. <u>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 29-A 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.</u> 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 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."

9. Though the above decision has been rendered while considering the issue of right of a borrower to be represented by a lawyer in the in-house proceedings of Defaulter Identification Committee but the decision clearly sets out the drastic consequences of declaring wilful defaulter.

10. In the present case the record reflects that two notices of personal hearing were issued to the writ petitioners during the second wave of the COVID Pandemic. The order of the learned Single Judge itself contains the submission that the writ petitioners are senior citizen aged about 73 years. By the notice of personal hearing dated 22nd of March, 2021 they were required to join the personal hearing through video conferencing arranged at Stressed Asset Management Branch-I, 8th Floor (Above Nightingale Hospital). The reply to the said notice was sent on 25th of March, 2021 with a request to fix another date when the writ petitioners could join virtually from their home. It is submitted by the learned Counsel for the writ petitioners that the office of the Stressed Asset Management Branch-I was

situated above the Hospital, therefore, it was not safe for the writ petitioners to go there during COVID wave and attend the hearing.

11. Apart from the above, it is also noticed that the communication dated 09.06.2021 sent by the bank conveying the order of the WDIC states about giving the personal hearing before the Committee on 09.04.2021 whereas no such personal hearing was given. It is also worth noting that the main issue raised by the writ petitioners about the decision of the join vendors of which the present bank is also a party has not been properly gone into.

12. The order of the learned Single Judge further reveals that Counsel or bank has also agreed for giving personal hearing before the Review Committee. Though the statement of Counsel has been disputed by the bank but if there was any error in recording the statement then the bank ought to have approached the learned writ Court seeking correction in the order.

13. Before this Court it is the submission of the bank that the Review Committee cannot give personal hearing as the Master Circular does not provide it whereas it is the submission of the writ petitioner that directing personal hearing before the Review Committee will take away his right to place the case before the Defaulter Identification Committee, therefore, there will be a loss of forum. It is understood that till now Review Committee has not approved the decision of the Defaulter Identification Committee.

14. In the aforesaid circumstances, we are of the opinion that the writ petitioners are entitled to opportunity of hearing before the Defaulter Identification Committee. Hence, the present writ petition is disposed of by setting aside the decision of the Defaulter Identification Committee dated 09th of June, 2021 and directing the Committee to give an opportunity of

hearing to the writ petitioners and take a fresh decision in accordance with law.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
11.03.2022

PA(SS)

(A.F.R. / N.A.F.R.)