IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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CWP No. 22544 of 2020
Date of Decision: October 31, 2022

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Gautam Gupta and others ...Petitioners

Versus

Central Bank of India and another ...Respondents

Coram: Hon'ble Mr. Justice M.S. Ramachandra Rao
Hon'ble Mr. Justice H.S. Madaan

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Present:- Mr. Akshay Bhan, Senior Advocate assisted by Mr. Sandeep Wadhawan, Mr. Suvir Tandon, Mr. Rajan Gupta, Advocates for the petitioners

Mr. Gaurav Goel, Advocate for the respondents.

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M.S. Ramachandra Rao, J. (Oral)

This Writ Petition is filed challenging order dt.27.3.2019 passed by respondent No. 1-Bank, declaring the petitioners as 'Wilful Defaulters' being Directors/Corporate Guarantors of the borrower company M/s Supreme Tex Mart Limited.

It is not in dispute that a show cause notice was issued to the petitioners vide Annexure R7 dt.10.8.2018 proposing to declare the petitioners as Wilful Defaulters, and asking the petitioners to show cause within 15 days, why the first respondent Bank cannot treat the petitioners as Wilful Defaulters, but the reason for proposing to classify the petitioners as Wilful Defaulters i.e. diversion of funds for other purposes is just mentioned in the said show cause notice without giving specific instances of such diversions.

Reply was filed on 29.8.2018 vide Annexure R8 by the petitioners pointing out that in the show cause notice no instances of diversion of funds have been quoted, and by simply making an allegation without mentioning such instances, petitioners cannot be termed as 'Wilful Defaulters'.

The first respondent Bank replied on 15.9.2018 vide Annexure R9 simply rejecting the contentions of the petitioners, and reiterating its stand that the petitioners had diverted the funds for other purposes without giving any specific instances of such activity, and thereafter the Empowerment Committee chaired by the Executive Director of the respondent Bank took a decision to declare the borrower as well as the other petitioners as Wilful Defaulters, and this was approved by even the review committee on 27.3.2019, without giving any reasons.

Learned counsel for the petitioners contends that even as per the terms of the Master Circular dt.1.7.2015, in particular paragraph 3, it was incumbent on the Empowered Committee to consider evidence of wilful default, to issue a show cause notice to the borrower, and to the Directors/Guarantors, and then pass an order recording the fact of wilful default by giving reasons; that an opportunity should be given to the borrower, and to the promoters/all time Director for a personal hearing if the committee feels such an opportunity is necessary; and the order of the Empowered Committee should be reviewed by a Review Committee as well.

He contends that this Master Circular was challenged by the

State Bank of India before the Hon'ble Supreme Court in Civil Appeal No. 4776 of 2019 in the case of "*State Bank of India Versus M/s. Jah Developers Pvt. Ltd. & Ors.*" 2019(6)SCC 787, and the Hon'ble Supreme Court observed as under :-

> *"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. <u>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.</u>*

> *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."*

Thus the Supreme Court has noticed the serious consequences which would befall a borrower and guarantors if there is non compliance with principles of natural justice, and it has, therefore, insisted that not only is the borrower to be given copy of the order passed by the Empowered

Committee, but the borrower should be given an opportunity to represent against such order within 15 days to the Review Committee, and directed the Review Committee to pass a reasoned order, and then serve it on the borrower.

Though this judgment was rendered subsequent to the order passed on 27.3.2019 by the first respondent Bank, the principle laid down therein about compliance with natural justice before classifying a borrower/guarantor as Wilful Defaulter actually flows from the Master Circular dt.1.7.2013 itself and it cannot be lost sight of, and has to be applied with full force to the instant case as well.

Though counsel for the respondents contends that the procedure as mandated by the Master Circular of RBI dt.1.7.2015 has been followed by the respondents, we do not agree with the said contention since the show cause notice did not mention the specific instances of diversion of funds, and no evidence is considered and reason assigned by the Empowered Committee and Review Committee. In our view there is a violation of principles of natural justice.

In this view of the matter, the show cause notice Annexure R6 dt.10.8.2018 issued to the petitioners (without giving instances of diversion of funds), and the decision of the Wilful Defaulters Empowered Committee classifying the petitioners as Wilful Defaulters, as well as the order dt.27.3.2019 of the Wilful Defaulter Review Committee confirming the order passed by the Wilful Defaulter Empowered Committee, are all set aside.

The respondent No. 1 is directed to issue a show cause notice specifically indicating the material on the basis of which a prima facie conclusion of diversion of funds was drawn against the petitioners; petitioners are given opportunity to reply thereto within four weeks of the receipt of the same; then a reasoned order shall be passed by the Wilful Defaulter Empowered Committee, which shall be communicated to the petitioners; if the petitioners are aggrieved by the said order of the Wilful Defaulter Empowered Committee, within 15 days of receipt of the same, they shall file application before the Wilful Defaulter Review Committee on both questions of fact and law, and the said committee shall dispose of the same in accordance with law, and communicate its decision to the petitioners.

The Writ Petition is disposed of accordingly.

(M.S. Ramachandra Rao)
Judge

(H.S. Madaan)
Judge

October 31, 2022
P.Singh

Whether speaking/reasoned? Yes/No

Whether Reportable? Yes/No