In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

<u>W.P.O. No.12 of 2021</u>

RAMESH CHANDRA BARDIA
VS
STATE BANK OF INDIA AND ORS.

AND

<u>W.P.O. No.13 of 2021</u>

MANOJ TOSHNIWAL
VS
STATE BANK OF INDIA AND ORS.

AND

<u>W.P.O. No.20 of 2021</u>

MKN INVESTMENT PRIVATE LIMITED
VS
STATE BANK OF INDIA AND ORS.

AND

<u>W.P.O. No.24 of 2021</u>

BIPLAB SHANKAR BOSE
VS
STATE BANK OF INDIA AND ORS.

AND

<u>W.P.O. No.26 of 2021</u>

SWAPAN KUMAR DATTA
VS
STATE BANK OF INDIA AND ORS.

For the petitioner : Mr. Mainak Bose,
Ms. Urmila Chakraborty,
Mr. Rishav Karnani,
Mr. Pranav Sharma

For the respondent Bank	:	Mr. Joy Saha, Mr. Anirban Pramanick, Ms. Subhasree Dey
Hearing concluded on	:	20.12.2022
Judgment on	:	24.01.2023

The Court:

1. The Managing Directors/Personal Guarantors of EMC Limited, a company registered under the Companies Act, 2013 have preferred the present writ petitions, all against a Wilful Defaulter Identification Committee (IC) order dated February 24, 2020, whereby the petitioners were identified as Wilful Defaulters, and a Review Committee (RC) order confirming the same, communicated on December 28, 2020.

2. The EMC Limited (for short, "the company"), as the principal borrower, availed of a loan from a consortium of banks, of which the State Bank of India was the lead bank. On an application of an operational creditor under Section 9 of the Insolvency and Bankruptcy Code, 2016 (in brief, "the IBC"), a Corporate Insolvency Resolution Process (CIRP) started on November 12, 2018. The committee of creditors consisted of all the consortium banks. A resolution plan was approved by the committee of creditors and sanctioned by the Adjudicating Authority (NCLT, Kolkata Bench) on October 21, 2019.

3. On February 8, 2019, the IC issued a show cause notice based on the audited balance sheet of the company for the financial year 2016-17, to which a representation was made by the petitioners. The IC, by its order dated February 24, 2020, declared the petitioners to be wilful defaulters. The petitioners filed a representation against the IC order before the RC which passed its order, affirming the order of the IC, on July 8, 2020 and communicated the same to the petitioners on December 28, 2020.

4. Learned senior counsel for the petitioners assails the IC and RC orders on several grounds. First, the allegation of non-utilisation of funds for the specific purpose of the loan and diversion of funds for other purposes is contended to be baseless and contrary to the appraisal notes for the financial years 2014-15, 2015-16, 2016-17 and 2017-18 and also contrary to the recordings made in the minutes of the consortium meetings.

5. Insofar as the second allegation of transferring borrowed funds to subsidiary group companies of Rs. 23.21 Crore as per balance sheet for 2016-17 is concerned, it is submitted that the bank, after analysis and verification of transactions of the previous year, issued each year's appraisal note and renewed the loan. The appraisal note for renewal of loan for 2017-18 took into consideration all transfers and investments made during 2016-17 and records that all the said investments and loans and advances extended towards associates/subsidiaries are strategic in nature and considered acceptable. The loan was also renewed. Hence, it is argued, the respondents are barred by Estoppel, Acquiescence and Waiver from disputing the said transactions.

6. Learned senior counsel for the petitioners argues that all transfers of funds to subsidiaries and investments were made with full notice to, and knowledge of, the consortium members. Moreover, the investments were within 20% of the cash accrual of the previous year, as per terms of the sanction. That apart, it is submitted, the investments were made over an eight-year period from financial year 2010-11 to 2016-17 and not in 2016-17 only, which is recorded in the disclosed audited balance sheets.

7. The allegation of investments being made by the company to the tune of Rs. 139.05 Crore in different companies without the approval of the lenders is also denied. The appraisal note for financial year 2017-18 specifically considers such investments and approves the same as being strategic in nature and considered acceptable.

8. It is alleged that the IC failed to consider the promoter's infusion into the funds as per sanction.

9. The ID, it is contended, held that in a consortium meeting held on September 25, 2018 it was confirmed that the company maintains a current account with the HDFC Bank which was opened without the permission of the lenders. Such account, however, was opened in 2005, much prior to the sanction of loan by the respondent-bank.

10. Although the IC recorded that the investments were recorded in several joint lenders' meetings to be strategic and mainly to expand business, but also held that such investments made from the funds of the lenders never yielded any return and was also not returned to any of the consortium lenders. Such finding was based on the financial statements for the financial year 2016-17 and found place first in the ID order of 2020, although not reflected from the appraisal notes between 2011-12 and 2016-17.

11. Neither the IC nor the RC, it is argued, took into consideration the various details disclosed in the representations given by the petitioners at each of those stages. The RC did not take into consideration the petitioners' representation since the same was filed beyond 15 days. Learned counsel for the petitioners further argues that the RC failed to undertake an independent assessment on the events of wilful default and merely reproduced the IC report.

12. The IC and RC, it is alleged, travelled beyond the grounds enumerated in the show cause notice and held the petitioners to be wilful defaulters.

13. That apart, it is contended that the show cause notice is based on the events of 2016-17, in which financial year there was admittedly no default and the mechanism of wilful defaulter declaration could not have been resorted to.

14. In support of the said contention, learned senior counsel for the petitioners cites *Axis Bank Ltd. Vs. Gaurav Dalmia*, a Division Bench judgment of this court.

15. It is further argued that the IC as well as the RC orders are otherwise contrary to the judgment of the Supreme Court in *State Bank of India vs. Jah Developers Private Limited [(2019) 6 SCC 787]]* .

16. The Single Bench decisions of this court dated December 23, 2020 in *Suresh Kumar Patni vs. Punjab National Bank & Ors.* and *Kejriwal Mining Pvt. Ltd. & Ors. vs. Allahabad Bank &Ors.*, reported at *2020 SCC OnLine Cal 1050*, are also relied on by the petitioners.

17. It is reiterated on behalf of the petitioners that the initiation of proceedings for declaration of Wilful Defaulter was contrary to the Reserve Bank of India (RBI) Master Circular of July, 2015.

18. It is argued that the allegations of events of wilful default are based on the audited balance sheet of the borrower company for the financial year 2016-17. However, it would be evident from the appraisal note for the said financial year that there was no default in the said period. The lead bank, that is, the SBI, recorded therein that the conduct of the account is satisfactory and there was no instance of devolvement of LCs and invocation of BGs ever.

19. Hence, placing reliance of the Division Bench judgment of this court in *Axis Bank Ltd. vs. Gaurav Dalmia & Ors. (supra)*, is argued that when there is no default during the period complained of, no proceedings could be initiated under the Master Circular.

20. The respondent bank has admittedly accepted the investments in other companies in the appraisal notes of each year. Once accepted, the same amounts to approval, since the Master Circular does not require prior approval for such investments. The investments had the approval of the lenders and were never complained of till the issuance of the show cause notice in February, 2019.

21. It is factually denied that the investments were in excess of the terms of the sanction, that is, above 20% of the cash accrual of the previous year. Even if so done, it is submitted that the same was subsequently accepted and approved and as such stood waived and does not qualify as an event of wilful default under the Master Circular. Such ratification of the investments by the consortium banks over the years, which were considered to be in the business interest of the company, is argued to operate as estoppel against the respondent bank from taking any action thereon.

22. Such stand, it is argued, is contradictory to the process note issued by the respondent bank on January 3, 2017 for working capital assessment for the financial year 2016-17, which recorded that the investments were made for expansion of the activities of the borrowing company in diversified market and for the purpose of expanding its global presence. The argument, it is contended, is raised in course of final hearing for the first time, although not raised either in the show cause notice or dealt with in the order of either the IC or the RC.

23. Although the ground, that the borrower has not used the finance advanced for the specific purpose for which it was given, was alleged in the show cause notice, the IC did not provide any evidence in support thereof or arrived at any finding on the said issue. Hence, it is argued that the bank's stand is inconsistent.

24. Hence, both the orders of the IC and the RC respectively ought to be set aside, learned senior counsel contends.

25. Learned senior counsel appearing for the respondents contends that the specific performance for which the finance was availed of by the petitioners was mentioned in the Sanction Letter dated January 19, 2017. Such performance was to procure several construction materials like cement, MS Angle, tower materials etc. As the projects of the company are executed at various places all over India and normally at remote places, therefore the LCs can be opened for transporting of materials through transporters who may not be approved by the IBA.

26. However, the loan amount was diverted for other purposes. The year-wise movements of the funds from March 31, 2011 to March 31, 2017, as reflected in the relevant documents, indicate that the petitioner had admittedly made loans and advances over a period of years and the same were duly disclosed in the audited accounts of the respective years.

27. As per the audited balance-sheet for the financial year 2016-2017, the company had made an investment of Rs.139.05 crores in different companies. Such investments were made over a period of years in the ordinary course of business, allegedly with full knowledge of banks and other consortium bankers.

28. It has been admitted by the petitioner that all investments and advances to group/other companies were properly recorded in the books of accounts, details of which are claimed to be well-known to all lenders through submission of audited accounts and other documents submitted to the SBI as a part of compliance. The loans and advances extended to associates/subsidiaries were admitted by the petitioner to have digressed from Rs.35.61 crore in financial year 2016 to Rs.23.21 crore in financial year 2017. Thus, above diversion of funds to group companies and subsidiaries are admitted.

29. Learned senior counsel appearing for the respondents places reliance on the definition of diversion of funds as contemplated in Clause 2.2.1 of the Master Circular and submits that the act of the petitioners falls squarely within the said definition.

30. Learned counsel specifically argues that, in the present case, Clause 2.1.3, sub-clauses (b) and (c) as well as the definition of siphoning off funds in Clause 2.2.2 are satisfied, for which the petitioners have been held to be wilful defaulters. The defence of the petitioners to the admitted diversion of funds is two-fold according to the respondents:

a) The diversion was within the permissible limit of 20% and

b) The diversion was strategic in nature and was condoned by the banks.

31. With regard to the first defence, the sanction letter of the bank dated October 8, 2014 provided that a maximum cap of 20% of the cash accruals as on the last balance-sheet of the company will be allowed for the purpose of investments/advances/guarantees to its subsidiaries/associate companies in a year. All such investment/advances were to be done with prior approval from the lead bank.

32. However, the said letter and the conditions thereof were superseded by the subsequent sanction letter dated January 19, 2017, which does not contained any clause with regard to the investment of 20% of cash accruals with subsidiaries/associate banks. Thus, it is argued by the respondents, on and from January 19, 2017 such remission of 20% of cash accruals became impermissible, in spite whereof the accruals continue to be disbursed to subsidiaries and group companies.

33. No documents have been produced to show what the cash accruals were in each year or whether such cash accruals were the contribution of promoters or not.

34. Thus, the diversion of any funds of the lenders without necessary consent of the lenders cannot be explained by contending that such advances/diversions were within the 20% cap.

35. Regarding the second submission that the diversion was strategic in nature and condoned by the banks, not a single document has been produced by the petitioners to show any prior permission of the bank. Admittedly, the banks came to know of the diversions from their reflection in the financial statements of the borrower-company. The purported condonation was, thus, at best *post facto*. Learned senior counsel for the respondents argues that the attraction of the clauses of the Master Circular is automatic the moment there is diversion of funds. The issue of condonation does not arise inasmuch as the classification of wilful defaulter is concerned.

36. It is contended that irrespective of any diversion being condoned or not, the Master Circular applies.

37. Learned senior counsel appearing for the respondents next submits that the order of the IC dated December 19, 2019 provided elaborate reasons.

38. The same demonstrates due consideration and application of mind.

39. The decision of the RC dated December 28, 2022 contains a table where the diversion of funds was tabulated, on the basis of which the RC came to the finding that there has been a diversion of funds. The RC also takes note of the balance-sheet for the financial year 2016-2017. The RC has also noted that as per Note 39 of the audited balance-sheet for the year 2016-2017, the company has made an investment of Rs.139.05 crore in different companies. Only after considering the balance-sheet, the RC came to the conclusion that there was diversion of funds without the approval of lenders. The RC order is also reasoned and well-considered.

40. Learned senior counsel next contends that this Court, in exercise of jurisdiction under Article 226 of the Constitution, does not sit in appeal over an administrative decision but only enforces fundamental rights or legal rights or legal duties or rights in performance of legal duty and defends the abuse of power or neglect by public authorities. Interference if the decision is vested by error apparent on the face of record is also possible, but the High Court does not look into the sufficiency of the grounds. Learned counsel cites, in this context, *West Bengal Central Service Commission Vs. Abdul Hamid*, reported at *(2019) 18 SCC 39*.

41. Clause 2.2.1(d) of the Master Circular also provides for routing of funds through any bank other than the lender bank or members of consortium without prior permission of the lender as a ground for declaration of Wilful Defaulter. In the present case, it is admitted that the petitioners were routing money through the HDFC bank, which is not a part of the consortium. Hence, the petitioners are liable to be classified as wilful defaulters under Clause 2.2.1(d) of the Master Circular.

42. The petitioners have argued by way of defence that the HDFC bank account was in operation since prior to the consortium loan/advance. However, Clause (O), which is a part of the sanction letter dated January 19, 2017, clearly provides that the petitioners cannot have any current account in any other bank which is not a member of the consortium. Thus, the petitioners acted not only in violation of Clause 2.2.1(d) of the Master Circular but also the terms of the sanction letter of January 19, 2017.

43. In the reply to the show-cause notice dated February 8, 2019, given by the petitioners in March, 2019, the diversion of funds to group companies and subsidiaries was repeatedly admitted.

44. While distinguishing the cases cited by the petitioners, learned senior counsel for the respondents argues that *Axis Bank Ltd. (supra)* holds that once the resolution of a company in a CIRP succeeds and money due to the bank thereunder is paid in full, the classification of wilful default would be liable to be removed. However, this is subject to the fact that there are no personal guarantees furnished by any of the writ petitioners. In the present case, the borrower company went through a successful resolution process. However, the successful resolution applicant failed to pay the money, as a result whereof the resolution ultimately failed. In the circumstances, no money was recovered by the bank; as such, the decision in the matter of *Gaurav Dalmia (supra)* is not applicable. In any event, in the present case, there were personal guarantors, for which the said cited judgment is also not applicable.

45. Inasmuch as the ratio laid down in *State Bank of India vs. Jah Developers Private Limited (supra)* is concerned, the same has no application, it is argued. The only proposition laid down therein is that the borrower will have complete liberty to make a full representation both before the IC and the RC. In the present case, there is no complaint that the borrower was not allowed to make full representation before both committees. In fact, the petitioners filed reply and representation before both the IC and the RC, which were disposed of by orders. As such, *Jah Developers Private Limited (supra)* also has no application to the present case.

46. *Suresh Kumar Patni (supra)* is based, it is contended, only on its facts and does not lay down any proposition of law. On an appreciation of facts, the court arrived at a finding that the orders of the IC and RC were passed violating all norms of natural justice and consequently those orders were set aside. Having regard to the fact that the said case is based on the peculiar facts of the same, it cannot be used as a precedent.

47. Lastly, learned senior counsel argues that *Kejriwal Mining Pvt. Ltd. (supra)* is also not applicable since this Court was of the opinion that the petitioner had adopted dilatory tactics and consequently the orders of the two committees were upheld. Having regard to the fact that this is a case where orders of the two committees were upheld by the writ court, this case has no relevance nor is applicable to the facts of the present case. It is, thus, argued that the writ petitions ought to be dismissed.

48. Upon considering the submissions of parties, the first aspect which has to be considered is the scope of interference by the writ court in the present case. A composite reading of the IC and RC orders indicates that ample reasons were given while coming to the decisions in both the orders. Inasmuch as the finds of fact on merits are concerned, it is beyond the domain of the writ court to interfere. As rightly contended by the respondents by placing reliance on *Abdul Hamid's Case (supra)*, there is no scope of this Court sitting in appeal over the decision of the committees, more so since there is no jurisdictional error apparent on the face of the records, nor can there be found any fault in the decision-making process adopted by the respondent authorities.

49. The approval notes relied on by the petitioners are undoubtedly documents which indicate post facto knowledge of the consortium banks with regard to the loans/advances and investments. However, the sanction letter dated January 19, 2017, also annexed to the writ petition and not being a disputed document, does not provide for transfer of funds to subsidiaries.

50. However, in the present case, the borrower company admittedly made loans and advances over a period of years. The said fact is evident from the audited balance-sheet for the financial year 2016-2017 itself, which also reveals that the company had made an investment of Rs.139.05 crores in different companies.

51. Although the defence of such funds being utilised for strategic interests has been pleaded by the petitioners, the mere coinage of the vague expression "strategic interests" does not mitigate the action of the borrower company in utilising the finance obtained from the lender for purposes other than the specific purpose for which the finance was availed, giving rise to a diversion of funds as contemplated in Clause 2.1.3(b) of the Master Circular.

52. The said act of the borrower also tantamounts to siphoning off the funds as the funds have not been utilised for the specific purpose for which the finance was availed of, as envisaged in Clause 2.1.3(c) of the Master Circular. The ingredients of 'diversion of funds', as stipulated in Clause 2.2.1, are also satisfied in the present case, which is evident from the documents considered by the IC and the RC respectively. Not only were the investments made beyond the terms of the sanction and for other purposes than for which the loan was sanctioned, borrowed funds were admittedly transferred to the subsidiaries, group companies, for whatever reasons.

53. It is also an admitted position that funds were being routed through the HDFC, a non-consortium bank. The petitioners' contention that the transactions with the said bank had been going on prior to the loan does not cut much ice, since such transactions continued even after the loan was taken. In fact, the sanction letter clearly debarred the petitioners from doing so; yet, such transactions were carried on through the HDFC by the petitioners. The apprehension of at least a portion of such transactions being funded by the loan amount cannot be ruled out.

54. In the present case, the IC and the RC concurrently found that the said instances amounted to siphoning of funds and such judgment of the lenders could not be said to be devoid of a consideration of objective facts and circumstances. As such, merely because a different view may be possible, this Court cannot interfere with the decisions of both the committees in its writ jurisdiction.

55. It has been rightly contended by the respondents that the petitioners have admitted the making over of the loans and advances, which were disclosed in the audited accounts of the company. In fact, the documents scrutinised by the committees were themselves sufficient to come to the conclusion that the petitioners were wilful defaulters as per the stipulations of the Master Circular of the RBI.

56. Since there was no provision in the sanction letter dated January 19, 2017 for investment of 20% of cash accruals in subsidiaries, which was there in the October 8, 2014 sanction letter, there does not arise any question of such defence being taken by the petitioners for the admitted transfer of funds by way of investment/advances to its subsidiaries and/or group companies.

57. The contention of the petitioners that the approval notes by the banks amounted to approval for the purpose of satisfying the restrictions as imposed in that regard in the sanction letter does not hold its ground, since subsequent knowledge of the banks cannot be a determinant in deciding as to whether such investment/advances were with our without *prior* approval from the lead bank.

58. No condonation as such by the consortium banks can be found from the records for the purpose of furnishing a defence to the petitioners for violating the specific clauses of the Master Circular as cited in the IC and the RC orders.

59. The petitioners got ample opportunity and filed representations before both the committees, which were duly considered by the said committees. As such, the proposition laid down in *Jah Developers Pvt. Limited (supra)* is not attracted to the present case at all.

60. In the present case, there are personal guarantors. Moreover, the Corporate Insolvency Resolution Process did not culminate in fruition, although the same was successful initially, because of the failure of the successful resolution applicant to pay the money. Hence, *Gaurav Dalmia's case (supra)* is not applicable.

61. As far as *Suresh Kumar Patni (supra)* and *Kejriwal Mining (supra)* are concerned, nothing in the said judgments comes to the aid of the petitioners in alleviating the charges of wilful default brought by the IC and confirmed by the RC.

62. The RC, instead of mechanically reproducing the IC order, scrutinised the merits of the same and rendered its decision thereon.

63. In such view of the matter, the orders of the IC and the RC cannot be said to be vitiated by any irregularity or patent miscarriage of justice whatsoever.

64. Thus, the writ petitions fail. Accordingly, W.P.O. No.12 of 2021, W.P.O. No.13 of 2021, W.P.O. No.20 of 2021, W.P.O. No.24 of 2021 and W.P.O. No.26 of 2021 are dismissed on contest without any order as to costs.

65. 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.)