IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.07.2023

Pronounced on : 10.07.2023

CORAM : JUSTICE N.SESHASAYEE

W.P.No.10197 of 2023
and WMP.Nos.10212 & 10214 of 2023

Sandeep Goyal ... Petitioner

Vs

1.Indian Overseas Bank
Through its General Manager /
Member Identification Committee
Stressed Assets Management Department
Central Office, P.B.No.3765
763, Anna Salai, Chennai - 600 002.

2.Indian Overseas Bank
India Exchange Place Branch
International Business Branch
2, Wood Street, Kolkata - 700 017.
Through its Chief Manager

Also at :
Indian Overseas Bank
Regional Office 119, I Floor
Park Street, Kolkata - 700 016.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records in and connected with impugned decision dated 15.03.2023 passed by the first respondent pursuant to the show cause notice dated 07.10.2021, quash the same and forbear the respondents from conducting any inquiry on the show cause notice without furnishing the documents sought for and without allowing the petitioner to have legal assistance during the course of such proceedings.

For Petitioner : Mr.B.Sathish Sundar

For Respondents : Mr.F.B.Benjamin George

ORDER

The petitioner herein challenges the proceedings of the first respondent dated 15.03.2023, declaring him as a wilful defaulter. The facts of this case arises in the following circumstances :

- The petitioner was a Director of M/s.BRG Iron & Steel Co. Pvt. Ltd. The company was indebted to the second respondent (hereinafter would be referred to as the bank), and the petitioner as its Director, stood guarantee for the repayment of the loan by the company.

- The company did not honour its commitment, as a consequence, sometime in 2014, its loan account was declared as NPA. Subsequently, in March 2019, proceedings under IBC was initiated.
- It is in this setting, on 07.10.2021, the first respondent issued a show cause notice *inter alia* to the petitioner, as to why he should not be declared as a wilful defaulter. The show cause notice broadly disclosed that based on the Forensic Audit Report dated 09.05.2019, which disclosed that there is a diversion of the loan amount by the principal borrower, the company, to purposes other than the one for which it was sanctioned. The petitioner responded to the show-cause notice with his reply dated 30.10.2021.
- Subsequently, the first respondent issued a notice dated 27.06.2022, required the petitioner for an enquiry that was scheduled to take place at 11.00 a.m., on 14.07.2022.
- About few days prior to the schedule date of enquiry, to be precise, on 09.07.2022, two emails were dispatched to the first respondent, one by the petitioner and the other by the guarantors of the loan. Through his email, the petitioner had requested, (a) a copy of the forensic audit report referred to in the show cause notice; (b) to

permit him to be assisted by a legal and an audit experts during the enquiry; (c) an opportunity of being heard; and (d) for an adjournment to postpone the hearing scheduled for 14.07.2022 to another date.

- While so, exactly twenty-fours before the scheduled time of the personal hearing as was originally scheduled, to be precise at 11a.m on 13.07.2022, the first respondent sent an e-mail to the petitioner that the personal hearing would take place as scheduled at Indian Overseas Bank, Regional Office:119, I Floor, Park Street, Kolkata. There however, was no reference to the two emails which the petitioner and guarantors had sent on 09.07.2022, which to repeat included a request for adjourning the date of personal hearing to another date.
- Then there was a lull for the next few months. On 07.03.2023, the first respondent sent a communication through which it had informed the petitioner that his request for a copy of the forensic audit report was declined. This e-mail does not indicate any date of hearing of the proposed personal hearing, and did it informed the petitioner what had transpired on 14.07.2022.

2. It is in this backdrop, a week later, the first respondent came out with the impugned proceedings, dated 15.03.2023, declaring the petitioner as a wilful defaulter. This is now under challenge fundamentally on the ground that the first respondent's action had contravened paragraph 3(b) of the Master Circular of the RBI on the Wilful Defaulters, dated 01.01.2014, as updated on 07.01.2015 and that the petitioner was not accorded an opportunity of a personal hearing as intended by the petitioner before he was declared a wilful defaulter.

3. Taking this Court through Paragraph 3(a), 3(b) & 3(c) of the Master Circular, the learned counsel for the petitioner submitted that paragraph 3 (b) contemplates a right of hearing to the one before he is declared as a wilful defaulter. Relying on the ratio in ***State Bank of India & Ors. Vs. Rajesh Agarwal & Ors***. [2023 SCC OnLine SC 342] to fortify his contention that the rule of *audi alteram partem* is mandatory every time a proposed administrative action affects the civil rights of the citizen, the learned counsel argued that declaring the petitioner as a wilful defaulter without a hearing affects his creditworthiness and will leave a deep dent in his standing in the business world.

4. Filing his counter, the counsel for the respondents submitted that the petitioner's strategy aims to delay the inevitable as he had demanded the forensic audit report despite the fact that he has one with him. Indeed, he very extensively and generously refers to it in his reply to the show cause notice. So far as getting the assistance of an expert during the enquiry is concerned, the Hon'ble Supreme Court in ***State Bank of India Vs. Jah Developers Private Limited and Others*** [(2019) 6 SCC 787] has held that inasmuch as the enquiry contemplated under Master Circular 3(b) is an in-house proceedings, the one who faces an enquiry in terms of paragraph 3 of the Master Circular of the RBI, cannot claim the assistance of an expert as of right. The learned counsel then proceeded to state that the first respondent has done everything within his command to invite the petitioner for an enquiry on 14.07.2022, but the petitioner missed the opportunity with his inexplicable strategy. This apart, the impugned proceedings is only a provisional proceedings, and it has to be confirmed by a Review Committee as contemplated in paragraph 3(c) of the Master Circular referred to above. Therefore, he still has an opportunity to file his representation before the Review Committee and address the issue before it.

5. Clarifying the ratio in ***Rajesh Agarwal case***, the learned counsel for the respondents submitted that the same needs to be contextually understood, in that, it related to paragraph 8 of the Master Circular that authorises the first respondent to declare certain accounts as fraudulent accounts, and this provision does not contain a provision for an enquiry as contemplated under paragraph 3. It is in that context, the Hon'ble Supreme Court has held that the rule of *audi alteram partem* is in-built in every such proceedings where the civil right of an individual is put to peril.

6. The controversy revolves around paragraph 3 of the Master Circular, and the same is extracted below:

> ***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.

A close reading of paragraph 3(b) above would indicate that, (i) the borrower should be heard before he is declared as a defaulter; (ii) that he must be accorded a personal hearing if the first respondent feels such an opportunity is necessary; and (iii) it should record the reasons for its decision for declaring the borrower as a wilful defaulter.

7. The facts as narrated in paragraph No.1 above would show that the first respondent indeed had felt it necessary to accord a personal hearing to the petitioner, as could be seen from its email dated 13.07.2022, and this email

was despatched exactly 24 hours prior to the scheduled time of personal hearing meeting. It may be stated that a week prior to that, i.e., on 09.07.2022, the guarantors of the loan have requested for a change of date of the scheduled enquiry to another date. There is no reference to this request in the email of the first respondent dated 13.07.2022. But what is even more significant is that, on the very date on which the petitioner sought an adjournment of the enquiry, he had also sent another email where he *inter alia* had requested for a copy of the forensic audit report to enable him to participate in the enquiry. This email was responded to by the first respondent not in its email dated 13.07.2022 referred to above, but vide another communication dated 07.03.2023, some eight months later. In this communication, it declined to serve a copy of the forensic audit report.

8. What emerges from the correspondence of the first respondent dated 07.03.2023 is that till that point of time, the first respondent has not concluded its enquiry. After all, the petitioner has sought for a copy of the forensic audit report for his effective participation in the enquiry, and if only the enquiry had taken place as scheduled on 14.07.2022, then it would be meaningless to issue a correspondence dated 07.03.2023.

9. It is not the case of the petitioner that between 07.03.2023 and 15.03.2023, it had held a personal hearing as it originally intended in terms of paragraph 3(b) of the Master Circular. Therefore, this Court considers that inasmuch as the first respondent had taken a decision to accord a personal hearing to the petitioner, notwithstanding the fact that it was in possession of the petitioner's reply to the show cause notice, it must be held that there is a breach of paragraph 3(b) of the Master Circular, and there is a palpable violation of principles of natural justice.

10. It is true, under paragraph 3(c) of the Master Circular, the order of the first respondent Committee will have to go for a mandatory review, and that the petitioner will still have a right of hearing before the Review Committee. In a two-tier proceedings which paragraph 3 of the Master Circular contemplates, the petitioner is entitled to a right of hearing in each of the tier, and the omission or breach to afford a right of hearing in the first tier cannot be compensated merely because a borrower has a right to present his/her case before the Review Committee.

11. This apart, paragraph 3(b) also requires the first respondent to state the reason for its decision, but the impugned proceedings dated 15.03.2023 hardly makes any reference to the reply notice nor it has given any reason to declare the petitioner as a wilful defaulter.

12. Before parting with the case, this court also intends to record that it does not believe that the petitioner is without a copy of the forensic audit report for he has extensively referred to it in his reply to the show cause notice.

13. In fine, this Court allows the petition and sets aside the impugned order of the first respondent dated 15.03.2023, and directs the first respondent to hold a fresh enquiry with due notice to the petitioner, if it so desires, and after any such enquiry, if it decides to hold the petitioner as a wilful defaulter, it shall be through a speaking order, recording its reasons for the same. No costs.

10.07.2023

Index : Yes / No
Speaking order / Non-speaking order
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To:

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N.SESHASAYEE.J.,

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Pre-delivery order in
W.P.No.10197 of 2023

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