

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

R.V.W.O. No.33 of 2023

IA No. GA 1 of 2023

Arising out of

W.P.O. NO. 26 of 2021

Swapan Kumar Datta

VS

State Bank of India and Ors.

For the petitioner : Mr. Jishnu Chowdhury, Adv.
Mr. Souryadeep Banerjee, Adv.
Mr. Pranav Sharma, Adv.

For the respondents : Mr. Joy Saha, Sr. Adv.
Mr. Anirban Pramanick, Adv.

Hearing concluded on : 19.12.2023

Judgment on : 05.01.2024

Sabyasachi Bhattacharyya, J:-

1. The present review application has been filed by the writ petitioner in W.P.O. No. 26 of 2021 against an order dated January 24, 2023, whereby the said writ petition, along with other similar writ petitions, were dismissed on contest without any costs. The review application has been filed on the strength of a Division Bench judgment passed in appeals preferred by the present petitioner along with other unsuccessful writ petitioners from the said order of the Single Judge. The Learned Division Bench, while disposing of the appeal of the petitioner, granted liberty to the petitioner to approach this Court for a

review of its order dated January 24, 2023. The petitioner's primary ground is that this Court did not take into consideration the fact that the petitioner was not a Director of the Borrower-Company, that is, the EMC Limited at the relevant point of time, being the financial year 2016-2017, to which the allegations of wilful default pertained, but was only appointed as a Director of the Borrower-Company in the year 2018. The said omission according to the petitioner is an error apparent on the face of record justifying the prayer for review.

- 2.** The primary defence of the respondents, apart from the fact that the said fact was not brought to the notice of this Court or reflected in the order under review, is that the EMC Infrastructure Limited, of which the petitioner was a Director at the relevant point of time, and the borrower-Company EMC Limited are one and the same. From the records of the Registrar of Companies, the petitioner Swapan Kumar Datta is shown to be a Director of the EMC Limited since September 24, 2014. In the absence of any rectification of such entry, it is argued that the petitioner could not avoid liability for the relevant period. The respondents argue that this Court should lift the corporate veil and look into the alleged nexus between the wilful defaults committed by the different group companies of the borrower-Company and the role of the petitioner who is alleged to be dishonest and to hold a key managerial post in the entire group of companies aligned with the borrower-Company.
- 3.** Learned senior counsel appearing for the respondents also contends that the act of wilful default is not confined to a single transaction of

the year 2016-2017 but is a continuing offence due to non-repayment of the debt and non-regularisation of the account till date. Under Section 166 of the Companies Act, 2013, it is argued, the Director of a Company has a fiduciary duty to ensure that the business of the Company is not conducted contrary to the interest of the shareholders or contrary to the public interest.

4. The respondents argue that the definition of “unit” under Article 2.1.2 of the Master Circular of Wilful Default published by the Reserve Bank of India includes individuals, juristic persons and also persons who are in charge and responsible for the management of the affairs of the business enterprises. The involvement of the present petitioner cannot be denied, it is contended.
5. Since the petitioner did not raise any individual issue before either Committee, that is, the Wilful Defaulter Identification Committee or the Review Committee, the said issues cannot be raised now, it is argued.
6. At the outset, the objection as to maintainability of the review application taken by the respondents on the ground that the present issue was never raised at the time of hearing before the first Court is required to be dealt with, since it hits at the root of the review jurisdiction of this Court.
7. The respondents are undoubtedly correct in contending that the arguments made before the Division Bench are not reflected to have been advanced before the Single Judge, as evident from the order under review dated January 24, 2023. All the writ petitioners in the

bunch of writ petitions which were decided by the Single Judge were represented by the same set of counsel. The arguments recorded in the said order at the final hearing do not contain an iota of reflection of the individual issue of the present petitioner that he was not a Director of the borrower-Company at the relevant point of time.

8. However, it is well-settled that justice must not only be done but must also appear to have been done. Seen from such perspective, it cannot be denied that despite not being reflected in the final arguments, the said fact was clearly pleaded in the writ petition of the petitioner, that is, WPO No. 26 of 2021, in its very first few paragraphs. Moreover, the petitioner raised the issue before the first Committee that is the Wilful Defaulter Identification Committee but was never dealt with as such by either Committee. Hence, the ground taken in the review application ought not to be brushed aside merely since the same was not reflected in the final arguments before this Court. In any event, in the absence of any specific authorisation of learned counsel to waive or relinquish the point raised by the petitioner, we ought to proceed on the premise that the said issue was never relinquished by the petitioner even at the final hearing before the writ court.
9. We find from the materials pleaded and annexed here, which were before the two Committees at the relevant point of time, that the petitioner became a Director of the borrower-Company (EMC Limited) only on February 26, 2018 whereas the show-cause notice as well as the orders of the two Committees clearly proceed on the allegations of wilful default during the financial year 2016-2017. Even if, for

argument's sake, it is assumed that the acts of wilful default were not restricted to the year 2016-2017 but the recalcitrant acts leading to it were initiated much before, similar logic cannot be extended forward in time, since it cannot be said that a person was guilty of wilful default committed in 2016-2017 retrospectively by acts done in 2018 or thereafter.

- 10.** Neither the show-cause notice nor the orders of the committees speak of the complicity of the petitioner in the alleged defaults of the borrower company in the capacity of director of other group companies, as alleged now. The respondents seek to allege that the petitioner was a key person having a directorial/managerial role in all the group companies and was responsible for the act of wilful default of the borrower-Company EMC Limited, despite not being a director of the same during the relevant period. However, there is not an iota of reflection of such specific allegations regarding the petitioner playing a key role in the default as a managerial person in the other group companies either in the show-cause notice or in the orders of either Committee. Thus, the petitioner cannot be punished retrospectively on allegations which were never made against him at all in the show-cause notice or the orders.
- 11.** Even if the allegations against the petitioner were to be true (although not established till date to be so before any appropriate forum), the petitioner could not have been indicted without any allegation in the show cause notice or opportunity of hearing on such specific allegations.

- 12.** The respondents now produce purported extracts of the Register of Companies. The purported records of the Registrar of Companies produced with the review petition by the respondents are mere extracts, without the petitioner being confronted with the said documents or affording him the opportunity to deal with the same. The petitioner argues that the said entries do not prove beyond reasonable doubt that the petitioner was a Director of the borrower-Company at the relevant period.
- 13.** It is argued that the petitioner joined as a Director of not the borrower EMC Limited but EMC Infrastructure Limited on March 22, 2014 and was a Director of the said Company all through. On February 26, 2018, by an order of the National Company Law Tribunal (NCLT), Kolkata Bench, the EMC Limited (the Borrower) merged with EMC Infrastructure Limited of which the petitioner was already a Director since 2014. EMC Infrastructure Limited was changed subsequently to EMC Limited on July 6, 2018 as per the allegation of the petitioner.
- 14.** Thus, it is not an altogether incredible defence that the petitioner's name might be reflected in some of the current records of the Registrar of Companies as a Director of the EMC Limited in view of the chain of events as indicated above. EMC Infrastructure Limited merged with EMC Limited and subsequently was renamed as EMC Limited. Hence, if extracts are taken now, some of the records would definitely indicate that the petitioner has been a Director of the EMC Limited. A threadbare scrutiny and comparison between the respective Directors Identification Numbers of the petitioner during

the relevant periods would be an exercise entirely beyond the scope of the review application.

- 15.** It is well-settled that *post facto* reasons cannot be furnished in pleadings of a writ petition to justify actions taken against a person much prior to the filing of the writ petition. Hence, even if the respondents have a point in their allegations of complicity between the petitioner and the borrower-Company at the relevant juncture, this is not the appropriate forum or juncture of ventilating the same, since no such allegation was put to the petitioner and/or the petitioner given an opportunity to controvert the same by cogent materials at any relevant point of time, either in the show-cause notice or in the impugned orders of both the committees.
- 16.** The averment of continuing offence is not strong enough since mere non-repayment of a defaulted amount may not tantamount to a continuing offence of “wilful default” as contemplated in the relevant Master Circular of the RBI. Wilful default comprises of specific offences falling under the heads as provided in the Master Circular and cannot be stretched so far as to include subsequent acts on which the petitioner never got an opportunity to place a defence.
- 17.** In fine, it is incontrovertible that the petitioner was not a Director of the borrower-company, namely EMC Limited at the relevant point of time. At least, no such document has been produced before this Court to controvert such stand beyond doubt. More importantly, the writ petition contained such averments which were not looked into by this Court.

- 18.** Although the Division Bench did not remand the matter to this Court, for all practical purposes, the specific issue raised in the review application was adverted to by the Division Bench and on such specific ground liberty was given to the petitioner to prefer a review petition before this Court. Although not a remand, such liberty, in the context of the observations made by the Division Bench, reopened the issues now taken in the review petition. Hence, the petitioner cannot be precluded from agitating the said issue as a ground of review merely because it was not reflected in the order under review or was never argued at the final hearing of the main writ petition. The absence of jurisdictional facts required to confer authority on the Wilful Defaulter Identification Committee and Review Committee in respect of the petitioner does not get altered merely because such argument was not made specifically before the writ court in the final hearing of the writ petition.
- 19.** In view of the above observations, the order under review is required to be set aside insofar as the present petitioner is concerned.
- 20.** Accordingly, RVWO No. 33 of 2023 is allowed to the extent that the order dated January 24, 2023 only insofar as it relates to WPO No. 26 of 2021 and pertains to the allegations against the petitioner are reviewed and recalled. WPO No. 26 of 2021 thus stands allowed, thereby setting aside the orders of the first Committee (Wilful Defaulter Identification Committee) dated February 24, 2020 and the subsequent order of the Review Committee confirming the same and

communicated on December 28, 2020 insofar as those relate to the petitioner. IA No. GA 1 of 2023 is also disposed of accordingly.

- 21.** Nothing in this order, however, shall be construed as a bar to the respondent-Authorities from initiating fresh proceedings for declaration of the petitioner as wilful defaulter upon making specific allegations in that regard against the petitioner. Further, the present order is restricted insofar as the decision in the order dated January 24, 2023 pertains to WPO No. 26 of 2021 and the present petitioner.
- 22.** There will be no order as to costs.
- 23.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)