In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side
The Hon'ble Justice Sabyasachi Bhattacharyya

R.V.W.O. No.48 of 2023
I.A No. G.A. 1 of 2023
In
W.P.O. No.20 of 2021

MKN Investment Private Limited and Another
Vs
State Bank of India and Others

For the petitioners	:	Mr. Mainak Bose, Sr. Adv., Mr. Rishabh Karnani, Adv., Mr. Pranav Sharma, Adv.
For the respondents	:	Mr. Joy Saha, Sr. Adv., Mr. Anirban Pramanik, Adv., Mr. Punarbasu Nath, Adv., Ms. Bhaggasree Dey, Adv.
Hearing concluded on	:	06.12.2024
Judgment on	:	20.12.2024

Sabyasachi Bhattacharyya, J:-

1. The present application has been taken out for review of an order dated January 24, 2023 passed in W.P.O. No.20 of 2021.

2. In a nutshell, the petitioner, who had preferred W.P.O. No.20 of 2021, was a personal guarantor in respect of a loan taken by the EMC Limited, the borrower-Company. The principal borrower availed of a loan from a consortium of banks, with the State Bank of India as the lead bank. Subsequently, the borrower having defaulted in repayment of the loan, a proceeding was initiated for declaration of the borrower and its Managing Directors as well as guarantors as Wilful Defaulters under the Master Circular for Declaration of Wilful Defaulters of the Reserve Bank of India dated July 1, 2015.

3. The Wilful Defaulter Identification Committee (for short, "IC") declared the borrower-Company, its Managing Directors as well as the petitioner as Wilful Defaulters. Subsequently, the Review Committee (for short, "RC") affirmed the said decision of the IC, against which the writ petition was filed.

4. W.P.O. No.20 of 2021, filed by the present petitioner, was heard along with four other writ petitions preferred by the Managing Directors of the borrower-Company. The said five writ petitions were clubbed together and heard analogously and were disposed of by the Judgment and Order dated January 24, 2023, thereby affirming the decisions of the IC, as confirmed by the RC.

5. All the writ petitioners preferred separate appeals against the aforementioned order. The appeals were taken up together for hearing and one of the said appeals preferred by a different petitioner, bearing APOT No.46 of 2023, was disposed of with the observation that since the writ petitioner raised new grounds in appeal, if the appellant therein, with the leave of the writ court, files a review application, the writ court was requested to consider the same on merits and in accordance with law.

6. The present petitioner sought a similar relief and the Division Bench taking up the petitioner's appeal, bearing APOT No.44 of 2023, by an order dated September 27, 2023, disposed of the appeal with an observation that if the appellants, with the leave of the writ court, file a review application, the writ court was requested to consider the matter on merits and in accordance with law. Pursuant to such leave, the present review application has been filed.

7. Learned senior counsel for the review applicant contends that the distinguishing feature in case of the present petitioner was that the petitioner was a personal guarantor of the borrower-Company, which fact was overlooked by this Court while passing the order under review. The said order was passed primarily upon hearing the principal borrower, without taking into consideration the legal effect of Clause 2.6 of the Master Circular. As per Clause 2.6, in case of personal guarantors, the creditor is required to make a claim on the guarantor on account of the default made by the principal debtor. In case the said guarantor refused to comply with the demand made by the creditor/banker despite having sufficient means to make payment of the dues, such guarantor would also be treated as a Wilful Defaulter.

8. It is argued that in the present case, the petitioner/personal guarantor initially had sufficient means to make payment of the dues and had secured the loan by tangible assets. Measures were taken by the creditor/bank under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act") and the secured assets were sold and the sale proceeds appropriated towards meeting the debt. Thereafter, the petitioner did not have sufficient means to satisfy the debt further. As such, the precondition of Clause 2.6 of the Master Circular having not been satisfied, as the petitioner/guarantor did not have sufficient means to meet the debt, the petitioner could not have been declared to be a Wilful Defaulter.

9. It is, thus, contended that none of the Committees considered the effect of Clause 2.6 of the Master Circular.

10. Learned senior counsel for the petitioner argues that pleadings relating to non-consideration of Clause 2.6 were made in the writ petition bearing W.P.O. No.20 of 2021. However, those were overlooked by this Court while passing the order under review. As such, there was an error apparent on the face of the record on such count. It is contended by the petitioner that if there is a mistake on the part of the court, it can always be rectified by way of review. Order XLVII Rule 1 of the Code of Civil Procedure contemplates three grounds of review – error apparent on the face of record, discovery of new material and "any other sufficient reason". It is contended that the last such ground ought to be invoked in the present case as well, since an important facet of the argument was overlooked by the court. As the fact of the petitioner being a personal guarantor was overlooked and the petitioner was considered by this Court on similar footing as the principal borrower and its Managing Directors, sufficient ground for review is available on such count alone.

11. Learned senior counsel for the petitioner places reliance on *Board of Control for Cricket in India and another v. Netaji Cricket Club and others*, reported at *(2005) 4 SCC 741*, for the proposition that an application under Order XLVII Rule 1 would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient cause. A mistake on the part of the court would also attract the review jurisdiction and what would constitute sufficient reason would depend on the facts and circumstances of the case. The Supreme Court held that the words "sufficient reason" in Order XLVII Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate. The doctrine of "*actus curiae neminem gravabit*" was invoked by the Supreme Court in such context.

12. The petitioner also relies on an Order dated January 5, 2024 where another review application filed by one of the other writ petitioners in the present case was allowed by this Court on the premise that the petitioner therein was not a director of the borrower-Company at the relevant juncture.

13. Learned senior counsel for the respondents opposes the prayer for review and argues that the review application is not maintainable. It is argued that the mere grant of leave by the Division Bench to file a review application with the leave of this Court does not clothe the review application with legitimacy. It is contended that the review application is not maintainable, in view of none of the grounds under Order XLVII Rule 1 of the Code of Civil Procedure being attracted.

14. It is submitted that the petitioner chose not to argue the ground of Clause 2.6 of the Master Circular when the writ petition was heard and, as such, cannot now be permitted to reopen the order on such ground. It is pointed out that the Division Bench did not remand the matter but gave liberty to file review. Accordingly, the question of maintainability is open for this Court to consider and ought to be decided against the applicant.

15. Learned senior counsel further contends that the petitioner received show-cause notice prior to initiation of the Wilful Defaulter proceeding, admittedly replied to the same and was heard by both Committees. As such, there was no violation of the principles of Natural Justice. In its reply to the show-cause notice, the point of Clause 2.6 of the Master Circular or the claim of the petitioner in the capacity of personal guarantor was never urged. Thus, it is argued that the petitioner has come with unclean hands and the present endeavour to reopen all issues is mischievous. As such, the petitioner is not entitled to equity sufficient for this Court to invoke the review jurisdiction.

16. By placing reliance on the annexures to the affidavit-in-opposition filed by the respondents, it is argued that five writ petitions were filed by five sister concerns, including the petitioner. The Directors of all five Companies are substantially the same. Hence, the direct involvement of the petitioner in the wilful default cannot be denied.

17. Learned senior counsel next argues that Clause 2.6 of the Master Circular has two limbs - the first limb covering group companies who are also guarantors for the principal borrower and the second, other personal guarantors. In respect of group companies, the prior requisite of a demand and satisfaction as to the personal guarantor not meeting the debt despite having sufficient means is not required to be satisfied. Hence, it is contended that the present application be dismissed.

18. Upon a careful consideration of the arguments of the parties and a thorough perusal of the materials on record, I am of the considered opinion that the review application is misconceived. The respondents are justified in arguing the Division Bench did not conclusively decide the maintainability of the review application. In its judgment dated September 27, 2023, the Division Bench merely applied the line of reasoning taken in other similar appeals and observed that if the petitioner, with the leave of the writ court, files a review application, the writ court was requested to consider the matter on merits and in accordance with law. It was not recorded by the Division Bench in its order as to what was the line of distinction available to the petitioner with the other writ petitioners or as to what additional ground, if any, was urged before it by the present petitioner. Thus, we have to independently consider whether the parameters of review under Order XLVII of the Code of Civil Procedure are attracted in the present case.

19. The first salient feature of the present case is that the petitioner did not argue the purported distinguishing feature of its being a personal guarantor and the applicability of Clause 2.6 of the Master Circular at the hearing of the writ petition itself.

20. Several averments are made in writ petitions and it is obvious that the court need not peruse each and every sentence of the writ petition. Writ petitions are decided on the argument of parties. It is well-settled that despite several grounds being taken in a writ petition, it is the prerogative of the petitioner to abandon or relinquish some of such grounds. Hence, the invocation of Clause 2.6 and the fact that the petitioner was a personal guarantor, which allegedly places the present petitioner on a different footing than the principal borrower, in the pleadings of the writ petition does not necessarily mean that the writ court was called upon to adjudicate the same. It is relevant to mention here that all the five writ petitions were moved by the same set of counsel, which is moving the present review application as well. Common written notes of argument were filed for all the five writ petitions. It is not reflected from the order under review that the grounds now sought to be agitated were ever argued at the relevant juncture. Such grounds are also, conspicuously, absent in the written notes of arguments filed by the petitioners in connection with the writ petition.

21. It would be setting a dangerous precedent if parties to a writ petition, despite being heard at length while disposing of the writ petition, were permitted to seek review of the writ court's final order and ask the court to reopen its order for a *de novo* consideration despite having not argued the grounds of review, though very much available at the relevant point of time. If such a trend is permitted to gain currency, there would never be any finality to any order and it would be allowing the abuse of the power of review conferred on courts by litigants. Moreover, since detailed arguments are required to be advanced and considered to adjudicate the points now raised, it cannot be said that there was any error "apparent on the face of the order" passed in the writ petition.

22. It is well-settled that the expression "other sufficient reason" in Order XLVII Rule 1 is to be read in conjunction with the other grounds of review, applying the principle of *ejusdem generis*. Seen in such context, as none of the principal grounds of review, that is, discovery of new material or error apparent on the face of the records are available to the present petitioner, it cannot take advantage of the general ground of "any other sufficient reason" by treating the same to be an omnibus charter to challenge an order before a co-ordinate Bench as if the Bench was sitting in judgment over its own decision. Also, a point not urged by the writ petitioner at the time of arguments cannot be entertained for the first time in review.

23. That apart, it is palpable from the reply given by the petitioner to the show-cause notice issued in the proceeding for declaration of Wilful Defaulter that the petitioner never urged in the said reply that it was invoking its capacity of personal guarantor and/or Clause 2.6 of the Master Circular. The petitioner was given full-fledged hearing and opportunity of representation before both the IC and the RC and had ample opportunity to urge such points. However, there is nothing in the order under review or the records to indicate that the grounds now urged were ever argued before any of the forums at any point of time.

24. Another important aspect cannot be glossed over. Even if Clause 2.6 is taken into consideration the petitioner, as personal guarantor, admittedly had sufficient means to make payment of the dues at the relevant juncture. It is case of the petitioner that subsequently, upon the sale of the property given as security by the petitioner, the petitioner lost such means. However, since despite a claim having been made by the creditor-Bank from the petitioner to make good the default incurred by the principal debtor, the petitioner refused to comply the same, leading to measures being taken under Section 13(4) of the SARFAESI Act, is sufficient to bring the petitioner, even as a guarantor, within the fold of Clause 2.6 of the Master Circular. The very fact that Section 13(4) proceedings had to be initiated and were contested by the petitioner, which ultimately led to the security given by the petitioner being sold and the sale proceeds adjusted to partially meet the debt, shows that the petitioner, despite having sufficient means at that juncture, chose not to meet the debt of the principal borrower, thus attracting the second limb of Clause 2.6 of the Master Circular. Thus, even if Clause 2.6 was considered in the writ petition, the same would not have made a difference in the outcome of the same.

25. Furthermore, as rightly contended by learned senior counsel appearing for the respondents, the scheme of Clause 2.6 of the Master Circular clearly distinguishes between group companies of the principal borrower and individuals and non-group companies. The last two sentences of Clause 2.6 make it abundantly clear that the treatment of non-group corporate and individual guarantors (as opposed to group companies) was made applicable with effect from September 9, 2014 and not to cases where guarantees were taken prior to such date. Thus, a clear distinction is drawn between group companies of the principal debtor and other guarantors, individual or non-group corporates.

26. Again, the first limb of Clause 2.6 carves out a separate niche for group companies. It provides that in cases where guarantees furnished by the companies within the Group on behalf of the wilful defaulting units are not honoured when invoked by the banks such Group companies should also be reckoned as Wilful Defaulters. The ratio of such distinction is obvious. Group companies act in concert with each other and, as such, have been treated under Clause 2.6 to be on a footing equivalent with the principal borrower.

27. Thus, the prerequisite in Clause 2.6 of a claim having been refused by the personal guarantor "despite having sufficient means" has not been made applicable to guarantors which are group companies. Rather, a clear distinction in treatment has been drawn between two separate classes of guarantors – group companies of the wilfully defaulting units and other stranger-guarantors, be them individual guarantors or non-group corporates. Considering from such perspective as well, the very line of distinction sought to be drawn by the petitioner between itself (in the capacity of a personal guarantor) and the principal borrower-Company and its Managing Directors, is obliterated by the very provisions of Clause 2.6 of the Master Circular.

28. Since the rights and contentions of the principal borrower have otherwise been finally decided by the writ court and not interfered with by the appellate court, the said issues cannot be reopened in review. In fact, the liberty to file review applications given to the petitioner and other appellants was on the premise that they had made new arguments regarding distinguishing features which were not considered by the writ court. Erasure of the said distinguishing feature itself patently disentitles the petitioner from invoking the review jurisdiction, since the other points contended, *pari materia* with the principal borrower, have already been conclusively decided by the writ court.

29. In such view of the matter, no ground for review has been made out by the review applicant. Thus, the review application fails.

30. Accordingly, R.V.W.O. No.48 of 2023 is dismissed on contest without, however, any order as to costs.

31. GA 1 of 2023, the connected application, is accordingly disposed of as well.

32. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)