IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.06.2024

PRONOUNCED ON : 03.07.2024

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

W.P.No.17614 of 2021 and
W.M.P.No.18747 of 2021

Y.Shivaram Prasad ... Petitioner

-Vs-

1. Indian Overseas Bank,
   Review Committee,
   Stressed Assets Management Department,
   PB No.3765, 763, Anna Salai,
   Chennai – 600 002,
   Tamil Nadu.

2. Indian Overseas Bank,
   Identification Committee,
   Stressed Assets Management Department,
   PB No.3765, 763, Anna Salai,
   Chennai – 600 002,
   Tamil Nadu.

3. Indian Overseas Bank,
   Large Corporate Branch,
   R.S.Puram,
   Coimbatore – 641 002. ...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, to call for the records of the first respondent in the impugned letter Reg.No.CO/SAMD/ GM(BARP)/754/2021-22 dated 20.07.2021, and quash the same as violative of natural justice, illegal, arbitrar, unconscionable and issued without regard to due process of law.

For Petitioner : Mr.R.Vidhya Shankar

For Respondents : Mr.M.L.Ganesh

ORDER

This writ petition has been filed as against the order passed by the first respondent dated 20.07.2021, thereby confirming the order passed by the identification committee by declaring the petitioner as wilful defaulter as defined under the circular issued by the Reserve Bank of India.

2. The petitioner is the erstwhile director of Servalakshmi Paper Limited (hereinafter referred to as “the Company”) now under liquidation. The Company has availed credit facilities from the third respondent. Thereafter, the Company committed default and so it was declared as non performing assets. Even after five years, the Company

failed to repay the dues as such, the petitioner was issued with show cause notice on 10.01.2019, why the petitioner should not be declared as defaulter. The petitioner replied by way of explanation dated 29.01.2019 that the National Company Law Appellate Tribunal in Company Appeal in C.A.Nos.224 & 286 of 2018, had recorded that there was a resolution plan which the banks have in principle consented to consider. Therefore, the petitioner reserved his rights to canvas further issues to the show cause notice.

3. Thereafter, the petitioner was once again issued with show cause notice on 25.10.2019 for declaring him as wilful defaulter in relation to facilities availed from the third respondent. As per the draft forensic audit report, it could not constitute a credible document to draw any meaningful conclusion. The corporate insolvency resolution process of the Company commenced on 21.06.2017 and as such, the liquidator had taken custody of all documents. Hence, the petitioner could not have access to the records and documents of the Company, thereby incapacitating the petitioner from making complete submissions on merits.

4. On merits, the petitioner issued a detailed reply on

27.11.2019. Without furnishing any evidence apart from the incomplete forensic report, the second respondent called upon the petitioner for personal hearing. After submitting the reply by the petitioner, the petitioner attended personal hearing on 23.09.2020. Thereafter, the second respondent declared the petitioner as wilful defaulter as per the guidelines issued by the Reserve Bank of India.

5. Aggrieved by the same, the petitioner approached this Court in W.P.No.6896 of 2021 and this Court disposed the writ petition thereby observed that there is a remedy available to the petitioner before the Review Committee. As per the order passed by the identification committee, the petitioner was directed to submit written representation, if any, before the Review Committee who is the final authority to decide the matter within a period of fifteen days. Accordingly, the petitioner submitted the detailed submission and the same was not considered and also confirmed that the petitioner is wilful defaulter as defined by the circular issued by the Reserve Bank of India. Aggrieved by the same, the present writ petition has been filed by the petitioner.

6. The learned counsel appearing for the petitioner submitted

that declaration of the petitioner as wilful defaulter is arbitrary, gross violation of principle of natural justice. The petitioner was not even given opportunity of hearing before the Review Committee. The petitioner was not served with original final forensic report and as such the petitioner could not able to give proper reply for the show cause notice issued by the third respondent. Therefore, it is clear violation of principles of natural justice. The declaration of wilful defaulter permanently damnifies the petitioner and prevent from having access to financial and capital markets of the country. His fundamental right to do business is effectively taken away by declaration of wilful defaulter. The identification committee without stating any reasons mechanically declared the petitioner as wilful defaulter. The Review Committee also without considering the submission made by the petitioner and without discussing the case on merit basis, passed non speaking order by confirming the declaration made by the identification committee. It is non-est in the eye of law. In support of his contention, he relied upon the judgment of the Hon'ble Division Bench of this Court reported in ***AIR 2021 Mad 318*** in the case of ***Senthil Arumugasamy Vs. Deputy General Manager, State Bank of India & ors.***, which reads as follows :-

"19. It is the same sentiment which is expressed in the Calcutta judgment cited by the petitioner. When the Master Circular required a lesser committee of a bank to consider the matter and a further committee comprising more experienced and senior officials of the bank to assess the same thereafter, the Master Circular must be understood to imply that both committees would delve into the matter and the Review Committee would make an independent assessment. At the same time, it must be accepted that when appellate orders are passed affirming the orders under appeal, they may not involve any elaborate discussion or may even adopt the reasons furnished in the impugned order. However, the appellate order must also indicate the independent application of mind of the appellate authority; or else it would not qualify to be the discharge of any adjudicatory function. And, any meaningful reading of the Master Circular makes it obvious that the Review Committee referred to therein is tasked with the duty of adjudicating the matter; at least assessing the veracity of the findings of the Identification Committee.

20. In the present case, the Review Committee may have endorsed the view of the Identification Committee by expending a few lines. But the manner in which the Review Committee approached the matter *appears to be somewhat offensive and in derogation of the responsibility conferred on it by the Master Circular. The short initials of the two officials may as well have been obtained while they were half-way out the door. There is nothing to indicate that any more mind was applied to the matters in issue or the assessment was undertaken with any degree of seriousness.*

21. The perfunctory manner in which the Review Committee purported to consider the matter and deal with the same leaves a lot to be decided and cannot be accepted."

6.1. He also relied upon the judgment reported in ***2024 SCC OnLine Bom 745*** in the case of ***Milind Patel Vs. Union Bank of India & ors.,*** in which the Hon'ble Division Bench of Bombay High Court held as follows :-

"16. The very "imperative" cast in the Master Circular of ensuring a "transparent mechanism" would entail being transparent with a noticee with all relevant facts that would form the basis of a determination of whether there has been a wilful default. The discretion conferred on these commercial banking entities to inflict penal consequences was meant to be kept to the

bare minimum, which only underlines that the exercise of discretion has to be reasonable and not arbitrary. The absence of transparency with the reasons would render the exercise of discretion to be arbitrary. In this light, various petitions have been dealt with by writ courts including the Hon'ble Supreme Court of India and multiple benches of this very High Court, in connection with declaration of borrowers as wilful defaulters. However, for purposes of these proceedings, and in the interest of brevity, we highlight just a few of them.

17. In State Bank of India Vs. Jah Developers Private Limited and Others([2019] 6 SCC 787) ("Jah Developers") the need for the due process in the context of the Master Circular was analysed by the Hon'ble Supreme Court. After noting earlier judgments of the Hon'ble Supreme Court in connection with the Master Circular, the Court went on to declare the following:

"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. 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. Equally, under Section 29-A 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, In Paragraph 24 of the judgement March 04, 2024 Shraddha Talekar, PS This Order is modified/corrected by Speaking to Minutes Order dated

11/03/2024 OS-WP-3671-2023 - March 4, 2024 .docx and given the fact that Para 3 of the Master Circular dated 1- 7-2013 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 Para 3(b) of the Revised Circular dated 1-7-2015, 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 1-7-2013 itself considered such steps to be reasonable, we incorporate all these steps into the Revised Circular dated 1-7-2015"

....

25. A plain reading of Takano would throw light on how the Master Circular must be construed. The Master Circular consciously enables inflicting "penal" consequences, and underlines the " imperative" need to *adhere to a "transparent mechanism". The avoidance of information asymmetry and the means of ensuring transparency as outlined by the Hon'ble Supreme Court in Takano would necessarily mean that principles of natural justice, including the need to provide the underlying material, are inherent and implicit in the process stipulated under the Master Circular. The material and information in question for disclosure to the noticee would be all "relevant" material and not just information that is "relied upon" or "referred to" in the SCN."*

Hence, he prayed to allow the writ petition.

7. The respondents filed counter and the learned counsel appearing for the respondents submitted that the Company has availed credit facility to the tune of Rs.214.01 crores for the purpose of business operations which includes purchase of imported plant and machineries and indigenous machineries worth about 113.70 crores. On the discreet enquiry, it was found that the Company diverted the substantial loan amount for ulterior and other purpose to its allied and group of companies and related parties. Therefore, the Company committed default in repayment and it was declared as non performing asset on

30.04.2013 as per the guidelines issued by the Reserve Bank of India. Hence, the petitioner was issued show cause notice for the reason that a sum of Rs.250.28 crores was due during the review period and sought for explanation for the following acts of omission and commission:-

> *"a. Rs.205.28 crores paid to third parties during the review period and the nature of relationship with third parties at the time of transaction and nature/purpose of payment not clear.*
>
> *b. Rs.17.82 crores were made to the related parties and the nature/ purpose of the payment could not be ascertained.*
>
> *c. The proceeds from IPO was utilized to repay group companies.*
>
> *d. End use utilization of proceeds of term loan not clear.*
>
> *e. Originally the loan proposal was for purchasing imported machinery worth Rs.120 crores and indigenous machinery worth Rs.45 croroes but later, it is submitted by the borrower Company that indigenous machineries were purchased for Rs.80 croroes and imported machineries only at Rs.30 crores."*

7.1. On receipt of the same, the petitioner submitted evasive reply. After giving opportunity of hearing, the wilful defaulter identification committee had passed order on 05.02.2021, thereby declaring the petitioner and corporate guarantor are wilful defaulters as per the guidelines of the Reserve Bank of India. In fact, it was challenged before the Hon'ble Division Bench of this Court and the petitioner was directed to submit representation before the Review Committee. Thereafter, it was rightly confirmed by the Review Committee.

8. Heard the learned counsel appearing on either side and perused the material placed before this Court.

9. The Only ground raised by the petitioner is that Review Committee failed to pass reasoned order. On perusal of the order passed by the first respondent revealed that the representations submitted by the petitioner were put up before the Review Committee and the Review Committee discussed the grounds raised by the petitioner and confirmed that the petitioner had committed wilful default as defined in the circular issued by the Reserve Bank of India. Except this, no other reasons stated

by the first respondent. Therefore, the judgments cited by the learned counsel appearing for the petitioner are squarely applicable to the case on hand.

10. Thus it is clear that the petitioner can represent against the order passed by the wilful defaulter identification committee by way of representation before the Review Committee. The Review Committee must pass reasoned order on such representation which must then be served on the borrower. On this sole ground, the order passed by the first respondent cannot be sustained and it is liable to be quashed. Accordingly the order dated 20.07.2021, passed by the first respondent is hereby quashed. The first respondent is directed to pass reasoned order on the basis of the representation submitted by the petitioner within a period of four weeks from the date of receipt of a copy of this Order.

11. With the above directions, the Writ Petition stands allowed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

03.07.2024

Index : Yes/No

Speaking/Non Speaking order
Neutral Citation : Yes/No

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To

1. Review Committee,
   Indian Overseas Bank,
   Stressed Assets Management Department,
   PB No.3765, 763, Anna Salai,
   Chennai – 600 002,
   Tamil Nadu.

2. Identification Committee,
   Indian Overseas Bank,
   Stressed Assets Management Department,
   PB No.3765, 763, Anna Salai,
   Chennai – 600 002,
   Tamil Nadu.

3. The Manager,
   Indian Overseas Bank,
   Large Corporate Branch,
   R.S.Puram,
   Coimbatore – 641 002.

G.K.ILANTHIRAIYAN. J,

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W.P.No.17614 of 2021 and
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