BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 10.12.2024

CORAM

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

W.P(MD)No.3112 of 2019
and
W.M.P(MD)No.2443 of 2019

1.K.Subburaj
2.N.K.Pothiraaj ... Petitioners

Vs

1.The Zonal Manager,
Indian Bank,
Jenne Plaza, 3rd Floor,
5F, Bharathiar Salai,
Tiruchirappalli – 620 001.

2.The Assistant General Manager,
Indian Bank,
Sree Naga Arcade,
5, Williams Road,
Cantonment,
Tiruchirappalli – 620 001. ... Respondents

PRAYER: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records of the respondents especially the order of the first respondent dated 31.12.2018 in Ref.No.207/Recovery Section/627/2018-19 and quash the same.

For Petitioners : Mr.V.Ramesh
for Mr.M.Jayakumar

For Respondents : Mr.C.Karthik

ORDER

This Writ Petition has been filed by the petitioners challenging the order passed by the first respondent dated 31.12.2018, thereby declaring the petitioners as wilful defaulters.

2.Heard the learned counsel appearing on either side and perused the materials placed before this Court.

3.The first petitioner was the Chairman of M/s.Cethar Limited Company which is registered under the Companies Act. It was engaged in manufacturing of boilers/power plants. While being so, there was a cash inflow crunch which resulted in non-payment of letter of credit obligations to Banks by the company. The default drove the customers to release payments directly to the company's suppliers to make sure that the project execution was maintained. That apart, one of the vendors to the company initiated Corporate Insolvency Resolution Process before the National Company Law Tribunal, Chennai and an interim resolution professional was appointed for the company. Subsequently, a liquidator was appointed to the company. While being so, the petitioners were served with a show cause notice dated 28.03.2017 by the respondents as to why the petitioners should not be declared as 'wilful defaulters'. On receipt of the show cause notice, the petitioners submitted their explanation on 10.04.2017. However, the first respondent, without considering the show-cause notice and without following the guidelines, declared the petitioners as wilful defaulters.

4.The learned counsel appearing for the petitioners would submit that the petitioners were not show caused with all information as stated in the order impugned in this Writ Petition. The show cause notice refers only to an account with the Central Bank of India which was operated and a sum of Rs.75 crores was routed by the petitioners and it is a violation of the Guidelines Clause 2.2.3B of the Reserve Bank of India instead of 2.1.3D which relates to routing of funds through any Bank other than the lender bank or members of consortium without prior permission of the lender banks. Further, the impugned order refers to the order of the Screening committee and the Forensic Audit Report dated 28.03.2017 and the confirmation of the order passed by the Screening Committee by the Review Committee. The petitioner was not served with any Forensic Audit Report. The said audit report states that the petitioners had committed wilful default in terms of Clause 2.1.3B (b) read with 2.2.1B, 2.21C, 2.2.1d and 2.1.3D of the Reserve Bank of India Guidelines dated 01.07.2015. However, the show cause notice did not contain these violations so as to submit a proper explanation by the petitioners. After submitting an explanation, there was no enquiry conducted by the first respondent. The petitioners were served to appear before the Screening Committee. Accordingly, the petitioners appeared before the Screening Committee on 08.05.2018 and gave their statement. On the basis of the report submitted by the Screening Committee, after a period of 7-1/2 months, the first respondent passed the order, that too without conducting any enquiry. The Forensic Audit Report, dated 28.03.2017 was not furnished to the petitioner. Therefore, it is a clear violation of the principles of natural justice. Though the petitioners' company is under liquidation and the petitioners' company is no longer in any business, the stigma against the petitioners is liable to be removed as wilful defaulters.

5.In support of his contention, the learned counsel appearing for the petitioners relied upon the following Judgments:

(i) The State Bank of India Vs. Jah Developers Private Limited and others reported in (2019) 6 SCC 787.

(ii) Senthil Arumugasamy Vs. Deputy General Manager and others reported in AIR 2021 Madras 318.

(iii) M/s.Leo Primecomp Private Limited and others Vs. State Bank of India and another in W.P.No.17983 of 2019, dated 04.08.2021.

6.Per contra, the learned counsel appearing for the respondents would submit that the petitioners were given opportunity of hearing and after receipt of their explanation, the first respondent passed the order thereby declaring that the petitioners are classified as wilful defaulters. Further, the screening committee conducted a meeting on 08.05.2018 and held that the petitioners committed wilful default and fell within the ambit of Clause 2.1.3B (b) read with 2.2.1B, 2.21C, 2.2.1d and 2.1.3D of the Reserve Bank of India Guidelines dated 01.07.2015. The said order was confirmed by the review committee by its meeting dated 11.10.2018. The petitioners were also declared as wilful defaulters by the IDBI Bank. Therefore, they are all time defaulters and as such they were rightly declared as defaulters. Therefore, absolutely there is no infirmity in the order passed by the first respondent and prayed for dismissal of the Writ Petition.

7.The Hon'ble Supreme Court of India in the case of ***State Bank of India Vs. Jah Developers Private Limited and others*** reported in ***(2019) 6 SCC 787*** held that in the case of declaring a wilful defaulter it has to be discovered 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. Further, 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. 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. Therefore, the master circular dated 01.07.2013 issued by the Reserve Bank of India permitted the borrower to make a representation within 15 days of the preliminary decision of the First Committee, after following 3(b) of the revised circular dated 01.07.2015 must give its order to the borrower as soon as it is made. The borrower can then represent against such an order within a period of 15 days to the Review Committee. Such written representation can be a full representation on facts and law. The Review Committee must then pass a reasoned order on such representation which must then be served on the borrower.

8.The Hon'ble Division Bench of this Court in ***Senthil Arumugasamy Vs. Deputy General Manager and others*** reported in ***2021 SCC Online Mad 2899*** held as follows:

> *18. It is fairly submitted on behalf of the petitioner that though the decision impugned here of August 09, 2019 was communicated after the judgment in Jah Developers was delivered on May 08, 2019, it was only the communication which was dated August 09, 2019, since the decision of the Identification Committee was taken late in 2018 and the Review Committee's decision was rendered in March 2019. However, nothing turns on the fact that the decision in this case may have been taken prior to the judgment in Jah Developers or may only have been communicated after such judgment was pronounced. The dictum in Jah Developers has more to do with the seriousness that has to be attached to the decision-*

making process before an individual is declared to be a wilful defaulter than modifying the procedure prospectively. The dictum in Jah Developers has to be seen to imply that the procedure under the Master Circular ought always to have been as indicated in the judgment. The jurisprudence in such regard has been consistent for decades. Just as an appellant has a chance to point out the perceived errors in the order that is impugned and a delinquent in service law has an opportunity to deal with the findings rendered by the inquiry officer if the disciplinary authority, prima facie, agrees, therewith, the findings of an Identification Committee have, per force, to be permitted to be questioned by a person proposed to be declared as a wilful defaulter for the Review Committee to look into the same.

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. '

9.Therefore, the petitioners should be put on notice or communicated with the decision taken by the Identification Committee. After receipt of the said report, the petitioners must be given an opportunity to submit their explanation. On receipt of the same, once again the Review Committee shall have to pass an order to assert the report of the Identification Committee or deny the same by considering the representation submitted by the petitioner.

10.In the case on hand, the petitioner was served with show cause notice on 28.03.2017 so as to why the petitioners should not be declared as wilful defaulters. On receipt of the same, the petitioner submitted a representation on 10.04.2017 to the first respondent. On receipt of the representation, by the communication dated 17.04.2017, the second respondent referred to the Forensic Audit Report and made certain observations which are referred in the Forensic Audit Report and directed the petitioners to submit their reply. Admittedly, the petitioners were not served with the Forensic Audit Report. However, on receipt of the said communication from the second respondent, the petitioners submitted the reply on 02.05.2017. On 30.04.2018, the first respondent issued notice to the petitioner thereby summoning the petitioners to appear before the Screening Committee on 08.05.2018. The petitioners had appeared before the Screening Committee and submitted their written statements. However, the communication from the first respondent dated 30.04.2018 is completely different from the show cause notice dated 28.03.2017. The said communication stated so many violations. However, without conducting any enquiry, the impugned order has been passed by the first respondent that too after 7-1/2 months from the date of issuance of show cause notice.

11.On perusal of the order impugned in this Writ Petition would also reveal that the first respondent failed to discuss anything about the explanation and reply submitted by the petitioners. It is relevant to extract the mechanism for identification of wilful defaulters in the Master Circular issued by the Reserve Bank of India, dated 01.07.2015 hereunder:

> '3. Mechanism for identification of Wilful Defaulters
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> The mechanism referred to in paragraph 2.5 above should generally include the following:
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> (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.'

12.Thus, it is clear that the respondents did not follow the mechanism for identification of wilful defaulters as per the Master Circular issued by the Reserve Bank of India, dated 01.07.2015. Admittedly, neither the decision of the identification committee nor the decision of the review committee was served to the petitioners. The petitioners just were served with show cause notice. The petitioners were also not served with Forensic Audit Report, dated 28.03.2017. The above judgments are squarely applicable to the case on hand and the order impugned by the first respondent dated 31.12.2018 cannot be sustained and the same is liable to be quashed.

13.Accordingly, the impugned order passed by the first respondent dated 31.12.2018 is quashed. The respondents are directed to serve the copy of the Forensic Audit Report, dated 28.03.2017 and the Screening Committee Report, dated 08.05.2018 within a period of two weeks from the date of receipt of a copy of this order. On receipt of the same, the petitioners are at liberty to submit their explanation within a period of two weeks thereafter. On receipt of the same, the respondents are directed to conduct enquiry and after affording an opportunity of hearing to the petitioners and pass orders on merits and in accordance with law, within a period of four weeks thereafter.

14.With the above directions, this Writ Petition is allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

10.12.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
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To

1.The Zonal Manager,
Indian Bank,
Jenne Plaza, 3rd Floor,
5F, Bharathiar Salai,
Tiruchirappalli – 620 001.

2.The Assistant General Manager,
Indian Bank,
Sree Naga Arcade,
5, Williams Road,
Cantonment,
Tiruchirappalli – 620 001.

G.K.ILANTHIRAIYAN, J.

ps

Order made in
W.P(MD)No.3112 of 2019

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