

(2019) 08 DEL CK 0119

In the Delhi High Court

Case No : Civil Writ Petition No. 1157 Of 2019, Civil Miscellaneous No. 5224 Of 2019

AAP Infrastructures Ltd

APPELLANT

Vs

Bank Of Baroda And Anr

RESPONDENT

Date of Decision : 19-08-2019

Acts Referred:

Constitution Of India, 1950 — Article 19(1)(g)
Insolvency And Bankruptcy Code, 2016 — Section 29A

Citation : (2019) 177 DRJ 252

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Sandeep Sethi, Anusuya Salwan, Nikita Salwan, Sudhir Nandrajog, Shatrajit Banerji, Bishwajit Dubey, Abhinav Sharma, Abhilasha Singh

Final Decision : Disposed Off

Judgement

V. Kameswar Rao, J

1. This petition has been filed by the petitioner with the following prayers:-

"In view of the foregoing premise, it is, most respectfully, prayed that the Hon'ble Court may be pleased to:

i) Issue a writ, order or direction in the nature of certiorari to quash the letter bearing reference number CFS: ND 21: 730 dated 14.05.2018 declaring the Petitioner and its Directors as willful defaulter; and

ii) Issue a writ, order or direction in the nature of certiorari to quash the impugned show cause notice No.CFS: ND: 20:1837 dated 23.11.2017 for declaring the petitioner and its directors as willful defaulters; decision dated 20.02.2018 of the Committee of Executives holding that the petitioner has defaulted in meeting its repayment obligations and siphoned off the funds which were not utilized for the designated purpose for which the finance was availed of along with decision of the Review Committee dated 03.05.2018 confirming the

decision dated 20.2.2018 of the Committee of Executives;

iii) issue an appropriate writ order or direction to hold and declare that the impugned Circular bearing reference no. DBR.No.CID.BC.22/20.16.003/2015-16 dated 01.07.2015 issued and promulgated by respondent no.2 is unconstitutional and quash the same;

iv) issue a writ order of direction in the nature of mandamus calling for the records of respondent no.1 relating to Non-Performing Asset of the petitioner;

v) pass such other orders, as the Hon'ble Court may deem fit and proper in the facts and circumstances of the case, in favour of the Petitioner and its Directors and against the Respondents."

2. In substance, the challenge in this writ petition is, to a communication dated May 14, 2018 whereby the petitioner was communicated the decision of the Bank to declare the petitioner a willful defaulter.

3. It is the submission of Mr. Sandeep Sethi, learned Senior Counsel appearing for the petitioner that the petitioner is a Public Limited Company. On November 18, 2002, a Concession Agreement was entered between the Madhya Pradesh Road Development Corporation and the petitioner for reconstruction, strengthening, widening and rehabilitation of Seoni- Balaghat-Rajegaon Section of State Highway 11 and 26 Road in the state of Madhya Pradesh on Built, Operate & Transfer basis. In the year 2008, the project was completed and tolling started through O&M and Tolling contract, MBL. A request was made by the petitioner to the respondent No.1 for term loan of Rs.50 Crores for toll securitization. The respondent no.1 Bank sanctioned term loan of Rs.50 Crores at 12% interest p.a. for repayment of existing term loan of Punjab National Bank and for utilization in projects of promoter / holding company MBL.

4. A show cause notice dated November 23, 2017 was issued to the petitioner wherein it is alleged as under:-

a. Term Loan sanctioned for construction and toll collection on 114 Km state highway no. 11 and 26 on Seoni Balaghat Gondia Road built on BOT basis, awarded by Govt. of Madhya Pradesh under Sole Banking arrangement. As per the terms of the sanction the company has to deal exclusively with us and entire toll collection to be routed with us.

b. The company is not regular in depositing the toll collection. Company is maintaining current account with Corporation Bank, Sarita Vihar, New Delhi without prior approval / consent of the Bank and depositing the toll collection and transferring the funds to M/s MBL Infrastructure Ltd.

Thus the unit has defaulted in meeting its payment / repayment obligations to the lender and has siphoned off the funds so that the funds have not been utilized for specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.

In terms of RBI guidelines and to comply principles of natural justice, if you desire, you may send your submission for consideration by the Committee of Executives, headed by our Executive Director within 15 days from the date of this letter as to why your account and you be not classified by bank as a willful defaulter. The Committee reserve the right to give nor not to give the personal hearing to decide about classifying as wilful Defaulter in case your submission received."

The petitioner was asked to represent against the same within 15 days from the date of the said letter. The petitioner replied to the show cause notice vide its letters dated December 07, 2017 and February 19, 2018.

5. According to Mr. Sethi, the petitioner was in receipt of the communication dated May 14, 2018 where a reference has been made to the decision of the Committee of Executives ('First Committee' in short) dated February 20, 2018 declaring the Company and its Director as willful defaulters, which decision has been confirmed by the Review Committee. It is his submission that the petitioner had neither received the order of the First Committee nor that of the Review Committee. He stated that it was only in the month of December 2018 the petitioner was given both the orders of the First Committee and the Review committee as annexed at pages 95 to 97, 100 and 101 of the paper book. It is his submission that the petitioner did make a representation to the Managing Director of the Company on June 19, 2018 wherein the petitioner has explained its position. According to him, the order of the First Committee has not been given to the petitioner to make a representation to the Review Committee, as mandated by the Supreme Court in the case of State Bank of India vs. Jah Developers Pvt. Ltd. and Ors. AIR 2019 SC 2854. He stated that in the absence of the order being provided to the petitioner, the petitioner was not in the knowledge of the grounds, on which the First Committee has recommended, the petitioner be declared willful defaulter; resulting in the Review Committee without the representation of the petitioner confirming the decision of the First Committee. This, according to him, is in violation of the principles of natural justice, which was required to be followed in terms of the judgment of the Supreme Court, as the consequence of being declared willful defaulter is drastic inasmuch as the name of the petitioner shall be put on the website of the CIBIL and the Banks shall not advance loan to the petitioner and the petitioner cannot even apply to be a resolution applicant.

6. He by drawing my attention to pages 95 to 97, 100 and 101, which are the orders of the First Committee and Review Committee contend that the later Committee which is the Review Committee has verbatim followed the grounds as specified by the First Committee while recommending the name of the petitioner as willful defaulter. This, according to him, is a total non application of mind on the part of the Review Committee as it did not take into consideration the stand of the petitioner in reply to the show cause notice. He has relied upon two judgments of this Court in the case of Mekaster Trading Corporation v. Union of

India and Ors. (2003) 106 DLT 573 and Prakash Atlanta JV & Ors. vs. National Highways Authority of India & Ors. (2010) 169 DLT 664 in support of his submission that an administrative authority is required to give reasons for its decision. In other words, an order of administrative authority without reason is bad in law and against the principles of natural justice.

7. On the other hand, Mr. Sudhir Nandrajog, learned Senior Counsel appearing for the respondent No.1 Bank submitted that the plea of Mr. Sethi that the orders of the First Committee and the Review Committee dated February 20, 2018 and May 03, 2018 have been given to the petitioner only in December, 2018, is incorrect. In this regard, he has pointed out to para 146 of the petition to contend that it is the case of the petitioner that it had appealed to the Managing Director against the order of the Review Committee on June 19, 2018. In other words, had the orders been given in December, 2018, the petitioner could not have filed an appeal to the Managing Director against one of the orders in the month of June, 2018. It is his submission that no prejudice has been caused to the petitioner on the petitioner not being given the copy of the order of the First Committee dated February 20, 2018, wherein two allegations have been made against the petitioner which allegations have been admitted by the petitioner. In this regard, he has drawn my attention to the reply itself in support of his submission. He has also drawn my attention to various paragraphs of the writ petition being paragraphs 34, 35, 38, 41 and 56 to contend that the toll was to be deposited by the petitioner in the account maintained with the respondent Bank, whereas contrary to the concession agreement, Escrow agreement and sanction letters, the petitioner deposited the toll in another account that was maintained with the Corporation Bank and further transferred the same to its holding company MBL, which constitutes willful default on the part of the petitioner on the ground of siphoning of funds.

8. That apart, it is his submission that the Calcutta High Court had dismissed the petition filed by one Mr. Anjani Kumar Lakhotia, the person who was dealing with the respondent Bank, declaring him willful defaulter. Even the appeal before the Division Bench has been dismissed. So, this Court would not take a contra view and hold otherwise. He seeks the dismissal of the writ petition.

9. Mr. Sethi, in his rejoinder arguments, has stated that he has rightly stated that the orders dated February 20, 2018 and May 03, 2018 have been received in the month of December, 2018. The appeal, which has been filed by the petitioner to the Managing Director on June 19, 2018 was pursuant to a communication dated May 14, 2018 received by the petitioner informing the fact that the Company and its Directors have been declared as willful defaulters. He submitted that it is the case of the petitioner, that the order dated February 20, 2018 passed by the First Committee having not been given to the petitioner, the petitioner could not have made an effective representation to the Review Committee for its consideration. Such an order has to be given, denial of the same is contrary to the dicta of the Supreme Court in the case of State Bank of

India vs. Jah Developers Pvt. Ltd. and Ors. (supra). He also contested the submission made by Mr. Nandrajog that the petitioner has admitted the allegations, in its reply to the show cause notice dated November 23, 2017.

10. Having heard the learned counsel for the parties, the only issue, which arises for consideration is whether the order dated February 20, 2018 passed by the First Committee was required to be given to the petitioner to enable it make a representation to the Review Committee for its consideration. The answer in this respect has to be 'YES' as it was rightly stated by Mr. Sandeep Sethi that the petitioner was in receipt of communication dated May 14, 2018 by which the petitioner was conveyed the decision of the First Committee and the Review Committee declaring the petitioner and its Directors, as willful defaulters. The grounds on which the First Committee and the Review Committee have declared the petitioner and others as willful defaulters have never been conveyed to the petitioner nor anything has been placed before me to show otherwise. If that be so, it necessarily follows that the petitioner was denied the right of representation against the order of the First Committee, which is obligatory in terms of the judgment of the Supreme Court in the case of State Bank of India vs. Jah Developers Pvt. Ltd. and Ors. (supra), wherein, in para 21, the Supreme Court has held as under:-

"21. Given the above conspectus of case law, we are of the view that there is no right to be represented by a lawyer in the in-house proceedings contained in paragraph 3 of the Revised Circular dated 01.07.2015, as it is clear that the events of wilful default as mentioned in paragraph 2.1.3 would only relate to the individual facts of each case. 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 29A 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, and given the fact that paragraph 3 of the Master Circular dated 01.07.2013 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 paragraph 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 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 01.07.2013 itself considered such steps to be reasonable, we incorporate all these steps into the Revised Circular dated 01.07.2015. The impugned judgment is, therefore, set aside, and the appeals are allowed in terms of our judgment. We thank the learned Amicus Curiae, Shri Parag Tripathi, for his valuable assistance to this Court."

11. From the aforesaid judgment, it is clear that giving of such an order to enable the petitioner make a representation is part of principles of natural justice as the consequences of declaring a company willful defaulter are drastic.

12. Insofar as the plea of Mr. Nandrajog that the petitioner in his reply to show cause has admitted the allegations made against it is concerned, the same is not appealing. This I say so, for two reasons; firstly which has already been noted by me above that the copy of the order passed by the First Committee dated February 20, 2018 has not been given to the petitioner. Secondly, it is clear that both the Committees have neither considered nor dealt with the stand taken by the petitioner in its reply to the show cause notice. The said Committees or at least the Review Committee was required to refer to the reply and dealt with the same while rejecting the reply of the petitioner to the show cause notice. This would have been in compliance of principles of natural justice as reasons would indicate, application of mind, that too what were the relevant considerations for the authorities to reject the reply of the petitioner to the show cause notice.

13. Mr. Sandeep Sethi had rightly relied upon the two judgments in the cases of Mekaster Trading Corporation v. Union of India and Ors. (supra) and Prakash Atlanta JV & Ors. vs. National Highways Authority of India & Ors. (supra). In the case of Mekaster Trading Corporation v. Union of India and Ors. (supra), the Supreme Court has in paras 29 and 30 held as under:-

"29. Passing the order in such a slip shod manner which has the serious effect of blacklisting the petitioner for a long period of 5 years is certainly not act of good administration.

30. It is abundantly clear that the aforesaid summation cannot be called as "reasons" in support of the order. It can, at best, be termed as conclusion. Apart from this conclusion there is nothing in the order to indicate any supportive reason. Thus, there is no indication in the order as to what are the elements which persuaded the competent authority to reject the contentions of the

petitioner. The requirement that the reasons must meet the substance of the principle argument that the competent authority was required to consider is clearly lacking. No link between the material on which conclusions are based and the actual conclusion drawn is based, is found. If that has remained at the back of the mind of the authority passing the order, and has not surfaced on the records of the case, the ingredients of a reasoned order are not met. Reading of such an order would naturally not satisfy the aggrieved party's desire to know as to why decision was reached and what was the justification in rejecting his point of view. It would harbour the feeling that the authority proceeded with the matter with closed mind, whatever is stated in the show cause notice is final and giving of opportunity to show cause was empty formality as the defense was rejected summarily by labelling the same as 'not convincing'. It has to be emphasised that reasons for a decision are distinct from the conclusions recorded in the order. Apart from repeating that the petitioner had not fulfilled its contractual obligation as Indian Agent which was stated in the show cause notice (may be in detail), what was required was to at least indicate in a concise manner as to why the defense of the petitioner was unconvincing."

14. Similarly, in the case of Prakash Atlanta JV & Ors. vs. National Highways Authority of India & Ors. (supra), the Supreme Court has in paras 33 and 34 held as under:-

"33. At best the above statements can be termed as conclusions and not reasons. As pointed out by this Court in Mekaster Trading Corp., the above order does not indicate that "the decision maker successfully came to grips with the main contention advanced by the parties". It also fails to disclose "how the mind is applied to the subject matter; whether done relevantly or rationally". There are no reasons to indicate the application of mind and the mental process leading to the conclusion. Further as pointed out by the Division Bench of this Court in Indian Oil Corporation v. SPS Engineering Ltd. (supra) (DLT, p.425), "reasons must be contained in the order under challenge, and mere existence of reasons in the show cause notice, or any material referred to in the show cause notice, is not sufficient....the authority concerned must, at least in brief, deal in the impugned order with the explanation given in the reply, and give its reasons for holding that the explanation is not satisfactory.

34. In the considered view of this Court, the impugned order does not satisfy the requirement of the principles of natural justice i.e. of furnishing reasons for the conclusions. Considering that the impugned order read with the WP (Civil) No. 7443/2009 page 22 of 26 circular dated 24th February 2009 has adverse civil consequences for the Petitioner, it simply cannot be sustained in law. The damage, that has already been done in terms of the Petitioner not being awarded works by other organizations and even by the NHAI itself in not allowing it to bid, cannot possibly be reversed. However, on this aspect this court does not wish to dwell, as it is best left to be determined in appropriate proceedings in the civil court, if instituted, by the petitioners."

15. In so far as plea of Mr. Nandrajog, that, the petitioner has not denied, the allegations against it even in this petition is concerned, the same is not appealing for the reason, it is for the authority and not the court, to consider and conclude about the reply filed and its effect thereof. The authority having not applied its mind on the reply, as is clear from the order of the review committee, the action of the respondents is unsustainable.

16. In so far as, the plea of Mr. Nandrajog that the Calcutta High Court having rejected the writ petition filed by the Anjani Kumar Lakhota which order has been upheld by the Division Bench, this court would not take different view is concerned, the same is not appealing inasmuch as the Calcutta High Court did not consider the Judgment of the Supreme Court in SBI v. Jah Developers (supra). In fact, the Judgments of the Calcutta High Court were rendered before the Supreme Court had rendered its Judgment in Jah Developers (supra). In any case the issue in the case in hand is covered by the Judgment of the Supreme Court in Jah (Supra).

17. In view of the above, the present petition succeeds. The impugned order dated May 03, 2018 passed by the Review Committee and communication dated May 14, 2018 are set aside. The petitioner shall give response to the order dated February 20, 2018 passed by the First Committee within 15 days from today, which shall be considered by the Review Committee to pass appropriate orders.

18. The writ petition is disposed of.

CM No. 5224/2019 (for interim relief)

Dismissed as infructuous.