
(2022) 04 BOM CK 0051
In the Bombay High Court
Case No : ?Writ Petition No. 3490 Of 2019

Manish

APPELLANT

Vs

General Manager And Others

RESPONDENT

Date of Decision : 13-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 19(1)(g), 226

Citation : (2022) 04 BOM CK 0051

Hon'ble Judges : A. S. Chandurkar, J;M.S. Jawalkar, J

Bench : Division Bench

Advocate : Atul Pande, U.N.Fuladi, S.N.Fuladi

Judgement

A.S.Chandurkar, J

1. Rule. Rule made returnable forthwith and heard the learned counsel for the parties.

2] The petitioner in this writ petition filed under Article 226 of the Constitution of India has challenged the action of the respondents of declaring him a wilful defaulter by publication of his name vide public notice dated 29.06.2019. The petitioner seeks a declaration that the said action is in violation of guidelines prescribed by Reserve Bank of India on 01.07.2015.

3] It is the case of the petitioner as pleaded in the writ petition that in 1995, M/s. Munis Forge Ltd was incorporated under the provisions of the Companies Act, 1956 in which the petitioner was one of the Directors. The said Company obtained financial assistance from the Central Bank of India (for short, the Bank). The petitioner furnished his personal guarantee for repayment of the credit facility as availed. It is the further case of the petitioner that he resigned as a Director of Company on 14.09.1998 and this fact was informed to the Bank. The Bank found that the Company had failed to maintain its account regularly and hence it declared the Company as a Non Performing Asset (NPA). Recovery proceedings were filed against the Company and its directors before the Debts

Recovery Tribunal. Though the Tribunal allowed the original application preferred by the Bank on 19.08.2005, the recovery of the entire amount due has not yet been made. The petitioner submits that he had submitted a proposal for discharging his personal liability but the Bank had not accepted such request. On 29.06.2019 a public notice was published in the 'Times of India' Nagpur edition stating therein that the Company was a wilful defaulter alongwith its directors and guarantors. The name of the petitioner was mentioned as director as well as guarantor. The date of NPA was shown to be 31.03.1998. It is this public notice that has been challenged in this writ petition.

4] Shri Atul Pande, learned counsel for the petitioner submitted that the petitioner had been declared as a wilful defaulter without granting him any opportunity of hearing. This action was without any prior notice and was thus in breach of principles of natural justice. He submitted that the procedure of declaring a borrower as a wilful defaulter was governed by various circulars issued by the Reserve Bank of India and by relying upon the Master Circular dated 01.07.2015, it was submitted that the procedure prescribed therein was not followed by the Bank. In absence of complying with the principles of natural justice, a declaration of the petitioner to be a wilful defaulter was bad in law. In support of the aforesaid submissions the learned counsel placed reliance on the decision in *Erusian Equipment and Chemicals Ltd. vs. State of West Bengal and anr.* AIR 1975 SC 266, *State Bank of India vs. M/s. Jah Developers Pvt. Ltd. and ors.* AIR 2019 SC 2854, *Daffodills Pharmaceuticals Ltd. and anr. vs. State of U.P. and anr.* 2019 SCC Online SC 1607, Writ Petition (Lodg.) No.345 of 2011 (*Finolex Industries Ltd. and anr. vs. Reserve Bank of India and ors.*) with connected Writ Petition decided on 23/24th August, 2011 at the Principal Seat, Writ Petition No.2739/2017 (*Prafulla Shridhar Vaidya vs. The Chief Manager, Bank of Baroda and ors.*) decided on 13.06.2019, Writ Petition (L) No.1630 of 2019 (*Kailash Shahra Vs. IDI Bank Ltd.*) decided on 16.10.2019 at the Principal Seat and Writ Petition No.1958 of 2020 (*Shri Gunwant Deopare and anr. vs. The Branch Manager, Bank of Maharashtra and ors.*) decided on 24.08.2021. Referring to various affidavits filed by on behalf of the Bank it was submitted that different and contradictory stands had been taken therein. There was no material on record to indicate that the Bank had followed any procedure before declaring the petitioner to be a wilful defaulter. It was thus submitted that the impugned publication of public notice dated 29.06.2019 was liable to be set aside.

5] Shri S. N. Fuladi, learned counsel for the respondent supported the publication of the aforesaid public notice. It was submitted that the petitioner was aware that he was a wilful defaulter which was clear from his communication dated 01.08.2014. In that communication issued to the Bank the petitioner had submitted a proposal for one time settlement and had requested for removal of his name from the list of wilful defaulters. This indicated that even prior to publication of the public notice dated 29.06.2019 the petitioner was aware that he had been held to be a wilful defaulter. The adjudication before the Debts Recovery Tribunal in Original Application No.415/2001 had not been challenged

by the petitioner alongwith other borrowers. A recovery certificate pursuant to such adjudication dated 19.06.2005 had been issued. It was thus submitted that the petitioner had been declared a wilful defaulter after due notice and hence the publication of the public notice dated 29.06.2019 was justified. Reference was made to various affidavits filed on behalf of the Bank to support its action. The learned counsel relied upon the decision in Kotak Mahindra Bank Limited vs. Hindustan National Glass & Industries Ltd. And others (2013) 7 SCC 369 and submitted that the petitioner was not entitled to any relief whatsoever.

6] At the outset, it would be necessary to refer to the pleadings in the writ petition and the various affidavits filed by the Bank.

According to the petitioner the action of declaring him a wilful defaulter was without any prior notice and was in contravention of the guidelines under Master Circular dated 01.07.2015. In the written submissions filed by the Bank dated 27.07.2020 it has been stated in paragraph 9 as under:

"9. The main contention in the present petition by the petitioner that, while declaring the wilful defaulter by the respondent Bank as per RBI Circular dated 01.07.2014 No Show Cause Notice has been issued. It is respectfully submitted that the respondent-Bank issued show cause notice to the petitioner on his address. It is submitted that there is no substance in the said contention and allegations by the petitioner against the respondent Bank. It is respectfully submitted that the respondent-Bank has taken all precautions for complied the master circular of the Reserve Bank of India in respect of declaring the wilful defaulter to the petitioner. The allegations in this behalf are totally denied. It is submitted that as per the master circular dated 01.07.2014 the committee has been established headed by an Executive Director or equivalent and two other Senior Officer of the rank of General Manager/DGM of the Bank and after considering the case before them, issued show cause notice to the petitioner alongwith the reasons of wilful defaulter and called their submission. The petitioner failed to make the representation of the said show cause notice and thereafter the respondent Bank also issued notice for hearing and opportunity given to the petitioner, borrower, guarantors of personal hearing and the committee after considering the said scenario declared the petitioner as wilful defaulter." (emphasis supplied)

Thereafter the Bank filed additional written submissions dated 13.10.2020. In paragraph 6 it has been stated as under :

"6..... Looking to the said Circular dated 20.02.1999 as mentioned in Para supra and subsequent letter dated 22.12.2001 and lastly dated 30.05.2002 the petitioner and their company M/s. Munis Forge Ltd. has been declared wilful defaulter in the quarter of 2002. At that time quarter wise NPA accounts declared as wilful defaulter by the respondent Bank as per the instructions and guidelines of the respondent Bank, the said Company M/s. Munis Forge Ltd. has been declared wilful defaulter in March 2002. The letter dated 22.12.2001 and

30.05.2002 and gist of R.B.I. Scheme of defaulters' list is annexed herewith as Annexure R-3, R-4 and R-5. In this background, it is pertaining to note that the petitioner Company and its Directors were declared wilful defaulters in March 2002 and till 2003, the guidelines did not exist for giving personal hearing to wilful defaulter. Thus, old grievance of the petitioner is based on misinformation and without any ground, the Bank has been dragged into fictitious litigation. It is further submitted that this the case where the Bank is struggling to recover their dues from the year 2002 and still not able to recover since last two decades and the parties are enjoying litigation to litigation. In these facts and circumstances and as per the letter from the respondent Bank time to time there is no question arises to issue the show cause notices to the petitioner or his company M/s. Munis Forge Ltd." (emphasis supplied)

The Bank has relied upon the communication dated 20.02.1999 which relates to the scheme for collection and dissemination of information on cases of wilful defaulter which was to come in force from 01.04.1999.

The communication dated 22.12.2001 and 30.05.2002 in that regard are also referred to.

7] On 27.10.2021 this Court observed that even if it was assumed that in 1998 when the petitioner was declared to be a wilful defaulter no procedures were prescribed by the Reserve Bank of India, the principles of natural justice required the Bank to give an opportunity of hearing to the petitioner before declaring him to a wilful defaulter. In paragraph 5 of the order dated 27.10.2021 it was directed as under:

"5. All said and done, we would like to give one more opportunity to the bank to establish it's claim that the action taken against the petitioner was absolutely in good faith, by following the principles of natural justice and procedure which may have been in force at the time when the impugned declaration was made. For this purpose, some documents would have to be filed on record by the bank and it will also have to be explained as to why after a long period of 21 years from the declaration of the petitioner as a wilful defaulter, a public notice, for the first time, was issued and the action, if any, taken against the concerned erring officers of the bank in the matter. We also direct that the copy of the order identifying the petitioner as a wilful defaulter passed on 31 st March, 1998 or any other date be filed on record."(emphasis supplied)

Pursuant to the aforesaid order, additional reply has been filed by the Bank dated 28.12.2021. In paragraph 3 it has been stated as under:

"3. It is further submitted that the said company wherein petitioner is director i.e. Munis Forge was identified and declared as wilful defaulter on 31.12.2004. The said communication is annexed hereto as Annexure No.B. In this backdrop it is crystal clear that Loan Account of Munis Forge Ltd. is classified N.P.A. on 31.03.1998 and Munis Forge Ltd. is identified and declared wilful defaulter on 31.12.2004. Further more the publication of wilful defaulter in Times

of India on 29.09.2019 is outcome of the communication dated 22.05.2019 by respondent bank.....".(emphasis supplied)

It was asserted that the petitioner was not declared as wilful defaulter under Master Circular dated 01.07.2015. It was reiterated that the Company - Munis Forge Limited was identified as wilful defaulter on 31.12.2004.

8] Thereafter on 09.02.2022 the following order was passed:

"Pursuant to the order dated 27.10.2021 the respondent no.1 has filed an additional affidavit. In paragraph 3 thereof it has been stated that the loan account of M/s. Munis Forge Limited was classified as NPA on 31.03.1998 and that the said Company was identified and declared as wilful defaulter on 31.12.2004. It is further stated that the publication of list of defaulters in the newspaper on 28.06.2019 is the outcome of the communication dated 22.05.2019 issued by the respondents-Bank.

The learned counsel for the petitioner has in-vited attention to the document at page no.126 of the record of writ petition dated 30.05.2002 in the matter of taking action against wilful defaulters. Clause 7 thereof relates to penal measures to be taken and reference is made for the need on the part of the Bank to have transparent mechanism for the entire process so that penal proceedings are not misused and the scope of such discretionary power is kept at the minimum. Similarly, at page 131 of the record is a gist of Reserve Bank of India Schemes of defaulter lists. At serial no.3 the mechanism of redressal of grievances of wilful defaulters has been provided.

Since the respondent no.1 has now stated that the Company in question was declared as wil-ful defaulter on 31.12.2004, it would be necessary to examine whether the procedure as contemplated by the communication dated 30.05.2002 and sub-sequent gist of Reserve Bank of India Schemes of defaulter lists has been followed.

On behalf of the respondent no.1 reference is being made to the stand taken that since the ac-count was declared as NPA in the year 1998 at that point of time there was no definite procedure that was required to be followed and in paragraph 6 of the additional written submissions filed by the Bank it is stated that the mechanism of grievances of wilful defaulters has come into picture as per Circular dated 29.07.2003-page 116 of the record.

In view of aforesaid, the respondents are granted three weeks time to file an additional affi-davit indicating the aforesaid position.

Stand over three weeks." (emphasis supplied)

Pursuant to the order dated 09.02.2022 the Bank filed an additional reply through its Chief Manager dated 05.03.2022. In paragraph 4 it has been stated as under :

"4. In the present matter the Petitioner and their Company M/s. Munis

Forge Ltd. has been declared wilful defaulter on 31.12.2004. At that time quarter-wise N.P.A. Account were to be declared as wilful defaulter by the respondent Bank as per instructions and guidelines of the Reserve Bank of India to the respondent Bank. Accordingly, the guidelines did not exist to issue the show cause notice and also for giving the personal hearing to the wilful defaulter, nor it has been mentioned in the said guidelines in form of gist of RBI schemes of defaulter lists." (emphasis supplied.)

9] It is seen from the aforesaid pleadings that initially it was the case of the Bank that after granting due opportunity to the petitioner in terms of Master Circular dated 01.07.2015, the petitioner was declared as a wilful defaulter. Subsequently the stand taken is that since the account of the Company was quite old and all necessary papers could not be traced the information given earlier was incorrect. It was stated that the Company was declared as wilful defaulter in March 2002. This stand was again changed by filing subsequent affidavit and contending that the Company was classified as NPA on 31.03.1998 and it alongwith its directors were declared as wilful defaulters on 31.12.2004. By taking a stand that the guidelines prevailing then did not require issuance of show cause notice or personal hearing to a wilful defaulter, it is stated that no such notice or hearing was afforded to the petitioner.

10] According to the Bank as per its additional reply dated 05.03.2022 the Company was classified as NPA on 31.03.1998 and its Directors were declared as wilful defaulters on 31.03.2004. It would in this context be necessary to consider the Circulars prevailing at that point of time to examine whether such declaration was in accordance with those Circulars.

Initially there is a reference to the document dated 20.02.1999 which pertains to collection and dissemination of information on cases of wilful default. The said communication has been addressed to all Scheduled Commercial Banks and it has been stated that identification of wilful defaulters should be made keeping in view the track record of borrowers and should not be decided on the basis of isolated transactions/incidences. Default to be categorised as wilful must be intentional, deliberate and calculated. It requires the Banks and Financial Institutions to form a committee for identifying the cases of wilful default. Thereafter there is a reference to another communication dated 22.12.2001 in which it has been stated that the Banks and Financial Institutions should keep in mind the instructions issued earlier regarding exercise of due caution while dealing with defaulting companies and their directors. On 30.05.2002 after considering the recommendations of the Working Group on Wilful Defaulters (WGWD) the manner in which penal action against wilful defaulters was to be taken was laid down. As per Clause 7 of that process it was stated as under:

"It would be imperative on the part of the banks and FIs to put in place a transparent mechanism for the entire process so that the penal provisions are not misused and the scope of such discretionary powers is kept to the barest minimum. It should also be ensured that a solitary or isolated instance is not

made the basis for imposing the penal action.”

Thereafter the gist of Reserve Bank of India Schemes of defaulter list has been referred to and as per Clause 3 thereof it was observed that Banks and Financial Institutions did not have any mechanism for redressal of grievance in respect of borrowers classified as wilful defaulters. By Circular dated 29.07.2003 they were advised to form a committee of higher functionaries for classification of an account as wilful defaulter and also a committee headed by Chairman and Managing Director for giving hearing to borrowers to represent that they have been wrongly classified as wilful defaulters. It was stated that as advised by Circular dated 17.06.2004 the concerned borrower should be suitably advised about the proposal to classify him a wilful defaulter alongwith the reasons therefor. It was stated that a wilful defaulter should be given reasonable time (about 15 days) for making representation against such classification, if he so desires. The Reserve Bank of India then authorised the Credit Information Bureau (India) Limited (CIBIL) to publish list of defaulters of Rs.One Crore and above as well as wilful defaulters of Rs.Twenty Five lakhs and above as on 31.03.2003 and onwards. Lastly, the Bank has referred to a communication dated 23.07.2004 issued by the Reserve Bank of India to all Scheduled Commercial Banks and Financial Institutions that it should be ensured that penal provisions were used effectively after careful consideration and due caution. The Banks/Financial Institutions were advised to put in place transparent mechanism for initiating criminal proceedings based on the facts of each case.

11] From the aforesaid it becomes clear that from 20.02.1999 to 23.07.2004 various guidelines were issued by the Reserve Bank of India in the matter of identifying wilful defaulters and expressing caution by putting in place a transparent mechanism to ensure that the discretionary powers of declaring a borrower as wilful defaulter was kept at barest minimum. This would mean that before making such declaration a notice to the borrower who is proposed to be declared as a wilful defaulter has been contemplated. This would provide an opportunity to the borrower who is proposed to be held as wilful defaulter to put-forth his say in the matter. In M/s. Jah Developers Private Ltd.(supra) it has been held by the Honourable Supreme Court that whether default is intentional, deliberate and calculated is 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. Though these observations have been made in the context of the revised Circular dated 01.07.2015, the aspect of default to be categorised as wilful must be intentional, deliberate and calculated has also been stated in the initial communication dated 20.02.1999 that has been relied upon by the Bank. In that communication itself it has been stated that wilful default would cover deliberate non-payment of dues despite adequate cash flow and good networth. Thus, whether default on the part of the borrower is wilful or not can only be gathered after he is granted an opportunity to meet the stand of the lender that his default has been intentional, deliberate and calculated. The exercise of due caution while doing so has been reiterated in the communication dated 22.12.2001. Even

under Circular dated 30.05.2002 it has been stated that banks should ensure that a solitary or isolated instance is not made the basis for imposing penal action. Gist of Reserve Bank of India Scheme of defaulters list notices that Banks and Financial Institutions did not have a mechanism for redressal of grievances in respect of borrowers classified as wilful defaulters. They were thus advised to form a Committee of higher functionaries so as to give a hearing to the borrowers to represent that they have been wrongly classified as wilful defaulters. Further, it was expected that the concerned borrower would be suitably advised about the proposal to classify him as wilful defaulter alongwith the reasons therefor and by giving reasonable time of about fifteen days for making a representation thereagainst. All these communications and the Circulars referred to above are prior to 31.12.2004 when according to the Bank, the Company as well as the petitioner were declared as wilful defaulters. It thus goes without saying that before classifying the petitioner as wilful defaulter, it was expected that the Bank would put the petitioner on notice of the proposal to classify him as a wilful defaulter.

12] It is seen that by two orders dated 27.10.2021 and 09.02.2022, this Court had directed the Bank to place on record a copy of the order identifying the petitioner as a wilful defaulter either on 31.03.1998 or any other date according to the Bank. After the Bank came up with the stand that the petitioner was declared as a wilful defaulter on 31.12.2004 an opportunity was again granted to the Bank to indicate the compliance made by it with the procedure as contemplated by the communication dated 30.05.2002 as well as the gist of the Reserve Bank of India guidelines in that regard. The Bank however has taken a stand that at that point of time the guidelines did not exist to issue any show cause notice or to grant personal hearing to a borrower who is proposed to be classified as wilful defaulter. The Bank has gone to the extent of stating that this has also been mentioned in the said guidelines or in the gist of the Reserve Bank of India Scheme of defaulter list. The aforesaid stand taken by the Bank cannot be countenanced in the light of clear wordings of the communications referred to hereinabove including the Circular dated 30.05.2002 and the gist of the Reserve Bank of India Schemes of defaulters list. It thus becomes clear that the petitioner was declared as a wilful defaulter without complying with the prevailing Circulars as on 31.12.2004. Despite grant of sufficient opportunity to the Bank, it has failed to place on record any document to indicate compliance with the aforesaid communications and the Circulars. On the contrary, it has taken a stand that there was no such requirement of issuance of show cause notice and granting an opportunity of hearing.

13] Reliance placed by the learned counsel for the Bank on the decision in Kotak Mahindra Bank Ltd. (supra) does not come to its aid. In that decision the only question that the Honourable Supreme Court considered was whether a wilful default in meeting payment of obligations to a Bank under derivative transactions would be covered under the Master Circulars dated 01.07.2008 and 01.07.2009. While doing so, it clearly observed in paragraph 62 that it was not called upon to

decide whether the Master Circular violated the right of a person under Article 19 (1) (g) of the Constitution of India. It was held that the said Master Circular covered wilful defaults of dues by a client of the bank under other banking transactions also such as bank guarantees and derivative transactions. We may note that in its subsequent decision in M/s. Jah Developers Private Ltd. (supra) it was held that the provisions of Article 19 (1) (g) of the Constitution of India were attracted to the facts of that case. The other decisions relied upon by the learned counsel for the petitioner are based on Master Circular dated 01.07.2015 but since the Bank has taken a stand that the petitioner was declared as a wilful defaulter on 31.12.2004, these decisions are distinguishable on that count.

14] In the light of aforesaid discussion, we are satisfied that the Bank has failed to bring on record any compliance on its part of giving an opportunity of explanation to the petitioner before classifying him as a wilful defaulter on 31.12.2004. Despite the caution sounded by various communications and the Circular dated 30.05.2002 alongwith the gist of the Reserve Bank of India guidelines/Scheme on defaulters list relied upon by the Bank itself, no notice was issued to the petitioner nor was it put to him that he had an opportunity to make a representation against the proposed declaration of he being a wilful defaulter. On the contrary, the Bank has taken diverse stands in its affidavits filed from time to time. The stand finally taken is also found to be unacceptable in law. It is thus held that the petitioner has been declared as wilful defaulter on 31.12.2004 in violation of the prevailing guidelines at that time and in breach of principles of natural justice. The publication dated 29.06.2019 is thus found to be without any foundation.

Accordingly, declaration of the petitioner being a wilful defaulter by having his name published on 29.06.2019 is set aside. The action as taken by the Bank in that regard is set aside. The Bank is at liberty to take necessary steps if it intends to classify the petitioner as wilful defaulter by following the procedure prescribed in that regard.

Rule is made absolute in aforesaid terms with costs.