

(2021) 12 DEL CK 0125

In the Delhi High Court

Case No : Civil Writ Petition No. 4053 Of 2020, Civil Miscellaneous Application
No. 14518 Of 2020

Sanjay Dhingra

APPELLANT

Vs

Dhanlaxmi Bank Limited & Anr

RESPONDENT

Date of Decision : 16-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 19(1)(g)
Insolvency And Bankruptcy Code, 2016 — Section 29A, 95, 96

Citation : (2021) 12 DEL CK 0125

Hon'ble Judges : Prateek Jalan, J

Bench : Single Bench

Advocate : Karan Batura, Karan Singh, Mahipal Singh, Gaurav Gupta

Final Decision : Disposed Of

Judgement

Prateek Jalan, J

The proceedings in the matter have been conducted through hybrid mode [physical and virtual hearing].

1. The present writ petition is directed against communications dated 22.01.2020 and 12.05.2020 issued by the respondent no.1-Dhanlaxmi Bank Limited ["the Bank"] by which the petitioner has been declared as a Wilful Defaulter under the Master Circular on Wilful Defaulters ["the Master Circular"] dated 01.07.2015, issued by the Reserve Bank of India ["RBI"].

2. The petitioner was a director of a company by the name of M/s Kwalitiy Ltd. which is presently undergoing liquidation before the National Company Law Tribunal ["NCLT"]. His principal grievance is that he was not issued any show cause notice prior to the communication dated 22.01.2020, by which he has been declared a Wilful Defaulter by the Identification Committee of the Bank.

3. The procedure for declaration of Wilful Defaulters is laid down in Clause 3 of the Master Circular, the relevant provisions whereof read as follows:-

"3. Mechanism for identification of Wilful Defaulters

The mechanism referred to in paragraph 2.5 above should generally include the following:

(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.

(c) The Order of the Committee should be reviewed by another Committee headed by the Chairman / Chairman & Managing Director or the Managing Director & Chief Executive Officer / CEOs and consisting, in addition, to two independent directors / non-executive directors of the bank and the Order shall become final only after it is confirmed by the said Review Committee. However, if the Identification Committee does not pass an Order declaring a borrower as a wilful defaulter, then the Review Committee need not be set up to review such decisions."

(Emphasis supplied.)

4. This procedure has also been explained in a judgment of the Supreme Court in *State Bank of India vs. M/s Jah Developers Limited and Ors.*, (2019) 6 SCC 787. Paragraph 24 of the said judgment reads as follows:-

"24. 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 Para 3 of the Revised Circular dated 1-7-2015, as it is clear that the events of wilful default as mentioned in Para 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 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, 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. The impugned judgment [SBI v. Jah Developers (P) Ltd., LPA No. 113 of 2015 sub nom Punjab National Bank v. Kingfisher Airlines Ltd., 2015 SCC OnLine Del 14128 : (2016) 154 DRJ 164] , [Kingfisher Airlines Ltd. v. Union of India, 2015 SCC OnLineBom 6075 : (2016) 2 Mah LJ 838] 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."

(Emphasis supplied.)

5. Mr. Karan Batura, learned counsel for the petitioner, draws my attention to the impugned communication dated 22.01.2020, wherein the Bank refers to a Forensic Audit Report conducted by one M/s GSA & Associates. After recording the conclusions of the Forensic Audit, the communication states as follows:-

"The detailed forensic audit report clearly explains the "diversion of fund" by you which qualifies yourself and your company as "wilful defaulter" in terms of the extant guidelines of Reserve Bank of India.

In view of the above, the Bank has decided to classify you and the promoters as "Wilful defaulter" in terms of extant provisions of Reserve Bank of India. If you are having any grievance over the above decision of the Bank, you are advised to represent the matter in person, before the Grievance Redressal committee of the Bank headed by its Managing Director & CEO on or before 06.02.2020.

If there is no acceptable representation from you, the Bank will construe that you are not having any grievance over the Bank's decision in classifying you and your Promoters as wilful defaulter and the classification will be reported to RBI/CIBIL

as per extant instructions and also will be shared among other financial institutions/Banks as directed by RBL. Bank also reserves its right to publish in Newspaper about wilful default details with photographs of your promoters."

(Emphasis supplied.)

6. The petitioner filed a detailed reply to the communication dated 22.01.2021 on 04.02.2020, which runs into almost 30 typed pages. The matter was thereafter considered by the Committee described as the "Grievance Redressal Committee" and a further communication dated 12.05.2020 was issued, confirming the classification of the petitioner and the company as Wilful Defaulters.

7. The order dated 12.05.2020 is unclear as to the constitution of the Committee which passed the order. However, in the counter affidavit, the Bank has stated that the representation of the petitioner pursuant to the communication dated 22.01.2020 was to be considered by the Grievance Redressal Committee headed by the Managing Director and Chief Executive Officer ["CEO"] of the Bank.

8. It is clear from Clause 3 of the Master Circular and the judgment in M/s Jah Developers (supra) that the declaration of a borrower as a Wilful Defaulter requires compliance with three stages:-

a. After the Identification Committee [headed by the Executive Director] comes to a conclusion that an event of wilful default has occurred, a show cause notice is issued to the borrower.

b. The borrower is given an opportunity for personal hearing if the Committee feels such an opportunity is necessary. The Identification Committee thereafter passes a reasoned order.

c. The borrower is entitled to make a representation against the order of the Identification Committee, which is reviewed by another Committee headed by the Chairman/Managing Director and CEO of the Bank.

9. The aforesaid procedure has been elaborately discussed in M/s Jah Developers (supra), wherein it has been held that the order of the Identification Committee [i.e. the Committee headed by the Executive Director] must be a reasoned order, and should be served upon the borrower. The borrower has a right to make full representation on facts and law before the second Committee [the Review Committee headed by Managing Director/CEO], and the reasoned order of the Review Committee must also be served upon the borrower.

10. Applying these requirements to the facts of this case, it appears that there has been a lacuna in the procedure adopted by the Bank. The original communication dated 22.01.2020, recorded a decision to classify the petitioner as a Wilful Defaulter, and also contemplated a representation to be decided by the Committee headed by the Managing Director and the CEO of the Bank. As such, it appears to be a decision of the Identification Committee. However, the

decision was not preceded by a show cause notice in terms of Clause 3(b) of the Master Circular and no personal hearing was given to the petitioner. In these circumstances, the said communication cannot be sustained as a decision of the Identification Committee, and consequently the order of the Review Committee is also liable to be set aside.

11. However, it appears from the petitioner's communication dated 04.02.2020 that he in fact treated the communication as a show cause notice and submitted a detailed reply thereto. In these circumstances, instead of issuance of a fresh show cause notice, it is appropriate to treat the communication dated 22.01.2020 as a show cause notice and direct the Bank to take appropriate steps thereafter in accordance with Master Circular and Jah Developer (supra).

12. Mr. Batura submits that several subsequent developments have occurred which are required to be placed before the Bank in connection with proceedings under the Master Circular. He submits that proceedings have commenced against the petitioner under Section 95 of the Insolvency and Bankruptcy Code, 2016, and the NCLT has passed order under Section 96 thereof, imposing a moratorium on actions against the petitioner. He also submits that Forensic Audit Report of M/s GSA & Associates is under challenge before this Court in CRL.M.C. 1038/2021 to which the Bank is also a party. A Co-ordinate Bench of this Court, by an order dated 02.06.2021, directed a fresh Forensic Audit to be conducted, and restrained further coercive steps against the petitioner.

13. Having regard to the aforesaid factors, the writ petition is disposed of with the following directions:-

i. The communication dated 22.01.2020 issued by the Bank is treated as show cause notice under Clause 3(b) of the Master Circular.

ii. If the petitioner wishes to file any further representation against the show cause notice, he may do so within 15 days from today alongwith all supporting materials. The representation will be in addition to the reply submitted by him on 04.02.2020.

iii. The matter will be reconsidered by the Identification Committee of the Bank, after affording the petitioner a personal hearing.

iv. The Identification Committee will pass a reasoned order, which will be communicated to the petitioner.

v. The petitioner will be given an opportunity of fifteen days to make a representation against the order of the Identification Committee, if it is adverse to the petitioner.

vi. The representation will be considered by the Review Committee headed by the Managing Director/CEO under Clause 3(c) of the Master Circular.

vii. A reasoned order will be passed by the Review Committee, which will also be served upon the petitioner.

14. It is made clear that this Court has not adjudicated upon the merits of the contentions raised by the petitioner which are to be considered by the Bank at the first instance.

15. The writ petition, alongwith pending application, stands disposed of with these directions.