In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 204 of 2024

Atibir Industries Company Limited & Ors.
Vs.
Indian Bank

For the petitioners	:	Mr.Ranjan Bachawat, Sr. Adv., Mr.Suman Kumar Dutt, Adv., Mr.Arijit Bardhan, Adv., Mr.Sarosij Dasgupta, Adv., Mr.Soumyajit Mishra, Adv.
For the respondent	:	Mr.Sakya Sen, Adv., Mr.Shounak Mitra, Adv., Mr.Sidhartha Sharma, Adv., Mr. Danish Tashi, Adv., Mr.Rishav Dutt, Adv.
Hearing concluded on	:	14.03.2024
Judgment on	:	20.03.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner no. 1 is a borrower-Company and the other petitioners are its Directors/guarantors. In the present writ petition, the petitioners have challenged a Show-cause Notice dated March 1, 2024 issued by the respondent-Authorities for declaring the petitioners as wilful defaulters in terms of the Master Circular on Wilful Defaulters issued by the Reserve Bank of India (RBI) on July 1, 2015.

2. Learned senior counsel for the petitioners submits that the respondent, after having failed in numerous attempts to vex the petitioners on the self-same alleged default, have issued the impugned Show-cause Notice.

3. The premise of the Show-cause Notice is a purported classification of the account of the petitioner no. 1 as a Non Performing Asset (NPA) with effect from December 27, 2020. However, in a writ petition preferred against such classification, bearing WPO No. 1440 of 2023, this Court restrained the respondent by an order of injunction from proceeding on the premise of, or giving effect to, the impugned proposal for sale of NPAs on the premise that the classification of the petitioner no. 1's account as NPA was patently *de hors* the relevant RBI Circulars issued during the Covid-19 pandemic.

4. Hence, the said classification could not be a basis of the issuance of the show cause.

5. After such classification of NPA, the respondent-bank took out an application under Section 7 of the Insolvency and Bankruptcy Code (IBC), 2016 which was rejected.

6. The respondent-bank also initiated a proceeding for recovery of dues against the petitioners which is pending before the Debts Recovery Tribunal.

7. The respondent has, further, issued a Notice under Section 13(2) of the SARFAESI Act but as yet not taken measures under Section 13(4) of the said Act, thereby precluding the petitioners from challenging such measures before the Tribunal.

8. Over and above, a proceeding under Section 95 of the IBC has been initiated. It is argued that, thus, Section 96 of the IBC comes into play, imposing a moratorium on any legal action or proceeding in respect of the debt. Accordingly, it is argued, the present Show-cause

Notice, which is nothing but a proceeding in respect of the debt, is violative of Section 96, IBC.

9. Learned senior counsel next argues that in the first ground of the Show-cause Notice, the assets of the Directors/guarantors have been mentioned. However, the assets of the Directors are not the assets of the borrower-Company, which is the unit alleged to have committed the default.

10. That apart, it is contended that no copy of the Forensic Audit Report (FAR) or other documents relied on by the respondent in the Show-cause Notice were served on the petitioners.

11. Learned senior counsel next places the allegations made in the Show-cause Notice in a bid to contend that none of those meet the tests of 'wilful default' as defined in the Master Circular. Hence, it is argued that the Show-cause Notice ought to be set aside.

12. Learned counsel for the respondent-Bank argues that writ petitions are normally not entertained at the Show-cause stage. There has been no determination as yet on the merits of the allegations. Hence, no legal rights of the petitioners have been infringed for the petitioners to seek redress under Article 226 of the Constitution of India.

13. With regard to the NPA classification, it is argued that the petitioners themselves, in at least two communications (copies of which have been submitted in court during hearing) dated January 27, 2022 and September 19, 2022, have admitted the date of NPA to be December 27, 2020. Thus, the petitioners are precluded from disputing the said date of classification of NPA.

14. It is next argued that the default precedes the NPA classification. Only upon the account being overdue for over 90 days, it is classified as NPA. Thus, the NPA classification has nothing to do with the commission of default by the borrower. As Directors/guarantors, the petitioner nos. 2 to 9 cannot avoid liability for the default of the petitioner no. 1-Company.

15. Learned counsel for the Bank contends that although the petitioner no. 1 became a defaulter on September 30, 2020, no repayment whatsoever has been made till date. Thus, the petitioners cannot deny that they are wilful defaulters.

16. Learned counsel for the respondent-Bank cites *P. Mohanraj and others Vs. Shah Brothers Ispat Private Limited*, reported at *(2021) 6 SCC 258*, where the Supreme Court, while considering the respective provisions of moratorium under the IBC, observed that Section 14 was wider than Sections 81, 85, 96 and 101. Thus, a moratorium under Section 14 cannot be equated with one under Section 96 of the IBC.

17. Learned counsel also cites a judgment of this Court in *Gouri Prasad Goenka Vs. State Bank of India*, reported at *2021 SCC OnLine Cal 1942*, where it was held that a wilful defaulter proceeding does not come within the contemplation of Section 14 of the IBC.

18. The two judgments, read in conjunction, clearly denote that if a wilful defaulter proceeding does not come within the wider purview of Section 14 of the IBC, Section 96 of the same cannot be a bar to such a proceeding.

19. Learned counsel for the Bank next argues that the assets of the petitioners were disclosed on the premise that the petitioner nos. 2 to 9 are guarantors of the borrower, whose liability under Clause 2.6 of the RBI Master Circular is co-extensive with that of the borrower.

20. That apart, it is argued that the other allegations made against the petitioners in the Show-cause Notice come squarely within the purview of wilful defaulter under the Master Circular.

21. Insofar as the FAR is concerned, it is contended by the Bank that it is agreeable to hand over a copy of the same to the petitioners immediately.

22. Heard learned counsel for the parties and perused the materials on record.

23. The first issue which has been raised is whether the injunction order passed by the writ court against the respondent-Bank, on the premise that the NPA classification was *de hors* the Master Circular, can be a relevant consideration for vitiating the Show-cause Notice.

24. The petitioners have contended that the respondent-Bank preferred an appeal against the interim order which was subsequently withdrawn. Hence, the said finding, even at the interlocutory stage, has attained finality insofar as the parties are concerned and has been treated to be so by the respondent-bank by withdrawing its appeal against the same.

25. However, such contention of the petitioners is not tenable in the eye of law. A finding made at the interlocutory stage, howsoever backed by reasons, cannot be a conclusive finding. Findings made in interim

orders are tentative in nature, subject to the final adjudication of the writ. The withdrawal of an appeal preferred against the same does not matter much, since the effect would be that the interim order is still operative. Notably, the interim order did not stay the operation of the NPA classification as such. The injunction granted by the court restrained the bank from proceeding on the premise of or giving any effect to the proposal for sale of NPAs which was impugned in the writ petition. A finding leading to such restraint order was that the NPA classification was *de hors* the relevant RBI Circulars issued during the Covid-19 period. Hence, it cannot be said that merely by virtue of the said interim order or a finding made in connection therewith, in the absence of any other conclusive finding of court, the classification of NPA has been set aside finally.

26. Furthermore, it is rightly argued by the bank that the event of default by the borrower precedes the classification of the account as NPA. Only if an account remains overdue for the stipulated 90 days, the question of NPA classification arises. Thus, for holding a borrower to be a defaulter, the subsequent NPA classification is irrelevant. There is a different Circular of the RBI which governs the classification of accounts as NPA. Thus, it may very well be that a borrower becomes a defaulter and is declared to be a wilful defaulter upon the criteria of the Wilful Defaulter Master Circular being satisfied, even without classification of the account as NPA.

27. In the present *lis*, even if the best case of the petitioners is taken into consideration, applying the Pandemic Circulars of the RBI extending

the time for making good defaults, on and from November 30, 2020, the petitioner no. 1 was a defaulter. Apparently, no repayment has been made since then. Thus, it cannot be said that merely because the NPA classification is clouded in a writ petition, the respondent-Bank cannot proceed with the wilful defaulter proceeding.

28. However, it is made clear that the purported communications of the petitioners handed over by the Bank at the time of arguments cannot be looked into at this stage, having not been referred to in the Show-cause Notice. The principle laid down in *Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others*, reported at *AIR 1978 SC 851* is squarely applicable as well, precluding the respondent from furnishing new grounds which were not there in the original Show cause Notice.

29. The next objection raised by the petitioners is that the Show-cause Notice contains reference to the assets of the petitioner nos. 2 to 9, who were Directors of the Company, which assets are not part of the assets of the borrower-Company.

30. However, the first ground of wilful default disclosed in the Show-cause Notice clearly enumerates that seven of the petitioners have been dealt with in the capacity of guarantors, whose liability is co-extensive with the borrower as per Clause 2.6 of the RBI Master Circular. Technically, the respondent-Bank might be said to have jumped a step by enumerating the assets of the guarantor as a ground for wilful default. It is to be noted that under the Scheme of the Master Circular, there has to be a wilful default by the borrower unit, which,

in the present case, is the Company. For declaration of wilful defaulter of the unit, it is the assets of the unit which are to be considered.

31. However, it cannot be overlooked that under the same Master Circular, a guarantor may also be declared to be a wilful defaulter. Under Clause 2.6, it is clearly indicated that in connection with guarantors, in terms of Section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. Therefore, when a default is made in making repayment by a principal debtor, the Bank will be able to proceed against the guarantor/surety even without exhausting the remedies against the principal debtor. Seen from such perspective, the mentioning of the assets of the guarantors in the context of the alleged wilful default cannot be said to be wholly irrelevant. Although Clause 2.6 further provides that a banker has to make a claim on the guarantor on account of default and the guarantor has to refuse to comply with the demand despite having sufficient means to make payment of the dues, to be treated as wilful defaulter, the stage of considering such aspects of the matter has not yet arrived.

32. A Show-cause Notice need no plead in detail the full particulars of the requirements of the Master Circular but is required merely to outline the broad spectrum of offences committed by the borrower, its Directors and the guarantors to be labelled as wilful defaulters. The proper stage for consideration of compliance of Clause 2.6 on all other

aspects is the order passed by the Wilful Defaulter Identification Committee on consideration of the Show-cause Notice and the reply thereto. Hence, the merits of the said allegation cannot be considered in detail.

33. The same principle applies to the other components of allegations made in the Show-cause Notice. Sufficient ingredients to justify the allegations have been spelt out in the Show-cause Notice to bring the same within the broad purview of the Master Circular. The said ingredients, read in conjunction with the FAR and other documents which may be relied on by the Bank, are to be taken in conjunction at the time of consideration by the Wilful Defaulter Identification Committee and not at the show-cause stage. The composite effect of the documents and the broad allegations made in the Show-cause Notice are the subject-matter of adjudication by the said Committee, and thereafter the Review Committee. At the stage of Show-cause Notice, the court cannot adopt a fault-finding approach but such a Notice is to be seen in the perspective of disclosing sufficient ingredients to make the noticee aware of the nature of allegations made against it.

34. It is to be remembered that a Show-cause Notice is not a plaint in a civil suit that the rigours of Orders VI of the Code of Civil Procedure will be applicable in full vigour. The Show-cause Notice is only an indication of the allegations for the noticee to give appropriate reply, disclosing all material facts in the process.

35. Moreover, it is well-settled that under normal circumstances, courts are loathe to interfere at the show-cause stage since the noticee has the remedy of giving a reply thereto available to it. The merits of the allegations and defences can only be gone into by the first committee while deciding the matter.

36. Seen from such perspective, the arguments on the merits of the offences alleged in the Show-cause Notice cannot be adjudicated at this stage. Suffice to say, the impugned Show-cause Notice is not so bland, vague and *devoid* of proper ingredients so as to justify nipping the same at the bud.

37. Coming to the arguments on Section 96 of the IBC, it was clearly observed in *Gouri Prasad Goenka (supra)* that the moratorium envisaged in Section 14 of the IBC creates no hindrance to a wilful defaulter declaration proceeding, which, as held by the Supreme Court in several judgments, is *"to disseminate credit information pertaining to wilful defaulters for cautioning banks and financial institutions so as to ensure that further bank finance is not made available to them"* and not for recovery of debts or assets of the corporate debtor, which could hamper the corporate insolvency resolution process.

38. Thus, a wilful defaulter proceeding does not come within the contemplation of Section 14 or Section 96 of the IBC, which primarily pertains to legal actions to foreclose, recover or enforce security interest, or recovery of any property of the debt-in-question.

39. Again, the Supreme Court as clarified in *P. Mohanraj (supra)* that the language of Section 14 of the IBC is wider than Section 96. Since the judgment of this Court excludes wilful defaulter proceedings from the Section 14 moratorium, the same principle is applicable all the more with regard to Section 96.

40. In *P. Mohanraj (supra)*, the Supreme Court has repeatedly highlighted, particularly in paragraph nos. 35.2 and 35.3, that the moratorium concerns not merely recovery of debt but any legal proceeding *even indirectly relatable to recovery of any debt.* Hence, the moratorium applies to recovery proceedings and proceedings which directly or indirectly "relatable" to such recovery. A wilful defaulter proceeding cannot, by any stretch of imagination, be said to be even remotely relatable to recovery of debt but is merely an off-shoot of the debt. The corpus of debt is not the subject-matter of a wilful defaulter proceeding, unlike a recovery proceeding, but is a mere stimulus to spur the wilful defaulter proceeding into motion.

41. The yardsticks of declaration of wilful defaulter under the Master Circular are different from a recovery proceeding or a relatable proceeding; such declaration is merely to disseminate credit information pertaining to wilful defaulters for cautioning banks and financial institutions so as to ensure that further bank finance is not made available to them. Thus, the argument of the petitioners that the pendency of a proceeding under Section 95, IBC automatically entails a moratorium under Section 96 on a wilful defaulter proceeding is also not tenable in the eye of law.

42. The only valid argument of the petitioners is that since the Show-cause Notice itself refers to and relies on extensively on the FAR, in the absence of such FAR, the right of the petitioners to reply to the show-cause would be illusory. Hence, it was the incumbent duty of the respondent-bank to serve a copy of the FAR along with the Show-cause Notice on the petitioners.

43. However, merely on such ground, the Show-cause Notice, which is otherwise valid in law, cannot be set aside. The appropriate remedy for the petitioners would be a direction upon the respondent-bank to furnish a copy of the FAR to the petitioners to enable the petitioners to meaningfully controvert the same.

44. Accordingly, WPO No. 204 of 2024 is disposed of by directing the respondent-bank to serve a copy of the Forensic Audit Report and/or any other document, on which the bank intends to rely to substantiate the show-cause allegations, on the petitioners within a week from date. Service of such documents on the learned advocates for the petitioners appearing in this Court shall suffice for such purpose. If so served, the petitioners cannot take the point that individual service of the documents was not effected on each of them separately.

45. Upon such service, the respondent-Bank shall, in writing, grant a further fortnight's extension of time to the petitioners for filing their reply/replies to the Show-cause Notice. The petitioners will be at liberty to indicate to the respondent-bank whether they seek personal hearing, as indicated in the impugned Show-cause Notice itself. If so

indicated, such opportunity of hearing shall be given to the petitioners by the respondent-Bank at the earliest thereafter. However, such intention to have a personal hearing has to be expressed by the petitioners along with their reply and not later.

46. The respondent-Bank shall thereafter be free to proceed with the wilful defaulter proceeding in accordance with the Master Circular of the Reserve Bank of India and the law governing the field.

47. The parties shall act on the server copy of this order for the purpose of compliance without insisting upon prior production of a certified copy.

48. There will be no order as to costs.

49. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)