In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 1487 of 2023

Gouri Prasad Goenka
Vs.
State Bank of India & Ors.

For the petitioner	:	Mr. Jishnu Saha, Sr. Adv., Mr. Suddhasatva Banerjee, Adv., Mr. Ishaan Saha, Adv., Ms. Sananda Ganguli, Adv.
For the respondent (CIBIL)	:	Ms. Soni Ojha, Adv., Ms. Sonia Nandy, Adv.
Fir the respondent Bank	:	Mr. Om Narayan Rai, Adv., Ms. Deblina Lahiri, Adv., Mr. Mrinmoy Chatterjee, Adv., Mr. Piyas Choudhury, Adv.
Hearing concluded on	:	11.03.2024
Judgment on	:	20.03.2024

Sabyasachi Bhattacharyya, J:-

1. The writ petition has been preferred against an order passed by the Review Committee (RC) of the respondent no. 1-Bank, affirming the declaration of Wilful Defaulter of the petitioner. Learned counsel for the petitioner contends that the petitioner used to have business of Tea Gardens. It is argued that in none of the Committee Orders, any cogent ground has been made out under the Master Circular of the Reserve Bank of India (RBI) for declaration of Wilful Defaulters. It is argued that the RC, without returning its independent findings, has

mechanically repeated the decision of the Wilful Defaulters Identification Committee (First Committee). Thus, the RC Order is devoid of independent reasons and ought to be set aside.

2. Learned counsel argues that the borrower-Company, that is, Duncans Industries Limited, of which the petitioner was a Director, had approached the Bank for a One Time Settlement (OTS). The time for repayment of instalments under the OTS, which was agreed upon by the parties, had been extended from time to time. Before the last extended period expired, the borrower-Company underwent a Corporate Insolvency Resolution Process (CIRP) under the Insolvency and Bankruptcy Code (IBC), 2016. Thus, it cannot be said that the borrower-Company was a 'defaulter', as it did not have the opportunity to repay the loan under the OTS due to the commencement of the CIRP.

3. Secondly, the borrower-Company suffered huge losses during the relevant financial years, that is, from 2014-15 to 2018-19. The Committees failed to take into consideration that due to such huge losses, it could not be said that the borrower, despite having capacity to honour the repayment obligations, had defaulted in meeting the same. It is argued that there is no allegation of siphoning off the proceeds from sales realization.

4. The premise of the allegation that Clause 2.1.3(a) of the Master Circular applies, with regard to alleged non-repayment despite having capacity to pay, is that the credit summation in the company's cash credit account was lower than revenue earned from its operations.

5. It is argued that the Wilful Defaulter Identification Committee failed to rebut/disprove the allegation that the Company was suffering huge losses during the relevant period and consequently had no capacity to pay. Credit summation, in vague terms, cannot tantamount to or be a measure to determine "capacity to pay".

6. The Cash Credit Account maintained by the borrower-Company with the Bank was a monitored account and there was no contemporaneous allegation that revenue from sale proceeds was not being routed through the said account. Such allegation was made for the first time in the Show-cause Notice dated February 26, 2021 issued under the Wilful Defaulter Master Circular.

7. No particulars regarding routing of sale proceeds through other accounts were provided in the Show-cause Notice.

8. As regards the allegation under Clause 2.1.3(b) of the Master Circular, that the unit had defaulted in meeting the repayment obligation and had not used finance from the lender for the specific purpose for which such finance had been availed but had diverted the funds for other purposes, is not supported by any particulars being provided in the Show-cause Notice. It is alleged that the Bank came to know from the Resolution Professional of the borrower-Company that it was maintaining a current account with the ICICI Bank, Darjeeling Branch, which made it evident that the Company did not route the entire sale proceeds with the lender Bank without permission of the lender.

9. "Diversion of Funds", as per Clause 2.2.1 of the Master Circular, does not speak about siphoning of funds but of non-utilization of finance for the specific purpose for which it was availed. There is no allegation in the Show-cause Notice that the funds available were diverted for some other purpose through the ICICI Bank, Darjeeling Branch bank account.

10. The petitioner took a specific plea in the representation to the RC that the said account was maintained only for operational convenience of the garden and the total transaction through the same was a paltry amount. The account was primarily treated as an outflow account where money was transferred from the company's Bank Account to defray the operational expenses.

11. With regard to the allegation under Clause 2.1.3(d), that the unit had defaulted in meeting its repayment obligations and also disposed of or removed moveable fixed assets or immovable property given for the purpose of securing the term loan without the knowledge of the bank, it is argued that the borrower-Company had entered into agreements with third-parties in the year 2004 and the contract had only been renewed subsequently in July, 2013. There was no objection on the part of the Bank, which was fully aware of such transactions. That apart, the borrower-Company did not part with possession of the tea gardens in favour of the assignee but only entered into a marketing, management contract with it.

12. Insofar as the assignment of Hantapara, Garganda, Tulsipara and Dhumchipara Tea Estates are concerned, the Central Government had

authorized the Tea Board under Section 16E of the Tea Act in a Notification dated January 20, 2016 to take immediate steps to take over management and control of seven gardens belonging to the Company, including those gardens. A writ petition was filed by the Company against the Notification, which went up to a Division Bench of this Court which by an order dated September 20, 2016 observed that the situation had turned worse than what it was on the date of the Notification and accordingly directed the company to take over management of the gardens to pay the current and arrear dues of the workers and to run the garden in a prudent business-like manner, keeping the team informed of the steps taken by them. The order recorded that the same was passed only for the purpose of improving the lot of the workers as also that of the gardens.

13. As the borrower-Company did not have the funds to run the gardens or pay the dues of the workers, it was forced to enter into the agreements on July 20, 2018, August 19, 2018 and January 29, 2018 with Merico Agro Industries Limited. The agreements were for a fixed period where the borrower-Company retained possession and a right to supervise the same.

14. Learned counsel for the petitioner relies on a Division Bench judgment of this Court in *Iswari Prasad Tantia and Anr. v. Bank of Baroda and Ors.*, reported at *2020 SCC OnLine Cal 3282*, where it was held that the word "wilful" signifies a culpable mental state or the involvement of the concept of *mens rea*. The default must be intentional, which ingredient, it is argued, is absent in the present case.

15. The yields from the Tea Estates were mostly nil during the relevant period, which is borne out by the Information Memorandum published by the Resolution Professional of the borrower-Company.

16. Moreover, the lease of Hantapara had expired on December 2, 2004, that of Tulsipara on April 17, 2004, the lease of Dhumchipara on September 12, 2004 and the lease of Garganda, although renewed on September 8, 2006, had not been renewed properly as per the Land Department of the Government of West Bengal. Thus, the transfers alleged in the impugned decisions did not take place at all.

17. Learned counsel also seeks to distinguish the judgments cited by the respondents.

18. Learned counsel appearing for the respondent-Bank argues that the petitioner, in its representation, had not made out any new fact and, as such, the RC's decision had to be substantially similar to the First Committee decision. However, it is denied that it was a mere copy of the First Committee's decision. By pointing out to the latter portions of the RC order, learned counsel argues that the said Committee gave its independent decision on the issues involved.

19. The petitioner has argued that the borrower-Company being in a CIRP proceeding, the Director and promoter of the same also had to be absolved. Such contention is refuted by learned counsel for the Bank who cites the judgment of *Kotak Mahindra Bank Limited Vs. Hindustan national Glass & Industries Limited and Others*, reported at *(2013) 7 SCC 369*, for the proposition that it cannot be said if the debt is extinguished subsequent to default being committed, no proceeding

for wilful defaulter declaration can be initiated or continued. The offence committed by the Company or a juristic person does not absolve the responsibility of its Directors. The purpose of the Master Circular is to put in place a system of 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. It is argued that the same operates on a different footing than a CIRP under the IBC.

20. Learned counsel places reliance Section 31A of the IBC to further the said line of argument. The petitioner is admittedly the promoter and whole-time director of the borrower-Company, thus, satisfying the definition of an Officer who is in default as provided in Section 2(60) of the Companies Act, 2013.

21. Learned counsel for the respondent-Bank cites *Manish Kumar Vs. Union of India and Another,* reported at *2021 SCC OnLine SC 30*, where, while upholding the vires of Section 32A, the Supreme Court had observed that the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan was the reason behind introduction of Section 32A of the IBC. It was clarified that it is not as if the wrong-doers are allowed to get away.

22. Regarding the OTS argument, learned counsel for the respondent-bank contends that mere attempt to repay the loan through a, OTS post commission of a wilful default would not serve the purpose of the

RBI Master Circular. The OTS itself amounts to waiver of the Bank's rights and does not obliterate the wilful default.

23. The Bank argues that the charges levelled against the writ petitioner were clearly dealt with by both the Committees. The RC, apart from affirming the decision of the First Committee since no new point was established by the petitioner, also rendered its independent findings. The anomalies between the revenue earned by the borrower-Company during the relevant period and the huge gap with the credit summation during the same period itself shows that the sales realization was not routed through the account and not used for reducing the outstanding loan.

24. It is argued that suffering loss *ipso facto* does not indicate non-availability of fund. If revenue earned is not routed through the concerned account, the said act directly comes within the purview of the Master Circular. Learned counsel for the Bank places elaborate reliance on the balance-sheets and accounts of the borrower-Company during the relevant period to show that a huge chunk of the revenue earned was not routed through the respondent no. 1-Bank.

25. Learned counsel for the Bank argues that detailed judgments are not required to be passed by either of the Committees since those are administrative, and not even quasi-judicial, authorities. Even in *State Bank of India Vs. Jah Developers Private Limited and Others*, reported at *(2019) 6 SCC 787*, the Supreme Court held that the powers of the Committees were administrative powers given to in-house committees to gather facts and arrive at a result.

26. In *Union of India Vs. H.C. Goel*, reported at *AIR 1964 SC 364*, the Supreme Court held that in exercising jurisdiction under Article 226, the High Court will take the evidence as it stands and only examine whether on that evidence the impugned conclusion follows or not.

27. Learned counsel for the bank cites *Syed Yakoob Vs. K.S. Radhakrishnan and Others*, reported at *AIR 1964 SC 477*, where it was held that if findings of fact were allowed to be disturbed by High Courts in such manner that may lead to an interminable search for correct findings, the court would not interfere unless it is shown that the impugned finding is based on no evidence.

28. While testing an order of a quasi-judicial authority, it is argued that this Court should not be concerned with the correctness of the order. If the order can be sustained on some evidence already on record, even if the conclusion is not correct and the reasons are not adequate, there will be no interference by this Court. The Bank cites *B.C. Chaturvedi Vs. Union of India and others*, reported at *(1995) 6 SCC 749*, *State of T.N. and another Vs. S. Subramaniam*, reported at *(1996) 7 SCC 509*, for the proposition that the High Court would interfere in judicial review only if the impugned conclusion could not have been reached by a reasonable person. Learned counsel also cites *Deputy General Manager (Appeallte Authority) and Others Vs. Ajai Kumar Srivastava*, reported at *(2021) 2 SCC 612*.

29. Court would not interfere if the reasons, though not spelt out in the order, are available on the records, as held in *Income Tax Officer, Cuttack and Others Vs. Biju Patnaik,* reported at *1991 Supp (1) SCC*

161. It is next argued that in *Commissioner of Income-tax Vs. K.Y. Pilliah & Sons*, reported at *[1967] 63 ITR 411* and *Ram Kumar Vs. State of Haryana*, reported at *1987 (Supp) SCC 582*, it was held that if the appellate authority agrees with the findings of the original authority, it is not required to give separate reasons. The same principle, it is argued, applies to the RC decision. The laudable object of the RBI Master Circular, that is dissemination of information, it is argued, should not be interfered with by this Court. Even otherwise if a person has a weak repayment history he is not granted financial assistance by institutions as when the loans taken are not repaid, much of the funds go out of the financial system and the cycle of lending-repaying-borrowing is broken.

30. The petitioner's right to do business, though a fundamental right, must be considered in the context of the acts committed by the petitioner and its grave adverse effect on the nation's economic interest. It is, therefore, necessary that everyone is informed about wilful defaulters. Learned counsel cites in support of such contention *Reserve Bank of India Vs. Jayantilala N. Mistry,* reported at *(2016) 3 SCC 525*.

31. Regarding the argument of non-substantiation of Clause 2.1.2(b) read with 2.2.1(d) pertaining to opening of an account in the ICIC Bank, it is argued by the Bank that the said charge is indeed one of diversion of funds as Clause 2.2.1 provides that the term 'diversion of funds' referred to in Clause 2.1.3(b) would be construed to include any of the

items mentioned under Clause 2.2.1(d). The opening of the ICICI account was unauthorized.

32. Insofar as the transfer to Nagrifarm Tea Company is concerned, it is argued that the borrower-Company had entered into an agreement upon consideration of Re. 1/- only, allowing the Nagrifarm Tea Company Limited to take away the entire sale proceeds in respect of tea produced and manufactured at the gardens, indicating that the teas which were hypothecated to the Bank were alienated and disposed of to the detriment of the Bank.

33. Even if the reasons given in the impugned Committee orders are not to the liking of the petitioner, it is not a case of being an unreasoned order. Moreover, the balance sheets of the company showed that there was indeed *mens rea* to willfully not pay the Bank's dues.

34. While considering the arguments of the parties, it is observed that the petitioner has taken a plea that an OTS was reached in terms of which the petitioner was making payments. However, the same could not reach culmination as the CIRP intervened. Such argument, however, has no legs to stand upon. An OTS means that a part of the debts is only paid, whereas the other part is written-off by the Bank. Therefore, even if the OTS is in full and final settlement of the loan insofar as recovery is concerned, since a part of the same is written-off, it cannot be said that the loan was repaid in full. That apart, the default committed at the relevant juncture does not get effaced merely by entering into an OTS. Thus, if a default is found to be willful under

the contemplation of the RBI Master Circular, there may very well be a declaration to that effect despite an OTS being entered into.

35. The petitioner has taken a plea that due to loss suffered during the relevant period, it did not have the capacity to pay back. However, even if there is no profit but it is shown that revenue was earned but not used to repay the loan, there can very well be a wilful default under the contemplation of the Master Circular. Profit is not an essential criterion for making repayment. Mere earning of revenue and sales realization, if not utilized to meet the loan, it can very well be construed that despite having capacity to pay, repayment was not made by the debtor.

36. The bank has clearly made out a convincing case from the balance sheets of the Company during the relevant period that there was sufficient justification for arriving at the conclusion that despite having capacity to honour the obligations, the borrower-Company defaulted in meeting its repayment obligations. For the financial year 2015-16, whereas the revenue from operations was Rs. 129.30 Cr., the credit summation was merely Rs. 19.45 Cr. During 2016-17, the revenue was Rs. 44.06 Cr. and the credit summation was only Rs. 2.64 Cr. Similarly in the financial year 2017-18, the revenue from operations was Rs. 80.53 Cr., whereas credit summation was Rs. 3.07 Cr. only. The respondents have clearly indicated that the revenue earned by the borrower-Company was reflected in its own annual balance sheet. The credit summation is nothing but the sum total of the credit in the cash credit account during the said financial years.

Thus, the funds available to the Company by way of proceeds from sales realization were not routed through the account for reducing the outstanding loan.

37. As regards diversion of funds, the same has been contemplated in the Master Circular to include siphoning of money.

38. The petitioner admittedly parked some amounts from its sales realizations not in the cash credit account but in a different account opened with a different Bank, that is, the ICICI Bank, Darjeeling Branch. Hence, at a time when the borrower-Company was duty-bound to channelize its entire funds through the respondent no. 1-Bank due to its agreement with the latter, it failed to meet such obligation, which was a condition of the cash credit facility, and routed some money through a different bank account. Such act is sufficient to come within the purview of diversion of funds as contemplated in the Master Circular.

39. The transfer of some of the assets, movable fixed assets and/or immovable properties, has been disputed by the petitioner. Such dispute is *ex facie* sham.

40. The petitioner admittedly transferred/assigned, in whatever form, its entitlement to realization of sale proceeds of tea produced and manufactured in its gardens. The borrower-Company had pledged the tea gardens and its produce with the respondent no. 1-Bank. The revenue of a tea garden is almost exclusively earned from its sale and manufacture of tea. The right to realize the proceeds of such sale of tea and manufacture of the same comprises the entire corpus of the

secured assets. Having assigned the same in favour of third-parties, the borrower-Company was definitely guilty of disposing of and removing the secured assets pledged with the Bank without the knowledge of the Bank.

41. Admittedly, an agreement was entered into in the year 2004 which was much prior to the directions of the Central Government to take over management from the borrower-company. Even the Division Bench order of this Court directed the management to be continued by the borrower-Company. Hence, the lame excuse of the workers' interest is mere lip-service in the mouth of the petitioner, since the borrower-company, evidently without knowledge or permission of the lender-Bank, had transferred the security, invoking the umbrella of the Central Government directions. Even if the borrower was under compulsion to pay the workers, nothing prevented it from informing and taking consent of the lender-Bank before assigning the sale proceeds of the tea gardens, that is, the entire corpus of the assets, which was secured with the Bank. Such act on the part of the borrower company, of which the petitioner was a Promoter Director, definitely comes within the purview of wilful default as envisaged in the Master Circular.

42. The moratoria contemplated in the IBC were introduced for the protection of the corporate debtor in order to facilitate resolution. Such legal fiction, however, was created only in order to sustain the business of the company in the hands of the successful resolution applicant, *inter alia*, to protect the interests of the workers and the

business of the unit in general. However, even if CIRP commences, the Directors, who were the masterminds in control and charge of affairs of the Company at the relevant juncture, cannot be absolved of any wilful default committed by the borrower-Company at the relevant juncture.

43. In the present case, the petitioner was a Director and at the helm of affairs, responsible for the business operations of the company. The business decisions of the Company are attributable to the Directors, who are the living hands of the company which is a juristic person. Thus, the petitioner cannot be absolved of the wilful default committed by the borrower-Company in his capacity as a director and promoter, irrespective of an ongoing Corporate Insolvency Resolution Process.

44. Insofar as the argument that the RC order is devoid of reasons, the bank is justified in arguing that no new evidence was brought before the RC to justify an elaborate re-writing of the First Committee decision. The RC did take into account the relevant factors and rendered its independent finding, which are annexed at page 286 onwards of the writ petition, apart from confirming the rest of the findings of the First Committee.

45. That apart, in *Jah Developers (supra)*, the Supreme Court indeed observed that the First Committee and the RC are administrative committees and not quasi-judicial authorities. By such logic, in the absence of any procedural irregularity or patent perversity, elaborate judgments are not required or expected from the Committees. In the

present case, both the Committees adverted to the material issues and dealt with those in accordance with the materials available. It cannot, thus, be said that the impugned decisions were totally without evidence and thus perverse.

46. I do not find any patent irregularity or perversity in the impugned decisions or the procedure adopted by the Committees for arriving at the same, sufficient to interfere under Article 226 of the Constitution of India. The series of judgments cited by the Bank hold good on such proposition and are fully attracted to the present case.

47. *Jayantilala N. Mistry*'s case is apt in the context. The fundamental right to do business as embedded in Article 19 of the Constitution is undoubtedly available to the petitioner but has to be circumscribed by the acts of the petitioner, which have adverse effect on the economic interests of the nation. Hence, the basic premise and purpose of the Master Circular of the RBI are satisfied in the present case. The willfulness behind the default is evident from the actions of the borrower-company and the petitioner as discussed above, which speak for themselves. Thus, there is no scope of interference with the concurrent findings of both the Committees.

48. Accordingly, WPO No. 1487 of 2023 is dismissed on contest without any 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.)