In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 171 of 2021

Gouri Prasad Goenka
Vs.
State Bank of India

For the petitioner	:	Mr. Jishnu Saha, Mr. Ishaan Saha, Ms. Sananda Ganguli
For the State Bank of India	:	Mr. Om Narayan Rai, Mr. Saikat Ray Chowdhury
Hearing concluded on	:	27.04.2021
Judgment on	:	21.06.2021

The Court:

1. The writ petitioner has challenged two notices, respectively dated February 26, 2021 and March 2, 2021 both issued under the signature of Deputy General Manager of the State Bank of India (SBI). Both the letters are show-cause notices on similar grounds sent to the petitioner, the first in the capacity of guarantor of Duncans Industries Ltd. and the second in the capacity of Whole-time Director and Promoter (since suspended) of Duncans Industries Ltd.

2. The notices have been issued for the petitioner to show cause as to why the petitioner shall not be declared as wilful defaulter on the grounds as mentioned in the said notices. Submissions in writing were also sought in the show-cause notices from the petitioner.

3. Learned counsel for the petitioner argues that the first notice dated February 26, 2021, addressed to the petitioner as guarantor of Duncans, was without jurisdiction inasmuch as it fails to satisfy the requirements of Clause 2.6 of the Reserve Bank of India Master Circular on Wilful Defaulters dated July 1, 2016 (hereinafter referred to as "the RBI Master Circular"). It is argued that the show-cause notice contained no allegation to the effect that the petitioner, as guarantor, refused to comply with the demands made by the respondent-Bank, despite having sufficient means to do so, which is a pre-requisite for such notice to a guarantor.

4. Regarding the second notice, sent to the petitioner in the capacity of whole-time director and promoter, learned counsel argues that a petition was filed against the Duncans Industries Ltd. under Section 7 of the Insolvency and Bankruptcy code, 2016 (IBC), which resulted in commencement of a Corporate Insolvency Resolution Process (CIRP) of the company, which is still pending. An Interim Resolution Professional (IRP) was appointed over the company on and from March 5, 2020 and the power of its Board of Directors stood suspended in terms of Section 17(1)(b) of the IBC. A moratorium was also declared under Section 14 of the IBC prohibiting, *inter alia,* the institution or continuation of suits or proceedings against the corporate debtor-company. Hence, no proceeding could be instituted or continued for declaration of wilful defaulter in respect of the company itself, for which no notice was served on it.

5. Broadly arguing that the object and purpose of the IBC is resolution of corporate insolvency, learned counsel for the petitioner argues that, since no notice of wilful default was or could, in law, be served on the company itself, by the same logic, no such notice could also be served on its suspended promoter/director.

6. Learned counsel relies on *Committee of Creditors of Essar Steel India Limited through Authorised signatory Vs. Satish Kumar Gupta and others,* reported at *(2020) 8 SCC 531,* in support of the proposition that the resolution of corporate insolvency extinguishes the debts of the corporate debtor.

7. Learned counsel for the petitioner next cites the case of *Gaurav Dalmia Vs. Reserve Bank of India,* reported at *2020 SCC OnLine Cal 668,* in support of the proposition that once the alleged default of the company itself is extinguished by virtue of a corporate resolution, the 'wilful defaulter' tag of all the promoters and directors in such capacity only (and not in their individual capacities) for the same default, had to go.

8. It is reiterated by counsel that, pending the resolution of corporate insolvency of the company, the suspended directors cannot be proceeded against prematurely for declaration of wilful defaulter.

9. Learned counsel for the petitioner next contends that a One-Time Settlement (OTS) proposal of the company had been accepted by the respondent-Bank and was sanctioned on September 30, 2019. It is admitted that after making some payments under the OTS, the company could not make further payment. However, the ground for

stopping payment is, *inter alia*, cited to be admission of the petition under Section 7 of the IBC and imposition of moratorium under Section 14 of the IBC. Even thereafter, the Bank continued to extend the time for payment under the OTS, which could not be honoured in view of the subsistence of the aforesaid proceeding and moratorium.

10. The petitioner filed written notes of arguments, against which the respondent-SBI has also filed similar notes. Subsequently, a rejoinder written note was filed on behalf of the SBI in view of additional judgments having been relied on by the writ petitioner in its notes, to which a further response in writing was given by the petitioner.

11. Learned counsel for the Bank argues that the writ petition is premature, being directed against show-cause notices, which do not create any cause of action or infringe any legal right of the petitioner.

12. In this context, learned counsel places reliance on *State of Uttar Pradesh Vs. Brahm Dutt Sharma and Another,* reported at *(1987) 2 SCC 179* and *Trade Tax Officer, Saharanpur Vs. Royal Trading Company,* reported at *(2005) 11 SCC 518.* The ratio laid down in the said judgments is that there ought not to be interference by High Courts under Article 226 of the Constitution of India at the show cause stage.

13. In support of the argument that issuance of a show-cause notice does not infringe any right of the petitioner, since the Identification Committee (IC) can always drop the proceedings if the same is without merits after considering the representation of the alleged defaulter,

learned counsel for the bank cites *Secretary, Ministry of Defence and Ors. Vs. Prakash Chandra Mirdha,* reported at *(2012) 11 SCC 565.*

14. Learned counsel for the respondent-Bank next cites *Kejriwal Mining Pvt. Ltd and Ors. Vs. Allahabad bank and Anr.,* reported at *2020 SCC OnLine Cal 1250,* to argue that the IC order does not attain finality until the same is scrutinised by the Review Committee (RC).

15. By placing reliance on *Union Bank of India Vs. Sudhir Kumar Patodia (CAN 5340 of 2019 in MAT 787 of 2019)* and *Union of India Vs. Pawan Kumar Patodia (CAN 5342 of 2019 in MAT 788 of 2019),* both unreported Division Bench judgments of this Court, learned counsel contends that the Division Bench clearly found that even if the wilful defaulter notice was issued under the signature of the Deputy General Manager but the decision and consideration was by the Wilful Defaulter Identification Committee, such fact does not invalidate the notice itself. Moreover, it was held that no factual consideration can be undertaken by the writ court at the show cause stage.

16. It is further contended by the respondent-Bank that even if the authority having the power to decide a particular issue wrongly or improperly issues a show-cause notice, corrigible by the same authority (IC) or a higher authority (RC), it would, at best, be an error within, and not without jurisdiction, since the authority is deemed to have jurisdiction to issue the same. In support of such proposition, learned counsel for the Bank places reliance on *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another,* reported at *AIR 1969 SC 823.*

17. By placing reliance on *Kotak Mahindra Bank Limited Vs. Hindustan National Glass & Industries Limited and Ors.,* reported at *(2013) 7 SCC 369,* learned counsel for the Bank submits that a wilful defaulter proceeding is to disseminate credit information and not for recovery of property. As such, the moratorium or institution of a proceeding under Sections 14 and 7 of the IBC respectively does not debar a proceeding for declaration of wilful defaulter.

18. Learned counsel for the Bank relies on *Manish Kumar Vs. Union of India and Another,* reported at *2021 SCC OnLine SC 30,* for the proposition that wrong-doers are not allowed to get away by virtue of Section 32A of the IBC (as recently amended), but the said section was inserted in order to attract resolution applicants.

19. As far as the additional judgments cited by the petitioner, the first of such is that of *Ghanashyam Mishra and Sons Private Limited through the Authorized Signatory Vs. Edelweiss Asset Reconstruction Company Limited through the Director & Ors.,* reported at *2021 SCC OnLine SC 313,* which approved the ratio laid down in *Essar Steel* (supra).

20. The petitioner also cites *M/s Atlantic Projects Limited & Ors. Vs. The Allahabad Bank & Ors.,* reported at *2019 SCC OnLine Cal 611*, to argue that a show-cause notice issued by the Deputy General Manager on behalf of the Identification Committee delegates the power of the IC, and, as such, is not valid.

21. Citing *Whirlpool Corpn. Vs. Registrar of Trade Marks,* reported at *(1998) 1 SCC 1,* the petitioner contends that issuance of show-cause notice itself without authority of law or jurisdiction justifies

interference by the writ court and there is no question of alternative remedy being a bar.

22. Next relying on *State Bank of India Vs. M/s Jah Developers Pvt. Ltd. & Ors,* reported at *(2019) 6 SCC 787,* the petitioner argues that the revised Circular of the RBI was issued in public interest and ought to be read reasonably.

23. Such additional contentions are sought to be distinguished by learned counsel for the respondent in the context of the present case.

24. As far as the first question is concerned, it is *ex facie* clear from the materials-on-record that the writ petition is premature, since no right of the petitioner has been infringed by issuance of the show-cause notice. The grounds for such notices were clearly enumerated in both the impugned notices and the petitioner was given sufficient opportunity as per the RBI Master Circular to give representation against the notice.

25. That apart, it is evident from the impugned notices that those were merely communications as per the "orders and directions of the Committee", taken after consideration of the conduct of the account and utilization of credit facilities by the defaulter company, which exercise was duly undertaken by the IC itself and not the Deputy General Manager.

26. The petitioner, in the said notices, was given opportunity to make submissions in writing within 15 days from the date of the notices and it was clearly mentioned that the IC would pass necessary orders

thereupon. The entire preceding and proposed actions referred to in both the notices were taken by the IC, which had ample jurisdiction to do so under the RBI Master Circular. As such, the Deputy General Manager merely communicated the show-cause notices to the petitioner and did not intrude into the jurisdiction of the IC in any manner whatsoever. Thus, placing reliance on the dual Division Bench judgments of *Union Bank of India* (supra), it can safely be held that the issuance of the notice by the Deputy General Manger *ipso facto* did not invalidate the notice.

27. Since *M/s Atlantic Projects* (supra) relied on orders passed by a learned Single Judge in connection with the *Union Bank of India* matter, which were overruled by implication in the Division Bench judgments, passed in appeals against such orders of the learned Single Judge, the law laid down by the Division Bench has to be taken as the final pronouncement on the issue, which supports the above inference.

28. It is obvious that the writ court cannot go into a factual consideration of the merits of the allegations made in the notices at the show cause stage, particularly, since there is no flaw in the notices and the petitioner was given adequate opportunity to make written submissions in response thereof, thus adhering strictly to the letter and spirit of Clause 2.6 of the RBI Master Circular.

29. The first impugned notice dated February 26, 2021 cannot be held to be vitiated merely by absence of specific mention of prior refusal by the petitioner, as guarantor, to honour his liability in such capacity.

That apart, the legal fiction of dual capacity of the petitioner, that is, as a guarantor on the one hand and as a promoter/whole-time director on the other, ought to be pierced in view of the petitioner being in charge of the management of the defaulting company at the relevant period. A person at the helm of affairs during the period when the alleged default was committed is squarely an officer who is in default, as provided in Section 2(60) of the Companies Act, 2013.

30. Mere apprehension of a future resolution of the corporate insolvency, by way of a prospective Resolution Plan which is yet to materialize, cannot absolve the petitioner, in the capacity of either guarantor or promoter/whole-time director, from the liability for such default.

31. The language of Section 14 of the IBC is very clear as to its object and purpose, which is to attract resolution applicants to make offers to facilitate corporate resolution of the insolvency. Initiation or continuation of recovery proceeding against the corporate debtor itself during such resolution would prove counter-productive to such purpose.

32. However, whole-time directors and promoters who were in charge of the affairs of the defaulting company during the relevant period, when the default was committed, cannot be said to be absolved of their act of wilful default committed prior to final approval and acceptance of a resolution plan.

33. Moreover, Section 14(3)(b) of the IBC clearly carves out an exception for a surety in a contract of guarantee to a corporate debtor from the

purview of such moratorium, which governs the writ petitioner in the present case.

34. Unlike certain statutes, which provide for mandatory statutory pleadings (for example, pleadings as to readiness and willingness under Section 16 of the Specific Relief Act, 1963), the RBI Master Circular does not contemplate any mandatory averment in the show-cause notice regarding prior refusal to honour liability by the guarantor. Hence, the impugned notices would not be vitiated even if specific allegations to that effect were absent therein.

35. As regards satisfaction of the requirements of the Clauses of the RBI Master Circular on merits in a particular case, it depends upon a factual consideration, first by the IC and then the RC, for the 'wilful defaulter' label to be attached finally, and cannot be adjudicated prematurely by the writ court at the stage of show cause.

36. 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 resolution process.

37. Thus, a wilful defaulter proceeding does not come within the contemplation of Section 14 of the IBC, which primarily pertains to

legal actions to foreclose, recover or enforce security interest, or recovery of any property or the debt-in-question.

38. An act of wilful default, if committed by a promoter/whole-time director/guarantor of the corporate debtor who was in charge at the relevant period, is not obliterated automatically by the filing of an application under Section 7 of the IBC.

39. In *Gaurav Dalmia* (supra) this court considered the question as to the effect of approval of a resolution plan. If such a plan is approved and thereafter a show-cause notice is issued, the factual scenario would be entirely different from the present case, where no such resolution plan has been approved as yet and the CIRP is only at an initial stage. The declaration of a whole-time director/promoter or a guarantor as wilful defaulter cannot adversely affect the resolution process in any manner whatsoever. Rather, the purpose of such declaration of wilful defaulter, as indicated in the RBI Master Circular itself, is to disseminate credit information for cautioning banks and financial institutions and has no nexus with recovery of the debt.

40. Moreover, Section 32A had not been inserted by amendment in the IBC on the date when hearing was concluded in the matter of *Gaurav Dalmia* (supra). Section 32A, which has been held to be *intra vires* by the Supreme Court, clearly stipulates that the Corporate Debtor shall not be prosecuted for an offence committed prior to commencement of CIRP once a Resolution Plan has been approved by the Adjudicating Authority. The said provision, according to the Supreme Court, was important to attract bidders who must also be granted protection from

any misdeeds of the past since they had nothing to do with it. Hence, the purpose of introduction of Section 32A clearly indicates that the officers of the defaulting company in charge of its management and affairs at the relevant juncture are not absolved thereby. Such provision, which is now in force, has, thus, a relevant bearing on the present adjudication.

41. Similarly, an OTS for settlement of the debt, *ipso facto,* cannot erase the wilful default of a promoter/director or guarantor, if committed. Moreover, in the present case, the OTS had not reached culmination in view of the instalments pursuant thereto having not been cleared by the petitioner, for whatever reason. As such, there was no concluded OTS in the present case at all.

42. Even *Essar Steel* (supra), in paragraph no. 105 thereof, stipulates that the guarantor cannot escape payment, as the Resolution Plan itself may so provide, although a successful resolution applicant starts on a fresh slate after such resolution, as indicated in paragraph no.107 of the said report.

43. In view of the above discussions, no fault can be found with the issuance of the impugned show-cause notices to justify judicial interference therewith. Accordingly, the writ petition fails.

44. WPO 171 of 2021 is dismissed on contest, without any order as to costs. However, it is made clear that the merits of the wilful defaulter declaration proceeding against the petitioner have not been gone into by this Court and the observations made in this order are all tentative, restricted to the limited ambit of deciding the validity and legality of

the impugned show-cause notices. Such observations will, thus, not prejudice the rights and contentions of either of the parties in the wilful defaulter declaration proceeding.

45. In view of the instant writ petition being *sub judice* till passing of this order due to no fault of the writ petitioner, the time-limit for filing of representation by the petitioner by way of written submissions, in response to the impugned show-cause notices, is extended for the ends of justice for a further period of 15 days from this date. However, such time-limit is peremptory and in the event the same is not adhered to strictly by the writ petitioner, the respondent will be free to take subsequent steps in respect of the wilful declaration proceeding in accordance with law.

46. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)