Narendra Seoomal Sabnani And Others Vs State Bank Of India And Others

Court: Bombay High Court (Nagpur Bench)

Date of Decision: Dec. 1, 2021

Acts Referred: Constitution Of India, 1950 â€" Article 136, 226
Companies Act, 2013 â€" Section 2(60)

Hon'ble Judges: M. S. Sonak, J; Pushpa V. Ganediwala, J

Bench: Division Bench

Advocate: Kapil Hirani, S. N. Kumar

Final Decision: Disposed Of

Judgement

M. S. Sonak, J

1. Heard Shri Kapil Hirani, learned counsel for the petitioners, and Shri S. N. Kumar learned counsel for the respondents.

2. Rule. The rule is made returnable forthwith at the request and with the consent of the learned counsel for the parties.

3. The petitioners question orders dated 07.12.2020 and 26.03.2021 made by Wilful Defaulter Identification Committee (the WDIC) and the Review

Committee respectively, to the extent that such orders collectively declare the petitioners as Ã¢â‚¬Å“Wilful DefaulterÃ¢â‚¬â€‹.

4. Shri Kapil Hirani, learned counsel for the petitioners at the very outset made it very clear that the challenge to the above-impugned orders was qua

the petitioners only and not M/s. Universal Industrial Equipments and Technical Services Pvt. Ltd. (the Company) of which the petitioners were the

Directors. Therefore, notwithstanding the width of prayer clause (B) of the petition, this petition is restricted to challenging the impugned orders

insofar as they declare the petitioners as wilful defaulters and not to the extent that such orders declare the Company as wilful defaulter.

5. Having regard to the above position, we also make it clear that we are not examining the legality and validity of the impugned orders qua the

Company because, the Company has not challenged the impugned orders before us and further, we are informed that there are subsequent

developments concerning the status of the Company, due to which the Company may not even to be in a position to challenge the same before us. If

therefore, on account of the impugned orders attaining finality qua the Company, there is an impact on the status of the petitioner, then, such impact

will continue to operate against the present petitioners, even if we quash the impugned orders qua the present petitioners.

6. Shri Kapil Hirani, learned counsel for the petitioners has challenged the impugned orders broadly on the following grounds, which are urged in the

alternate and without prejudice to one another:-

(i) The impugned orders are contrary to the Reserve Bank of IndiaÃ¢â‚¬â„¢s Master Circular of Wilful Defaulters dated 01.07.2015.

(ii) The show-cause notice dated 22.10.2020 was not issued by the WDIC but, by the Deputy General Manager (DGM), who had no jurisdiction to

issue the same. Therefore, the very initiation of proceedings is ultra vires.

(iii) The impugned orders relied upon the valuation report of Shri K. R. Phadke. Despite the request, a copy of this valuation report was never made

available to the petitioners. This means that some material adverse to the interest of the petitioner has been relied upon without granting the petitioner

reasonable opportunity of explaining the same or countering the same. There is thus a violation of the principle of natural justice, which vitiates the

impugned orders.

(iv) The impugned orders contain no reasons, are non-speaking, and are made in a mechanical manner and without application of mind.

(v) There are no findings in the impugned orders about default on the part of the petitioners being intentional or deliberate or calculated. In the absence

of any such findings, the impugned orders are quite unsustainable.

7. Shri Kapil Hirani, learned counsel for the petitioners relied upon the decisions of this Court in the case of M/s. Kanchan Motors Vs. Bank of India

[Writ Petition (L) No. 2072/2018, decided on 12.07.2018] and Gunwant Deopare Vs. Branch Manager, Bank of Maharashtra [Writ Petition No.

1958/2020, decided on 24.08.2021] in support of his contention that the order declaring any person or entity as wilful defaulter must be a speaking

order containing reasons.

8. Shri S. N. Kumar, learned counsel for the respondents submits that the impugned orders were made on admissions of the petitioners and therefore,

there was no necessity of any elaborate reasons. He submits that there were admission as well as un- impeachable record that the petitioners had

opened separate bank accounts and deposited the amount therein. He submits that from this, it was quite evident that criteria prescribed under para

no. 2.1.3 of the Master Circular was fulfilled. He submits that the Committee exercised administrative powers and therefore, there can be no

requirement of giving any elaborate reasons in support of its orders. He submits that the contention of the show-cause notice being issued by DGM

and not by the WDIC was never raised by the petitioners before the WDIC or the Review Committee and therefore, such issue cannot be raised for

the first time in this Writ Petition. He submits that even otherwise this contention has no substance because the purpose of the show-cause notice was

only to afford a reasonable opportunity to the petitioners. He submits that all the relevant materials were furnished to the petitioners and there was no

violation of the principle of natural justice. For all these reasons, he submits that this petition may be dismissed.

9. The rival contentions now fall for our determination.

10. In this case, the record bears out that the credit facility was extended by respondent no. 1 to the Company sometime in November-2011. Further,

in September-2015 or thereabout, the Company was classified as a Non-Preforming Asset (NPA). On 22.10.2020, the DGM representing the WDIC

issued the show-cause notice to the Company as well as to the petitioners requiring them to show-cause as to why they should not be declared as

Ã¢â‚¬Å“Wilful DefaultersÃ¢â‚¬. The petitioners filed their response to the show-cause notice but did not object to the issue of show-cause notice by the

DGM. A personal hearing was granted in the matter and by the impugned order dated 07.12.2020, the Company and the petitioners were declared as

Ã¢â‚¬Å“Wilful DefaultersÃ¢â‚¬â€‹ but, were given 15 days window period to file representation against this order to the Review Committee.

11. The petitioners on 15.12.2020 submitted their representation to the Review Committee. The Review Committee vide order dated 23.03.2021 has

rejected this representation and confirmed the impugned order dated 07.12.2020.

12. Now, there is no dispute that the issue of declaring any person or entity as a wilful defaulter is governed by the RBIÃ¢â‚¬â„¢s Master Circular dated

01.07.2015. This Master Circular consolidates the instructions on this issue up to 30.06.2015. Para no. 2 of the Master Circular contents guidelines for

determining wilful defaulters. In particular, para no. 2.1.3 indicates the events in which a wilful default would deemed to have occurred. This includes

inter alia the events where the unit had defaulted in meeting its payment/repayment to the lender even it has the capacity to honor such obligations;

non-utilization of finances for specific purposes for which it was availed of but, was defaulted for other purposes; siphoning of the funds that not being

released for the specific purpose for which they were obtained; disposal or removal of movable fixed assets or immovable property given to secure a

term loan without knowledge of bank/lender. This clause provides identification of wilful default should be made keeping in view the track record of

the borrowers and should not be based on isolated transactions/incidents. Most importantly, this Clause provides that default be categorized as wilful

must be intentional, deliberate, and calculated.

13. Para no. 2.5 of the Master Circular provides for penal measures that should be initiated by the banks and financial institutions against the wilful

defaulters identified in terms of para no. 2.1.3 of the Master Circular. From the perusal of sub-para no. (a) to

(d) and para no. 2.5, it is evident that penal measures are quite substantial and severe. Therefore, this paragraph itself provides that it would be

imperative on the part of the bank and financial institutions 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 are 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.

14. Para no. 3 of the Master Circular provides for a mechanism of identification of the wilful defaulters. In the first place, 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. Secondly, if the Committee concludes that 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.

Thirdly, 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. Fourthly, as regards a non-

promoter/non-whole-time director, the provisions of Section 2(60) of the Companies Act, 2013 must be kept in mind.

15. Para no. 4 provides for criminal action against wilful defaulters and para no. 5 provides for reporting with which we are not concerned for the

present.

16. The Master Circular, therefore, not only provides for the event in which wilful default would be deemed to have been occurred but, also requires

that the default to be categorized as wilful must be intentional, deliberate, and calculated. The mechanism for identification of wilful default

incorporates inter alia principle of natural justice and fair play including, in particular, the requirement of recording all reasons. Shri HiraniÃ¢â‚¬â„¢s

contention will therefore have to be examined having regard to such provisions of the Master Circular.

17. Para no. 3(b) of the Master Circular refers to the issuance of show-cause notice by the WDIC. In this case, the show-cause notice has been

issued by the DGM. However, on perusal of such show-cause notice, we find that the DGM has merely acted on the order and directions of the

WDIC. Para no. 4 of the show-cause notice dated 22.10.2020 makes it clear that the same is issued as per the order and directions of the WDIC.

From the perusal of the show-cause notice, we are quite satisfied that the show-cause notice is in fact has been issued by the WDIC itself though, the

same may have been communicated by the DGM in terms of the order and directions of the WDIC. Therefore, the show-cause notice itself cannot be

said to be vitiated on the ground urged by Shri Hirani, on behalf of the petitioners. Besides, we find that even the Petitioners quite correctly proceeded

on this position and did not even raise any dispute on this score before the WDIC or the Review Committee.

18. In response to the show-cause notice, the petitioners filed detailed submissions. The WDIC was expected to consider such submissions and

thereafter issue an order recording a conclusion of wilful default and the reasons for the same. This is clear from what is set out in para no. 3(d) of

the Master Circular. However, from the perusal of the impugned order dated 07.12.2020 made by the WDIC, we find that the WDIC has, in tabular

form, referred, in brief, to the allegations in the show-cause notice, the selective response to the allegations and thereafter, recorded conclusion that

the petitioners and the Company are wilful defaulters. In support of such conclusion, the impugned order, in a quite cursory manner, has used the

following expressions:- Ã¢â‚¬Å“the reply given by the company is not acceptableÃ¢â‚¬. Ã¢â‚¬Å“the reply given by the company does not commensurate the

default criteria.Ã¢â‚¬â€‹

19. The impugned order dated 07.12.2020 also states that borrowers have accepted having opened accounts in other banks in their reply or they have

invested funds in associate concerns. Shri Hirani points out that there are no such admissions and in any case, the detailed submissions in the context

of the alleged opening of bank accounts or investments have not even been referred to, much less considered and evaluated in the impugned orders.

There is merit in this contention because the impugned order does not reflect any such consideration.

20. In terms of the mechanism provided in the Master Circular, the petitionersÃ¢â‚¬â„¢ representation against the order dated 07.12.2020 was referred to

the Review Committee, which disposed of said representation by the impugned order dated 23.03.2021. Again, the perusal of the impugned order

dated 26.03.2021 indicates that even Review Committee has simply paraphrased the expressions used by the WDIC in its order dated 07.12.2020 to

uphold the impugned order dated 07.12.2020. Even the Review Committee has referred to the so-called admissions on the part of the petitioners and

the Company. The Review Committee, in addition, has referred to and relied upon the valuation of Shri K. R. Phadke to conclude that the facts

mentioned therein are correct and based upon the same, the criteria for declaring the petitioners and the Company as wilful defaulter stands fulfilled.

Importantly, even the order of the Review Committee simply proceeds to state that submissions made on behalf of the Company are not acceptable

without giving any explanation as to why or based on what reason such submissions are not acceptable.

21. Therefore, in the peculiar facts of the present case, we are quite satisfied that the impugned orders dated 07.12.2020 and 26.03.2021 are non-

speaking orders containing no reasons to back the conclusion recorded in the same. The requirement of recording of reasons cannot be downplayed

by merely contending that powers exercised by the WDIC or the Review Committee are only administrative and not quasi-judicial or judicial. The

Master Circular, which governs the issue of declaring person or entity as wilful defaulter itself provides in para no. 3(b) that the WDIC has to consider

the submissions made in response to the show-cause notice and only thereafter issue an order recording the fact of wilful default and the reasons for

the same. Besides, having regards to consequence that issue upon declaration of a person or entity as a wilful defaulter, the principles of natural

justice will have to be read into the decision- making process. The requirement of giving reasons is now accepted as one of the facets of the principles

of natural justice.

22. In the case of National Highways Authority of India Vs. Madhukar Kumar [MANU/SC/0698/2021], the HonÃ¢â‚¬â„¢ble Supreme Court has held that

it is settled law that the reasons are harbinger between the mind of the maker of the order to the controversy in question and the decision or

conclusion arrived at. It also excludes the chances to reach arbitrary, whimsical or capricious decision or conclusion. The reasons assure an inbuilt

support to the conclusion/decision reached. The order when it affects the right of a citizen or a person, irrespective of the fact, whether it is quasi-

judicial or administrative fair play requires recording of germane and relevant precise reasons. The recording of reasons is also an assurance that the

authority concerned consciously applied its mind to the facts on record. It also aids the appellate or revisional authority or the supervisory jurisdiction

of the High Court under Article 226 or the appellate jurisdiction of this Court under Article 136 to see whether the authority concerned acted fairly and

justly to mete out justice to the aggrieved person. Similarly, in the case of S. N. Mukherjee Vs. Union of India [(1990) 4 SCC 594], the HonÃ¢â‚¬â„¢ble

Supreme Court has held that even an administrative authority, exercising judicial or a quasi-judicial power, must record reasons for its decision. This is

subject to the exception where the requirement has been expressly or by necessary implication done away.

23. The impugned orders in the present case have recorded conclusions without indicating the reasons in support of the same. Use of mere expression

like the one referred to in paragraph 18 above does not amount to giving of reasons. The reasons must reflect some application of mind to the

submissions made in the response to the show-cause notice failing which an impression is legitimately created that there is no consideration of such

submissions. As noted, even para no. 3(b) of the Master Circular provides for consideration of such submissions before making the order declaring a

person or an entity as a wilful defaulter and the record of reasons in support of the conclusion.

24. In the precise context of the Master Circular dated 01.07.2015, the Division Bench of this Court in M/s. Kanchan Motors (supra) was pleased to

set aside the orders made by the WDIC and the Review Committee because such orders were found to be non-reasoned or non-speaking orders. The

Division Bench did not approve the practice of simply recording conclusions without any reasons to back the same. The Division Bench observed that

the absence of reasons in the order of the Review Committee amounts to a denial of justice since it is now well-settled that reasons are live links

between the minds of decision taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity for

objectivity so that the affected party can know why the decision has gone against him. One of the statutory requirements of natural justice is spelling

out the reasons for the order made, in other words, a speaking order. Even in respect of administrative orders, the giving of reasons is one of the

fundamentals of good administration. Based on all these observations, the Division Bench set aside the orders impugned before it on the ground that

such orders were non-speaking and non-reasoned.

25. Similarly, in Gunwant Deopare (supra) another Division Bench of this Court held that before any declaration as wilful defaulter is made, the

fairness and reasonableness demand that the concerned borrower is served with an order recording the facts of wilful default and the reasons for the

same. Further, it is also necessary that the WDIC and the Review Committee are satisfied that the default is intentional, deliberate, and calculated and

such satisfaction must be reflected in the orders to be made by the WDIC and the Review Committee. Since the orders impugned before the Division

Bench were bereft of the reasons and there was no satisfaction about default being intentional, deliberate, and calculated, the same were set aside.

26. Since we propose to set aside the impugned orders on the ground that they contain no reason or are non-speaking orders, we do not wish to go into

the issue concerning the non-supply of valuation report relied upon by the WDIC and the Review Committee. But we do feel that to avoid any

challenges based on a failure of natural justice or even as a measure of fairness, it would be better if this valuation report is made available to the

petitioners so that the petitioners can make their submissions on the same. For the present, however, we make it clear that we are setting aside the

impugned orders mainly on the ground that they contain no reasons in support of their conclusion and in that sense are non-speaking orders.

27. We dispose of this petition by making the following order:-

(i) Subject to the caveat in paragraph nos. 4 & 5 of this judgment and order, we set aside the impugned orders qua the petitioners only and not the

Company.

(ii) The respondents are granted liberty to proceed from the stage of issuance of show-cause notice dated 22.10.2020 and make such orders as may

be appropriate in terms of the Master Circular dated 01.07.2015.

(iii) Rule is made absolute to the aforesaid extent only.

There shall be no order as to costs.