

IN THE HIGH COURT OF TELANGANA AT HYDERABAD

W.P. No. 36737 of 2022

Between:

Mr Ritesh Kumar Agarwal and others

... Petitioners

And

State Bank of India and others

... Respondents

JUDGMENT PRONOUNCED ON: 15.04.2024

THE HON'BLE MRS JUSTICE SUREPALLI NANDA

1. Whether Reporters of Local newspapers : Yes
may be allowed to see the Judgment?
2. Whether the copies of judgment may be : Yes
marked to Law Reporters/Journals?
3. Whether Their Lordships wish to : Yes
see the fair copy of the Judgment?

SUREPALLI NANDA, J

THE HON'BLE MRS JUSTICE SUREPALLI NANDA

W.P. No. 36737 of 2022

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➤ Head Note:

!Counsel for the Petitioners: Mr S.Raja Gopalan

^counsel for Respondents: Mr Srinivas Chitturu

? Cases Referred:

1. 2023 (6) SCC 1

HON'BLE MRS JUSTICE SUREPALLI NANDA

W.P. No. 36737 of 2022

ORDER:

Heard Mr S.Rajagopalan, learned counsel appearing on behalf of the petitioners and Mr Srinivas Chitturu, learned standing counsel appearing on behalf of the respondents.

2. The petitioners approached the Court seeking payer as under:

"to issue any writ or order or direction more particularly one in the nature of writ of Certiorari and call for the Records pertaining to Declaration of petitioners vide orders No.SBI/SAMB/SEC/JVK/LRS/2020-2021/287, dated 28th July 2021 passed by Wilful Defaulter Identification Committee (Second Respondent herein) and consequential orders passed vide order dated 23.02.2022 by Wilful Defaulter Review Committee (3rd respondent herein) and quash the aforementioned orders declaring the petitioners as Wilful Defaulters."

3. The case of the petitioners as per the averments made by the petitioners in the affidavit filed by the petitioners in support of the present writ petition is as under:

a) The 1st and 2nd Petitioner herein are suspended promoters of Rajvir Industries Limited, a company incorporated under companies act and having Corporate Identification Number L17116TG2004PLC044053 and the Respondent No.1 had classified the account of Rajvir Industries Limited as a Non-Performing Account on 29.06.2014.

b) Thereafter, the 1st Respondent in the month of September 2019, had filed an application for initiation of Corporate Insolvency Resolution Process (CIRP) of Rajvir Industries Limited with C.P. (IB) No 747/7/HDB/2019. Aggrieved by the same, the Petitioners had challenged the said application on the grounds that the Default date i.e. 29.06.2014 is more than 3 years prior to filing of CIRP application and further by virtue of Section 18 of limitation act the said application for initiation of CIRP is liable to be dismissed.

c) The Respondent had issued a Show Cause notice dated 14.11.2019 wherein it was cited that the Wilful Defaulter

Identification Committee had examined the conduct of the account and utilization of credit facilities.

d) The 1st petitioner through vide letter dated 27.11.2019, requested the Respondent herein to share the copy of Forensic Audit Report of Chaturvedi & Co, so as to enable the promoters to provide the necessary clarifications and reply. However, the respondent through letter dated 29.11.2019, refused to share the copy of the report stating that the said report is confidential and meant for internal purposes only. Thereafter, the 1st petitioner had sent a reply letter to the same vide reply letter dated 13.12.2019.

e) The respondent bank had on 10.08.2020 issued a notice for personal hearing by Wilful Defaulter Identification Committee and the said meeting was scheduled for virtual hearing on 28.08.2020. Thereafter, the 1st petitioner through letter dated 14.08.2020 and in the first hearing on 28.08.2020 has reiterated his request for forensic audit report of Chaturvedi & Co to the 1st respondent.

f) Petitioner Nos. 1 & 2, vide their letter dated 08.12.2020 requested the respondent bank to grant exemption to the

guarantors to loan availed by M/s Rajvir Industries Limited on the ground that they are not involved in the day to day operations of the M/s Rajvir Industries Limited.

g) Thereafter, the petitioner has attended the hearing scheduled on 22.12.2020 and same request was made by the petitioner to the Wilful Defaulter Committee i.e., to provide the petitioner with the Forensic Audit Report.

h) Subsequently, the Petitioner vide his letter 01.03.2021 addressed to Respondent, reiterated the contents of their letters dated 13.12.2019, 12.02.2020 and 28.08.2020 and once again requested the Respondent to provide the petitioners with the copy of Forensic Audit Report relied upon by Wilful Defaulter Identification Committee. Along with the said letter, the Petitioner had annexed the ledger account statement pertaining to Standard Chartered Bank Payment and receipts for the financial year 2017-2018 and 2018-2019.

i) More so, as per the said ledger account pertaining to Standard Chartered Bank for the financial year 2017-2018 and 2018-2019, it is apparent from the face of record that the monies so received by way of discounting of Export bills, were

used for repayment of interest and principal of monies due and payable by Rajvir Industries Limited to Consortium of bankers, for purchase of raw materials, salaries, etc. and the said expenses were solely incurred for maintaining the business affairs of Rajvir Industries Limited as Going Concern.

j) In the meantime, on 26.04.2021, the NCLT had admitted the CIRP application filed by the respondent bank and appointed Shri. T.S.N.Raja as Resolution Professional for administering the Corporate Insolvency Resolution Process. On 01.06.2021, the Resolution Professional issued letters addressing the Petitioner Nos. 1 & 2 herein restraining them from attending the office and/or factory of Rajvir Industries Limited.

k) Aggrieved by the same, the 1st and 2nd Petitioner had challenged the impugned order dated 01.06.2021, vide I.A. No 277 of 2021 in C.P(IB) No 747/7/HDB/2019 and in the said Interlocutory application, the Resolution Professional was arrayed as 1st Respondent and State Bank of India representing the consortium of creditors was arrayed as the 2nd Respondent.

l) Thereafter, the Respondent vide notice dated 16.06.2021, scheduled the appearance of Petitioners before the Wilful Defaulter Identification Committee on 02.07.2021.

m) The Rajvir Industries Limited, being a Medium, Small and Micro Enterprise, had submitted their Expression of Interest to the Resolution Professional in the month of July, 2021 and the same was rejected by the Resolution Professional on the grounds that Rajvir Industries Limited was not a Medium, Small and Micro Enterprise. Aggrieved by the same, the petitioners filed an I.A No. 370 of 2021 in C.P.(IB) No 747/7/HDB/2019.

n) The petitioners herein had appeared before the willful defaulter committee and requested them to provide them with forensic audit report and also highlighted the fact that since the Resolution Professional had restrained the 1st and 2nd Petitioner from attending the office of Rajvir Industries Limited from 01.06.2021 to 03.09.2021 the petitioners were handicapped from providing relevant details to support their case.

o) Furthermore, the committee has identified the petitioners as Wilful Defaulters vide Proceedings dated 28.07.2021. The Petitioner Nos. 1 & 2 were informed of the said identification of promoters as Wilful Defaulters on 10.08.2021, for which email reply dated 11.08.2021 was issued highlighting the fact that the Resolution Professional has restrained the Petitioners from entering in to office premises for procuring the vital piece of evidence and requested the Wilful Defaulter Identification Committee to rescind the identification of promoters as Wilful Defaulter Identification Committee.

p) On 19.08.2021, the petitioners/promoters had issued another letter addressed to Respondent, highlighting the fact that IDBI Bank, another member of Consortium of Creditors who has also initiated wilful defaulter proceedings on or about the same time, had found that the reply submitted by 1st and 2nd Petitioners, regarding routing of funds are found to be satisfactory and hence the dealing group at IDBI Bank has decided to drop Wilful Default charge "Routing of funds through non-lending banks" against the petitioners (promoter/Director/Guarantors) of Rajvir Industries Limited.

q) The NCLT, through its orders dated 03.09.2021 in I.A No 277 of 2021 in C.P(IB) No 747/7/HDB/2019, permitted the promoters (Petitioner Nos. 1 & 2) to attend office and/or factory and declared the impugned order dated 01.06.2021 of Resolution Professional as being contrary to laws.

r) The Resolution Professional through memo dated 20.06.2022, filed in I.A. No. 370 of 2021 in C.P. (IB) No 747/7/HDB/2021 submitted that, the Respondent bank herein had declared the Promoters/petitioners as Wilful Defaulter on 23.02.2022 and neither the same was informed nor the copies of the Order dated 23.02.2022 were supplied and it was only upon several requests made by the petitioner, the said declaration by the respondent bank was supplied to the petitioners.

s) That the Resolution Professional vide his memo dated 20-06-2022, filed in I.A No 370 of 2021 in C.P.(IB) No 747/7/HDB/2021 submitted that the Respondent bank herein had declared the Promoters as Wilful Defaulter on 23.02.2022.

t) The petitioners had submitted a resolution plan for Rajvir Industries Limited on 03.08.2022 and a revised

resolution plan dated 13.08.2022 as per instructions of Consortium of Bankers and the Respondent is now taking umbrage under the declaration of Petitioners as Wilful Defaulter and is refusing to consider the resolution plan submitted by the Petitioners despite the Order of NCLT in I.A No 370 of 2021 in C.P. (IB) No.747/7/HDB/2019 and thereby causing irreparable losses and mental stress to the petitioners. Hence, this Writ Petition.

PERUSED THE RECORD

4. Order dated 28.09.2022 passed in W.P.No.3655 of, 36737 and 36751 of 2022, reads as under:

“At request of Sri Srinivas Chitturu and Sri V.S.N.Raju, learned counsel appearing for respondents to file counter, list on '12.10.2022.

According to the petitioner, despite specific request being made, Respondent bank did not furnish forensic audit and RP has restrained the petitioner from discharging his duties from 01.06.2021 to 03.09.2021. He had submitted resolution plan on 29.06.2022 pursuant to NCLT order. COC meeting was on 09.08.2022. Even then, respondents-banks have declared the petitioners as willful defaulters.

Whereas, Sri Srinivas Chitturu, learned counsel appearing for IDBI would submit that IDBI bank has already furnished the names of the petitioners as willful defaulters to the credit information companies. Therefore, the petitioners herein have to implead Reserve Bank of India.

In view of the same, the matter requires examination.

Till 12.10.2022, the respondents-Banks are directed not to take further steps pursuant to the order dated 08.11.2021 passed by Willful Defaulter Review Committee of IDBI Bank. Liberty is granted to the petitioners to take steps to implead Willful Defaulter Review Committee of Industry Development Bank of India (IDBI) also Reserve Bank of India (RBI)

5. **Counter filed on behalf of the respondent and in particular paras 9, 11, 17 and 22, read as under:**

"9. It is submitted that the Forensic Audit Report is a confidential document of the Answering Respondent and it contains various issues including lapses on the part of the Answering Respondent's personnel, if any; deficiencies in the system, if any and other material, the disclosure of which would jeopardize the interests of the Bank. Therefore, such documents cannot be parted with by the banks. Moreover, the Forensic Audit Report was obtained at the cost of the Answering Respondent and based on the records of the borrower company, bank statements, etc. **Hence, the Petitioners have no right to get a copy of it.** In spite of this the Bank provided to the Petitioners the relevant extracts from the said Report and such supply was acknowledged by one of the Petitioners. This material fact was deliberately concealed by the Petitioners. Hence the writ petition is devoid of merits and liable to be dismissed.

11.They do not even require any report much less the Forensic Audit Report, to submit their defense in respect of the observations. Despite this the Answering

Respondent supplied the relevant extracts from the Report. It is submitted that it is obvious that the Writ Petition has been filed with a clear motive of stalling the recovery process of public money, by resorting to these frivolous petitions which are devoid of any merit and liable to be dismissed with exemplary costs.

17. It is submitted that the Petitioners, by showing the interim stay granted by this Hon'ble court on 28.09.2022 is trying to push their resolution plan, in-spite of their ineligibility. **Without admitting the contentions of the Petitioners, even if the Hon'ble Court sets aside the declaration, the Answering Respondent would be at liberty to initiate fresh proceedings for declaration of Petitioners as willful defaulters, after rectifying the mistakes if any, pointed out by the Hon'ble Court while disposing of the Writ Petition.** In such a case, it would amount that the provisions of Section 29A would get violated if the Petitioners are allowed to push their resolution plan under the guise of orders of this Hon'ble High Court. Therefore, the Answering Respondent humbly prays the Hon'ble Court not to allow the Petitioners to stall the recovery process by taking advantage of the proceedings and the orders in the interest of public policy, economy, etc.

22. In reply to para 11-15, it is submitted that the bank at every stage of proceedings provided sufficient opportunity to the petitioner to substantiate their stand

against the proposal of declaration of willful defaulters. The Answering Respondent Bank has meticulously complied with the procedure and acted in a fair manner. In fact, the admissions of the Petitioner in operating with other banks and using the funds for expenditure is contrary to the sanction terms, themselves prove the misconduct on the part of Petitioners and nothing else is required to prove them as defaulters.

6. The learned counsel appearing on behalf of the petitioners mainly puts forth the following submissions:

- i) The declaration of the petitioners vide order No.SBI /SAMB/SEC/JVK/LRS/2020-2021/287, DATED 28.07.2021 passed by Wilful Defaulter Identification Committee (2nd respondent herein) and consequential orders passed vide order dated 23.02.2022 by Wilful Defaulter Review Committee (3rd respondent herein) declaring the petitioners as wilful defaulters needs to be quashed since the Fundamental Rights of the petitioners mandated in Article 19(1)(g) of Constitution of India had been grossly violated by State Bank of India.
- ii) The respondent had steadfastly refused to provide the forensic Audit Report relied by them for the purpose of identification and Classification of petitioners herein as wilful defaulters despite repeated requests by the petitioners herein and hence, the declaration of petitioners herein as wilful defaulters is liable to be set aside.
- iii) The resolution professional had restrained the petitioner herein from attending office and/or factory from 01.06.2021

to 03.09.2021 and thereby the petitioners were restrained from producing crucial documents pertaining to their submissions and claims before the wilful defaulter Identification Committee.

iv) The wilful Defaulter Identification Committee despite being aware that the petitioners were restrained by resolution professional proceeded to identify the petitioners as wilful defaulter's, hence, the declaration of the petitioners herein as wilful defaulters is liable to be set aside.

v) The petitioners did not receive any order issued by the wilful defaulter Review Committee and hence, the wilful Defaulter Review Committee admittedly did not apply its mind independently prior to declaring the petitioners as wilful defaulters and hence the declaration of petitioners as wilful defaulter is liable to be set aside.

vi) Reliance was placed on Forensic Report to declare the petitioners as wilful defaulters which was however, never shared with the petitioners.

vii) Respondent bank with a malafide intention to prevent the petitioners from filing a resolution plan as mandated under Section 240A of Insolvency and Bankruptcy Code has classified the petitioners as wilful defaulters and that too without following the principles of natural justice and hence, the declaration of the petitioners as wilful defaulter is liable to be set aside.

Based on the aforesaid submissions, learned counsel for the petitioners contends that the writ petition needs to be allowed.

7. Learned standing counsel appearing on behalf of the respondent bank mainly putsforth the following contentions:

i) Writ petition is not maintainable against the respondent bank since the relationship between the petitioners and the Answering respondent is that of a Borrower and Creditor and based on commercial contracts.

ii) The respondent bank had not been discharging any statutory duty or public duty while dealing with recovery of its dues, hence, on this count also writ petition is not maintainable.

iii) The respondent bank at every stage of proceedings provided sufficient opportunity to the petitioners to substantiate their stand against the proposal of declaration of wilful defaulters.

iv) The Answering respondent bank has meticulously complied with the procedure and acted in a fair manner.

v) Since the petitioners had failed to give proper response/reply in respect of the payments made from saving bank account which is not satisfactory and unacceptable, the recommendation to include the petitioners names as wilful

defaulters was made since petitioners are liable to pay substantial amount to the respondent bank and are trying to evade payment and are resorting to litigation.

Based on the aforesaid submissions and placing reliance on the averments made in the counter affidavit filed by the respondents the learned counsel appearing on behalf of respondent Nos. 1, 2 and 3 contended that the writ petition has to be dismissed in limini.

DISCUSSION AND CONCLUSION

8. The Apex Court in the judgment in State Bank of India and Others Vs. Rajesh Agarwal & Others at para 81 reported in 2023 (6) SCC 1, dealing with a case of declaration of account as fraud observed that principles of natural justice demand that the borrowers must be served a notice given an opportunity to explain the findings in the forensic audit report before the account is declared as fraud. This itself indicates that Forensic Audit Report must be necessarily supplied to the borrower prior to declaring an account as fraud. This Court in principle opines that the same principles of natural justice need to be necessarily followed prior to

declaring the petitioners as defaulters or willful defaulters and the petitioners should be furnished with the copy of the Forensic Audit Report prior to such declaration by the Respondent Bank and consistent with the principles of natural justice, the respondent bank should provide an opportunity to petitioners by furnishing a copy of the Forensic Audit Report and allow the petitioners a reasonable opportunity to submit a representation before declaring the petitioners as willful defaulters which admittedly as borne on record had not been followed in the present case even as per the averments made by the respondent in the counter affidavit filed at paras 9, 11, 17 (referred to and extracted above).

9. A bare perusal of the averments made by the petitioners in the affidavit filed in support of the present writ petition at para 12 clearly indicates that the 1st petitioner had requested State Bank of India vide his letter dated 27.11.2019 to provide them the copy of the forensic audit report, but State Bank of India vide

their letter dated 29.11.2019, had declined to provide the Forensic Audit Report to the petitioners herein.

The said letter dated 29.11.2019 of the Deputy General Manager, State Bank of India, reads as under:

“With reference to your letter dated 27.11.2019, in reply to our letter No.SAM/SEC/ESN/919 dated 14.11.2019, we have to advise that as per the Bank’s extent instructions, forensic audit report is private and confidential and meant for our internal purposes. It is, therefore, not possible to share the report with you.

02. As regards clarifications sought by us, please state/advise your version/clarifications on the issues mentioned in our notice.

03. In case we do not receive your clarifications as per the timeline mentioned in our notice, it shall be deemed that you do not intend to clarify or do not have anything to clarify. The bank would proceed accordingly for further action as per the notice.”

10. A bare perusal of the averments made in the counter affidavit filed on behalf of the respondent bank in particular, paras 9, 11, 17 (referred to and extracted above) and the contents of the letter dated 29.11.2019 of the Deputy General Manager, SBI, clearly indicates that Forensic Audit Report had not been furnished to

the petitioners prior to passing of the impugned orders dated 28.07.2021 and 23.02.2022 declaring the petitioners as willful defaulters and the same is contrary to the relevant procedure to be followed by the respondent bank for conducting the proceedings for willful defaulters declaration and the same clearly indicates that the respondent bank admittedly committed a mistake.

11. Taking into consideration:

(a) the law and the view laid down by the Apex Court in the judgment reported in 2023 (6) Supreme Court Cases page 1 at paras 81 and 95 in State Bank of India v Rajesh Agarwal and applying the said principles to be followed before classifying borrowers account as fraud in principle to the facts of the present case as necessary principles to be followed by the respondent bank prior to declaring the petitioners herein as willful defaulter's,

(b) duly taking into consideration the aforesaid facts and circumstances of the case,

(c) duly considering the interim orders granted in favour of the Petitioners dated 28.09.2022 which are in force as on date,

(d) duly considering the averments made in the counter affidavit filed on behalf of the respondent bank, in particular, paras 9, 11, 17 (referred to and extracted above),

(e) duly considering the contents of the letter dated 29.11.2019 of the Deputy General Manager, SBI, which clearly indicate that the Forensic Audit report had not been furnished to the petitioners' prior to passing of the impugned orders dated 28.07.2021 passed by the 2nd respondent and 23.02.2022 passed by the 3rd respondent.

The Writ Petition is allowed as prayed for.

12. It is however, observed that the Respondent Bank would be at liberty to reinitiate the proceedings afresh for declaration of the petitioners as willful defaulters, if so advised, in accordance to law in conformity with principles of natural justice. However, there shall be no order as to costs.

Miscellaneous petitions, if any, pending shall stand closed.

SUREPALLI NANDA, J

Dated: 15.04.2024

Note: L.R. copy to be marked

b/o

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