IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3254 OF 2018

Manjula Bhatia ...Petitioner

Versus

Bank of Baroda & Ors. ...Respondents

Mr. Amir Arsiwala a/w Ms. Radha Naik and Ms. Shivani Kumbhojkar i/b. The Law Point for Petitioner.
Mr. Harsh Sheth i/b. MDP Legal for Respondent No.1.
Ms. Tanya Srivastava i/b. MLS Vani & Associates for Respondent No.3.
Mr. Mithilesh Challu i/b. I.V. Merchant & Co. for Respondent No.5.

CORAM : M. S. Sonak &
Jitendra Jain, JJ.

DATED: 14 November 2024

PC.:-

1. Heard learned counsel for the parties.

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

3. The Petitioner, a Non-Executive Woman Director of PSL Limited, challenges the impugned letter dated 16 July 2018 declaring her a “willful defaulter.”

4. The record shows that a show-cause notice dated 22 November 2016 was issued only to the Company, M/s PSL Limited, of which the Petitioner was a Non-Executive Woman Director. Admittedly, no separate notice was issued to the Petitioner.

5. At the personal hearing held on 15 February 2017, the Managing Director of PCL Limited pointed out that Non-Executive

Women Directors like the Petitioner could not be declared willful defaulters. The Managing Director reiterated this position in his communication dated 17 February 2017 addressed to the Committee of Executives on willful defaulters, Bank of Baroda. In this communication, the petitioner was explicitly mentioned under the caption of Woman Director.

6. The Master Circular dated 1 July 2015, under which the impugned order is purported to be made, provides in clause 3(b) that if the Committee concludes that an event of willful default has occurred, it shall issue a show cause notice to the concerned borrower and a promoter / whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of willful default and the reasons for the same. An opportunity for a hearing is also contemplated if the Committee feels such an opportunity is necessary. As noted earlier, no notice was issued to the Petitioner as contemplated by clause 3(b) of the Master Circular.

7. Clause 3(d) of the Master Circular also provides that certain safeguards must be adopted before a non-promoter or non-whole-time director can be regarded as an officer in default. Clause 3(d) of the Master Circular dated 1 July 2015 is transcribed below for the convenience of reference: -

> *"(d) As regard a non-promoter / non-whole time director, it should be kept in mind that Section 2(60) of the Companies Act, 2013 defines an officer who is in default to mean only the following categories of directors:*
>
> *(i) whole-time director*
>
> *(ii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;*
>
> *(ii) every director, in respect of a contravention of any of the provisions of Companies Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation*

> *in such proceedings and who has not objected to the same, or where such contravention had taken place with his consent or connivance.*
>
> *Therefore, except in very rare cases, a non-whole time director should not be considered as a wilful defaulter unless it is conclusively established that:*
>
> *i. he was aware of the fact of wilful default by the borrower by virtue of any proceedings recorded in the minutes of meeting of the Board or a Committee of the Board and has not recorded his objection to the same in the Minutes; or,*
>
> *ii. the wilful default had taken place with his consent or connivance.*
> *The above exception will however not apply to a promoter director even if not a whole time director.*
>
> *(iv) As a one-time measure, Banks / Fls, while reporting details of wilful defaulters to the Credit Information Companies may thus remove the names of non-whole time directors (nominee directors / independent directors) in respect of whom they already do not have information about their complicity in the default / wilful default of the borrowing company. However, the names of promoter directors, even if not whole time directors, on the board of the wilful defaulting companies cannot be removed from the existing list of wilful defaulters.*

8. The above-quoted clause also contemplates a notice to non-promoters or non-whole-time directors should there be any proposal declaring such non-promoters and non-whole-time directors as officers in default or willful defaulters. Besides, the show cause notice must allege the *prima facie* existence of the circumstances referred to in clause 3(d) of the Circular.

9. Despite the above, Respondent No.1 issued the impugned order dated 16 July 2018, declaring the Petitioner a willful defaulter without issuing any notice. The impugned letter is almost non-speaking and does not consider the circumstance that no notice was issued to the Petitioner. The communication dated 17 February 2017, addressed by the Managing Director of PSL Limited, pointed out that Non-Executive Women Directors could not be declared "willful defaulters." Thus, this is a case of failure of natural justice. This has also not been dealt with or

considered. There is no finding that the circumstances spoken of in clause 3(d) of the master circular were fulfilled in the case of the petitioner, who was admittedly a non-whole-time woman director. These are sufficient grounds to quash the impugned letter dated 16 July 2018.

10. In ***State Bank of India vs. Jah Developers Private Limited & Ors.***[1], the Hon'ble Supreme Court in the context of the Master Circular dated 1 July 2015 read with Circular dated 1 July 2013 as made the following observations at paragraph 24 which are transcribed below for the convenience of reference:-

> *"**24.** Given the above conspectus of case law, we are of the view that there is no right to be represented by a lawyer in the in-house proceedings contained in Para 3 of the Revised Circular dated 1-7-2015, as it is clear that the events of wilful default as mentioned in Para 2.1.3 would only relate to the individual facts of each case. What has typically to be discovered is whether a unit has defaulted in making its payment obligations even when it has the capacity to honour the said obligations; or that it has borrowed funds which are diverted for other purposes, or siphoned off funds so that the funds have not been utilised for the specific purpose for which the finance was made available. Whether a default is intentional, deliberate, and calculated is again a question of fact which the lender may put to the borrower in a show-cause notice to elicit the borrower's submissions on the same. However, we are of the view that Article 19(1)(g) is attracted in the facts of the present case as the moment a person is declared to be a wilful defaulter, the impact on its fundamental right to carry on business is direct and immediate. This is for the reason that no additional facilities can be granted by any bank/financial institutions, and entrepreneurs/promoters would be barred from institutional finance for five years. Banks/financial institutions can even change the management of the wilful defaulter, and a promoter/director of a wilful defaulter cannot be made promoter or director of any other borrower company. Equally, under Section 29-A of the Insolvency and Bankruptcy Code, 2016, a wilful defaulter cannot even apply to be a resolution applicant. Given these drastic consequences, it is clear that the Revised Circular, being in public interest, must be construed reasonably. This being so, and given the fact that Para 3 of the Master Circular dated 1-7-2013 permitted the borrower to make a representation within 15 days of the preliminary decision of the First Committee, we are of the view that first and foremost, the Committee comprising of the Executive*

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> *Director and two other senior officials, being the First Committee, after following Para 3(b) of the Revised Circular dated 1-7-2015, must give its order to the borrower as soon as it is made. The borrower can then represent against such order within a period of 15 days to the Review Committee. Such written representation can be a full representation on facts and law (if any). The Review Committee must then pass a reasoned order on such representation which must then be served on the borrower. Given the fact that the earlier Master Circular dated 1-7-2013 itself considered such steps to be reasonable, we incorporate all these steps into the Revised Circular dated 1-7-2015. The impugned judgment [SBI v. Jah Developers (P) Ltd., LPA No. 113 of 2015 sub nom Punjab National Bank v. Kingfisher Airlines Ltd., 2015 SCC OnLine Del 14128 : (2016) 154 DRJ 164] , [Kingfisher Airlines Ltd. v. Union of India, 2015 SCC OnLine Bom 6075 : (2016) 2 Mah LJ 838] is, therefore, set aside, and the appeals are allowed in terms of our judgment. We thank the learned Amicus Curiae, Shri Parag Tripathi, for his valuable assistance to this Court."*

11. The above observations support the Petitioner's claim that the impugned letter was issued in breach of the principles of natural justice that the master circular had required the decision-makers to follow.

12. We quash and set aside the impugned letter dated 16 July 2018 on the above grounds in so far as it concerns the Petitioner. However, we reserve liberty to Respondent No.1 to issue afresh show cause notice if it deems it necessary and proper and, after that, to proceed in accordance with the law, insofar as the Petitioner is concerned. Further, we restrain Respondent Nos.2 to 5 from acting upon the impugned letter dated 16 July 2018 against the Petitioner based on the impugned letter, which, in any event, we have quashed *qua* the Petitioner.

13. The Rule accordingly is made absolute by quashing the impugned letter dated 16 July 2018 to the extent it affects the Petitioner.

14. The Respondents Nos.6 to 12 have not instituted any petition before us, and in this petition, we do not deem it appropriate to grant

them any relief. If they are aggrieved by the impugned letter dated 16 July 2018, they are at liberty to challenge the same in accordance with the law. All contentions in this regard are kept open.

15. This Petition is disposed of in the above terms without any cost order.

16. All concerned to act on an authenticated copy of this order.

(Jitendra S. Jain, J.) (M. S. Sonak, J.)