

2 SCOB [2015] HCD 27**HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)**

WRIT PETITION NO. 9147 of 2008.

Shafi A Choudhury

..... Petitioner.

-Versus-

Government of Bangladesh and others.

..... Respondents.

Mr. Rfique-Ul- Hoque, Senior Advocate with
Mr. Muhammad Saifullah Mamun, Advocate
.... For the petitioner.Mr. Md. Mamunur Rashid, Advocate
... For the respondent No.4.Mr. Syed Hasan Zobair, Advocate.
... For respondent No.2.

Judgment on 03 April, 2014.

Present:**Mr. Justice Md. Ashfaul Islam****And****Mr. Justice Md. Ashraful Kamal****Banking Companies Act 1991:****Section 5 GaGa read with section 27 KaKa:**

The process of enlistment of any defaulter name in the CIB list is a continuing process within the meaning of section 5 GaGa read with section 27 KaKa of Banking Companies Act 1991 and also read with Article 42 of Bangladesh Bank Order 1972. If all these provisions are read together one and only inference that could be made is that if any person or a company is indebted to in any manner with any financial institution and the debt remains unpaid, it is the duty of the respondent Bangladesh Bank in its turn to enlist the name of the incumbent in the CIB list nothing more nothing less.

...(Para 18)

JUDGMENT**Md. Ashfaul Islam,J:**

1. At the instance of the petitioner, Shafi A. Choudhury, this Rule Nisi was issued in the following terms:

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why report of Credit Information Bureau (CIB) Bangladesh Bank classifying the petitioner as a defaulter borrower under borrower Code No.913 and serial No. 323 in respect of a Loan granted by the Respondent Pubali Bank Ltd. in favour of the Pro-forma Respondent No.5 [M/S Albert Davit (Bangladesh Ltd)] should not be declared to have been made without lawful authority and is a nullity. At the time of issuing Rule an order of injunction was passed restraining the Respondent No.3 from reporting through the Credit Information Bureau showing a defaulter borrower under borrower Code No.913 and serial No. 323 in respect of a Loan granted by the Respondent Rupali Bank Ltd. in favour of the Pro-forma Respondent No.5 [M/S Albert Davit (Bangladesh Ltd)] should the be declared to have been made without lawful authority and is a nullity.”

2. The fact leading to the Rule, in short, is that Respondent No.5 [M/S Albert Davit (Bangladesh Ltd)] is a private limited company established on 21.10.1950. By President Order No.27 the said company was declared as an abandoned property by the government and vested upon Bangladesh Chemical Industries Corporation (BCIC). On 05.11.1971 the Eastern Mercantile Bank (presently Respondent Pubali Bank Ltd.) granted a credit facility under CC (Pledge) and CC (Hypo) for the

amount of Tk.65 lac and 5 lac respectively in favour of the said company. In the year 1984 Government under its "Disinvestment Policy" decided to hand over the said Company to the private sector. Accordingly, the Government published tender notice to sell the said Company. The petitioner as a businessman, along with six other family members participated in a tender floated by the Ministry of Industries for the purchase of shares of the said Company. The said tender was awarded to the petitioner and his family members at Tk.13.77 crores. An agreement for sale was executed on 07.04.1984 between the Ministry of Industries for transfer of shares in the said Company subject to joint audit and verification of all assets including liability to the Respondent No.3 and 4 (hereinafter referred to as the Pubali Bank). The shares of the said Company were never transferred to the petitioner and his family members. As such the petitioner and his family members do not hold any shares in the said Company.

3. On 31.10.1992 the petitioner sent a letter to the Pubali Bank for holding necessary audit to determine the actual liability of the said Company. The respondent Pubali Bank, on the other hand, by several letters asked the petitioner to clear up the outstanding dues and requested the respondent – Bangladesh Bank to write off amount of Tk.53,79,627.00 from the interest account and Tk.39,92,742.00 from the interest suspended account.

4. The Pubali Bank vide its letter No.7893 dated 05.09.1995 informed the company that the liability of said company stood at Tk.1,15,03,916.25 and the same amount is payable in two year installments. This liability was determined by the management of the Pubali Bank and approved by its Board of Directors. The respondent Pubali Bank stated in its letter dated 05.09.1995 that for waiver of interest the permission of Bangladesh Bank would be required since the petitioner was a director of Pubali Bank Limited. The Pubali Bank failed to realize that the petitioner merely acted as an authorized representative/agent of the said company. He had no shares in the said company nor was a director of the same. The respondent wrongly associated the petitioner with the debts and liabilities of the said company. So the petitioner is not a defaulter.

5. Thereafter several years have gone passed but no solution could be reached between the petitioner and writ respondents for different reasons. In paragraph 35 to 37 regard have been taken on several decisions of the Appellate Division and this Division to highlight that the petitioner company is a artificial person and the loan was taken by an artificial person and in the event of default by such artificial person in repayment of the loan, such default of the company would not ipso facto render any member or director of such artificial person a defaulter. Under the said circumstances the petitioner being aggrieved by the enlistment of his name in the CIB list moved this Division and obtained the present Rule and order of injunction as aforesaid.

6. Mr. Rafique-Ul Hoque, the learned Senior Advocate appearing with Mr. Muhammad Saifullah Mamun, the learned Advocate for the petitioner after taking us with the petition and the relevant Annexures thereto mainly contends that although the petitioner has been acting as ex-officio Chairman and Managing Director of the Albert Davit (BD) Ltd. but without holding any share of the said company he cannot be held personally liable to pay dues of the Company since he did not give any personal guarantee or undertaking to pay the said liability. The shares of the said company have not yet been transferred in the name of the petitioner. The petitioner has just been acting as the designated Chairman and Managing Director of the said Company for mere management purpose and he is not the proprietor or owner of the same as mentioned above. The shares of the said Company are still lying with the Ministry of Industries. In such situation, the debts and liability of the said Company cannot legally be attributed to the petitioner and hence he is not a defaulter borrower. He further argued that the Company paid Tk.115,03,916.25 to the Pubali Bank as full and final settlement of liability of the company according to the decision taken in the 252nd and 683rd Board of Directors Meeting of Pubali Bank.

7. Mr. Hoque further submits that enlistment of the name of the petitioner in CIB report showing him as defaulter borrower cannot be sustained in that the elementary principle of Company law is that the company is a legal person and the director is not liable for any debt of the company. Therefore,

the learned Senior Counsel concludes that for the aforesaid reasons the petitioner's name appearing in the list of CIB showing him as a defaulter borrower should be declared to have been done illegally having no legal effect.

8. Mr. Md. Mamunur Rashid, the learned Advocate, on the other hand, by filing affidavit-in-opposition on behalf of respondent No.4 Pubali Bank Ltd. opposes the Rule. Mr. Syed Hasan Zobair, the learned counsel by filing affidavit-in-opposition also opposes the Rule appearing on behalf of respondent No.2-Bangladesh Bank. In supplementary affidavit filed by the respondent – Pubali Bank the other version of the case has been depicted in that admittedly the petitioner took loan over the company Albert David (Bangladesh) Ltd. from the Government along with its assets and liabilities vide agreement dated 07.04.1984. Since inception of taking over the company, it had loan liability with the respondent bank. After execution of agreement the petitioner took over the company vide Ref: No.ADL/GM/83-84 dated 07.04.1984. The petitioner after taking over the company applied to the respondent bank on 21.01.1985 for renewal and enhancement of L/C limit of the company pursuant to which loan was renewed and enhanced vide sanction letter dated 09.04.1985. Subsequently the loan was renewed and enhanced/reduced on several times. As security against the loan the petitioner executed various charge documents such as D.P. Note, Letter of continuity, Stock delivery letter, Stock ownership declaration etc. The petitioner also executed personal guarantee as security against the loan.

9. The Ref: No.ADL/GM/83-84 dated 07.04.1984, application dated 20.01.1985 for renewal and enhancement of loan, renewal of loan vide sanction letter dated 09.04.1985, charge documents and personal guarantee have been annexed to the petition and marked as Annexure- 3, 3(a), 3(b), 3(c), 3(d), 3(e), 3(f) and 3(g).

10. It has been submitted that on application of the petitioner the liabilities of the company was rescheduled vide HO/CD/5614/2001 dated 28.08.2001 which was communicated to the petitioner vide respondent bank's letter No.PBL/HO/CD/6034/2001 dated 12.09.2001. The petitioner having accepted the reschedulement submitted a cheque for Tk.1,03,53,524.62. Regarding the cheque respondent bank wrote a letter to the petitioner on 27.08.2001 informing him that his cheque would have been accepted by the bank had he given an undertaking in writing that the cheque amount was for down payment against its total liabilities of Tk. 4,69,54,072.62 as on 31.03.2001. Thereafter the petitioner confirmed that cheque for Tk.1,03,53,524.62 was made as down payment of liabilities of Albert David (Bangladesh) Ltd.

11. The learned counsel further submits that existence of the company could not be imagined of without the petitioner. The petitioner was all in all of the Albert Davit (Bangladesh) Ltd. He took over the company being a successful bidder along with its assets and liabilities. After taking over the company its loan was renewed, enhanced and rescheduled on his application. He deposited the down payment after reschedulement. All the loan amount used to be drawn by cheque under his own signature. So he is wholly & solely responsible for the defaulted loan liabilities of the company. In law a company is an artificial juristic person. If it is so, then Albert Davit (Bangladesh) Ltd. may be considered as a body of which the petitioner Mr. Shafi A. Choudhury is its heart/soul. The respondent bank filed Artha Rin Suit No.45/2003 in the Artha Rin Court, No.3, Dhaka against the company Albert Davit (Bangladesh) Ltd. impleading the petitioner as its sole responsible person. The suit has been decreed on 25.04.2012 against the petitioner. As such it has been established by the Court's verdict that the petitioner is the only person wholly and solely responsible for repayment of liabilities of the company.

12. Therefore, on the basis of above submissions the learned counsel for the respondent–Pubali Bank as well as Bangladesh Bank by summing up their arguments unequivocally submit that according to Article 43 and 44 of Chapter IV of the Bangladesh Bank Order 1972, Bangladesh Bank is empowered to collect credit information from banks and financial institutions. On the basis of the credit information provided by the concerned Bank or financial Institution, Bangladesh Bank prepares the CIB report of the concerned persons and organizations in good faith in order to discharge its

Zte kZ^o vte th, tLj vcx MhxZv tKvb cvej K wj wgtUW tKvgcxbi cwi Pj K bv nBtj A_{ev} D³ tKv=úvbxZ Zrvvi ev Dnvi tkqti i Ask 25% Gi Awak bv nBtj, D³ cvej K wj wgtUW tKv=úvbx t^omsukó cázóvb evj qv MY^o nBte bv |

17. The legislature in the said amended law inserted the word “t^o b^o v^o i” and cleared the ambiguity whatsoever or at all in respect of definition and scope of defaulter borrower. Further in section 5 (Chha) of the Banking Companies Act definition of “t^o b^o v^o i” has been given in the following manner :

“5(0) t^o b^o v^o i A_{ev} v^o f^o q^o i Zi f^o v^o m^o v^o m^o, Lwi^o ev BRivi w^o f^o i t^o Z ev Ab^o tKvb f^o v^o t^o Aw^o R^o m^o h^o v^o m^o m^o v^o e^o v^o M^o h^o Y^o K^o v^o i e^o v^o tKv=úvbx ev cázóvb Ges tKvb R^o w^o g^o b^o v^o i B^o n^o v^o i A^o s^o f^o n^o B^o t^o e |

Section 27 KaKa stands as it is:

“27KK| tLj vcx FY MhxZvi Zvj K^o v^o BZ^o w^o | (1) cáz^o K^o e^o v^o s^o K^o tKv=úvbx ev Aw^o R^o cázóvb , mgq mgq, Dnvi tLj vcx FY MhxZvi Zvj K^o v^o e^o v^o s^o j^o v^o t^o k^o e^o v^o s^o t^o K^o t^o c^o Y^o K^o v^o i t^o e |

(2) Dc-av^o i^o v^o (1) Gi Aaib cáz^o B^o Zvj K^o v^o e^o v^o s^o j^o v^o t^o k^o e^o v^o s^o K^o t^o t^o k^o i m^o K^o e^o v^o s^o K^o tKv=úvbx I Aw^o R^o cázóvb t^o c^o Y^o K^o v^o i t^o e |

(3) tKvb tLj vcx FY MhxZvi Abk^o t^o K^o v^o e^o v^o s^o K^o tKv=úvbx ev Aw^o R^o cázóvb tKv^o i^o f^o c^o FY m^o v^o e^o v^o c^o v^o b^o K^o v^o i t^o e |

(4) Av^o c^o v^o Z^o: e^o j^o e^o v^o Ab^o tKvb Av^o B^o t^o b^o h^o v^o v^o w^o K^o O^o v^o K^o b^o v^o t^o K^o b^o tLj vcx FY MhxZvi w^o e^o i^o t^o x^o FY c^o v^o b^o K^o v^o i e^o v^o s^o K^o tKv=úvbx ev t^o q^o i g^o Z Aw^o R^o cázóvb c^o v^o i^o j^o Z Av^o B^o Ab^o v^o t^o i g^o v^o v^o t^o q^o i K^o v^o i t^o e |”

18. If we evaluate all these the laws having bearing on the issue together with the factual aspect of the case it becomes clear that the agreement that was executed in the year 1984 clearly speaks that the petitioner bought the incumbent company (“AS IS Where Is Basis”) assuming all the liabilities of the same. Further we have already stated that there is no dispute that the petitioner in his individual capacity obtained the loan from the respondent-Pubali Bank after furnishing charge documents and complying with the other boundened formalities. And Banking Companies Act has pinpointed the situation that leads to enlistment of the name of any defaulter borrower (t^o b^o v^o i) in the CIB list. In many a decision the Appellate Division and this Division finally set at rest that the process of enlistment of any defaulter name in the CIB list is a continuing process within the meaning of section 5 GaGa read with section 27 KaKa of Banking Companies Act 1991 and also read with Article 42 of Bangladesh Bank Order 1972. If all these provisions are read together one and only inference that could be made is that if any person or a company is indebted to in any manner with any financial institution and the debt remains unpaid, it is the duty of the respondent Bangladesh Bank in its turn to enlist the name of the incumbent in the CIB list nothing more nothing less. With the amendment of section 5 GaGa the definition as it could be found now contains a wider version of the category of persons to be included as defaulter borrower.

19. That being the situation we hold that the main argument of Mr. Rafique-Ul Hoque is a fallacious one under the facts and circumstances of the present case. By bringing the elementary principle of company law as it has been stated the settled provision of Banking Companies Act cannot be given a go by. The petitioner herein is indeed a defaulter borrower within section 5 GaGa read with section 27 KaKa of the Bank Company Act and Article 42 of Bangladesh Bank Order 1972.

20. On the conspectus, the irresistible result that follows that this Rule should be discharged with cost.

21. In the result, the Rule is discharged with cost. The order of stay granted earlier by this Court is hereby recalled and vacated.

22. Communicate this order at once.