Ratul Puri vs Bank Of Baroda on 29 February, 2024

Author: Purushaindra Kumar Kaurav

Bench: Purushaindra Kumar Kaurav

2024:DHC:1645

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
BEFORE
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV
+ W.P.(C) NO.4128 OF 2023 & CM APPL. 15982/2023

Between: -

RATUL PURI
S/O LATE SHRI DEEPAK PURI
R/O H.NO.2 VILLAGE MANAGANJ WARD NO.11
JAITHARI, ANUPPUR,
MADHYA PRADESH- 484330

ALSO AT:
A-187, NEW FRIENDS COLONY
NEW DELHI - 110025 ..... Petitioner

(Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Vaibhav Mishra, Mr. Karan Batura, Mr. Ekansh Mishra and Mr. Jayant Chawla, Advocates)

AND

BANK OF BARODA
THROUGH GENERAL MANAGER
SH. V.K. KHANDELWAL
STRESSED ASSETS MANAGEMENT BRANCH
4th FLOOR, RAJENDRA BHAWAN
RAJENDRA PLACE, NEW DELHI - 110008 ..... Respondent

(Through: Mr. Chinmoy Pradip Sharma, Senior Advocate alongwith Mr. Kush Sharma, Standing Counsel and Mr. Nishchaya Nigam, Advocate)

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Pronounced on: 01.03.2024

JUDGMENT

1. By way of this Writ Petition filed under Article 226 of the Constitution of India, the Petitioner has challenged the impugned order dated 23.3.2023 passed by the Review Committee of the Respondent, Bank of Baroda ("Respondent Bank"). By the said impugned order, the Review Committee of the Respondent Bank confirmed the order dated 19.8.2022 passed by the Identification Committee, declaring the Petitioner as a Wilful Defaulter under the "Master Circular on Wilful Defaulters, 2015" ("Master Circular"), issued by the Reserve Bank of India ("RBI").

Facts of the case

2. It is stated that the Petitioner is the Chairman of Hindustan Power Projects Pvt. Ltd., which runs a 1200 mega-watt power plant and supplies electricity to three States namely, U.P., M.P. and Haryana. The Petitioner's company has availed loan facilities amounting to thousands of crores from various banks and it is stated that there has never been any default in servicing the debt since inception.

3. However, the Respondent Bank sought to declare the Petitioner as a Wilful Defaulter with respect to his association in another company known as Moser Baer Solar Ltd. ("MBSL") under the Master Circular, thereby, depriving the Petitioner from availing credit facilities for his present and prospective business enterprises.

4. It is stated that, another company namely, Moser Baer India Limited ("MBIL") was a company incorporated in 1983 by the father of the Petitioner to manufacture storage discs. MBIL exported discs to large multinational companies like Sony, Hitachi, TDK, Fuji, Mitsubishi etc.

5. As per the case of the petitioner, around the year 2005, it was realized that the business of storage discs began to slow down due to the technological advancement and emergence of new mediums of storage like Cloud. Hence, it was decided to diversify the business into more upcoming fields, at that time, like the solar cells and modules.

6. It is submitted that, accordingly, Moser Baer Solar Limited ("MBSL"), the company in question, was incorporated on 6.3.2007 and was engaged in the business of manufacture of solar cells and modules. MBSL was a 100% subsidiary of MBIL. As stated, the solar business of MBSL was valued at more than USD 1 billion at the relevant time when several institutional investors made investment in MBSL. The Petitioner was appointed as Director of MBSL on 29.3.2007.

7. It is stated that MBSL had availed credit facilitates from various Banks including the Respondent Bank from 2007 onwards. The Respondent Bank sanctioned credit facility to MBSL on 20.9.2007, 22.2.2008, 5.4.2011 and 5.4.2013.

8. It is stated that when MBSL was started in 2007, the global photovoltaic industry which manufactures solar cells and modules was passing through rapid growth. The manufacturing was concentrated in Europe, USA and Japan. The Chinese share of manufacture was only about 15% at

that time.

9. It is further submitted that, however, post the global financial crisis of 2008, the prices of solar panels in European market collapsed. Simultaneously, the Chinese government infused a stimulus package of USD 570 billion for its domestic solar panel industry, which included USD 43 billion in subsidies.

10. It is also submitted that, armed with substantial subsidies, the Chinese companies started dumping solar cells and modules across the globe, including in India, at significantly lower prices. This led to bankruptcies in companies in almost all jurisdictions involved in manufacturing of solar cells. The USA, in order to protect its domestic industry, imposed a 70% anti-dumping duty on Chinese companies.

11. It is stated that consequently, the Directorate General of Anti- Dumping and Allied Duties of India had to also make recommendation for imposition of anti-dumping duty of Chinese solar cells and modules. However, the Government of India, did not act on the said recommendation, plausibly to promote energy in India at cheaper rates.

12. It is the case of the petitioner that in 2008, the Petitioner started to have disagreements with his father over the strategies to run the business. As a result, the Petitioner started to dissociate with the business of MBSL.

13. It is further submitted that in 2010, pursuant to a family arrangement, the Petitioner transferred his entire shareholding in MBSL to his father and completely dissociated himself with the day to day working of MBSL.

14. On 30.4.2012, the Petitioner resigned as the Executive Director of MBSL and Form-32 to that effect was filed with the Registrar of Companies ("RoC"). The Petitioner, on 16.11.2022, completely exited MBSL, when he resigned as whole time Director of MBSL and Form-32 to that effect was filed with the RoC.

15. It is submitted by the Petitioner that as MBSL faced financial decline and there was a looming threat of loan repayment default, the lenders, including the Respondent Bank, considered MBSL's case for Corporate Debt Restructuring ("CDR") in accordance with the CDR Master Circular ("CDR Master Circular") issued by the RBI. To ascertain the sustainability of CDR, the lenders required MBSL to submit a Flash Report, which would present the reasons for its decline, its viability and plan for revival. The said Flash Report would then be forwarded by the lenders to an independent agency for obtaining a Techno Economic Viability ("TEV") Report. The TEV Report would indicate whether the restructuring plan proposed by MBSL was financially viable or not. The lender banks would also get conducted a Stock Audit of MBSL.

16. In compliance thereof, on 24.3.2012, MBSL submitted an application and its Flash Report to the lender banks to the Corporate Debt Restructuring Cell ("CDR-Cell"). In the said Flash Report, MBSL stated that it is a step-down subsidiary of MBIL. MBSL gave a brief summary of its profile and

outlined the reasons for losses incurred in the recent years. It stated that despite losses, MBSL continued to service all its debts till 30.11.2011 and even repaid the principal sum of the term loans. Due to cash flow problems, MBSL was facing difficulties in servicing the debt since January, 2012. MBSL submitted a financial proposal for its revival to the lender banks based on restructured debt.

17. After considering the Flash Report submitted by MBSL, the lender banks vide letter dated 24.5.2012 noted that the Corporate Debt Restructuring-Empowered Group ("CDR-EG") in its meeting held on 7.5.2012 had decided to admit the proposal of MBSL for CDR. The CDR-EG nominated Punjab National Bank as the Monitoring Institution and it was entrusted to prepare the draft final restructuring proposal. It was stated that MBSL was placed as Class-B borrower under the CDR Master Circular.

18. Before finalizing the restructuring package, the lender banks decided to call for a Technical Viability Study of MBSL from Feedback Infra; Economic Viability Assessment from PNB Investments Services Ltd. and Stock Audit from M/s Mehrotra and Mehrotra, Chartered Accountants.

19. MBSL had written a letter dated 4.4.2012 to the CDR-EG stating that the Flash Report of MBSL had incorrectly mentioned the Petitioner as Director of MBSL. It was stated that the Petitioner had already exited MBSL and hence, any decision by the CDR-EG about CDR may be taken on the assumption that the Petitioner was not part of MBSL. The aforesaid assertion was reiterated by MBSL to the CDR-EG on 16.7.2012.

20. On 20.7.2012, a Joint Lenders Meet ("JLM") was held to discuss the final CDR package of MBSL. The lender banks discussed multiple aspects of restructuring and agreed on various aspects.

21. On 10.10.2012, another JLM took place. The JLM took into consideration the Technical Viability Study dated September, 2012 of MBSL from Feedback Infra; Economic Viability Assessment from PNB Investments Services Ltd. and Stock Audit Report dated 29.8.2012 from M/s Mehrotra and Mehrotra, Chartered Accountants of MBSL. The representative of Feedback Infra, which conducted the Technical Viability Study of MBSL stated that the demand for solar panels was increasing substantially, both nationally as well as internationally. With the anticipated anti-dumping duties on Chinese companies, the viability of MBSL would improve. It was suggested that the core strategy and operating plans of MBSL are technically feasible.

22. The lender banks, thereafter, issued a Final Restructuring Scheme ("FRS") of MBSL. On 21.1.2013, the lender banks further issued a modified FRS in respect of MBSL.

23. On 18.3.2013, the CDR-Cell issued a letter stating that on 21.1.2013, the CDR-EG has approved the proposed restructuring package of MBSL. The Punjab National Bank was appointed as the Monitoring Institution, leading the CDR process along with other consortium banks. The details of approved package were outlined in Annexure-1. MBSL was classified as Class-B borrower under the CDR Scheme, which has Classes from A to D. In the Class-B category, MBIL was classified as "Corporate/promoters affected by external factors and also having weak resources, inadequate

vision and not having support of professional management." The Class-C is assigned to those corporates who "diverted funds" to unrelated fields with or without lenders' permission.

24. On 22.3.2013, a meeting of the Monitoring Committee of lender banks took place. In this meeting, it was agreed that in lieu of personal guarantee of the Petitioner, MBSL offered a collateral security of Rs.33 Crores, for which MBSL prayed for two months' time.

25. On 28.3.2013, in accordance with the approved debt restructuring package, a Master Restructuring Agreement ("MRA") was executed between MBSL and the lender banks, whereby, the debt of MBSL was restructured. Subsequently, a supplementary MRA dated 27.5.2014 was executed between MBSL and the lender banks.

26. On 5.6.2013, MBSL and lender banks executed Trust and Retention Account Agreement ("TRA") which required MBSL to transact, for its day-to-day functioning, only through the TRA Account. A supplementary TRA was executed on 27.5.2012.

27. On 20.9.2013, the CDR-EG noted that the lender banks have agreed for substitution of personal guarantee of the Petitioner with collateral security of Rs.33 Crores.

28. Subsequently, several JLM and Monitoring Committee meetings took place on 27.5.2014, 12.6.2014, 17.6.2014, 5.12.2014, 18.5.2015 and 2.3.2016. In the meeting held on 27.5.2014, the lender banks agreed to reduce the collateral security of Rs.33 Crores to Rs.25.53 Crores in lieu of the Petitioner's personal guarantee. Accordingly, the Petitioner did not furnish his personal guarantee for the CDR package nor did he participate in any of the deliberations for the approval of the CDR package.

29. However, the CDR-Cell, on 30.11.2016, decided to exit the lender banks from the CDR package on account of its failure.

30. On an application filed by one of the financial creditors under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC"), the NCLT vide order dated 14.11.2017, appointed an Interim Resolution Professional.

31. On 1.3.2019, one Haribhakti & Co. LLP, Chartered Accountants, submitted their Forensic Audit Report to the Resolution Professional of MBSL.

32. On 13.3.2020, the Respondent Bank issued a Show Cause Notice to the Petitioner under the Master Circular alleging that it was proposed to classify him as Wilful Defaulter under the Master Circular as MBSL defaulted to meet its loan repayment obligations. It was alleged that MBSL has diverted funds on the basis of four allegations levelled in the said Show Cause Notice.

33. On 30.3.2020, the Petitioner submitted a reply stating that he was neither the Director nor shareholder of MBSL. It was stated that the Show Cause Notice was issued belatedly i.e., eight years after the Petitioner ceased to be Director of MBSL. The Respondent Bank had not provided the

necessary relied upon documents to the Petitioner. Hence, the Show Cause Notice deserved to be withdrawn.

34. Subsequently, the Petitioner, on 30.7.2020, again received the same Show Cause Notice dated 13.3.2020.

35. On 12.8.2020, the Petitioner sent another reply to the Respondent Bank reiterating that he did not hold any position in MBSL since 16.11.2012. The relied upon documents are yet to be provided by the Respondent Bank. The Respondent Bank was again requested to withdraw the Show Cause Notice.

36. The Respondent Bank, on 31.10.2020, issued a letter to the Petitioner for personal hearing, which was challenged by the Petitioner before this Court vide W.P. (C) No.8729 of 2020. The said Writ Petition was disposed of by this Court vide order dated 6.11.2020 directing the Respondent Bank to provide copies of all the relied upon documents to the Petitioner and adequate opportunity was directed to be given to the Petitioner to respond to the Show Cause Notice after receipt of such documents.

37. On 6.11.2020, the Respondent Bank fixed the personal hearing for 12.11.2020.

38. On 12.11.2010, during the personal hearing, the Petitioner requested for the relied upon documents.

39. On 11.1.2021, the Petitioner received another notice of personal hearing for 15.11.2021. Along with the letter dated 11.1.2021, the Respondent Bank furnished a copy of Forensic Audit Report.

40. Thereafter, certain correspondences took place between the parties in relation to the personal hearing.

41. The Petitioner found that his name was appearing on the website of TransUnion CIBIL Ltd. as Wilful Defaulter, which was placed at the behest of the Respondent Bank in relation to MBSL.

42. On 22.5.2022, the Petitioner requested the Respondent Bank for removal of his name from the website. The Petitioner sent reminder letters dated 9.7.2022 and 26.7.2022.

43. On account of inaction by the Respondent Bank, the Petitioner filed W.P. (C) No.12737 of 2022 before this Court. During the pendency of the said Writ Petition, the Identification Committee of the Respondent Bank vide order dated 19.8.2022 declared the Petitioner as Wilful Defaulter under the Master Circular. This Court, vide its order dated 8.9.2022, disposed of the said Writ Petition directing the Respondent Bank to send an intimation for deleting the Petitioner's name from the defaulters list. This Court gave liberty to make a representation before the Review Committee of the Respondent Bank against the order dated 19.8.2022 passed by the Identification Committee.

44. In the order dated 19.8.2022, the Identification Committee dropped allegation Nos.1 and 2 against the Petitioner. However, the Identification Committee held that allegation Nos.3 and 4 are acts of Wilful Default.

45. On 22.9.2022, the Petitioner filed a representation before the Review Committee of the Respondent Bank against the order dated 19.8.2022 passed by the Identification Committee.

46. The Review Committee of the Respondent Bank, however, rejected the said representation and by the impugned order dated 23.3.2023, confirmed the order dated 19.8.2022 passed by the Identification Committee, thereby confirming its declaration of the Petitioner as Wilful Defaulter. The Review Committee also confirmed allegation Nos.3 and 4 as acts of Wilful Default.

47. Against the aforesaid impugned order, the present Writ Petition has been filed. This Court vide interim order dated 29.3.2023 stayed the operation of the impugned order.

48. I have heard Mr. Dayan Krishnan, learned Senior Counsel appearing for the Petitioner along with Mr. Vaibhav Mishra, Mr. Karan Batura, Mr. Ekansh Mishra and Mr. Jayant Chawla, Advocates and Mr. Chinmoy Pradip Sharma, learned Senior Counsel appearing for the Respondent Bank alongwith Mr. Kush Sharma, Standing Counsel and Mr. Nishchaya Nigam, Advocate, at length, and perused the record.

Relevant discussion in W.P. (C) No. 4181/2023

49. This Court in W.P. (C) No. 4181/2023 titled as Ratul Puri v. Bank of Baroda, has extensively dealt with the scheme of RBI's Master Circular for declaring a person as "Wilful Defaulter", "standard of proof" to decide the validity of event of Wilful Default under the Master Circular, scope of judicial review in administrative action and scheme of CDR issued by RBI.

50. The scheme of the RBI's Master Circular for declaring a person as "Wilful Defaulter", as discussed in terms of paragraph nos.48 to 59 is reproduced as under:-

> 48. Before going into the facts of the case, it is essential to examine the scheme of the Master Circular. In order to put in place a system 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, the RBI, in exercise of power under Sections 21 and 35A of the Banking Regulation Act, 1949 issued the Master Circular dated 1.7.2015.
>
> 49. Originally, a scheme for declaration as wilful defaulter was framed by the RBI in 1999 on the recommendations made by the Central Vigilance Commission, which was subsequently modified in 2002. At the time of consideration of the petitioner s case, the Master Circular of 2015 was in force.

> 50. Clause 2.1.3 of the said Master Circular defines the event of "wilful default". In the present case, the petitioner has been declared a wilful defaulter under Clauses 2.1.3(b) and (c).

Clause 2.1.3(b) provides that an event of wilful default shall be deemed to be occurred if the unit has defaulted in loan repayment obligation; has not utilized the loan amount for the purpose it was granted and diverted the funds for other purposes. Clause 2.1.3(c) provides that an event of wilful default shall be deemed to be occurred if the unit has defaulted in meeting loan repayment obligations; has siphoned off the funds and the funds are not utilized for the specific purpose for which the loan was availed.

51. The last part of Clause 2.1.3 also mandates that the identification of wilful default should be made keeping in view of track record of the borrower and not on the basis of isolated transactions/ incidents. It specifically mandates that a "default" in order to be categorized as "wilful" must be "intentional, deliberate and calculated". Clause 2.1.3(b) and (c), which have been invoked in the present case, reads as under:

> "2.1.3 Wilful Default: A 'wilful default' would be deemed to have occurred if any of the following events is noted:
>
> (a) The unit has defaulted in meeting its payment / repayment obligations to the lender even when it has the capacity to honour the said obligations.
>
> (b) The unit has defaulted in meeting its payment / repayment obligations to the lender and has not utilised the finance from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purposes.
>
> (c) The unit has defaulted in meeting its payment / repayment obligations to the. lender and has siphoned off the funds so that the funds have not been utilised for the specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.
>
> (d) The unit has defaulted in meeting its payment / repayment obligations to the lender and has also disposed off or removed the movable fixed assets or immovable property given for the purpose of securing a term loan without the knowledge of the bank /lender.

The identification of the wilful default should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/incidents. The default to be categorised as wilful must be intentional, deliberate and calculated."

52. A bare reading of Clauses 2.1.3(b) and (c) clearly reveals that an event of wilful default can only take place when the "loan amount" lent by the bank is diverted or siphoned off by the borrower, for any use, other than for which the loan was granted.

53. Clause 2.2 of the Master Circular defines "diversion of funds" and "siphoning of funds" as under:

> "2.2 Diversion and siphoning of funds: The terms "diversion of funds" and "siphoning of funds" should construe to mean the following: -
>
> 2.2.1 Diversion of funds, referred to at para 2.1(b) above, would be construed to include any one of the undernoted occurrences:
>
> (a) utilisation of short-term working capital funds for long-term purposes not in conformity with the terms of sanction;
>
> (b) deploying borrowed funds for purposes / activities or creation of assets other than those for which the loan was sanctioned;
>
> (c) transferring borrowed funds to the subsidiaries / Group companies or other corporates by whatever modalities;
>
> (d) routing of funds through any bank other than the lender bank or members of consortium without prior permission of the lender;
>
> (e) investment in other companies by way of acquiring equities / debt instruments without approval of lenders;
>
> (f) shortfall in deployment of funds vis-à-vis the amounts disbursed / drawn and the difference not being accounted for.

2.2.2 Siphoning of funds, referred to at para 2.1(c) above, should be construed to occur if any funds borrowed from banks / FIs are utilised for purposes un- related to the operations of the borrower, to the detriment of the financial health of the entity or of the lender. The decision as to whether a particular instance amounts to siphoning of funds would have to be a judgement of the lenders based on objective facts and circumstances of the case."

54. The definition of "diversion of funds" and "siphoning of funds", as aforesaid, also makes it explicitly clear that the event of "diversion of funds" or "siphoning of funds" can take place only when the "borrowed funds" are deployed or used, for any purpose, other than for which the loan was sanctioned. The Master Circular further places an obligation on the bank to make the judgment about "diversion of funds" or "siphoning of funds" based on "objective facts and circumstances of the case."

55. Clause 2.5 of the Master Circular provides for initiation of penal measures against the persons or entities declared as wilful defaulter under Clause 2.1.3 of the Master Circular, which includes non-grant of additional loan facility by any bank or financial institution in the future; debarring them from floating new venture for a period of five years from the date of removal of name as wilful defaulter; initiation of criminal proceedings; change of management of borrower unit;

non-induction of the person in the Board of the company etc. The last part of Clause 2.5 places a specific obligation on the banks to put in place a transparent mechanism so that the penal provisions of the said clause are not misused and the scope of such discretionary exercise of power is kept to a bare minimum. Solitary or isolated incidents are not to be used for the use of penal action under the said clause. Clause 2.5 reads as under:

> "2.5 Penal measures In order to prevent the access to the capital markets by the wilful defaulters, a copy of the list of wilful defaulters (non-suit filed accounts) and list of wilful defaulters (suit filed accounts) are forwarded to SEBI by RBI and Credit Information Bureau (India) Ltd. (CIBIL) respectively.

The following measures should be initiated by the banks and FIs against the wilful defaulters identified as per the definition indicated at paragraph 2.1 above:

> a) No additional facilities should be granted by any bank / FI to the listed wilful defaulters. In addition, the entrepreneurs / promoters of companies where banks / FIs have identified siphoning / diversion of funds, misrepresentation, falsification of accounts and fraudulent transactions should be debarred from institutional finance from the scheduled commercial banks, Development Financial Institutions, Government owned NBFCs, investment institutions etc. for floating new ventures for a period of 5 years from the date the name of the wilful defaulter is published in the list of wilful defaulters by the RBI.
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> b) The legal process, wherever warranted, against the borrowers / guarantors and foreclosure of recovery of dues should be initiated expeditiously. The lenders may initiate criminal proceedings against wilful defaulters, wherever necessary.
>
> c) Wherever possible, the banks and FIs should adopt a proactive approach for a change of management of the wilfully defaulting borrower unit.
>
> d) A covenant in the loan agreements with the companies in which the banks/FIs have significant stake, should be incorporated by the banks/FIs to the effect that the borrowing company should not induct on its board a person whose name appears in the list of Wilful Defaulters and that in case, such a person is found to be on its board, it would take expeditious and effective steps for removal of the person from its board.

It would be imperative on the part of the banks and FIs 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."

56. Clause 2.9 provides that the RBI under the "Credit Information Companies (Regulations) Act, 2015" has granted certificate to four Credit Information Companies. The lender banks should submit a list of wilful defaulters to such Credit Information Companies. This would make the list of

wilful defaulters available to banks and financial institutions on real time basis and dissuade them from grant of credit facility to such persons and entities. Clause 2.9 reads as under:

> "2.9 Reporting to RBI / Credit Information Companies
>
> (a) Banks/FIs should submit the list of suit-filed accounts of wilful defaulters of Rs.25 lakh and above as at end-March, June, September and December every year to a credit information company which has obtained certificate of registration from RBI in terms of Section 5 of the Credit Information Companies (Regulation) Act, 2005 and of which it is a member.

Reserve Bank of India has, in exercise of the powers conferred by the Act and the Rules and Regulations framed thereunder, granted Certificate of Registration to (i) Experian Credit Information Company of India Private Limited, (ii) Equifax Credit Information Services Private Limited, (iii) CRIF High Mark Credit Information Services Private Limited and (iv) Credit Information Bureau (India) Limited (CIBIL) to commence/carry on the business of credit information. Credit Information Companies (CICs) have also been advised to disseminate the information pertaining to suit filed accounts of Wilful Defaulters on their respective websites.

(b) Banks / FIs should, however, submit the quarterly list of wilful defaulters where suits have not been filed only to RBI in the format given in Annex 1.

(c) In order to make the current system of banks/FIs reporting names of suit filed accounts and non-suit filed accounts of Wilful Defaulters and its availability to the banks by CICs / RBI as current as possible, banks / FIs are advised to forward data on wilful defaulters to the CICs/Reserve Bank at the earliest but not later than a month from the reporting date.

d) After examining the recommendations of the Committee to Recommend Data Format for Furnishing of Credit Information to Credit Information Companies (Chairman: Shri. Aditya Puri) it has been decided to implement the following measures with regard to reporting and dissemination of information on wilful defaulters:

a. Banks/FIs may continue to furnish the data on wilful defaulters (non-suit filed accounts) of Rs. 25 lakhs and above for the quarter ending June 30, 2014 and September 30, 2014 to RBI in the existing format.

b. In terms of Credit Information Companies (Regulation) Act, 2005, banks/FIs are advised to furnish the aforementioned data in respect of wilful defaulters (non-suit filed accounts) of Rs. 25 lakhs and above for the quarter ending December 31, 2014 to CICs and not to RBI. Thereafter, banks/FIs may continue to furnish data in respect of wilful defaulters to CICs on a monthly or a more frequent basis. This would enable such information to be available to the banks/FIs on a near real time basis.

Explanation In this connection, it is clarified that banks need not report cases where

(i) outstanding amount falls below Rs.25 lakh and

(ii) in respect of cases where banks have agreed for a compromise settlement and the borrower has fully paid the compromised amount."

57. Clause 3 of the Master Circular provides the mechanism for identifying a wilful defaulter. The said provision provides that the evidence of wilful default shall be examined by a Committee headed by Executive Director or equivalent and consisting of two other senior officers of the rank of GM/DGM. If the said Committee concluded that an event of wilful default has occurred, it shall issue a show cause notice to the concerned unit or person calling for his response. After consideration of the response, a final order recording the event of wilful default, or otherwise, may be issued alongwith the reasons for the same. Wherever the Committee considers necessary, an opportunity of personal hearing should also be granted. This Committee is called as the "Identification Committee."

58. The order of the Identification Committee shall be reviewed by another Committee headed by the Chairman/MD/CEO and two other independent/non-Executive Directors of the bank. The order declaring a person as wilful defaulter shall become final only after it is confirmed by this Review Committee. The said clause also provides that under Section 2(60) of the Companies Act, 2013, an officer who is in "default" to mean only "whole time director" unless the case falls in the category of exceptions enumerated in the said clause. Clause 3 reads as under: -

> "3. Mechanism for identification of Wilful Defaulters The transparent mechanism referred to in paragraph 2.5(d) above should generally include the following:
>
> (a) The 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 and consisting of two other senior officers of the rank of GM/DGM.
>
> (b) If the Committee concludes that an 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.

(c) The Order of the Committee should be reviewed by another Committee headed by the Chairman / CEO and MD and consisting, in addition, of two independent directors of the Bank and the Order shall become final only after it is confirmed by the said Review Committee.

(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;
>
> (iii) every director, in respect of a contravention of any of the provisions of this 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 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.

A similar process as detailed in sub paras (a) to (c) above should be followed when identifying a non-

promoter/non-whole time director as a wilful defaulter."

59. Clause 4.2(iii) also provides for initiation of criminal proceedings against declared wilful defaulters, wherever necessary."

51. In terms of paragraph nos.60 to 64, this Court has made a reference to the consequences of a person or entity being declared as a Wilful Defaulter and held that the said declaration also affects the right to reputation of a person, which is also a fundamental right flowing from Article 21 of the Constitution. The concluding paragraph of the said discussion reads as under:-

> "64. As held by the Hon ble Supreme Court, the declaration of a person as wilful defaulter and barring him from credit facility in the future have civil and penal consequences, which also have the effect of adversely affecting his reputation. Thus, the declaration of a person as wilful defaulter, apart from adversely affecting the fundamental rights guaranteed under Article 19(1)(g) of the Constitution, also affects the right to reputation of a person, which is also a fundamental right guaranteed under Article 21 of the Constitution. The decisions of the Hon ble Supreme Court in the cases of Sukhwant Singh v. State of Punjab, Subramanian Swamy v. Union of India and Om Prakash Chautala v. Kanwar Bhan are noteworthy in this regard."

52. While dealing with the standard of proof to decide the validity of an event of Wilful Default under Master Circular in paragraph nos.65 to 69, it was concluded that in the test of validity of civil action on preponderance of probability, the graver the consequences of such civil action, the higher is the degree of proof required. The conclusion of the said discussion is encapsulated in the paragraph reproduced as under:-

> "69. From the aforesaid enunciation of law, it is evident that in the test of validity of civil action on preponderance of probability, the graver the consequences of such civil action, the higher is the degree of proof required. The court must first consider the existing probabilities, followed by a comparative analysis of the respective weights to be attached to the probabilities. The degree of probability is based on the subject matter. The subject matter under scrutiny is one of the circumstances to be kept in mind while deciding the degree of proof. While accepting the probability in favour of one fact over the other, the court must be in a position to say that a reasonable person could proceed with a supposition that such fact exists. This test is not only in conformity with the precedents discussed above but is also in tandem with Section 3 of the Indian Evidence Act, 1872. If this principle of law is tested on the anvil of the Master Circular, it is clear that the Master Circular entails not only grave civil, but also penal consequences. Considering the subject matter and grave civil and penal consequences, the validity of an order declaring as wilful defaulter would require a closer scrutiny as to whether such an order falls within the four corners of the Master Circular or is it otherwise.

53. The court went on to hold in terms of paragraph no.70 that if the relevant, germane and valid considerations are ignored or overlooked by an executive authority while taking a decision, the same would fail to withstand judicial scrutiny. Paragraph no.70, which accentuates the discussion on scope of judicial review in administrative action, reads as under:-

> "70. Before this Court delves deeper into the facts of the present case, it is also important to discuss the scope of judicial review in administrative action. The Hon ble Supreme Court in the case of Rajesh Agarwal (supra) has held that the act of declaring a person as wilful defaulter or fraud is in the nature of administrative action. The scope of judicial review on administrative action is well defined. It is not necessary to discuss judicial decisions in detail except to note a recent decision of the Hon ble Supreme Court in Mohd. Mustafa (supra), wherein, it was reiterated that if the discretionary power has been exercised in disregard of relevant consideration, the Court would hold the action bad in law. If the relevant, germane and valid considerations are ignored or overlooked by an executive authority while taking a decision, the same would fail to withstand judicial scrutiny. The relevant observations are as under: -
>
> ***"

54. The scheme of CDR, as discussed in paragraph nos.71 to 89, is reproduced as under:-

"71. The RBI has framed the CDR Master Circular enabling the lender banks to prepare a CDR scheme in respect of a business entity, which is struggling in meeting its existing loan repayment obligations. The CDR Master Circular requires the borrower to submit a Flash Report to the lender banks making the restructuring proposal. Wherever necessary, the lender banks would obtain a TEV Report to ascertain the viability of the company. The CDR Master Circular also requires the lender banks to change the management of the company where there has been "diversion of funds". In case of "diversion of funds", wherever necessary, the banks may also carry out forensic audit of the company. Clause 3 of the CDR Master Circular reads as under: -

"3. SCRUTINY BEFORE CDR REFERENCE/ APPROVAL 3.1 Referring Institution (RI) should ensure primafacie viabili ty of units at the time of submission of Flash Report. Wherever necessary TEV study from independent reputed agencies be conducted while drafting the final CDR package.

3.2 RI/MI may also examine the possibility of change of man agement while drafting the final CDR package. If the case has been found to be adversely affected due to incompetent management of the Company or where diversion/misuse of funds has taken place, change of management should be the first option.

3.3 Wherever necessary and specially in cases of diversion of funds, forensic audit/ special investigative audit may be got carried out by the MI."

72. Similarly, Clause 6.3 of the CDR Master Circular provides that companies indulging in frauds and malfeasance will remain ineligible for the CDR Scheme. Clause 6.3 reads as under: -

"6.3 Wilful Defaulters RBI in its guidelines on CDR mechanism has stipulated as under: While corporate indulging in frauds and malfeasance even in a single bank will continue to remain ineligible for restructuring under CDR mechanism as hitherto, the Core group may review the reasons for classification of the borrower as wilful defaulter specially in old cases where the manner of classification of a borrower as a wilful defaulter was not transparent and satisfy itself that the borrower is in a position to rectify the wilful default provided he is granted an opportunity under the CDR mechanism. Such exceptional cases maybe admitted for restructuring with the approval of the Core Group only. The Core Group may ensure that cases involving frauds or diversion of funds with mala fide intent are not covered. In view of the above, details of eligibility criteria to be followed in respect of cases of willful defaulters etc. are given in Annexure III."

73. Clause 6.3 specifically requires the Core Group of banks to "ensure that cases involving frauds or diversion of funds with mala fide intent are not covered." The said clause further provides that the "details of eligibility criteria to be followed in respect of cases of wilful defaulters etc. are given in Annexure III."

74. Annexure III, which relates to "Cases of Wilful Defaulters:

> Eligibility Criteria, Financial Viability Parameters Procedural Aspects" thereof makes reference to RBI s guidelines issued on 2.7.2012, which define "wilful default" as:
>
> "(i) The unit has defaulted in meeting its payment/ repayment obligations to the lender even when it has the capacity to honour the said obligations.
>
> (ii) The unit has defaulted in meeting its payment/ repayment obligations to the lender and has not utilized the finance from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purposes.
>
> (iii) The unit has defaulted in meeting its payment/ repayment obligations to the lender and has siphoned off the funds so that the funds have not been utilized for the specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.
>
> (iv) The unit has defaulted in meeting its payment/ repayment obligations to the lender and has also disposed off or removed the movable fixed assets or immovable property given by him or it for the purpose of securing a term loan without the knowledge of the bank/ lender."

75. The aforesaid definition of wilful default in RBI s guidelines issued on 2.7.2012 is identical to the definition of wilful default as defined in the Master Circular in question in the present case.

76. Paragraph 2 of Annexure III of the CDR Master Circular then mandates that "Banks/ FIs should take" specified "measures in identifying and reporting instances of wilful default". These steps are similar to the steps provided in the Master Circular viz. identification by Identification Committee, show cause notice to borrower, representation before Grievance Redressal Committee/ Review Committee and finally a decision.

77. Paragraph 4 restates that "Cases of Wilful Defaulter Not Eligible Under CDR". This clarifies again that cases of reported siphoning of funds or misfeasance, fraud etc. are prima facie not eligible to be covered under CDR.

78. Paragraph 5 mandates referring institution to check list of wilful defaulters as maintained by RBI/ CIBIL to verify whether any FI/ bank has reported the company as wilful defaulter and inter alia, report such instances to the CDR-EG.

79. Where a borrower is classified as a wilful defaulter, the core group may review the reasons for such classification and even such exceptional cases may be admitted for CDR, but they are required to undergo a much more onerous and rigorous process before an MRA/ TRA is executed.

80. Clause 7 of the CDR Master Circular enjoins the lender banks to classify the borrowing company in one of the four categories from A to D. Category-C is assigned where there is diversion of funds by the company:

> "7. BORROWER CLASSIFICATION FOR STIPULATIO N OF STANDARD TERMS AND CONDITIONS 7.1 It is observed that borrower -
>
> Corporate get into a stress situation because of various external and internal factors. The restructuring schemes are accordingly formulated envisaging various actions on the part of the borrowers and participating lenders. Based on experience and various features of the borrower-corporate and their promoters/sponsors, the borrower-corporate are categorized into four Classes for the purpose of stipulation of standard terms & conditions under the CDR Mechanism. The classification is as under:
>
> Borrower Class 'A':
>
> Corporate affected by external factors pertaining economy and Industry.
>
> Borrower Class 'B':
>
> Corporate/promoters affected by external factors and also having weak resources, inadequate vision, and not having support of professional management.
>
> Borrower Class 'C':
>
> Over-ambitious promoters; and borrower-corporate which diverted funds to related/unrelated fields with/without lenders' permission.
>
> Borrower Class 'D':
>
> Financially undisciplined borrower-corporate."

81. Clause 7.2 provides that:

> "The classification of each borrower-corporate shall be decided at the meeting of the CDR Empowered Group (EG) whereat the Financial Restructuring Proposal is approved. The standard terms and conditions applicable to different classes of borrowers are set out in Annexure-IV."

82. As per Clause 7.3, "Referring Institution should incorporate all applicable standard terms and conditions in the restructuring package, besides special conditions deemed necessary in specific cases..." Annexure IV in paragraph A (1) to (28), provides standard conditions for all four category of borrowers.

83. Paragraph B imposes "Additional Conditions for Borrower Class - „B (In addition to Standard Conditions Stipulated Under A)". Paragraph C imposes "Additional conditions for Borrower Class - „C (In addition to Standard Conditions Stipulated Under A & B)". Paragraph D imposes "Additional conditions for Borrower Class - „D (In addition to Standard Conditions Stipulated under A, B & C)". Thus, the lower the Class assigned, the higher the conditions are to be placed.

84. As per Clause 8.1, "A decision of the CDR Empowered Group relating to prima facie feasibility and/or final approval of Restructuring Scheme shall be taken by a Super-Majority Vote at a duly convened meeting, after giving reasonable notice, to the Lenders and to the Eligible Borrower."

85. As defined in Clause 8.3, „Super-Majority Vote means not less than 60 per cent of number of lenders holding not less than 75 per cent of aggregate principal outstanding Financial Assistance.

86. On admission of Flash Report, as per Clause 9.3, "the borrower should open a current account with the MI (Monitoring Institution) to be designated "pre-TRA" account..." and the procedure for which is described in Clauses 9.3 (i) to (xiii).

87. Clause 10 provides for a "Monitoring Mechanism" to ensure success of CDR mechanism and provides for an exhaustive process for proper implementation of the restructuring scheme. Clause 22 provides for criteria and procedure for exit from CDR.

88. After the TEV Report is made by an "independent agency" and an independent auditor conducts a Stock Audit of the company (both appointed by banks/ consortium of banks), the bank/ consortium of banks then commission the preparation of FRS, which is deliberated and approved by the banks and such approved FRS is submitted to the CDR-EG for its approval.

89. As per Clause 10.9, pursuant to the approval of CDR package by the CDR-EG, MRA and TRA are drawn, deliberated and signed between the company and the banks. This implements/ puts in effect the CDR package for a borrower company."

Satisfaction to issue Show Cause Notice in the instant case

55. Keeping in mind the principles laid down by this Court in the final order in W.P. (C) No. 4181/2023 titled as Ratul Puri v. Bank of Baroda, the facts of the case in hand deserves to be analysed.

56. This Court, vide order dated 28.11.2023, had directed the Respondent Bank to place on record the document which showed the satisfaction arrived at by the Respondent Bank to issue Show Cause Notice to the Petitioner. The Respondent Bank filed Minutes of Meeting dated 24.2.2020, wherein, the decision to issue Show Cause Notice to the Petitioner was taken. In a chart relating to MBSL, the Respondent Bank has referred to the four allegations in the Show Cause Notice and in the column of documentary evidence for the allegations, it is mentioned Forensic Audit Report of M/s Haribhakti & Co. LLP. It is thus evident that the Respondent Bank has issued Show Cause Notice to the Petitioner only by referring to the observations made in the Forensic Audit Report. This Court is of

the view that this approach of the Respondent Bank is not in conformity with the scheme of the Master Circular.

57. Under the Master Circular, to declare a person as a Wilful Defaulter, lender banks have to independently find that the "Wilful Default" is "intentional, deliberate and calculated" and the said conclusion must be based on "objective facts and circumstances of the case". The Forensic Audit Report can act as a piece of corroboration for the said exercise, but not the sole basis. The lender banks must record their satisfaction of commission of Wilful Default which according to them are "intentional, deliberate and calculated".

58. Further, under Clause 2.1.3 of the Master Circular, the lender banks have to keep in mind the track record of the borrower. The decision to declare an entity or person as Wilful Defaulter cannot be taken on the basis of isolated transactions/incidents. A similar obligation is cast on lender banks in Clause 2.5 of the Master Circular, which require the lender banks 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 is required to be ensured that solitary or isolated instances are not made the basis for imposing the penal action under the Master Circular.

59. In the present case, the satisfaction to issue Show Cause Notice, does not appear to have been recorded in accordance with the requirements of the Master Circular. Keeping the object of the Master Circular in mind and the consequences that it entails, both civil and penal, the lender banks have an obligation to comply with the inbuilt safeguards in the Master Circular. Lest, the line between persons who commit mere default in repayment of loan obligations and those who commit Wilful Default in terms of the Master Circular, would get obliterated.

Whether the Petitioner committed acts of Wilful Default?

60. The allegation No.3 on which the Identification Committee of the Respondent Bank declared the Petitioner as Wilful Defaulter is that - Helios Photovoltaic Ltd. (earlier known as MBPV) was incurring losses since 2011-12 but MBSL kept on investing amount continuously. The said finding was based on certain observations made in the Forensic Audit Report.

61. On behalf of the Petitioner, it is contended that the investments by MBSL in Helios Photovoltaic Ltd. were made from funds raised from Private Equity (PE) investors and were within the knowledge of the lender banks. The lender banks cannot allege these investments to be act of Wilful Default several years later. It is contended that Helios Photovoltaic Ltd. was a strategic investment made by MBSL for manufacturing and supply of PV cells, which was a critical component for MBSL in its assembly line of solar cells.

62. The Petitioner further contends that the investments made by MBSL in Helios Photovoltaic Ltd. were duly reflected in the financial statements and audited balance sheets of MBSL. The lender banks including the Respondent Bank, by virtue of the terms of loan approvals provided to MBSL since September 2007, always had access to the financial statements and audited balance sheets of MBSL and were fully aware of the investments. It is contended that the Respondent Bank had full

access to inspect and review MBSL's books of accounts and in fact it did so, as otherwise loan facilities to MBSL would not have been renewed year after year in favour of MBSL. It is also contended that the Respondent Bank was a common lender in all of the group companies i.e., MBIL, MBSL and HPVL.

63. Reliance is placed on a letter sent vide email dated 6.10.2008, written by the Respondent Bank to MBSL, stating that in the balance sheet of MBSL, it is shown that the MBSL has made investment in Helios Photovoltaic Ltd. (earlier known as MBPV). The Respondent Bank sought the details of such investment from MBSL. MBSL through its email dated 7.10.2009, provided the said details of investment in Helios Photovoltaic Ltd. to the Respondent Bank.

64. Further, prior to the admission of MBSL in the CDR Scheme, MBSL had submitted its Flash Report in 2012 to the lender banks, which also disclosed the investments made in Helios Photovoltaic Ltd.

65. Even during the consideration of the CDR Scheme, the lender banks had a JLM meeting on 10.10.2012. In the said meeting, the representative of PNB Investments Services Ltd., which conducted the Economic Viability Assessment, addressed the lender banks and explained that long term funds were utilized for investment on subsidiaries.

66. In the letter dated 18.3.2013, which approved the restructuring package, the details of package were earmarked in Annexure-1. In Clause 1.1(iii), the lender banks noted that the investments were made by MBSL in its 100% subsidiary. These investments are to be retained and disposal of these investments is not proposed. Relevant portion is reproduced as under:-

> "(iii) Sale of surplus assets/ investments There are no significant surplus assets/ investments proposed for sale.
>
> The investments are towards equity and preference share capital in its 100% fully owned subsidiary MBPV. These investments are required to be retained in terms of non-disposal undertaking executed with secured lenders of MBPV. Hence, no disposal of these investments is proposed."

67. The lender banks had issued the FRS before the finalization of the CDR package. In the FRS, which is the lender banks' internal document, the lender banks noted that MBSL had made investment in its 100% subsidiary. The lender banks noted that investment in the subsidiary was required to be retained and that the investment by MBSL in Helios Photovoltaic Ltd. was a strategic investment where the latter supplied PV cells to MBSL in its assembly modules. The relevant part of FRS is reproduced as under:-

> "2.3 Comments on financial position and working results ...the Long-Term Surplus of Rs. 429.88 crore during FR 2008-09, which was used towards the following during FY 2010 to FY 2012.
>
> a) Cash Loss
> b) Repayment of Term Loan of Rs. 112 crore

c) Funding of Fixed Assets (net of term loans and equity for capex infused during FR 2009-10 to FY 2011-12 of Rs. 169 crore and

d) Investments in wholly owned subsidiary - MBPV Investments:

The investments are towards equity and preference share capital in 100% fully owned subsidiary MBPV. These investments are required to be retained in terms of non-disposal undertaking executed with secured lenders of MBPV. Further, investment in MBPV is strategic investment, whereby MBPV supplies PV cells to MBSL in its assembly of modules."

68. After noting the investments made by MBSL in Helios Photovoltaic Ltd., the lender banks placed MBSL in Class-B borrower under the CDR Master Circular, which applies where a company is affected by external factors and not Class-C, which applies for diversion of funds. The lender banks, therefore, did not treat the investment in Helios Photovoltaic Ltd. as diversion of funds at any stage. On the contrary, the lender banks found the investment to be "strategic" and required MBSL to retain the said investment.

69. In this view of the matter, it is difficult to accept the Respondent Bank's argument that the investment in Helios Photovoltaic Ltd. amounts to diversion of funds. It is evident that the Respondent Bank was aware of the investments, found the same to be strategic and required MBSL to retain them.

70. Thus, after having complete knowledge of the investments and treating them to be strategic, which were required to be retained, the Respondent Bank, after eight years, cannot be permitted to do a volte face and hold that the said investment amounted to diversion of funds.

71. The aforesaid finding is further substantiated by the Respondent Bank's own pleading in the Counter Affidavit which states:-

"23... It is reiterated that while the Respondent Bank was aware of the investments during the process of CDR, the fact relating to mismanagement and huge diversion of funds of the Company were discovered in the forensic audit report."

72. This Court had put a specific query to learned counsel for the Respondent Bank that when the admitted documents on record show that the Respondent Bank had full knowledge about the investments at all time, then what was the basis to term the same as Wilful Default. Learned counsel for the Respondent Bank has relied upon paragraph no.18 of his Counter Affidavit which records as under:-

"18... It is submitted that in respect of the said submission, the COE has duly observed that HPVL was incurring losses since 2011-12, but MBSL kept on investing continuously in HPVL."

73. In other words, the submission is that even though Helios Photovoltaic Ltd. was incurring losses 2011-12 onwards, MBSL continued to invest in Helios Photovoltaic Ltd., which is an act of Wilful Default. This Court is not impressed with the said submission. When admittedly, the Petitioner resigned as Executive Director on 30.4.2012 and as full time Director on 16.11.2012, he cannot be held liable for investment, if any, that was made after 2011-12. Even otherwise, the Forensic Audit Report nowhere has regarded these investments as diversion of funds. The conclusion drawn by Forensic Audit Report states - "Owing to inadequacy of documents explaining arrival, basis & justification of investments made in HPVL raises question on need of such investment. Further, considering the current financial status of HPVL, recovery of these investments seems to be doubtful." The Report has not drawn any conclusion owing to inadequacy of documents. It has not made any conclusion or finding of diversion of funds.

74. Another argument advanced by the Respondent Bank, as is evident from paragraph no.19 of its Counter Affidavit, is that it became aware of the diversion of funds only from the Forensic Audit Report. MBSL made investments in Helios Photovoltaic Ltd. and did not bring the investments back into the company despite the distress. This submission, again, is made contrary to the lender banks' own stand in the documents leading to the CDR package. In the letter dated 18.3.2013, which approved the restructuring package of MBSL, the lender banks required MBSL to retain the investment. In the FRS, the lender banks again noted that investment in the subsidiary was required to be retained and that the investment by MBSL in Helios Photovoltaic Ltd. was a strategic investment. Even in Clause 4.3.5 of MRA dated 28.3.2013, the lender banks, which included the Respondent Bank, restricted MBSL from selling its investments in HPVL. On one hand, the lender banks are requiring MBSL to retain the investment as a condition of CDR package, whereas, it is now sought to be contended that since MBSL did not bring back the investment, the same constitutes an act of Wilful Default. Such a stand cannot be countenanced.

75. The lender banks must follow the mandate of Clause 2.1.3 read with Clause 2.5 of the Master Circular and independently find the acts of "Wilful Default" which are "intentional, deliberate and calculated" and the said conclusion should be based on "objective facts and circumstances of the case". Under the Master Circular, transferring funds in the subsidiary may amount to Wilful Default, if the same is found to be "intentional, deliberate and calculated" on objective assessment of facts and circumstances. However, the said burden is not discharged. By merely quoting the Forensic Audit Report, which itself has not drawn any conclusion of diversion of funds, the decision to declare Wilful Defaulter is highly vulnerable. The documents of Respondent Bank of 2012 i.e., eight years before issuance of Show Cause Notice, found the investments to be strategic and required to be retained, cannot subsequently become "intentional, deliberate and calculated" acts of Wilful Default.

76. Learned Senior Counsel for the Petitioner has attempted to show that the investment in Helios Photovoltaic Ltd. was made by MBSL from the funds raised from PE investors. Even after making the investments, MBSL had cash surpluses. It is further contended that the Respondent Bank had given loan of Rs.261.35 Crores, as on 2009-10, to MBSL for creation of fixed assets. MBSL created fixed assets of Rs.477.46 Crores, which implies that the loan amount was used for the purpose for which it was granted. The investment in Helios Photovoltaic Ltd. was towards creation of fixed asset

as it manufactured PV cells, which was a critical component for MBSL in its assembly line of solar cells. When the investment is made to create a fixed asset and which supports the main business of MBSL, the same cannot be regarded as diversion of funds. The aforesaid submissions do not require any adjudication for the reasons already recorded in preceding paragraphs.

77. The allegation No.4 which has been found by the Identification Committee to be act of Wilful Default is that MBSL had engaged in trading activities and had purchased from and sold to M/s Helios Photo Voltaic Ltd. amounting to Rs.173.34 Crores and 93.47 Crores, respectively.

78. During the course of arguments, this Court had requested learned counsel for the Respondent Bank to explain this allegation as an act of Wilful Default. Learned counsel has taken this Court through the Unusual Indicator column in the Forensic Audit Report and referred to the trading between MBSL and M/s Helios Photo Voltaic Ltd. as unusual, the two being related party. He stated that the same argument is stated in his Counter Affidavit as well in paragraph no.18 recording -

> "18... Further, other trading activities have been pointed out between HPVL and the Company." Secondly, he has drawn the attention of this Court to the conclusion drawn by the Forensic Audit report that the Forensic Auditor was unable to verify actual movement of goods against these purchase and sale transaction with M/s Helios Photo Voltaic Ltd.

79. Learned Senior Counsel for the Petitioner submits that the Forensic Audit Report does not specify the period of trading transactions between MBSL and M/s Helios Photo Voltaic Ltd. In the event, the said trading transactions refer to period post 16.11.2012 i.e., when the Petitioner ceased to hold any position in MBSL, then no fault can be attributed to the Petitioner. In the event, the said trading transactions were alleged to be prior to the exit, the same were duly reflected in the financial statements of MBSL and the Respondent Bank had access to the financial statements and balance sheets of MBSL, at all times.

80. Further, at the time of finalization of the CDR Scheme, the lender banks including the Respondent Bank had TEV Report of MBSL from Feedback Infra; Economic Viability Assessment from PNB Investments Services Ltd. and Stock Audit from M/s Mehrotra and Mehrotra, Chartered Accountants. After considering the said documents, the lender banks placed MBSL in Class-B as per the CDR Master Circular. In the Class-B category, MBIL was classified as "Corporate/promoters affected by external factors and also having weak resources, inadequate vision and not having support of professional management." The Class-C is assigned to those corporates who "diverted funds" to unrelated fields with or without lenders' permission. Thus, the lender banks did not treat the trading between MBSL and M/s Helios Photo Voltaic Ltd. to be diversion of funds.

81. The Petitioner has further placed reliance on the Agreement dated 30.6.2020 between MBSL and M/s Helios Photo Voltaic Ltd. for the supply of goods. Reliance is also placed on the Report issued by M/s Vaish & Associates issued under Section 92E of the Income Tax Act, 1961 to contend that the transaction between MBSL and M/s Helios Photo Voltaic Ltd. were in ordinary course of business and at arms- length basis.

82. Learned Senior Counsel for the Petitioner placed reliance on the FRS to contend that the lender banks in the FRS, which is a 2012 document, had acknowledged that M/s Helios Photo Voltaic Ltd. is a subsidiary of MBSL, which was a strategic investment, created to supply PV cells to MBSL, which is required for assembly of modules. It is thus contended that this explains the trading transactions between MBSL and M/s Helios Photo Voltaic Ltd.

83. Regarding the observation that the Forensic Auditor was unable to verify actual movement of goods against these purchase and sale transactions with M/s Helios Photo Voltaic Ltd., learned counsel for the Respondent Bank did not dispute that the manufacturing units of both MBSL and its 100% subsidiary are based in the custom bonded Special Economic Zone, Greater Noida ("SEZ"). The units of MBSL and M/s Helios Photo Voltaic Ltd. are at a distance of 50 meters and controlled by the custom officials. Since the goods are to be moved at a distance of 50 meters, no lorries are deployed. It is for this reason that the Forensic Auditor, due to non-availability of supporting documents was unable to verify actual movement of goods.

84. This Court has also perused the Forensic Audit Report in this regard. In the conclusion, it observes - "Due to non-availability of any supporting documents, we are unable to verify actual payment of goods against these purchase and sale transaction with HPVL." The Forensic Audit Report is, therefore, inconclusive and does not record any definite finding of diversion of funds. The Respondent Bank has merely quoted a part of the Forensic Audit Report and gave a finding of diversion of funds without any supporting material, which is inappropriate.

85. As held above, under the Master Circular, a lender bank has to record a finding of an act of Default to be Wilful if the same is "intentional, deliberate and calculated" on objective assessment of facts and circumstances. However, the said burden is not discharged by merely quoting the Forensic Audit Report, which itself has not drawn any conclusion of diversion of funds.

86. Learned counsel for the Respondent Bank has made huge emphasis on the point that when MBSL was about to default in its loan repayment obligations, the Petitioner exited the said company making an easy escape. This Court is unimpressed with the said argument. Resignation from the company is a legal right of every Director. In this case, the Petitioner resigned from MBSL and submitted Form-32 with the RoC. MBSL informed the lender banks also about the resignation of Petitioner from MBSL. When MBSL was about to default in its loan repayment obligations, MBSL informed the lender banks to consider the CDR package on the assumption that the Petitioner was no longer associated with MBSL and his personal guarantee was not available. On 20.9.2013, the CDR-EG noted that the lender banks have agreed to substitution of personal guarantee of the Petitioner with collateral security of Rs.33 Crores. In the meeting held on 27.5.2014, the lender banks agreed to reduce the collateral security of Rs.33 Crores to Rs.25.53 Crores in lieu of the Petitioner's personal guarantee. The Petitioner did not furnish his personal guarantee for the CDR package nor did he participate in any of the deliberations for the approval of the CDR package. The lender banks still approved the CDR package and acted upon it without the presence and personal guarantee of the Petitioner. The lender banks, therefore, tacitly acquiesced to the Petitioner's exit from MBSL and approved the CDR package of MBSL without his presence in any capacity or personal guarantee. In this view of the matter, it is not open for the lender banks to contend that

when MBSL was about to default in its repayment obligations, the Petitioner made an easy escape. In any case, resignation from a company per se is not an act of Wilful Default under the Master Circular.

Effect of Forensic Audit Report

87. From a reading of the orders passed by the Identification Committee and the Review Committee, it is evident that the Respondent Bank attributed acts of Wilful Default to the Petitioner only on the basis of the Forensic Audit Report. The question which arises at this juncture is whether the observations made in the Forensic Audit Report can be the sole basis for the Respondent Bank to conclude an event of Wilful Default.

88. The nature of Forensic Audit Report in respect of a company is discussed by the Calcutta High Court in Prashant Bothra & Anr. v. Bureau of Immigration & Ors.1 It was held that a Forensic Audit Report, at best, is a piece of evidence in liquidation proceedings and is in no manner a conclusive proof of any illegality committed under a law. The Forensic Audit Report is merely an opinion of the author, which is based on several disclaimers. The Forensic Audit Report cannot be conclusive proof of its observations. The relevant observations are as under:-

> "21. The very premise of the request was a forensic audit report allegedly authored by a particular concern. The said report, at best, is a piece of evidence in the liquidation proceeding and is in no manner conclusive proof of evidence of any illegality committed by any entity. In fact, it is common experience that each and every such forensic audit report contains several disclaimers, restricting the operation of the same to the proceeding in which they are filed, as well as confined to the impression of the authors thereof on the basis of the documents which are available to them.
>
> 22. Under no stretch of imagination can such a report be conclusive proof of the allegations against the petitioners."

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89. This Court is inclined to agree with the aforesaid proposition of law. Even under the Indian Evidence Act, 1872, the opinion of an expert witness under Section 45 is not a conclusive proof. It is subject to cross examination and the opinion and conclusions of an expert are subject to challenge. In the present scheme of things, the Master Circular casts a specific obligation on the Respondent Bank to act independently and objectively under Clause 2.1.3 read with Clause 2.5, as discussed above. It would, therefore, be unsafe if lender banks start to declare borrowers as Wilful Defaulter merely on the basis of observations made in Forensic Audit Report without there being an independent application of mind. The lender banks must follow the mandate of Clause 2.1.3 read with Clause 2.5 of the Master Circular and independently find acts of "Wilful Default" which are "intentional, deliberate and calculated" and the said conclusion should be based on "objective facts and circumstances of the case". Any other view would lead to consequences where mere cases of default would be categorised as acts of Wilful Default under the Master Circular. The Master

Circular is not to be invoked in every case of default but only when the default is Wilful Default as construed under the scheme of the Master Circular.

Identification of Wilful Default has to be made keeping in view the track record of the borrower and not on the basis of isolated transactions/incidents

90. Under Clause 2.1.3 of the Master Circular, the identification of an entity or a person as a Wilful Defaulter has to be made on the basis of the track record of the borrower and not on the basis of the isolated transactions/ incidents. A similar obligation is cast on lender banks in Clause 2.5 of the Master Circular, which requires the lender banks 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 is required to be ensured that solitary or isolated instances are not made the basis for imposing the penal action under the Master Circular. This requirement is cast in the Master Circular with an object to punish those borrowers who have not acted bonafidely in the interest of the business enterprise but made a concerted effort to divert borrowed funds. The Master Circular assumes that where the track record of the borrower is otherwise sound, then isolated transactions or incidents that may not be financially prudent, may not, alone be sufficient to declare a borrower as Wilful Defaulter.

91. Let us now consider the track record of MBSL as per the FRS, which is an internal document prepared by the Respondent Bank before finalizing the CDR package. The FRS was prepared when MBSL was already in financial constraints and was unable to meet its loan repayment obligations.

92. In the FRS, the lender banks have noted that MBSL is a subsidiary of MBIL and engaged in the manufacturing of photovoltaic cells. The company used the SEZ Unit in Greater Noida to design, manufacture, sell, export photovoltaic cells in the global market. It had a production capacity of 90 MW selective emitter crystalline cells, 50 MW crystalline modules and 40 MW Thin Films PV. The company began its commercial operations at an initial cost of Rs.439.21 Crores. In 2011, the company consolidated and set up project for advanced high performance selective emitter high efficiency crystalline silicon cell with annual capacity of 90 MW. The cost of this project was Rs.624.69 Crores. The company demonstrated strong EPC capabilities and quality manufacturing. It has commissioned more than 50 PV projects in India and Germany. The company has significant customer base in Europe, Asia, Pacific, Middle East and the US.

93. The FRS noted that 2011-12 onwards, the company's financial operations were adversely affected due to (a) global solar photovoltaic market was operating under stress due to huge supply addition from China; (b) China offering USD 43 billion subsidy to its domestic companies, which led to abnormal fall in the prices of solar cell. The company, however, has been able to service its debt till 31.12.2011. The CDR-EG had admitted MBSL in Class-B as per the CDR Master Circular, which applies where MBSL was classified as Class-B borrower under the CDR Scheme, which has Classes from A to D. In the Class-B category, MBIL was classified as "Corporate/promoters affected by external factors and also having weak resources, inadequate vision and not having support of professional management." Class-C is assigned to those corporates who "diverted funds" to unrelated fields with or without lenders' permission. Thus, the lender banks considered MBSL to be

a borrower which was affected by external factors and not by diversion of funds.

94. Before finalization of the CDR package, the lender banks obtained a TEV Report and Stock Audit Report from external agencies. After considering the said Reports, the lender banks approved the CDR package. The net worth of MBSL even as on 31.3.2012 was found to be Rs.658.66 Crores.

95. In the Flash Report, it is noted that MBSL could service all its debts till 30.11.2011 and even repaid the principal sum of the term loans.

96. The aforesaid position, which is accepted by the lender banks in their own document i.e., the FRS, does not show a consistent negative track record of MBSL. MBSL was seen as a global player in photovoltaic cells. It had presence in several countries. It had serviced its debt and largely repaid the principal dues. The Respondent Bank, under Clause 2.1.3 read with Clause 2.5 of the Master Circular, was obligated to reflect upon the entire track record of MBSL and then conclude whether there existed events of Wilful Default and not on the basis of isolated transactions/incidents.

Consequences of admitting MBSL for CDR under the CDR Scheme

97. On considering the manner in which the scheme of CDR Master Circular is to be implemented, it is seen that CDR Master Circular is equipped with several measures to ensure that cases involving frauds or diversion of funds with mala fide intent are not admitted for CDR.

98. These include provisions like Clause 6.3 read with paragraph no.4 of Annexure III, which renders corporates indulging in fraud and malfeasance as ineligible for CDR. Further, CDR scheme provides for four Classes - A to D, out of which, Categories C and D relate to cases of diversion of funds and the said categorisation has to be done by the lenders on their own.

99. The classification has a direct bearing on eligibility as also the conditions to be imposed upon the borrower. The lower the category the more stringent the conditions to be imposed upon a borrower in accordance with paragraphs C and D of Annexure IV. Significantly, "Before CDR Reference/Approval", Clause 3.3 of CDR Scheme expressly empowers banks to commission a Forensic Audit "wherever necessary and specially in cases of diversion of funds".

100. The aforesaid provisions in the CDR scheme leads to the conclusion that the categorization of a borrower in one of the categories between A and D has to be based on an objective satisfaction.

101. This Court is of the view that it is incumbent upon banks who are dealing with public funds and discharging a public duty to make appropriate enquiries as to whether a borrower is in genuine financial difficulty or whether there exists events of fraud and malfeasance. If the lender banks find fraud or malfeasance, the CDR-EG must either refuse CDR completely or impose such additional onerous conditions as provided in the CDR Scheme itself.

102. In the present case, the lender banks were fully aware of all the transactions, which are now alleged to be acts of Wilful Default. This fact is part of the documents leading to the finalization of

the CDR scheme. Despite noting all transactions, financial statements, balance sheets, TEV Report and Stock Audit Report, the lender banks placed MBSL in Class-B of CDR Master Circular which cannot be assigned if there is diversion of funds. They found no occasion to order a forensic audit of MBIL before finalization of CDR scheme. The lender banks, therefore, never treated the alleged acts of Wilful Default as an act of diversion or siphoning either during finalization of CDR scheme or after its failure.

103. It may so happen that during the finalisation of CDR Scheme, the lender banks are not aware of certain acts of commission or omission, which may constitute acts of Wilful Default. The lender banks may become aware of such acts subsequently, may be, on their own, or on the basis of subsequent Forensic Audit Report. Having considered such acts, which were known subsequently, the lender banks may take an objective decision under the Master Circular on whether such acts constitute Wilful Default or not. In such a situation, the mere fact that earlier CDR Scheme was finalised and nothing negative was flagged at that stage, may not come in the way of lender banks in invoking jurisdiction under the Master Circular. However, it may not be open for lender banks to classify known acts as events of Wilful Default merely because subsequently, in respect of the same known acts, the Forensic Audit Report has made certain observations. To declare a person as a Wilful Defaulter, lender banks have to independently find that the "Wilful Default" is "intentional, deliberate and calculated" and the said conclusion is based on "objective facts and circumstances of the case", as required under the Master Circular. The Forensic Audit Report, at best, can act as a piece of corroboration for the said exercise, but not the sole basis.

104. To take any other view would entail the transfer of jurisdiction to determine acts of Wilful Default to Forensic Auditors, which by law under the Master Circular is vested in the Identification Committee and Review Committee of the Respondent Bank. When a law requires a particular act to be done in a particular manner, then it has to be done in that manner alone and no other. [See: Tata Chemicals Ltd. v. Commr. of Customs2 and Krishna Rai v. Banaras Hindu University3].

105. In view of the aforesaid discussion, the reasons assigned in the impugned order dated 23.3.2023 passed by the Review Committee, confirming the Petitioner as Wilful Defaulter under the Master Circular, are unsustainable and the impugned order is accordingly, quashed and set aside. The Writ Petition is allowed in the aforesaid terms. Pending application(s), if any, are disposed of.

(PURUSHAINDRA KUMAR KAURAV) JUDGE FEBRUARY 29, 2024/SS (2015) 11 SCC 628 (2022) 8 SCC 713