*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%   **Date of decision: 24th May, 2016**

+   **W.P.(C) 3306/2014**

RAMESH KUMAR SAREEN ..... **Petitioner**
Through: Mr. Lajwinder Singh, Adv.

Versus

UNION OF INDIA & ORS. ...... **Respondents**
Through: Mr. B.S. Shukla & Mr. Rachit Goel, Advs. for R-1.
Mr. Suhail Dutt, Sr. Adv. with Mr. H.S. Parihar, Mr. Kuldeep Parihar & Mr. Azhar Alam, Advs. for R-2.
Ms. Kittu Bajaj, Adv. for R-3&4.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The journey which this petition has travelled would be evident from setting out hereinbelow the orders passed in this petition from time to time and which would also save time in penning this judgment. Accordingly, the relevant orders are re-produced hereinbelow:

Order dated 13/01/2016

> "1. The petition impugns the action of the respondents No.3&4 State Bank of Bikaner & Jaipur of forwarding the name of the petitioner to the Reserve Bank of India (RBI) / Credit Information Bureau of India Ltd. (CIBIL) and other Credit Information Companies (CICs) for inclusion in the 'Wilful Defaulter' list.
>
> 2. The petition was entertained.
>
> 3. However the respondents No.3&4 Bank inspite of opportunity did not file counter affidavit and the right to file its counter affidavit was closed.

4. Today, when the petition is listed for hearing, the counsel for the respondents No.3&4 Bank has not appeared and has sent a proxy counsel who does not know anything about the case.

5. The counsel for the petitioner has been heard.

6. It is the case of the petitioner that, (i) he was an Independent/ Professional Director of the company which had availed of loan facility from the respondents No.3&4 Bank; (ii) he had become a Director on 20th October, 2007, after the loan was taken in the year 2005; (iii) he ceased to be a Director on 26th March, 2012 and first show cause notice was issued on 28th August, 2013; (iv) though in reply to the show cause notice and in response to the letters giving the petitioner an opportunity of hearing he placed all the facts but without dealing with the same, the decision dated 9th December, 2013 impugned in this petition was taken.

7. The conduct of the respondents No.3&4 Bank of not filing counter affidavit and of not properly representing the matter before this Court is inexplicable.

8. Since public monies are involved in the matter, it is deemed appropriate to direct the personal presence of the General Manager/Chief General Manager of the respondents No.3&4 Bank of Branch at Ajmal Khan Road, Karol Bagh, New Delhi which appears to have given the loan before this Court on the next date of hearing.

9. For today's adjournment, the respondents No.3&4 Bank is also burdened with costs of Rs.10,000/- to be paid to the counsel for the petitioner on or before the next date of hearing.

10. List on 15th January, 2016."

Order dated 15/01/2016

"1. This order is in continuation of the order dated 13th January, 2016.

2. Costs of Rs.10,000/- is stated to have been paid.

3. In response to the directions issued, Mr. Charan Singh, Chief Manager and Mr. Deep Kumar, Law Officer of the Asset Recovery Branch, Delhi of the respondents No.3&4 State Bank of Bikaner & Jaipur are present.

4. The counsel for the petitioner has further submitted:

(I) that as per the Reserve Bank of India (RBI) Circular on Wilful Defaulters, the proposal for declaring a wilful defaulter is to be mooted by a Committee of high functionaries of the Bank headed by Executive Director and consisting of two General Managers (GMs) / Deputy General Managers (DGMs) as decided by the

Board of the concerned Bank. However the proposal in the present case was mooted by a Committee comprising of Chief General Manager, two DGMs and GM as evident from page 87 of the paper book. The Committee was thus not headed by the Executive Director as is required under the RBI Guidelines;

(II) that the Grievance Redressal Committee of the respondents No.3&4 Bank which is to finally consider the objection/ representation against the proposal mooted by the Committee aforesaid is required to do the same after considering the representation. However, the Grievance Redressal Committee of the respondents No.3&4 Bank considered only the four documents as listed in the internal note dated 2nd November, 2013 at page 79 of the paper book and which does not include the representation / objection of the petitioner;

(III) that the definition of 'wilful defaulter' in the RBI Circular is with respect to "the unit" or "the borrower". When the borrower is a company, the Directors of the company would not be borrowers. Rather, the RBI Circular in Clause 5 thereof provides for reporting the name of the Directors and in which clause also mentions only current Directors at the time the company was classified as a defaulter. It is argued that the petitioner ceased to be a Director with effect from 26th March, 2012 and the company of which he was a Director was classified as a NPA on 28th May, 2012 and was declared as a wilful defaulter on 7th November, 2013, as evident from the letter dated 9th December, 2013 at page 68 of the paper book;

(IV) that the petitioner as Director had not given any guarantee for the dues of the company. It is for this reason only that the respondents No.3&4 Bank in the proceedings initiated before the Debt Recovery Tribunal (DRT) for recovery have not made the petitioner a party.

5. I have enquired from the counsel for the petitioner, as to when the entry of Form-32 of the petitioner ceasing to be a Director was made by the Registrar of Companies.

6. Neither counsel is aware of the same.

7. The counsel for the respondents No.3&4 Bank qua the first of the aforesaid contentions states that the Committee for mooting the proposal for declaration as wilful defaulter was in order as there is no post of Executive Director in the respondents No.3&4 Bank.

8. However, without the respondents No.3&4 Bank pleading so and which

right of the respondents No.3&4 Bank to file the counter affidavit has been closed, the respondents No.3&4 Bank cannot be permitted to take such a plea.

9. The counsel for the respondents No.3&4 Bank then states that an opportunity be given to file the counter affidavit.

10. Counter affidavit be filed within ten days. The counsel is cautioned not to file the counter affidavit as may have been prepared earlier but to answer all the aforesaid contentions in the counter affidavit.

11. The defence of the present petition by the respondents No.3&4 Bank shows a total apathy of the respondents No.3&4 Bank to contesting litigation and which effects the public monies of which the respondents No.3&4 Bank is the custodian.

12. On enquiry, it is informed that the top legal functionary of the respondents No.3&4 Bank is the Assistant General Manager (Law). The said officer to remain personally present on the next date of hearing.

13. List on 2nd February, 2016."

2. On 2nd February, 2016 after reproducing the orders dated 13th January, 2016 and 15th January, 2016 *inter alia* the following order was passed:

3. Mr. Manoj Kumar, AGM (Loan), Mr. Sunil Kumar and Mr. Deep Kumar, Law Officers of the respondent no.3&4 State Bank of Bikaner & Jaipur (SBB&J) appear in response to the earlier directions and have been apprised of the default of the said Bank before the Court in the present case. Save for apologising therefor, they are unable to state as to what measures have been taken to prevent such default in future. The respondent no.3&4 SBB&J is directed to bestow consideration to the matter and ensure that it is properly defended in the Courts and is not proceeded against in default.....

4. The respondent no.3&4 SBB&J in its counter affidavit filed has stated (i) that the subject account became NPA as on 28th May, 2012 and since an account is declared as NPA on default for three months, it means that the default in the account started on 29th February, 2012; (ii) that the petitioner resigned from the Board of Directors on 26th March, 2012 i.e. after the default had started – his resignation at that juncture was an intentional endeavour to find an escape route and frustrate the move of the respondent no.3&4 SBB&J to declare him as wilful

defaulter; (iii) that though the petitioner claims to be an independent Director but no record of the Company in ROC describes him as independent Director – even Form No.32 of his resignation describes him as a Director and not as an independent Director or professional Director; (iv) that there has been no procedural infirmity; (v) that the present case involves diversion of fund/non-payment of Rs.500 crores of the Banks; (vi) the Company despite being a legal person acts through its Directors and the Directors are responsible for default and cannot be allowed to go scot free on the premise of resignation after making the Company sick; (vii) that Master Circular of the Reserve Bank of India (RBI) requires the wilful default to be identified by a Committee headed by Executive Director and comprising of two other senior officers of the rank of General Manager/Deputy General Manager – the respondent no.3&4 SBB&J being a subsidiary of the SBI does not have the post of Executive Director and thus in accordance with the Master Circular the Chief General Manager headed the said Committee for identifying the wilful default; (viii) that wilful default in the present case is writ large owing to the fact that funds of significant magnitude advanced by consortium of Banks still remain unpaid and there is no primary security to fall back upon and the debts are shown against non-existent/fake companies, making a clear cut case of diversion of funds; and, (ix) that the entry of Form No.32 of the petitioner ceasing to be a Director was made in the ROC on 27th March, 2012.

5. The counsel for the respondent no.3&4 SBB&J has argued on the same lines.

6. Per contra the counsel for the petitioner has contended that the respondent no.3&4 SBB&J has still failed to meet his contentions, (i) that as per the Master Circular dated 1st July, 2013 of the RBI it is "The unit" i.e. the Company which in the present case was M/s. Surya Vinayak Industries Ltd. which is considered as the 'wilful defaulter' and the penal measures are prescribed against the 'wilful defaulters' only and not against the Directors who are separately dealt with in the RBI Circular and whose names are only to be reported; (ii) that the petitioner was admittedly not a Director or even otherwise connected to the Company at the time the loan was disbursed and joined the same subsequently; (iii) that the petitioner was not a Director when the Company was declared as a wilful defaulter and was not associated as a Director with the Company even at the time the account was

classified as NPA on 28th May, 2012; (iv) that the petitioner had no financial stake in the business of the Company; (v) that the penal measures as have been provided against wilful defaulters are not provided against Directors of Company declared as wilful defaulter; (vi) however the respondent no.3&4 SBB&J by declaring the petitioner as a wilful defaulter has made the petitioner liable for the said penal measures also including of debarring him from grant of any facilities by any Bank/Financial Institutions; and, (vii) that the petitioner is himself a retired Government official and was neither the promoter of the business nor stood as Guarantor for the financial assistance availed by the Company.

7. The counsel for the respondent no.3&4 SBB&J post passover has handed over in Court the Status Report as on 25th September, 2013 of M/s. Surya Vinayak Industries Ltd. showing the petitioner to be holding three shares out of the total issued and paid up share capital of 3,23,87,927 shares and on the basis thereof has contended that the petitioner has falsely stated that he did not have any stake in the company.

8. In my opinion merely from the factum of the petitioner holding three shares out of the total issued and paid up 3,23,87,927 shares, it cannot be deduced that the petitioner had a financial stake in the business of the Company or was anything other than a salaried Director.

9. The counsel for the respondent no.3&4 SBB&J has then drawn attention to the Note dated 5th July, 2013 prepared by the respondent no.3&4 SBB&J for recommending declaration of M/s. Surya Vinayak Industries Ltd. and its Directors as wilful defaulters and has contended that while out of the nine other Directors, three are shown as independent Directors, the petitioner is not shown as such.

10. I have considered the rival contentions.

11. The Master Circular dated 1st July, 2013, (i) in Clause 2.1 thereof while defining wilful default, uses the expression "The unit"; (ii) in Clause 2.2 titled "Diversion and siphoning of funds", mentions utilisation of funds for the purposes other than sanctioned by the lending Banks and transferring thereof to subsidiaries/group companies or routing thereof to other investments, showing an element of illegally enriching therefrom; (iii) in Clause 2.5 provides for penal measures of debarring from availing facilities from other Banks and initiating of criminal proceedings against the wilful defaulters only; (iv) in Clause 2.6 deals with

Guarantees furnished by group companies; (v) in Clause 2.7 deals with Role of auditors; (vi) in Clause 2.8 with Role of Internal Audit/Inspection; (vii) in Clause 2.9 with Reporting of wilful defaulters to RBI/Credit Information Companies; (viii) in Clause 3 provides Grievance Redressal Mechanism; and, (ix) in Clause 5 with "Reporting names of the Directors" and Clauses 5.1 and 5.2 thereunder are as under:-

> *"**5.1 <u>Need for Ensuring Accuracy.</u>***
> *RBI/Credit Information Companies disseminate information on non-suit filed and suit filed accounts respectively, as reported to them by the banks/FIs and responsibility for reporting correct information and also accuracy of facts and figures rests with the concerned banks and financial institutions.* ***Therefore, banks and financial institutions should take immediate steps to up-date their records and ensure that the names of current directors are reported. In addition to reporting the names of current directors, it is necessary to furnish information about directors who were associated with the company at the time the account was classified as defaulter to put the other banks and financial institutions on guard.*** *Banks and FIs may also ensure the facts about directors wherever possible, by cross-checking with Registrar of Companies.*
> ***5.2 <u>Position regarding Independent and Nominee directors</u>***
> *Professional Directors who associate with companies for their expert knowledge act as independent directors. Such independent directors apart from receiving director's remuneration do not have any material pecuniary relationship or transactions with the company, its promoters, its management or its subsidiaries, which in the judgment of Board may affect their independent judgment. As a guiding principle of disclosure, no material fact should be suppressed while disclosing the names of a company that is a defaulter and the names of all directors should be published. However while doing so, a suitable distinguishing remark should be made clarifying that the concerned person was an independent director. Similarly the names of directors who are nominees of government or financial institutions should also be reported but a suitable remark 'nominee director' should be incorporated.*
> *Therefore, against the names of the Independent Directors and Nominee Directors they should indicate the abbreviations 'Ind" and "Nom" respectively in brackets to distinguish them from other directors."*

12. It *prima facie* appears that the Circular treats wilful defaulters differently from Directors of wilful defaulters.

13. I have also wondered the meaning to be ascribed to the expressions "current Directors" and "Directors who were associated with the Company at the time the account was classified as defaulter" in Clause 5.1 and to the words "Professional Directors" and "Independent Directors" in Clause 5.2 supra. I have wondered whether the petitioner, who was not associated with the Company as a

Director at the time the account was classified as NPA on 28th May, 2012, but who was associated with the Company as a Director within a period of 90 days prior thereto would qualify under Clause 5.1 to be reported to the RBI/other Banks. A question also arises whether a salaried professional rendering full time services to a Company and also on the Board of Directors of the Company, though not qualifying as an Independent Director, but at the same time having no financial stake in the Company and business save emoluments and being not in a position to siphon of the funds of the Company would qualify for the treatment provided under Clause 5.2 supra.

14. The counsel for the respondent no.3&4 SBB&J has no replies in this regard and states that she can only inform the Policy of the respondent no.3&4 SBB&J on these aspects.

15. I am however of the opinion that each Bank cannot adopt its own interpretation qua the aforesaid matters and there has to be uniformity in implementing the Master Circular of the RBI.

16. Though RBI was impleaded as respondent no.2 to the present petition and the notice of the petition was also issued to the RBI but the counsel for the RBI on 11th July, 2014 stated that no relief was claimed in the petition against the RBI and thus RBI would not be filing the counter affidavit and stopped appearing thereafter.

17. Mr. K.S. Parihar nominated counsel for the RBI has been sent for and has been apprised of the position and seeks time to obtain instructions.

18. A copy of this order be given dasti under signatures of Court Master to the counsel for the RBI.

19. It is felt that RBI, if already does not have a Policy in this regard should at least while issuing fresh circulars in this regard, as are found to being issued yearly, consider all the aforesaid aspects.

20. List on 2nd March, 2016."

3. The respondent no.2 Reserve Bank of India (RBI) in answer to the queries has filed an affidavit dated 20th April, 2016 *inter alia* stating:

"11. It is submitted that as far as Master Circular on Wilful Defaulters dated July 1, 2013 is concerned, while the definition of wilful default refers to the unit, on a proper reading and interpretation of the circular all those directors who were in charge and responsible for the affairs of the company including promoters would also come within the purview of wilful defaulters in the event such an assessment is made based on the guidelines set out therein. In the subsequent circular of July 1, 2015 it is clarified that show cause notice shall also be given to promoter and also whole time director of the company. Further, under clause 3(d) it has been provided that a non-promoter/non-whole time director should be considered as a wilful defaulter only in rare cases until it is conclusively established that:

i. He was aware of the fact of fact of wilful default by the borrower by virtue of any proceedings recorded in the minutes of meeting of the Board or a Committee of the Board and has not recorded his objections to the same in the minutes or

ii the wilful default had taken place with his consent or connivance. Further a reference to Section 2 (60) of the Companies Act has also been made in this regard.

12. In its order dated February 2, 2016 the Hon'ble Court has desired a few clarification on RBI's above circulars. One of the questions relates to the association of directors with the company in default from the perspective of determining their responsibility. In this context, it is submitted that the intent of the master circular is *inter alia* to debar from accessing further institutional finance the directors of the wilfully defaulting companies and the companies with whom they may be associated in future. In this context, it needs to be recognized that the acts of the companies that constitute the reasons for wilful default (e.g. siphoning/diversion of funds) could have occurred over a period of time rather than at a point of time. However, the classification of the account as a non-performing asset as a result of such acts is made after the required repayments in the loan account remain overdue for a continuous period of 90 days. The mention of the words "at the time of default" in the RBI directions is intended to provide general reference for determination of the association of directors who were responsible for the wilful default. The implementation of the directions would require that banks identify the executive directors who were associated with the company at the time when the company committed acts that led to the default**.** At a minimum, the directors who were associated with the company at any time during the continuous overdue period of 90 days should be held responsible for the wilful default. It is possible that the overdue in the account were an outcome of company's acts that

were committed before their outcome started reflecting as overdue in the account. If this is established, the directors associated during such time could also be declared as wilful defaulters as they would be responsible for that due to their omissions or commissions. Similarly, if it is established by the bank's investigations that the acts of the company continued even beyond the time of classification of the account as a non-performing asset, the directors associated during such time may also be declared as wilful defaulters as they would have contributed to wilful default due to their omissions or commissions.

13. Another question concerns the differential treatment of wilfully defaulting companies and their directors. The Hon'ble court has also desired to know the difference between various types of directors referred to in the RBI circulars. In this regard it is submitted that the Master Circular on wilful defaulters does make a difference between wilful defaulters and the directors of the Wilful Defaulter entities inasmuch as different types of directors are treated differently under the circular. The intent is to debar from further institutional finance only those directors who would have contributed to the wilful default. In particular, the treatment of 'current 'directors' and the 'professional directors' is expected to be different. The term 'current director' would refer to persons who are directors of the wilfully defaulting company at the time of periodic reporting as per the Master Circular that follows the initial identification of a company as a wilful defaulter.

14. It is submitted that Non-whole time/independent directors who are exempted have been clearly specified in the Master Circular dated July 1, 2015. The RBI circular exempts the professional directors and the directors nominated by financial institutions and government from being declared as wilful defaulters. Such independent directors apart from receiving director's remuneration do not have any material pecuniary relationship or transactions with the company, its promoters, its management or its subsidiaries, which in the judgment of Board may affect their independent judgment. Therefore, while reporting the names of directors, a suitable distinguishing remark is required to be made clarifying that the concerned person was an independent director. Similarly the names of directors who are nominees of government or financial institutions should also be reported but a suitable remark 'nominee director' should be incorporated. However, a salaried director/whole time director as referred to in paragraph 13 of the order, would also be a 'director'

responsible for the management of the company and as such liable to be reported as a Wilful Defaulter subject to the provisions the Master Circular. It is further submitted that RBI has not defined the term 'independent director', and as such, the same may have the meaning as generally understood keeping also in mind the provisions of the Companies Act, 2013.

15. As is clear from the above, the RBI has revised its directions on 'wilful defaulters', every time improving the same based on the experience gained including the observations made by the Courts. The RBI will continue to bring about more clarity to our circular on 'wilful defaults' to reflect the experience gained during their implementation including the pronouncements by the courts.

16. In the premises, it is humbly prayed that this Hon'ble Court may take this affidavit on record and pass appropriate orders as this Hon'ble Court may deem fit and proper in the interest of justice."

4. The senior counsel for the respondent no.2 RBI in response to specific query whether the subsequent Circular dated 1st July, 2015 referred to in the affidavit aforesaid would govern the period prior thereto also as in the present case, under instructions states that the Circular of 1st July, 2015 only clarifies the position and thus what has been stated in the counter affidavit aforesaid with reference to the said Circular would apply to the facts of the present case also.

5. The counsel for the petitioner contends that he does not agree in entirety with the interpretation by the respondent no.2 RBI of the Circular dated 1st July, 2015, copy of which is annexed to the aforesaid affidavit. He has further argued that the said Circular when applied to the petitioner,

would nullify the action of the respondents no.3&4 State Bank of Bikaner & Jaipur (SBBJ) of forwarding the name of the petitioner to the respondent no.2 RBI / Credit Information Bureau of India Ltd. (CIBIL) for inclusion in the wilful defaulter list is fallacious.

6. It is not for this Court to conduct the enquiry in this respect. As the orders aforesaid would show, the clarification and the stand of respondent no.2 RBI qua the matter has emerged now only. Though the counsel for the respondents no.3&4 SBBJ contends that the petitioner in response to the show cause notice issued to him did not rebut any of the material averments but in my view when neither the respondent no.3&4 SBBJ nor the petitioner knew how the Circular dated 1st July, 2013 of the RBI (acting whereunder impugned action was taken) was to be interpreted, the petitioner needs to be heard afresh before his name can be permitted to be continued on the wilful defaulter list.

7. The petition is thus disposed of with the following directions:

(i) The respondents no.3&4 SBBJ if desirous of continuing the name of the petitioner in the wilful defaulter list to, on or before 25th June, 2016, issue a fresh show cause notice to the petitioner in the light of the affidavit of the respondent no.2 RBI reproduced hereinabove and the Circular dated 1st July, 2015 supra;

(ii) In the event of such a show cause notice being given, the petitioner shall have liberty to respond thereto, on or before 15th July, 2016;

(iii) If the respondents no.3&4 RBI are not satisfied with the reply of the petitioner, a personal hearing would be given to the petitioner by the competent officer / Committee of the respondents no.3&4 SBBJ;

(iv) The respondents no.3&4 SBBJ would take a decision about the continuance of the name of the petitioner in the wilful defaulter list on or before 31st August, 2016 and if the said decision is against the petitioner, it will be a reasoned one and a copy thereof shall be furnished to the petitioner within the said time;

(v) The petitioner, if remains aggrieved, would have remedies in accordance with law;

(vi) If the show cause notice is not given within the aforesaid time or if a reasoned order is not passed by 31st August, 2016, the name of the petitioner shall in any case be removed from the wilful defaulter list.

No costs.

RAJIV SAHAI ENDLAW, J.

MAY 24, 2016
'gsr'