

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Before:

The Hon'ble Justice Hiranmay Bhattacharyya

WPA 9699 of 2020

Ishwari Prasad Tantia & Anr.

Vs.

IDBI Bank Ltd. & Ors.

For the Petitioner : Mr. Jishnu Saha
Mr. R.N. Ghose
Mr. Ishan Saha.....advocates

For the Respondents : Mr. Kausik De
Mr. Chayan Gupta
Mr. Mohini Majumder
Ms. K. Mehrotra
Mr. Roshan Pathak..... for the respondents
nos. 1 to 8

Heard on : 07.01.2021

Judgment on : 29.01.2021

Hiranmay Bhattacharyya, J.:

The writ petitioners have filed the instant application under Article 226 of the Constitution of India praying for a mandamus commanding the respondents to remove the names of the petitioners from the list of wilful defaulters and for setting aside the

order dated October 13, 2020 passed by the Wilful Defaulters Review Committee.

The facts giving rise to the instant writ petition are as follows –

Tantia Construction Ltd. (for short “TCL”) is a public limited company incorporated under the Companies Act, 1956. A corporate insolvency resolution process was instituted against the company by the State Bank of India being the lead bank by filing an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short “IBC”). The resolution plan submitted by M/s. EDCL infrastructure limited and M/s. US Construction Private Limited was approved by the National Company Law Tribunal, Kolkata Bench by its order dated February 24, 2020. In the meantime, the respondent no. 1 issued a show cause notice dated November 19, 2019 to the promoters/ directors of TCL. The petitioners replied to the show cause notice and appeared before the Wilful Defaulters Committee on December 27, 2019 for a personal hearing. The Wilful Defaulters Committee in its meeting held on March 11, 2020 declared the petitioners as wilful defaulters. The petitioners made representations against the aforesaid decision classifying them as wilful defaulters. The written representation received from the petitioners as well as the response of the Department was placed before the Wilful Defaulters Review Committee in its meeting held on August 27, 2020. The Review Committee by an order dated October 13, 2020 held that the petitioners are fit to be declared as wilful defaulters and their names are to be forwarded to Credit

Information Companies and other actions to be initiated as specified in RBI circular.

The writ petitioners are aggrieved by the decision of the Wilful Defaulters Review Committee in classifying them as wilful defaulters.

Mr. Jishnu Saha, learned Senior Counsel for the petitioner contended that wilful default would be deemed to have occurred if any of the events mentioned in 2.1.3 of the Master Circular on wilful defaulters dated July 1, 2015 is noted. He contended that the identification of the wilful default should be made keeping in view the track records of the borrowers and should not be decided on the basis of an isolated transactions/ incidents. In order to classify a default as wilful the same must be intentional, deliberate and calculated. Mr. Saha contended that the order of the Wilful Defaulters Review Committee is an unreasoned one and the same was passed without taking into consideration the points raised by the writ petitioners in their representation. He contended that TCL was absolved of the wilful default upon approval of the resolution plan and the company was taken over by the successful resolution applicant. Thereafter, no allegation of wilful default can survive against the writ petitioners as promoters/ directors. In other words, the contention of Mr. Saha is that the promoters/directors cannot be classified as wilful defaulters after the company itself is absolved of the wilful default. In support of such submission Mr. Saha relied upon the following judgments : (i) *Committee of Creditors of Essar*

Steel India Limited vs. Satish Kr. Gupta reported at 2019 SCC Online SC 1478. (ii) *Gaurav Dalmia vs. Reserve Bank of India* reported at 2020 SCC Online (Cal) 668. (iii) a judgment of the Division Bench of this Hon'ble Court dated September 18, 2020 in *Axis Bank Ltd. vs. Gaurav Dalmia and others*. (iv) *State Bank of India vs. Jah Developers* reported at AIR 2019 SC 2854.

Per contra, Mr. Gupta the learned advocate for the respondent contended that the writ petitioners are not merely the promoters/directors but they were also the guarantors. He contended that the statement made in the writ petition that no demand was made on the petitioners on the basis of their guarantees is a gross suppression of material facts as a proceeding before the Debts Recovery Tribunal being OA 286 of 2019 is pending wherein the personal guarantee of the writ petitioners were invoked. He relied upon a judgment of the Hon'ble Supreme Court of India in the case of *Prestige Lights Ltd. vs. State Bank of India*, reported at (2007) 8 SCC 449 and submitted that the instant writ petition is liable to be dismissed on the ground of suppression alone. Mr. Gupta further contended that the show cause notice refers to the series of defaults committed by petitioners and the same cannot be said to be an isolated default in any manner whatsoever. Mr. Gupta relied upon a judgment of a co-ordinate bench of this court in the case of *Gouri Shankar Jain vs. Punjab National Bank* reported at AIR 2020 (Cal) 90 in support of his submission that the contractual obligations between the financial creditor and the guarantor are not extinguished by the outcome of a proceeding under IBC, 2016.

In reply Mr. Saha, learned Senior Counsel for the petitioner admitted the pendency of proceedings before the Debt Recovery Tribunal. He stated that, through, advertence such fact was not stated in the writ petition. By referring to clause 2.6 of the Master Circular Mr. Saha contended that a non-group corporate or an individual guarantors can be classified as an willful defaulters in case such guaranties were given with effect from September 9, 2014 and the guarantees taken prior to this date does not come within the purview of the said Master Circular. Mr. Saha contended that the guarantees given by the petitioners in the instant case was prior to September 9, 2014 and as such the petitioners being individual guarantors cannot be classified as wilful defaulters pursuant to the said Master Circular.

The Learned Advocate for the parties advanced their arguments on points of law and as such affidavits were neither sought for nor invited by this Court.

The question which has cropped up in the instant writ petition is whether the writ petitioners being the promoter / directors of a company as well as guarantors to the loan facility can be classified as wilful defaulters even after the company is absolved of its liability.

The purpose of the Master Circular on Willful Defaulters is 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.

Paragraph 2.1.3 of the Master Circular defines Wilful Default. Para 2.1.3 is extracted below –

“2.1.3 Wilful Default: A ‘wilful default’ would be deemed to have occurred if any of the following events in 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.”

Paragraph 2.2.1 of the said Master Circular defines diversion of funds as refer to at paragraph 2.1.3 above. Paragraph 2.2.1 is extracted below-

“2.2 Diversion and siphoning of funds

2.2.1 Diversion of Funds: The term ‘diversion of funds’ referred to at paragraph 2.1.3 (b) above, should 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.”

Paragraph 2.5 of the Master Circular provides that no additional facilities should be granted by the bank or financial institutions to companies including their entrepreneurs/ promoters to the listed Wilful Defaulters. It also provides for initiation of legal

process against the borrowers/ guarantors. Paragraph 3 of the Master Circular provides the mechanism for identification of Wilful Defaulters.

IDBI Bank Limited (for short “IDBI”) granted fund based working capital loan facilities to TCL in order to finance the company’s ongoing projects under consortium banking arrangement. The writ petitioners entered into loan facility agreement and other security documents for working capital facilities and also created mortgage of the immovable properties in favour of IDBI and other consortium lenders. The writ petitioners executed various guarantee agreements with IDBI and other consortium lenders. The writ petitioners were, thus, required to pay interest and other charges and also repay installments of principal in accordance with the provisions of the loan agreement and a supplemental loan agreement.

The Deputy General Manager, MPA Management Group, IDBI Bank being the respondent no. 4 herein issued a show cause notice to the writ petitioners dated November 19, 2019 alleging that the writ petitioners have failed and neglected to pay the principal as well as the interest in terms of the aforesaid agreement and committed defaults in performance of other conditions of the loan agreement. It was specifically stated in the said show cause notice that it has been decided that the names of the directors of TCL be reported to RBI for inclusion in the list of wilful defaulters on the grounds being criteria numbers 2.1.3 (b) [2.2.1 (c) and 2.2.1 (d)] of

the Master Circular dated 01.07.2015. One of the allegations against the directors was routing of all funds through any bank other than lender bank or members of consortium without prior permission of the lender.

The writ petitioners replied to the said show cause notice by a letter dated December 3, 2019. The writ petitioners were afforded an opportunity of hearing on December 27, 2019. The writ petitioners appeared before the said committee and made their submissions before the Wilful Defaulters Committee. The respondent no. 4 herein by a letter dated January 13, 2020 requested the writ petitioners to provide all the necessary documents to substantiate their submission before the Wilful Defaulters Committee. The petitioners thereafter submitted the documents in support of their submissions.

The resolution plan submitted by EDCL and USC was approved by the Learned National Company Law Tribunal, Kolkata Bench by its order dated February 24, 2020 and the EDCL took control of TCL along with its assets and liabilities.

The Wilful Defaulters Committee observed that the writ petitioners could not provide convincing replies on the charges of Wilful Defaults in terms of Serial no. 2.1.3(b) [2.2.1 (d)] of the Master Circular of RBI on Wilful Defaulters dated July 1, 2015. The Wilful Defaulters Committee of the Bank declared the writ petitioners as wilful defaulters. The respondent no. 4 issued a notice dated April 22, 2020 requesting the writ petitioners to submit

their further representation on the classification of wilful defaulter before the Review Committee. The writ petitioners by a letter dated April 29, 2020 reiterated the submissions made by them in the letter dated December 3, 2019 which is the reply to the show cause notice dated November 19, 2019. It was further stated therein that they have also submitted the documents as requested by the respondent no. 4.

The Wilful Defaulters Review Committee in its meeting held on August 27, 2020, after considering the written representations submitted by the writ petitions and the department's response thereto, passed an order that the promoters/ directors of TCL i.e. the petitioners herein are fit to be declared as wilful defaulters. It was specifically observed by the said Review Committee that despite the fact that operations of the committee were allowed through TRA account only, the borrower has routed substantial transactions through non TRA accounts which is diversion of funds and violation of CDR terms and falls under the criteria of wilful default under 2.1.3 (b) [2.2.1 (d)].

The company operates through its directors. The directors, who are in charge of the affairs of the company are responsible for diversion of funds. Thus, in case a company is held guilty of diversion of funds the company as well as its directors can be classified as Wilful Defaulters. Though the company is absolved of its liability through corporate resolution process and the board of directors are removed from the board of the said company, such

directors would still be liable in case they have furnished personal guarantee to the loan facility extended to the company. The directors being at the helm of the affairs of a company are responsible for diversion of funds.

The next question which arises is whether the contractual obligations between the financial creditor and the surety are obliterated or modified or suspended by the eventual outcome of a proceeding under Section 7 of the IBC, 2016.

The company functions through its directors. The directors are responsible for the actions of the company. They may be found to be in wilful default along with the borrower company but such directors may not be liable to meet the financial obligation of the company when they do not extend any guarantee or create any mortgage of their personal properties. The writ petitioners were the executive directors of TCL upto March 13, 2019. The petitioners were also guarantors to the loan sanctioned by the respondents in favour of the company. The resolution plan which was approved by the Learned National Company Law Tribunal in clause 15.14 specifically provides that the existing guarantees of the erstwhile promoters of the corporate debtor in favour of the financial creditors shall continue to be in full force and effect and the financial creditors shall always have the right to enforce the same, even post or during implementation of the resolution plan. Thus, it is evident there from that the financial creditor has the right to enforce the

guarantee given by the petitioners herein as erstwhile promoters of TCL.

It is now well settled that the corporate Debtor in a proceeding under the IBC, 2016 may stand discharged of its liability to its creditors but such discharge does not absolve the surety of its liability. A co-ordinate bench of this Hon'ble Court in *Gouri Shankar (supra)* after considering the provisions of Section 31 of the IBC, 2016 observed that the contractual obligations between the financial creditor and the surety are not obliterated or modified or suspended by the eventual outcome of a proceeding under section 7 of the IBC. This court in *Gouri Shankar Jain (supra)* held, thus-

“35. *In a proceeding under Section 7 of the Code of 2016, the consent of the surety is immaterial when, the creditor is dealing with the principal debtor in terms of the Code of 2016. Therefore, when, the Adjudicating Authority sanctions a Resolution Plan in respect of the corporate debtor in an application under Section 7 of the Code of 2016, then, the action taken by the creditor in a proceeding under Section 7 of the Code of 2016 is involuntary. The Corporate Debtor in a proceeding under Section 7 of the Code of 2016 may stand discharged of its liability to its creditors. Such discharge being had in a proceeding for bankruptcy and insolvency, the same does not absolve the surety of the liability as has been held in Maharashtra State Electricity Board, Bombay (supra). The sanctioned Resolution Plan cannot be construed to be a variation of the terms of the contract between the principal debtor and the creditor, without the consent of the surety, discharging the surety as to transaction subsequent to the variants or at all. Similarly, the action of a financial creditor applying under Section 7 of the Code of 2016 cannot be*

construed to be an action of creditor in terms of Section 134 of the Act of 1872. When, the financial creditor approaches the National Company Law Tribunal under Section 7 of the Code of 2016, it approaches the Tribunal for the purpose of recovering its claim. An application under Section 7 of the Code of 2016 cannot be construed to be a discharge of the surety in terms of Section 134 of the Act of 1872. On the same analogy, an application under Section 7 of the Code of 2016 cannot be construed to be a discharge of the surety under Section 135 of the Act of 1872. An application under Section 7 of the Code of 2016 and the consequential orders that may be passed under the Code of 2016 cannot also be construed to be a discharge of the surety in terms of Section 139 of the Act of 1872. The implied promise recognised under Section 145 of the Act of 1872 is not impaired by any order that may be passed under the Code of 2016. As noted above, when, a financial creditor approaches the National Company Law Tribunal under the provisions of the Code of 2016, it does so, in exercise of statutory rights. Contractual obligations between the financial creditor and the surety are not obliterated or modified or suspended by the eventual outcome of such proceeding.

37. *Section 14 of the Code of 2016 does not apply to a personal guarantor. The Code of 2016 does not allow personal guarantors to escape their liability. When an application under Section 7 of the Code of 2016 is admitted by the Adjudicating Authority, the steps taken subsequent thereto flows out of the statute. The two termination points of an application under Section 7 of the Code of 2016, after the admission of such application, do not result in any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor to constitute a discharge of a surety under Section 133 of the Act of 1872."*

Thus, in cases where a director found to be in wilful default is a guarantor or a mortgagor, they have to carry the burden of the financial obligation to ensure repayment. In such a case where the directors are guarantors and fails and neglects to fulfill their

financial obligation of repayment, they can be classified as wilful defaulters as has been held by a Division Bench of the Hon'ble High Court at Calcutta in FMA 906 of 2020 (*Axis Bank Limited vs. Gourav Dalmia & Ors.*). However, in the said judgment the Division Bench held that the writ petitioners therein stood rid of their burden as wilful defaulters and their names were liable to be removed from the list of wilful defaulters the moment the money due to the bank was paid in the full or was agreed to be received by way of a compromise since no personal guarantee was furnished by any of the writ petitioners therein. In the instant case the writ petitioners furnished personal guarantee to the loan facilities extended by the concerned bank and the writ petitioners would be liable till the entire debt is discharged and can be classified as wilful defaulters.

For the reasons as aforesaid, this Court is of the view that the writ petitioners who were the guarantors to the loan facility extended to the company and have defaulted in repayment can be classified as wilful defaulters even after the company is absolved of its liability.

By relying on the judgment in the case of *Jah Developers (supra)* Mr. Saha contended that the authorities have to discover as to whether the unit has defaulted in making its payment obligations even when it has the capacity to honour the obligations or siphoned off funds so that the funds have not been utilised for the specific purpose for which the finance was made available. He further submitted that the said authority is to consider whether a default is

intentional, deliberate and calculated. According to him the decision of the Review Committee does not disclose such reasons and as such the same is contrary to the principles laid down in *Jah Developers (supra)* and is liable to be set aside.

The Hon'ble Supreme Court in *Jah Developers (supra)* held that the moment a person is declared to be a wilful defaulter the impact on its fundamental right to carry on business is direct as no additional facilities can be granted by any bank/ financial institutions and the entrepreneurs / promoters would be barred from institutional finance for 5 years. Taking into consideration such drastic consequences the Hon'ble Supreme Court held as-

“.....Given these drastic consequences, it is clear that the Revised Circular, being in public interest, must be construed reasonably. This being so, and given the fact that paragraph 3 of the Master Circular dated 01.07.2013 permitted the borrower to make a representation within 15 days of the preliminary decision of the First Committee, we are of the view that first and foremost, the Committee comprising of the Executive Director and two other senior officials, being the First Committee, after following paragraph 3(b) of the Revised Circular dated 01.07.2015, must give its order to the borrower as soon as it is made. The borrower can then represent against such order within a period of 15 day to the Review Committee. Such written representation can be a full representation on facts and law (if any). The Review Committee must then pass a reasoned order on such representation which must then be served on the borrower. Given the fact that the earlier Master Circular dated 01.07.2013 itself considered such steps to be reasonable, we

incorporate all these steps into the Revised Circular dated 01.07.2015.”

The petitioners were given an opportunity to make a representation against the decision of the first committee to classify them as wilful defaulters. The writ petitioners submitted a representation reiterating their earlier reply which was submitted in response to the show cause notice. The Review Committee after considering the representations and the submissions made by the writ petitioners held that the borrower has routed substantial transactions through non-TRA accounts which is diversion of funds and violation of CDR terms. Thus, the Review Committee considered the said manner in the light of the observations made in *Jah Developers(supra)* and passed a reasoned order.

The Show Cause notice stated in details about the nature of wilful default. The reference of the documents on the basis of which the writ petitioners were sought to be classified as wilful defaulters were also indicated in such notice. The writ petitioners got several opportunities to controvert such allegations. The writ petitioners relied upon some documents in support of their contention that they cannot be classified as wilful defaulters. The Review Committee after consideration of all documents and the submissions of the parties classified the writ petitioners as willful defaulters. The in-house committees constituted in terms of the Master Circular are fact finding authorities. Such Committees arrived at their decisions on the basis of materials placed before it. There is no infirmity in the decision making process.

The guarantees given by an individual as referred to in Clause 2.6 of the Master Circular does not relate to guarantees given by the promoter guarantors of the company said to be in wilful default. As such I am unable to accept the submission of Mr. Saha that the guarantees given by the writ petitioners do not fall within the mischief of the Master Circular as the same was given prior to September 9, 2014.

For the reasons as aforesaid, this Court is of the view that the names of the writ petitioners cannot be removed from the list of wilful defaulters merely on the ground that the company is absolved of its liability as the petitioners have furnished personal guarantees to the loan facility extended by the respondent. The order of the Review Committee does not suffer from any infirmity.

Though in the writ petition it is specifically stated that no demand was made on the petitioners on the basis of the personal guarantees given by the petitioners to the respondent no. 1 i.e. the IDBI Bank Limited, but Mr. Saha, in course of hearing, in his usual fairness, admitted that the respondent no. 1 has indeed invoked the guarantees given by the petitioners and a proceeding in respect thereof, initiated by the respondent no. 1 herein before the Kolkata Debts Recovery Tribunal no. 1 being OA No. 286 of 2018, is pending.

Such suppression, in my view, is a suppression of material facts and a writ court may refuse to entertain the writ petition as has been held by the Hon'ble Supreme Court in *Prestige Lights*

(*supra*). As such the instant writ petition is also liable to be dismissed on that ground alone.

Let me now deal with the judgments cited by Mr. Saha.

In *Gourav Dalmia (supra)* the directors of the company did not furnish personal guarantees to the loan extended by the bank. On such facts it was held that the defaulter tag of the petitioners in the capacity of the promoters and the directors had to go.

In the instant case the petitioners have furnished their personal guarantee to the loan extended by the respondent no. 1 and as such the judgment of the co-ordinate bench in the case of *Gourav Dalmia (supra)* is not applicable to the facts of the instant case.

In *Essar Steel India (supra)* important questions as to the role of resolution applicants, resolution professionals, the committee of creditors constituted under the IBC, 2016, the jurisdiction of the National Company Law Tribunal and the Appellate Tribunal qua resolution plans approved by the committee of creditors as well as the constitutional validity of Sections 4 and 6 of the Insolvency and Bankruptcy Code (Amendment Act. 2019) were raised. Whether a promoter/ director being the guarantor can be classified as a Wilful Defaulter even after the company is absolved of its default was not the issue which fell for consideration in *Essar Steel India (supra)*. As such the said judgment has no manner of application to the facts of the instant case.

For the reasons as aforesaid WPA No. 9699 of 2020 is accordingly dismissed without, however, any order as to costs.

Photostat certified copy of this judgment, if applied for, be supplied to the parties on priority basis upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)