BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 11.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE **ABDUL QUDDHOSE**

W.P.(MD)Nos.16977, 16978, 16979 and 16981 of 2019

and

W.M.P.(MD).Nos.13548, 13549, 13551 of 2019 and 2231, 2233, 2235, 2236 of 2020

Selvaraj Moses .. Petitioner in W.P.(MD).No.16977 of 2019
Mrs.Anny Jonson .. Petitioner in W.P.(MD).No.16978 of 2019
T.Johnson .. Petitioner in W.P.(MD).No.16979 of 2019
Samuel Jeffson .. Petitioner in W.P.(MD).No.16981 of 2019

Vs

1.Ministry of Finance,
Represented by its Secretary,
Department of Financial Services,
Jeevan Deep Building,
Parliament Street, New Delhi-110001.

2.Reserve Bank of India,
Represented by its Chief General Manager,
Department of Banking Operations and Development,
Central Office, 13th Floor, Central Office Building,
Shahid Bhagat Singh Road, Mumbai-400 001.

3.State Bank of India,
represented by its Deputy General Manager,
Secured Assets Management Branch,
"Red Cross Buildings" 32, Red Cross Road,
Egmore, Chennai-600 008.

4.TransUnion CIBIL Limited,
(Formerly: Credit Information Bureau (India) Limited),
Represented by its Authorized Representative,
One Indiabulls Centre, Tower 2A, 19th Floor,
Senapati Bapat Marg, Elphinstone Road,
Mumbai-400 013. .. Respondents

COMMON PRAYER: Petitions filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records relating to the publication of the wilful defaulters list, listing the petitioners as wilful defaulter and quash the same and consequently direct the respondents 3 and 4 to follow and comply the RBI Circular DBR.No.CID.BC.22/20.16.003/2015-16 dated 01.07.2015 of the second respondent in the light of the directions in Civil Appeal No.4776 of 2019, dated 08.05.2019 of the Hon'ble Supreme Court of India.

In all Writ Petitions

For Petitioners	: Mr.Issac Mohanlal Senior Counsel for M/s.Muthukeethaiyan
For R-1	: Mr.H.Lakshmi Shankar Central Government Standing Counsel
For R-3	: Mr.S.Sethuraman Standing Counsel
For R-4	: Mr.S.Pon Senthilkumaran

COMMON ORDER

These writ petitions have been filed challenging the publication of the wilful defaulters list listing the petitioners as wilful defaulters and the petitioners have sought for a consequential direction to the respondents 3 and 4 to follow and comply with the Circular of Reserve Bank of India, dated 01.07.2015, issued by the second respondent, in the light of the directions given by the Honourable Supreme Court in Civil Appeal No.4776 of 2019, dated 08.05.2019.

2.The petitioners have filed these writ petitions on the following grounds.

a) The action of the respondents 3 and 4 rejecting the petitioners' Resolution Plan submitted under Section 29 A of the Insolvency Bankruptcy Code, 2016, on the ground that the petitioners are wilful defaulters is in direct violation of Article 19(1)(g) of the Constitution of India.

b) The action of the respondents 3 and 4 in declaring the petitioners as wilful defaulters without due process could be a direct violation of Article 19(1)(g) of the Constitution of India.

c)The action of the respondents 3 and 4 is in violation of Circular / Guidelines issued by the Reserve Bank of India, dated 01.07.2013 and 01.07.2015, wherein, the detailed process has been specified to identify the wilful defaulters. According to the petitioners, they do not fall under the said category as per the aforesaid Guidelines issued by the Reserve bank of India.

d) The action of the respondents 3 and 4 is in violation of the law of the land and is in sheer breach of the Principles laid down by the Honourable Supreme Court in the case of ***State Bank of India Vs. Jah Developers***, reported in ***(2019) 6 Supreme Court Cases 787.***

e) The action of the respondents 3 and 4 has caused irreparable loss and injury to the employees of the petitioners' companies and their family members.

f) The companies of the petitioners is MSME and providing employment for 1400 employees mainly in EXIM trade, generating substantial foreign exchange for the country.

3.A counter affidavit has been filed by the third respondent stating that they have followed the procedure as per the Master Circular issued by the Reserve Bank of India. As per the said Circulars, there is no necessity for the third respondent to furnish a copy of the Identification Committee's (First Committee) Report to the petitioner. According to them, the petitioners were afforded sufficient opportunity of hearing by the third respondent. It is also their case that they deny the explanation submitted by the petitioners. According to them, Principles of Natural Justice has not been violated. It is their case that the action of the respondents is as per the Circular and Guidelines issued by the Reserve Bank of India, dated 01.07.2013 and 01.07.2015.

4.The fourth respondent has also filed a separate counter and they would sum up by stating that they are inclined to grant any relief to the petitioners, if it would serve the ends of justice, if this Court directs the third respondent to instruct the fourth respondent to change/update credit information of the petitioners, the fourth respondent shall duly comply with the same on receipt of such instructions from the third respondent.

5.Heard Mr.Issac Mohanlal, learned Senior Counsel appearing for the petitioners, Mr.H.Lakshmi Shankar, learned Central Government Standing Counsel, appearing for the first respondent, Mr.S.Sethuraman, learned Standing Counsel, appearing for the third respondent and Mr.S.Pon Senthilkumaran, learned counsel appearing for the fourth respondent in all writ petitions.

6.The learned Senior Counsel appearing for the petitioners drew the attention of this Court to the Judgment of the Honourable Supreme Court made in the case of ***State Bank of India Vs. Jah Developers***, reported in ***(2019) 6 Supreme Court Cases 787*** and in particular, he referred to paragraph 24 of the said Judgment.

7.According to him, the procedure laid down by the Honourable Supreme Court has been violated in the instant case. According to him, in the case on hand, the Identification Committee (First Committee) comprising of the Executive Director and two other Senior Officials must give a copy of the Report to the Borrower as per the Revised Circular of the Reserve Bank of India, dated 01.07.2015. According to him, the third respondent has not complied with the directions issued by the Honourable Supreme Court in the aforesaid decision as the Identification Committee (First Committee) report was not furnished to the petitioners. The petitioners have also not been given an opportunity of hearing.

8.The learned Senior Counsel for the petitioners would submit that since the order of the Identification Committee (First Committee) was not furnished to the petitioners, they have been denied the opportunity to review the said order. He would also submit that the conclusions reached by the Identification Committee (First Committee) was also not brought to the knowledge of the petitioners. He would submit that though the petitioners were invited for a hearing by the Identification Committee (First Committee), thereafter, the report of the Identification Committee (First committee) was not furnished to them. According to him, the petitioners' right to carry on business under Article 19(1)(g) of the Constitution of India is affected due to the arbitrary and illegal order treating them as wilful defaulters. According to him, due to the same, the petitioners have been prevented from submitting a Resolution Plan under Section 29 A of the Insolvency Bankruptcy Code, 2016 and prevented from availing financial facilities from financial institutions. It is also submitted by the learned Senior Counsel for the petitioners that on various dates during the period between May 2017 and October 2018, petitioners' companies have made a payment of Rs.5,29,88,194/- to the third respondent bank. Therefore, he would submit that the impugned publication of the wilful defaulters list listing the petitioners as a wilful defaulter has to be quashed and remanded back to the respondents 3 and 4 for fresh consideration on merits and in accordance with law.

9.Mr.S.Sethuraman, learned Standing Counsel, appearing for the third respondent would reiterate the contents of the counter affidavit filed in this writ petition. He would submit that only in accordance with the Reserve Bank Circulars, the impugned publication has been issued. He would further submit that the decision of the Honourable Supreme Court referred to by the learned Senior Counsel for the petitioners is a subsequent development.

10.The learned counsel for the fourth respondent would submit that the fourth respondent will abide by any directions issued by this Court based on the merits of the respective contentions.

11.The Honourable Supreme Court in the case of ***State Bank of India Vs. Jah Developers***, reported in ***(2019) 6 Supreme Court Cases 787,*** relating to a similar issue of declaring a person as a wilful defaulter has laid down the procedure for declaring a person as a wilful defaulter in para 24 of the Judgment which reads as follows:

> *"24.Given the above conspectus of case law, we are of the view that there is no right to be represented by a lawyer in the in-house proceedings contained in Para 3 of the Revised Circular dated 01.07.2015, as it is clear that the events of wilful default as mentioned in Para 2.1.3 would only relate to the individual facts of each case. What has typically to be discovered is whether a unit has defaulted in making*

its payment obligations even when it has the capacity to honour the said obligations; or that it has borrowed funds which are diverted for other purposes, or siphoned off funds so that the funds have not been utilised for the specific purpose for which the finance was made available. Whether a default is intentional, deliberate, and calculated is again a question of fact which the lender may put to the borrower in a show-cause notice to elicit the borrower's submissions on the same. However, we are of the view that Article 19(1)(g) is attracted in the facts of the present case as the moment a person is declared to be a wilful defaulter, the impact on its fundamental right to carry on business is direct and immediate. This is for the reason that no additional facilities can be granted by any bank/financial institutions, and entrepreneurs/promoters would be barred form institutional finance for five years. Banks/financial institutions can even change the management of the wilful defaulter, and a promoter/director of a wilful defaulter cannot be made promoter or director of any other borrower company. Equally, under Section 29-A of the Insolvency and Bankruptcy Code, 2016, a wilful defaulter cannot even apply to be a resolution applicant. Given these drastic consequences, it is clear that the Revised Circular, being in public interest, must be construed reasonably. This being so, and given the fact that Para 3 of the Master Circular dated 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 Para 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 days to the Review committee. Such written representation can be a full representation on facts and law (if any). The Review Committee must then pass a reasoned order on such representation which must then be served on the borrower. Given the fact that the earlier Master Circular dated 01.07.2013 itself considered such steps to be reasonable, we incorporate all these steps into the Revised Circular dated 01.07.2015. The impugned judgment is, therefore, set aside, and the appeals are allowed in terms of our judgment. We thank the learned Amicus Curiae, Shri

Parag Tripathi, for his valuable assistance to this Court."

12.As seen from the aforementioned judgment, due to the drastic consequences involved in declaring a person as wilful defaulter, the Honourable Supreme Court has issued the following directions before declaring a person as a wilful defaulter.

a) A preliminary decision has to be taken by the Identification Committee (First Committee) to declare a person as a wilful defaulter.

b) The borrower in accordance with the Master Circular of the Reserve Bank of India is permitted to make a representation, within 15 days of the preliminary decision of the Identification Committee (First Committee).

c) The Committee shall comprise of the Executive Director and two other Senior Officials of the bank.

d) The order of the Identification Committee (First Committee) after considering the representation of the borrower has to be furnished to the borrower, the borrower can then represent against the order of the Identification Committee (First Committee), within a period of 15 days to the Review Committee. Such written representation can be a full representation of facts and law (if any).

e) The Review Committee must pass a reasoned order on such representation, which must then be served on the borrower.

13.In the case on hand admittedly, the Identification Committee (First Committee) order has not been served on the petitioners. It is also contended by the petitioners that they are also not aware of the same. No documents have been produced by the respondents to prove that the order of the Identification Committee (First Committee) was served upon the petitioners. Only on receipt of the Identification Committee (First Committee) order, the petitioners, if aggrieved by the same will be in a position to review the same, within a period of fifteen days to the Review Committee. Having not been served with the order of the Identification Committee (First Committee), they have lost that opportunity. The petitioners have also contended that subsequent to the initiation of the proceedings under the Insolvency Bankruptcy Code, 2016, they have made substantial payments. The action of declaring a person as a wilful defaulter is a drastic action, which affects their fundamental right to carry on business under Article 19 (1)(g) of the Constitution of India. That is the reason why the Honourable Supreme Court has directed the Financial Institutions/Banks to adhere strictly to the procedure before declaring a person as a wilful defaulter. The petitioners have been prevented from submitting a Resolution Plan to the Insolvency Resolution Professional under Section 29 A of the

Insolvency Bankruptcy Code 2016, even though they are desirous of submitting the same only on account of the fact that they have been declared as wilful defaulters.

14.For the foregoing reasons, this Court is of the considered view that the procedure laid down by the Honourable Supreme Court in the case of ***State Bank of India Vs. Jah Developers***, reported in ***(2019) 6 Supreme Court Cases 787***, referred to supra has not been followed and therefore, the impugned list declaring the petitioners as wilful defaulters has to be quashed and the matter has to be remanded back to the third respondent for fresh consideration on merits and in accordance with law.

15.Accordingly, the impugned list declaring the petitioners as wilful defaulters is hereby quashed and the matter is remanded back to the third respondent for fresh consideration on merits and in accordance with law. The third respondent shall follow the procedure as laid down in para No.24 of the Judgment of the Honourable Supreme Court in the case of ***State Bank of India Vs. Jah Developers***, reported in ***(2019) 6 Supreme Court Cases 787***, by issuing fresh notice to the petitioners and shall complete the said exercise, within a period of six months from the date of receipt of a copy of this order. Since the impugned list declaring the petitioners as wilful defaulters has been quashed, in the interregnum before passing final orders, the third respondent shall communicate the fourth respondent to remove the petitioners from the wilful defaulters' list in the official web site of the fourth respondent.

16.With the aforesaid directions, these writ petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

TM

Note:*In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate/litigant concerned.*

TO

1.The Secretary Ministry of Finance,
Department of Financial Services,
Jeevan Deep Building,
Parliament Street, New Delhi-110001.

2.The Chief General Manager,
Reserve Bank of India,
Department of Banking Operations and Development,
Central Office, 13th Floor, Central Office Building,
Shahid Bhagat Singh Road, Mumbai-400 001.

3.The Deputy General Manager,
State Bank of India,
Secured Assets Management Building,
"Red Cross Buildings" 32, Red Cross Road,
Egmore, Chennai-600 008.

4.The Authorized Representative,
Trans Union CIBIL Limited,
(Formerly: Credit Information Bureau (India) Limited),
One Indiabulls Centre, Tower 2A, 19th Floor,
Senapati Bapat Marg, Elphinstone Road,
Mumbai-400 013.

+4 CC to M/s.M. MUTHUGEETHAYAN, Advocate (SR-18060, 18061, 18062 & 18063[F] dated 12/04/2022)

+8 CC to M/s.S. SETHURAMAN, Advocate (SR-18080, 18081, 18082 & 18083 [F] dated 12/04/2022)

+1 CC to M/s.S. PON SENTHIL KUMARAN, Advocate (SR-18248[F] dated 12/04/2022)

+3 CC to M/s.H. LAKSHMI SHANKAR, Advocate (SR-18508, 18509 & 18510 [F] dated 13/04/2022)

W.P.(MD)Nos.16977, 16978, 16979 and 16981 of 2019
and
W.M.P.(MD).Nos.13548, 13549, 13551 of 2019
and 2231, 2233, 2235, 2236 of 2020
11.04.2022

sb(CO)
GC(25.04.2022) 8P 21C