

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No.1572 of 2023

**SANJAY PRAKASH BANSAL AND ANR.
VS
THE RESERVE BANK OF INDIA AND ORS.**

WPO No.1727 of 2023

**SANJAY PRAKASH BANSAL AND ANR
VS
THE RESERVE BANK OF INDIA AND ORS**

For the petitioners	:	Mr. Ranjan Bachawat, Snr. Adv. Mr. Arijit Bardhan, Adv., Mr. Avirup Chatterjee, Adv., Mr. Rishav Das, Adv
For the respondent Bank	:	Mr. Shashwat Nayak, Adv., Mr. Santosh Kr. Ray, Adv., Ms. Antalina Guha, Adv
Hearing concluded on	:	19.10.2023
Judgment on	:	17.11.2023

Sabyasachi Bhattacharyya, J:-

1. In WPO No. 1572 of 2023, the petitioners have challenged their declaration as wilful defaulter under the Reserve Bank of India (RBI) Master Circular on Wilful Defaulters dated July 1, 2015 and in WPO No. 1727 of 2023 the order of the Review Committee affirming the said finding. The petitioners were Directors and guarantors of One Bhumya Tea Company Private Limited (for short, "the Company").

2. The first Committee, by its order dated August 8, 2023, declared them to be wilful defaulters. A challenge was preferred by way of the first writ petition, during pendency of which the Review Committee affirmed the said order, which has been challenged in the second writ petition.
3. Learned senior counsel appearing for the petitioners contends that the show-cause notice dated February 23, 2022 pertaining to declaration of wilful defaulter was addressed to the Company and not the petitioners, with only copies marked to the petitioners. Hence, the said notice was not a proper show-cause notice to the petitioners at all within the contemplation of the RBI Circular.
4. Secondly, it is argued that Clause 2.6 of the Circular stipulates that a guarantor would be treated as a wilful defaulter if he or she refuses to comply with the demand made by the creditors/banker despite having sufficient means to make payment of the dues. Neither the Show-cause Notice dated February 23, 2022 nor the impugned order dated August 8, 2023 contains the ingredients of the said clause.
5. Thirdly, it is contended that the hearing notices dated July 23, 2022 and August 1, 2023 reveal that the petitioners were notified to be present at the hearing in the capacity of promoter/directors only, and not as guarantors.
6. Learned senior counsel relies on Clause 3(b) of the RBI Circular, which provides that an opportunity should be given to the borrower and/or promoter/whole-time Director for a personal hearing if the Committee feels such an opportunity is necessary. The said clause

has not been satisfied since no personal hearing was given to the petitioners.

7. Insofar as the Review Committee is concerned, it is argued that if the first committee order dated August 8, 2023 goes, the consequential order of the Review Committee should also be set aside automatically.
8. Moreover, it is contended that the Review Committee ("RC" in brief) did not take any decision independently as its order does not reflect conscious and independent application of mind. A mere repetition of the first Committee's order is violative of the Master Circular and the well-settled law in such context.
9. Moreover, it is argued that the RC order does not disclose the composition of the Committee. It has been signed by the Zonal Head of the Kolkata Zone of the respondent-UCO Bank whereas the concerned Master Circular dated July 1, 2015 contemplates the Committee to be headed by the Chairman/Chairman and Managing Director or the Managing Director and Chief Executive Officer/CEOs and consisting in addition two independent Directors/non-Executive Directors of the Bank. In the absence of satisfaction of such criteria, the order is vitiated, being without authority.
10. Learned senior counsel also assails the hot haste in which the RC passed its orders despite the Bank itself having sought adjournment on September 8, 2023 in WPO No.1572 of 2023, which was a pending challenge against the Wilful Defaulter Committee's order.
11. The petitioners place reliance on *Gaurav Dalmia Vs. RBI and others* [WP 24289 (W) of 2019] for the proposition that the cause of action

leading to declaration of the Directors of a company as wilful defaulters is same as that against the company itself. The Company, at the time of passing of the Wilful Defaulter Committee order, was under a Corporate Insolvency Resolution Process (CIRP) before the NCLT, that is, National Company Law Tribunal and the allegation of default against the company was in abeyance.

12. Learned senior counsel also relies on the judgment in *M/s. Father Tractor and others Vs. Bank of Baroda and others* [WPA No. 17465 of 2023] where it was held that if there was no adjudication worth the name by the Committee for Identification of Wilful Defaulters, the remedy to go before the RC would be illusory and hence an application under Article 226 of the Constitution would be maintainable.
13. With regard to the argument that there was no conscious application of mind by the RC, learned senior counsel cites the judgment of *Moser Bear India Limited Vs. UCO Bank and another* [WP No. 381 of 2018] and *Deepak Puri and another Vs. UCO Bank and others* [WP No. 401 of 2018], where it was held that the Master Circular dated July 1, 2015 contemplates a two-tier decision-making process for the purpose of identification of a wilful defaulter and that the RC must pass a reasoned order on the representation made by the borrower.
14. Learned counsel for the respondent no.2/UCO Bank insinuates that the first writ petition bearing WPO No.1572 of 2023 is not maintainable since the order of the RC has not been challenged. However, such argument pales into insignificance since subsequently

a challenge has also been preferred to the RC order by way of the second writ petition; hence the said question is not gone into.

15. It is next argued on behalf of the Bank that the challenge to the first Committee decision is also not maintainable since the remedy of the petitioners lay before the RC, which was not availed of by them.
16. Learned counsel for the Bank submits that Directors are not absolved by the approval of resolution plan inasmuch as the plan was passed on August 28, 2023 whereas the first committee passed its order on August 8, 2023.
17. Learned counsel argues that there is no bar on initiation of wilful defaulter proceeding even after admission of CIRP and during the pendency of CIRP prior to approval of a resolution plan, in support of which proposition learned counsel cites *Ayan Mallick and another Vs. State Bank of India [WPO No.23 of 2021]*.
18. It is next contended that the first writ petition was affirmed on September 1, 2023 whereas the resolution plan was approved on August 28, 2023. Having not pleaded the said fact, the petitioners cannot argue on the same.
19. Insofar as the petitioners' capacity as guarantors is concerned, it is contended that sufficient notice was given to the petitioners to pay up the debt. Proceedings were initiated under Section 95 of the Insolvency and Bankruptcy Code, 2016 (in short, "the IBC"), for the purpose of enforcement of personal guarantee, which are pending before the NCLT. The demand notice dated December 18, 2020, along with institution of the proceeding under Section 95 of the IBC and the

show-cause notice dated February 23, 2022 constituted adequate notices for demand under Clause 2.6 of the RBI Master Circular.

- 20.** Learned counsel appearing for respondent no.2 argues that the show-cause notice dated February 23, 2022 clearly mentioned that the petitioners were being addressed both as directors and guarantors.
- 21.** The notices of personal hearing are irrelevant for the adjudication of the instant dispute, it is contended, as those were issued prior to the setting aside of the earlier Wilful Defaulter Identification Committee (WDIC) order dated March 30, 2023 by this Court.
- 22.** Fresh notice for personal hearing was issued on August 1, 2023 which adequately refers to the petitioners as guarantors.
- 23.** The notice of personal hearing also refers to the show-cause notice dated February 23, 2023 wherein allegations were made also under Clause 2.6, which refers to guarantors.
- 24.** The same people, being the directors as well as guarantors of the defaulting Company, cannot be permitted to hide behind the corporate veil.
- 25.** It is argued that the issuance of demand notice, despite being a vital fact, has been suppressed by the petitioners, for which the writ petitions ought to be dismissed. In such context, learned counsel refers to *Iswari Prasad Tantia and another Vs. IDBI Bank Limited and others* [WPA No. 9699 of 2020].
- 26.** The order of the WDIC is a reasoned order, since the Jamguri Tea Estate was transferred to Darjeeling Organic Tea Estates Pvt. Ltd., of which the petitioner no.1 was a Director at the time of transfer.

- 27.** It is argued that a *de facto* transfer is also a transfer in the context of a tea estate, apropos a company dealing in production of tea and the purported financial hardship with respect to revenue generation faced by the same. Transfer also took place by agreement as recorded in the Forensic Audit Report (FAR) which was never challenged by the petitioners. Despite the possession of the tea estate being transferred, losses accruing to the same for the financial years 2016-2022 were accounted for in the books of Bhumya Tea Company Pvt. Ltd. for which the wilful defaulter proceeding was also initiated. All such facts were duly dealt with by both the Committees.
- 28.** The reasonings of the Committees, even if an alternative view is possible in the opinion of this Court, ought not to be set aside under Article 226, it is argued.
- 29.** Learned counsel next contends that mere observations regarding earlier facts in the RC order do not vitiate the decision itself. In fact, in the absence of any representation before the RC by the borrower or the petitioners, the discussions of the RC had to be substantially identical with the WDIC decision. Hence, it is contended that both the writ petitions ought to be dismissed.
- 30.** Upon hearing learned counsel for the parties, the challenge to the RC decision is taken up for adjudication first.
- 31.** The argument of hot haste on the part of the respondent no.2-Bank advanced by the petitioners cannot be accepted. The Master Circular of the RBI stipulates a rough timeline which was adhered to by the Bank. In the absence of any restraint order of the court, nothing

prevented the RC from passing its order. Merely by reason of such expedition, the order of the RC cannot be said to have been vitiated.

32. The argument that the RC order was a replica of the first Committee order cannot be accepted as well, since there had to be identity between the two to a substantial extent, in the absence of any representation having been given by the petitioners to change the circumstances or the arguments made before the first Committee. There is reflection in the latter part of the RC order that the RC considered the Bank's allegations and the petitioners' defence and came to a finding. Thus, there is nothing to vitiate the decision-making process of the RC on such score.
33. The petitioners have argued that no opportunity of hearing was given to the petitioners by the RC. However, the Master Circular of the RBI dated July 1, 2015 does not provide for any such fresh hearing. As per the landmark judgment of *Jah Developers*, the principles of natural justice were carved out by the Supreme Court to the extent that the affected party would be entitled to give a representation before the Review Committee. In the present case, no response/rejoinder/representation was given by the petitioners. Hence, there was no question of any further hearing being given to the petitioners in support of such non-existent representation which was never submitted by the petitioners before the RC.
34. The materials before the RC remained the same as those before the first committee and the RC dealt with the same by affirming the order of the WDIC. Such procedure cannot be faulted *per se*.

- 35.** However, the illegality in the RC order lies elsewhere. Clause 3(c) of the Circular stipulates that the RC must be headed by the Chairman/Chairman and Managing Director or the Managing Director and Chief Executive Officer/CEOs and consisting, in addition, of two independent Directors/non-Executive Directors of the Bank. In the present case, however, the order of the RC was not only communicated on September 27, 2023 by the Zonal Head, Kolkata of UCO Bank, the order of the RC itself, dated September 12, 2023 was signed solely by the said Zonal Head, Kolkata Zone of the UCO Bank. Although, within parenthesis, it was written that the order was on behalf of the RC of wilful defaulters, mere mention of the same does not bring the order within the purview of the Master Circular.
- 36.** Nothing in the Master Circular empowers the RC to delegate its authority to the Zonal Head of the concerned Bank. In the present case, the order itself was admittedly signed only by the Zonal Head, who is in no way qualified to comprise of the RC within the contemplation of the Master Circular. Thus, such illegality hits at the very root of the order and renders the same a nullity, being palpably without jurisdiction. Hence, on such ground alone, the RC order impugned in WPO No. 1727 of 2023 stands vitiated, being a nullity in the eye of law.
- 37.** Reverting back to the WDIC order challenged in WPO No. 1572 of 2023, the strongest argument of the petitioners is that no notice was given to the petitioners in the capacity of guarantors, which acquires significance since they had been absolved in the capacity of Directors

by acceptance of the resolution plan regarding the borrower-company by the NCLT.

- 38.** Let us scrutinize the language of Clause 2.6 of the Master Circular, which is the relevant provision in the context.
- 39.** The Clause says that where a banker has made a claim on guarantor on account of default made by the principal debtor, the liability of the guarantor is immediate. In case the said guarantor refuses to comply with the demand made by the creditor/banker despite having sufficient means to make payment of the dues, such guarantor would also be treated as a wilful defaulter.
- 40.** In the present case, a previous order of the WDIC dated March 30, 2023 passed on the basis of the show-cause notice dated February 23, 2022 had been set aside by this Court on June 9, 2023 and the matter had been remanded back without setting aside the show-cause notice itself. Hence the WDIC rightly proceeded on the basis of the same show-cause notice afresh and passed the impugned order dated August 8, 2023.
- 41.** The show-cause notice clearly mentioned that the petitioners had been identified as wilful defaulters both in the capacity of Directors and personal guarantors. Clause 2.6 of the RBI Circular had been clearly mentioned in the notice, along with its alleged violation by the petitioners. It was clearly mentioned in its last paragraph of the show-cause notice that the alleged acts of the petitioners were done in the capacity of directors as well as guarantors.

- 42.** The petitioners were designated both as directors and guarantors. Thus, there could not be any irregularity in the said exercise, as the petitioners were addressed both in the capacity of directors and personal guarantors.
- 43.** The argument that the notice was issued only to the Company and not to the petitioners is frivolous. Marking copies of the same to the petitioners by mentioning them to be directors and guarantors and making specific allegations in the body of the show-cause notice against the directors and guarantors is sufficient to satisfy the requirement of the Master Circular dated July 1, 2015. It is well-settled that while construing a notice, a pedantic approach has to be taken and the notice has to be construed in a manner to ascertain as to whether the contents of the same were sufficiently intelligible to the noticee. A fault-finding approach is deprecated by the jurisprudence pertaining to notices.
- 44.** The subsequent notices of hearing to the petitioners were only a continuation of the show-cause notice and should be read as such. Even if there were minor faults/omissions in the said notices, the hearing notices clearly referred to the show-cause notice and the grounds alleged therein and, as such, cannot be said not to address the petitioners in their capacity of guarantors as well.
- 45.** In very caption of the notices of hearing described the petitioners as directors and guarantors. In the body of the notices, although it was mentioned that the Company and its promoters/whole-time directors were being given a personal hearing, the description of the petitioners

both as directors and guarantors, read with the contents of the initial show-cause notice, was sufficient to indicate that the petitioners would be heard in both capacities. The petitioners remain the same biological persons both as directors or guarantors and thus cannot insist upon a hairline pseudo-distinction on such count merely because of non-mentioning of the expression “guarantors” in one of the paragraphs of the notices of hearing.

- 46.** The very first sentence in the notices of hearing clearly stated that the Committee referred to its show-cause notice dated February 23, 2022 under the caption “Subject”, wherein the identification of the company, its directors, and personal guarantors as wilful defaulters were duly intimated to the petitioners. It was also stated that subsequently the petitioners’ letters denying all instances of wilful default were received. Such clear reference to the show-cause notice and its reply elucidated sufficiently the context of the hearing and the petitioners could not feign ignorance that they were being called upon for hearing both as directors and personal guarantors of the borrower-company.
- 47.** The other limb of argument of the petitioners is that no prior demand was made to the petitioners to pay up as guarantors within the contemplation of Clause 2.6.
- 48.** The relevant sentence in Clause 2.6 is that where a banker “has made claim on the guarantor on account of the default made by the principal debtor”, the liability of the guarantor is immediate.

- 49.** In the present case, a demand was made under Section 95 of the IBC on the petitioners, which was a sufficient claim within the contemplation of the above sentence in Clause 2.6. The said Clause (or any other clause of the Circular, for that matter) does not carve out a special mechanism of an independent and separate notice of demand being given to the guarantor but refers generally to “a claim” on the guarantor. The only qualification is that the claim has to be made on the guarantor on account of the default made by the principal debtor, upon which the liability of the guarantor is immediate. Thus, the notice within the contemplation of Section 95 of the IBC was a sufficient claim for the purpose of Clause 2.6 of the Master Circular.
- 50.** Another branch of the petitioners’ argument is that the petitioners, as guarantors, had never refused to comply with the demand made by the creditor/banker *despite having sufficient means* to make payment of the dues.
- 51.** It is insinuated by the petitioners that “having sufficient means” has to be established by the respondents and not the petitioners. It is argued that the proposition that the petitioners did not pay despite having sufficient means is a negative proof which cannot be asked to be discharged by the petitioners.
- 52.** However, the law is otherwise. There are two components to such test. First, the petitioners are required be shown to have sufficient means and second, that they have not made payment despite the demand.

- 53.** The second aspect requires no proof in the present case, since the banker has made a claim and the petitioners have not repaid, either as guarantor or director.
- 54.** The first aspect of whether the petitioners have or had, at the relevant juncture, sufficient means is entirely within the special knowledge of the petitioners within the contemplation of Section 106 of the Indian Evidence Act. Thus, the burden of proof of the actual/sufficient financial means of the petitioners at the relevant juncture is not on the banker but on the petitioners themselves. Having not discharged such burden, the petitioners cannot be permitted to argue that their sufficient means were not proved by the Bank. Hence, the provisions of Clause 2.6 are squarely applicable in the present case.
- 55.** Insofar as the merits of the order of the WDIC is concerned, sufficient reasons were given by the Committee for coming to their conclusion and there is no justification for the writ court to substitute its own views (even if an alternative view was possible in the facts of the case) unnecessarily, that too, within the limited scope of Article 226 of the Constitution of India.
- 56.** In any event, the argument of the petitioners that there was no transfer or siphoning of funds cannot be adjudicated by the writ court. Even on the face of it, if a tea estate parts with possession of the estate itself and transfers its revenue-generation and earning rights to a third party, the same may be enough to be construed as default as contemplated in the RBI Circular for Wilful Defaulters. A transfer of the corpus of the property is not necessarily required to hold so.

Thus, even if the agreement with a third party by the borrower did not operate as a transfer of the title in the property itself, if the revenue of the tea estate was transferred *in praesenti*, the same might constitute a transfer to defraud the creditor.

- 57.** In the least, such questions are arguable and cannot be gone into at this juncture.
- 58.** However, having held so, the order of the Wilful Defaulter Committee cannot be sustained for a single reason.
- 59.** Although at the juncture when the WDIC passed its order declaring the petitioners to be wilful defaulters on August 8, 2023, no resolution plan had been approved and the petitioners could have been held to be wilful defaulters, Clause 3(b) of the Master Circular clearly stipulates that the order of the first Committee shall become final only after it is confirmed by the RC. In the present case, the WDIC declared the petitioners to be wilful defaulters on August 8, 2023. However, the same attained finality only on September 12, 2023 when the RC affirmed the same.
- 60.** Yet, in the interregnum on August 28, 2023, the resolution plan had already been approved by the NCLT in respect of the borrower company in connection with the CIRP, thus absolving the borrower-Company itself of the default.
- 61.** Hence, on the date when the WDIC order attained finality, there was no subsisting default in the eye of law. In any event, the RC order has also been held to be a nullity above. So the WDIC declaration never attained finality under Clause 3 (b) of the RBI Master Circular.

- 62.** It is trite that without a 'default', there cannot be any 'wilful default'. Thus, the order of the WDIC, even if otherwise valid in law, having not ripened into fruition prior to the approval of the resolution plan by the NCLT, is of no effect in the eye of law. Clause 3(b) of the Master Circular debars the same from having any such effect, since it never attained finality. In such view of the matter, the WDIC order also cannot have any valid legal footing to stand on as of today and has to be set aside.
- 63.** Accordingly, WPO No.1572 of 2023 and WPO No.1727 of 2023 are allowed on contest, thereby setting aside the order dated August 8, 2023 passed by the Wilful Defaulter Identification Committee and the order dated September 12, 2023 by the Review Committee declaring the petitioners to be wilful defaulters. Any act done consequential to such declarations also stand hereby reversed. The respondents shall immediately take necessary action to undo steps, if any, taken consequential to the wilful defaulter declaration.
- 64.** There will be no order as to costs.
- 65.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)