**HIGH COURT OF CALCUTTA**

**Bench: Justice Sabyasachi Bhattacharyya**

**Date of Decision: 14th May 2024**

CONSTITUTIONAL WRIT JURISDICTION

ORIGINAL SIDE

WPO No. 633 of 2023

With

WPO No. 212 of 2024

**Vishambhar Saran and Anr. …Petitioner(s)**

**Versus**

**Central Bank of India and Ors. …Respondent(s)**

**Legislation:**

Master Circular on Wilful Defaulters issued by the Reserve Bank of India (RBI) on July 1, 2015

**Subject:** Writ petitions challenging the decisions of the Willful Defaulter Identification Committee and the Review Committee of the Central Bank of India declaring the petitioners as willful defaulters.

**Headnotes:**

Master Circular on Wilful Defaulters – Interpretation and Application – Forensic Audit Report – Validity and Reliance – Writ petitions challenging the decision of the Willful Defaulter Identification Committee and the Review Committee (RC) of the Central Bank of India declaring the petitioners as willful defaulters. The main evidence relied upon by the First Committee was a Transaction Audit Report (TAR) prepared by M/s. Deloitte Touche Tohmatsu India, LLP. The TAR contained disclaimers regarding its conclusiveness, and its findings were not independently verified. NCLT and NCLAT had previously dismissed the reliance on the TAR in related insolvency proceedings. – Held that reliance solely on the TAR, which itself was inconclusive and discredited by judicial authorities, was improper and untenable. The Central Bank of India could not independently declare the petitioners as willful defaulters when the

lead Bank, Punjab National Bank, had dropped the charges. – Decisions of both the First Committee and the RC set aside and quashed. [Paras 2-36]

Reliance on Forensic Audit Report – Inadequate Basis for Willful Defaulter Declaration – Analysis – Held – The sole reliance on the TAR by the First Committee and RC was unjustified. The TAR itself contained multiple disclaimers, stating that it was not conclusive, not independently verified, and not suitable for legal proceedings. The NCLT and NCLAT had rejected the TAR's findings in related insolvency proceedings, making it untenable for the Central Bank to rely on it for declaring the petitioners as willful defaulters. [Paras 6-14, 15-18, 20, 22-24]

Procedural Irregularities – Natural Justice – Review Committee's Decision – Held – The RC's decision was grossly mechanical, clubbing twenty-one entities together without individualized reasoning, and was primarily based on the discredited TAR. The Supreme Court's guidelines in State Bank of India vs. Jah Developers Private Limited were not followed, as no reasoned order was provided to the petitioners. – RC's decision set aside for lack of adherence to due process and principles of natural justice. [Paras 31-34]

Decision – Quashing of Willful Defaulter Declaration – Court quashes the decisions of the Willful Defaulter Identification Committee and the Review Committee declaring the petitioners as willful defaulters. All consequential actions, including the uploading of the petitioners' names as willful defaulters, to be reversed immediately. [Paras 35-36]

**Referred Cases:**

- State Bank of India vs. Jah Developers Private Limited and Others (2019) 6 SCC 787

Representing Advocates:
For the petitioners: Mr. Sabyasachi Choudhury, Adv., Mr. Rajarshi Dutta, Adv., Mr. Debjyoti Saha, Adv.
For the respondents: Ms. Usha Doshi, Adv., Ms. Priyanka Gope, Adv.

**Sabyasachi Bhattacharyya, J:-**

**1.** The two writ petitions, being on connected issues, are taken up together for hearing.

**2.** In WPO No. 633 of 2023, the petitioners have challenged the decision of the Willful Defaulter Identification Committee (hereinafter referred to as “the First Committee”)to declare the petitioners as Willful Defaulters under the Master Circular on Wilful Defaulters issued by the Reserve Bank of India (RBI) on July 1, 2015.

**3.** In WPO No. 212 of 2024, the petitioners have challenged the decision of the Review Committee (RC) to affirm the said declaration of the First Committee. At the juncture when the second writ petition was filed, a cryptic communication of the decision of the RC was made to the petitioners, based on which the writ petition was filed. Subsequently, having been served with a copy of the detailedminutes of the RC, the same has been annexed to a supplementary affidavit filed in connection with the second writ petitionand also brought within the fold of the challenge.

**4.** Thus, the subject-matter of consideration in the present writ petitions is whether the respondent-Bank, that is, the Central Bank of India was justified in declaring the petitioners to be willful defaulters through its First Committee and in affirming the same in the decision of the RC.

**5.** Upon hearing learned counsel for the parties, each of the components of challenge is being dealt with separately hereinbelow.

**6.** The first ground taken by the petitioners is that the sole basis of the First Committee decision was a Transaction Audit Report (TAR) authored by M/s. Deloitte Touche Tohmatsu India, LLP, an Auditor which purportedly carried out a forensic audit of the borrowerCompany. A bare perusal of the First Committee decision substantiates the fact that the entire decision is based on allegations levelled in the said TAR. No independent evidence apart from the TAR has been relied on by the First Committee in coming to its conclusions.

**7.** It is rather surprising that the First Committee relied on the said report. The Auditor Firm which authored the report itself indicated in several places of the report that the same was not conclusive. Instances are:

In the second paragraph of the report, the Auditor stated that the report has been prepared solely for the internal use and benefit of the Resolution

Professional (RP) for the specific purpose described in the Contract. In paragraph 4 of the report, the Auditor clarifies that it did not independently verify the accuracy/reliability/genuineness of the information and makes no warranties or representations with respect to any part of the report. Any user who gets any access to or use of the Report, the Auditor went on to specify, understands and accepts that it has no rights with respect to the Report except the limited right to view and use the Report for information purposes alone and at his sole and entire risk. It was reiterated in paragraph 6 that the Auditor has not made and does not make any warranties or representations to any user and does not owe any duty of care or responsibility towards any user in respect of the Report.

**8.** Again, in paragraph 8, it is stipulated that the scope of the services of the Auditor did not constitute an audit conducted in accordance with generally accepted accounting principles, or an examination of internal controls/procedures or other attestation or review or services to perform or agreed upon procedures in accordance with the standards established by the Institute of Chartered Accountants of India.

**9.** In paragraph 10 of the report, the Auditor (rather proudly) declares that it has assumed that the verbal explanations provided by the representatives of the Corporate Debtor were accurate and honest representations but did not independently verify the accuracy/reliability/genuineness of the information or from other independent sources unless specified otherwise specifically in the Report. Hence, *the content of the Report should not form the sole basis for any decision as to a potential course of action without independent confirmation of its findings*, [emphasis supplied] nor should it be relied on as preferred advice on assets/liabilities-in-question or the concerned entities and individuals to which it relates.

**10.** In paragraph 11, the Auditor or any of its partners, Directors or employees undertake no responsibility in anyway whatsoever to any user in respect of errors or omissions in the Report including those which may arise from incorrect or incomplete information provided by the Corporate Debtor/Resolution Professional including the representatives.

**11.** Findings and observations, as noted in paragraph 13 of the Report, may change based on additional information and clarifications provided subsequently to the Auditor. It is reiterated in Paragraph 14 that no warranties

or representations with respect to the Report to any user are made and the Report is neither a recommendation nor aprofessional advice.

**12.** Importantly, in paragraph 15 it is stated that the findings of the Report are not binding on any person, entity, authority or court and hence, no assurance is giventhat a position contrary to that expressed therein will not be asserted by any person, entity, authority, etc. The results of the work, it was stated, with respect to review of information provided should be considered only as a guide and not as a definitive pronunciation on an individual, entity, etc.

**13.** Paragraph 17 boldly asserts that *the observations reported in those documents may not be indicative of misconduct or diversion of funds unless additional procedures are performed to validate the same and the report may not be suitable for any legal proceedings against any individual or entity* [Emphasis supplied].

**14.** Hence, the prelude to the report itself thoroughly vitiates the conclusiveness, veracity and credibility of the same.

**15.** The second most important feature of the case is that the report was prepared by the concerned Auditor at the behest of the Liquidator (Resolution Professional) in a Corporate Insolvency Resolution Process (CIRP), in connection with an application under Sections 45 and 66 of the Insolvency and Bankruptcy Code (IBC), 2016 against the suspended Board of Directors of the Corporate Debtor, the borrowerCompany. The application of the Liquidator came up for consideration before the National Company Law Tribunal (NCLT) and was rejected by the same. The premise of such rejection was that since the Liquidator had no other material except the findings of the Auditor which do not allege anything against the respondents, the prayer for directing the respondents to make contribution could not be allowed. The TAR was thus thoroughly disbelieved and refused to be relied on by the NCLT.

**16.** An appeal was preferred against the Appellate Tribunal which was decided by the National Company Law Appellate Tribunal (NCLAT) on September 30, 2019. The appeal was also dismissed, thereby affirming the findings and conclusions of the NCLT disbelieving the TAR.

**17.** As rightly argued by the petitioners, the Liquidator in the CIRP represented the Committee of Creditors, comprising the componentBanks of the Consortium which granted the loan to the borrowerCompany in the first place.

**18.** The present respondent-Bank, the Central bank of India, was one of the constituents of the Consortium and thus, being represented by the Liquidator,

is also bound by the NCLT order refusing to accept the said report. Thus, the respondent-Bank's efforts to declare the writ petitioners as willful defaulters on the sole basis of the TAR are not tenable in the eye of law.

**19.** To add to the woes of the respondents further, the lead Bank of the Consortium, the Punjab National Bank (PNB), although initially took a view that the petitioners were willful defaulters, subsequently did a *volte face*and, by relying on the dismissal of the TAR by the NCLT, as affirmed by the NCLAT, the PNB held that the petitioners are not willful defaulters, leaving it open for the Bank to proceed in future on the basis of independent material, if the same comes forth. However, till date, nothing has come forward by way of independent material to substantiate the stand of the respondents.

**20.** Thus, the reliance on the TAR in the decisions of the First Committee and the RC are entirely *de hors* the law and perverse.

**21.** Moreover, in the TAR itself, as reflected in the quoted portions thereof in the Show-cause Notice and the decision of the First Committee, no allegation has been made against the petitioners vis-à-vis the Central Bank, which is the respondent no. 1 in the present writ petitions. Hence, the Central Bank cannot have an additional or independent cause of action beyond that of the lead Bank or the subject-matter of the NCLT proceeding.

**22.** Even from the averments recorded in the Show-cause Notice and the Willful Defaulter Decision, it is found that the sole allegation, under Clause 2.1.3(b) of the Master Circular, was not substantiated. The said Clause, read with Clause 2.2.1(c), makes it mandatory that for an allegation of diversion of funds or willful default to be made, it has to be established that the petitioners channelized the funds received by way of loan from the Consortium of Banks for any "other purpose" than that for which the loan was intended.

**23.** Moreover, the Bank had to substantiate that the alleged transactions were made by the petitioners from the money which was given by way of the loan/credit by the Consortium.

**24.** Several allegations have been made regarding fixed deposits being opened, furniture and cars having not been shown as assets, etc. The petitioners categorically refuted the claims by contending that there was no link between the credit taken from the Consortium and the utilization of such assets/funds. Hence, having failed to substantiate any link between the loan granted and the use alleged and in the absence of any material to substantiate that the loan was used for any other purpose than that intended, the very premise of the willful defaulter declaration goes.

**25.** The Bank, vainly, has sought to project that the NCLT order was confined to the TAR not being used for lodging criminal complaints.

**26.** However, an isolated extraction of one paragraph/sentence out of the NCLT order cannot serve the purpose sought to be achieved by the Bank. The finding-in-question regarding the TAR not to be used for lodging criminal complaints was a corollary of the entire purport of the decision of the NCLT, which refused to accept the veracity of the TAR as a whole in several paragraphs. Moreover, lodging of criminal proceedings in the present context is a mere follow-up action of a willful defaulter declaration within the contemplation of the Master Circular and does not stand on an independent footing. The said observation, thus, was not restricted to lodging of criminal complaints but the allegations made in the TAR were disbelieved as a whole.

**27.** The Bank also argues that the Central Bank of India, being a constituent of the creditor-Consortium, could have proceeded with the willful defaulter proceeding despite no specific allegation regarding the loan given by the Central Bank having been referred to either in the Show Cause or the TAR or the First Committee order.

**28.** Suchargument is wholly untenable. If the respondent-Bank seeks to take refuge of its being a constituent of the Consortium, it is bound by the decision of the lead Bank, the PUNJAB NATIONAL BANK, to drop the charges of willful defaulter in terms of the NCLT Order refuting the TAR.

**29.** On a stand-alone footing, on the other hand, the Central Bank of India has no charges to fall back upon vis-à-vis any transaction done by the petitioners in respect of the Central Bank. Thus, seen from both perspectives, the respondent no. 1-Bank does not have a cause action against the writ petitioners at all.

**30.** Insofar as the RC decision is concerned, the less said the better.

**31.** A gross mechanical approach has been adopted by the RC in passing the said order. As many as twenty-one individual entities were clubbed together for the purpose of review of declaration of willful defaulters in a single meeting. The borrower-Company was one of the said entities. In the column “Details of Personal hearing, if any [Stage-(II)]”, the Bank has only narrated about the fact that a hearing was given and of the filing of the writ petitions.

**32.** In Item 21, containing the reasons for willful default, the sole reliance was on the TAR, some of the observations of which were merely quoted. In a cryptic one-liner following such quotation, the RC held that based on the above

points, it was found that funds have been diverted from the system by the borrower. The sole reliance placed was on Criterion 2.1.3(b) of the Master Circular which has been discussed above. Along with the petitioners, other entities were also clubbed and similar observations made. At the end of the minutes, the RC, in a went on to observe blandly that it proposes to review the decision of the First Committee in respect of the above entities and its Director/guarantors. The resolution was that *if approved*, the resolution following the comment was to be passed. The "resolution" was merely that the Committee had reviewed the decision taken by the First Committee in respect of the twenty-one entities, the names of which were listed mechanically, and that the Company, its Director/proprietor/partners/guarantors be declared as Willful Defaulters, which were approved.

**33.** The said meetingsis nothing but a travesty of justice, flouting all norms of natural justice and the provisions of the Master Circular itself. In *State Bank of India vs. Jah Developers Private Limited and Others,* reported at *(2019) 6 SCC 787*, the detailed modalities to be adopted by the First Committee and the RC were discussed by the Supreme Court. The Supreme Court, in paragraph no. 24 of the said judgment, laid down *inter alia* that after the First Committee decision, the borrower canrepresent 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 Supreme Court held that the Review Committee must then pass a reasoned order on such representation which must then be served on the borrower.

**34.** Apart from serving the minutes of the meeting late, there is no reasoned order at all in the present case by the RC which vitiates the decision of the RC on such count alone. However, the observations made hereinabove vitiate the First Committee decision itself, thus rendering the RC decision an exercise in futility *ab initio*.

**35.** In view of the above observations, the decision of both the First Committee and the RC declaring the petitioners to be Willful Defaulters are hereby set aside and quashed.

**36.** Accordingly, WPO No. 633 of 2023 and WPO No. 212 of 2024 are allowed on contest, thereby setting aside and quashing the decisions of the Willful Defaulters Identification Committee and the Review Committee declaring the petitioners to be Willful Defaulters. All consequential steps taken in pursuance thereof, including the uploading of the names of the petitioners as Willful Defaulters, shall immediately be reversed by the respondents.

**37.** There will be no order as to costs.

**38.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.