2024:DHC:1643

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

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

\+ **W.P.(C) NO.9491 of 2023 & CM APPL.36246/2023**

Between: -

RATUL PURI
S/O LATE SHRI DEEPAK PURI
A-187, NEW FRIENDS COLONY
NEW DELHI-110025

ALSO AT:
H.NO.2 VILLAGE MANAGANJ WARD NO.11
JAITHARI, ANUPPUR,
MADHYA PRADESH- 484330 .... PETITIONER

(Through: Mr. Dayan Krishnan, Senior Advocate with Mr. Vaibhav Mishra, Mr. Karan Batura, Mr. Ekansh Mishra and Mr. Jayant Chawla, Advocates)

AND

PUNJAB NATIONAL BANK
THROUGH MANAGING DIRECTOR &
CHIEF EXECUTIVE OFFICER
SH. ATUL KUMAR GOEL
HEAD OFFICE, PLOT NO.4
SECTOR 10, DWARKA, NEW DELHI - 75 ….. RESPONDENT

(Through: Mr. Sanjay Bajaj alongwith Mr. Shivam Takkar and Mr. Sarthak Sehgal, Advocates)

Pronounced on: 29.02.2024

J U D G M E N T

1. By way of this Writ Petition filed under Article 226 of the Constitution of India, the Petitioner has challenged the impugned order dated 20.04.2023 passed by the Review Committee of the Respondent, Punjab National Bank ("**Respondent Bank**"). By the said impugned order, the Review Committee of the Respondent Bank confirmed the order dated 13.07.2022 passed by the Identification Committee, declaring the Petitioner as a Wilful Defaulter under the "Master Circular on Wilful Defaulters, 2015" ("**Master Circular**"), issued by the Reserve Bank of India ("**RBI**").

Facts of the case

2. It is stated that the Petitioner is the Chairman of Hindustan Power Projects Pvt. Ltd., which runs a 1200 mega-watt power plant and supplies electricity to three States namely U.P., M.P. and Haryana. The Petitioner's company has availed loan facilities amounting to thousands of crores from banks and it is stated that there has never been any default in servicing the debt since inception.

3. However, the Respondent Bank sought to declare the Petitioner as a Wilful defaulter with respect to his association in another company known as Moser Baer Solar Ltd. ("**MBSL**") under the Master Circular, thereby, depriving the Petitioner from availing credit facilities for his present and prospective business enterprises.

4. It is stated that another company namely Moser Baer India Limited ("**MBIL**") was a company incorporated in 1983 by the

father of the Petitioner to manufacture storage discs. MBIL exported discs to large multinational companies like Sony, Hitachi, TDK, Fuji, Mitsubishi etc.

5. As per the case of the Petitioner, around the year 2005, it was realized that the business of storage discs began to slow down due to technological advancement and emergence of new mediums of storage like Cloud. Hence, it was decided to diversify the business into more upcoming fields, at that time, like the solar cells and modules.

6. It is stated that, accordingly, MBSL, the company in question, was incorporated on 06.03.2007 and was engaged in the business of manufacturing of solar cells and modules. MBSL was a 100% subsidiary of MBIL. As stated, the solar business of MBSL was valued at more than USD 1 billion at the relevant time when several institutional investors made investment in MBSL. The Petitioner was appointed as a Director of MBSL on 29.03.2007.

7. It is further stated that MBSL had availed credit facilitates from various banks including the Respondent Bank. The Respondent Bank sanctioned credit facility to MBSL on 04.04.2008, 03.06.2010, 20.08.2010, 25.03.2011 and 02.09.2011.

8. It is stated that when MBSL was started in 2007, the global photovoltaic industry which manufactures solar cells and modules was passing through rapid growth. The manufacturing was concentrated in Europe, USA and Japan. The Chinese share of manufacturing was only about 15% at that time.

9. It is stated that, however, post the global financial crisis of 2008, the prices of solar panels in European market collapsed. Simultaneously, the Chinese government infused a stimulus package of USD 570 billion for its domestic solar panel industry, which included USD 43 billion in subsidies.

10. It is also stated that, armed with substantial subsidies, the Chinese companies started dumping solar cells and modules across the globe, including in India, at significantly lower prices. This led to bankruptcies in companies in almost all the jurisdictions involved in manufacture of solar cells. The USA, in order to protect its domestic industry imposed a 70% anti-dumping duty on Chinese companies.

11. It is stated that consequently, the Directorate General of Anti-Dumping and Allied Duties of India had to also make recommendation for the imposition of anti-dumping duty on Chinese solar cells and modules. However, the Government of India, did not act on the said recommendation, plausibly to promote energy in India at cheaper rates.

12. It is the case of the petitioner that in 2008, the Petitioner started to have disagreements with his father over the strategies to run the business. As a result, the Petitioner started to dissociate with the business of MBSL.

13. It is further submitted that in 2010, pursuant to a family arrangement, the Petitioner transferred his entire shareholding in

MBSL to his father and completely dissociated himself with the day to day working of MBSL.

14. It is also stated that on 30.04.2012, the Petitioner resigned as the Executive Director of MBSL and Form-32 to that effect was filed with the Registrar of Companies ("**RoC**"). The Petitioner, on 16.11.2022, completely exited MBSL, when he resigned as a whole time Director of MBSL and Form-32 to that effect was filed with the RoC.

15. It is submitted by the Petitioner that as MBSL faced financial decline and there was a looming threat of loan repayment default, the lenders, including the Respondent Bank, considered MBSL's case for Corporate Debt Restructuring ("**CDR**") in accordance with the CDR Master Circular ("**CDR Master Circular**") issued by the RBI. To ascertain the sustainability of CDR, the lenders required MBSL to submit a Flash Report, which would present the reasons for its decline, its viability and plan for revival. The said Flash Report would then be forwarded by the lenders to an independent agency for obtaining a Techno Economic Viability ("**TEV**") Report. The TEV Report would indicate whether the restructuring plan proposed by MBSL was financially viable or not. The lender banks would also get conducted a Stock Audit of MBSL.

16. In compliance thereof, on 24.03.2012, MBSL submitted an application and its Flash Report to the lender banks to the Corporate Debt Restructuring Cell ("**CDR-Cell**"). In the said Flash Report,

MBSL stated that it is a step-down subsidiary of MBIL. MBSL gave a brief summary of its profile and outlined the reasons for losses incurred in the recent years. It stated that despite losses, MBSL continued to service all its debts till 30.11.2011 and even repaid the principal sum of the term loans. Due to the cash flow problems, MBSL had been facing difficulties in servicing the debt since January 2012. MBSL submitted a financial proposal for its revival to the lender banks based on restructured debt.

17. After considering the Flash Report submitted by MBSL, the lender banks *vide* letter dated 24.5.2012 noted that the Corporate Debt Restructuring-Empowered Group ("**CDR-EG**") in its meeting held on 07.05.2012 had decided to admit the proposal of MBSL for CDR. The CDR-EG nominated the Respondent Bank as the Monitoring Institution and entrusted it to prepare the draft final restructuring proposal. It was stated that MBSL was placed as Class-B borrower under the CDR Master Circular.

18. Before finalizing the restructuring package, the lender banks decided to call for a Technical Viability Study of MBSL from Feedback Infra; Economic Viability Assessment from PNB Investments Services Ltd. and Stock Audit from M/s Mehrotra and Mehrotra, Chartered Accountants.

19. MBSL had written a letter dated 04.04.2012 to the CDR-EG stating that the Flash Report of MBSL had incorrectly mentioned the Petitioner as the Director of MBSL. It was stated that the Petitioner had already exited MBSL and hence, any decision by the

CDR-EG about the CDR may be taken on the assumption that the Petitioner was not part of MBSL. The aforesaid assertion was reiterated by MBSL to the CDR-EG on 16.07.2012.

20. On 20.07.2012, a Joint Lenders Meet ("**JLM**") was held to discuss the final CDR package of MBSL. The lender banks discussed and agreed on multiple aspects of restructuring.

21. On 10.10.2012, another JLM took place. The JLM took into consideration
the Technical Viability Study dated September, 2012 of MBSL from Feedback Infra; Economic Viability Assessment from PNB Investments Services Ltd. and Stock Audit Report dated 29.08.2012 from M/s Mehrotra and Mehrotra, Chartered Accountants of MBSL. The representative of Feedback Infra, which conducted the Technical Viability Study of MBSL stated that the demand for solar panels was increasing substantially, both nationally as well as internationally. With the anticipated anti-dumping duties on Chinese companies, the viability of MBSL would improve. It was suggested that the core strategy and operating plans of MBSL are technically feasible.

22. The lender banks, thereafter, issued a Final Restructuring Scheme ("**FRS**") of MBSL. On 21.01.2013, the lender banks further issued a modified FRS in respect of MBSL.

23. On 18.03.2013, the CDR-Cell issued a letter stating that on 21.01.2013, the CDR-EG had approved the proposed restructuring package of MBSL. The Respondent Bank was appointed as the

Monitoring Institution, leading the CDR process along with other consortium banks. The details of approved package was outlined in Annexure-1. MBSL was classified as Class-B borrower under the CDR Scheme, which has Classes from A to D. In the Class-B category, MBIL was classified as "*Corporate/promoters affected by external factors and also having weak resources, inadequate vision and not having support of professional management*." The Class-C is assigned to those corporates who "*diverted funds*" to unrelated fields with or without lenders' permission.

24. On 22.03.2013, a meeting of the monitoring committee of the lender banks took place. In this meeting, it was agreed that in lieu of personal guarantee of the Petitioner, MBSL offered a collateral security of Rs.33 Crores for which MBSL prayed for two months' time.

25. On 28.03.2013, in accordance with the approved debt restructuring package, a Master Restructuring Agreement ("**MRA**") was executed between MBSL and the lender banks, whereby, the debt of MBSL was restructured. Subsequently, a supplementary MRA dated 27.05.2014 was executed between MBSL and the lender banks.

26. On 05.06.2013, MBSL and lender banks executed Trust and Retention Account Agreement ("**TRA**"), which required MBSL to transact for its day-to-day functioning only through the TRA Account. A supplementary TRA was executed on 27.05.2012.

27. On 20.09.2013, the CDR-EG noted that the lender banks have agreed to substitution of personal guarantee of the Petitioner with collateral security of Rs.33 Crores.

28. Subsequently, several JLM and monitoring committee meetings took place on 27.05.2014, 12.06.2014, 17.06.2014, 05.12.2014, 18.05.2015 and 02.03.2016. In the meeting held on 27.05.2014, the lender banks agreed to reduce the collateral security of Rs.33 Crores to Rs.25.53 Crores in lieu of the Petitioner's personal guarantee. The Petitioner did not furnish his personal guarantee for the CDR package nor did he participate in any of the deliberations for the approval of the CDR package.

29. However, on 30.11.2016, the CDR-Cell decided to exit the lender banks from the CDR package on account of its failure.

30. On an application filed by one of the financial creditors under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), the NCLT *vide* order dated 14.11.2017, appointed an Interim Resolution Professional.

31. On 01.03.2019, one Haribhakti & Co. LLP, Chartered Accountants, submitted their Forensic Audit Report to the Resolution Professional of MBSL.

32. On 9.4.2019, the Respondent Bank issued a Show Cause Notice to the Petitioner under the Master Circular alleging that it was proposed to classify him as a Wilful Defaulter under the Master

Circular as MBSL defaulted to meet its loan repayment obligations. It was alleged that MBSL had diverted the funds for other purposes.

33. On 01.05.2019, the Petitioner submitted a reply stating that he was neither the Director nor the shareholder of MBSL. It was stated that earlier also, the Respondent Bank attempted to declare the Petitioner as Wilful Defaulter, for which, W.P. (C) No.7797 of 2017 was filed before this Court. However, the Respondent Bank stated before this Court that it was not taking any action against the Petitioner. Hence, the Writ Petition was disposed of *vide* order dated 14.11.2017. It was contended that after the Petitioner exited from MBSL, the lender banks admitted MBSL for CDR as per the CDR Master Circular. It is stated that if any act of Wilful Default was noted at that stage, then MBSL would not have been admitted to CDR. The Petitioner contended that during the CDR process, the lender banks were informed that the personal guarantee of the Petitioner was not available, which was accepted by them. Hence, the Show Cause Notice deserved to be withdrawn.

34. On 07.02.2020, the Wilful Defaulter Identification Committee of the Respondent Bank declared the Petitioner as Wilful Defaulter for failing to meet the loan repayment obligations and for diversion of the funds for other purposes.

35. On 26.02.2020, the Petitioner sent a representation to the Respondent Bank reiterating his non-involvement in any act of Wilful Default.

36. On 10.06.2020, the Respondent Bank issued another Show Cause Notice to the Petitioner alleging the act of Wilful Default. The Respondent Bank, on its own, withdrew the order dated 07.02.2020, whereby, the Petitioner was declared as Wilful Defaulter. The Petitioner filed his replies dated 18.11.2021 and 20.12.2021 to the said Show Cause Notice.

37. The Respondent Bank issued another Show Cause Notice dated 14.02.2022 to the Petitioner. In this Show Cause Notice, the Respondent Bank alleged events of Wilful Default.

38. The Petitioner, on 23.02.2022, submitted its point-wise reply to the alleged acts of Wilful Default to the Respondent Bank.

39. The Identification Committee of the Respondent Bank *vide* its order dated 13.07.2022 declared the Petitioner as Wilful Defaulter under the Master Circular on alleged acts of Wilful Default.

40. Pursuant to the said declaration, the Petitioner filed W.P. (C) No.12264 of 2022 before this Court against the order dated 13.07.2022. This Court *vide* its order dated 25.08.2022 declined to interfere with the said Writ Petition, as the Petitioner had the remedy before the Review Committee of the Respondent Bank under the Master Circular. This Court, however, directed that in the event the Review Committee reaches a conclusion which is adverse to the Petitioner, the said decision would not be given effect to for a period of 15 days.

41. On 08.09.2022, the Petitioner filed a representation before the Review Committee of the Respondent Bank against the order dated 13.07.2022 passed by the Identification Committee.

42. The Review Committee of the Respondent Bank, however, rejected the said representation and by the impugned order dated 20.04.2023, confirmed the order dated 13.07.2022 passed by the Identification Committee, thereby, confirming its declaration of the Petitioner as Wilful Defaulter.

43. Against the aforesaid impugned order, the present Writ Petition has been filed. This Court *vide* interim order dated 28.07.2023 stayed the operation of the impugned order.

44. I have heard Mr. Dayan Krishnan, learned Senior Counsel appearing for the Petitioner alongwith Mr. Vaibhav Mishra, Mr. Karan Batura, Mr. Ekansh Mishra and Mr. Jayant Chawla, Advocates and Mr. Sanjay Bajaj, learned counsel appearing for the Respondent Bank alongwith Mr. Shivam Takkar and Mr. Sarthak Sehgal, Advocates, at length, and perused the record.

Relevant discussion in W.P. (C) No. 4181/2023

45. This Court in W.P. (C) No. 4181/2023 titled as ***Ratul Puri v. Bank of Baroda,*** has extensively dealt with the scheme of RBI's Master Circular for declaring a person as "Wilful Defaulter", "standard of proof" to decide the validity of event of Wilful Default under the Master Circular, scope of judicial review in administrative action and scheme of CDR issued by RBI.

46. The scheme of the RBI's Master Circular for declaring a person as "Wilful Defaulter", as discussed in terms of paragraph nos.48 to 59 is reproduced as under:-

> *48. Before going into the facts of the case, it is essential to examine the scheme of the Master Circular. In order 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, the RBI, in exercise of power under Sections 21 and 35A of the Banking Regulation Act, 1949 issued the Master Circular dated 1.7.2015.*
>
> *49. Originally, a scheme for declaration as wilful defaulter was framed by the RBI in 1999 on the recommendations made by the Central Vigilance Commission, which was subsequently modified in 2002. At the time of consideration of the petitioner's case, the Master Circular of 2015 was in force.*
>
> *50. Clause 2.1.3 of the said Master Circular defines the event of "wilful default". In the present case, the petitioner has been declared a wilful defaulter under Clauses 2.1.3(b) and (c). Clause 2.1.3(b) provides that an event of wilful default shall be deemed to be occurred if the unit has defaulted in loan repayment obligation; has not utilized the loan amount for the purpose it was granted and diverted the funds for other purposes. Clause 2.1.3(c) provides that an event of wilful default shall be deemed to be occurred if the unit has defaulted in meeting loan repayment obligations; has siphoned off the funds and the funds are not utilized for the specific purpose for which the loan was availed.*
>
> *51. The last part of Clause 2.1.3 also mandates that the identification of wilful default should be made keeping in view of track record of the borrower and not on the basis of isolated transactions/ incidents. It specifically mandates that a "default" in order to be categorized as "wilful" must be "intentional, deliberate and calculated". Clause 2.1.3(b) and (c), which have been invoked in the present case, reads as under:*
>
> > *"2.1.3 Wilful Default: A 'wilful default' would be deemed to have occurred if any of the following events is 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) <u>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.</u>

(c) <u>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.</u>

(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. **<u>The default to be categorised as wilful must be intentional, deliberate and calculated</u>**."*

52. A bare reading of Clauses 2.1.3(b) and (c) clearly reveals that an event of wilful default can only take place when the "loan amount" lent by the bank is diverted or siphoned off by the borrower, for any use, other than for which the loan was granted.

53. Clause 2.2 of the Master Circular defines "diversion of funds" and "siphoning of funds" as under:

*"**2.2 Diversion and siphoning of funds:** The terms*

"diversion of funds" and "siphoning of funds" should construe to mean the following: -

2.2.1 Diversion of funds, referred to at para 2.1(b) above, would 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.

***2.2.2 Siphoning of funds**, referred to at para 2.1(c) above, should be construed to occur if any **funds borrowed** from banks / FIs are utilised for purposes un-related to the operations of the borrower, to the detriment of the financial health of the entity or of the lender. **The decision as to whether a particular instance amounts to siphoning of funds would have to be a judgement of the lenders based on objective facts and circumstances of the case**."*

54. The definition of "diversion of funds" and "siphoning of funds", as aforesaid, also makes it explicitly clear that the event of "diversion of funds" or "siphoning of funds" can take place only when the "borrowed funds" are deployed or used, for any purpose, other than for which the loan was sanctioned. The Master Circular further places an obligation on the bank to make the judgment about "diversion of funds" or "siphoning of funds" based on "objective facts and circumstances of the case."

55. Clause 2.5 of the Master Circular provides for initiation of penal measures against the persons or entities declared as wilful defaulter under Clause 2.1.3 of the Master Circular, which includes non-grant of additional loan facility by any bank or

financial institution in the future; debarring them from floating new venture for a period of five years from the date of removal of name as wilful defaulter; initiation of criminal proceedings; change of management of borrower unit; non-induction of the person in the Board of the company etc. The last part of Clause 2.5 places a specific obligation on the banks to put in place a transparent mechanism so that the penal provisions of the said clause are not misused and the scope of such discretionary exercise of power is kept to a bare minimum. Solitary or isolated incidents are not to be used for the use of penal action under the said clause. Clause 2.5 reads as under:

> *"**2.5 Penal measures***
> *In order to prevent the access to the capital markets by the wilful defaulters, a copy of the list of wilful defaulters (non-suit filed accounts) and list of wilful defaulters (suit filed accounts) are forwarded to SEBI by RBI and Credit Information Bureau (India) Ltd. (CIBIL) respectively.*
> *The following measures should be initiated by the banks and FIs against the wilful defaulters identified as per the definition indicated at paragraph 2.1 above:*
> *a) No additional facilities should be granted by any bank / FI to the listed wilful defaulters. In addition, the entrepreneurs / promoters of companies where banks / FIs have identified siphoning / diversion of funds, misrepresentation, falsification of accounts and fraudulent transactions should be debarred from institutional finance from the scheduled commercial banks, Development Financial Institutions, Government owned NBFCs, investment institutions etc. for floating new ventures for a period of 5 years from the date the name of the wilful defaulter is published in the list of wilful defaulters by the RBI.*
> *b) The legal process, wherever warranted, against the borrowers / guarantors and foreclosure of recovery of dues should be initiated expeditiously. The lenders may initiate criminal proceedings against wilful defaulters, wherever necessary.*
> *c) Wherever possible, the banks and FIs should adopt a proactive approach for a change of management of the wilfully defaulting borrower unit.*
> *d) A covenant in the loan agreements with the companies in which the banks/FIs have significant stake, should be incorporated by the banks/FIs to the effect that the borrowing company should not induct on its board a person whose name appears in the list of*

Wilful Defaulters and that in case, such a person is found to be on its board, it would take expeditious and effective steps for removal of the person from its board. It would be imperative on the part of the banks and FIs to put in place a transparent mechanism for the entire process so that the penal provisions are not misused and the scope of such discretionary powers are kept to the barest minimum. It should also be ensured that a solitary or isolated instance is not made the basis for imposing the penal action."

56. Clause 2.9 provides that the RBI under the "Credit Information Companies (Regulations) Act, 2015" has granted certificate to four Credit Information Companies. The lender banks should submit a list of wilful defaulters to such Credit Information Companies. This would make the list of wilful defaulters available to banks and financial institutions on real time basis and dissuade them from grant of credit facility to such persons and entities. Clause 2.9 reads as under:

"***2.9 Reporting to RBI / Credit Information Companies***

(a) Banks/FIs should submit the list of suit-filed accounts of wilful defaulters of Rs.25 lakh and above as at end-March, June, September and December every year to a credit information company which has obtained certificate of registration from RBI in terms of Section 5 of the Credit Information Companies (Regulation) Act, 2005 and of which it is a member. Reserve Bank of India has, in exercise of the powers conferred by the Act and the Rules and Regulations framed thereunder, granted Certificate of Registration to (i) Experian Credit Information Company of India Private Limited, (ii) Equifax Credit Information Services Private Limited, (iii) CRIF High Mark Credit Information Services Private Limited and (iv) Credit Information Bureau (India) Limited (CIBIL) to commence/carry on the business of credit information. Credit Information Companies (CICs) have also been advised to disseminate the information pertaining to suit filed accounts of Wilful Defaulters on their respective websites.

(b) Banks / FIs should, however, submit the quarterly list of wilful defaulters where suits have not been filed only to RBI in the format given in Annex 1.

(c) In order to make the current system of banks/FIs reporting names of suit filed accounts and non-suit filed accounts of Wilful Defaulters and its availability to the banks by CICs / RBI as current as possible, banks / FIs are advised to forward data on wilful defaulters to the CICs/Reserve Bank at the earliest but not later than a month from the reporting date.

d) After examining the recommendations of the Committee to Recommend Data Format for Furnishing of Credit Information to Credit Information Companies (Chairman: Shri. Aditya Puri) it has been decided to implement the following measures with regard to reporting and dissemination of information on wilful defaulters:

a. Banks/FIs may continue to furnish the data on wilful defaulters (non-suit filed accounts) of Rs. 25 lakhs and above for the quarter ending June 30, 2014 and September 30, 2014 to RBI in the existing format.

b. In terms of Credit Information Companies (Regulation) Act, 2005, banks/FIs are advised to furnish the aforementioned data in respect of wilful defaulters (non-suit filed accounts) of Rs. 25 lakhs and above for the quarter ending December 31, 2014 to CICs and not to RBI. Thereafter, banks/FIs may continue to furnish data in respect of wilful defaulters to CICs on a monthly or a more frequent basis. This would enable such information to be available to the banks/FIs on a near real time basis.

<u>Explanation</u>

In this connection, it is clarified that banks need not report cases where

(i) outstanding amount falls below Rs.25 lakh and

(ii) in respect of cases where banks have agreed for a compromise settlement and the borrower has fully paid the compromised amount."

57. Clause 3 of the Master Circular provides the mechanism for identifying a wilful defaulter. The said provision provides that

the evidence of wilful default shall be examined by a Committee headed by Executive Director or equivalent and consisting of two other senior officers of the rank of GM/DGM. If the said Committee concluded that an event of wilful default has occurred, it shall issue a show cause notice to the concerned unit or person calling for his response. After consideration of the response, a final order recording the event of wilful default, or otherwise, may be issued alongwith the reasons for the same. Wherever the Committee considers necessary, an opportunity of personal hearing should also be granted. This Committee is called as the "Identification Committee."

58. The order of the Identification Committee shall be reviewed by another Committee headed by the Chairman/MD/CEO and two other independent/non-Executive Directors of the bank. The order declaring a person as wilful defaulter shall become final only after it is confirmed by this Review Committee. The said clause also provides that under Section 2(60) of the Companies Act, 2013, an officer who is in "default" to mean only "whole time director" unless the case falls in the category of exceptions enumerated in the said clause. Clause 3 reads as under: -

> ***"3. Mechanism for identification of Wilful Defaulters***
>
> *The transparent mechanism referred to in paragraph 2.5(d) above should generally include the following:*
>
> *(a) The evidence of wilful default on the part of the borrowing company and its promoter/whole-time director at the relevant time should be examined by a Committee headed by an Executive Director and consisting of two other senior officers of the rank of GM/DGM.*
>
> *(b) If the Committee concludes that an event of wilful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the promoter/whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of wilful default and the reasons for the same. An opportunity should be given to the borrower and the promoter/whole-time director for a personal hearing if the Committee feels such an opportunity is necessary.*
>
> *(c) The Order of the Committee should be reviewed by another Committee headed by the Chairman / CEO and MD and consisting, in addition, of two independent*

directors of the Bank and the Order shall become final only after it is confirmed by the said Review Committee.

(d) As regard a non-promoter/non-whole time director, it should be kept in mind that Section 2(60) of the Companies Act, 2013 defines an officer who is in default to mean only the following categories of directors:

(i) Whole-time director

(ii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iii) every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings and who has not objected to the same, or where such contravention had taken place with his consent or connivance.

Therefore, except in very rare cases, a non-whole-time director should not be considered as a wilful defaulter unless it is conclusively established that

I. he was aware of the fact of wilful default by the borrower by virtue of any proceedings recorded in the Minutes of the Board or a Committee of the Board and has not recorded his objection to the same in the Minutes, or,

II. the wilful default had taken place with his consent or connivance.

A similar process as detailed in sub paras (a) to (c) above should be followed when identifying a non-promoter/non-whole time director as a wilful defaulter."

59. Clause 4.2(iii) also provides for initiation of criminal proceedings against declared wilful defaulters, wherever necessary."

47. In terms of paragraph nos.60 to 64, this Court has made a reference to the consequences of a person or entity being declared as a Wilful Defaulter and held that the said declaration also affects the right to reputation of a person, which is also a fundamental right flowing from Article 21 of the Constitution of India. The concluding paragraph of the said discussion reads as under:-

> *"64. As held by the Hon'ble Supreme Court, the declaration of a person as wilful defaulter and barring him from credit facility in the future have civil and penal consequences, which also have the effect of adversely affecting his reputation. Thus, the declaration of a person as wilful defaulter, apart from adversely affecting the fundamental rights guaranteed under Article 19(1)(g) of the Constitution, also affects the right to reputation of a person, which is also a fundamental right guaranteed under Article 21 of the Constitution. The decisions of the Hon'ble Supreme Court in the cases of* ***Sukhwant Singh v. State of Punjab, Subramanian Swamy v. Union of India*** *and* ***Om Prakash Chautala v. Kanwar Bhan*** *are noteworthy in this regard."*

48. While dealing with the standard of proof to decide the validity of an event of Wilful Default under Master Circular in paragraph nos.65 to 69, it was concluded that in the test of validity of civil action on preponderance of probability, the graver the consequences of such civil action, the higher is the degree of proof required. The conclusion of the said discussion is encapsulated in the paragraph reproduced as under:-

> *"69. From the aforesaid enunciation of law, it is evident that in the test of validity of civil action on preponderance of probability, the graver the consequences of such civil action, the higher is the degree of proof required. The court must first consider the existing probabilities, followed by a comparative analysis of the respective weights to be attached to the*

> *probabilities. The degree of probability is based on the subject matter. The subject matter under scrutiny is one of the circumstances to be kept in mind while deciding the degree of proof. While accepting the probability in favour of one fact over the other, the court must be in a position to say that a reasonable person could proceed with a supposition that such fact exists. This test is not only in conformity with the precedents discussed above but is also in tandem with Section 3 of the Indian Evidence Act, 1872. If this principle of law is tested on the anvil of the Master Circular, it is clear that the Master Circular entails not only grave civil, but also penal consequences. Considering the subject matter and grave civil and penal consequences, the validity of an order declaring as wilful defaulter would require a closer scrutiny as to whether such an order falls within the four corners of the Master Circular or is it otherwise.*

49. The court went on to hold in terms of paragraph no.70 that if the relevant, germane and valid considerations are ignored or overlooked by an executive authority while taking a decision, the same would fail to withstand judicial scrutiny. Paragraph no.70 which accentuates the discussion on scope of judicial review in administrative action reads as under:-

> *"70. Before this Court delves deeper into the facts of the present case, it is also important to discuss the scope of judicial review in administrative action. The Hon'ble Supreme Court in the case of* ***Rajesh Agarwal (supra)*** *has held that the act of declaring a person as wilful defaulter or fraud is in the nature of administrative action. The scope of judicial review on administrative action is well defined. It is not necessary to discuss judicial decisions in detail except to note a recent decision of the Hon'ble Supreme Court in* ***Mohd. Mustafa (supra),*** *wherein, it was reiterated that if the discretionary power has been exercised in disregard of relevant consideration, the Court would hold the action bad in law. If the relevant, germane and valid considerations are ignored or overlooked by an executive authority while taking a decision, the same would fail to withstand judicial scrutiny. The relevant observations are as under: -*
>
> ***"

50. The scheme of CDR, as discussed in paragraph nos. 71 to 89, is reproduced as under:-

"71. The RBI has framed the CDR Master Circular enabling the lender banks to prepare a CDR scheme in respect of a business entity, which is struggling in meeting its existing loan repayment obligations. The CDR Master Circular requires the borrower to submit a Flash Report to the lender banks making the restructuring proposal. Wherever necessary, the lender banks would obtain a TEV Report to ascertain the viability of the company. The CDR Master Circular also requires the lender banks to change the management of the company where there has been "diversion of funds". In case of "diversion of funds", wherever necessary, the banks may also carry out forensic audit of the company. Clause 3 of the CDR Master Circular reads as under: -

> *"**3. SCRUTINY BEFORE CDR REFERENCE/APPROVAL***
>
> *3.1 Referring Institution (RI) should ensure primafacie viability of units at the time of submission of Flash Report. Wherever necessary TEV study from independent reputed agencies be conducted while drafting the final CDR package.*
>
> *3.2 RI/MI may also examine the possibility of change of management while drafting the final CDR package. If the case has been found to be adversely affected due to incompetent management of the Company or where diversion/misuse of funds has taken place, change of management should be the first option.*
>
> *3.3 Wherever necessary and specially in cases of diversion of funds, forensic audit/ special investigative audit may be got carried out by the MI."*

72. Similarly, Clause 6.3 of the CDR Master Circular provides that companies indulging in frauds and malfeasance will remain ineligible for the CDR Scheme. Clause 6.3 reads as under: -

> ***"6.3 Wilful Defaulters***
>
> *RBI in its guidelines on CDR mechanism has stipulated as under: While corporate indulging in frauds and malfeasance even in a single bank will continue to remain ineligible for restructuring under CDR mechanism as hitherto, the Core group may review the reasons for classification of the*

*borrower as wilful defaulter specially in old cases where the manner of classification of a borrower as a wilful defaulter was not transparent and satisfy itself that the borrower is in a position to rectify the wilful default provided he is granted an opportunity under the CDR mechanism. Such exceptional cases maybe admitted for restructuring with the approval of the Core Group only. **The Core Group may ensure that cases involving frauds or diversion of funds with mala fide intent are not covered**. In view of the above, details of eligibility criteria to be followed in respect of cases of willful defaulters etc. are given in Annexure III."*

73. Clause 6.3 specifically requires the Core Group of banks to "ensure that cases involving frauds or diversion of funds with mala fide intent are not covered." The said clause further provides that the "details of eligibility criteria to be followed in respect of cases of wilful defaulters etc. are given in Annexure III."

74. Annexure III, which relates to "Cases of Wilful Defaulters: Eligibility Criteria, Financial Viability Parameters Procedural Aspects" thereof makes reference to RBI's guidelines issued on 2.7.2012, which define "wilful default" as:

"(i) The unit has defaulted in meeting its payment/ repayment obligations to the lender even when it has the capacity to honour the said obligations.

(ii) The unit has defaulted in meeting its payment/ repayment obligations to the lender and has not utilized the finance from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purposes.

(iii) 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 utilized for the specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.

(iv) 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 by him or it for the purpose of securing a term loan without the knowledge of the bank/ lender."

75. The aforesaid definition of wilful default in RBI's guidelines

issued on 2.7.2012 is identical to the definition of wilful default as defined in the Master Circular in question in the present case.

76. Paragraph 2 of Annexure III of the CDR Master Circular then mandates that "Banks/ FIs should take" specified "measures in identifying and reporting instances of wilful default". These steps are similar to the steps provided in the Master Circular viz. identification by Identification Committee, show cause notice to borrower, representation before Grievance Redressal Committee/ Review Committee and finally a decision.

77. Paragraph 4 restates that "Cases of Wilful Defaulter Not Eligible Under CDR". This clarifies again that cases of reported siphoning of funds or misfeasance, fraud etc. are prima facie not eligible to be covered under CDR.

78. Paragraph 5 mandates referring institution to check list of wilful defaulters as maintained by RBI/ CIBIL to verify whether any FI/ bank has reported the company as wilful defaulter and inter alia, report such instances to the CDR-EG.

79. Where a borrower is classified as a wilful defaulter, the core group may review the reasons for such classification and even such exceptional cases may be admitted for CDR, but they are required to undergo a much more onerous and rigorous process before an MRA/ TRA is executed.

80. Clause 7 of the CDR Master Circular enjoins the lender banks to classify the borrowing company in one of the four categories from A to D. Category-C is assigned where there is diversion of funds by the company:

> *"**7. BORROWER CLASSIFICATION FOR STIPULATIO N OF STANDARD TERMS AND CONDITIONS***
>
> *7.1 It is observed that borrower –*
>
> *Corporate get into a stress situation because of various external and internal factors. The restructuring schemes are accordingly formulated envisaging various actions on the part of the borrowers and participating lenders. Based on experience and various features of the borrower-corporate and their promoters/sponsors, the borrower-corporate are categorized into four Classes for the purpose of stipulation of standard terms & conditions under the CDR Mechanism. The classification is as under:*
>
> ***Borrower Class 'A':***

Corporate affected by external factors pertaining economy and Industry.

Borrower Class 'B':
Corporate/promoters affected by external factors and also having weak resources, inadequate vision, and not having support of professional management.

Borrower Class 'C':
Over-ambitious promoters; and borrower-corporate which diverted funds to related/unrelated fields with/without lenders' permission.

Borrower Class 'D':
Financially undisciplined borrower-corporate."

81. Clause 7.2 provides that:

*"The classification of each borrower-corporate shall be decided at the meeting of the CDR Empowered Group (EG) whereat the Financial Restructuring Proposal is approved. The standard terms and conditions applicable to different classes of borrowers are set out in **Annexure-IV**."*

82. As per Clause 7.3, "Referring Institution should incorporate all applicable standard terms and conditions in the restructuring package, besides special conditions deemed necessary in specific cases…" Annexure IV in paragraph A (1) to (28), provides standard conditions for all four category of borrowers.

83. Paragraph B imposes "Additional Conditions for Borrower Class – 'B' (In addition to Standard Conditions Stipulated Under A)". Paragraph C imposes "Additional conditions for Borrower Class – 'C' (In addition to Standard Conditions Stipulated Under A & B)". Paragraph D imposes "Additional conditions for Borrower Class – 'D' (In addition to Standard Conditions Stipulated under A, B & C)". Thus, the lower the Class assigned, the higher the conditions are to be placed.

84. As per Clause 8.1, "A decision of the CDR Empowered Group relating to prima facie feasibility and/or final approval of Restructuring Scheme shall be taken by a Super-Majority Vote at a duly convened meeting, after giving reasonable notice, to the Lenders and to the Eligible Borrower."

85. As defined in Clause 8.3, 'Super-Majority Vote' means not less than 60 per cent of number of lenders holding not less than 75 per

cent of aggregate principal outstanding Financial Assistance.

86. On admission of Flash Report, as per Clause 9.3, "the borrower should open a current account with the MI (Monitoring Institution) to be designated "pre-TRA" account…" and the procedure for which is described in Clauses 9.3 (i) to (xiii).

87. Clause 10 provides for a "Monitoring Mechanism" to ensure success of CDR mechanism and provides for an exhaustive process for proper implementation of the restructuring scheme. Clause 22 provides for criteria and procedure for exit from CDR.

88. After the TEV Report is made by an "independent agency" and an independent auditor conducts a Stock Audit of the company (both appointed by banks/ consortium of banks), the bank/ consortium of banks then commission the preparation of FRS, which is deliberated and approved by the banks and such approved FRS is submitted to the CDR-EG for its approval.

89. As per Clause 10.9, pursuant to the approval of CDR package by the CDR-EG, MRA and TRA are drawn, deliberated and signed between the company and the banks. This implements/ puts in effect the CDR package for a borrower company."

Satisfaction to issue Show Cause Notice in the instant case

51. Keeping in mind the principles laid down by this Court in the final order in W.P. (C) No. 4181/2023 titled as ***Ratul Puri v. Bank of Baroda***, the facts of the case in hand deserves to be analysed.

52. This Court, *vide* order dated 28.11.2023, had directed the Respondent Bank to place on record the document which showed the satisfaction arrived at by the Respondent Bank to issue Show Cause Notice to the Petitioner. On 02.12.2023, the Respondent Bank filed Minutes of Meeting dated 08.11.2019, wherein, the decision to issue Show Cause Notice to the Petitioner was taken. At Serial No.2 in the said minutes of the meeting, the decision to issue Show Cause Notice to Petitioner for alleged acts of Wilful Default

is taken by the Respondent Bank. In the reasons column, the Respondent Bank has referred to observations made in the Forensic Audit Report, based on which it has concluded that there is diversion of funds. It is thus evident that the Respondent Bank has issued Show Cause Notice to the Petitioner only by referring to the observations made in the Forensic Audit Report. This Court is of the view that this approach of the Respondent Bank is not in conformity with the scheme of the Master Circular.

53. Under the Master Circular, to declare a person as a Wilful Defaulter, lender banks have to independently find that the "Wilful Default" is "intentional, deliberate and calculated" and the said conclusion is based on "objective facts and circumstances of the case". The Forensic Audit Report can act as a piece of corroboration for the said exercise, but not the sole basis. The lender banks must record their satisfaction of commission of Wilful Default which according to them are "intentional, deliberate and calculated".

54. Further, under Clause 2.1.3 of the Master Circular, the lender banks have to keep in mind the track record of the borrower and the decision to declare an entity or person as Wilful Defaulter cannot be taken on the basis of isolated transactions/incidents. A similar obligation is cast on the lender banks in Clause 2.5 of the Master Circular, which require the lender banks to put in place a transparent mechanism for the entire process so that the penal provisions are not misused and the scope of such discretionary powers are kept to the barest minimum. It is required to be ensured

that solitary or isolated instances are not made the basis for imposing the penal action under the Master Circular.

55. In the present case, the satisfaction to issue Show Cause Notice does not appear to have been recorded in accordance with the requirements of the Master Circular. Keeping the object of the Master Circular in mind and the consequences that it entails, both civil and penal, the lender banks have an obligation to comply with the inbuilt safeguards in the Master Circular. Lest, the line between persons who commit mere default in repayment of loan obligations and those who commit Wilful Default in terms of the Master Circular, would get obliterated.

Whether the Petitioner committed acts of Wilful Default?

56. The *first* ground relied upon by the Identification Committee of the Respondent Bank for declaring the Petitioner as Wilful Defaulter is that MBSL gave Rs.135.50 Crores as interest free deposit to its parent company i.e., MBIL, under various lease agreements, which is upto 58.82 times more than the yearly rentals. This, according to the Respondent Bank, amounts to diversion of funds. The Respondent Bank has come to this conclusion on the basis of certain observations made in the Forensic Audit Report.

57. The *second* ground relied upon by the Identification Committee was that MBSL had executed financial lease agreements with MBIL. However, instead of utilizing the said utilities on its own, MBSL leased back the said utilities to MBIL on operating

lease. This also, according to the Identification Committee of the Respondent Bank, amounts to diversion of funds.

58. Learned Senior Counsel appearing for the Petitioner is at pains to explain that the deposits made by MBSL in favour of its parent company MBIL under lease agreements can never be regarded as diversion of funds, which were refundable security deposits. The observation that the deposits are 58.82 times of the yearly rentals is factually incorrect. The total security deposit under the lease agreements was only 3.05 times of the rental. The Forensic Audit Report and the Respondent Bank considered 58.82 times from one of the lease agreements. Whereas, with respect to all the lease agreements executed between MBSL and MBIL, the average security deposits come to 3.05%, which is evident from the following chart:-

Exhibit 1.3- "Summary of excess security deposits over and above yearly lease rentals" Amt in INR

Sr. No.	Agreement Description	Party with whom agreement has been entered into	Amount of Security Deposit	Amount of rent (P.A)	Ratio of Lease rent per annum to Security deposit (Times)
1	Deed for Sub lease of Building – Thin Film 1	Moser Baer India Limited	43,50,00,000	14,400,000	30.21
2	MOU for sub-lease of land – Thin Film 2	Moser Baer India Limited	2,00,00,000	3,900,000	5.13
3	Deed for sub-lease of land – Thin Film 1	Moser Baer India Limited	6,00,00,000	1,020,000	58.82
4	Deed for sub-lease of building –	Moser Baer India Limited	55,00,00,000	1,36,80,000	40.20

	Thin Film 2				
5	MOU for leasing of utilities	Moser Baer India Limited	29,00,00,000	416,460,000	0.70
	Total/Average		133,50,00,000	44,94,60,000	3.05%

59. Learned counsel for the Respondent Bank has not controverted the aforesaid position. It thus appears that the first alleged act of Wilful Default is based on a factually incorrect premise that the security deposits by MBSL to MBIL were 58.82% of the rental.

60. The record of this case would further reveal that in March, 2007, MBSL had entered into an Agreement with Applied Materials, USA for supply of the Thin Film Solar Module Line. The said Agreement necessitated MBSL to establish its manufacturing unit for effecting supplies.

61. As noted above, MBSL was a 100% subsidiary of MBIL. MBIL had 27.5 acres of land as Special Economic Zone ("**SEZ**") in Greater Noida (U.P.) for non-conventional sources of energy. MBIL was approved by the competent authorities as the developer of the said SEZ. The law at that time and the approval letter dated 01.09.2006 of the competent authority produced by the Petitioner, did not permit any entity other than MBIL to develop and operate the SEZ.

62. MBIL, therefore, developed the necessary infrastructure including buildings and manufacturing facilities at the SEZ at a cost of Rs.353.53 Crores. The developed infrastructure was then given

by MBIL to MBSL on financial and operating leases. The term of these leases varied between 7 to 20 years.

63. Learned Senior Counsel for the Petitioner further contended that under the financial arrangement agreed between MBIL and MBSL, though the security deposit made by MBSL was high, the rental was merely 43.85 Crores. Even after paying the security deposit and the annual rental, MBIL, from the lease agreements, made only a 12.80% Internal Rate of Return, which by no stretch of imagination can be said to be anything out of the ordinary. The commercial lending rate, at the time, was around 13% and hence, a return of 12.80% on the investments made by MBIL was a fair return, which is evident from the following chart relied upon by the Petitioner:-

Detail of Finance Lease	**Date of Leasing**	**Cost of assets out (In Crore)**	**Security Deposit (In Crore)**	**Annual Lease Rental**	**Tenure of Lease**	**Total Lease Rent (in Crore)**	**Ratio of Deposit vs. Lease Rent (Times)**		**IRR**
							As per us	**As per Forensic Auditor**	
Building									
Thin Film-I	23.06.2008	53.37		14,400,000	20 yrs.	28.80	1.91	30.21	16.66%
Thin Film-II	31.03.2010	62.08		7,680,000	20 yrs.	15.36	2.83	40.20	12.05%
Total		**114.45**		**22,080,000**		**44.16**			

Land									
Sub Lease I	23.06.2008			10,20,000	82 yrs.	8.364	0.72	58.82	Operating Lease
Sub Lease II	31.03.2010			39,00,000	80 yrs.	31.20	Not Paid	5.13	Operating Lease
Total				**49,20,000**		**39,564**			
Utilities									
Utility 7	31.03.2010	28.56		57,600,000	7 years	40.32	0.07	0.07	12.02%
Utility 8	31.03.2010	58.51		108,300,000	8 years	86.64	0.07	0.07	12.03%
Utility 9	31.03.2010	96.91		164,160,000	9 years	147.74	0.08	0.07	11.99%
Utility 10	31.03.2010	55.10		86,400,000	10 years	86.40	0.09	0.07	12.02%
Total		**239.08**		**416,460,000**		**361.10**	**0.08**	**0.07**	
Total		**353.53**		**44,34,60,000**		**444.82**	**0.3**	**3.06**	**12.80% IRR**

64. The aforesaid chart, which is also not controverted by the Respondent Bank, indicates that the return made by MBIL for its investments does not appear to be anything out of the ordinary. The surrounding circumstances and the nature of return do not objectively establish that the lease agreements were intentional, deliberate and calculated acts of Wilful Default.

65. This Court shall now consider the Forensic Audit Report, which is the basis for invoking the Master Circular by the Respondent Bank. A perusal of the Forensic Audit Report reveals that it pertains to period between 01.04.2012 to 31.03.2015. The said Report is based on the audited financial statements pertaining to the said period. The lease agreements were executed prior to the review period and reflected in the audited financial statements of that period. However, the Forensic Auditor had no access to the same being prior to the review period.

66. Since the documents of the relevant time were unavailable to the Forensic Auditor, the Report concludes that in absence of supporting documents justifying agreed rates for leased assets, lease income, electricity and water charges, the lease transactions are questionable. Hence, it may be classified under Section 66 of the IBC. It is thus evident that the Forensic Audit Report has not given any conclusive finding that in the execution of the lease agreements, MBSL diverted any borrowed funds. This inference has been drawn by the Identification Committee of the Respondent Bank on its own without any other supporting material.

67. It is also worthwhile to mention that the Bank of Baroda, which is another public sector bank, had also charged the Petitioner for Wilful Default on this allegation. However, considering the explanation given by the Petitioner, the said allegation was dropped by the Review Committee of Bank of Baroda in its order dated 23.03.2023. It appears that lender banks, which were all a common

part of the CDR package, are picking and choosing from the Forensic Audit Report and issuing Show Cause Notice, without there being any consistency on the alleged acts of Wilful Default.

68. At this stage, it is essential to deal with the argument raised by the Respondent Bank that 7 out of the 9 lease agreements are unstamped. In this regard, reference may be made to the proviso to Section 3 of the Indian Stamp Act, 1899, which provides that no duty is chargeable in respect of any instrument executed in favour of a developer or unit in connection with the carrying out of purposes of the SEZ. In any case, it is evident that the lender banks were aware of the lease agreements and execution of unstamped lease agreements *per se* cannot amount to diversion of funds.

69. This brings us to the *second* ground relied upon by the Identification Committee that MBSL had executed financial lease agreements with MBIL. However, instead of utilizing the said utilities on its own, MBSL leased back the said utilities to MBIL on operating lease. This, according to the Identification Committee of the Respondent Bank, amounts to diversion of funds.

70. Learned Senior Counsel for the Petitioner contends that the aforesaid observation made by the Identification Committee based on the Forensic Audit Report is also made in absence of documents of the relevant period.

71. As discussed above, the SEZ was owned by MBIL. MBIL being the parent company of MBSL, executed lease agreements to enable MBSL to manufacture in the SEZ and hence, developed the

necessary infrastructure for the same. As per the approval letter dated 01.09.2006 issued by the Ministry of Commerce, Government of India, the right and responsibility to operate utilities including power generation and utility assets on the SEZ remained exclusively with MBIL.

72. It is also seen that as per approval dated 22.05.2007, MBSL received permission only to manufacture thin film and crystalline silicon based solar modules.

73. Hence, to comply with the said condition, MBSL was necessitated to give back on operating lease in favour of MBIL, the operation of power generation and utility assets for operations. These operating leases were effective from 01.04.2010 for a period of 10 years and whereunder, MBIL agreed to pay MBSL a lease rent of Rs.382.77 crores.

74. It is clear that for any act of diversion or siphoning to take place, it is to be seen whether the company in question resulted in losses as a result of the transaction in question.

75. The figures produced by the Petitioner and which have not been disputed by the Respondent Bank establish that had MBSL functioned normally, MBIL, over a period of 10 years, would have paid MBSL an amount of Rs.382.77 Crores under the operating leases as against an amount of Rs.390.05 Crores to be paid by MBSL to MBIL under the financial leases.

76. It, therefore, appears that the net outflow and inflow are nearly the same with respect to lease transactions ranging between 7-10 years and therefore no significant loss or profit would be made by either MBSL or MBIL under these transactions. In fact, MBSL would have made a financial gain of Rs.5.46 Crores. A transaction where the borrower is making financial gain can hardly be described as diversion of funds. It appears that merely because the Forensic Auditor observed the execution of operating lease by MBSL in favour of MBIL to be unusual, perhaps since the Financial Auditor did not have access to documents of this period, the Respondent Bank could not have drawn an inference of diversion of funds. This is more particularly when the Forensic Auditor in its Report itself has not drawn any conclusion of diversion of funds.

77. There is another aspect of the matter. The Respondent Bank sanctioned the loan facilities to MBSL *vide* sanction letters dated 04.04.2008, 03.06.2010, 20.08.2010, 25.03.2011 and 02.09.2011. The loan sanction letters enabled the Respondent Bank to access the financial statements of MBSL and its balance sheets at all times. The lease agreements were reflected in the financial statements. The Respondent Bank was aware of the lease agreements and the nature of transactions. Even after being aware of the lease agreements, the Respondent Bank continued to sanction further credit facilities. The Respondent Bank, therefore, did not perceive anything out of the ordinary from these lease agreements.

78. After MBSL faced financial constraints and was unable to meet its loan repayment obligations, it was considered for (2) by

the lender banks under the CDR Master Circular, which required MBSL to submit Flash Report. In 2012, MBSL submitted its Flash Report. In Clause 13, under the head of "Buildings & Infrastructure Facilities", MBSL categorically disclosed the details of the financial and operating lease agreements entered into with its parent company i.e., MBIL. Thus, even by virtue of the Flash Report, the Respondent Bank was fully aware of the lease agreements and the nature of transactions.

79. Based on the Flash Report, at the time of consideration of MBSL's application for CDR, the lender banks in their meeting held on 10.10.2012 noted that MBSL had accumulated liabilities of around Rs.161 Crores towards lease agreements and MBSL proposed to pay them over a period of 10 years. Thus, even at the time of finalization of the CDR Scheme, the Respondent Bank was aware of the lease agreements and the liabilities arising out of it and did not find these to be questionable or out of the ordinary.

80. On 18.03.2013, when MBSL was not in a position to meet its loan repayment obligations, the CDR-EG approved the restructuring package of MBSL. In the letter dated 18.03.2013, the CDR-EG approved the CDR package as per Annexure-1 to the said letter. In Clause IX of Schedule-1, the lender banks again acknowledged that MBSL has lease liabilities towards MBIL. A CDR package even for MBIL was finalized, which required MBIL not to seek further deferment of lease liabilities. Accordingly, the lease liabilities towards MBIL were deferred. This document again shows that the lender banks were fully aware about the lease

agreements and lease liabilities of MBSL at the time of approval of the CDR package of MBSL.

81. After the approval of the CDR package, the lender banks issued FRS, which is admittedly their own internal document. No adverse finding regarding the lease agreements is recorded in the FRS. The lender banks, including the Respondent Bank, subsequently entered into MRA and TRA with MBSL without any demur.

82. It is thus evident that the lender banks were aware of the lease agreements and the nature of liabilities of MBSL pursuant to the said Agreements since 2008. Neither before the approval of the CDR package in 2012 nor thereafter, the lender banks considered the same to be not over board. The lender banks never raised any concern regarding the same until the Show Cause Notice was issued by the Respondent Bank alleging the lease agreements to be an act of diversion of funds. The act of invoking the Master Circular against the Petitioner by the Respondent Bank, based on observations made in the Forensic Audit Report, several years after the execution of lease agreements, appears to be an afterthought.

83. The Review Committee in the impugned order has recorded that the Forensic Auditor concluded that the lease agreements between MBIL and MBSL were created for diverting banks funds. The learned Senior Counsel for the Petitioner has taken this Court through the Forensic Audit Report to show that no such observation is made in the Forensic Audit Report. The Review Committee has

attempted to add words to the Forensic Auditor, which is non-existent in the Report.

84. When the Petitioner made the aforesaid submissions before the Review Committee, the Review Committee, instead of dealing with each of them on merits, again rejected them by relying on the observations made in the Forensic Audit Report. Thus, there appears to be no independent application of mind by the Respondent Bank. From the Respondent Bank's Minutes of Meeting dated 08.11.2019, it is evident that the Show Cause Notice was issued by quoting Forensic Audit Report; the Identification Committee passed its order quoting the Forensic Audit Report and even the Review Committee rejected the Petitioner's explanation by merely quoting the Forensic Audit Report. The Forensic Audit Report itself does not conclude diversion of funds. Hence, this Court is of the view that the Respondent Bank has failed to discharge its obligations under Clause 2.1.3 read with Clause 2.5 of the Master Circular and proceeded to invoke the jurisdiction under the Master Circular merely on the basis of the Forensic Audit Report, which itself did not record any conclusion of diversion of funds.

85. The *third* ground on which the Respondent Bank declared the Petitioner a Wilful Defaulter is that MBSL made investments of Rs.696.49 Crores in its subsidiary Helios Photovoltaic Ltd. (earlier known as MBPV) "without the approval of the lenders".

86. On behalf of the Petitioner, it is contended that the investments by MBSL in Helios Photovoltaic Ltd. were made from funds raised from Private Equity (PE) investors and were within the knowledge of the lender banks. The lender banks cannot allege these investments to be an act of Wilful Default, several years later, by observing that the investments were made without approval of the lenders. It is contended that Helios Photovoltaic Ltd. was a strategic investment made by MBSL for manufacturing and supply of PV cells, which was a critical component for MBSL in its assembly line of solar cells.

87. The Petitioner further contends that the investments made by MBSL in Helios Photovoltaic Ltd. were duly reflected in the financial statements and audited balance sheets of MBSL. The lender banks, by virtue of the terms of the loan approval terms, always had access to the financial statements and audited balance sheets of MBSL and were fully aware of the investments.

88. Further, prior to the admission of MBSL in the CDR Scheme, MBSL had submitted its Flash Report in 2012 to lender banks which also disclosed the investments made in Helios Photovoltaic Ltd.

89. Even during the consideration of the CDR Scheme, the lender banks had a JLM meeting on 10.10.2012. In the said meeting, the representative of PNB Investments Services Ltd., which conducted the Economic Viability Assessment, addressed the

lender banks and explained that long term funds were utilized for investment on subsidiaries.

90. In the letter dated 18.03.2013, which approved the restructuring package, the details of package were earmarked in Annexure-1. In Clause 1.1(iii), the lender banks noted that the investments were made by MBSL in its 100% subsidiary. These investments are to be retained and disposal of these investments is not proposed. Relevant portion is reproduced as under:

> *"(iii) Sale of surplus assets/ investments*
>
> *There are no significant surplus assets/ investments proposed for sale.*
>
> *The investments are towards equity and preference share capital in its 100% fully owned subsidiary MBPV. These investments are required to be retained in terms of non-disposal undertaking executed with secured lenders of MBPV. Hence, no disposal of these investments is proposed."*

91. The lender banks had issued the FRS before the finalization of the CDR package. In the FRS, which is the lender banks' internal document, the lender banks noted that MBSL had made investment in its 100% subsidiary. The lender banks also noted that investment in the subsidiary was required to be retained and that the investment by MBSL in Helios Photovoltaic Ltd. was a strategic investment where the latter supplied PV cells to MBSL in its assembly modules. The relevant part of FRS is reproduced as under:

> ***"2.3 Comments on financial position and working results***
>
> ***

Investments:

The investments are towards equity and preference share capital in 100% fully owned subsidiary MBPV. These investments are required to be retained in terms of non-disposal undertaking executed with secured lenders of MBPV. Further, investment in MBPV is strategic investment, whereby MBPV supplies PV cells to MBSL in its assembly of modules."

92. Even after noting the investments made by MBSL in Helios Photovoltaic Ltd., the lender banks placed MBSL in Class-B borrower under the CDR Master Circular, which applies where a company is affected by external factors and not Class-C, which applies for diversion of funds. The lender banks, therefore, did not treat the investment in Helios Photovoltaic Ltd. as diversion of funds at any stage. On the contrary, the lender banks found the investment to be strategic and required MBSL to retain the said investment.

93. In this view of the matter, it is difficult to accept the Respondent Bank's argument that the investment in Helios Photovoltaic Ltd. amounts to diversion of funds as the same was made without approval of the Respondent Bank. It is evident that the Respondent Bank was aware of the investments; found the same to be strategic and required MBSL to retain them.

94. After having complete knowledge of the investments and treating them to be strategic, which is required to be retained, the Respondent Bank, after several years, cannot be permitted to do a *volte face* and hold that the said investment amounted to diversion of funds.

95. For declaring the Petitioner as Wilful Defaulter, the Respondent Bank has relied upon the Forensic Audit Report. In the said Report, it is noted that investment is made by MBSL in Helios Photovoltaic Ltd. which was incurring losses since 2011-12. The Forensic Auditor could not verify any losses prior to this period, as it was beyond the review period. The Forensic Auditor has questioned the wisdom of making these investments in Helios Photovoltaic Ltd., when it was incurring losses.

96. Learned Senior Counsel for the Petitioner submits that the Petitioner resigned as Executive Director of MBSL on 16.04.2012 and as full time Director on 16.11.2012. For 2011-12 or onwards, whether Helios Photovoltaic Ltd. was incurring losses or not; or MBSL made further investment or not, is not known to the Petitioner. The Petitioner cannot be held liable for any act that has transpired after he ceased to have any position in MBSL. He further submits that the Forensic Audit Report nowhere has regarded these investments as diversion of funds. The conclusion drawn by the Forensic Audit Report states – "*Owing to inadequacy of documents explaining arrival, basis & justification of investments made in HPVL raises question on the need of such investment. Further, considering the current financial status of HPVL, recovery of these investments seems to be doubtful*." The Report has not drawn any conclusion owing to the inadequacy of documents. It has not made any conclusion or finding of diversion of funds.

97. The lender banks must follow the mandate of Clause 2.1.3 read with Clause 2.5 of the Master Circular and independently

acts of "Wilful Default" which are "intentional, deliberate and calculated" and the said conclusion should be based on "objective facts and circumstances of the case". Under the Master Circular, transferring funds in the subsidiary may amount to Wilful Default, if the same is found to be "intentional, deliberate and calculated" on an objective assessment of facts and circumstances. However, the said burden is not discharged by merely quoting the Forensic Audit Report, which itself has not drawn any conclusion of diversion of funds. The documents of Respondent Bank of 2012 i.e., several years before the issuance of Show Cause Notice, found the investments to be strategic and required to be retained, cannot subsequently become "intentional, deliberate and calculated" acts of Wilful Default.

98. Learned Senior Counsel for the Petitioner has attempted to show that the investment in Helios Photovoltaic Ltd. was made by MBSL from the funds raised from PE investors. Even after making the investments, MBSL had cash surpluses. It is further contended that the Respondent Bank had given a loan of Rs.261.35 Crores, as on 2009-10, to MBSL for creation of fixed assets. MBSL created fixed assets of Rs.477.46 Crores, which implies that that the loan amount was used for the purpose for which it was granted. The investment in Helios Photovoltaic Ltd. was towards the creation of fixed assets as it manufactured PV cells, which was a critical component for MBSL in its assembly line of solar cells. When the investment is made to create a fixed asset and which supports the main business of MBSL, the same cannot be regarded as diversion of funds. However, in light of the discussion made and conclusion

drawn above, it is not necessary to record a finding on these submissions.

99. The last and *fourth* ground relied upon by the Respondent Bank is that MBSL had given supplier advances and loans to M/s Value Solar Energy Ltd. of Rs.25.60 Crores as on 31.03.2012, and of Rs.29.67 Crores as on 31.03.2015. MBSL did not provide supporting documents to the Forensic Auditor. Hence, the Forensic Auditor could not ascertain the basis as well as terms and conditions on which the loans and advances were made.

100. This Court also perused the Forensic Audit Report in this aspect. The Forensic Audit Report states that MBSL had made loans and advances to M/s Value Solar Energy Ltd. In 2019, when the Forensic Audit took place, the then management of MBSL did not provide the supporting documents to the Forensic Auditor. Hence, the Forensic Auditor could not ascertain the basis as well as terms and conditions on which the loans and advances were made.

101. This Court is of the view that the aforesaid observation can hardly be categorized as diversion of funds. The Forensic Auditor has noted the factum of loans and advances. However, it is not in a position to comment on their nature of such transactions, as necessary documents were not available. Thus, the Forensic Audit Report has not drawn any conclusion about diversion of funds.

102. Learned Senior Counsel for the Petitioner contends that even otherwise, the Petitioner ceased to have any position in MBSL from 16.11.2012 onwards. If during the Forensic Audit carried out

several years later, certain documents are not available to the Forensic Auditor, no fault can be attributed to the Petitioner.

103. Learned Senior Counsel has also explained that M/s Value Solar Energy Ltd. was a group company of MBSL and was engaged in the business of solar products including wafers used as raw material in production of modules. Under a MoU dated 13.3.2011, M/s Value Solar Energy Ltd. was supplying wafers to MBSL. Accordingly, advance of Rs.35.59 Crores was made to M/s Value Solar Energy Ltd. for supplying of wafers. Further, Form-2 under Section 75(1) of the Companies Act, 1956 of MBSL indicates that M/s Value Solar Energy Ltd. had invested Rs.16 Crores in MBSL by redeemable preference shares. This amount had to be repaid by MBSL to M/s Value Solar Energy Ltd. Subsequently, under an Agreement dated 29.03.2012, MBSL purchased M/s Value Solar Energy Ltd.'s preference shares. However, MBSL could make the payment with a shortage of Rs.7.2 Crores. Thus, after squaring up the transactions, it is MBSL which owed Rs.7.2 Crores to M/s Value Solar Energy Ltd. The loans and advances by MBSL to M/s Value Solar Energy Ltd., therefore, cannot be termed as a diversion of funds.

104. While it is not necessary to go into the aforesaid details, suffice is to say that the Forensic Audit Report only observed that it is not in a position to comment on their nature of loans and advances made to M/s Value Solar Energy Ltd., as necessary documents were not available. Merely because necessary documents were unavailable to the Forensic Auditor, the

Respondent Bank could not have drawn an inference of diversion of funds. In doing so, the Respondent Bank failed to adhere to the requirement of Clause 2.1.3 read with Clause 2.5 of the Master Circular to identify "Wilful Default" which is "intentional, deliberate and calculated" and based on "objective facts and circumstances of the case". The Respondent Bank cannot merely quote an observation from the Forensic Audit Report, which itself is not conclusive, and conclude that the same amounts to the diversion of funds.

105. Learned counsel for the Respondent Bank has alleged that the Petitioner's exit from MBSL was intentional. He has also relied upon an undertaking dated 24.08.2010 and 22.09.2010 of MBSL contending that the management of MBSL would not be changed without the permission of the Respondent Bank. It is alleged that the breach of this undertaking by the Petitioner supports the finding of Wilful Default rendered by the Respondent Bank.

106. This argument though impressive on first blush, lacks merit on deeper scrutiny. In this case, the Petitioner resigned from MBSL as Executive Director on 30.04.2012 and as full time Director on 16.11.2012 and submitted Form-32 to that effect with the RoC. Contemporaneously, MBSL had informed the lender banks about the resignation of the Petitioner from MBSL. When MBSL was about to default in its loan repayment obligations, MBSL informed the lender banks to consider the CDR package on the assumption that the Petitioner was no longer associated with MBSL and his personal guarantee was not available. On 20.09.2013, the CDR LEG

noted that the lender banks have agreed to the substitution of personal guarantee of the Petitioner with collateral security of Rs.33 Crores. In the meeting held on 27.05.2014, the lender banks agreed to reduce the collateral security of Rs.33 Crores to Rs.25.53 Crores in lieu of the Petitioner's personal guarantee. The Petitioner did not furnish his personal guarantee for the CDR package nor did he participate in any of the deliberations for the approval of the CDR package. The lender banks still approved the CDR package and acted upon it without the presence and personal guarantee of the Petitioner. The lender banks, therefore, tacitly acquiesced to the Petitioner's exit from MBSL and approved the CDR package of MBSL without his presence in any capacity or personal guarantee.

107. Further, the undertaking relied upon by the Respondent Bank was not given by the Petitioner but by MBSL. Hence, if there exists a breach of the said undertaking, the remedy, if any, lies against MBSL and elsewhere and not against the Petitioner.

108. In any case, resignation from a company *per se* is not an act of Wilful Default under the Master Circular.

Effect of Forensic Audit Report

109. From a reading of the orders passed by the Identification Committee and the Review Committee, it is evident that the Respondent Bank attributed acts of Wilful Default to the Petitioner only on the basis of the Forensic Audit Report. The question which arises at this juncture is whether the observations made in the

Forensic Audit Report can be the sole basis for the Respondent Bank to conclude an event of Wilful Default.

110. The nature of the Forensic Audit Report in respect of a company is discussed by the Calcutta High Court in ***Prashant Bothra & Anr. v. Bureau of Immigration & Ors.***[1] It was held that a Forensic Audit Report, at best, is a piece of evidence in liquidation proceedings, and is in no manner a conclusive proof of any illegality committed under a law. The Forensic Audit Report is merely an opinion of the author, which is based on several disclaimers and it cannot be a conclusive proof of its observations. The relevant observations are reproduced as under:-

> *"21. The very premise of the request was a forensic audit report allegedly authored by a particular concern. The said report, at best, is a piece of evidence in the liquidation proceeding and is in no manner conclusive proof of evidence of any illegality committed by any entity. In fact, it is common experience that each and every such forensic audit report contains several disclaimers, restricting the operation of the same to the proceeding in which they are filed, as well as confined to the impression of the authors thereof on the basis of the documents which are available to them.*
>
> *22. Under no stretch of imagination can such a report be conclusive proof of the allegations against the petitioners."*

111. This Court is inclined to agree with the aforesaid proposition of law. Even under the Indian Evidence Act, 1872, the opinion of an expert witness under Section 45 is not a conclusive proof. It is subject to cross-examination and the opinion and conclusions of an Expert are subject to challenge. In the present scheme of things, the Master Circular casts a specific obligation on

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the Respondent Bank to act independently and objectively under Clause 2.1.3 read with Clause 2.5 as discussed above. It would, therefore, be unsafe if lender banks start to declare borrowers as Wilful Defaulter merely on the basis of observations made in the Forensic Audit Report without there being an independent application of mind. The lender banks must follow the mandate of Clause 2.1.3 read with Clause 2.5 of the Master Circular and independently find acts of Wilful Default which are "intentional, deliberate and calculated" and the said conclusion should be based on "objective facts and circumstances of the case". Any other view would lead to consequences where mere cases of default would be categorised as acts of Wilful Default under the Master Circular. The Master Circular is not to be invoked in every case of default but only when the default is Wilful Default as construed under the scheme of the Master Circular.

Identification of Wilful Default has to be made keeping in view the track record of the borrower and not on the basis of isolated transactions/incidents

112. Under Clause 2.1.3 of the Master Circular, the identification of an entity or a person as a Wilful Defaulter has to be made on the basis of the track record of the borrower and not on the basis of the isolated transactions/ incidents. A similar obligation is cast on the lender banks in Clause 2.5 of the Master Circular, which requires the lender banks to put in place a transparent mechanism for the entire process so that the penal provisions are not misused and the scope of such discretionary powers are kept to the barest minimum.

It is required to be ensured that solitary or isolated instances are not made the basis for imposing the penal action under the Master Circular. This requirement is cast in the Master Circular with an object to punish those borrowers who have not acted *bonafidely* in the interest of the business enterprise but made a concerted effort to divert borrowed funds. The Master Circular assumes that where the track record of the borrower is otherwise sound, then isolated transactions or incidents that may not be financially prudent, may not, alone be sufficient to declare a borrower as Wilful Defaulter.

113. Let us now consider the track record of MBSL as per the FRS, which is an internal document prepared by the Respondent Bank before finalizing the CDR package. The FRS was prepared when MBSL was already in financial constraints and was unable to meet its loan repayment obligations.

114. In the FRS, the lender banks have noted that MBSL is a subsidiary of MBIL and engaged in the manufacture of photovoltaic cells. The company used the SEZ Unit in Greater Noida to design, manufacture, sell, export photovoltaic cells in the global market. It had a production capacity of 90 MW selective emitter crystalline cells, 50 MW crystalline modules and 40 MW Thin Films PV. The company began its commercial operations at an initial cost of Rs.439.21 Crores. In 2011, the company consolidated and set up a project for advanced high-performance selective emitter high efficiency crystalline silicon cell with annual capacity of 90 MW. The cost of this project was Rs.624.69 Crores. The company demonstrated strong EPC capabilities and quality manufacturing. It

has commissioned more than 50 PV projects in India and Germany. The company has significant customer base in Europe, Asia, Pacific, Middle East and the US.

115. The FRS noted that 2011-12 onwards, the company's financial operations were adversely affected due to (a) the global solar photovoltaic market was operating under stress due to huge supply addition from China; (b) China offering USD 43 billion subsidy to its domestic companies, which led to abnormal fall in the prices of solar cell. The company, however, has been able to service its debt till 31.12.2011. The CDR-EG had admitted MBSL in Class-B as per the CDR Master Circular, which applies where MBSL was classified as a Class-B borrower under the CDR Scheme, which has Classes from A to D. In the Class-B category, MBIL was classified as "*Corporate/promoters affected by external factors and also having weak resources, inadequate vision and not having support of professional management*." The Class-C is assigned to those corporates who "*diverted funds*" to unrelated fields with or without lenders' permission. Thus, the lender banks considered MBSL to be a borrower that was affected by external factors and not by the diversion of funds.

116. Before finalization of the CDR package, the lender banks obtained a TEV Report and Stock Audit Report from external agencies. After considering the said Reports, the lender banks approved the CDR package. The net worth of MBSL even as on 31.03.2012 was found to be Rs.658.66 Crores.

117. In the Flash Report, it is noted that MBSL could service all its debts till 30.11.2011 and even repaid the principal sum of the term loans.

118. The aforesaid position, which is accepted by the lender banks in their own document i.e., the FRS, does not show a consistent negative track record of MBSL. MBSL was seen as a global player in photovoltaic cells. It had presence in several countries. It had serviced its debt and largely repaid the principal dues. The Respondent Bank, under Clause 2.1.3 read with Clause 2.5, was obligated to reflect upon the entire track record of MBSL and then conclude whether there existed events of Wilful Default and not on the basis of isolated transactions/incidents.

Consequences of admitting MBSL for CDR under the CDR Scheme

119. This Court deems it appropriate to make certain observations regarding the manner in which the scheme of CDR Master Circular is to be implemented. The CDR Master Circular is equipped with several measures to ensure that cases involving frauds or diversion of funds with *mala fide* intent are not admitted for CDR.

120. These include provisions like Clause 6.3 read with paragraph no.4 of Annexure III, which renders corporates indulging in fraud and malfeasance as ineligible for CDR. Further, CDR scheme provides for four Classes – A to D, out of which, Categories

C and D relate to the cases of diversion of funds and which categorisation has to be done by the lenders on their own.

121. The classification has a direct bearing on eligibility as well as the conditions to be imposed upon the borrower. The lower the category the more stringent the conditions to be imposed upon a borrower in accordance with paragraphs C and D of Annexure IV. Significantly, before "CDR Reference/Approval", Clause 3.3 of CDR Scheme expressly empowers Banks to commission a Forensic Audit "wherever necessary and specially in cases of diversion of funds".

122. The aforesaid provisions in the CDR scheme leads to the conclusion that the categorization of a borrower in one of the categories between A and D has to be based on an objective satisfaction.

123. This Court is of the view that it is incumbent upon banks who are dealing with public funds and discharging a public duty to make appropriate enquiries as to whether a borrower is in genuine financial difficulty or whether there exist events of fraud and malfeasance. If the lender banks find fraud or malfeasance, the CDR-EG must either refuse CDR completely or impose such additional onerous conditions as provided in the CDR Scheme itself.

124. In the present case, the lender banks were fully aware of all the transactions, which are now alleged to be acts of Wilful Default. This fact is part of the documents leading to the finalization of the

CDR scheme. Despite noting all transactions, financial statements, balance sheets, TEV Report and Stock Audit Report, the lender banks placed MBSL in Class-B of CDR Master Circular which cannot be assigned if there is diversion of funds. They found no occasion to order a forensic audit of MBIL before finalization of CDR scheme. The lender banks, therefore, never treated the alleged acts of Wilful Default as an act of diversion or siphoning either during finalization of CDR scheme or after its failure.

125. It may so happen that that during the finalisation of CDR Scheme, the lender banks are not aware of certain acts of commission or omission, which may constitute acts of Wilful Default. The lender banks may become aware of such acts subsequently, may be, on their own, or on the basis of subsequent Forensic Audit Report. Having considered such acts, which were known subsequently, the lender banks may take an objective decision under the Master Circular on whether such acts constitute Wilful Default or not. In such a situation, the mere fact that an earlier CDR Scheme was finalised and nothing negative was flagged at that stage, may not come in way of the lender banks in invoking jurisdiction under the Master Circular. However, it may not be open for lender banks to classify known acts as events of Wilful Default merely because subsequently, in respect of the same known acts, the Forensic Audit Report has made certain observations. To declare a person as a Wilful Defaulter, lender banks have to independently find that the "Wilful Default" is "*intentional, deliberate and calculated*" and the said conclusion is based on "*objective facts and circumstances of the case*" as

required under the Master Circular. The Forensic Audit Report, at best, can act as a piece of corroboration for the said exercise, but not the sole basis.

126. To take any other view would entail the transfer of jurisdiction to determine acts of Wilful Default to Forensic Auditors, which, by law under the Master Circular, is vested in the Identification and Review Committee of the Respondent Banks. When a law requires a particular act to be done in a particular manner, then it has to be done in that manner alone and no other. [See: ***Tata Chemicals Ltd. v. Commr. of Customs***[2] and ***Krishna Rai v. Banaras Hindu University***[3]].

127. In view of the aforesaid discussion, the reasons assigned in the impugned order dated 20.04.2023 passed by the Review Committee confirming the Petitioner as Wilful Defaulter under the Master Circular are unsustainable and the impugned order is accordingly, quashed and set aside. The Writ Petition is allowed in the aforesaid terms. Pending application(s), if any are disposed of.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

FEBRUARY 29, 2024/SS

[2] (2015) 11 SCC 628
[3] (2022) 8 SCC 713