HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 1630 OF 2019

Kailash Shahra having residence at 10-A Sharda Building, Flat No.102, A Road, Near Churchgate Railway Station, Mumbai-400 020, Maharashtra	Petitioner
versus	
IDBI Bank Limited having its registered office at IDBI Tower, WTC Complex, Cuff Parade, Colaba, Mumbai- 400 005 and having its branch office at NMG, IDBI Towers, first floor, Plot No. C-7, G-Block, opposite NSE, BKC, Bandra (East), Mumbai 400 051	Respondent

Mr.Sanjay Jain with Mr.Mayur Khandeparkar and Mr.Chitrangada Singh i/b. M/s.Clove Legal for the petitioner.

Mr.G.N.Pandit for the respondent.

CORAM :- S. C. DHARMADHIKARI & G. S. PATEL, JJ.

DATED :- OCTOBER 16, 2019

ORAL JUDGMENT :- (Per S.C.Dharmadhikari, J.)

1. By this writ petition under Article 226 of the Constitution of India, the petitioner claims the following three reliefs:-

> "(a) That this Hon'ble Court be pleased to issue a writ of Certiorari or any other appropriate writ, order or direction in the nature of Certiorari calling for the records and proceedings pertaining to the meetings and hearings carried out by the purported "Wilful Defaulter

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Identification Committee" which issued the Show Cause Notice dated July 25, 2017 and the Review Committee which issued the Impugned Notice dated December 8, 2017, informing the Petitioner of being declared as a wilful defaulter and this Hon'ble Court be pleased to issue a writ of mandamus or writ in the nature of mandamus, after examining the validity, legality and propriety thereof, quashing and setting aside the impugned notices;

(b) That this Hon'ble Court be pleased to issue a writ of Mandamus or any other writ, order or direction in the nature of Mandamus restraining the Respondents jointly and severally whether by themselves, their men, agents, assigns, subordinates and/ or superiors in office or otherwise howsoever from forwarding the name of the Petitioner as a wilful defaulter to Credit Information Companies and Reserve Bank of India and further communicating in any manner whatsoever, to any third person or entity or publishing in any manner or in any media or public domain whatsoever, the name of the Petitioner as a wilful defaulter pursuant to the impugned order and impugned Notice dated December 8, 2017.

(c) That this Hon'ble Court be pleased to issue a writ of Mandamus or any other writ, order or direction in the nature of Mandamus, in case the Credit Information Companies, Reserve Bank of India and/ or any other third person or entity has been communicated the impugned order and impugned Notice dated December 8, 2017 or its content, so as to notify to the all the third parties including the Credit Information Companies and Reserve Bank of India, that the impugned order has been quashed and/ or set aside and/ or recalled and/ or stayed and/ or kept in abeyance and that the same is not to be acted upon and to take immediate steps to rectify the same."

2. Since extensive arguments have been canvassed and affidavits have been placed on record, we admit this petition.

3. Rule. Respondent waives service. By consent of both sides, this writ petition is disposed of finally.

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4. The petitioner before this court is a senior citizen residing at Mumbai. He was a non-executive, according to him and non full time Director of one Ruchi Soya Industries Limited, a public listed company having its registered office at Goregaon (East), Mumbai – 400 065.

5. The respondent is a company incorporated and registered under the Companies Act, 1956 and carrying on banking business. It is carrying on this business from the branches established within the States of India. Its banking business is covered by the Finance Act, 1949.

6. The petitioner says that he was not involved in any key decision making and day to day operations of the company. He had not attended any meeting with consortium member banks or joint lenders' forum or steering committee or auditors of the borrower company and had never dealt with any customer/ client of the borrower company. The petitioner says that the borrower company had availed various credit facilities and had also made repayment of substantial amounts resulting in renewal and extension of the facilities, but beyond the documents executed by the borrower company, the petitioner is proceeded against only because he executed a deed of guarantee dated 15th May, 2013 providing his personal guarantee towards the repayment

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obligations of the borrower company pursuant to the loan agreement dated 15th May, 2013.

7. In July, 2017, the petitioner received a show cause notice. That notice is dated 25th July, 2017. That is issued by the respondent bank alleging that in view of the defaults committed by the borrower company, it has been decided by the respondent bank that the name of the borrower company and its Directors would be reported to the Reserve Bank of India (RBI) and others for inclusion in the list of wilful defaulters. Thus, the petitioner was called upon to show cause as to why his name should not be reported as wilful defaulter. The borrower company objected to this show cause notice by its reply of 10th August, 2017. It raised various contentions, including making a request for providing details of Identification Committee report along with copies of all documents relied upon by the Identification Committee to enable the borrower company to suitably respond to the allegations made in the show cause notice. Exhibit 'C' is a copy of this reply dated 10th August, 2017. The petitioner neither received any response from the bank nor the borrower company. In other words, assuming that this was a joint request of the petitioner and the borrower company, the petitioner expected a reasonable response so that the show cause notice and the allegations could be

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contested. Therefore, the petitioner filed a reply to the notice on 18th August, 2017 denying the allegations therein. The petitioner pointed out that he had only been a Nominee Director on the Board of Directors and that from 2001, he has neither been involved in the day to day business nor was he aware of the defaults with respect to repayment of loans by the borrower company. He disputed his declaration as a wilful defaulter on the ground of lack of information and evidence available before the Identification Committee and urged that he must be provided with said information and documents and thereafter, be granted a personal hearing before the Identification Committee.

8. The respondent bank replied to this communication on 22nd September, 2017, *inter-alia*, contending that the committee was constituted, but it is the petitioner who is responsible for not obtaining the relevant documents. In any event, it is stated that the petitioner was having the necessary documents in his possession as also the information and the petitioner was informed about the personal hearing that was scheduled to be held on 5th October, 2017.

9. Exhibit 'F' is a copy of the letter dated 4th October, 2017 issued by the borrower company. It says that the borrower company had requested the bank to postpone the hearing or

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reschedule it. The personal hearing was thus rescheduled on 2nd November, 2017. Prior to it, there was correspondence between the borrower company and the bank. It appears that the personal hearing was rescheduled. Yet, there was a reply, for at that personal hearing, the borrower company and its Directors were not present. Thus, the grievance is that though there is an audit carried out by M/s. G.D.Apte and Company, there are other documents, based on which, the allegations in the show cause notice are made and in these circumstances, the copies of the relevant documents, together with the right to inspect the originals should have been allowed.

10. Since the arguments before us are revolving around the adherence to the principles of natural justice, we do not wish to make detailed reference to the correspondence on record. All that we have is a grievance that the notice dated 8th December, 2017 informs the petitioner that the Review Committee has passed an order, inter-alia, against the petitioner, confirming that the Identification Committee has declared the borrower company along with its Directors as wilful defaulters and their names would be reported to the concerned credit institutions and the RBI.

11. The argument is that the petitioner did not receive any notice of the meetings of the Identification Committee or Review

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Committee, which were held for inquiring whether an event for wilful default had occurred or not and whether the petitioner be declared as a wilful defaulter.

12. There is subsequent correspondence, but Mr.Jain appearing for the petitioner would submit that merely because there is subsequent correspondence, the petitioner has not waived the right of a fair hearing and that such fair hearing means, copies of all records and documents be served on the petitioner well in advance. Further, the orders and copies thereof should also have been furnished. The relevant records, which have gone into the exercise carried out by the Review Committee, should also have been furnished to the petitioner. This stand of the petitioner, according to Mr.Jain, is not diluted by the subsequent correspondence.

13. An affidavit in reply has been filed by the respondent and though there is an additional affidavit pointing out the urgency of the matter, we do not think that it has any relevance to the controversy. In the affidavit in reply filed by the Deputy General Manager of the respondent bank, it has been stated that there were Joint Lenders Meetings held on 28th July, 2016 and 7th September, 2016, whereafter, the evaluation was done. At these meetings, the company was given certain advise. Ultimately, when

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the auditor reported that the borrower company has failed to discharge its liability to the satisfaction of the bank, its account was classified as non-performing asset on 31st March, 2017. As on that date, the total outstanding is Rs.484.03 crores. During the period March, 2016 to December, 2017, the bank guarantees worth Rs.1.92 crores were invoked and letters of credits worth Rs.208.47 crores were devolved and paid by the respondent bank. It is thus asserted in this affidavit that there is a huge outstanding amount payable and the company has persistently defaulted in clearing the dues of the bank.

14. The affidavit says that the respondent bank considered the request for postponement of hearing from 5th October, 2017 to 2nd November, 2017. The request for personal hearing made by the borrower company, including the petitioner, was considered favourably and the personal hearing was postponed on two occasions. Despite giving sufficient opportunity, the Directors did not appear for the personal hearing. That is how the company and its Directors, including the petitioner before us, were declared as wilful defaulters. That was done on 27th November, 2018 and intimated to the company and its Directors on 8th December, 2018. It is alleged that Dinesh Chandra Shahara, the Managing Director and Chief Executive Officer of the company has already challenged

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the declaration as far as he is concerned, by filing a writ petition being Writ Petition No.919 of 2019 before this court. Mr.Vijay Kumar Jain, another Director has filed a writ petition in Punjab and Haryana High Court being Writ Petition No.13981 of 2018 claiming similar reliefs. The affidavit asserts that the necessary procedure and in tune with the RBI circular has been followed. The bank has acted fairly. There is no question of penalising the petitioner, and visiting him with serious consequences, without adhering to the principles of fairness and natural justice. In fact Rs.9,000/- crores are now due and payable to more than 20 lenders. The writ petition is filed only to delay and postpone the inevitable. On technical grounds, the declaration cannot be held to be vitiated or set aside. More so, when further legal proceedings are pending against the borrower company.

15. As far as the main ground is concerned, the stand of the bank is reflected in para 22 of the affidavit in reply. For ready reference, we reproduce this paragraph:-

> "22. With reference to para-10 to 20, I say that I have already clarified earlier that the Petitioner's Guarantee is in force and continuing. I deny that the Show Cause Notice is pre-maturedly and unjustly issued without considering the observations of the forensic auditors G.D.Apte & Company as falsely alleged. I say that audit report as categorically shown that the company M/s.Ruchi Soya Industries Ltd., was having 55 dummy companies and was illegally routing the monies to the said 55 companies. The directors and the addresses of the said companies was common and many of the employees

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> of the borrower company were shown as the directors in the said 55 companies. The said action was to defraud the Respondent and other consortium banks. The Review Committee had also confirmed the finding of identification committee which the Petitioner is very much aware about. I deny the allegations made that no reports of Identification Committee and Review Committee were served upon the Petitioner as alleged. I say that complete details of the said reports were provided to the company and the directors including the Petitioner. I say that the said reports being private and confidential could not have been served upon the Petitioner. I say that the Petitioner is the Promoter Director and Ex-Chairman of the Company and is very much liable for the plight of the Company. I say that the Petitioner and other directors of the company were in complete knowledge about the routing of the funds to the 55 connected companies. They were aware about the mal practices being followed to defraud the banks. To say therefore that the Petitioner was not provided with the documents etc., is only a clever modus to create a false ground for challenging the declaration. The Petitioner was provided with the entire special audit report showing the mal practices and therefore to say that the Petitioner was not having any information or documents in hand etc., is totally false and dishonest. I say that the Identification Committee Report and Review Committee Report are the internal private documents of the JLF and therefore were not to be made available to the borrowers. The Petitioner was provided with the special audit report which was sufficient to answer the queries of the bank. The Petitioner and other directors intentionally did not attend the personal hearing. I say that the Bank had already supplied the information about the constitution of the committee vide its letter dated 22nd September, 2017, however their report etc., being confidential in nature could not have been supplied to the Petitioner. The allegations made are denied therefore. I say that the Respondent Bank had totally followed the RBI Circular and therefore the contentions are ill-founded, incorrect and are dishonestly made."

16. The petitioner has filed an affidavit in rejoinder, in which, it is reiterated that the essential argument has not been dealt with. The petitioner points out that if breach of principles of natural

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justice is writ large on the proceedings, then, independent proof of prejudice resulting therefrom has to be furnished. The prejudice is apparent from the above stand. The argument of the bank that all documents and reports were rupplied and then urging that their contents are known to the petitioner, is self defeating and contradictory. That establishes and proves the prejudice. The bank is making light of a serious act of breach of principle of natural justice by pointing out the fact that some of the documents are in the knowledge of the borrower company and therefore, their contents are known to the petitioner. This stand is not supportable, according to the petitioner. There is a challenge to the whole process and if the petitioner had been provided a real opportunity to meet the show cause notice and the allegations therein, he would have satisfied the bank that there is no occasion to declare him as a wilful defaulter. Our attention is invited specifically to the rejoinder affidavit, which deals with para 22 of the affidavit in reply.

17. When this petition was placed before us on previous occasion, the affidavit of the bank was called for on specific grounds. An order to that effect is passed and on 14th August, 2019, this court observed as under:-

> "1. Let Mr. Pandit take instructions, particularly on the point raised by Mr. Jain, appearing for the petitioner, that the

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petitioner has not been supplied with a copy of the order passed by the Identification Committee. The petitioner says that such an order has to be then placed before the Review Committee in terms of the Master Circular and the Review Committee also must pass its order based on independent satisfaction. It is stated that copies of these orders are not supplied to the petitioner. The petitioner is informed that these are confidential documents and cannot be supplied.

2. We inquired from Mr. Pandit as to on what basis the affidavit in-reply, at running page 235 (internal page 21, in para 30) says that the Review Committee's report being an internal and confidential document, same is not required to be served on the petitioner. In the same way, it is also said in the preceding paragraph that declaration of the petitioner as wilful defaulter does not suffer from any *mala fides*. The petitioner has no document such as the copy of the final order or the declaration so as to infer from it that the same is not *mala fide*. It is only when the petitioner is not supplied with such documents that the petitioner can make the allegation of this nature.

3. The above being a very serious allegation and in the backdrop of the assertion of the respondent that the reports of the Identification Committee and the Review Committee are internal private documents and were not made available to the borrower, that we called upon Mr. Pandit specifically because under challenge is a communication, copy of which is at Exhibit-B, running pages 44 & 45 of the paper-book. That refers to the Master Circular on Wilful Defaulters issued by the Reserve Bank of India and the show cause notice dated 25-7-2017. It specifically says that the Wilful Defaulter Committee issued an order recording the fact of the petitioner being a wilful defaulter, which was reviewed and confirmed by another Committee (Review Committee) of the Bank constituted in accordance with the Circular, at its meeting held on 27-11-2017.

4. It is based on the above that the Bank has taken adecision to declare the petitioner as a wilful defaulter. Thus, the orders of the Wilful Defaulter Committee and that of the Review Committee are not made available to the petitioner and that is stated to be private and confidential.

5. We list this matter on **3-9-2019** for passing orders."

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18. We had placed this matter under the caption "for passing orders" so that Mr.Pandit appearing for the respondent can outline the bank's response and stand essentially on the ground of alleged breach of principles of natural justice. However, Mr.Pandit has been instructed to state that beyond the affidavit in reply and the stand taken therein, the bank does not want to say anything, much less agree with the petitioner that a fresh opportunity should be extended to him.

19. On the above positions being noticed by us, we were constrained to hear the matter in details.

20. Mr. Jain appearing for the petitioner invited our attention to the show cause notice and he would submit that there are serious allegations in this show cause notice. The allegations are divided into several sub-paras and the chart would reflect as to how the accusation is that the funds have been siphoned and diverted so that the bank liability is not discharged. Then, our attention is invited to the Master Circular on Wilful Defaulters issued by the RBI. Mr.Jain would submit that the impugned communication of 8th December, 2017 sets out as to how the bank was interested in calling upon the petitioner to make submissions by extending an

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opportunity of personal hearing, but it is evident that such a personal hearing has to precede a disclosure of the materials on which the show cause notice is issued. Mr.Jain would submit that ordinarily a show cause notice sets out the allegations and provides particulars and imputations for the same. There, specific materials are referred so as to cull out a charge. The show cause notice cannot be issued on vague and general grounds and assuming it could have been issued in this case without the requisite particulars or imputations being provided, still, prior to the adjudication into such show cause notice, the relevant records should have been disclosed and copies supplied. That is how the circular of the RBI should be read and that there is two stage compliance which is required to be made. Firstly, the Identification Committee, prior to the show cause notice being issued, culls out all the allegations and calls for the reply. If the replies are to be placed before the Identification Committee and it has to make an order assigning reasons, then, that order gets a finality only when the Review Committee applies its independent mind to it. At that stage, the petitioner must be given an opportunity to remain present and make submissions. The petitioner can not only demolish the contents of the show cause notice, but also challenge findings and conclusion in the order of the Identification Committee. This would be a complete exercise and only then the

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Review Committee can either endorse the finding of the Identification Committee or overturn it and drop the proceedings. That is absent here and the bank has taken a very bold stand and its attitude is defiant in nature. It says that it is not obliged to provide to the petitioner anything which is confidential in nature. Mr.Jain wold submit that there is nothing confidential in the adjudicatory proceedings. If the power is quasi judicial in nature, then, the bank has to comply with the principles of natural justice. It could not have stated, as asserted in para 22 of the affidavit in reply, that it was not obliged to provide the necessary documents. Mr.Jain would assail the stand in this affidavit by urging that the petitioners cannot be attributed complete knowledge of every alleged act of omission and commission of the borrower company and the documents in that behalf. The petitioner cannot be asked to show cause and effectively in the absence of the relevant documents being provided. The report of the special auditor being provided does not meet the requirement. The Identification Committee report and the Review Committee report cannot be termed as internal private documents. They could not have been withheld from the petitioner. It is in these circumstances that Mr.Jain would submit that the opportunity to show cause or the personal hearing was an empty formality.

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21. Mr.Jain has brought to our notice the RBI guidelines on wilful defaulters and the clarification provided by the same. In addition, he relied upon the Master Circular on wilful defaulters dated 1st July, 2013 issued by the RBI. Mr.Jain relies upon the latest judgment of the Hon'ble Supreme Court in the case of *State Bank of India vs. Jah Developers Private Limited and Ors.*[1]. In addition, he relies upon the judgment of this court rendered by a Division Bench in the case of *Finolex Industries Limited and Anr. vs. Reserve Bank of India and Ors.*[2], decided on 23/24th August, 2011. Mr.Jain would submit that this follows the judgments of the Hon'ble Supreme Court and that of this court rendered consistently. He would submit that this court has not accepted the line of argument and canvassed before us. Thus, the judgments, in the case of *Finolex Industries Limited* (supra) and in the case of *M/s.Kanchan Motors and Ors. vs. Bank of India and Ors.*[3], decided on 12th July, 2018, by this court clinch the issue, according to Mr.Jain.

22. Mr.Pandit appearing for the bank would urge that this writ petition is an abuse of the process of this court simply because all documents are with the borrower company. The borrower company knows the act of default and consequences thereof. The

1 **(2019) 6 SCC 787**
2 **WPL/345/2011 and Connected Matter**
3 **WPL/2072/2018**

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borrower company is also aware of huge financial liability. The borrower company has not disputed the position as emerging from the show cause notice, the order of the Identification Committee and that of the Review Committee. Only one Director has brought this challenge and for reasons best known to him. It is the borrower company which is putting up these Directors, some of whom are senior citizens, in order to defeat and frustrate the claim of the bank. It is pertinent to note, according to Mr.Pandit, that the petitioner refused to appear before the committee though accommodated. He cannot now turn around and blame the bank. The bank was not holding back any material as complained. The bank would have extended all the co-operation and assistance had the petitioner appeared before the bank. The bank has done everything possible in order to render a fair and just decision. The decision has been rendered more than two years back. The writ petition is filed in the year 2019. That, therefore, should not be entertained and must be dismissed purely on account of the conduct of the petitioner.

23. For the decision of the question involved, it would be necessary to reproduce the show cause notice, copy of which is annexed to the petition. It reads as under:-

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"REGISTERED POST WITH ACKNOWLEDGMENT DUE

Ref. No.IDBI/NMG/BKC/RSIL/526/2017-18 July 25, 2017

1. Ruchi Soya Industries Ltd. Ruchi House, Royal Palms, Survey No.169, Arey Milk Colony, Near Mayur Nagar, Goregaon (East) Mumbai-400 065	**2. Shri Kailash Chandra Shahra,** Chairman, Ruchi Soya Industries Ltd., Ruchi House, Royal Palms, Survey No.169, Arey Milk Colony, Near Mayur Nagar, Goregaon (East) Mumbai-400 065
3. Shri Dinesh Chandra Shahra Ruchi Soya Industries Ltd., Ruchi House, Royal Palms, Survey No.169, Arey Milk Colony, Near Mayur Nagar, Goregaon (East) Mumbai-400 065	**4. Shri Vijay Kumar Jain,** Whole Time Director, Ruchi Soya Industries Ltd., Ruchi House, Royal Palms, Survey No.169, Arey Milk Colony, Near Mayur Nagar, Goregaon (East) Mumbai-400 065
5. Shri Kailash Chandra Sahra, Flat No. 102, Sharda Building, Churchgate, Mumbai – 400 020	**6. Shri Dinesh Chandra Shahra,** Sealand Co-operative Housing Society, Navy Road, Cuff Parade, Mumbai – 400 005

Dear Sirs,

Working Capital facilities granted to Ruchi Soya Industries Ltd. - Defaults committed Classification as Wilful Defaulter

We, IDBI Bank Ltd. (IDBI Bank), granted to Ruchi Soya Industries Ltd. (the Borrower/ the Company) at its request, working capital facilities under consortium arrangement and LER/ CMS facilities aggregating Rs.800 crore [Cash Credit/ EPC/ PCFC/ FBD (Manufacturing)– Rs.330 crore, WCDL (as inner limit to CC)– Rs.150 crore, ILC/ FLC/ BC/ TCBG (manufacturing)-Rs.300 crore, ILC/ FLC/ BC/TCBG (Trading)-Rs.100 crore, LC (Merchant LC as inner limit to LC)-Rs.50 crore, BG (as inner limit of LC)-Rs.30 crore, LER-Rs.50 crore, CMS-Rs.20 crore, in order to finance the company's working capital needs for its units located at various locations.

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2. The Borrower has, inter-alia, entered into Loan Agreement(s)/ working capital consortium agreement with IDBI Bank, executed Deed of Hypothecation for working capital assistance of Rs.730 crore the Borrower have executed various supplemental inter-se agrrement and supplemental Joint Deed of Hypothecation and also created mortgage on the immovable properties in favour of IDBI Bank and other lenders. The Borrower was required to pay interest and other charges as also repay installments of principal in accordance with the provisions of the loan agreements and supplemental loan agreements. However, the Borrower has failed and neglected to pay the same and committed defaults in performance of other conditions of the loan agreement(s).

3. In view of the defaults committed by the Borrower, your case was examined vis-a-vis the criteria on wilful default as laid down by RBI and it was observed that the Borrower met the criteria, laid down by RBI, to be classified as wilful defaulter. It was also observed that the Borrower has committed various irregularities such as deliberate suppressions/ misrepresentation of facts. Having regard to the above, it has been decided that the names of the Borrower company and its directors be reported to RBI/ Credit Information Companies (CICs) for inclusion in the list of wilful defaulters on the following grounds:

Sr. No.	Criteria for Wilful Default as per RBI's Master Circular on Wilful Defaulters dated July 1, 2015	Position of Borrower
1	**Diversion of funds:** **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.**	
	Transferring funds to the subsidiaries/ Group companies or other corporates by whatever modalities.	During the period April 1, 2012 to June 30, 2016, it is observed that there are huge transactions with 55 connected parties (Companies as per the list given in

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		<u>**Annexure**</u>) which are having common registered office, common auditors, employees of Ruchi Soya Soya Industries Ltd. (RSIL) as its directors and shareholdings by the promoters/ employees of RSIL. The receivables outstanding from these connected parties stood at Rs.5358 crore as on October 31, 2016. The company has not provided any detailed response/ justification on the said transactions till date. Realisability of these debts/ receivables is doubtful as the same are not backed by the sufficient documents as opined by the auditors appointed by the lenders. It is also observed that the combined networth of the 54 companies (connected parties) was negative at Rs.1470.94 crore (as on different dates as available on the MCA website) and only 15 companies (out of these 54 companies) had combined positive networth of about Rs.2.42 crore. The company has not submitted any concrete plans to realise the receivables from the said parties. Thus, there is reasonable cause to believe that company has transferred funds to the 55 connected parties by carrying out huge

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		transactions with these parties resulting into doubtful receivables of Rs.5358 crore.
2	**Siphoning off of funds:** **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.**	
	Siphoning of funds, as referred 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 judgment of the lenders based on objective facts and circumstances of the case.	As mentioned at item 1 above, siphoning of funds is construed on the basis of huge transactions (which are not supported by sufficient documentary evidences) by the company with 55 connected parties, resulting into huge receivables Rs.5358 crore as on October 31, 2016 from these connected parties. In the absence of any detailed response/ justification on the said transactions by the company to the satisfaction of the lenders, there is reasonable cause to believe that funds borrowed from the consortium lenders have been siphoned off through the connected parties and are utilised for purposes un-related to the operations of the company, to the detriment of the financial health of the company.

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> 3. In view of the above, you are hereby advised to show-cause, if you so desire, within 15 days from the date of this letter as to why your company/ promoter/ directors/ whole time director should not be reported as wilful defaulters to RBI/ Credit Information Companies (CIAs).
>
> Yours faithfully,
>
> (Teena Gawande)
> Dy.General Manager,
> NPA management Group"

24. The show cause notice makes serious charges. A perusal of the same would reveal that the charges are under two broad heads, namely, that the unit has defaulted in meeting its payment/ repayment obligation to the lender and has not utilised the finance from the loan for the specific purpose for which it was availed of, but it has diverted the funds for other purpose. All acts of omission and commission are attributed to the borrower company. However, the notice is addressed to the Directors as well. The second head is of siphoning of funds and that the unit has defaulted in meeting its payment/ repayment obligations and has siphoned of all the funds so that the funds have not been utilised for the specific purpose for which the finance was availed of. Therefore, the petitioner amongst others was called upon to show cause why the company and the Promoter Directors, whole-time Directors should not be reported as wilful defaulters.

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25. The annexures to this show cause notice in tabulated form set out the period-wise outstanding. A perusal of this show cause notice and the tabulated statements would reveal that the petitioner had received this show cause notice. At page 48 of the paper book is a copy of the impugned communication. That reads as under:-

"**REGISTERED POST WITH ACKNOWLEDGMENT DUE**

"WITHOUT PREJUDICE"

Ref: IDBI/ NMG/ BKC/ RSIL/ 958/ 2017-18 December 8, 2017

1. Ruchi Soya Industries Ltd. Ruchi House, Royal Palms, Survey No.169, Arey Milk Colony, Near Mayur Nagar, Goregaon (East) Mumbai-400 065	**2. Shri Kailash Chandra Shahra,** Chairman, Ruchi Soya Industries Ltd., Ruchi House, Royal Palms, Survey No.169, Arey Milk Colony, Near Mayur Nagar, Goregaon (East) Mumbai-400 065
3. Shri Dinesh Chandra Shahra Ruchi Soya Industries Ltd., Ruchi House, Royal Palms, Survey No.169, Arey Milk Colony, Near Mayur Nagar, Goregaon (East) Mumbai-400 065	**4. Shri Vijay Kumar Jain,** Whole Time Director, Ruchi Soya Industries Ltd., Ruchi House, Royal Palms, Survey No.169, Arey Milk Colony, Near Mayur Nagar, Goregaon (East) Mumbai-400 065
5. Shri Kailash Chandra Sahra, Flat No. 102, Sharda Building, Churchgate, Mumbai – 400 020	**6. Shri Dinesh Chandra Shahra,** Sealand Co-operative Housing Society, Navy Road, Cuff Parade, Mumbai – 400 005

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Dear Sir,

Inclusion of name of the company and its promoter/ whole-time director, in CIBIL/ CISs list of Wilful Defaulters

Please refer to the Master Circular on Wilful Defaulters (RBI Circular) issued by RBI and the Show Cause Notice No.IDBI/ NMG/ BKC/ RSIL/ 526/ 2017-18 dated July 25, 2017 issued by the bank calling for your submissions and the opportunity for personal hearing granted to you by the Wilful Defaulter Committee constituted in accordance with RBI circular for examining incidence of wilful default. After careful examination of the above, the Wilful Defaulter Committee issued an order recording the fact of your wilful default which was reviewed and confirmed by another committee (Review Committee) of the Bank constituted in accordance with RBI circular at its meeting held on November 27, 2017.

Based on the above, we hereby inform you that the bank has taken a decision to declare you as a wilful defaulter in accordance with RBI Circular and report your name to all Credit Information Companies and/ or RBI.

Please note that the above action is without prejudice to the recovery actions and civil/ criminal actions, both joint and several, pending or that that may be initiated by the bank against you.

Yours faithfully,

(Dy. General manager)
NPA Management Group"

26. A perusal of the same reveals that the bank asserts that it had extended an opportunity of personal hearing. After careful examination of the contents of the show cause notice, the Master Circular, the Wilful Default Committee issued an order recording the fact of the wilful default, which was reviewed and confirmed by another committee (Review Committee) of the bank constituted in

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accordance with the RBI Circular at its meeting held on 27th November, 2017. Based on the above, the bank has taken a decision to declare the petitioner as wilful defaulter.

27. From the order, it is not revealed that any reference is made to a communication of 10th August, 2017 addressed to IDBI Bank Limited purportedly in reply or response to the show cause notice. The reply says that the show cause notice is not in consonance with the RBI Circular. It has been stated that there are no details provided about the constitution or composition of the committee. The proposals submitted to the committee by the bank for declaring the petitioner and the borrower company as wilful defaulters, documents and/ or information relied upon by the committee and findings of the committee on such a proposal, the minutes of the meeting held by the committee for arriving at a decision to declare the borrower company and the petitioner as wilful defaulters. The borrower company sets out in its reply that if the copies of the documents are provided, the borrower company is ready to attend the personal hearing and make necessary submissions in the matter.

28. The petitioner, on 18th August, 2017 had replied to the show cause notice and contended that there is a mechanism set out for identification of wilful defaulter and that requires certain stages to

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be followed mandatorily. Thereafter, it has been stated that there is no evidence of wilful default noted in the show cause notice and no evidence has been examined by the so called committee. It is only a vague and general assertion that there are huge transactions and therefore, there is reasonable cause to believe that there is a diversion of funds. Further, this allegation is to be supported by evidence and that has not been provided. The petitioner, therefore, denies that he is a wilful defaulter. Apart from seeking copies of the relevant documents, the assertion of the petitioner is that he has been only a decorative Director and since the date of his by-pass surgery in the year 2001, he has never involved himself in banking business nor involved in the day to day business operations of the borrower company. He is not aware of the alleged default with respect to repayment of debt obligation to the consortium of banks. The petitioner, therefore, requested for dropping of the show cause notice. This is a detailed reply given to the show cause notice, but not dealing with the allegations on merits for went of supply of the relevant documents.

29. It is pertinent to note that on 22nd September, 2017, the bank replied to the response of the borrower company and its Directors to the show cause notice and informed that the Wilful Defaulter Committee, consists of the Deputy Managing Director as Chairman

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and two Executive Directors as Members of the committee. It is, therefore, constituted in accordance with the RBI Circular. Then, insofar as its meetings are concerned, it is stated that the committee held a meeting dated 24th July, 2017 to deliberate, *inter-alia*, on the proposal to declare Ruchi Soya Industries Limited and its Promoters/ Directors as wilful defaulters as per the guidelines laid down by the RBI. Then, in response to Query No.3, it says that there was deliberation of the committee on specific debts in terms of the circular. The evidence that was examined is the report of the special audit carried out by the IDBI Bank Limited on behalf of the consortium. M/s.G.D.Apte and Company was the special auditor. It had provided the adverse observations and based on that, a detailed response from the company was called for on 14th February, 2017. The company submitted certain replies, but as late as on 26th July, 2017. However, no supporting annexures have been provided to the bank. Thus, there is no clarification provided to the bank. Yet, the bank was ready and willing to provide an opportunity of personal hearing. That appears to have been availed of, but, pertinently, prior thereto, the copies of the report of the special auditor with all the related papers came to be supplied to the borrower company and the petitioner. On 4th October, 2017, another letter was addressed by the borrower company. In that, there is a reference made to

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certain documents supplied by the petitioner. The date of the personal hearing is also referred in this communication, but a request is made that there was a short notice and therefore, the date is deferred. Thereafter, the bank addressed a letter on 24th October, 2017 fixing the personal hearing on 2nd November, 2017. Later on, it was rescheduled to 7th November, 2017 as noted above. The petitioner, in the meanwhile had, on 30th October, 2017, addressed a communication to the respondent bank and said very clearly that the disclosure of the names and corresponding designation of the committee members has not been provided nor is a copy of the proposal of the bank to declare them as wilful defaulters addressed to the committee been provided. Then, it is stated that copies of minutes of the meeting have not been provided. These are vital documents and therefore, the date of hearing, though scheduled, it would not be effective.

30. The petitioner relied upon a letter of 3rd November, 2017 of Ruchi Soya Industries Limited to the bank. He has also referred to the letter of 18th November, 2017 addressed to the bank by Ruchi Soya Industries Limited. We are not making reference to all these communications simply because the bank maintains that the subject audit report has been forwarded, whereas, the Ruchi Soya Industries Limited claims that it has not been forwarded. All that

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we have on record are the contents of these special audit reports, which are specifically relied upon. The borrower company's version is reiterated by the petitioner from time to time apart from his assertion that he was only a non-executive Director.

31. With the above material, we must now note the stand of the bank in issuing the notice to the guarantors of the loan. The guarantors include the petitioner. The RBI Circular and which is the most relevant document has specific provisions to declare parties like the petitioner as wilful defaulter. The same has not been specifically annexed, but a copy is provided by Mr.Jain during the course of arguments. Mr.Jain says that this RBI Circular is of 9th September, 2014, but it refers to the Master Circular on Wilful Defaulters dated 1st July, 2014. The September, 2014 circular clarifies para 2.1 of the earlier circular. Now, para 2.1 as clarified on 9th September, 2014 reads as under:-

> "Paragraph 2.1 of the circular lists out various events when a "wilful default" would be deemed to have occurred. In view of references received from a few banks regarding scope/ definition of "wilful default", it is clarified as follows:
>
> a) The term 'lender' appearing in the circular covers all banks/ FIs to which any amount is due, provided it is arising on account of any banking transaction, including off balance sheet transactions such as derivatives, guarantee and Letter of Credit.
>
> b) The term 'unit' appearing therrein has to be taken to include individuals, juristic persons and all other forms of business enterprises, whether incorporated or not. In

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> case of business enterprises (other than companies), banks/ FIs may also report (in the Director column) the names of those persons who are in charge and responsible for the management of the affairs of the business enterprise."

32. Para 2.6, which is amended, is also reproduced for ready reference as under:-

> "Paragraph 2.6 of the circular is amended to read as follows:
>
> "While dealing with wilful default of a single borrowing company in a Group, the banks/ FIs should consider the track record of the individual company, with reference to its repayment performance to its lenders. However, in cases where guarantees furnished by the companies within the Group on behalf of the wilfully defaulting units are not honoured when invoked by the banks/ FIs, such Group companies should also be reckoned as wilful defaulters.""

33. A perusal of the same would reveal that though the term 'lender' appearing in the circular covers all banks/ financial institutions to which any amount is due, it is specifically then saying that the dues must be on account of any banking transaction, including off balance sheet transactions such as derivatives, guarantee and letter of credit. The term 'unit' appearing in para 2.1 is to be taken to include individuals, juristic persons and all other forms of business enterprises, whether incorporated or not. In case of business enterprises, other than companies, banks/ financial institutions may also report the names of those persons who are in charge and responsible for the management of the affairs of the business enterprise.

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34. Then, amended para 2.6 says that the bank should consider the track record of the individual company with reference to its repayment performance to its lenders and the guarantees furnished by the companies within the group on behalf of the wilfully defaulting units, if not honoured, then, they should also be reckoned as wilful defaulters. However, in connection with guarantors, a clarification in the parent circular is given. The clarification is that when the default is made by the principal debtor, the banker will be able to proceed against the guarantor/ surety even without exhausting the remedies against the principal debtor. That is clear from section 128 of the Indian Contract Act, 1872. As such, where a banker has made a claim on the guarantor on account of the default made by the principal debtor, the liability of the guarantor is immediate. In case the said guarantor refuses to comply with the demand made by the creditor/ banker, despite having sufficient means to make payment of the dues, such guarantor would also be treated as a wilful defaulter. The default, however, should occur after the date of issuance of the circular.

35. Now, in the main circular of 1st July, 2015, para 2.1.3 defines the "Wilful Default" and it would be deemed to have occurred if any of the events in that para are noted. Essentially, the default is in repayment/ payment obligations. The para then says that the

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identification of the wilful defaulter should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/ incidents. The default to be categorised as wilful must be intentional, deliberate and calculated. Para 2.2 deals with diversions and siphoning of funds. It is apparent from a perusal of these paragraphs that in addition to the penal measures, the wilful defaulters must suffer the consequences following the definitions and the details set out in the ingredients of this circular. It is evident that the whole process must go by the mechanism for identification of wilful defaulters. Para 3 of the same circular reads as under:-

> "**3. mechanism for identification of Wilful Defaulters:**
>
> The mechanism referred to in paragraph 2.5 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 or equivalent 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/ Chairman

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& Managing Director or the Managing Director & Chief Executive Officer/ CEOs and consisting, in addition, to two independent directors/ non-executive directors of the bank and the Order shall become final only after it is confirmed by the said Review Committee. However, if the Identification Committee does not pass an Order declaring a borrower as a wilful defaulter, then the Review Committee need not be set up to review such decisions.

(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 Companies 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 meetingof 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.

The above exception will however not apply to a promoter director even if not a whole time director.

(iv) As a one-time measure, Banks/ FIs, while reporting details of wilful defaulters to the Credit

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> Information Companies may thus remove the names of non-whole time directors (nominee directors/ independent directors) in respect of whom they already do not have information about their complicity in the default/ wilful default of the borrowing company. However, the names of promoter directors, even if not whole time directors, on the board of the wilful defaulting companies cannot be removed from the existing list of wilful defaulters.
>
> (e) A similar process as detailed in sub-paragraphs (a) to (c) above should be followed when identifying a non-promoter/ non-whole time director as a wilful defaulter."

36. Now, after examination by the committee and its conclusion that an event of wilful default has occurred, a show cause notice has to be issued and the concerned borrower, promoter/ whole time Director can be called to give submissions and after consideration thereof, there is an order contemplated. That order is to be made by the committee. The committee, on wilful default, while making an order, has to record reasons. The opportunity of personal hearing is to be provided if the committee feels that it is necessary. Apart therefrom, there is a requirement of the order of the committee to be reviewed by another committee and that is headed by the Chairman/ Chairman and Managing Director or the Managing Director and Chief Executive Officer and consisting, in addition, two independent Directors/ non-executive Directors of the bank. That gives finality to the order of the Identification Committee. That gets finality only when it is confirmed by the Review Committee. If the Identification Committee does not pass

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an order declaring the borrower as wilful defaulter, then, the Review Committee need not be set up. Now, if the para was to end at this stipulation only, then, there was no need for consideration of the arguments of both sides. Para 3 with clauses (a) and (b) is not complete. After them, follow clause (c) and then clause (d). It is clear from clause (d) that as regards 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 categories of Directors referred to in clause (d) of para 3. Either he is a whole time Director or 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. Finally, every Director can be declared to be wilful defaulter in respect of a contravention of any of the provisions of the Companies Act, 2013. Thus, the definition of the term "officer in default" appearing in section 2(60) of the Companies Act, 2013 is utilised to clarify that except in rare cases, a non-whole time Director should not be considered as a wilful defaulter unless it is conclusively established that he was aware of the fact of wilful default by the borrower company by virtue of any proceedings recorded in the minutes of the meeting of the Board or a committee of the Board and has not recorded his

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objection to the same in the minutes or, the wilful default had taken place with his consent or connivance. The exception will not apply to a Promoter Director even if not a whole time Director if he is covered by sub-clause (iv) of clause (b) of para 3 of the Master Circular.

37. Therefore, it is this aspect of the matter which is relevant for our purpose. It is true that there is a power to pronounce even a Director as a wilful defaulter and that such a declaration is not confined to the borrower company alone. Firstly and importantly, a mere default is not enough. Secondly, only an intentional, deliberate act brings in the Declaration. Lastly and thirdly, other than the borrower company, its promoter/ whole-time Director can be subjected to such a declaration, but for that there should be evidence. The other Director is covered only when clause (d) of para 3 is attracted. However, there ought to be established and proven acts attributable to each, before such a drastic step is taken. To our mind, therefore, some of the documents and records may be relevant for enabling the Director like the petitioner to effectively defend himself. Further, before a personal hearing is granted to him, he should be aware of the allegations in the show cause notice with specific details so that he is able to recollect or the bank is in a position to refresh his memory. It will then alone

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be able to establish whether there is any consent with the acts of omission and commission of the borrower company by such Director. That he has participated in the meeting and that when the proceedings are recorded in the minutes of the meeting of Board, this gentleman has not recorded his objection to the same in the minutes or, the wilful default had taken place with his consent or connivance. This is therefore, understood by a Division bench of this court to mean that the Master Circular has an inbuilt mechanism. The inbuilt mechanism or safety valve is that the identification of the wilful defaulter is to be done in accordance with the Master Circular. Secondly, after the identification is done, a show cause notice has to be issued based on the order of the Identification Committee and which must be a reasoned order. After that show cause notice is issued, an opportunity has to be given to deal with the allegations in the show cause notice. The materials then have to be placed before a Review Committee and as and when that Review Committee applies its mind and gives its approval to the order of the Identification Committee that a finality is attached to it.

38. The judgment delivered in the case of *Finolex Industries* (supra), with great respect, rightly concludes that this Master Circular contemplates a two stage inquiry by the bank. Paras 37,

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38 and 39 of this judgment are extremely relevant. Para 41 sets out the consequences of wilful default. These are indeed drastic and serious. Therefore, the Division Bench says that absent compliance with the procedural norms and and upon breach of the principles of natural justice, the decision would stand vitiated. In the later decision in the case of *Kanchan Motors* (supra), the Division Bench reiterated the position, after referring to the Master Circular, in the following words:-

> "14. On the close scrutiny of the aforesaid provisions of Master Circular, it is clear that the consequences of declaring any lender as wilful defaulter are serious in nature. It is also clear that for declaring a lender to be wilful defaulter specific finding is required to have been recorded in terms of Clause 2.1.3.(a) to (d) as the case may be. The Master Circular also provides a mechanism to be adopted for identifying the wilful defaulter. It includes, availability of evidence of wilful default on the part of borrowing company and its promoter/whole-time director which needs to be examined by the Identification Committee. If the Committee concludes that an event of wilful default has occurred, it is obligatory on the part of Identification Committee to issue a show cause notice to the concerned borrower and the promoter/whole-time director calling from their submissions and after considering their submissions as may be received, an order recording the fact of wilful default has to be passed after giving reasons for the same. It is also incumbent upon the Identification Committee to give an opportunity of personal hearing to borrower & promoter/whole-time director if it feels that such opportunity is necessary. The said order of the Committee needs to be reviewed by another Committee (Review Committee) as per Clause 3(c) of the Master Circular.
>
> .....
>
> 18. We are also of the considered view that the Respondent Bank cannot be allowed to say that it is not necessary for them to supply copy of the order passed by

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the Identification Committee. As would be clear from Clause 3(b) of the Master Circular the Identification Committee has to record reasons while passing the order of recording the fact of commission of wilful default as also to assign valid reasons as to whether it is necessary to give the borrower and the promoter/whole time director the opportunity of personal hearing. This requirement whether has been complied with or not could have been examined only if the said order was brought on record. But strangely in reply the Bank has taken a stand that the order dated 9th March, 2018 passed by the Identification Committee is the internal order and it is not supposed to be served upon the Petitioners. It is also stated by the Respondents in the reply that no question arises of serving the order dated 9th March, 2018 on the Petitioners and that the order dated 9th March, 2018 is the preliminary internal order and after its finalization by Review Committee, it is conveyed to the Petitioners. Thus from the stand by the Respondents, it is clear that they have neither supplied copy of the order passed by the Identification Committee to the Petitioners nor according to them it was necessary. It is also very strange that the said order has not even been brought on record by the Bank to deny the Petitioners' contention that their grounds raised through reply dated 29th January, 2018 to show cause notice against proposed declaration of wilful defaulter have not been considered and that as to why the Petitioners were denied the opportunity of being heard.

19. In our considered view the stand of the Bank that they are not obliged to furnish copy of the order passed by the Identification Committee cannot be sustained. Such stand if accepted would given rise to arbitrary exercise of powers as the Identification Committee may give complete go bye to the requirement of assigning reasons for declaring a party as Wilful Defaulter and also requirement of giving reasons as to why opportunity of personal hearing would not be necessary.

.....

21. Having regard to the aforesaid in our considered view failure to supply the reasons by the Identification Committee of recording the fact that the Petitioners are in wilful default and as to why they need not be given an opportunity of hearing when in their reply dated 29th January, 2018 the Petitioners have raised various grounds opposing the proposed action of declaring them

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> wilful defaulter and sought opportunity of personal hearing cannot be said to be justified. Similarly absence of reasons in the order of Review Committee also amounts to denial of justice. It is now well settled that reasons are the live links between the minds of the decision taker to controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity to objectivity right to reason is an indispensable part of sound judicial system. The rational is that the affected party can know why the decision has gone against him. One of the statutory requirement of the natural justice is spelling out reasons for the order made, in other words a speaking order. Even in respect of administrative order the giving of reasons is one of the fundamentals of good administration."

39. We respectfully concur with the above views. The whole exercise is not a mere ritual nor the paras are to be chanted as mantras. The presence of the word "evidence" is crucial. What is the legal meaning of this term is clear from a authoritative pronouncement of the Hon'ble Supreme Court in the case of *M/s.Bareilly Electricity Supply Co. Ltd. vs. The Workmen and* Ors.[4]. The Hon'ble Supreme Court held thus:-

> "14. An attempt is however made by the learned Advocate for the Appellant to persuade us that as the Evidence Act does not strictly apply the calling for of the several documents particularly after the employees were given inspection and the reference to these by the witness Ghosh in his evidence should be taken as proof thereof. The observations of Venkatarama Aiyer J., in Union of India v. Varma, 1958-2 Lab LJ 259 at Pp. 263-64 = (AIR 1957 SC 882) to which our attention was invited do not justify the submission that in labour matters where issues are seriously contested and have to be established and proved the requirements relating to proof can be dispensed with. The case referred to above was dealing with an enquiry into the misconduct of the public servant in which he complained he was not permitted to cross-examine. It however turned out that he was

4 **AIR 1972 SC 330**

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allowed to put questions and that the evidence was recorded in his presence. No doubt the procedure prescribed in the Evidence Act by first requiring his chief-examination and then to allow the delinquent to exercise his right to cross-examine him was not followed, but that the enquiry officer, took upon himself to cross-examine the witnesses from the very start. It was contended that this method would violate the well recognised rules of procedure, in these circumstances it was observed at page 264:

> "Now it is no doubt true that the evidence of the Respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; but that Act has no application to enquiries conducted by Tribunal even though they may be judicial in character. The law requires that such Tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that which obtains in a Court of Law."

But the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the question that naturally arises is, is it a genuine document, what are its contents and are the statements contained therein true. When the Appellant produced the balance-sheet and profit and loss account of the Company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged the Appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure under Order XIX Civil Procedure Code and the Evidence Act both of which incorporate these general principles. Even if all technicalities of the Evidence Act are not strictly applicable except in so far as Section 11 of

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> the Industrial Disputes Act, 1947 and the rules prescribed therein permit it, it is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its word on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witness who have executed them, if they are alive and can be produced. .....”

40. We do not see any substance in the argument of Mr.Pandit that in this case the Master Circular need not be given an interpretation as placed by the Hon’ble Supreme Court in a decision of the year 2019 [*State Bank of India* (supra)]. As early as on 24th August, 2011, this court interpreted the Master Circular in *Finolex* case (supra). Therefore, it was always the understanding of this court that this Master Circular to be implemented, enforced and imposed effectively and efficiently requires compliance with the principles of natural justice. True it is that mere allegation of breach of principles of natural justice is not enough. The breach will have to be established and proved. The findings in the order of the Identification Committee may be tentative and prima facie and no finality is attached to it unless a review of the same by a high power committee is taken. But, at least at that stage, it is necessary that principles of natural justice are complied with. The paragraphs of the circular, therefore, are interpreted by the banks to conclude that no breach occurs of such principles even if the relevant and germane materials are withheld and the version of the alleged wilful defaulters is not taken into

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consideration or brushed aside by the Review Committee. These are not empty formalities. There is no paper compliance contemplated by law. A serious deliberation and due consideration is required at the hands of this high power committee. It must identify the wilful defaulter all over again and afresh by bearing in mind the definitions in the Companies Act, 2013, particularly of the term "officer in default". There has to be a clear default attributable to the Director. If he is not a whole-time Director, then, there is a requirement in the definition itself of alleging, establishing and proving his consent by not raising any objection and by active participation in deliberations and discussions of the Board of Directors of that particular company. In the event there is a case made out of collusion, then, details, particulars of the same are required to be referred to and thereafter, the allegations should be established and proved with cogent and satisfactory materials. The reasons assigned by the Identification Committee are open for independent scrutiny of the the Review Committee.

41. The judgment of the Hon'ble Supreme Court in the case of *State Bank of India* (supra), though not directly on the point, still, while negating the contention of the respondents that services of a lawyer ought to be mandatorily provided while meeting the allegations in the show cause notice, in para 24, the Hon'ble Supreme Court clinched the issue and held as under:-

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24. Given the above conspectus of case law, we are of the view that there is no right to be represented by a lawyer in the-in-house proceedings contained in Para 3 of the Revised Circular dated 1-7-2015, as it is clear that the events of wilful default as mentioned in Para 2.1.3. would only relate to the individual facts of each case. What has typically to be discovered is whether a unit has defaulted in making its payment obligations even when it has the capacity to honour the said obligations; or that it has borrowed funds which are diverted for other purposes, or siphoned off funds so that the funds have not been utilised for the specific purpose for which the finance was made available. Whether a default is intentional, deliberate, and calculated is again a question of fact which the lender may put to the borrower in a show-cause notice to elicit the borrower's submissions on the same. <u>However, we are of the view that Article 19(1)(g) is attracted in the facts of the present case as the moment a person is declared to be a wilful defaulter, the impact on its fundamental right to carry on business is direct and immediate.</u> This is for the reason that no additional facilities can be granted by any bank/financial institutions, and entrepreneurs/promoters would be barred from institutional finance for five years. Banks/financial institutions can even change the management of the wilful defaulter, and a promoter/director of a wilful defaulter cannot be made promoter or director of any other borrower company. Equally, under Section 29-A of the Insolvency and Bankruptcy Code, 2016, a wilful defaulter cannot even apply to be a resolution applicant. Given these drastic consequences, it is clear that the Revised Circular, being in public interest, must be construed reasonably. This being so, and given the fact that Para 3 of the Master Circular dated 1-7-2013 permitted the borrower to make a representation within 15 days of the preliminary decision of the First Committee, we are of the view that first and foremost, the Committee comprising of the Executive Director and two other senior officials, being the First Committee, after following Para 3(b) of the Revised Circular dated 1-7-2015, must give its order to the borrower as soon as it is made. The borrower can then represent against such order within a period of 15 days to the Review Committee. Such written representation can be a full representation on facts and law (if any). The Review Committee must then pass a reasoned order on such representation which must then be served on the borrower. Given the fact that the earlier Master Circular dated 1-7-2013 itself considered such

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> steps to be reasonable, we incorporate all these steps into the Revised Circular dated 1-7-2015. The impugned judgment is, therefore, set aside, and the appeals are allowed in terms of our judgment. We thank the learned Amicus Curiae, Shri Parag Tripathi, for his valuable assistance to this Court."

42. There is no merit in the contention of Mr.Pandit that this judgment is delivered in the year 2019, whereas, the impugned decision is taken in the year 2017. The circular is of 2015. That has been interpreted by the Hon'ble Supreme Court and also in a Division Bench judgment of this court. It is, therefore, no point telling us on affidavit in these proceedings that the petitioner is not prejudiced at all. True it is that the petitioner cannot demand, as of right, a fresh opportunity to appear before the Identification Committee or to give a reply to the show cause notice and place his version before the Identification Committee now. However, when tentative and prima facie findings of the Identification Committee as enumerated and recorded in its reasoned order are placed before the Review Committee, at least the petitioner must know what is the opinion of the Identification Committee. The petitioner must know how the order of the Identification Committee reads.

43. The bank, in the affidavit in reply categorically says that it is not obliged to provide copies of the Identification Committee report and the Review Committee report to the petitioner as they are internal private documents. This cannot be a valid ground on

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which the petitioner is denied the copies of these two vital documents. That the petitioner had with him a copy of the special audit report and that was sufficient to answer the queries of the bank is thus an afterthought and is not a sound reason assigned in the affidavit in reply to deny the petitioner access to the relevant documents.

44. We do not think that the petitioner intentionally avoided to attend the personal hearing. In the facts and circumstances of the case, the petitioner was genuinely handicapped. The petitioner had sought answers to several queries, some of which may be general and irrelevant. The petitioner need not be provided with names and designation of the members of the Identification Committee for its composition is set out in the Master Circular of the RBI itself. Apart therefrom, the designation by itself is not decisive. This hyper technical approach of the petitioner need not be countenanced, but when the petitioner says that there is no confidentiality attached to the orders an reports of the Identification Committee and that of the Review Committee, but Mr. Pandit says otherwise, then, we have a serious quarrel with the stand of the IDBI Bank Limited. Ordinarily, we would have been justified in setting aside the order of 8th December, 2017, but it would mean the benefit would accrue to all those proceeded

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against. We do not wish to do that. We would like the petitioner to be provided an opportunity of personal hearing before the Review Committee and prior thereto, the petitioner be provided the copies of the relied upon documents and which would have ordinarily been considered by this Review Committee. If the Review Committee had before it the documents which have been considered by the Identification Committee, then, the copies thereof ought to be provided to the petitioner well in advance before he places his version in review proceedings. If there is evidence examined by the Identification Committee and which is referred to in its reasoned order, then, even that ought to be provided. If the evidence on record is only on the report of the special auditor, then, beyond furnishing a copy of that report with all annexures thereto, the Review Committee need not provide anything else to the petitioner. Thus, with the materials before the Identification Committee duly provided, the Review Committee should grant a personal hearing to the petitioner, consider his version and thereafter pass a fresh speaking order in accordance with law. The benefit of our order and direction shall not accrue to anybody other than Kailash Shahra. The order of 8th December, 2017 will continue to operate and bind the borrower company and others.

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45. With the aforesaid directions, the writ petition is allowed. Rule is made absolute in the above terms.

46. We clarify that we have not granted reliefs in terms of the prayers in this petition as reproduced above, as they are widely worded. Needless to clarify that when the petitioner desires participation in the review proceedings afresh, he can obtain the relevant papers, documents and copies thereof which may pertain to everybody, including the borrower company. However, it is the allegations in the show cause notice or the requirement of the Master Circular qua the petitioner alone which would be the subject matter of the fresh round directed by us above. The petitioner, therefore, will not be permitted to show cause insofar as the case against the borrower company.

47. Further needless to clarify that if any steps are taken as apprehended by the petitioner in terms of prayer clauses (c) and (d) of the petition, those have to abide by our order and directions.

48. Needless to clarify and finally that we have not expressed any opinion on the rival contentions.

49. At this stage Mr.Pandit says that the operation of this order be stayed for a period of eight weeks in order to enable the respondent to approach a higher court. This request is opposed by Mr.Jain.

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50. Since we have directed, in the fresh round, a very restricted inquiry or adjudication following the Hon'ble Supreme Court judgment, we do not think that any useful purpose would be served by granting the request of Mr.Pandit. The request is refused.

51. We can take care of the apprehension of Mr.Pandit about delaying tactics by directing that the petitioner should obtain copies of all the documents and records as noted above within a period of three weeks from today. Should he not avail of this opportunity within the stipulated time, no further time will be granted to the petitioner. After obtaining copies of all the relevant documents, the petitioner should appear before the Review Committee within a period of four weeks thereafter. After appearance of the petitioner, the Review Committee shall pass its reasoned order within a period four weeks from his appearance before it. The petitioner shall not seek extension of time on account of his ill health. Moreover, no facility of appearance through an advocate shall be extended to him.

(G.S.PATEL, J.) **(S.C.DHARMADHIKARI, J.)**

J.V.SALUNKE,PS

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