# IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## ORDINARY ORIGINAL CIVIL JURISDICTION

## WRIT PETITION NO.12 OF 2025

Ankit Bhuwalka
Erstwhile Director of
Bhuwalka Steel Industries Limited,
Flat No. B1 101, Oberoi Esquire,
Oberoi Garden City, Opposite
Oberoi Woods, Goregaon East,
Mumbai, Mumbai Suburban,
Maharashtra - 400063 .....Petitioner

Vs.

1. IDBI Bank Limited
   Acting through Chief General
   Manager / Authorized
   Signatory, Wilful Defaulters
   Review Committee
   Having its registered office at,
   IDBI Tower, WTC Complex,
   Cuffe Parade, Mumbai 400005

2. Union of India
   Room No. 272, 2nd Floor,
   Aaykar Bhavan, Maharshi Karve Road,
   New Marine Lines, Churchgate,
   Mumbai-400020,
   Maharashtra .....Respondents

Mr. Simil Purohit, Senior Advocate, with Ms. Supriya Majumdar, Mr. Rishabh Chandra i/b Vaish Associates, for the Petitioner.
Mr. Prakash Shinde, with Mr. Harsh Sheth, Ms. Niyati Merchant i/b MDP Legal, for the Respondent No.1-IDBI Bank
Mr. Mohamedali M. Chunawala, for Respondent No.2.

CORAM : REVATI MOHITE DERE &
DR. NEELA GOKHALE, JJ.
RESERVED ON : 10th JANUARY 2025.
PRONOUNCED ON : 16th JANUARY 2025.

Judgment: *(Per Dr Neela Gokhale J.)*

1) **Rule**. Rule made returnable forthwith. With consent of the parties the matter is taken up for final hearing.

2) The Petitioners seek quashing of Show Cause Notice ('SCN') dated 5th April 2023 issued by the Respondent No.1-Bank and Order dated 14th September 2023 issued by the Wilful Defaulter Committee of the Bank. He also assails the subsequent Order dated 25th October 2024 passed by the Wilful Defaulter Review Committee ('WDRC') and Order dated 13th June 2024 issued by the Wilful Defaulter Committee ('WDC').

3) The Petitioner is the erstwhile Director of the company known as Bhuwalka Steel Industries Limited ("BSIL"). Pursuant to a resolution of BSIL, under the Insolvency and Bankruptcy Code, 2016 ('IBC'), the company came under the control of a new management. The Petitioner is essentially aggrieved by orders passed by the Respondent No.1 declaring him as Wilful Defaulter on the basis of a

Transaction Audit Report ('TAR') prepared by one M/s. G.D. Apte & Co. at the behest of the erstwhile Resolution Professional ('RP') of BSIL. His main grievance is that he was deprived of a substantial opportunity of being heard inasmuch as the documents on the basis of which a decision to declare him as Wilful Defaulter was taken, were not provided to him and the TAR relied upon by the Respondent No.1 was held by the NCLT, Bengaluru Bench to be based on surmises and conjectures.

4) The facts of the case reveal that in 2018, a Company Petition (IB) No. 228/BB/2018 was filed by one Indu Corporation Private Limited against BSIL before the NCLT, Bengaluru Bench. The Petition was admitted by the NCLT on 8th April 2019 under the Corporate Insolvency Resolution Process ('CIRP') and one Mr. Shivadutta was confirmed as RP. During the course of the CIRP, M/s. G.D. Apte & Co. were appointed as auditors by the RP to carry out the transaction audit/ forensic audit of the BSIL. Based on the findings in the TAR, the RP filed an application before the NCLT alleging that certain fraudulent transactions had taken place in BSIL including certain related party transaction between BSIL and its group company, called Shree Durga Trade Links Private Limited ('SDTL'). It transpires

from the observation made in the order dated 10th March 2021 passed by the NCLT that the forensic audit report/transaction audit report was based on surmises and conjectures and only assumed that the transactions were fraudulent. The NCLT observed that the said Report seemed to be based on assumptions which were neither examined nor cross-checked by confronting the parties to the transactions. Placing reliance solely on this report, the Respondent No.1 Bank proceeded to declare the Petitioner as Wilful Defaulter. It is the grievance of the Petitioner that he was not given an opportunity of a meaningful hearing since the documents underlying the TAR were inaccessible to him thereby compelling him to approach this Court by filing the present petition.

5) Mr. Simil Purohit, learned Senior Counsel appeared for the Petitioner while Mr. Prakash Shinde, learned counsel appeared for the Respondent No.1-Bank. Mr. Mohamedali Chunawala, learned counsel represented the Respondent No.2. We have heard counsels for all the parties and perused the documents with their assistance.

6) Mr. Purohit took us through the correspondence between the parties in detail. He pointed out the show-cause notice dated 5th

April 2023 issued to him and his brother and co-director, Mr. Ajay under the Master Circular on Wilful Defaulters dated 1st July 2015 issued by the RBI. According to him, the show-cause notice merely reproduced an extract from the TAR, which reflected the opinion of the auditor without any supporting documents. The Petitioner then addressed an e-mail dated 22nd April 2023 to the Respondent No.1 conveying that since BSIL was under a new management, the Petitioner did not have access to previous information and data. He sought time to reply to the SCN.

7) Petitioner again by e-mail dated 25th May 2023 sought more time to respond as the earlier staff and CA of BSIL were not available to provide data to him. The WDC without waiting for his reply to the SCN nor providing a personal hearing, passed an order dated 14th September 2023 declaring the Petitioner and the co-director as 'Wilful Defaulter'. By e-mail dated 17th October 2023, the Petitioner once again requested the Respondent No.1 to provide him copies of all the documents/materials on the basis of which the SCN was issued to him by the WDC. According to Mr. Purohit, there was no response to the said e-mail. The Petitioner thus, issued a response dated 28th October 2023 to the SCN without the benefit of

supporting documents.

8) Mr. Purohit submits that the Petitioner sought the supporting documents on multiple occasions, but the Respondent No.1 failed to furnish the same apart from an extract of the TAR provided by e-mail dated 2nd November 2023. The Petitioner, by e-mail dated 20th November 2023 conveyed his objection that the TAR only reflects the opinion of the auditor and does not contain an independent analysis by the Respondents in arriving at the decision to declare the Petitioner as 'Wilful Defaulter'. He reiterated his request for grant of personal hearing, which was eventually granted on 28th February 2024. This hearing, according to him was not a meaningful representation without access to the supporting documents. The Petitioner tried to get the required information from the erstwhile CA of BSIL namely, Mr. Nilamadhab Mishra, who was also unable to provide the same.

9) Thereafter, the order dated 13th June 2024 was issued by the WDC recording its findings that the Petitioner and his brother have committed wilful default as per RBI's Master Circular and are fit to be declared as 'Wilful Defaulters'. The WDC recommended that its

decision be submitted to WDRC for confirmation. By order dated 25th October 2024, the WDRC confirmed the order of the WDC, which was communicated to the Petitioner on the same day. The Petitioner addressed an e-mail dated 11th November 2024 to the RP seeking access to old documents of the company, however, the RP by e-mail dated 12th November 2024 indicated his inability as the new management had taken over the company and the RP stood discharged. The Petitioner by e-mail dated 27th November 2024 even reached out to the new management seeking inspection of old documents, which went unanswered.

10) Mr. Simil Purohit contended that the orders impugned herein are passed without application of mind and in complete disregard of the principles of natural justice. He says that the Respondent No.1 had an obligation to provide access to the material based on which the Petitioner was declared to be a 'Wilful Defaulter'. Most importantly, he points to the NCLT order dated 10th March 2021, which held the TAR to be inconclusive. He asserts that the allegations in the SCN were based on documents leading to the TAR. The Respondent No.1 is under a statutory obligation to share the said documents without which the Petitioner cannot be expected to

meaningfully defend himself. He thus says that the entire action of the Respondent No.1 is in contravention of the RBI' Master Circular and urges the Court to quash the orders impugned in the Petition.

11) Mr. Purohit placed reliance on the following judgments:

(a) *Milind Patel v. Union Bank of India & Ors.*[1]

(b) *State Bank of India v. Jah Developers Pvt. Ltd. & Ors.*[2]

(c) *Kotak Mahindra Bank v. Hindustan National Glass & Ind. Ltd.*[3]

(d) *Hindustan National Glass Ind. Ltd. v. Reserve Bank of India*[4]

(e) *Vishambhar Saran & Anr. v. CBI & Ors.*[5]

(f) *State Bank of India & Ors. v. Rajesh Agarwal & Ors.*[6]

12) Per contra, Mr. Prakash Shinde raised a preliminary

1 2024 SCC Online Bom 745
2 (2019) 6 SCC 787
3 (2013) 7 SCC 369
4 2009 SCC Online Cal 2112
5 2024 SCC Online Cal 4978
6 (2023) 6 SCC 1

objection as to the maintainability of the Petition on the ground that the Respondent No.1 is not 'State' nor an instrumentality of the State within the meaning of Article 12 of the Constitution of India. The Respondent No.1 is now a private sector bank for regulatory purpose with effect from 21st January 2019. Thus, the present Petition under Article 226 of the Constitution of India is not maintainable.

13) On the merits of the matter, Mr. Shinde says that the suspended directors, including the Petitioner herein were consulted by the RP during the process of preparation of the TAR and were also given sufficient opportunity by the auditors to provide clarifications on their observations on the TAR. Despite repeated requests and reminders, the Petitioner did not offer any clarification. Thus, the RP filed fresh Applications before the NCLT under the provisions of Section 43, 44, 66 and 69 of the IBC and the same are pending before the adjudicating authority. Admittedly, now the company is under the control of the new management pursuant to the approval of the NCLT.

14) Mr. Shinde also reiterates the correspondence between the parties to contend that several opportunities were given to the

Petitioner and his brother to represent themselves but they continued to seek time, which according to him was nothing but delay tactics employed by them. He further stated that relevant extracts of the TAR were provided to the Petitioner vide E-mail dated 2nd November 2023 and the entire TAR was readily available with the Petitioner as the same was served to him by the RP alongwith the IA/122/2022 filed before the NCLT. Pursuant to this the Petitioner has also responded to the SCN and this indicates that the Petitioner availed of the opportunity despite his purported grievance of not having access to documents. Mr. Shinde states that the Petitioner was given a personal hearing and has also filed his written representation before the WDRC. It is only after considering all the documents/replies/representations and overall conspectus of the matter that the WDRC passed the detail order dated 16th September 2024 confirming the findings of the WDC and the Petitioner was declared as Wilful Defaulter by Order dated 25th October 2024 which is impugned in the present petition. Mr. Shinde thus affirms that there is no procedural infirmity in the procedure adopted by the Respondent No.1, and it has complied with all the requirements set out in the Master Circular as well as the directions of the Apex Court

in its various decisions. He thus urges us to dismiss the petition. He placed reliance on the following decisions of the Supreme Court and this Court:

A) ***Mrinmayee Rohit Umrotkar v. Union of India & Ors.***[7]

B) ***Jah Developers (Supra)***

15) Before proceeding to render an analysis in 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 Master Circular dated 1.7.2015. Clause 2.1.3 defines the term 'Wilful Default'. It reads as thus:

> *"**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.*

7 2021(4) Mh.L.J.

*(b) 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.*

*(c) 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.*

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

16) 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.*"

17) 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.

18) Clause 3 of the Circular lays down the mechanism for Identification of Wilful Defaulter, the relevant extract of which reads as thus:

> **"3. Mechanism for identification of Wilful Defaulters**
>
> *(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. 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 decision.*

*(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."*

19) As discussed earlier, the object of the Master Circular is salutary. The Master Circular aims to protect the country's banks and financial institutions from unscrupulous entities and individuals. It is intended to identify and punish those entities and individuals who have diverted or siphoned off borrowed funds for purposes other than for which the loan facility was availed leading to default in the repayment obligations. Such individuals and entities must be identified and their names be published in public domain so that they are barred from availing any further loan facility from any other bank. If such an exercise is not undertaken, the cycle of diversion/siphoning of borrowed funds; default and re- borrowing, leading to same situation may continue. Such a scenario may adversely affect the liquidity of the banking system and affect the overall financial health of the country.

There is, thus, no doubt that the Master Circular aims to achieve a very laudable object. Notably, the scheme of the Master Circular indicates that it is both a punitive and preventive measure.

20) However, it needs to be acknowledged that the consequences for an individual or an entity who is declared as wilful defaulter are also drastic. As discussed earlier, such an individual or entity is barred from availing any loan facility in the future; is proscribed from floating new venture; and may face criminal proceedings. Additionally, being labelled as wilful defaulter in public domain also affects the reputation of such individual and entity. Business entities would hesitate to do any business or dealing with someone who is declared as wilful defaulter. The availability of loans from financial institutions is the backbone of doing business. It is not only a mode of raising finance but it is also an indicator of the creditworthiness of the business entity. Hence, the deprivation to avail such facility virtually knocks a financial death knell on such individual or entity.

21) The Supreme Court in the case of ***Jah Developers (Supra)***, had an occasion to examine the consequences of a person being

declared as wilful defaulter under the Master Circular. The Supreme Court held that a person declared as wilful defaulter affects the fundamental right of a person under Article 19(1)(g) of the Constitution as it directly affects the right to do business and thus, the Master Circular must be construed reasonably. The relevant paragraph of the said decision reads as under:-

> *"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. However, we are of the view that Article 19(1)(g) is attracted in the facts of the present case as the moment a person is declared to be a wilful defaulter, the impact on its fundamental right to carry on business is direct and immediate. This is for the reason that no additional facilities can*

*be granted by any bank/financial institutions, and entrepreneurs/promoters would be barred 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 steps to be reasonable, we incorporate all these steps into the Revised Circular dated 1-7-2015....."*

22) Subsequently, in the case of ***Rajesh Agarwal (Supra)***, the

Supreme Court dealt with another similar Circular issued by the RBI known as the Master Directions on Frauds. The said Circular deals with the mechanism to declare an account as fraud. The Supreme Court held that such classifications entail serious civil consequences for the borrower. The proceedings forming an opinion about classification as fraud are "administrative" in nature and the principles of natural justice apply to the administrative decision making. It was held that there are both civil as well as penal consequences. Such consequences in the Master Directions on Frauds are similar to the consequences envisaged in the Master Circular and hence the observations made by the Supreme Court in ***Jah Developers (Supra)*** squarely applied. It was further held that the bar from raising finances could be fatal for the borrower leading to its "civil death" in addition to the infraction of their rights under Article 19(1)(g) of the Constitution. It was further held that classifying an account as fraud not only affects the business and goodwill of the borrower, but also the right to reputation.

23) Thus, classification of a borrower's account as fraud has the effect of preventing the borrower from accessing institutional finance for the purpose of business. It also entails significant civil

consequences as it jeopardises the future of the business of the borrower. Therefore, the principles of natural justice necessitate giving an opportunity of a hearing before debarring the borrower from accessing institutional finance. The action of classifying an account as 'wilful' or 'fraud' not only affects the business and goodwill of the borrower, but also the right to reputation. A decision taken by any authority affecting the right to reputation of an individual has civil consequences. Therefore, in such situations the principles of natural justice would come into play. Any order or decision of the authority adversely affecting the personal reputation of an individual must be taken after following the principles of natural justice. In case any authority in discharge of its duties fastened upon it under the law, travels into the realm of personal reputation adversely affecting him, it must provide a chance to him to have his say in the matter. In such circumstances, right of an individual to have the safeguard of the principles of natural justice before being adversely commented upon is statutorily recognised and violation of the same will have to bear the scrutiny of judicial review.

24) From the aforesaid enunciation of law, it is evident that the graver the consequences of such civil action, the higher is the

degree of proof required. 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 procedural mechanism prescribed in Master Circular or is it otherwise.

25) The SCN dated 5th April 2023 records that the WDC examined the conduct of the account and utilization of credit facilities by BSIL and concluded that the acts/events of wilful default as detailed in the table in the SCN are committed by the Petitioner and his brother. The table containing the details is reproduced herein under:

| Criteria No. | 2.1.3 (b) [2.2.1 (c)] |
|---|---|
| *Criteria for Wilful Default* | <u>Diversion of funds:</u><br>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. |
| | The term 'diversion of funds' referred at paragraph 2.1.3(b) above, should be construed to cinclue transferring borrowed funds to the subsidiaries / Group companies or other corporates by whatever modalities. |
| *Position of Borrower* | BSIL had receivables of Rs.74.50 crore as |

| | |
|---|---|
| *(as per Transaction Review Report*<br><br>*dated March 5, 2020 by M/s G D Apte & Co.)* | on 31.03.2016 from Shri Durga Trade Links Pvt. Ltd. (SDTL) arising out of the following transactions: |

| Particulars | Amount (Rs.Cr) |
|---|---|
| Amount due as on 01.04.2015) | **4.22** |
| Amount receivable on account of purchase/sale transactions | **33.94** |
| Receivable by BSIL from related parties transferred to SDTL | **15.02** |
| Receivable by BSIL from other parties transferred to SDTL | **21.07.** |
| Other entries | **0.15** |
| **Total** | **74.50** |

The receivable from SDTL was reduced to Rs.74.27 crore from 01.04.2016 to 31.03.2019 mainly on account of funds received. No significant transactions were carried out between these parties after 31.03.2016. Receivables of BSIL from related/other parties were transferred to SDTI, even though there were amount due from SDTL to BSIL in their direct trading transactions. In Audited Financial Statements for FY2018-19, BSIL made provision of doubtful debts of Rs.75.30 crore including Rs.74.27 crore due from SDTL.

BSIL/promoters/directors were enquired on existence of any disputes with SDTL and also between SDTL & its respective customers due to which these dues were not paid by the parties or other reasons for non-payment due to which these dues were provided for in the Financial Statements. However, no information was furnished in these respect by

| | |
|---|---|
| | company/promoters/directors.<br><br>BSIL/Promoters did not inform whether it has taken any tangible efforts for recovery of these receivables from SDTL and also whether any legal actions for recovery of dues is envisaged even though BSIL & SDTL are owned and controlled by common members of Bhuwalka family viz. Shri Ajay Bhuwalka and Shri Ankit Bhuwalka are directors/shareholders in BSIL and SDTL. Receivables were transferred to SDTL even though BSIL, in its direct trading transactions with SDTL, had to receive substantial amounts from SDTL. The transactions between BSIL & SDTL does not appear to be transactions in ordinary in course of business.<br><br>In view of the above, it can be concluded that BSIL has diverted an amount of Rs.74.27 crore through SDTL which would have been otherwise available for payment to lenders. Thus, these transactions with SDTL amounts to Diversion of funds as per RBI Circular (RBI/2015-16/100 dated July 1, 2015) on "Wilful Defaulter". |

26) It is thus clear from the table that the position of the Borrower as relied upon by the WDC is as per the Transaction Review Report dated 5th March 2020 prepared by the auditor M.s G.D Apte &Co. At the cost of repetition, it is necessary to note that the RP had made an application before the NCLT bearing IA No. 133/2020 u/s 60 r/w 66 of the IBC. By its Order dated 10th March 2021, the NCLT

disposed the application holding that the same was premature and directed the RP to carry out basic enquiry of all surrounding facts to make out his case, make enquiries from all concerned parties with reference to the transactions highlighted in the forensic report, and arrive at some definite conclusion before referring the matter to the Tribunal u/s 66 of the Code. NCLT has also observed that the forensic Report prepared by the Auditors simply assumes the transactions to be fraudulent and the conclusions that funds were siphoned away were reached in a summary manner. We specifically enquired with both the counsels as to whether the Forensic Report commented upon by the NCLT was the same as the TAR referred to in the SCN. We were assured by both the counsels that it was the same report. It is thus safe to accept that the basis of issuance of the SCN was primarily the findings in the TAR, which were observed by the NCLT to be mere assumptions. Considering the grave consequences that follow a finding by the WDC, the degree of proof required and expected to have been relied upon by the WDC should be much higher and not simply based on a TAR which itself was unacceptable to the NCLT.

27) Let us now examine the second aspect in the matter. The Petitioner via emails dated 22nd April 2023 and 25th May 2023

sought time to respond to the SCN specifically stating that he had no access to the documents underlying the TAR which was relied upon by the WDC and sought copies of the same. Neither providing the required documents nor replying to the request made by the petitioner, the WDC proceeded to take a decision dated 14th September 2023 to declare the Petitioner as wilful defaulter. The decision was communicated to the Petitioner by letter dated 27th September 2023 and was further called upon to avail a final opportunity to submit any further representation. By email dated 17th October 2023, the Petitioner once again requested for documents but there was no reply. Ultimately he sent a response to the SCN *albeit* without the benefit or assistance of any documents on the basis of which he was required to explain the findings in the TAR by email dated 28th October 2023. It appears that by email dated 2nd November 2023 the Respondent No.1 sent an extract of the TAR, which obviously was of no assistance to the Petitioner since the statement of accounts and other documents which formed the basis of the TAR were not provided to him. We are quite perplexed to comprehend the reluctance of the Respondent No.1 to share the documents with the Petitioner. It is most unreasonable to expect the

Petitioner to tender a reasonable clarification/explanation to the TAR and consequently the SCN without having access to the relevant facts and figures. We thus find merit in the Petitioner's submission that the extract of the TAR does not reflect any independent analysis made by the Respondent No.1 as it was already circumspect in the NCLT order of 10th March 2021. The SCN based only on the TAR is consequently exceptionable.

28) On 28th February 2024, a personal hearing was given to the Petitioner. Admittedly, even during the personal hearing the Petitioner expressed his grievance regarding lack of access to the records. Pursuant to the personal hearing, WDC decided that the Petitioner was fit to be declared as wilful defaulter by its Order dated 13th June 2024. Vide the same order, the WDC recommended to the WDRC to confirm the same. A perusal of the Order dated 13th June 2024 reveals that admittedly the Petitioner sought transaction level details to respond to allegations based on the TAR and the WDC told him that for replying to the allegations, the Petitioner and his brother can check the records of the group company of BSIL namely STDL as they themselves were its shareholders. From this it is clear that despite repeated requests made by the Petitioner to supply documents, the

only answer of the committee was that since the Petitioner was a shareholder in STDL, he must make efforts to procure the documents from STDL. Even Mr. Shinde in his arguments reiterated the justification that since the Petitioner was privy to the proceedings before the NCLT and the TAR was prepared with the Balance sheets and accounts statements of the BSIL, he is presumed to have the necessary information. It is pertinent to note that the proceedings before the NCLT pertaining to Corporate Debtor BSIL are quite distinct from the proceedings to declare Petitioner *albeit* a suspended director of BSIL, as wilful defaulter and the Petitioner is proceeded against in his individual capacity. Even if the Petitioner is presumed to have access to documents in the proceedings before the NCLT, he is justified in seeking documents in the conduct of WDC proceedings. It is not for the WDC to shrug away its responsibility under the pretext of such presumptions and assumptions. The statutory procedural mechanism laid down in the Master Circular, interpreted in various decisions of the Supreme Court must be followed by the Respondent No.1 and its committees in letter and spirit. We thus, have no hesitation in agreeing with the Petitioner that the personal hearing cannot be construed to be meaningful with the Petitioner having his

hands tied behind in the context of the Respondent No.1 withholding the necessary documents and expecting to offer his comments.

29) In the case of ***Milind Patel (Supra)*** *this* court held that not only must information that is referred to and relied upon in the SCN be supplied but also information that may undermine the allegations contained in the SCN must be supplied only to ensure that everything relevant to arrive at the truth is available to both the parties. The objective of the proceedings initiated by issuance of a SCN is not to somehow find the noticee guilty of wilful default on the terms as alleged. Instead the objective is to arrive at the truth as to whether or not an individual in question is to subjected to 'penal' consequences. Mr. Shinde also placed reliance on the decision of the Apex Court in ***Jah developers (Supra)*** but the said decision in fact holds otherwise than his submission and does not assist him any. In any case, we have already discussed the said decision herein above.

30) We now deal with the issue regarding maintainability of the present petition against the Respondent No.1-Bank which Mr. Shinde urges is not 'State' and hence not amenable to writ jurisdiction. We have already discussed the decision of the Supreme Court in the

matter of ***Jah Developers (Supra)***. The Supreme Court clearly expressed its view that Article 19(1)(g) of the Constitution of India is attracted as the moment a person is declared as wilful defaulter there is a direct and immediate impact on his fundamental right to carry on business. It is settled law that a Fundamental right under Article 19 or 21 can be enforced even against persons other than State or its instrumentalities. In a recent decision a majority of a five-judge bench of the Supreme Court in the matter of ***Kaushal Kishore vs State of Uttar Pradesh and Others***[8] held that a fundamental right can be enforced even against a non-state actor. Justice Ramasubramanian (as he then was) writing for the majority wrote, "The original thinking that these rights can be enforced only against the state, changed over a period of time. The transformation was from 'state' to 'authorities' to 'instrumentalities of state' to 'agency of the government' to 'impregnation with governmental character' to 'enjoyment of monopoly status conferred by state' to 'deep and pervasive control' to the 'nature of the duties/functions performed." In this connection, he also quoted Justice Vivian Bose's famous words in **S. Krishnan v. State of Madras**[9], about not placing undue importance on petty linguistic

8 (2023) 4 SCC 1
9 AIR 1951 SC 301

details, and 'penetrating deep into the heart and spirit of the Constitution'. On the strength of this prescription, Justice Ramasubramanian ( as he then was) proceeded to answer the question whether a fundamental right under Articles 19 or 21 could be claimed other than against the state or its instrumentalities, in the affirmative. In this view of the matter, we have no hesitation in holding the present petition to be maintainable against the present Respondent No.1. We have also perused the decision of this Court in **Mrinmayee (Supra)** relied upon by the Respondent No.1 but the same is in a different context and hence does not assist the Respondent No.1.

31) In view of the aforesaid discussion, we are inclined to quash and set aside the Show Cause Notice dated 5th April 2023 issued by the Respondent No.1-Bank; order dated 14th September 2023 issued by the Wilful Defaulter Committee of the Respondent No.1-Bank; Order dated 13th June 2024 issued by the Wilful Default Committee and Order dated 25th October 2024 passed by the Wilful Defaulter Review Committee qua the Petitioner only.

32) It is made clear that we have not gone into the merits of the matter and have limited our finding to the procedural infirmities

committed by the Respondent No.1 Bank. Hence, we grant liberty to the Respondent No.1 Bank to initiate any action against the Petitioner herein, as it may be advised. The Bank is at liberty to issue fresh show cause notice to the Petitioner by making proper disclosure of material and information on which the show cause notice may be based. We further make it clear that by this judgment, we are not foreclosing a fair and effective determination of the issue by the Respondent No.1 Bank, but it would be required to comply with the due process of law for the time being in force and adhere to the principles of natural justice.

33) Needless to state that all/any consequential action taken pursuant to the impugned order are also quashed and set aside.

34) The Petition is allowed accordingly. Rule is made absolute.

35) There shall be no order as to costs.

36) All parties to act on an authenticated copy of this Judgment.

**(DR. NEELA GOKHALE, J.)** **(REVATI MOHITE DERE, J.)**