www.taxguru.in

HIGH COURT OF M.P. BENCH AT INDORE

(S.B. Hon'ble Justice Shri Vivek Rusia)

W.P. No.27421/2018

REVATI CEMENTS PVT. LTD & ANR.

VERSUS

STATE BANK OF INDIA & ORS.

****

Shri S.C. Bagadiya, learned Senior Advocate with Shri Jerry Lopez, Advocate for the petitioners.

Shri A.K. Sethi, learned Senior Advocate with Shri R.C. Singhal, Advocate for respondents.

****

ORDER

(Delivered on 11.3.2019)

The petitioners have filed the present petition being aggrieved by order dated 18.6.2018 and 10.10.2018 by the respondents No.2 and 3, respectively by which they have been declared as 'wilful defaulter' under the provisions of Reserve Bank of India, Master Circular No.DBR No. CID.BC.22/20.16.003/2015-16 dated 1.07.2015 (hereinafter referred as 'Master Circular').

2. Facts of the case are as under :-

The petitioner No.1 is a company incorporated under the provisions of the Companies Act,1956 and the petitioner No.2 is a Director of petitioner No.1. The respondent No.1/bank is a Government owned public sector bank engaged in the business of banking in India through branches established in different States of India.

3. The petitioner No.1 decided to set up 3.0 MTPA

integrated cement plant in Tehsil Raghuraj Nagar, District Satna along with a 45 megawatt captive thermal power plant. The petitioner No.1 also got limestone mining lease of an area 906 hectare for the period of 30 years from the State of M.P. The petitioner No.1 has also obtained all the approvals from the competent authorities for setting up the plant and placed the orders for supply of key equipment for the establishment of the plant.

4. In the course of its business, the respondent No.1/bank sanctioned term loan facility in the month of April 2008, to petitioner no.1 which was revalidated in the month of October 2009. According to the petitioners, the respondents gave option of either availing the facility of Letter of Credit or disbursement Term Loan. The petitioners opted for credit facility ie., Foreign Letter of Credit, which is an arrangement whereby the bank acting at the request of customer (importer / buyer) undertake to pay in the goods/services to a third party (exporter / beneficiary) by a given date. According to the petitioners upon availing the Foreign Letter of Credit, funds were never disbursed to them and the same was directly paid to the exporter / beneficiary.

5. Vide letter dated 20.12.2010, the respondent No.1/bank/bank has sanctioned the term loan of Rs.150 Crore to the petitioners subject to the certain conditions. According to the petitioners, the respondent No.1/bank/Bank has wrongly imposed the condition of mortgaging of mining lease, which was not there in the original sanction letter as well as in first revalidation in the month of October 2009. In fact the petitioners have no

authority to mortgage the mining lease granted by the State Government hence due to which they, could not avail the facility of term loan from the respondent No.1/bank. The respondent No.1/bank/Bank was also not ready to amend the pre-disbursement condition pertaining to mortgage of the mining land. Ultimately, the petitioner No.1 could not setup the cement plant due to some other compelling reasons . The petitioner No.1 was classified as NPA on 29.8.2013. On 30.9.2016, the respondent No.1/bank filed the original application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, before Dedt Recovary Tribunal, Jabalpur, for recovery of the amount paid on behalf of the buyer to the foreign supplier by way of Foreign Letter of Credit on behalf of the petitioner No.1. The petitioners have filed the reply and also filed a counter claim against the respondent No.1/bank.

6. After four years now the respondent No.1/bank issued a show cause notice(SCN) to the petitioners proposing to declare them as "wilful defaulter" under Master Circular. By way of show cause notice, the petitioners were called upon to show cause and make a representation within 30 days of the receipt of the notice as to why they should not be included in the list of 'wilful defaulter'. Vide reply dated 29.7.2017, the petitioners have requested for supply of all the details and documents relied upon by the respondent No.1/bank and which formed the basis of allegations / charges containing in the said show cause notice. Vide letter dated 29.11.2017, the petitioners were directed to appear before the 'wilful defaulter' Identification Committee (in short ' Identification

Committee '). According to the petitioners, the respondents have failed to provide documents namely *viz.*, (i) Details of Constitution of Identification Committee, (ii) Minutes of Meeting of Identification Committee, (iii) Agenda of Meeting, (iv) Deliberation of the respondent No.2 etc.

7. The petitioners approached this court by way of W.P.No.1065/2018 interalia sought a direction as to permit them to be represented through their Advocate or CA at the time of personal hearing before the Identification Committee. By order dated 16.1.2018, the writ petition was disposed of with a liberty to the petitioners to make an application before Identification Committee, seeking permission to represent through its Advocate, in light of the judgment passed by the Delhi High Court in the case of ***Punjab National Bank V. Kingfisher Airlines Ltd*** decided on 17.12.2015. Thereafter, the petitioner attended the meeting on 18.1.2018 along with an Advocate, but the Identification Committee did not permit the Advocate to represent the petitioners during personal hearing. The petitioners made a various correspondent to the committee, seeking permission to represent through lawyer / chartered accountant who are not partner, director, officer and employer of the petitioner No.1.Identification Committee has denied the representation through chartered accountant, lawyer etc but personal hearing was provided to the petitioners on 18.6.2018 and thereafter, vide impugned communication dated 23.10.2018, the respondents have taken a decision to declare the petitioners as 'wilful defaulter'. Thereafter, the matter was placed before the Wilful Default Review

Committee who has also affirmed the order of Identification Committee. Hence, the present petition.

8. After notice the respondents have filed the return by submitting that the petitioner No.1 – Company was sanctioned a Term Loan Limit of Rs.150 Crore with sub-limit of letter of credit for one time upto Rs.75.00 Crore within the said term loan limit vide sanction letter dated 20.12.2010. The petitioners infused Rs.100 Crore by way of upfront equity and submitted a circular dated 3.1.2012 issued by chartered accountant which reveals that the petitioner No.1 had a source of equity fund of Rs.103.43 Crore and term loan disbursement by Allahabad Bank Rs.15.79 Crore in total Rs.119.22 Crore. The chartered accountant has also certified that the petitioners has invested the aforesaid amount in land building civil work plant and machinery and miscellaneous expenses etc. as on 31.12.2011. At the request of the petitioners, the documentary letter of credit dated 21.7.2011 and documentary letter of credit dated 6.8.2011 were issued by the respondent No.1/bank – bank in favour of the foreign supplier for sale and supply of relative machineries to the petitioner's company. The respondent No.1/bank has furnished an undertaking that if petitioner no.1 company commits default of terms and conditions of the said letter of credit, it will pay out of bills received under the said letter of credit from its own sources. The machineries pertaining to the said letter of credit were dispatched by the foreign suppliers and the bills / document related thereto were sent to the respondentno.1 – Bank for payment in terms of the liability under the said Letter Of Credit, the respondent No.1

– Bank has to remit the amount of the said bills to the foreign bank of the said foreign supplier.

9. Later on, the respondent No.1/bank – bank came to know from the balance-sheet as on 31.3.2014 that out of equity fund of Rs.103.43 Crore, only amount of Rs.49.21 Crore is available with the petitioner No.1. As such, it is obvious that by 31.3.2014, the petitioner – company had withdrawn the amount of Rs.54.22 Crore without knowledge / consent of the respondentNo.1/ Bank. As per the terms and conditions of undertaking.It was obligatory on the part of the petitioner no.1– company to pay the amount of the said two letter of credit to respondent no.1/bank. Since the petitioner no.1–company arbitrarily without prior permission or intimation to the respondent no.1/ Bank or any of the member bank of consortium has taken away / withdrawn / siphoned / diverted / misused the said equity of Rs.54.22 Crores, therefore, 'Identification Committee' and the 'Wilful Defaulter' Review Committee of the respondentno.1/Bank have rightly and correctly identified the petitioner no.1 company and its director / guarantor as a 'wilful defaulter' under clause 2.1.3.(b) and 2.1.3.(c) of Master Circular. It has been further submitted that in terms of the RBI Master Circular, the 'Identification Committee' is required to be headed by the executive or equivalent consisting of two other senior officers of the rank of GM / DGM of the Bank. The Identification Committee Review Committee is required to be head by the Bank's Chairman / Chairman and MD / Managing Director and C.O. with two independent directors / non-executive director of the Bank. It is further

submitted that all the relevant documents were provided to the petitioners.

10. It has been also been submitted that so far the issue of representation through Advocate is concerned, this Hon'ble Court vides order dated 19.6.2018 has held that the representation through legal practitioner/chartered accountant or consultant cannot be permitted. This court has already considered the judgment passed by the Delhi High court in the case of ***Punjab National Bank V/s. Kingfisher Airlines*** (supra) and judgment passed by the Calcutta High Court in the case of ***Dynametic Overseas Pvt.Ltd & Anr. V/s. State Bank of India & Ors.***. Now the issue is pending before the Apex Court in SLP No.8591/2016. The Writ Appeal No.831/2018 filed against the order dated 19.6.2018 is also pending before this court. The respondents have also filed an application for vacating the stay along with the return.

11. Shri Bagadiya, learned senior counsel appearing for the petitioners argued that respondents have wrongly issued show cause notice to the petitioners, when they did not borrow any loan. The credit facility availed by the petitioners was in the form of non-fund based credit facilities. No money came to the account of the petitioners from the respondent no.1/Bank. Since the funds were never disbursed to the petitioners there could never be any instance or occasion of routing any or stiffening or diversion of fund by the petitioner. The Term Loan Facility would involve disbursement of the fund in the petitioner's Bank account. The respondentno.1/Bank directly made payment by way of letter of credit to the foreign exporters for the supplied

goods. The goods are not in possession of the petitioners as the same are held up before the custom authorities. It is further submitted by him that the respondent no.1/bank never opened any term loan account nor sanctioned any working capital facilities to the petitioner No.1. Therefore, this is no relationship of lender and borrower between them. The so called withdrawal of the amount of Rs.54.22 Crore was not received by the petitioners from the respondent No.1/bank –Bank. It was not the money of respondent no.1/bank lying in the current account of the petitioner No.1 with the HDFC Bank since March 2005. The respondent no.1/ Bank had no lien over the said amount therefore, the petitioner no.1 has wrongly been declared as 'wilful defaulter'.

12. Shri Bagadiya, learned senior counsel further emphasised on the definition of 'wilful default' given in the Master Circular according to which the wilful default would be deemed to have occurred in the event of default in making repayment or non-utilization of the finance or the stiffening of the fund. The petitioner is not falling in any of the category as the petitioner neither received any amount / loan from the respondents nor diverted for other purpose. The amount has been utilized for the purpose of purchase of the machines. It is further submitted that as per the master circular isolated transaction should not be a criteria for categorizing the petitioner as 'wilful defaulter'. Therefore, the entire action is beyond authority and contrary to the provisions of the master circular.

13. It is further submitted that the mechanism provided for

identification of defaulters in master circular has also not been followed by the respondents. The petitioners were not provided proper personal hearing by the Identification Committee. The petitioner made several representations for providing opportuning of hearing through advocate or chartered accountant but same was illegally being denied. The word personal hearing used in clause 3 (b) in the master circular should not have been given narrow meaning or limited to the hearing to the Directors or Promoters and Representatives of the unit. The Identification Committee erred in denying the representation through the advocates to the petitioners. The declaration of the 'wilful defaulter' is having a serious consequence therefore, the personal hearing should be an effective hearing and the petitioners are having right to be represented through advocate or chartered accountant having legal knowledge or background. In support of his contention, Shri Bagadiya has placed reliance over the judgment passed by the High Court of Delhi in the case of ***Punjab National Bank V. Kingfisher Airlines Ltd*** reported in 2015 SCC online DEL 14128. He has also placed reliance over the interim order passed by Apex Court in the case of ***Dinesh Sahara V/s. State Bank of India (SLP No.21522/ 2018***) by which the Apex Court has permitted professional lawyer to appear on behalf of the default unit before the Committee.

14. Shri Bagadiya, learned senior counsel has further submitted that the Identification Committee Review Committee passed the order without giving opportunity of hearing to the petitioner and it was incumbent upon the

review committee to pass the reasoned and speaking order while upholding the order passed by the 'Identification Committee'. He has further pleaded that the Manager of the respondent – Bank was not empowerd under the master circular to issue show cause notice. In support of his contention he has placed reliance over the judgment of the Apex Court in the case of ***Shantanu Ghosh & Ors. V/s. State Bank of India & Ors. [Cal HC] 2013 SCC Online Cal 11603***, ***M/s. Kanchan Motors & Ors. V/s. Bank of India & Ors., 2018 SCC Online Bom 1761 – Bombay HC*** and ***Bimal Kumar Dutt V/s. Union of India (Calcutta High Court) W.P.No.388/2014.***

15. Per contra, Shri A.K. Sethi, learned Senior counsel appearing for the respondents submitted that as per the RBI instructions issued by way of the master circular, a show cause notice was issued to the petitioners as they defaulted in meeting its payment or re-payment obligation to the respondent no1/ Bank and did not utilise the finance from the Bank. The petitioner has routed the funds through any other Bank other than the respondent no.1/ Bank. The respondent no.1/Bank never denied the maintenance of current account outside the Bank, but all the sale and transaction ought to have been routed from its Bank. Therefore, the petitioners are fulfilling the criteria of 2.2.1.d of the master circular. It is further submitted that the petitioner's company did submit a details of source of fund of Rs.103.43 Crores brought in via equity including share application money, but later on withdrew the amount of Rs.54.22 Crores equity share including share application money without honouring its commitment under the Letter of Credit open through the

respondent no.1/ Bank. Hence, the petitioners have committed wilful default under the criteria 2.1.3.C. The respondent no.1/Bank paid the amount to the Foreign Exporters who supplied the machine to the petitioners but they have failed to utilise that machine therefore, indirectly, they did not utilise the fund for specific purpose, without honouring its commitment under the letter of credit the petitioners have siphoned its fund. Hence, committed wilful default. The Identification Committee did not commit any error while declaring the petitioner has 'wilful defaulter'. As per the master circular, a show cause notice was issued to the petitioners and before recording the findings, opportunity of personal hearing was granted. The Identification Committee is neither a court nor tribunal therefore, the representation through advocate is not permitted under the master circular. The clause3(b) specifically provides opportunity of personal hearing to the borrower and the Promoter / Full Time Director. The writ court of this court in the case of ***Surender Singh V/s. Bank of Baroda*** (W.P. 22228/2017) has already held that the petitioner before the Identification Committee is not having right to be represented by an advocate after relying the judgment passed by the Division Bench of the Calcutta High Court in the case of ***Dynamatic Overseas Pvt. Ltd. V/s. State Bank of India.***

16. It is further submitted by Shri Sethi, learned senior Advocate that so far the opportunity by review committee is concerned, there is no such provision in the master circular. Under clause 3(c) of master circular the order of committee is liable to be reviewed by another committee headed by

Chairman and Managing Director of the Bank. The order of committee is final only after its confirmation by the review committee. This is nothing but an internal arrangement in the Bank to provide double check system before declaring any borrowing unit as 'wilful defaulter'. Since, the review committee has affirmed the order passed by the identification committee therefore, no independent reasons are required to be assigned in its order , which may be necessary only in the case of the reversal of the finding.

17. The petitioners were provided all the documents relied in the show cause notice. The details of the Constitution of Identification Committee has also been provided in the letter dated 4.1.2018. In view of the above Shri Sethi, learned Senior counsel for the respondents prays for dismissal of the petition.

18. By way of rejoinder Shri Bagadiya, learned senior Advocate for the petitioner submitted that the petitioners have already given offer of One Time Settlement to the respondents/Bank. In response to it the respondent no.1 has advised the petitioners to improve the OTS offer. Vide letter dated 28.8.2018, the petitioner no.1 has offered amount of Rs.13.00 Crores to be paid on or before 31.3.2020 as One Time Offer. By letter dated 13.9.2018 the Bank insisted for deposit of 5% of OTS amount upfront .In view of above respondents be directed to consider the offer of the petitioners before taking any penal consequential action against petitioners .

19. That I have given a due consideration to the arguments

of the learned Senior counsel appearing on behalf of the respective parties and in my considered opinion the writ petition is devoid of merit and substance hence the same is liable to be dismissed on the following reasons :-

20. The main emphasis of the petitioners is that the credit facility availed by the petitioners was in the form of non-fund based credit facilities i.e., Foreign Letter of Credit, which is an arrangement between Bank and the foreign exporters. The respondent no.1/Bank never disbursed any fund in the petitioner's account as same was directly paid by way of Foreign Letter of Credit. Since the funds were never disbursed to the petitioners there could never be any occasion of routing and siphoning or diversion of fund. The petitioners have never opted for Rupee Term Loan Facilities, which could involve disbursement of the fund into and from the Bank into petitioner's bank accounts. This issue is no more *res intigra* .Similar issue was came up before the Apex Court in the case of ***Kotak Mahindra Bank Ltd V/s. Hindustan National Glass and Industries Ltd***. reported in *(2013) 7 SCC 369* in which the Apex court has held that the definition of wilful default given in the master circular to mean not only the wilful default by a unit which has defaulted in meeting its repayment obligation to the lender but also to mean a unit which has defaulted in meeting its payment obligation to the Bank under facility such as the Bank guarantee. The derivative

transaction in India with the Bank falls under the regulatory purview of RBI because, they would have a substantial bearing on the credit system and the credit policy in respect of which RBI has regulatory power under the Act of 1934 and 1949. Such derivative transaction may not only involves a lender borrower relationship between the Bank and its constituents but dues by a constituent remaining unpaid to the Bank may affect the credit policy and credit system of the country. It has been held that wilful defaults of the parties under a derivative transaction with a Bank are covered by the master circular under judicial interpretation of master circular. paras 43 to 46 are reproduce as under:-

Interpretation of the Master Circular by the Court

46. *In these appeals, the only question that we are called upon to decide is: whether a wilful default in meeting payment obligations to a bank under a derivative transaction will be covered under the Master Circular?*

47. *The definition of "wilful default" is contained in Clause 2.1 of the Master Circular dated 1-7-2008 and the Master Circular dated 1-7-2009 is the same. We, therefore, extract Clause 2.1 of the Master Circular dated 1-7-2008, hereinbelow:*

*"**2.1. Definition of 'wilful default'**.—The term 'wilful default' has been redefined in supersession of the earlier definition as under:*

A 'wilful default' would be deemed to have occurred if any of the following events is noted—

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

(b) 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 of 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."

48. *We find from the definition of "wilful default" in the Master Circular quoted above that a wilful default would be deemed to have occurred in any of the events mentioned in sub-clauses (a), (b), (c) and (d) of Clause 2.1. These sub-clauses use the word "lender" and for this reason the Calcutta High Court has taken a view in the impugned judgment that the Master Circular applies only to a lender-borrower relationship and thus only a wilful default by a borrower to the bank which has lent funds by way of loans and advances would be covered under the Master Circular and a party who has not borrowed any money from a bank and has availed the facility of derivative transaction from a bank and has defaulted in meeting its payment obligation to the bank under the derivative transaction is not covered by the Master Circular. The Calcutta High Court, therefore, has gone by a literal interpretation of the word "lender" in sub-clauses (a), (b), (c) and (d) in the definition of "wilful default" in Clause 2.1 of the Master Circular.*

49. *This approach of the Calcutta High Court in interpreting the Master Circular, in our considered opinion, is not correct because it is a settled* 392 *principle of interpretation that the words in a statute or a document are to be interpreted in the context or subject-matter in which the words are used and not according to its literal meaning. In Principles of Statutory Interpretation, 13th Edn., 2012, Justice G.P. Singh has given this explanation to the rule of literal construction at p. 94:*

"When it is said that words are to be understood first in their natural, ordinary or popular sense, what is meant is that the words must be ascribed that natural, ordinary or popular meaning which they have in relation to the subject-matter with reference to which and the context in which they have been used in the statute. Brett, M.R. called it a 'cardinal rule' that 'Whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used'. 'No word', says Professor H.A. Smith 'has an absolute meaning, for no words can be defined in vacuo, or without reference to some context'. According to Sutherland there is a 'basic fallacy' in saying 'that words have meaning in and of themselves', and 'reference to the abstract meaning of words', states Craies, 'if there be any such thing, is of little value in interpreting statutes'. In the words of Justice Holmes: 'A word is not a crystal transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances

> *and the time in which it is used.' Shorn of the context, the words by themselves are 'slippery customers'. Therefore, in determining the meaning of any word or phrase in a statute the first question to be asked is —'What is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase.' The context, as already seen, in the construction of statutes, means the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy."*

We will, therefore, have to interpret the word "wilful default" in the Master Circular by reading the Master Circular as a whole, looking at the provisions of the 1934 Act and the 1949 Act under which RBI has powers to issue circulars and instructions to the banks, the purpose for which the Master Circular was issued and the mischief that the Master Circular intends to remedy because these constitute the context and the subject-matter in which the definition of "wilful default" finds place in the Master Circular.

***50.** The Bombay High Court, on the other hand, has come to the conclusion in the impugned judgment that the Master Circular covers also a default in complying with the payment obligations under derivative transactions by relying on the language of not only the Master Circular dated 1-7-2009 but also of the Circulars issued by RBI on 8-8-2008, 13-10-2008, 29-10-2008, 9-4-2009 and 1-7-2010 which do not relate to wilful default but relate to prudential norms, assets classification as non-performing assets, etc. This approach of the Bombay High Court in interpreting the Master Circular, in our considered opinion, is also not correct because the subject-matter of these Circulars of RBI issued on 8-8-2008, 13-10-2008, 29-10-2008, 9-4-2009 and 1-7-2010 do not relate to wilful default but relate to prudential norms, assets classification as non-performing assets, etc. These circulars issued by RBI on 8-8-2008, 13-10-2008, 29-10-2008, 9-4-2009 and 1-7-2010 may have been issued by RBI but these are not circulars amending or clarifying the definition of "wilful default" in the Master Circular. The circulars issued by RBI on 8-8-2008, 13-10-2008, 29-10-2008, 9-4-2009 and 1-7-2010 on which the Bombay High Court has relied on while interpreting the definition of "wilful default" in the Master Circular do not constitute the context or the subject-matter in which the definition of "wilful default" in the Master Circular has to be construed. The context will only include pari materia circulars issued by RBI, but will not include circulars issued by RBI on subject-matters other than wilful default.*

51. On a reading of the paragraph in the Master Circular titled "Introduction", we find that pursuant to the instructions of the Central Vigilance Commission for collection of information on wilful defaults of Rs 25 lakhs and above, a scheme was framed by RBI with effect from 1-4-1999 under which the banks and notified all-India financial institutions were required to submit to RBI the details of the wilful defaulters. Hence, the Master Circular originated pursuant to the instructions of the Central Vigilance Commission and these instructions are contained in a communication dated 27-11-1998 of the Central Vigilance Commission on the subject "improving vigilance administration in banks". The instructions have been issued by the Central Vigilance Commission in exercise of its powers under Section 8(1)(h) of the Central Vigilance Commission Ordinance, 1998, whereunder it exercises superintendence over the vigilance administration of the various Ministries of the Central Government or Corporations established by or under any Central Act, Government Companies, societies and local authorities owned or controlled by the Central Government.*

52. Para 2.3 of the aforesaid instructions issued by the Central Vigilance Commission is extracted hereinbelow:

*"**2.3. Lack of communication between banks***

2.3.1. All cases of wilful default of Rs 25 lakhs and above will be reported by all banks to RBI as and when they occur or are detected.

2.3.2. Whether a matter is a case of wilful default will be decided in each bank by a Committee of Officers.

2.3.3. RBI will circulate the information received from the banks of wilful default, every three months. The data with RBI will also be accessible directly by the banks concerned after the WAN is installed in position.

2.3.4. There should be greater intra-bank communication about wilful default, frauds, cheating cases, etc. so that the same bank does not get exploited in different branches by the same defaulting parties."

53. It will be clear from the language of the aforesaid instructions issued by the Central Vigilance Commission that all cases of wilful default of Rs 25 lakhs and above were to be reported by all the banks to RBI as and when they occur or are detected and RBI was required to circulate the information received from the banks of wilful default every three months and there was to be greater intra-bank communication about the wilful defaults. These instructions of the Central Vigilance Commission covered "all cases of wilful default of Rs 25 lakhs and above" and were not confined to only wilful default by a borrower of his dues to the bank in a lender-borrower relationship. Thus, it will be clear from the aforesaid instructions of the Central Vigilance Commission that all cases of wilful default of Rs 25 lakhs and above were to be reported by the banks to RBI and not just cases of defaults by borrowers of loans or advances from banks and the mischief

that was sought to be remedied was that banks are not exploited by parties who have the capacity to pay their dues to the banks but who wilfully avoid paying their dues to the banks.

54. *Pursuant to the aforesaid instructions of the Central Vigilance Commission, RBI circulated a Scheme for Collection and Dissemination of Information on Cases of Wilful Default of Rs 25 lakhs and above which was to come into force with effect from 1-4-1999. Sub-para (ii) of the scheme in Para 2 of the Circular dated 20-2-1999 is extracted hereinbelow:*

*"**2. (ii)** The scheme will cover all non-performing borrowal accounts with outstanding (funded facilities and such non-funded facilities which are converted into funded facilities) aggregating Rs 25 lakhs and above."*

It will be clear from the language of sub-para (ii) of Para 2 of the scheme quoted above that the scheme was to cover not only funded facilities, but also non-funded facilities which are converted into funded facilities. Thus, the scheme relating to Collection and Dissemination of Information on cases of wilful default of Rs 25 lakhs and above was to cover not only loans and advances which are funded facilities, but also facilities which do not relate to loans and advances.

***55.** When we look at the Master Circular, we find that the purpose of the Master Circular is*

> *"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".*

Hence, the purpose of the Master Circular is to have a system to disseminate credit information pertaining to wilful defaulters amongst banks and financial institutions so that no further bank finance is made available to such wilful defaulters from such banks and financial institutions. The expression "credit information" has not been defined in the Master Circular, but has been defined in Section 45-A(c) of the 1934 Act as follows:

"45-A. (c) 'credit information' means any information relating to—

(i) the amounts and the nature of loans or advances and other credit facilities granted by a banking company to any borrower or class of borrowers;

(ii) the nature of security taken from any borrower or class of borrowers for credit facilities granted to him or to such class;

(iii) the guarantee furnished by a banking company for any of its customers or any class of its customers;

(iv) the means, antecedents, history of financial transactions and the creditworthiness of any borrower or class of borrowers;

(v) *any other information which the Bank may consider to be relevant for the more orderly regulation of credit or credit policy."*

It will be clear from the language of sub-clause (v) of Section 45-A(c) of the 1934 Act quoted above that "credit information" means not only any information relating to matters in sub-

clauses (i), (ii), (iii) and (iv), but also relates to any other information which the bank considers to be relevant for the more orderly regulation of credit or credit policy. Hence, "credit information" is not confined to information relating to a borrower of the bank, but may also relate to a constituent of the bank who intends to take some credit from the bank. The purpose of the Master Circular being to caution banks and financial institutions from giving any further bank finance to a wilful defaulter, credit information cannot be confined to only the wilful defaults made by existing borrowers of the bank, but will also cover constituents of the bank, who have defaulted in their dues under banking transactions with the banks and who intend to avail further finance from the banks.

56. *Keeping in mind the mischief that the Master Circular seeks to remedy and the purpose of the Master Circular, we interpret the words used in the definition of "wilful default" in Clause 2.1 of the Master Circular to mean not only a wilful default by a unit which has defaulted in meeting its repayment obligations to the lender, but also to mean a unit which has defaulted in meeting its payment obligations to the bank under facilities such as a bank guarantee. According to us the word "lender" in sub-clauses (a), (b), (c) and (d) means the "bank" because "payment obligations" mentioned in clause (a) do not ordinarily refer to obligations to a lender and clause (d) has used the expression "bank/lender". Moreover, the instructions of the Central Vigilance Commission pursuant to which the scheme relating to collection and dissemination of credit information on wilful defaulters was formulated by RBI were to cover "all cases of wilful defaults of Rs 25 lakhs and above". Also Clause 2.6 of the Master Circular states inter alia that in cases where a letter of comfort and/or the guarantees furnished by the companies within the group on behalf of the wilfully defaulting units are not honoured when invoked by the banks/financial institutions, such group companies should also be reckoned as wilful defaulters. It is, thus, clear that non-funded facilities such as a guarantee is covered by the Master Circular and when a guarantee is invoked by a bank/financial institution but is not honoured, the defaulting constituent of the bank is treated as a wilful defaulter even though it may not have borrowed funds from the bank in the form of advances or loans.*

57. *The scheme of collection and dissemination of information on cases of wilful default of Rs 25 lakhs and above was framed by RBI in the year 1999 when the derivative transactions were not part of the country's economy. Under the FEMA Regulations, 2000 only banks were authorised to deal with the derivative transactions. Section 45-V introduced along with other provisions of Chapter III-D in the 1934 Act by the Reserve Bank of India (Amendment) Act, 2006 declared that transactions in derivatives, as may be specified by RBI from time to time, shall be valid, if at least one of the parties to the transaction is the bank, a scheduled bank, or such other agency falling under the regulatory purview of RBI under the 1934 Act, FEMA Act or any other Act or instrument having the force of law, as may be specified by RBI from time to time. Derivative transactions in India thus were valid only if they were with any*

bank or any other agency falling under the regulatory purview of RBI because they would have a substantial bearing on the credit system and credit policy in respect of which RBI has regulatory powers under the 1934 and 1949 Acts. Such derivative transactions may not involve a lender-borrower relationship between the bank and its constituent, but dues by a constituent remaining unpaid to a bank may affect the credit policy and the credit system of the country. Information relating to defaulters of dues under derivative transactions who intend to take additional finance from the bank obviously will come within the meaning of "credit information" under Section 45-A(c)(v) of the 1934 Act.

***58.** We do not find force in the submission of Dr A.M. Singhvi that any information relating to a party who has defaulted in payment of its dues under derivative transactions cannot be disclosed by a bank to RBI or any other bank because of an implied contract between the bank and its customer or by Section 45-E of the 1934 Act.*

***59.** Sections 45-C and 45-E of the 1934 Act are extracted hereinbelow:*

*"**45-C. Power to call for returns containing credit information**.—(1) For the purpose of enabling the Bank to discharge its functions under this Chapter, it may at any time direct any banking company to submit to it such statements relating to such credit information and in such form and within such time as may be specified by the Bank from time to time.*

(2) A banking company shall, notwithstanding anything to the contrary contained in any law for the time being in force or in any instrument regulating the constitution thereof or in any agreement executed by it, relating to the secrecy of its dealings with its constituents, be bound to comply with any direction issued under sub-section (1).

* * *

*45-E. **Disclosure of information prohibited**.—(1) Any credit information contained in any statement submitted by a banking company under Section 45-C or furnished by the Bank to any banking company under Section 45-D shall be treated as confidential and shall not, except for the purposes of this Chapter, be published or otherwise disclosed.*

(2) Nothing in this section shall apply to—

(a) the disclosure by any banking company, with the previous permission of the Bank, of any information furnished to the Bank under Section 45-C;

(b) the publication by the Bank, if it considers necessary in the public interest so to do, of any information collected by it under Section 45-C, in such consolidated form as it may think fit without disclosing the name of any banking company or its borrowers;

(c) *the disclosure or publication by the banking company or by the Bank of any credit information to any other banking company or in accordance with the practice and usage*

customary among bankers or as permitted or required under any other law:

Provided that any credit information received by a banking company under this clause shall not be published except in accordance with the practice and usage customary among bankers or as permitted or required under any other law.

(d) the disclosure of any credit information under the Credit Information Companies (Regulation) Act, 2005 (30 of 2005).

(3) Notwithstanding anything contained in any law for the time being in force, no court, tribunal or other authority shall compel the Bank or any banking company to produce or to give inspection of any statement submitted by that banking company under Section 45-C or to disclose any credit information furnished by the Bank to that banking company under Section 45-D."

***60.** We have already held that information relating to a party who has defaulted in payment of its dues under derivative transactions to the bank is credit information within the meaning of Section 45-A(c)(v) of the 1934 Act. Sub-section (1) of Section 45-C of the 1934 Act provides that RBI may at any time direct any banking company to submit to it such statements relating to such credit information and in such form and within such time as may be specified by RBI from time to time. Hence, information relating to a party, who has defaulted in payment of its dues under derivative transactions being credit information may be called for from the banking company by RBI under sub-section (1) of Section 45-C of the 1934 Act. Sub-section (2) of Section 45-C of the 1934 Act further provides that the banking company shall, notwithstanding anything to the contrary contained in any law for time being in force or in any instrument regulating the constitution thereof or in any agreement executed by it, relating to the secrecy of its dealings with its constituents, be bound to comply with any direction issued under sub-section (1). Sub-section (1) of Section 45-E says that such credit information shall be treated as confidential and shall not be published or otherwise disclosed "except for the purposes of this Chapter", but sub-section (2)(a) of Section 45-E clearly provides that nothing in Section 45-E shall apply to the disclosure by any banking company, with the previous permission of RBI, of any information furnished to RBI under Section 45-C. Thus, confidentiality of any credit information either by virtue of any other law or by virtue of any agreement between the bank and its constituent cannot be a bar for disclosure of such credit information including information relating to a derivative transaction to RBI under sub-section (1) of Section 45-C.*

***61.** We do not also find any force in the submission of Mr Bhaskar P. Gupta that the Master Circular has penal consequences and, therefore, has to be literally and strictly construed. Clause 4.3 of the Master Circular, which contemplates criminal action by banks/financial institutions, is extracted hereinbelow:*

*"**4.3. Criminal action by banks/financial institutions**.—It is essential to recognise that there is scope even under the exiting legislations to initiate criminal action against wilful defaulters*

depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the Indian Penal Code (IPC), 1860. Banks/Fls are, therefore, advised to seriously and promptly consider initiating criminal action against wilful defaulters or wrong certification by borrowers, wherever considered necessary, based on the facts and circumstances of each case under the above provisions of IPC to comply with our instructions and the recommendations of JPC.

It should also be ensured that the penal provisions are used effectively and determinedly but after careful consideration and due caution. Towards this end, banks/Fls are advised to put in place a transparent mechanism, with the approval of their Board, for initiating criminal proceedings based on the facts of individual case."

All that the aforesaid Clause 4.3 of the Master Circular states is that there is scope even under the exiting legislations to initiate criminal action against wilful defaulters depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the Penal Code, 1860 and the banks and financial institutions are strictly advised to seriously and promptly consider initiating criminal action based on the facts and circumstances of each case under the above provisions of IPC. Thus, the Master Circular by itself does not have penal consequences, whereas Sections 403 and 415 IPC have penal consequences. The provisions of Sections 403 and 415 IPC obviously have to be strictly construed as these are penal provisions and will get attracted depending on the facts and circumstances of each case, but the provisions of the Master Circular need not be strictly construed. As we have held, the Master Circular has to be construed not literally but in its context and the words used in the definition of "wilful defaulter" in the Master Circular have to draw their meaning from the context in which the Master Circular has been issued.

***62.** We are also not impressed with the argument of Mr Soli J. Sorabjee that the Master Circular contemplates grave consequences affecting the right of a person under Article 19(1)(g) of the Constitution of India to carry on any trade, business or occupation and should be strictly construed as otherwise it will be exposed to the challenge of unconstitutionality. No challenge was made by the writ petitioners before the Bombay High Court to the constitutionality of the Master Circular and the challenge by the writ petitioners before the Calcutta High Court was to the constitutionality of only Clause 3 of the Master Circular relating to the grievance redressal mechanism. Hence, we are not called upon to decide in these appeals whether the Master Circular violates the right of a person under Article 19(1)(g) of the Constitution of India. Similarly, we cannot consider in these appeals, the contention raised by Dr A.M. Singhvi that the Master Circular has the effect of blacklisting a bank's client and would, therefore, be arbitrary and violative of Article 14 of the Constitution. In these civil appeals, we are concerned with the interpretation of the Master Circular and on interpretation of the Master Circular, we find that the Master Circular covers not only wilful defaults of dues by a borrower to the bank but also covers wilful defaults of dues by a client of the bank under other*

banking transactions such as bank guarantees and derivative transactions.

***63.** In the result, we hold that wilful defaults of parties of dues under a derivative transaction with a bank are covered by the Master Circular and this we hold not because RBI wants us to take this view, because this is our judicial interpretation of the Master Circular. The impugned judgment[1] of the Calcutta High Court is set aside and the impugned judgments of the Bombay High Court are sustained. We make it clear that we have not expressed any opinion on the individual transactions between the bank and the parties and our judgment is based solely on the interpretation of the Master Circular. Accordingly, the appeal filed by Kotak Mahindra Bank Ltd. against the judgment of the Calcutta High Court is allowed and the appeals filed against the judgment of the Bombay High Court by different parties are dismissed. The parties, however, shall bear their own costs.*

21. In view of the above, it is clear that the Bank paid the amount to the foreign exporters for the purchase of machinery by the petitioner. The petitioner is legally bound to repay this amount to the Bank therefore, even if, the loan amount or the fund was not directly disbursed in the petitioner's current account but it was directly paid to the exporters on behalf of the petitioner by the respondent – Bank. Hence, the relationship of lenders and borrower has been established between petitioners and respondent No.1/bank . Since, the petitioners have defaulted in meeting its repayment obligation to the respondent no1./bank even when it has a capacity to pay therefore, rightly invited findings in respect of wilful default. The company was having the equity share of Rs.103.43 Crores, and out of which withdrew the Rs.54.22 Crores equity share without honouring its commitments under the letters of credit opened by to respondent No.1/bank . Therefore, under

2.1.3(c) the petitioners have rightly been categorized as 'wilful defaulter'.

22. So far the issue of opportunity of personal hearing through advocate is concerned a coordinate Bench of this court in the case of Surender (supra) has already held that the borrower is not having right to be represented through lawyer/advocate under the master circular. As per clause 3.(b) the personal hearing is available only to borrower Director and Promoter of the alleged default unit. The identification committee is neither a court nor a tribunal. Therefore, I have no reason to take a different view as taken by the coordinate bench of this court in the case of Surender (supra). Even otherwise, the similar issue is also pending before the Div. Bench of this court as well as the Apex .

23. So far the opportunity of hearing by review committee is concerned, same is not provided in clause 3 of master circular. The mechanism is provided for identification of 'wilful defaulter' by the identification committee. The order passed by committee is liable to be reviewed by another committee headed by superior officer named as review committee. Therefore, the RBI has decided to provide double check system by two levels of authorities before declaring any unit as 'wilful defaulter'. Since the review committee has affirmed the stand taken by identification committee therefore, opportunity of hearing is not required. It is not like remedy of appeal to the default unit. If the identification

committee does not pass any order declaring the borrower as 'wilful defaulter' then, review committee did not be setup to review such type of decision. It means the role of review committee is only to cross-check the decision of identification committee before declaring borrower as 'wilful defaulter' otherwise, a right would have been given to Bank also to apply for review before the review committee in case, identification committee does not pass an order declaring the borrower as 'wilful defaulter' .Hence, this contention raised by the petitioners is also not having any substance. Hence same is liable to be rejected.

24. By impugned communication dt.23.10.2018, the name of the petitioner has been forwarded to CIC.So far the offer of One Time Settlement is concerned, the Bank has already initiated the proceeding for recovery before DRT, Jabalpur. If the petitioners are really serious for settlement dispute with the respondents – Bank then they may submit an offer before the DRT in a pending proceeding for which no direction is required from this court. The petition is accordingly, dismissed.

No order as to cost.

(VIVEKRUSIA)

JUDGE

SS/-

HIGH COURT OF M.P. BENCH AT INDORE

W.P. No.27421/2018

26.2.2019

Shri S.C. Bagadiya, learned Senior Advocate with Shri Jerry Lopez, Advocate for the petitioners.

Shri A.K. Sethi, learned Senior Advocate with Shri R.C. Singhal, Advocate for respondents.

Heard.

Reserved for orders.

(VIVEK RUSIA)
JUDGE

W.P. No.27421/2018

11.03.2019

Order passed separately, signed and dated.

(VIVEK RUSIA)
JUDGE

SS/-

HIGH COURT OF M.P. BENCH AT INDORE

W.P. No.27421/2018

REVATI CEMENTS PVT. LTD & ANR.

VERSUS

STATE BANK OF INDIA & ORS.

Order post for 11.03.2019

(VIVEK RUSIA)

JUDGE