IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/LETTERS PATENT APPEAL NO. 596 of 2022
In R/SPECIAL CIVIL APPLICATION NO. 2518 of 2022
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/LETTERS PATENT APPEAL NO. 596 of 2022
With
R/LETTERS PATENT APPEAL NO. 597 of 2022
In SPECIAL CIVIL APPLICATION NO. 2943 of 2022
With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2022
In R/LETTERS PATENT APPEAL NO. 597 of 2022
In SPECIAL CIVIL APPLICATION NO. 2943 of 2022

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KIRTILAL RAVCHANDBHAI SANGHAVI
Versus
RESERVE BANK OF INDIA

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Appearance:
MR DEVEN PARIKH, SENIOR ADVOCATE WITH MR SHAKTI S JADEJA(5491) for the Appellant(s) No. 1,2,3,4,5,6,7,8
MR SP MAJMUDAR(3456) for the Appellant(s) No. 1,2,3,4,5,6,7,8
MR BH BHAGAT(153) for the Respondent(s) No. 2
RULE SERVED for the Respondent(s) No. 1

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CORAM:**HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR**
and
HONOURABLE MR. JUSTICE ASHUTOSH J. SHASTRI

Date : 02/01/2023
COMMON CAV JUDGMENT
(PER : HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR)

1. In these intra-court appeals the order dated 10.02.2022 passed in Special Civil Application No.2518 of 2022 is under challenge whereunder the learned Single Judge has dismissed the Special Civil Application and affirmed the impugned orders dated 01.09.2021

(Annexure-N) passed by second respondent, order dated 02.02.2021 (Annexure-L), notices / communications dated 18.09.2021/ 28.08.2020 (Annexure-O) issued by second respondent.

BRIEF BACKGROUND OF THE CASE :

2. Parties are referred to as per their rank before the learned Single Judge. Petitioners are the Ex-Directors of Sanghavi Exports International Private Limited (at present under liquidation) which was then engaged in the business of manufacturing and export of cut and polished diamond and diamond studded jewellary. Said company had availed certain financial facilities from the group of consortium members wherein the Bank of India was the lead bank and second respondent was one of the consortium member. Said company defaulted in repayment of loans and came to be classified as a Non-performing Asset (NPA) by the second respondent. Second respondent has initiated recovery proceedings before the Debt Recovery Tribunal for recovery of dues

by filing an application under Section 19 of DRT Act. The lead bank has initiated proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short) which is said to have been challenged by the petitioners before the Debt Recovery Tribunal, Ahmedabad.

3. The lead bank also initiated insolvency proceedings before National Company Law Tribunal (NCLT) which ordered for liquidating the borrower company and Liquidator came to be appointed. Again the lead bank is said to have initiated proceedings under the SARFAESI Act calling upon the borrower to repay the outstanding amount of 822.30 Crores and challenge to said action is said to be now pending before the Debt Recovery Tribunal-II, Ahmedabad.

4. Second respondent has issued a show cause notice dated 28.08.2020 to petitioners and others as to why the names of petitioners should not be included in

the list of 'Willful Defaulters' as per Reserve Bank of India (for short 'RBI') guidelines. There were exchange of communications pursuant to the said show cause notice between the parties and after affording personal hearing, order dated 02.02.2021 (Annexure-L) came to be passed. Second respondent declared the petitioners as 'Willful Defaulters' on the grounds mentioned in the show cause notice. Fifteen days time was granted to the petitioners to have their further submission – representation for consideration by Review Committee on Willful Defaulters ('WDRC', for short). Accordingly, petitioners submitted a representation dated 15.02.2021 reiterating the reply given to the show cause notice and relied upon its earlier representations. Thereafter, respondent No.2 by order dated 01.09.2021 has confirmed the decision of WDC and declared the petitioners as Willful Defaulters. Pursuant to the same, petitioners have been called upon to pay the outstanding amount to the second respondent bank within 15 days failing petitioners were informed that bank would proceed to publish the names, photographs

and other details of petitioners in the newspapers/magazines.

5. Being aggrieved by the same, Special Civil Application came to be filed and as already observed hereinabove same has been dismissed by the learned Single Judge by arriving at a conclusion that there was breach of both clauses of the circular dated 01.07.2015 issued by RBI namely Clause 2.2.1 (c) and (d) by the petitioners. It has been further held that while exercising the jurisdiction under Articles 226 and 227 of the Constitution of India, the writ Court would not sit in appeal over the findings of fact arrived at by WDIC or WDRC and hence, held that the impugned orders did not warrant interference. Hence, these intra-court appeals.

6. We have heard the arguments of Shri Deven Parikh, learned Senior Counsel appearing for appellants. Respondent No.1 is served and unrepresented. Shri B.H.Bhagat, learned advocate has addressed the arguments on behalf of second respondent.

7. It is the contention of Shri Deven Parikh, learned Senior Counsel appearing for the writ applicants that learned Single Judge having arrived at a conclusion that WDIC has not assigned any reason in the order dated 02.02.2021, ought not to have dismissed the Special Civil Application on the ground of said Committee having considered all submissions of the writ applicants and having assigned reasons for declaring the writ applicants as willful defaulters. He would also contend that as per the mandate of Clause 3(a) and 3(b) of the RBI circular, there should have been evidence on record to show 'Willful Defaulter' on the part of the borrowing company and WDIC ought to have recorded the fact of willful defaulter and only after recording the same could have been reviewed by the Review Committee. Hence, contending that order of WDIC is itself not in consonance with the guidelines issued by RBI, same ought to have been quashed. He would further contend that order dated 02.02.2021 is in violation of principles of natural justice inasmuch as the said order refers to the audit reports of

M/s.Deloitte and M/s.Amit Ray and Co., the copies of which though demanded by the writ applicants were never furnished. He would also contend that RBI circular dated 01.07.2015 mandates two stages to be followed by the authorities namely (a) the role of Identification Committee by declaring the noticee as a defaulter by passing a reasoned order and (b) approval of the said order by the Review Committee also by a considered order which according to him are lacking in the instant case. He would submit that willful default has been defined under the circular and 2nd respondent ought to have examined the objections filed by petitioners and this precise exercise ought to have been undertaken by the Identification Committee and same having not been undertaken has resulted in a prejudicial order being passed and as such its reviewing by the WDRC is an empty formality and would not serve any purpose. He would submit, had WDIC assigned reasons, the consequential question would have arisen before the WDRC to review the said reasoning by evaluating the

same and in the instant case said exercise having not been undertaken by WDIC for want of reasons having not been assigned by it, question of reviewing a non-reasoned order had not arisen at all.

8. He would also submit that show cause notice dated 28.08.2020 though speaks of diversion of funds and by relying upon two audit reports which undisputedly had not been furnished to petitioners though sought for has resulted in impugned orders being passed by WDIC and WDRC which are liable to be quashed. Even otherwise, said audit reports would disclose about the outstanding amounts to be received by petitioners and it does not say a word about any diversion of funds having been carried out. Hence, he prays for appeals being allowed. In support of his submissions, he has relied upon the following judgments :

(i) Natwar Singh vs. Director of Enforcement and another, reported in **(2010) 13 SCC 255.**

(ii) State Bank of India vs. Jah Developers Private Limited, reported in **2019 AIJEL-SC 64236.**

9. Per contra, Shri B.H.Bhagat, learned advocate appearing for second respondent would support the impugned orders and he would contend that second respondent has followed the mechanism as provided in the master circular before arrived at conclusion that petitioner has to be declared as “Willful Defaulter”. He would contend that show cause notice was followed by personal hearing notice and after extending opportunity, considering the replies submitted by petitioners, a detailed order has been passed by the WDIC which eventually was reviewed by the WDRC after extending personal hearing on various occasions which had culminated in the order being passed on 29.06.2021 (Annexure-N). He would submit that order of WDIC would become final only upon confirmation by WDRC and there is no procedural irregularity committed as sought to be made out by petitioners.

10. He would also submit that petitioners are squarely covered by the provisions of Clauses 2.1.3 (b), 2.1.1 (c) and 2.2.1 (d) of master circular dated 01.07.2015 and would draw the attention of the Court to the order of WDRC which clearly culls out and refers to breach of both the clauses of circular namely diversion and transferring of funds and routing of funds which was based on the forensic audit reports. Hence, he would submit that there is no error committed by the authorities and prays for dismissal of the appeals.

11. Having heard the learned advocates appearing for the parties and after bestowing our careful and anxious consideration to the rival contentions raised at the Bar, we are of the considered view that following points would arise for our consideration :

(i) Whether the order dated 02.02.2021 passed by Willful Defaulter Identification Committee – WDIC is liable to be set aside on any grounds including the ground of violation of principles of natural justice ?

OR

Whether the order dated 02.02.2021 is liable to be set aside on the ground of violation of principles of natural justice?

(ii) Whether the order passed by the Willful Defaulters Review Committee – WDRC dated 29.06.2021 (Annexure-N) suffers from any infirmity either in law or on facts calling for our interference?

(iii) What order ?

RE : POINT NO.1 :

12. At the outset, it requires to be noticed that thrust of the arguments advanced on behalf of the writ applicants is to the effect that order dated 02.02.2021 passed by WDIC vide Annexure-L is to be quashed on the ground that said order was not preceded by a show cause notice dated 28.08.2020 (Annexure-E) under which the second respondent refers to the report of M/s.Deloitte as well as M/s.Amit Ray and Co. has been referred to and despite a demand being made by the petitioners seeking copies of the reports by communication dated

10.09.2020, same has not been furnished and as such, all consequential proceedings are liable to be quashed as it was in violation of principles of natural justice.

13. There cannot be any dispute with regard to the proposition that when an authority intends to pass an order against a person who is likely to be aggrieved or affected, such person cannot be condemned or found fault with unless extended a fair opportunity of hearing. Natural justice or fair administrative procedure is regarded as an important procedural safeguard against an undue exercise of such power by the administration.

14. The Hon'ble Apex Court in the matter of **Union of India and another vs. Tulsiram Patel and others**, reported in **AIR 1985 SC 1416** has held that natural justice has assumed significance in modern administration process and held them as 'foundational and fundamental concepts' which are part of legal and judicial procedures. Natural justice is mainly the procedural concept. If an action of the authority is

contrary to the doctrine of *audi alteram partem,* such act would be frowned upon. The whole edifice is built upon the well-known adage that no one may be condemned unheard. It is the fundamental principle that a person against whom some action is proposed to be taken, or whose right or interest is going to be affected adversely, ought to be given a reasonable opportunity to defend himself. Procedural fairness is thus regarded as an integral element of administrative process. The principle of natural justice also gives a sense of participation to the concerned person in administrative decision making which can by itself be justified as democratic value. Natural justice also serves as a means of making agencies accountable. If a hearing has been extended to the affected person, the adjudicating authority would be in a better position to review the administrative action. Keeping these principles in mind when we turn our attention to the facts on hand, it would indicate that as per the circular dated 01.07.2015 (Annexure-P), the Reserve Bank of India has issued the said circular to

disseminate credit information pertaining to willful defaulters for cautioning banks and financial institutions so as to ensure that further bank finance is not made available to such of those persons who are to be declared as willful defaulters. The guidelines issued under such circular are required to be followed by the authorities in its letter and spirit.

15. The Hon'ble Apex Court in the case of **State Bank of India vs. Jah Developers Private Limited (supra)**, while examining the issue as to whether a lawyer has any right under Section 30 of the Advocates Act, 1961, to appear before the In-house Committee as mentioned in the extant circular after having held that no right is vested in a lawyer in the In-house proceedings contained in the revised circular dated 01.07.2015 (Annexure-P herein). After having considered various clauses of the circular, it has been held :

> *"21. 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 paragraph 3 of the*

Revised Circular dated 01.07.2015, as it is clear that the events of wilful default as mentioned in paragraph 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 anybank/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 29A 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 paragraph 3 of the Master Circular dated 01.07.2013 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 paragraph 3(b) of the Revised Circular dated 01.07.2015, 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 01.07.2013 itself considered such steps to be reasonable, we incorporate all these steps into the Revised Circular dated 01.07.2015. The impugned judgment is, therefore, set aside, and the appeals are allowed in terms of our judgment. We thank the learned Amicus Curiae, Shri Parag Tripathi, for his valuable assistance to this Court."

16. In the show cause notice dated 28.08.2020 issued to the petitioners, it has been notified to the following effect :

"Diversion of funds :

The unit has defaulted in meeting its payment – repayment obligations to the lender and has not utilized the finance

from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purpose."

17. To arrive at the aforesaid conclusion, it has referred to the reports of M/s.Deloitte as also the report of M/s.Amit Ray and Co.

18. Insofar as second ground on which the second respondent has proposed to declare the petitioners as willful defaulters is on the ground of "routing of funds through any bank other than the lender bank or members of consortium without prior permission of the lender". The prime grievance of the learned Senior Counsel appearing for the petitioners is that the said show cause notice refers to two audit reports and immediately on receipt of the show cause notice, petitioners by their reply dated 10.09.2021 had sought for copies of the said two reports which undisputedly has not been furnished till date and as such, the order of WDIC is in violation of principles of natural justice. In reply dated 15.02.2021

(Annexure-M) submitted on behalf of the petitioners the very same petitioners have commented on the forensic audit reports. To cut short further dwelling or discussion of this aspect, it would suffice to extract the very reply submitted by the petitioners themselves namely reply dated 15.02.2021 (Annexure-M) wherein at paragraph-3 they have stated to the following effect :

> ***"3. <u>On forensic audit</u> :***
>
> *(i) Your bank has got the forensic audit conducted, twice. No other bank, under consortium arrangement, including the lead bank, had then instructed for forensic audit. You have cited two reports on the forensic audits, by M/s.Deloitte and M/s.Amit Ray & Co. who submitted reports on 18.07.2017 and 22.05.2020, respectively. We advise that*
>
> *(a) xxxxx*
>
> *(b) xxxxx*
>
> *(i) xxxxx*
>
> *(ii) xxxxx*
>
> *(iii) Vide Criteria No. 2.2.1 (c), as stated vide your letter under reference, on willful default, regarding transferring of funds to subsidiaries/ group companies, we say that both the forensic*

auditors have stated different observations. The observations have been conclusively replied vide individual representation dated 12-01-2021 which form an integral part of our present reply. The credits as stated in the report dated 18-07-2017, pertain to payments for raw diamonds and raw gold. Since, after classification of account as NPA on 31-12-2015, by your bank, the operations in the account with your bank, were curtailed, by default and operations were carried out with other banks/ lending institutions, to continue business transactions. It appears that the forensic auditor, could not have access to the operations with other banks/ lending institutions. The alleged credits pertain to forex transactions, could not evade exposure in the books of account/ statements. The facts have since been submitted vide representations dated 12-01-2021."

19. There is discussion with reference to two audit reports and petitioners have tried to find fault with said audit reports by going into merits of the audit reports. As such, it is too late in the day for petitioners to contend that they were not aware of the reports or in other words, non-furnishing of the audit reports had prejudiced their defense. It is only an afterthought and raised to stave off the proceedings initiated by the second respondent under

which they had expressed intention to declare petitioners as willful defaulters. By supplying these reports afresh for being commented upon by the petitioners would not have altered the position nor would have changed the line of defense of petitioners. There may be situations wherein for some reason – perhaps because the evidence against the individual is thought to be utterly compelling, it is felt that a fair hearing "would make no difference" - meaning that hearing would not change the conclusion reached by the decision maker – then no legal duty to supply a hearing arises. This approach was endorsed by Lord Wilberforce in **Malloch vs. Aberdeen Corporation** reported in **(1971) 2 ALL ER 1278 (HL)**, whereunder it was held '*breach of procedure... cannot give rise to a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court dos not act in vain*'.

20. The aforesaid comments were relied upon by Brandon (L) Justice in **Cinnamond v. British Airports Authority – (1980) 2 All ER 368 (CA)** and held :

> *" ... no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."*

In such situations, fair procedure appears to serve no purpose since 'right' result can be secured without according such treatment to the individual.

21. Thus, what can be deduced from the aforesaid analysis would be that every violation of a facet of natural justice may not lead to a conclusion that order passed is always null and void. The validity of the order has to be decided on the touchstone of 'prejudice'. The ultimate test is always the same i.e. the test of prejudice or the test of fair hearing. The Hon'ble Apex Court in **ECIL vs. B. Karunakar – (1993) 4 SCC 727,** while summing up the discussion and answering various questions posed therein, had to say qua the prejudice principle as under:

> *"30. Hence the incidental questions raised above may be answered as follows:*

xx xx xx

(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non- furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to

> *stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."*

22. Thus, in all cases of non-furnishing of the copies whenever demanded which would not result in prejudice would not find favour for such order being set aside on the premise of natural justice having been violated. In such circumstances, it would also not warrant remanding of the matter to the authorities for redoing the exercise as it would be an empty formality and would serve no purpose and parties would be back to square one. As to whether any purpose would be served in remanding the case, this Court will have to keep in mind whether any prejudice is caused to the person against whom the action is taken. This has been answered in **B. Karunakar's** case (supra) by the Hon'ble Apex Court in the following terms :

> *"31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary*

proceedings, the Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the Court/ Tribunal and given the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/ Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as it regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment."

23. Keeping the aforesaid principles in mind, it will have to be examined when there is an infraction of principles of natural justice is alleged it will have to be

examined as to whether any purpose would be served in remitting the case to the authority to pass fresh orders after furnishing the copies. However, said situation does not arise at all in the instant case. *Firstly,* the copies of the audit reports were very much available with the petitioners and petitioners themselves have delved upon these reports in their reply submitted to the show cause notice and as such the boogie of violation of principles of natural justice raised by the petitioners on the ground of non-furnishing of copies referred to in the impugned order has resulted in great prejudice is liable to be considered only for the purposes of outright rejection and we do so. *Secondly,* we notice that copies of the said two audit reports was very much in the know-how of the petitioners and particularly when petitioners themselves have dealt with in detail in their reply submitted to the second respondent. Admitting for a moment that copies of audit reports ought to have been furnished to the petitioners on demand being made by them and on account of non-furnishing the same has resulted in

violation of principles of natural justice and consequently, matter has to be remanded back to the authorities is an argument, which cannot be accepted in the instant case as it would only be an empty formality and would serve no fruitful purpose since petitioners were fully aware of the contents of the report. In other words, the doctrine of '*useless formality theory*' would surface, which aspect has received the consideration of the Hon'ble Apex Court in the case of **M.C.Mehta vs. Union of India – (1999) 6 SCC 237**, and held to the following effect :

> "22. Before we go into the final aspect of this contention, we would like to state that case relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case-law and literature as to whether relief can be refused even if the court thinks that the case of the applicant is not one of `real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed. See Malloch v. Aberdeen Corpn., (per Lord Reid and Lord Wilberforce), Glynn v. Keele University, Cinnamond v. British Airports Authority and other cases where such a view has been held. The latest addition to this view is R. v. Ealing Magistrates. Court, ex p. Fannaran, (Admn. LR at p. 358) (See de

Smith, Suppl. P.89) (1998) where Straughton, L.J. held that there must be `demonstrable beyond doubt' that the result would have been different. Lord Woolf in Lloyd v. McMohan, (WLR at p. 8620 has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in McCarthy v. Grant, however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is `real likelihood-not certainty- of prejudice.' On the other hand, Garner Administrative Law (8th Edn. 1996. pp.271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from Ridge v. Baldwin, Megarry, J. in John v. Rees, stating that there are always `open and shut cases. and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authority to consider. Ackner, J has said that the `useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that `convenience and justice are often not on speaking terms' More recently, Lord Bingham has deprecated the `useless formality theory' in R. v. Chief Constable of the Thames Valley Police Forces, ex p. Cotton by giving six reasons (see also his article `Should Public Law Remedies be Discretionary?" 1991 PL. p.64). A detailed and emphatic criticism of the `useless formality theory. has been made much earlier in `Natural Justice, Substance or Shadow' by Prof. D.H. Clark of Canada (see 1975 PL.pp.27-63) contending that Malloch (supra) and Glynn (supra) were wrongly decided. Foulkes (Administrative Law, 8th Edn. 1996,

p.323), Craig (Administrative Law, 3rd Edn. P.596) and others say that the court cannot prejudge what is to be decided by the decision-making authority. De Smith (5th Edn. 1994, paras 10.031 to 10.036) says courts have not yet committed themselves to any one view though discretion is always with the court. Wade (Administrative Law, 5th Edn. 1994, pp.526-30) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove a `real likelihood' of success or if he is entitled to relief even if there is some remote chance of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their `discretion', refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in State Bank of Patiala v. S.K. Sharma, and Rajendra Singh v. State of M.P., that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived."

24. In that view of the matter, Point No.1 deserves to be answered against the writ applicants and in favour of respondent No.2.

RE : POINT NO.2 :

25. The Circular dated 01.07.2015 issued by the Reserve Bank of India describes 'Willful Default' under Clause 2.1.3 as under :

> *"**2.1.3 Wilful Default**: A 'wilful default' would be deemed to have occurred if any of the following events is noted :*
>
> *(a) The unit has defaulted in meeting its payment/repayment obligations to the lender even when it has the capacity to honour the said obligations.*
>
> *(b) 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 for the purpose of securing a term loan without the knowledge of the bank/lender.

The identification of the wilful default should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/ incidents. The default to be categorized as wilful must be intentional deliberate and calculated."

26. Clause 3 of the Circular describes the mechanism for identification of the Willful Defaulters. It reads :

"3. Mechanism for identification of Wilful Defaulters :

The mechanism referred to in paragraph 2.5 above should generally include the following :

(a) The evidence of wilful default on the part of the borrowing company and its promoter / whole-time director at the relevant time should be examined by a Committee headed by an Executive Director or equivalent and consisting of two other senior officers of the rank of GM / DGM.

> *(b) If the Committee concludes that an event of wilful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the promoter / whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of wilful default and the reasons for the same. An opportunity should be given to the borrower and the promoter / whole-time director for a personal hearing if the Committee feels such an opportunity is necessary.*
>
> *(c) The order of the Committee should be reviewed by another Committee headed by the Chairman / Chairman & Managing Director & Chief Executive Officer / CEOs and consisting, in addition, to two independent directors / non-executive directors of the bank and the order shall become final only after it is confirmed by the said Review Committee. However, if the Identification Committee does not pass an order declaring a borrower as a wilful defaulter, then the Review Committee need not be set up to review such decisions. xxx xxx xxx"*

27. The order of the Willful Defaulter Identification Committee dated 02.02.2021 has already been upheld by us while answering / adjudicating Point No.1 formulated hereinabove. To arrive at a conclusion that the writ

applicant unit had defaulted in meeting its payment/repayment obligations to the lender and had not utilized the finance from the lender for the specific purposes for which finances were availed but had diverted the funds for other purposes had noticed that out of 16 entities accounts for Rs.609.59 Crores as against the total debtors of Rs.708.23 Crores and the said Rs.609.59 Crores are related to associated companies. It has been further noted that on analysis of bank statements it was observed that Rs.22.03 Crores were paid to Crystal Gems (HK) Limited, Rs.17.14 Crores paid to Radiant Exports, Rs.29.88 Crores was paid to Smile Jewellery LLC and Rs.2.34 Crores was paid to Sanghavi Diamonds Inc. (NY) and none of these four entities had appeared in the Monthly Creditors Statements. It was also noticed that the outstanding balances from the four related or associated parties was to the tune of Rs.609.59 Crores and no legal action was taken by the company in respective countries for recovery of the said amounts. For these reasons as more fully described in the order dated

02.02.2021, there has been an order passed declaring the petitioners namely writ applicant as willful defaulters. A perusal of Clause 3(b) of the Circular dated 01.07.2015 referred to hereinabove would indicate that if the WDIC were to conclude that an event of willful default has occurred, it is required to issue a show cause notice to the borrower and the Promoters/Whole-Time Director and after calling for their submissions and after considering their submissions issue an order recording the fact of willful default and the reasons for the same. As could be noticed from the order dated 02.02.2021, the reasons have been assigned after considering the submissions of the concerned borrower and the Promoter/Director. Hence, it cannot be gainsaid by petitioner that there has been no reason assigned in the order passed for declaration of Willful Defaulter. In this background, we are not inclined to subscribe to the view or opinion expressed by the learned Single Judge under the impugned order dated 10.02.2022 passed in Special Civil Application No.2518 of 2022. Be that as it may. The

learned Single Judge in the same breath has further concluded that the Review Committee has considered all the submissions of the petitioners and has assigned reasons for declaring the petitioners as Willful Defaulters. In fact, this view also gets support from the judgment of the Hon'ble Apex Court in the case of **State Bank of India vs. Jah Developers Private Limited (supra),** whereunder it has been held to the following effect :

> *"21. 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 paragraph 3 of the Revised Circular dated 01.07.2015, as it is clear that the events of wilful default as mentioned in paragraph 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 29A 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 paragraph 3 of the Master Circular dated 01.07.2013 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 paragraph 3(b) of the Revised Circular dated 01.07.2015, 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 xxx xxx xxx valuable assistance to this Court."

28. In the aforesaid background, when the order of the Review Committee – WDRC dated 29.06.2021 (Annexure-N) is perused, it would clearly indicate that on the observations of WDRC the response of the Promoters/ Directors/Guarantors of the company has been considered and it has been found as under :

RE : DIVERSION OF FUNDS :

28.1 The four entities mentioned are related/associate companies and the transactions have not been submitted by the company. There are no justifiable reason for non-recovery of huge amount from company's own related/associate companies. Merely because the said debtors have suffered due to genuine business loss overseas or due to adverse economic conditions being the genuine reason for inaction namely not initiating legal action was held to be reply not being satisfactory.

RE: ROUTING OF FUNDS :

28.2 The Review Committee has found that the company had admitted maintaining accounts with the banks outside consortium though it had admitted that as per the sanctioned terms the company ought to have routed all its transactions through consortium lenders including the second respondent and no permission/consent of consortium lenders had been obtained for operating such accounts. In this background, the justification made by the promoters/ directors/guarantors of the company that due to classification of account as NPA by the consortium banks, it had routed its business transactions with other banks and continued the business operations as not being satisfactory.

29. This Court while exercising the jurisdiction under Article 226 of the Constitution of India could not be in a position to act as an expert body, sitting in the armchair of the financial experts as to what should have been the business prudence cannot be the subject-matter

of judicial scrutiny. We are of the considered view that the conclusion reached by the experts particularly in the field of finance and banking cannot be substituted with our views. The interference in such matters, in writ jurisdiction would not be called for unless it is demonstrably perverse or illegal or contrary to admitted facts. If the impugned decision is tested on the touchstone of reasonable person examining the plea of the debtor from the point of view of lender then such decision arrived at by the Review Committee cannot be substituted with the view of this Court. The reasons assigned by the Promoters/Directors/Guarantors of the company has been held to be as not satisfactory by the second respondent, a member of the consortium of lenders and said view cannot be substituted with the view of this Court by examining the same on merits also would not detain us for too long to brush aside the contention of the learned Senior Counsel appearing for the petitioner. Hence, point No.2 is answered in the negative or in favour of the respondent.

RE : POINT NO. 3 :

30. For the reasons aforestated, we proceed to pass the following

ORDER

(i) Letters Patent Appeal Nos.596 of 2022 and 597 of 2022 are hereby dismissed.

(ii) The order dated 10.02.2022 passed in Special Civil Application No.2518 of 2022 is hereby affirmed subject to the observations made by us hereinabove insofar as the finding recorded at paragraph-27.

(iii) Civil Application Nos.1 of 2022 in both appeals stand dismissed as they do not survive for consideration.

(iv) Costs made easy.

(ARAVIND KUMAR, CJ)

(ASHUTOSH J. SHASTRI, J)

GAURAV J THAKER