Jagdish Prasad Saboo Vs IDBI Bank Limited

Court: Gujarat High Court

Date of Decision: March 27, 2023

Acts Referred: Constitution Of India, 1950 â€" Article 226
Insolvency And Bankruptcy Code, 2016 â€" Section 14, 14(1)(d), 81, 85, 94, 95, 96, 100, 101
Negotiable Instruments Act, 1881 â€" Section 138

Hon'ble Judges: A.S. Supehia, J

Bench: Single Bench

Advocate: Aditya A Gupta, Mohit A Gupta, BH Bhagat

Final Decision: Dismissed

Judgement

A.S. Supehia, J

1. In the present writ petition, the petitioner, being aggrieved of the order dated 12.05.2022 passed by the Wilful Defaulter Identification Committee

(WDIC), order dated 30.08.2022 passed by the Wilful Defaulter Review Committee (WDRC) and also the impugned communication dated

16.05.2022, by which the petitioner is declared Ã¢â‚¬Å“Wilful DefaulterÃ¢â‚¬ has been assailed. Thus, the petitioner is assailing the action of declaring him as

a Wilful Defaulter.

2. The respondent-IDBI Bank Limited is a part of consortium of the banks being Canara Bank, Bank of Baroda, including E-Dena Bank, Andhra

Bank (now Union Bank of India) and IDBI Bank. The consortium of the banks is led by Canara Bank. The petitioner was the Director of a Company

Surya Exim Ltd. (SEL), which was incorporated in the year 28.06.1989 and was engaged in the business of trading, including grading of various items

like graded non-coking steam coal, POY chips, POY/FDY Yarn, Pet Films etc. Earlier it was known as Prestige Marketing Limited and later, the

name was changed to Surya Exim Limited (SEL) from 13.09.2002. Due to inadequate cash-flows, on account of non-realization of trade receivables,

the account of the company - SEL turned into a Non-Performing Asset (NPA) in the books of various consortium members banks, including the

respondent-Bank. Such account of the petitioner was declared as NPA by the consortium members in the month of August 2019, more particularly by

the respondent-IDBI on 18.08.2019. The account of SEL was red-flagged on 09.10.2019 and internal investigation was carried out by Canara Bank

and an internal investigation report dated 13.02.2020 was made by the consortium. The Forensic Auditor was appointed by Canara Bank to carry out

a forensic audit of the account of SEL. After such audit was carried out, Forensic Audit Report (FAR) was issued on 08.07.2020, which was

conducted by SKVM & Co. A show-cause notice dated 28.05.2021 was issued by the respondent-IDBI, through its Deputy General Manager for

declaring the petitioner amongst others persons, as a Wilful Defaulter. The petitioner replied to the show-cause notice on 17.06.2021 and thereafter

also, on 13.08.2021. Finally, the petitioner replied vide letter dated 22.09.2021 to the communication dated 06.09.2021, written by the respondent-IDBI.

Thereafter, WDIC vide its order dated 13.12.2021, declared the petitioner as a Wilful Defaulter.

2.1 It appears that by the letter dated 02.03.2022, an opportunity of personal hearing was extended to the petitioner and the petitioner attended hearing

on 15.03.2020 and additionally also clarified his stand by the letter dated 19.03.2022. By the impugned order dated 12.05.2022 passed by the WDIC,

the petitioner was again declared as a Wilful Defaulter. Thereafter, the petitioner made a detailed representation before the WDRC on 09.07.2022.

The WDRC by the impugned order dated 30.08.2022 confirmed the report of the WDIC. It appears that during pendency of the writ petition, further

communication has been issued to the petitioner dated 16.09.2022 declaring the petitioner as a Wilful Defaulter and calling upon him to pay the

amount.

SUBMISSIONS OF LEARNED ADVOCATE FOR THE PETITIONER:

3. Learned advocate Mr.Aditya Gupta appearing for the petitioner at the outset, has submitted that the impugned orders are required to be quashed

and set aside since FAR of the SKVM & Co. dated 08.07.2020 was never supplied to the petitioner. It is submitted that the petitioner had time and

again requested the respondent to supply the FAR however, the same was not supplied and the Committees have declared the petitioner as a Wilful

Defaulter. He has submitted that the similarly, the WDRC, without appreciating the contents of the letter/ communication dated 09.07.2022, has

confirmed the findings of the WDIC. It is submitted that the order passed by the WDIC is absolutely unreasoned order.

3.1 It is further submitted that the petitioner has been granted interim moratorium under section 96 of the Insolvency and Bankruptcy Code, 2016 (the

IBC) by the National Company Law Tribunal (NCLT) in the application between TATA Capital Financial Services Limited Vs. Jagdish Prasad Saboo

and in view of interim moratorium under section 96 of the IBC, no proceedings can be initiated against the petitioner with respect to any debt. While

placing reliance on the judgment of the Apex Court in the case of P.Mohanraj and Ors. Vs. Shah Brothers Ispat Private Limited, 2021 (6) S.C.C. 258,

it is submitted that no action against the petitioner can be taken, as the expression used in section 96 of the IBC is Ã¢â‚¬Å“in respect of any debtÃ¢â‚¬ and

accordingly, no recovery even indirectly can be made.

3.2 Learned Advocate Mr.Gupta has also placed reliance on the judgement of the Division Bench of this Court in the case of Ionic Metalliks and Ors.

vs. Union of India and Ors., 2015 (2) GLH 156 and has submitted that since the show-cause notice issued on 28.05.2021 to the petitioner is bereft of

any details and hence, the show-cause notice and the subsequent proceedings are required to be quashed and set aside. He has further submitted that

all the proceedings are conducted behind the back of the petitioner. It is submitted that on 23.03.2020 lock-down was imposed in view of the COVID-

19 pandemic and letter dated 14.05.2020 was sent by the Canara Bank on behalf of the consortium of banks seeking clarification for the purpose of

FAR and since the petitioner did not have access to the record due to pandemic, he was unable to provide necessary details with the reply dated

13.07.2020. It is submitted that in the end of the month December 2020, it came to knowledge of the petitioner that without waiting for the

petitionerÃ¢â‚¬â„¢s reply on the clarification, the FAR was issued on 08.07.2020 i.e. five days before the reply dated 13.07.2020. While inviting attention

of this Court to the observations made in the impugned report as well as the orders passed by the WDIC and WDRC, it is submitted that the same

suffer from non-application of mind and are cut and paste orders, which have been relied upon declaring the petitioner as a Wilful Defaulter. Finally,

he has placed reliance on the judgement of the Apex Court in the case of State Bank of India Vs. M/s. JAH Developers Private Limited and Ors.

(2019) 6 S.C.C. 787, and has submitted that the moment a person is declared as a Wilful Defaulter, the impact on his fundamental rights to carry on

business is direct and immediate and hence, before taking the drastic measures, the Committee is required to consider representation made by the

borrower and the said representation has to be considered on face of law by the WDRC. He has also placed reliance on the judgement of the High

Court of Calcutta in the case of Ayan Mallick and anr. Vs. SBI dated 04.03.2021 passed in WPO No.23 of 2021. Hence, it is submitted that since the

order passed by the WDRC is a non-speaking and unreasoned order, the same may be quashed and set aside.

SUBMISSION OF THE LEARNED ADVOCATE FOR THE RESPONDENT-IDBI:

4. Per contra, learned advocate Mr.B.H.Bhagat appearing for the respondent-IDBI has supported the FAR and the impugned orders passed against

the petitioner declaring him as a Wilful Defaulter. It is submitted that contention raised by the petitioner with regard to non-supply of FAR of SKVM

& Co. deserves to be rejected since in the show-cause notice itself, the relevant findings of FAR are incorporated and the petitioner was given ample

opportunities to deal with the same. He has submitted that in fact, the petitioner was aware about the contents of the FAR and he has also responded

to the same on various occasions and hence, the impugned orders cannot be set aside only on the ground that the FAR was not supplied to him. He

has submitted that the petitioner is involved in serious irregularities of diversion, routing and siphoning the funds. It is submitted that the WDIC and

WDRC have passed the orders and communicated to the petitioner, after thorough investigation and examinations of the FAR. It is submitted that

personal hearing was also afforded to the petitioner before the WDIC and his written representation was also considered by the Committee and by a

reasoned order, after examination of the contents of representation and details of the FAR, the petitioner has been declared as a Wilful Defaulter.

4.1 While placing reliance on the judgement of the Division Bench of this Court dated 02.01.2023 passed in Letters Patent Appeal No.596 of 2022 and

allied matters, learned advocate Mr.Bhagat has submitted that the issue raised in the present writ petition is squarely covered by the observations

made by the Division Bench of this Court. He has submitted that the Division Bench has held that once the Wilful Defaulter is aware of the details of

the forensic report and has submitted the replies dealing with such report, it is not necessary that the impugned orders are required to be quashed and

set aside on the ground of non-supplying of the report. It is submitted that the Division Bench has held that such orders declaring the Wilful Defaulter

cannot be set aside on the ground of Ã¢â‚¬Å“violationÃ¢â‚¬ of principles of natural justice on the ground of non-furnishing of the report, until and unless it is

shown that the contents of the FAR were not known to the Wilful Defaulter. It is submitted that even if the matter warrants remand, the Division

Bench has held that the same would be an empty formality and would not serve any purpose and hence, the impugned orders may not be disturbed.

Thus, it is submitted that having commented on the FAR, the petitioner cannot now seek setting aside of the orders declaring him as a Wilful Defaulter

on the ground that the FAR is not supplied to him.

4.2 With regard to the submissions advanced by the learned advocate for the petitioner taking shelter under the interim moratorium issued to him under

Section 96 of the IBC, learned advocate Mr.Bhagat has placed reliance on the judgement of High Court of Calcutta in the case of Adarsh

Jhunjhunwala Vs. State Bank of India and Anr. dated 24.01.2021. He has submitted that the petitioner has surreptitiously obtained ad-interim relief in

terms of paragraph No.9(b) from this Court vide order sated 28.09.2022, while citing the decision of High Court of Delhi in WP(C) No.2232 of 2021,

which is subsequently held to be not a good law in view of the judgement passed by the High Court of Calcutta in case of Adarsh

Jhunjhunwala(supra). He has also placed reliance on the judgement of the Apex Court in the case of State Bank of India Vs. V.Ramakrishnan and

Anr., (2018) 17 S.C.C. 394 and has submitted that the interim moratorium under Section 96 of the IBC will not affect the Wilful Defaulter proceedings

and such proceedings are not covered under the interim moratorium granted under Section 96 of the IBC. It is submitted that interim moratorium

under Section 96 of the IBC operates only against the debt of co-obligant and purpose of master circular dated 01.07.2015 issued by the Reserve

Bank of India (RBI) for the Wilful Defaulter will get frustrated. It is submitted that object and purpose of master circular of the RBI for Wilful

Defaulter is dissemination of credit information of the Wilful Defaulters so that other lenders are cautioned and they do not lend further money and

further fraud and loss of money on or before the next date of hearing public can be kept prevented. It is submitted that the Wilful Defaulter

proceedings are not for recovery of debt and repayment of debt will not ipso facto extinguish the default and hence, the proceedings under

Section 96 of the IBC cannot in any manner absolve borrower, who has been found to be a Wilful Defaulter. It is submitted that the case of Ayan

Mallick and anr. Vs. SBI (supra) dated 04.03.2021 passed in WPO No.23 of 2021 by the High Court of Calcutta has referred to the provisions

Section 14 of the IBC, which applies to corporate debtor as opposed to moratorium under Section 96 of the IBC, which is against the debt. It is

submitted that the petitioner has deliberately and willfully concealed and suppressed the order of High Court of Calcutta dated 24.01.2021 and the

decision of the Apex Court in the case of V.Ramakrishnan and Anr. (supra) and has obtained the interim relief.

4.3 Learned advocate Mr.Bhagat has submitted that the respondent-Bank has followed mechanism, as provided under Clause 3 of the master circular

dated 01.07.2015 of the RBI and accordingly, by a well-reasoned show-cause notice dated 28.05.2021 by incorporating the findings of the FAR, the

petitioner was called upon explaining discrepancies therein. It is submitted that further the letter dated 02.03.2022 was also issued upon the petitioner

to uphold the principles of natural justice and after affording personal opportunity of hearing before the WDIC, the impugned order has been passed.

With regard to the order passed by the WDRC, he has submitted that the WDRC has also considered the representation filed by the petitioner dated

09.07.2022 and by a well-reasoned order, it has confirmed the order passed by the WDIC. While referring to the FAR of SKVM & Co. dated

08.07.2020, learned advocate Mr.Bhagat has submitted that the respondent has provided relevant conclusion of the report, which was material for

declaring the petitioner as a Wilful Defaulter. While placing reliance on the judgement of High Court of Bombay in the case of Nitin Vs. IDBI Bank

Ltd., 2019 (109) Taxmann.com 211 (Bomaby), it is submitted that the petitioner was afforded complete opportunity to defend himself and since neither

principles of natural justice has been violated nor there is any breach of master circular issued by the RBI, the impugned orders may not be set aside.

4.4 Learned advocate Mr.Bhagat has submitted that finally after the proceedings were over and the petitioner was declared as a Wilful Defaulter vide

notice dated 16.09.2020 and pursuant to the RBI circular dated 29.09.2016, which has prescribed to initiate penal measures against the borrower

declared as a Wilful Defaulter for putting their names and photographs in the newspapers/magazines, the petitioner was accordingly called upon finally

to pay the entire outstanding amount of Rs.21,41,66,301.23/-. It is thus, submitted that the impugned orders as well as FAR may not be set aside.

5. Heard the learned advocates for the respective parties and also perused the documents as pointed out by them.

ANALYSIS AND CONCLUSION:

6. The first and foremost issue, which falls for deliberation, is with regard to contention raised by the respective advocates appearing for the parties of

impact of moratorium granted under the provision of Section 96 of the IBC. The petitioner is seeking shelter under the interim moratorium under

Section 96 of the IBC, which has been granted in the application filed by Tata Capital Finance Service Ltd. and such order is passed by the NCLT,

Ahmedabad under Section 95 of the IBC on 07.03.2022. It is asserted by the petitioner that since the interim moratorium is granted, no proceedings

with regard to recovery of any debt, even indirectly can be initiated.

7. The petitioner has placed reliance on the observations made by the Apex Court in this regard in the case of P Mohanraj (supra). The relevant

observations are made as under:

Ã¢â‚¬Å“35.1 Sections 96 and 101 read as follows:

Ã¢â‚¬Å“96. Interim-moratorium.Ã¢â‚¬"(1) When an application is filed under Section 94 or Section 95Ã¢â‚¬

(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of

admission of such application; and

(b) during the interim-moratorium periodÃ¢â‚¬

(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section

(1) shall operate against all the partners of the firm as on the date of the application.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any

financial sector regulator.Ã¢â‚¬‹

Ã¢â‚¬Å“101. Moratorium.Ã¢â‚¬"(1) When the application is admitted under Section 100, a moratorium shall commence in relation to all the debts and shall

cease to have effect at the end of the period of one hundred and eighty days beginning with the date of admission of the application or on the date the

Adjudicating Authority passes an order on the repayment plan under Section 114, whichever is earlier.

(2) During the moratorium periodÃ¢â‚¬

(a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;

(b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and

(c) the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;

(3) Where an order admitting the application under Section 96 been made in relation to a firm, the moratorium under sub-section (1) shall operate

against all the partners of the firm.

(4) The provisions of this Section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial

sector regulator.Ã¢â‚¬‹

35.2 *** *** ***

35.3 When the language of these Sections is juxtaposed against the language of Section 14, it is clear that the width of Section 14 is even greater,

given that Section 14 declares a moratorium prohibiting what is mentioned in clauses (a) to (d) thereof in respect of transactions entered into by the

corporate debtor, inclusive of transactions relating to debts, as is contained in Section 81, 85, 96 and 101. Also, Section 14 (1)(d) is conspicuous by its

absence in any of these Sections. Thus, where individuals or firms are concerned, the recovery of any property by an owner or lessor, where such

property is occupied by or in possession of the individual or firm can be recovered during the moratorium period, unlike the property of a corporate

debtor.

36. *** *** ***

37. 29. V. Ramakrishnan (supra) looked at and contrasted Section 14 with Sections 96 and 101 from the point of view of a guarantor to a debt, and in

this context, held:

Ã¢â‚¬Å“26. We are also of the opinion that Sections 96 and 101, when contrasted with Section 14, would show that Section 14 cannot possibly apply to a

personal guarantor. When an application is filed under Part III, an interim-moratorium or a moratorium is applicable in respect of any debt due. First

and foremost, this is a separate moratorium, applicable separately in the case of personal guarantors against whom insolvency resolution processes

may be initiated under Part

III. Secondly, the protection of the moratorium under these Sections is far greater than that of Section 14 that pending legal proceedings in respect of

the debt and not the debtor are stayed. The difference in language between Sections 14 and 101 for a reason.

26.1. Section 14 refers only to debts due by corporate debtors, who are limited liability companies, and it is clear that in the vast majority of cases,

personal guarantees are given by Directors who are in management of the companies. The object of the code is not to allow such guarantors to

escape from an independent and co-extensive liability to pay off the entire outstanding debt, which is why Section 14 is not applied to them. However,

insofar as firms and individuals are concerned, guarantees are given in respect of individual debts by persons who have unlimited liability to pay them.

And such guarantors may be complete strangers to the debtor Ã¢â‚¬" often it could be a personal friend. It is for this reason that the moratorium

mentioned in Section 101 would cover such persons, as such moratorium is in relation to the debt and not the debtor.Ã¢â‚¬â€‹

These observations, when viewed in context, are correct. However, this case is distinguishable in that the difference between these provisions and

Section 14 was not examined qua moratorium provisions as a whole in relation to corporate debtors vis-Ãƒ -vis individuals/firms.

8. The aforementioned observations made by the Apex Court under the provision of Section 96 of the IBC pertain to the legal action of the

proceedings with respect to any debt, which shall be stayed when interim moratorium under Section 96 of the IBC has been issued. The Apex Court,

while dealing with the proceedings under Section 138 of the Negotiable Instruments Act, 1881 (for short ""the N.I.Act"") has held that expression Ã¢â‚¬Å“in

respect of any debtÃ¢â‚¬ has wide connotation and includes anything done directly or indirectly with respect to recovery of any debt and any legal

proceedings being indirect recovery of any debt would be covered. The petitioner is equating his case of having being declared as Wilful Defaulter to

the proceedings in respect of any debt as envisaged under Section 96 of the IBC.

9. The intention of the moratorium, granted under Section 96 of the IBC cannot be extended to the proceedings with respect to a borrower, who has

been declared as a Wilful Defaulter. The interim moratorium under Section 96 of the IBC can be referred only to the debt, as mentioned therein. If

such interpretation, which has been put by the petitioner is accepted, the very object and purpose of the master circular of the RBI, which is meant for

Wilful Default of the Wilful Defaulter cautioning the other lenders from further lending money, would get frustrated.

10. The High Court of Calcutta in the case of Adarsh Jhunjhunwala(supra), after considering the observations made by the Apex Court in the case of

V.Ramakrishnan ((supra)), has held thus:

Ã¢â‚¬Å“In the backdrop of the above this Court is inclined to accept the argument of Mr. Rai for the bank that the moratorium in respect of debt is

restricted to proceedings of recovery of any debt against the respondent Ã¢â‚¬Å“in personÃ¢â‚¬. This is in harmony with dicta at paragraph 20 in the

Ramakrishnan Case (supra). To stay wilful defaulter proceedings, criminal proceeding or quasi criminal proceeding under any Moratorium under

Section 96 would defeat the object and purpose of the part III of the IBC. Stay of such collateral proceedings would also result in putting a premium

on the impropriety and illegality for which the proceedings under Section 95 are initiated. The argument of Mr. Rajarshi Dutta that the continuation of

the wilful defaulter proceedings would seriously hamper and impede his clientÃ¢â‚¬â„¢s ability to make good repay or come up with; a scheme to satisfy

creditors is fallacious. Such stay would also amount to permitting a wrong doer to commit a further wrongs for the purpose of remedying an existing

wrong. All lenders are required to be put on notice of the Wilful default who to prevent further erosion of public finances. The observation in Para 22

do not apply in this instant case as have not been applied in the conclusion of the said decision. It appears to this Court that the Ramakrishnan decision

has not been placed before the Coordinate Bench in the Ayan Mallick case (supra). As already stated earlier any moratorium under the IBC cannot

permit a wrong doer to continue to such doing.Ã¢â‚¬â€‹

11. The Apex Court in the aforementioned case of P Mohanraj (supra) has not dealt with the aspect of Wilful Defaulter and has only confined its

observations with regard to the proceedings under Section 138 of the N.I.Act and with regard to recovery proceedings of debt, as envisaged under

Section 96 of the IBC. The proceedings of declaring the borrower, as per the master circular as a Wilful Defaulter, are in absolutely different realm

than the recovery proceedings of debt and hence, the provision of Section 96 of the IBC cannot be extended to the petitioner, which has been declared

as Wilful Defaulter.

11.1 Thus, the proceedings of Wilful Defaulter cannot be equated to the recovery of debt and hence, the moratorium under Section 96 of the IBC

cannot frustrate the action of the respondents declaring the petitioner as a Wilful Defaulter.

12. The petitioner has also contended that since the FAR of SKVM & Co. was not supplied, the impugned orders, being in violation of principles of

natural justice, are required to be quashed and set aside. In this regard, it would be apposite to incorporate the observations made by the Division

Bench of this Court dated 02.01.2023 passed in Letters Patent Appeal No.596 of 2022 in Special Civil Application No.2518 of 2022 and allied matters.

The Coordinate Bench of this Court in identical set of facts, wherein FAR was not supplied and borrower was declared Wilful Defaulter after

considering the master circular issued by the RBI dated 01.07.2015, which defines the Wilful Defaulter, has dismissed the writ petition filed by the

Wilful Defaulter. The Division Bench confirmed the observations made by the Coordinate Bench and has observed thus:

Ã¢â‚¬Å“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 Wilful 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 Ã¢â‚¬" perhaps because the evidence against the individual is thought to be utterly compelling, it is felt that a fair hearing Ã¢â‚¬Å“would make no

differenceÃ¢â‚¬ - meaning that hearing would not change the conclusion reached by the decision maker Ã¢â‚¬" 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 procedureÃ¢â‚¬Â¦ 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. *** *** ***

21. *** *** ***

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. KarunakarÃ¢â‚¬â„¢s case (supra) by the HonÃ¢â‚¬â„¢ble Apex Court in the following terms :

Ã¢â‚¬Å“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.Ã¢â‚¬â€‹

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 Ã¢â‚¬Ëœuseless formality

theoryÃ¢â‚¬â„¢ would surface, which aspect has received the consideration of the HonÃ¢â‚¬â„¢ble Apex Court in the case of M.C.Mehta vs. Union of India

Ã¢â‚¬" (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 documentary evidence Smith, Suppl. P.89) (1998)

where Straughton, L.J. held that there must be `demonstrable beyond doubtÃ¢â‚¬â„¢ 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.Ã¢â‚¬‹

13. In light of the aforementioned observations made by the Division Bench, the contents of the show-cause notice dated 28.05.2021 issued to the

petitioner are relevant to be examined. The show-cause notice itself incorporates details of diversion, routing and siphoning of funds by the petitioner.

The petitioner accordingly responded to the aforesaid show-cause notice vide his reply dated 17.06.2021. Thereafter, on 02.08.2021 the petitioner was

again given opportunity of explanation and he was informed that the respondent does not concur with the stand taken by him. The petitioner again filed

a detailed representation on 13.08.2021. The respondent-IDBI forwarded the report of WDIC dated 13.12.2021 declaring the petitioner as a Wilful

Defaulter. The report of the WDIC mentions that the petitioner was given ample opportunities to explain the defaults committed by him. The relevant

allegations with regard to the diversion, routing and siphoning of the funds were already communicated to him by the show-cause notice. The

petitioner was also afforded personal hearing by the WDIC on 13.12.2021. Thus, the petitioner was very well aware of the contents of the FAR and

he was given full opportunity to explain the allegations mentioned therein with regard to diversion, routing and siphoning of the funds. Thus, when the

petitioner was already afforded an opportunity and conveyed the necessary material with regard to irregularities committed by him and he has also

responded to the same, it was not necessary to forward the entire FAR of SKVM & Co. to him.

14. The petitioner accordingly filed representation before the WDRC on 08.07.2020. A perusal of the WDRC order reveals that the representation of

the petitioner dated 09.07.2022 has been considered by the WDRC. It is alleged by the petitioner that the order of the WDRC is a cut and paste order

and hence, the same may be set aside. In the considered opinion of this Court, the order cannot be set aside solely on this ground since the WDRC

has recorded the findings of the WDIC as well as the contents of the show-cause notice and after referring to the contents of the reply dated

09.07.2022, the WDRC has accordingly concluded and confirmed the order of the WDIC declaring the petitioner as a Wilful Defaulter in terms of

master circular dated 01.07.2015 issued by the RBI. The WDIC as well as WDRC scrupulously, after thorough investigation, have found that the

petitioner, without permission of the lenders, has diverted the funds, which falls under the criteria of Wilful Defaulter, as prescribed in Clauses

2.1.3(B), 2.2.1(C) and 2.2.1(D) of the RBI master circular dated 01.07.2015. Both the Committees, after detailed analysis and observations and

considering the representation filed by the petitioner and the defence taken by him against the show-cause notice, have concluded that the petitioner is

fit to be declared as a Wilful Defaulter in terms of the RBI master circular dated 01.07.2015.

15. At this stage, I may with profit also incorporate observations made by the Division Bench of this Court in the judgement dated 02.01.2023 passed

in Letters Patent Appeal No.596 of 2022 and allied matters, which are as under:

Ã¢â‚¬Å“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.Ã¢â‚¬‹

16. The Division Bench of this Court has specifically held that while exercising the jurisdiction under Article 226 of the Constitution of India, this Court

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,

and it cannot be the subject-matter of judicial scrutiny. It is further observed that the conclusion reached by the experts, particularly in the field of

finance and banking cannot be substituted with a view of the Court and interference in such matters in the writ jurisdiction would not be called for

unless it is demonstrably perverse or illegal or contrary to the admitted facts. It is further held if the decision, which is decided 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 WDRC cannot be substituted

with a view of the Court. In the present case, this Court has noticed that the petitioner has been given sufficient opportunities to put up his case and

this Court cannot interfere with the expert opinion of the Committees by venturing itself into the case and find faults with the aspect of such findings

of the Committees. The findings in such matters and examination of the factual aspect regard to the defaults have to be left on absolute wisdom of

such Committees, dealing with the proceedings of declaring the borrower as a Wilful Defaulter. The entire exercise of both the committees, including

calling upon the forensic report cannot be ignored and the impugned orders cannot be set aside merely on the ground that the petitioner was not

supplied the FAR in wake of the fact that he was already made aware of the relevant irregularities on illegalities committed by him, which was

unearthed by the FAR. The petitioner could have satisfied the concerned committees by supplying relevant materials in order to show that the

transactions are legally permissible and would not in any manner amount to dubious or illegal transactions with regard to diversion, routing and

siphoning of the funds. When the petitioner was being called upon to explain his conduct, it was always open for him to satisfy requirements of the

respondents and prove his intention by supplying cogent materials. The petitioner, despite having given such opportunity, has miserably failed to satisfy

the allegations made against him with regard to diversion, routing and siphoning of the funds and instead, he is blaming the respondent committees for

not supplying of the FAR.

17. As noticed hereinabove, the Coordinate Bench of this Court in similar set of facts, wherein the FAR was not supplied and the Wilful Defaulter

was aware about all the irregularities levelled against him, has rejected the petition, which has been confirmed by the Division Bench of this Court by

the judgement dated 02.01.2023.

18. The judgement of M/s.JAH Developers Private Limited (supra), cannot come to rescue of the petitioner since in the present case, the WDRC has

already considered his representation and the said judgement is already considered by the Division Bench of this Court. In the present case, as noticed

hereinabove, both the Committees by the reasoned orders have dealt with all the facts and defence taken by the petitioner and hence, it cannot be said

that the impugned orders are conflicting with the law enunciated by the Apex Court in the case of M/s.JAH Developers Private Limited (supra).

Similarly, the observations made by the Division Bench of this Court in the case of Ionic Metalliks and Ors. (supra) will not apply to the facts of the

present case since in the present case, the show-cause notice already incorporates necessary materials and details, on the basis of which the petitioner

is called upon to explain why he should not be declared as Wilful Defaulter within the meaning of the RBI Master Circular dated 01.07.2015.

19. On the substratum of the preceding analysis, the writ petition fails. Rule is discharged.

FURTHER ORDER

After the judgment has been pronounced, learned advocate Ms.Prachi Bohra for the learned advocate Mr.Gupta has requested to stay the aforesaid

observation.

Request is not acceded in view of the aforementioned findings and analysis.