

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

WRIT PETITION NO.1825 OF 2019

1. Nitin s/o Mansukhlal Shah
Age: 62 years, Occ: Business
R/o Flat No.201-202, D-Wing
2nd Floor, Kukreja Palace 2,
Vallabh Bagh Lane, Near Police
Ground, Ghatkopar (East)
Mumbai – 400 077.

2. Rahul s/o Nitin Shah
Age: 42 years, Occ: Business
R/o Flat No.201-202, D-Wing
2nd Floor, Kukreja Palace 2,
Vallabh Bagh Lane, Near Police
Ground, Ghatkopar (East)
Mumbai – 400 077.

3. Kunal s/o Nitin Shah
Age: 34 years, Occ: Business
R/o Flat No.201-202, D-Wing
2nd Floor, Kukreja Palace 2,
Vallabh Bagh Lane, Near Police
Ground, Ghatkopar (East)
Mumbai – 400 077.

.... Petitioners

- Versus -

1. IDBI Bank Limited
Scheduled Commercial Bank
having its registered office at:
IDBI Tower, WTC Complex
Cuffe Parade, Mumbai
400 077 and branch office at:

Specialized Corporate Branch,
MCG 47. OPUS Centre,
Ground Floor, Central Road,
MIDC, Andheri East,
Mumbai – 400 005.

2. Reserve Bank of India
established under the
Reserve Bank of India Act, 1934
having address at 16th Floor,
Central Office Building
Shahid Bhagat Singh Marg
Mumbai – 400 001
through its CGM and/or Secretary

3. Nitin Fire Protection Industries Ltd.
Under Corporate Insolvency Resolution
Process under Insolvency and
Bankruptcy Code 2016
having its office at:-
501, Delta, Technology Street
Hiranandani Gardens, Powai
Mumbai – 400 076
through Resolution Professional
Uliyar Balakrishna Bhat
having address at:-
A-005, Western Edge II,
Off. Western Express Highway
Borivali East, Mumbai – 400 066.

.... Respondents

Mr. V.R. Dhond, Senior Advocate with Mr. Ashish
Kamat i/by Mr. D.P. Desai for the Petitioners.
Mr. Piyush Raheja with Ms Aausi Shah i/by
Indian Law LLP for Respondent No.1.
Mr. Prakash Shinde with Mr. Nishit Dhruva
i/by MDP & Partners for Respondent No.3.

**CORAM: S.C. DHARMADHIKARI &
SANDEEP K. SHINDE, JJ.**

DATE : JULY 17, 2019

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. Rule. Respondent Nos.1 & 3 waive service. Respondent No.2 being a formal party and since affidavits are not necessary to be filed, on the basis of the petition and its annexures, by consent heard finally.

2. The petitioners before this Court seek to quash a decision, copy of which is at Exhibit-O.

3. The writ jurisdiction of this Court is invoked to challenge this decision. That is dated 19-10-2018. A copy of the same is at pages 133-134 of the paper-book. That reads as under:-

“IDBI BANK

“WITHOUT PREJUDICE”

Ref: IDBI/NMG/NFPIL/2017-18/523 October 19, 2018

<i>Nitin Fire Protection</i>	<i>Nitin Fire Protection</i>
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<i>Industries Limited 501, Delta Technology Street,Hiranandani Gardens, Powai, Mumbai-400 076.</i>	<i>Industries Limited, 801 & 802, C-Wing, Neelkanth Business Park, Kirol Road, Vidhyavihar (W), Mumbai-400 076.</i>
<i>Shri Rahul Nitin Shah Flat No.201-202, D-Wing 2nd Floor, Kukreja Palace 2, Vallabh Bagh Lane Extended, Near Police Ground, Ghatkopar (East), Mumbai – 400 077.</i>	<i>Shri Nitin M. Shah Flat No.201-202, D-Wing 2nd Floor, Kukreja Palace 2, Vallabh Bagh Lane Extended, Near Police Ground, Ghatkopar (East) Mumbai – 400 077.</i>
<i>Shri Rahul Nitin Shah Flat No.201-202, D-Wing 2nd Floor, Kukreja Palace 2, Vallabh Bagh Lane Extended, Near Police Ground, Ghatkopar (East), Mumbai – 400 077.</i>	

Dear Sir/Madam,

Inclusion of name of the company and its Promoter-Director, Mr. Nitin Shah and Whole-time Director(s), Mr. Rahul Shah and Mr. Kunal Shah in CIBIL/CICs list of wilful defaulters

Please refer to the Master Circular on Wilful Defaulters (RBI Circular) issued by RBI and the Show Cause Notice No.IDBI/NMG/NFPIL/371/2018-19 dated June 28, 2018 issued by the Bank calling for your submissions and the opportunity for personal hearing granted to you by the Identification Committee constituted in accordance with RBI circular for examining incidence of wilful default. After careful examination of the above, the Identification Committee issued an order recording the fact of your wilful default which was reviewed and confirmed by another committee (Review Committee) of the Bank constituted in accordance with RBI circular at its meeting

held on September 19, 2018.

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

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

*Yours faithfully,
Sd/-
(Ashish Aggarwal)
Deputy General Manager”*

4. The petitioners before us are individuals. They are citizens of India. They say that they are the Promoters of the third respondent-Company. That is presently under the Corporate Insolvency Resolution Process under the relevant provisions of The Insolvency and Bankruptcy Code, 2016. The petitioner No.1 is the founder-proprietor of M/s. Nitin Industries, started for trading and manufacturing of fire protection equipment in the year 1984 and later converted into a Public Limited Company. The Public Limited Company is M/s. Nitin Fire Protection Industries Limited, the third respondent before us. The petitioner Nos.2 and 3 are designated as Chief

Executive Officer of the third respondent.

5. Annexure “A” and “A-1” to the petition are relied upon to say that these are the appointment orders of petitioner Nos.2 and 3. The first respondent is a Scheduled Commercial Bank. It was incorporated under The Companies Act, 1956 as a Limited Company and has been categorised as Other Public Sector Bank. As per the directions issued by the Ministry of Finance by its Circular dated 31-12-2007 and Reserve Bank of India, it is treated on par with Nationalised Bank. It is thus a Government owned Bank. It is a full service universal Bank providing gamut of financial products set out in para 2 of the petition. The second respondent is the Reserve Bank of India (“**RBI**”) established under The Reserve Bank of India Act, 1934. The third respondent before us is a Company which due to the order passed by the National Company Law Tribunal dated 22-10-2018, under Section 7 of The Insolvency and Bankruptcy Code, 2016, has been admitted into Corporate Insolvency Resolution Process and is being represented by Resolution Professional as mentioned in the cause title.

6. It is candidly stated in para 5 that the petitioners are the Promoters of respondent No.3 which was initially started as a proprietary concern and grew multifold. It was later converted into a Public Limited Company in 1995. It also expanded its presence in overseas market, mainly the United Arab Emirates, South Asia and Europe. It is stated that over three decades of experience makes this company a leading player in the fire protection industries. It is stated that the business of the third respondent is directly dependent on demand from oil & gas industry, which in turn is dependent on international crude oil prices. The real estate and infrastructure are other important sectors driving the demand of the third respondent's products. It is stated that the third respondent requires high amount of working capital as the products are first installed as per the customer specifications and only then after the successful installation/testing, sales are realised. The petitioners do not dispute that they have a decade long association with the first respondent for its financial requirements. The facilities, particularly set out in para 5, have been extended and there are

Deeds of Guarantee executed as Security for working capital facilities from 2013. In para 7, it is stated that the working capital facility/financial assistance, from 2013 onwards, became part of a consortium facility which included Axis Bank, Dena Bank and Bank of Baroda. It is stated that due to adverse and unavoidable circumstances, the third respondent was incapable of making repayment of its debt obligation resulting in default. A judicial notice of global meltdown in international oil prices, slowdown in real estate industry and currency fluctuation can be taken into consideration by this Court which, *inter alia*, affected the financial conditions of the third respondent. Its export fell from Rs.260/- crores in Financial Year 2016 to Rs.53/- crores in Financial Year 2017. Non-realisation of receivables also adversely affected its working capital cycle further worsening the situation leading to default in payment of its debt obligation. The first respondent, due to this default, declared the facility as a non-performing asset (NPA) on 31-1-2017.

7. The first respondent due to classification of the account as a NPA and as per its policy initiated the Forensic

Audit for the third respondent. M/s. J. Singh & Associates were appointed for conducting the Forensic Audit. The same has been recorded in the joint lenders meeting held on 21-6-2017. The petitioners claim that they are a victim of adverse market conditions but still made all efforts and attempts to settle their dues. They forwarded a proposal for one time settlement and a copy of the same is annexed as Exhibit "D" to the petition. This proposal was not given due consideration. Then the first respondent addressed an email and for proper appreciation of the arguments of the learned Senior Counsel Mr. Dhond, appearing for the petitioners, we reproduce the relevant paras:-

"10. It is further submitted that the Respondent No.1 addressed an email dated 16.09.2017 sharing the draft Forensic Audit report with NFPII soliciting clarifications/explanations to the observations recorded in the said draft report. Such clarifications/explanations are sought for proper understanding of transactions recorded in annual accounts statements before concluding the findings/observations in the said report. The Petitioners gave its full co-operation and diligently shared its comments/explanation by an email dated 21.09.2017. The Petitioner have also sent a detailed reply by its letter dated 22.09.2017. Annexed herewith and collectively mark as EXHIBIT-E-1 to E-3 is copy of email dt. 16.09.2017 sent by Respondent No.1, reply through email dt. 21.09.2017 sent by Respondent No.3 and by letter dated 22.09.2017.

11. *The Petitioners received an email dated 15.02.2018 from the Auditor. The Petitioners were shocked to observe that the final Forensic Audit report was finalized on 21.08.2017 itself, a date which is prior to sharing of draft report to NFPIL soliciting its clarifications/explanations for finalization of the draft report. Similarly, an email dated 14.02.2018 sent by Respondent No.1 to all lenders clearly shows that said audit report has not been finalized. It is pertinent to point out here that the Joint Lenders Meet held on 21.02.2018, noted that observations of Petitioners with respect to forensic audit report has been shared with the Auditor and the Auditor has failed to incorporate the same in his final report. Due to said reason, the report was yet to be accepted by IDBI Bank (Respondent No.1 herein). The Petitioners have written to Respondent No.1 by its letter dated 14.03.2018 seeking details of said Minutes of Meeting but has not received any response on it. The Hon'ble Court may direct the Respondent No.1 to produce Minutes of Meeting held in 6th October 2017 and 21.02.2018, if need be. Annexed herewith and collectively marked as **EXHIBIT-“F1 to F2”** is the copy of email dated 15.02.2018, 14.02.2018 and the said letter dated 15.03.2018. Needless to state that the Respondent No.1 did not consider clarifications/explanations given by NFPIL and the whole exercise of seeking explanations was merely an empty formality. Annexed herewith and marked as **EXHIBIT-“G”** is the copy of conclusion of final Forensic Audit Report dated 21.08.2017. The Petitioners crave leave to produce full version of final Forensic Audit Report if require by Hon'ble Court along with Minutes of Meeting.”*

8. It is claimed that the first respondent solely relying on the Forensic Audit Report (“**FAR**” for short) issued a Show Cause Notice dated 29-6-2018, calling upon the petitioners to

show cause as to why they should not be declared as wilful defaulters under the procedure established by the RBI in its Master Circular dated 1-7-2015. A copy of this Show Cause Notice dated 29-6-2018 is annexed as Exhibit “H” to the paper-book. The petitioners filed a reply and admittedly on their behalf as also on behalf of the Company giving cogent reasons and explanation showing that there is no case of wilful default and siphoning of funds, as alleged, as per the guidelines issued in the Master Circular. They sought a personal hearing. Thereafter it is stated that the first respondent has admitted that the Show Cause Notice is based on the findings of the FAR and assured an opportunity of personal hearing on a future date. In para 14 of the petition, it is stated that the first respondent failed to consider the explanation offered by the third respondent-Company to the observations of the draft FAR. The record shows that the FAR was finalised even before being sent to the third respondent for its comments. It is in these circumstances that reliance is placed in the reply dated 17-7-2018 of the first respondent.

9. Then, it is stated that the petitioners were called for a personal hearing on 3-8-2018 by an advance intimation of 24-7-2018 and they were hopeful that they would be able to give a detailed explanation and clarification along with documentary evidence so as to request withdrawal of the Show Cause Notice. Annexures “L” and “M” to the petition are the letters exchanged in relation to personal hearing. The arguments are based on para 16 of the petition which is reproduced for ready reference:-

“16. Petitioners are shocked that they were not even granted a few minutes hearing by the officials of Respondent No.1 bank on 04.08.2018 to provide explanation on the observations recorded in Forensic Audit Report and more particularly in Show Cause Notice, covering a period of full three financial years. In fact, it was only a monologue in which Petitioners were told that certain transactions were not as per the RBI guidelines and hence the said notice has been served. Petitioners were not permitted to explain how the said transactions was credited by the Respondent No.1 after receipt & verification of transaction documents and the same was within the knowledge of bank's trade finance team, who granted its approval by not objecting to it. The Petitioners were forced by the officials of respondent-bank to approach another department to submit its response, defeating the sole purpose of personal hearing. The above conduct of Respondent No.1 clearly shows that no reasonable opportunity was granted to Petitioners and the same can be verified from the video-records of Respondent bank, if

*need be. Principles of natural justice is one of basic tenets of any due process of law which requires that no person can be condemned without giving it a reasonable opportunity of fair hearing. The fair hearing is not an empty formality. It includes all reasonable opportunities required by the party to present its case. Thus, all actions in violation of principles of natural justice, is a nullity in eyes of laws. Annexed herewith and marked as **Exhibit-"N"** is copy of summary of written submission made by Petitioners on 04.08.2018. The Petitioners crave leave to produce full copy of said written submission if required by Hon'ble Court."*

It is stated that ignoring the explanation and the written submissions, the impugned decision has been taken. The petitioners are now declared as wilful defaulters.

10. The petitioners term this action as arbitrary and vitiated by non-observance of the principles of natural justice. It is claimed that the impact of this decision is huge in as much as on 19-7-2019 the petitioners would be held to be ineligible to submit a resolution plan so as to resolve the issue of insolvency and bankruptcy of the third respondent simply because they are declared to be wilful defaulters. Now, the writing on the wall is clear. The Insolvency and Bankruptcy Code, 2016 will take full effect.

11. Mr. Dhond, learned Senior Counsel appearing on behalf of the petitioners contended before us that the Master Circular of the RBI does not and would never enable taking of any action which is *ex facie* arbitrary, high-handed and violative of the mandate of Articles 14 and 19(1)(g) of the Constitution of India.

12. Placing reliance upon a decision of the Hon'ble Supreme Court of India in **Civil Appeal No.4776 of 2019 (State Bank of India v. Jah Developers Pvt. Ltd.)**, decided on 8-5-2019, Mr. Dhond would submit that this circular contemplates a speaking order being passed. The impugned decision fails to satisfy that test for the simple reason that it is unreasoned. First of all, its title reads "Without Prejudice". The prejudice and bias is writ large on it. It includes the name of the Company and its Promoter-Director, Mr. Nitin Shah and Whole-time Directors Mr. Rahul Shah and Mr. Kunal Shah in the list of wilful defaulters. Mr. Dhond would submit that this decision has been reached without even bothering to deal with the

submissions and explanation placed on record. Mr. Dhond has, for instance, taken us through the annexures to this petition to urge that there are no reasons in the impugned order but one can turn to the allegations in the Show Cause Notice to appreciate the stand of the petitioners before us. The petitioners do not admit the allegations. They gave an explanation to the same in writing which is both *bona fide* and reasonable. Now, the Show Cause Notice is founded on the FAR. However, the first respondent itself terms this a draft FAR. If indeed it was a draft, then, no recommendation much less an opinion therein can be said to be conclusive. In fact the joint lenders and the petitioners do not admit this to be a final report.

13. Alternatively and without prejudice to the above, it is urged that these petitioners cannot be termed as wilful defaulters. For a default to be wilful, there has to be something more than mere non-payment or mere non-routing of transactions through normal banking channel. In the instant case, there is a full explanation about the questionable transactions and in that regard Mr. Dhond would invite our

attention to the emails. He would submit that there is a trail. The trail itself will reveal that the observations in the draft FAR were not to be treated as decisive or worthy of such weightage as is now projected before us. It is stated that after the petitioners were given an opportunity to forward their proposals and emails, the Show Cause Notice falsely alleges that there is siphoning of funds. This again is a serious charge and possibly in the nature of a fraud attributed to the petitioners. Far from it, there is no question of siphoning because the exporter abroad exported goods which were imported into India. Once they were imported into India, the payment for the same was made and how that payment was made has been duly explained. In that regard, our attention has been invited to the explanation provided in the reply to the Show Cause Notice. Mr. Dhond would submit that the Company or its Director, according to Clause 2.2.2 of the RBI Master Circular dated 1-7-2015 cannot be held to be guilty of siphoning of funds when the charge or allegation is vague and there are no particulars or supporting documents. Siphoning of funds, according to Mr. Dhond, can be

attributed only if the funds borrowed from Banks or Financial Institutions are utilised for purposes unrelated to the operations of the borrower and to the detriment of the financial health of the entity or of the lender. Any such allegation is not made out from this vague charge. In fact receivable from debtors has not been set-off against the payables from creditors to the tune of Rs.148.27 crores. It is stated that even the audit does not establish any such siphoning. It is clear from the communication dated 17-7-2018 that the Bank has forwarded the report and yet proceeds to comment upon the same by relying on some draft recommendations and opinions.

14. Our attention has been invited by Mr. Dhond to the explanation which says that this ground or charge refers to transactions prior to March, 2017. These transactions have been duly audited by reputed Chartered Accountant firms. Many of such transactions being foreign trade were done with the knowledge of the first respondent as the first respondent is also the authorised dealer under the Foreign Exchange Law. Apart from that, in the personal, meeting explanation was provided

with regard to these transactions. Mr. Dhond also relied upon the additional affidavit tendered by the petitioners in this petition and he would submit that the petitioners have made a clear statement that there has to be diversion of funds in order to establish that there has been any siphoning. The transaction was in the nature of an indenting transaction and there was no utilisation of funds by the third respondent. In fact, goods were purchased from one party and sold to another and the third respondent received monies towards commission only. That has been duly accounted for. Our attention is invited to the annexures to the additional affidavit. It is claimed that these explanations in fact satisfy the other lenders. Even in relation to the first respondent's case, it is stated that the Forensic Auditor's observations have been point-by-point replied to. It is in these circumstances that Mr. Dhond would submit that the transaction with Inesh Accerro Limited was a trading transaction wherein the materials were directly transported at the customer's location by the vendor. It is, therefore, not a case where the petitioners could be categorised as wilful defaulters.

15. Mr. Dhond would submit that nothing other than what is reflected in the impugned decision should be allowed to be relied upon and therefore vehemently opposes tendering of an affidavit in reply by the first respondent. Mr. Dhond submits that the transactions with Kardon Holdings Limited and Eurotech Fire Protection Limited, referred specifically by the first respondent, have been duly explained. It is submitted that the explanation is both *bona fide* and reasonable. In such circumstances, Mr. Dhond would criticise the impugned decision as wholly arbitrary and violative of the constitutional mandate enshrined in Articles 14 and 19(1)(g) of the Constitution of India.

16. On the other hand, Mr. Raheja, learned counsel appearing for respondent No.1, supports the impugned decision. He would submit that there is absolutely no substance in the allegation that principles of natural justice have been breached. In that regard, our attention has been invited to a communication dated 20-10-2018 which follows the impugned

decision. In that, there is a reference made to the personal hearing which was granted. The third respondent's officials have thanked the first respondent-Bank for a personal hearing. The Committee fully heard the said representatives and it is not as if the Committee's decision has been blindly endorsed without any application of mind by the Reviewing Authority. The argument of Mr. Dhond that principles of natural justice were violated, according to the learned counsel, therefore, has no substance. Apart therefrom, the explanation in this communication is consistent and it says that there was an error in not adhering to certain procedures and guidelines of the RBI while undertaking and finalising transactions with foreign parties.

17. It is then submitted by the counsel that the argument of Mr. Dhond that the Report of the Forensic Auditor is a draft and could not have been relied upon, has no merit. In that regard, our attention has been invited to the emails. The emails, according to the counsel, would demonstrate as to how the petitioners themselves have understood the Report of the Forensic Auditor. It is not construed by them as a mere draft

report. In fact, if that was the position, they would not have referred to this as a final report and made payment to the Auditor for the same. In that regard, pages 86, 87 and 88 of the paper-book are relied upon. The counsel would, therefore, submit that we should not treat this writ petition as an appeal against the impugned decision. The impugned decision is consistent with the Master Circular which does not assure a personal hearing either through an Advocate or to be such elaborate as if the proceedings are a trial in a Court of law. For these reasons, he would submit that the writ petition is merit-less and should be dismissed.

18. For properly appreciating these contentions, we must first refer to the RBI's Master Circular. That is dated 1-7-2015. A copy of the same is annexed to this writ petition. That Circular, at page 103 (Exhibit-I) of the paper-book, opens by referring to an earlier Master Circular and says that the RBI consolidates instructions/guidelines issued to Banks/Financial Institutions on matters related to wilful defaulters. These are thus instructions to all Scheduled Commercial Banks and All India Notified

Financial Institutions. That is to put in place a system to disseminate credit information relating to wilful defaulters for cautioning Banks and Financial Institutions so as to ensure that further Bank finance is not made available to them. After defining the terms “Lender” and “Unit”, the Circular sets out very elaborately the definition of the term “Wilful Default”. It would be deemed to have occurred if any of the events noted in para 2.1.3 and particularly Clauses (a) to (d) thereof occur. That is, the unit has defaulted in meeting its payment/repayment obligations to the lender even when it has the capacity to honour the same; 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 it was availed of but has diverted the funds for other purposes; and the default in meeting its payment/repayment obligations to the lender and has siphoned off the funds is also an event. Finally, disposal or removal of the movable fixed assets or immovable property given as a security for the obligation, after defaulting in meeting with the same, is taken as a wilful

default. 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 categorised as wilful must be intentional, deliberate and calculated. Diversion and siphoning of funds is also elaborately dealt with in para 2.2.

19. Now, in the light of the same, if the mechanism for identification of wilful defaulter is perused, all that it contemplates is that the Bank concerned should deal with parties like the petitioners fairly. The petitioners in this case and from inception have not disputed that there has been a default. In fact, after the working capital requirements were renewed and the guarantees and security provided, the petitioners relied on the market conditions globally. In fact on 18-8-2017, the petitioners' third respondent-Company forwarded a proposal for one time settlement of its total outstanding debt with the respondent-Bank. There are financial constraints is admitted so also that the revenue of the Company has declined from Rs.471.3 crores in Financial Year 2016 to Rs.272/- crores in

Financial Year 2017, leading to heavy losses. It is stated that the decline in revenue was primarily due to sales returns from overseas customers, non-realisation of the receivables, slow moving stock, adverse economic scenario, etc.. The outstanding debt position together with the financial performance of the third respondent was also set out in this proposal. After showing that there has been a fluctuation in the international crude prices, how the losses were suffered or the fund position could not be improved, it was proposed that there is an investor showing interest and he has been convinced to invest in the Company to revive its business. The Promoters were on a look out for financial partners/outright purchasers with adequate means. They could not find anyone who would be in a position to run the operations profitably with the burden of Bank liabilities. As far back as on 29-5-2017, they referred to an investor showing interest but his condition was that the debt of the Company should be zeroed down. It is only to enable the petitioners as also the third respondent to prevent further deterioration of the assets value, that this one time settlement

proposal was given. That proposal is summarised in this letter which ends on page 73 of the paper-book.

20. There is an open email response and referring to this proposal it is stated that this proposal was placed before the External Settlement Advisory Committee of the first respondent wherein the Committee has sought certain clarifications. It has referred to the group financials and sought the latest audited balance-sheets of their subsidiaries. The communication via the email says that the petitioners must furnish details of the sales transaction (Purchase Order, date of transaction, margin etc.) along with elaborate reasons for return and the present status of the goods under transaction, so also the loss incurred on account of sales return. Mr. Dhond would rely upon the attachments to this email to urge that it refers to the FAR as a draft but by itself this nomenclature does not carry the case of the petitioners any further. Even the one time settlement proposal was examined and it was placed before the appropriate Committees, clarifications and details were sought for, the petitioners and the third respondent were aware of the precarious financial position

and the demand from the Bank.

21. At page 85, there is a communication from the petitioners' third respondent-Company/authorised signatory and they purport to provide details of strategic investor but that would be handed over at the time of joint lenders financial meeting and details of sales return and action taken in that regard have been handed to the Auditor but further details would be separately submitted. The observations of the Forensic Auditor with comments of the Management duly filled were attached to this communication of 22-7-2017. Far from showing that there is any draft or tentative observation or comment, it is said in this communication that these observations have been expressly commented upon and an explanation is provided. Then, at page 86, the communication is that there is a final report which was sent to the Bank by this Auditor and his work has been completed. If there is any pendency, the petitioners would be happy if that is informed and they would release his payment. The matter has been followed up for two months. Thus, the petitioners settled the dues of this Auditor. Thereafter,

we have on record the emails. That one of the emails refers to the joint lenders' meeting convened on 21-2-2018 and the agenda, item No.1, is a discussion earlier held on the FAR.

22. Mr. Dhond's argument terms the report as a draft but what he fails to point out is that there were elaborate discussions on this FAR but lenders had various observations and therefore the decision on closure of the report could not be taken. The argument is that the lenders' observations have been communicated to the Forensic Auditor but they have not been incorporated in the report. The discussion on the FAR would be continued in the convened meeting. Apart therefrom, the first respondent had already issued individual demand notice under Section 13(2) of the The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 on 4-12-2017. The proceedings before the Directorate of Revenue Intelligence are also pending. It is thus evident that the Bank was purporting to inform the petitioners that such discussions, which would be held at the meeting, definitely have an impact on their creditworthiness and therefore the petitioners

are welcome to participate in the same. The report is also annexed and what we have on record therefore is a communication styled as a Show Cause Notice dated 29-6-2018. That is fairly elaborate. The petitioners are aware as to what is the precise allegation. The undisputed position is that, working capital limits aggregating to Rs.160/- crores comprising of fund based limit of Rs.45/- crores and non-fund based limit of Rs.115/- crores were granted by the first respondent-Bank to the third respondent-Company for the purpose of meeting the Company's working capital requirement. Then there are documents which have been referred to such as Loan Agreement, Deed of Hypothecation, various Supplemental Inter-se Agreements, Supplemental Deed of Hypothecation, Working Capital Consortium Agreement and mortgage of immovable properties in favour of the IDBI Bank. Mr. Rahul Nitin Shah and Mr. Kunal Nitin Shah have executed Guarantee Agreements furnishing their guarantees for the loan sanctioned by the first respondent to the third respondent. The Show Cause Notice says that the borrower was required to pay interest and

other charges as also to repay installments of the principal in accordance with the provisions of the Loan Agreement and Supplemental Loan Agreements, but it failed and neglected to pay the same and committed defaults in performance of other conditions of the Loan Agreement. In view of these defaults, the case was examined by applying the criteria on wilful default in terms of the RBI's Circular and it was observed that the borrower met that criteria laid down by the RBI to be classified as a wilful defaulter. That is why the names of the borrower and its Promoters/Directors were reported to the Reserve Bank of India/Credit Information Companies for inclusion in the List of Wilful Defaulters and then the grounds have been set out. It has been very categorically said that receivables from debtors have been set-off against the payables to creditors (third party) to the tune of Rs.148.27 crores. These were not routed through the banking system. Hence the Company has not been using fair practices in its business and diverting the cash flow out of the banking system. Then Letters of Credit were opened by entering into purchase transactions with parties like Inesh Accerro

Limited to the tune of Rs.10/- crores and the Letters of Credit were discounted by them. However, the movement of goods with respect to the said transaction was not conclusively proved. Thus, the clear charge is that if amounts have been received from the debtors but they have been set off against the payments to be made to creditors and that sum is to the tune of Rs.148.27 crores, which amount has not been disbursed through the normal banking channel and system, surely a case of diversion of the cash flow is made out. Taking out monies from the banking system has been understood as detrimental to the financial health of the entity as also the lender. Then no detail has been provided of the movement of goods, namely, the underlying transactions for which the Letters of Credit were opened, is equally a charge serious enough to fall, and in this case, under the heading Siphoning of Funds.

23. To our mind, there was nothing vague and uncertain about such a charge. The petitioners knew the case they had to meet. That is why on 12-7-2018 they replied to this letter of the first respondent and stated that the allegations are denied.

However, the transactions are stated to be prior to March, 2017 and they have been duly audited by reputed Chartered Accountant firms. The Bank is attributed the knowledge of these transactions. However, in relation to ground (a), we find that the explanation is not truthful for there would not have been a rider attached and that was that the Company is willing to explain each of the transactions in relation to ground (a), in a personal meeting before the Members of the Committee or Authority of the Bank, and in relation to ground (b), it was stated that the Company has sufficient documentary proof in respect of the transactions. It is willing to share the copies of such documentary evidence with the Bank. It is thus clear that there are mere denials and rest of the explanation only highlights the violation of the RBI guidelines and the Circular.

24. To our mind, therefore, the first respondent-Bank did not hold back anything from the petitioners. There are clear charges levelled. An explanation was called for and there was evidence from the forensic audit conducted in the account for the period 1-4-2014 to 31-3-2017. The Audit is by M/s. J. Singh

& Associates. Surely these transactions have been referred therein and that is why the Bank would deduce that they can form the basis for a Show Cause Notice so as to attract para 2.2 of the Master Circular. It is in these circumstances, after notifying its intention, the explanation was called for by the first respondent. It then decided to hold a personal hearing and communicated the date and time of that personal hearing. That is by the communication at page 123. Copy of this communication was also forwarded to the individual Directors, namely, the petitioners before us. It is thus clear that the principles of natural justice were followed. If this was not the position, then on 26-7-2018 the petitioners would not have communicated to the first respondent-Bank the names of the persons who would attend the personal hearing on the stated date and time, that is, 3-8-2018 at 5:00 p.m. in the office of the first respondent. It is clear from the petition itself that there is substance in the criticism that para 16 of the writ petition contains an allegation which is a pure after-thought. It also appears to us to be very apparent that the petitioners seek to

give an explanation to the transactions and that is clear from page 127 of the paper-book. It is stated that this was the explanation for adjustment of Rs.148.27 crores. This is a list of the transactions filed in the FAR and stated to be not routed through the banking channel. However, an explanation is given in relation to Eurotech Fire Protection Company Limited and that is stated to be a transaction for the Financial Year 2014-15. The two transactions Mr. Dhond refers to are, one of Eurotech and the other of Kardon Holdings Limited. It is stated that there are attached documents, namely, Foreign Bills Transaction Advice from IDBI Bank dated 21-8-2014 regarding receipt of US\$ 500,000/-. It is stated that the Company purchased this fire fighting equipment and this material was sold to Reliable Safety Trading Limited in UAE. The Company made a profit on this merchant trading transaction in the sum of US\$ 500,000/-. Then it is stated that the Company entered into an arrangement, wherein Reliable Safety Trading Limited was requested to make payment directly to Eurotech Fire Protection Company Limited and the balance to be paid to the third respondent's account.

This balance amount of US\$ 500,000/- has been received on 20-8-2014 and this transaction is reported to IDBI Bank on 19-8-2014. Thereafter, explanation is provided to the transaction with Kardon Holdings Limited in the sum of Rs.66.33 crores. There are other details which are sought to be provided. However, it is not as if the impugned decision makes no reference to the materials at all. It informs the third respondent as also the petitioners that the Identification Committee issued an order recording the fact of the petitioners' wilful default after careful examination of the materials produced. These findings are reviewed and confirmed by the Review Committee of the Bank constituted in terms of the RBI Circular. Those materials are, a Show Cause Notice dated 28-6-2018, the submissions thereto in writing and at the personal hearing. All decisions are taken in accordance with the RBI Circular.

25. If this was not the position, then on 20-10-2018, the petitioner had no occasion to thank the first respondent for a personal hearing and may be that this letter is addressed

without prejudice but that does not mean that there was no personal hearing or that an oral opportunity to give an explanation to the allegations in the show cause notice was not provided at all. The communication itself says that there were discussions in brief with regard to the parameters which have been pointed out by the members of the first respondent's Committee and derived from the observations of the FAR. Thus, supporting clarification and documents were provided during the personal hearing and other documents were submitted on 13 & 14-8-2018. The third respondent presumed that this was a satisfactory explanation. They also then deal with certain specified transactions as noted in the letter of 29-6-2018 and reiterated the position that these transactions were not as per the certified guidelines of the RBI. These transactions were reported to the authorised dealers and reflected in the book debt statement. Pertinently, the parties before us are not laymen. They know enough about foreign exchange deals and transactions. Section 10 of The Foreign Exchange Management Act, 1999 (“**FEMA, 1999**”) deals with an Authorised person, its

responsibilities and obligations as set out in sub-sections of that Section. Thus, the details of the transactions are being provided by the petitioners/third respondent at pages 127-130 of the paper-book. The moot question is that these transactions/adjustments were not in accordance with the FEMA, 1999. Appropriate declarations ought to have been made in relation thereto in accordance with law. The details are being provided subsequently. The third respondent says that it was never made aware by the trade finance team of IDBI Bank of such violation and this margin towards this sale transaction was credited by the Bank after verifying the transaction documents which gives the third respondent a fair opinion that the transactions were duly verified by the representative of the IDBI Bank before crediting this payment into their account. Banks are attributed expertise and reliance is placed on the expertise of the Bank and there is an admission that the third respondent did not get into the details of the transaction. If these would have been pointed out, then possibly they would have then credited the foreign currency and rectified any defect. In fact it is stated that

the Bank's representative wilfully accepted the remittance and credited the same into the account. There is a purported clarification given but more than that this communication questions the role of the first respondent as an authorised dealer. It is in these circumstances, we find that the Company seeks to justify its application for condonation of the error even though none of the Bankers intimated to them in the year 2014/2015 about such a lapse.

26. It is evident that the FAR clearly pointed out these transactions and invited the attention of the first respondent as to how there is a diversion of funds.

27. We are not sitting in judgment over the conclusion reached by experts and particularly in finance and banking. To our mind, therefore, neither the principles of natural justice have been violated nor the Master Circular is breached in arriving at the conclusion that the petitioners are wilful defaulters.

28. Mr. Dhond may rely upon the decision of the Hon'ble

Supreme Court in the case of **Jah Developers Pvt. Ltd.** (supra), but there the question and issue was, when a person is declared to be a wilful defaulter, is such person is entitled to be represented by a lawyer of his choice before the declaration is made. The Supreme Court came to the conclusion that there is no requirement of providing the services of an Advocate and that lawyer's presence at such proceedings, before that declaration is given, is not mandated. In fact, the decision of the Hon'ble Supreme Court to allow the Appeal of the State Bank of India is after taking a survey of the Judgments in the field. Thus, the Supreme Court concludes that there is no right to be represented by a lawyer. It clarifies that individual facts of each case have to be taken into consideration and whether a unit has defaulted in making payment obligation even when it has the capacity to honour the obligation and other matters referred to in the Circular, have to be tested upon, without the party proceeded against, being provided with the services of a lawyer. The caution administered is, 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. The impact of the declaration is enormous and there is no doubt about it. Therefore, the Bank has to be careful in issuing such a declaration. It must adhere to the Master Circular and the guidelines enumerated therein. However, when there is an adherence to the same, then, in individual facts and circumstances peculiar to a case the declaration is not to be faulted or interfered with in writ jurisdiction.

29. Like every decision of the experts, even in this case, the parameters for interference therewith in writ jurisdiction are too well-settled to require any reiteration. The decision ought to be demonstrably unreasonable and perverse. The decision ought to be tested on the touchstone that no reasonable person in the position of the lender, the first respondent in this case, would arrive at the conclusion that the party before it is a wilful defaulter. That the default is not wilful has to be established by those who are charged with the same. The explanation in this case is not trustworthy, honest and reliable.

30. As a result of the above discussion, we do not find any merit in the submissions of the petitioners. The petition is dismissed. Rule is discharged. No costs.

(SANDEEP K. SHINDE, J.)

(S.C. DHARMADHIKARI, J.)