

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

BEFORE:-

THE HON'BLE JUSTICE RAJASEKHAR MANTHA

WPO No. 223 of 2021

SURESH KUMAR PATNI & ORS.

VERSUS

STATE BANK OF INDIA, INDUSTRIAL FINANCE BRANCH & ANR.

For the Petitioners : Mr. Joy Saha, Senior Advocate.
Mr. Anuj Singh, Advocate.
Ms. Rashmi Singhee, Advocate.
Ms. Madhuja Barman, Advocate.

For the Respondent Bank : Mr. Om Narayan Rai, Advocate.
Mr. P. Agarwal, Advocate.

Hearing Concluded on : 22.07.2021

Judgment On : 26.07.2021

Rajasekhar Mantha, J.:-

1. The writ petitioners are aggrieved by order/communication dated 20th March, 2021 issued by the Review Committee/ Second Committee, respondents declaring them Wilful Defaulters. Prior thereto on 7th June, 2019 the Wilful Defaulter Identification Committee (WDIC)/First Committee in terms of the Master Circular of the Reserve Bank of India on Wilful Defaulters dated 1st July, 2015 (vide no. RBI/2015-16/100DBR.No.CID.BC.22/20.16.003/2012-16) identified the petitioners as Wilful Defaulters on, inter alia, the grounds that:-

- a) The petitioners defaulted in meeting payment/repayment obligations to the Bank, even though they had the capacity, to do so.

- b) The petitioners have not utilised the finance from the lender for the purpose for which it was availed. The petitioners have diverted funds for other purposes.
 - c) Short term working capital funds have been utilised for long term purposes.
 - d) Investments were made in other companies by acquiring equity without approval of the bank.
 - e) The petitioners have siphoned off funds without using the same for the purpose of which funds were availed.
2. Against each of the aforesaid allegations the evidence and documents relied upon to substantiate, wilful default were the audited Balance Sheets of M/s Rohit Fero Tech Limited (Principal Debtor) for the year ending 31st March, 2016, 31st March, 2017 and 31st March, 2018.
3. In reply thereto on 9th July, 2019, Advocates acting for the petitioners and the principal borrower purported to show cause. The petitioners also asked the bank to disclose all evidence before the said Wilful Defaulter Identification Committee (WDIC). The bank by communication dated 16th August, 2019 replied to the cause shown by the petitioners. The petitioners through their Advocates replied to the said reply on 9th September, 2019. By a letter dated 9th December, 2019 the WDIC offered a personal hearing to the petitioners via video conference. The petitioners were required to come to the video

conferencing room at Bank's Branch in Kolkata at Middleton Street at 1 p.m. on 30th December, 2019.

4. Prior thereto by a letter dated 26th December, 2019 the petitioners after reiterating their earlier contentions placed further facts showing cause and asked for the same to be placed before the WDIC.
5. The Bank thereafter by communication dated 3rd March, 2020 extended time and deferred the date of personal hearing to 20th March, 2020 at 11 a.m. and once again asked the petitioners to be present for virtual hearing at the Middleton Street office of the bank.
6. In reply thereto the petitioners by communication dated 18th March, 2020 asked for personal hearing to be allowed from the residence or the office of the petitioners at Kolkata. The petitioners did not avail the come to the bank on 20th March, 2020.
7. By a communication dated 16th July, 2020 the petitioners once again asked the bank for documents relating to the petitioners' credit facilities; details of the constitution of the WDIC; all materials and documents relied upon by the WDIC and the minutes of meeting of the Committee leading to the identification of the petitioners as Wilful Defaulters. The bank was also called upon to recall the previous show cause and hold personal hearing online without they having to come to the branch of the bank. The said request was reiterated on 22nd August, 2020, 26th November, 2020 and 7th January, 2021.

8. With a view to alleviate the repeated requests of the petitioners, the bank by communication dated 3rd February, 2021 once again resubmitted and furnished documents to the petitioners. By an order dated 12th May, 2021, the petitioners were informed that the Review Committee of the bank in its meeting dated 20th March, 2021 confirmed the decision of the WDIC dated 27th November, 2020. It was intimated that the names of the petitioners and the principal borrower would be included in the CIC's list of Wilful Defaulters. It was further informed that the bank would publish photographs of the petitioners in newspapers informing the public at large that they are Wilful Defaulters. The minutes of the meeting of the Review Committee dated 20th March, 2021 leading to the order no. 2020-2021/12/45 were enclosed with such order.
9. Mr. Joy Saha, Ld. Senior Counsel appearing for the petitioners, would assail not only the final order of the Review Committee but also the WDIC proceedings conducted to declare the writ petitioners as Wilful Defaulters on, inter alia, the following grounds:
 - a) That the writ petitioners were not furnished with the documents relied upon by the WDIC. They were, therefore, deprived of an opportunity of defending themselves.
 - b) The petitioners could not have attended the personal hearing offered by the WDIC while sitting at the branch of the bank in view of the on-going pandemic. The petitioners were thus wrongfully denied the personal hearing albeit virtually

from their residence and/or office. The petitioners were, therefore, never offered any personal hearing. He relied on the decision of the Supreme Court in the case of **State Bank of India vs. Jah Developers Private Limited & Ors.** reported in **(2019) 6 SCC 787, Alogoma Steels Ltd. & Ors. vs. SBI & Ors. (Single Bench)** reported in **2019 SCCOnline Cal 4276** and **Gouri Prasad Goenka vs. State Bank of India & Anr.** reported in **2019 SCCOnline Cal 4630** in support of this argument.

c) The WDIC could not have found diversion of funds by the petitioners since the entire sale proceeds of the business of the petitioners could not be paid to the lenders without meeting the overheads. There was thus no diversion of funds or non-payment of dues despite the having capacity to do so.

d) The investment by the principal debtor in a 100% owned subsidiary was to the knowledge of the lenders even at the time of reschedulement of loans.

e) There are in fact no reasons advanced or answers given by the WDIC to any of the contentions of the petitioners in the cause shown by them. The finding and answers in column 4 of the order of WDIC is mechanical and devoid of any reasons.

f) The Review Committee did not give detailed or any reasons or any reason for that matter while confirming the

order of the WDIC. The Review Committee has verbatim reproduced the findings of the WDIC. The order declaring the petitioners wilful defaulter is, therefore, not valid in the eye of law and is liable to be quashed.

g) Publication of photographs of the borrowers cannot be done at the drop of a hat and except where there are exceptional circumstances or where the borrower has mala fide intention in committing any of the acts under the Wilful Defaulter guidelines. In support thereof reliance is placed on a decision of the Division Bench of this Court in the case of **State Bank of India & Ors. vs. Ujjal Kumar Das and Anr.** reported in **2016 SCCOnline Cal 1217**, **Siddharth Agarwal and others vs. State Bank of India** reported in **2018 (187) AIC 713** and **Metsil Exports Private Limited & Anr. vs. Punjab National Bank & Anr.** reported in **2016 SCCOnline Cal 6173**.

10. Mr. Om Narayan Rai, Ld., Counsel appearing for the Bank, opposes the submissions of the petitioners argument to argument both law and fact and relies upon the following decisions:

a) **Kotak Mahindra Bank Limited vs. Hindustan National Glass & Industries Limited and Ors.**, reported in **(2013) 7 SCC 369, Para 62**.

- b) **Syed Yakoob vs. K.S. Radhakrishnan & Ors.**, reported in **AIR 1964 SC 477, Para 7.**
- c) **State of UP vs. Sudhir Kumar Singh & Ors.** reported in **2020 SCCOnline SC 847.**
- d) **Ram Kumar vs. State of Haryana** reported in **1987 Supp SCC 582.**
- e) **Union Bank of India vs. Sudhir Kumar Patoria** being MAT No. 787 of 2019 Judgment dated **28.02.2020.02.2020.**
- f) **S.N. Mukherjee vs. Union of India** reported in **(1990) 4 SCC 594 Para 36.**
- g) **Manish Kumar vs. UOI & Anr.**, reported in **2021 SCCOnline SC 30 Para 275, 276 and 280.**

11. Having heard the rival submissions of the parties at length, this Court now proceeds to deal with the same.
12. The argument of the writ petitioners that they were not supplied the documents relied upon by the WDIC or that documents were supplied to the petitioners after the decision of the WDIC, cannot be accepted. The show cause notice issued by the WDIC itself clearly refers to the audited Balance Sheet of the principal debtor Rohit Fero Tech Ltd. for the year ending 31st March, 2016, 31st March, 2017 and 31st March, 2018. No other documents have been relied upon by the Identification

Committee. The findings of the Identification Committee have been culled out only from such audited Balance Sheets. Such Balance Sheets are public documents and/or own documents of the petitioners. The question of formal and/or further supply of the same, therefore, does not and cannot arise.

13. The repeated requests for supply of the documents relied upon by the Identification Committee, therefore, do not appear to be bona fide. Hence the petitioners' argument on that score cannot be sustained. In so far as supply of documents by the Bank under communication of its letter dated 3rd February, 2021, it is apparent and clear that the bank was furnishing for the 2nd time and resubmitting the documents to the petitioners. The arguments of the petitioners that they have been furnished with the documents after the decision having been taken by the WDIC, cannot be sustained.
14. It is indeed true that in terms of the decision of the Supreme Court in the case of **State Bank of India vs. Jah Developers (supra)**, the borrower is entitled under the revised Master Circular to make a representation against the findings of the WDIC/First Committee. Personal hearing of the borrowers has not been mandated by the Supreme Court or required under the Master Circular. What is mandatory is that the borrower should be allowed to represent against the show-cause notice issued by the WDIC. Admittedly the writ petitioners had represented against the show cause issued by the WDIC on 07.06.2019 and the same has been considered by the bank

by letter dated 09.07.2019. **Paragraph 24** of the **Jah Developer decision (supra)** is set out hereinbelow:

“24. Given the above conspectus of case law, we are of the view that there is no right to be represented by a lawyer in the in-house proceedings contained in Para 3 of the Revised Circular dated 1-7-2015, as it is clear that the events of wilful default as mentioned in Para 2.1.3 would only relate to the individual facts of each case. What has typically to be discovered is whether a unit has defaulted in making its payment obligations even when it has the capacity to honour the said obligations; or that it has borrowed funds which are diverted for other purposes, or siphoned off funds so that the funds have not been utilised for the specific purpose for which the finance was made available. Whether a default is intentional, deliberate, and calculated is again a question of fact which the lender may put to the borrower in a show-cause notice to elicit the borrower's submissions on the same. However, we are of the view that Article 19(1)(g) is attracted in the facts of the present case as the moment a person is declared to be a wilful defaulter, the impact on its fundamental right to carry on business is direct and immediate. This is for the reason that no additional facilities can be granted by any bank/financial institutions, and entrepreneurs/promoters would be barred from institutional finance for five years. Banks/financial institutions can even change the management of the wilful defaulter, and a promoter/director of a wilful defaulter cannot be made promoter or director of any other borrower company. Equally, under Section 29-A of the Insolvency and Bankruptcy Code, 2016, a wilful defaulter cannot even apply to be a resolution applicant. Given these drastic consequences, it is clear that the Revised Circular, being in public interest, must be construed reasonably. This being so, and given the fact that Para 3 of the Master Circular dated 1-7-2013 permitted the borrower to make a representation within 15 days of the preliminary decision of the First Committee, we are of the view that first and foremost, the Committee comprising of the Executive Director and two other senior officials, being the First Committee, after following Para 3(b) of the Revised Circular dated 1-7-2015, must give its order to the borrower as soon as it is made. The borrower can then represent against such order within a period of 15 days to the Review Committee. Such written representation can be a full representation on facts and law (if any). The Review Committee must then pass a reasoned order on such representation which must then be served on the borrower. Given the fact that the earlier Master Circular dated 1-7-2013 itself considered such steps to be reasonable, we incorporate all these steps into the Revised Circular dated 1-7-2015. The impugned judgment [*SBI v. Jah Developers (P) Ltd.*, LPA No. 113 of 2015 sub nom *Punjab National Bank v. Kingfisher Airlines Ltd.*, 2015 SCC OnLine Del 14128 : (2016) 154 DRJ 164] · [*Kingfisher Airlines Ltd. v. Union of India*, 2015 SCC OnLine Bom 6075 : (2016) 2 Mah LJ 838] 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.”

15. Repeated assertions that the petitioners were prejudiced by absence of personal hearing, therefore, cannot be sustained. The petitioners even otherwise were offered a personal hearing by the bank at its office which was not availed by the writ petitioners.
16. The arguments made on merits i.e. the actual findings; that funds were needed to meet overheads and that investments in subsidiaries cannot amount to a diversion, cannot be entertained by the Writ Court since the same would amount to sitting in the appeal on the findings of the WDIC. A Writ Court under Article 226 cannot assail the decision itself except in rare circumstances. It is only the decision making process that is looked into.
17. On the last argument that the order of the Review Committee is not sustainable for absence of reasons, it is necessary to refer to the decision of the Supreme Court in the case of **State of UP vs. Sudhir Kumar Singh (supra)**. At Paragraph 39, it was held as follows:

“39. An analysis of the aforesaid judgments thus reveals:

(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the *audi alteram partem* rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction *per se* does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

(5) The “prejudice” exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.”

18. Further in the **Ram Kumar decision (supra)** the Hon’ble Supreme

Court has stated at **paragraph 7 and 8** as follows:

“7. It has been pointed out by the High Court that the punishing authority has passed a lengthy order running into seven pages mentioning therein the contents of the charge-sheet, the detailed deposition of the witnesses, as recorded by the enquiry officer, and the findings of the enquiry officer. The explanation submitted by the appellant has also been reproduced in the impugned order. Thereafter, the punishing authority stated as follows:

“I have considered the charge-sheet, the reply filed to the charge-sheet, the statements made during enquiry, the report of the enquiry officer, the show cause notice, the reply filed by the delinquent and other papers and that no reason is available to me on the basis of which reliance may not be placed on the report of the enquiry officer. Therefore, keeping these circumstances in view, I terminate his service with effect from the date of issue of this order.”

8. In view of the contents of the impugned order, it is difficult to say that the punishing authority had not applied his mind to the case before terminating the services of the appellant. The punishing authority has placed reliance upon the report of the enquiry officer which means that he has not only agreed with the findings of the enquiry officer, but also has accepted the reasons given by him for the findings. In our opinion, when the punishing authority agrees with the findings of the enquiry officer and accepts the reasons given by him in support of such findings, it is not necessary for the punishing authority to again discuss evidence and come to the same findings as that of the enquiry officer and give the same reasons for the findings. We are unable to accept the contention made on behalf of the appellant that the impugned order of termination is vitiated as it is a non-speaking order and does not contain any reason. When by the impugned order the punishing authority has accepted the findings of the enquiry officer and the reasons given by him, the question of non-compliance with the principles of natural justice does not arise. It is also incorrect to say that the impugned order is not a speaking order.”

19. In **S.N Mukherjee vs. Union Of India** at **Paragraph 36**, the Supreme

Court stated as follows:

“36. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighed with this Court in holding that an administrative authority must record reasons for its decision, are of no less significance. These considerations show that the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.”

20. The same principles of administrative law are applied in both service law and the law with regard to Wilful Defaulters, as held by a Division Bench of this Court in **Union Bank of India vs. Sudhir Kumar Patoria (supra)**. In fact, the rules and law applied to administrative and quasi judicial proceedings have a common source in administrative law.
21. It is seen in the facts of the above case that reasons have been given by the WDIC in arriving at its findings and that too after specifically referring to every point in cause-shown by the petitioners. The Review Committee being a Confirming Authority having agreed with the findings of the WDIC/First Committee need not and could not have given any further reasons. The principle that when a Disciplinary

Authority agrees with the findings of the Enquiry Committee and an Appellate Authority agrees with the findings of the Disciplinary Authority or Appellants need not give detailed reasons or even any reasons at all, must and should also be applied in the instant case. Hence the arguments that the reasons Review Committee are devoid of reason and hence not sustainable is rejected.

22. A Writ Court cannot go into weigh the sufficiency of reasons given by an administrative or quasi judicial authority. What is seen, is whether there are some reasons, however small, in support of the findings. This is so as it is only a bank and the lender, given their special relations that can assess whether any default on the part of a borrower is wilful or not. A writ Court does not possess such expertise.
23. The writ petitioners have not been able to demonstrate as to how they have been prejudiced by any of the alleged acts or omissions on the part of the respondent. Assuming for the sake of argument that there is some infraction of procedure on the part of the bank (although the Court does not find any) it is now well settled that every infraction of the principle of natural justice would not ipso facto vitiate proceedings. The petitioner must be able to demonstrate clearly the prejudice suffered by the reason of such infraction. Hence even if one accepts the submission of Mr. Saha that there has been some minor infractions of natural justice or procedure, no prejudice appears to have been caused to the petitioners, by such infraction.

24. Although not pressed in course of arguments it has been pleaded in the writ petition that the bank has instituted proceedings under Section 7 of the IBC, 2016. It is submitted that declaring the writ petitioners as Wilful Defaulters would deprive the petitioners of Rights under Section 32 A of the IBC. It is argued that the impugned orders under Master Circular, 2015 would entail penal consequence on the petitioners and are in derogation of the proceedings under and the provisions of the IBC, 2016.
25. It is evident from **Paragraph 275, 276 and 280** of the decision of the Supreme Court in the case of **Manish Kumar vs. Union Of India (supra)** that the benefits of Section 32 A are not available to every other promoter and guarantor of every corporate debtor. The relevant paragraphs of the aforesaid decision are set out hereinbelow:

“275. Section 32A has been divided into three parts consisting of sub-Sections (1) to (3). Under sub-Section (1), notwithstanding anything contained, either in the Code or in any other law, liability of a corporate debtor, for an offence committed prior to the commencement of the CIRP, shall cease. Further, the corporate debtor shall not be liable to be prosecuted for such an offence. Both, these immunities are subject to the following conditions:

- i. A Resolution Plan, in regard to the corporate debtor, must be approved by the Adjudicating Authority under Section 31 of the Code;
- ii. The Resolution Plan, so approved, must result in the change in the management or control of the corporate debtor;
- iii. The change in the management or control, under the approved Resolution Plan, must not be in favour of a person, who was a promoter, or in the management and control of the corporate debtor, or in favour of a related party of the corporate debtor;
- iv. The change in the management or control of the corporate debtor must not be in favour of a person, with regard to whom the relevant Investigating Authority has material which leads it to entertain the reason to believe that he had abetted or conspired for the commission of the offence and has submitted or filed a Report before the relevant Authority or the Court. This last limb may require a little more demystification. The person, who comes to acquire the management and control of

the corporate person, must not be a person who has abetted or conspired for the commission of the offence committed by the corporate debtor prior to the commencement of the CIRP. Therefore, abetting or conspiracy by the person, who acquires management and control of the corporate debtor, under a Resolution Plan, which is approved under Section 31 of the Code and the filing of the report, would remove the protective umbrella or immunity erected by Section 32A in regard to an offence committed by the corporate debtor before the commencement of the CIRP. To make it even more clear, if either of the conditions, namely abetting or conspiring followed by the report, which have been mentioned as aforesaid, are present, then, the liability of the corporate debtor, for an offence committed prior to the commencement of the CIRP, will remain unaffected.;

276. The first *proviso* in sub-Section (1) declares that if there is approval of a Resolution Plan under Section 31 and a prosecution has been instituted during the CIRP against the corporate debtor, the corporate debtor will stand discharged. This is, however, subject to the condition that the requirements in sub-Section (1), which have been elaborated by us, have been fulfilled. In other words, if under the approved Resolution plan, there is a change in the management and control of the corporate debtor, to a person, who is not a promoter, or in the management and control of the corporate debtor, or a related party of the corporate debtor, or the person who acquires control or management of the corporate debtor, has neither abetted nor conspired in the commission of the offence, then, the prosecution, if it is instituted after the commencement of the CIRP and during its pendency, will stand discharged against the corporate debtor. Under the second *proviso* to sub-Section (1), however, the designated partner in respect of the liability partnership or the Officer in default, as defined under Section 2(60) of the Companies Act, 2013, or every person, who was, in any manner, in-charge or responsible to the corporate debtor for the conduct of its business, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor. This is despite the extinguishment of the criminal liability of the corporate debtor under sub-Section (1). Still further, every person, who was associated with the corporate debtor in any manner, and, who was directly or indirectly involved in the commission of such offence, in terms of the Report submitted and Report filed by the Investigating Authority, will continue to be liable to be prosecuted and punished for the offence committed by the corporate debtor. Thus, the combined reading of the various limbs of sub-Section (1) would show that while, on the one hand, the corporate debtor is freed from the liability for any offence committed before the commencement of the CIRP, the statutory immunity from the consequences of the commission of the offence by the corporate debtor is not available and the criminal liability will continue to haunt the persons, who were in in-charge of the assets of the corporate debtor, or who were responsible for the conduct of its business or those who were associated with the corporate debtor in any manner, and who were directly or indirectly involved in the commission of the offence, and they will continue to be liable.

280. We are of the clear view that no case whatsoever is made out to seek invalidation of Section 32A. The boundaries of this Court's jurisdiction are clear. The wisdom of the legislation is not open to judicial review. Having regard to the object of the Code, the

experience of the working of the code, the interests of all stakeholders including most importantly the imperative need to attract resolution applicants who would not shy away from offering reasonable and fair value as part of the resolution plan if the legislature thought that immunity be granted to the corporate debtor as also its property, it hardly furnishes a ground for this Court to interfere. The provision is carefully thought out. It is not as if the wrongdoers are allowed to get away. They remain liable. The extinguishment of the criminal liability of the corporate debtor is apparently important to the new management to make a clean break with the past and start on a clean slate. We must also not overlook the principle that the impugned provision is part of an economic measure. The reverence courts justifiably hold such laws in cannot but be applicable in the instant case as well. The provision deals with reference to offences committed prior to the commencement of the CIRP. With the admission of the application the management of the corporate debtor passes into the hands of the Interim Resolution Professional and thereafter into the hands of the Resolution Professional subject undoubtedly to the control by the Committee of Creditors. As far as protection afforded to the property is concerned there is clearly a rationale behind it. Having regard to the object of the statute we hardly see any manifest arbitrariness in the provision.”

26. Useful reference in this context may also be made to the case of **Kotak**

Mahindra decision (supra) paragraph 49.

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

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

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

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

27. The petitioners even otherwise are not entitled to benefit of Section 32A, since no resolution plan has been sanctioned as yet by the NCLT and even if a resolution plan was approved, the petitioners cannot avail the benefits of Section 32A for being promoters and consequently being persons in default under Section 32 A read with Section 2(60) of the Companies Act, 2013.
28. On the question of penal consequences useful reference may be made to the decision of the **Kotak Mahindra Bank (supra)** particularly **paragraph 61**.

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

“4.3. Criminal action by banks/financial institutions.—It is essential to recognise that there is scope even under the exiting legislations to initiate criminal action against wilful defaulters depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the Penal Code, 1860 (IPC), 1860. Banks/FIs are, therefore, advised to seriously and promptly consider initiating criminal action against wilful defaulters or wrong certification by borrowers, wherever considered necessary, based on the facts and circumstances of each case under the above provisions

of IPC to comply with our instructions and the recommendations of JPC.

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

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

29. For the reasons stated hereinabove, the writ petition must fail and is hereby dismissed.
30. In the facts of the case, however, there shall be no order as to costs.
31. Urgent Photostat Certified server copy of this judgment, if applied for, be supplied to the parties on urgent basis.

(Rajasekhar Mantha, J.)

Later

After judgment is delivered Counsel for the petitioners seeks stay of the operation for a period of 2 weeks. Such prayer is considered and rejected.

(Rajasekhar Mantha, J.)