

**IN THE HIGH COURT OF TELANGANA AT HYDERABAD**

**W.P. No. 36551 of 2022**

**Between:**

Mr Ritesh Kumar Agarwal and others

... Petitioners

And

IDBI Bank and others

... Respondents

**JUDGMENT PRONOUNCED ON: 15.04.2024**

**THE HON'BLE MRS JUSTICE SUREPALLI NANDA**

1. Whether Reporters of Local newspapers : Yes  
may be allowed to see the Judgment?
2. Whether the copies of judgment may be : Yes  
marked to Law Reporters/Journals?
3. Whether Their Lordships wish to : Yes  
see the fair copy of the Judgment?

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**SUREPALLI NANDA, J**

**THE HON'BLE MRS JUSTICE SUREPALLI NANDA****W.P. No. 36551 of 2022****% 15.04.2024****Between:**

Mr Ritesh Kumar Agarwal and others

... Petitioners

And

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... Respondents

&lt; Gist:

➤ Head Note:

!Counsel for the Petitioners: Mr S.Raja Gopalan

^counsel for Respondents: Mr V.V.S.N.Raju

? Cases Referred:

1. 2023 (6) SCC 1

**HON'BLE MRS JUSTICE SUREPALLI NANDA**

**W.P. No. 36551 of 2022**

**ORDER:**

Heard Mr S.Rajagopalan, learned counsel appearing on behalf of the petitioners and Mr V.V.S.N.Raju, learned standing counsel appearing on behalf of the respondents.

**2. The petitioners approached the Court seeking payer as under:**

"to issue any writ or order or direction more particularly one in the nature of writ of Certiorari and call for the Records pertaining to Declaration of petitioners herein as wilful defaulter by Wilful Defaulter Identification Committee vide order No.WDC/25/(FR22)/RIL, dated 12.08.2021 and consequential order of the Wilful Defaulter Review Committee vide order No.WDRC/19/(FY2021-2022)/RIL, dated 08.11.2021."

**3. The case of the petitioners as per the averments made by the petitioners in the affidavit filed by the petitioners in support of the present writ petition is as under:**

a) The 1<sup>st</sup> and 2<sup>nd</sup> Petitioner herein are suspended promoters of Rajvir Industries Limited, a company

incorporated under companies act and having Corporate Identification No. L17116TG2004PLC044053 and the Respondent No.1 had classified the account of Rajvir Industries Limited as a Non-Performing Account on 29.06.2014.

b) Thereafter, the State Bank of India in the month of September 2019, had filed an application for initiation of Corporate Insolvency Resolution Process (CIRP) of Rajvir Industries Limited with C.P. (IB) No 747/7/HDB/2019. Aggrieved by the same, the Petitioner had challenged the said application on the grounds that the Default date i.e. 29.06.2014 is more than 3 years prior to filing of CIRP application and further by virtue of Section 18 of limitation act the said application for initiation of CIRP is liable to be dismissed.

c) The Respondent had issued a Show Cause notice dated 18.05.2020 wherein it was cited that the Wilful Defaulter Identification Committee had examined the conduct of the account and utilization of credit facilities and had concluded that the acts/events of willful default are as follows:

(i) The unit has defaulted in meeting its payment obligations to the lender and has not utilized the finance

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

(ii) Routing of Funds through any bank other than the lender bank or members of the consortium without the permission of the lender.

As per the Forensic Audit report of Chaturvedi & Co, the company was maintaining current accounts with Standard chartered bank(SCB) and Corporation Bank respectively during the Financial Year 2017-2018 and 2018-2019 without the permission of the lender banks. Hence it is evident that the company did not route the entire sale proceeds with the lender banks, instead, the funds were routed through banks other than the lender banks without prior permission of the lenders."

d) Thereafter, the 1<sup>st</sup> Petitioner herein had replied to the said notice vide his reply dated 02.06.2020 on behalf of Rajvir Industries Limited as well as the promoter/ guarantors who are the petitioners herein denying the allegations made by Respondent Bank and in the said letter the Petitioners also highlighted the fact that they are not in possession of Forensic Audit report relied upon by the Respondent bank and requested the Forensic Audit report to be shared with petitioners. The 1<sup>st</sup> Petitioner has also requested State Bank

of India vide letter dated 27.11.2019 to provide petitioners the copy of the forensic audit report, but State Bank of India through vide their letter dated 29.11.2019 had declined the same.

e) The Respondent through vide their letter dated 04.02.2021, informed the petitioners that they have been declared as wilful defaulters by the Willful Defaulter Identification committee and vide the said letter the Petitioners came to be aware that there was a paper publication dated 04.04.2020 issuing show cause notice to the Petitioners. Hence, petitioners submits that the Willful Defaulter Identification Committee of State Bank of India had unilaterally and arbitrarily and without granting personal hearing to the Petitioners had Identified/declared the petitioners as willful defaulters.

f) Thereafter, the petitioner has submitted a representation dated 15.02.2021 to the Deputy General Manager of Respondent bank reiterating the contents of petitioners' letter dated 02.06.2020 and also annexed the ledger copy pertaining to transactions undertaken at Standard

Chartered Bank for the financial years 2017-2018 and 2018-2019.

g) On 26.04.2021, the NCLT had admitted the CIRP application filed by State Bank of India and appointed Shri. T.S.N. Raja as Resolution Professional for administering the CIRP. On 01.06.2021, the Resolution Professional, had issued letters addressed to 1<sup>st</sup> and 2<sup>nd</sup> Petitioner herein restraining them from attending the office and/or factory of Rajvir Industries Limited.

h) Aggrieved by the same, the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner had challenged the impugned order dated 01.06.2021, vide I.A. No 277 of 2021 in C.P(IB) No 747/7/HDB/2019 and in the said Interlocutory application, the Resolution Professional was arrayed as 1<sup>st</sup> Respondent and State Bank of India representing the consortium of creditors was arrayed as the 2<sup>nd</sup> Respondent.

i) The Rajvir Industries Limited, being a Medium, Small and Micro Enterprise, had submitted Expression of Interest to the Resolution Professional on 08.07.2021 and the same was rejected by the Resolution Professional on the grounds that Rajvir Industries Limited was not a Medium, Small and Micro

Enterprise. Aggrieved by the same, the petitioners filed an I.A.No. 370 of 2021 in C.P.(IB) No 747/7/HDB/2019.

j) Thereafter, the Respondent vide notice dated 17.07.2021 had scheduled the personal hearing of Petitioners herein before the Willful Defaulter Identification Committee on 29.07.2021. The petitioner Nos.1 and 2 herein has appeared before the committee and requested to provide Forensic Audit Report and also highlighted the fact that since the Resolution Professional had restrained the 1<sup>st</sup> and 2<sup>nd</sup> Petitioner from attending the office of Rajvir Industries Limited from 01.06.2021 to 03.09.2021 and they were handicapped from providing relevant details to support petitioners' case.

k) Furthermore, the committee has identified the promoters as Willful Defaulters vide Proceedings dated 12.08.2021 and referred the case of the petitioners to Wilful Defaulter Review Committee. The petitioners then issued a representation to the Wilful Defaulter Review committee vide email dated 26.08.2021 stating that the petitioners had highlighted the fact that the Resolution Professional has restrained the Petitioner Nos. 1 & 2 from entering in to office premises for procuring the vital piece of evidence and



requested the Willful Defaulter Identification Committee to rescind the identification of promoters as willful defaulters.

l) The NCLT, through its orders dated 03.09.2021 in I.A No 277 of 2021 in C.P(IB) No 747/7/HDB/2019, permitted the promoters (Petitioner Nos. 1 & 2) to attend office and/or factory and declared the impugned order dated 01.06.2021 of Resolution Professional as being contrary to laws.

m) The Resolution Professional through memo dated 20.06.2022, filed in I.A. No. 370 of 2021 in C.P. (IB) No 747/7/HDB/2021 and submitted that, the Respondent bank herein had declared the Promoters/petitioners as Willful Defaulter on 08.11.2021 and neither the same was informed nor the copies of the Order dated 08.11.2021 were supplied to the petitioners and upon several requests made by the petitioner, the said declaration by the respondent bank was supplied to the petitioners.

n) The petitioners had submitted a resolution plan for Rajvir Industries Limited on 03.08.2022 and a revised resolution plan dated 13.08.2022 as per instructions of Consortium of Bankers and the Respondent is now taking umbrage under the declaration of Petitioners as WilfulDefaulter

and is refusing to consider the resolution plan submitted by the Petitioners despite the Order of NCLT in I.A No 370 of 2021 in C.P. (IB) No.747/7/HDB/2019 and thereby causing irreparable losses and mental stress to the petitioners. Hence, this Writ Petition.

#### **PERUSED THE RECORD**

**4. Order dated 28.09.2022 passed in W.P.No.3655, 36737 and 36751 of 2022, reads as under:**

“At request of Sri Srinivas Chitturu and Sri V.S.N.Raju, learned counsel appearing for respondents to file counter, list on '12.10.2022.

According to the petitioner, despite specific request being made, Respondent bank did not furnish forensic audit and RP has restrained the petitioner from discharging his duties from 01.06.2021 to 03.09.2021. He had submitted resolution plan on 29.06.2022 pursuant to NCLT order. COC meeting was on 09.08.2022. Even then, respondents-banks have declared the petitioners as willful defaulters.

Whereas, Sri Srinivas Chitturu, learned counsel appearing for IDBI would submit that IDBI bank has already furnished the names of the petitioners as willful defaulters to the credit information companies. Therefore, the petitioners herein have to implead Reserve Bank of India.

In view of the same, the matter requires examination.

Till 12.10.2022, the respondents-Banks are directed not to take further steps pursuant to the order dated 08.11.2021 passed by Willful Defaulter Review Committee of IDBI Bank. Liberty is granted to the petitioners to take steps to implead Willful Defaulter Review Committee of Industry Development Bank of India (IDBI) also Reserve Bank of India (RBI)”

**The said order dated 28.09.2022, passed in the present writ petition is in force, as on date.**

**5. Vacate Stay Petition has been filed by the Respondent Nos. 1 to 3 to vacate the interim orders dated 28.09.2022 in I.A No. 2 of 2022 in W.P. No. 36551 of 2022.**

**6. Counter Affidavit filed by the Respondent No. 1 to 3 and in particular, para 5 read as under:**

"5. With reference to the contention of the petitioners at paras 34 & 37 that they were not provided with the Forensic Audit Report has no relevance as the petitioners are confronted with specific allegations that they have committed certain acts which constitute Willful Default as defined under the RBI Master Circular dt.01.07.2015 which acts are not being rebutted by the petitioners.

It is submitted that the letters dt.02.06.2020 & 15.02.2021 of the borrower company categorically articulates that the auditors have done forensic audit taking into consideration the details submitted by the borrower company and the submissions made by them to the forensic auditors and as such the allegation of the borrower company that they are not provided with forensic audit report when it was conducted in their presence and to their knowledge clearly shows the allegation if malafide intention and baseless. It is

submitted that the only charge expected to be answered by the petitioners with regard to utilization of the short term working capital loans to repay the long term loans without utilizing the funds for the purpose for which the loans were sanctioned, which is not in conformity of the sanction for which the Forensic Audit Report is not required. **The petitioners having failed to provide an acceptable explanation to the act of mis-utilization of loan amount are trying to harp on the non providing of Forensic Audit Report.**

**7. The learned counsel appearing on behalf of the petitioners mainly puts forth the following submissions:**

i) The declaration of the petitioners vide WDC/25/(FR22)/RIR, dated 12.08.2021 passed by Wilful Defaulter Identification Committee (2<sup>nd</sup> respondent herein) and consequential orders passed vide order dated 08.11.2021 by Wilful Defaulter Review Committee (3<sup>rd</sup> respondent herein) declaring the petitioners as wilful defaulters needs to be quashed since the Fundamental Rights of the petitioners mandated in Article 19(1)(g) of Constitution of India had been grossly violated.

ii) The respondent has steadfastly refused to provide the forensic Audit Report relied by respondents for the purpose of identification and Classification of petitioners herein as wilful defaulters despite repeated requests by

the petitioners herein and hence, the declaration of petitioners herein as wilful defaulters is liable to be set aside.

iii) The resolution professional had restrained the petitioner herein from attending office and/or factory from 01.06.2021 to 03.09.2021 and thereby the petitioners were restrained from producing crucial documents pertaining to their submissions and claims before the wilful defaulter Identification Committee.

iv) The wilful Defaulter Identification Committee despite being aware that the petitioners were restrained by resolution professional proceeded to identify the petitioners as wilful defaulter's, hence, the declaration of the petitioners herein as wilful defaulters is liable to be set aside.

v) The petitioners did not receive any order issued by the wilful defaulter Review Committee and hence, the wilful Defaulter Review Committee admittedly did not apply its mind independently prior to declaring the petitioners as wilful defaulters and hence the declaration of petitioners as wilful defaulter is liable to be set aside.

vi) Respondent bank with a malafide intention to prevent the petitioners from filing a resolution plan as mandated under Section 240A of Insolvency and Bankruptcy Code and has classified the petitioners as wilful defaulters and that too without following the principles of natural justice and hence, the declaration of

the petitioners as wilful defaulter is liable to be set aside.

Based on the aforesaid submissions, learned counsel for the petitioners contends that the writ petition is to be allowed.

**8. Learned standing counsel appearing on behalf of the respondent bank mainly putsforth the following contentions:**

i) Writ petition is not maintainable against the respondent bank since the relationship between the petitioners and the Answering respondent is that of a Borrower and Creditor and based on commercial contracts.

ii) The respondent bank had been discharging any statutory duty or public duty while dealing with recovery of its dues, hence, on this count also writ petition is not maintainable.

iii) The respondent bank at every stage of proceedings provided sufficient opportunity to the petitioner to substantiate petitioners stand against the proposal of declaration of wilful defaulters.

iv) The Answering respondent bank has meticulously complied with the procedure and acted in a fair manner.

v) Since the petitioners had failed to give proper response/reply in respect of the payments made from savings bank account which is not satisfactory and acceptable, the recommendation to include the petitioners name as wilful defaulters was made since petitioners are liable to pay substantial amount to the respondent bank and are trying to evade payment and are resorting to litigation.

Based on the aforesaid submissions and placing reliance on the averments made in the counter affidavit filed by the respondents the learned counsel appearing on behalf of respondents 1, 2 and 3 contended that the writ petition has to be dismissed in limini.

### **DISCUSSION AND CONCLUSION**

**9. The Apex Court in the judgment in State Bank of India and Others Vs. Rajesh Agarwal & Others at para 81 reported in 2023 (6) SCC 1, dealing with a case of declaration of account as fraud observed that principles of natural justice demand that the borrowers must be served a notice given an opportunity to explain the findings in the forensic audit report before the account is declared as fraud. This itself indicates that Forensic**

Audit Report must be necessarily supplied to the borrower prior to declaring an account as fraud. This Court in principle opines that the same principles of natural justice need to be necessarily followed prior to declaring the petitioners as defaulters or willful defaulters and the petitioners should be furnished with the copy of the Forensic Audit Report prior to such declaration by the Respondent Bank and consistent with the principles of natural justice, the respondent bank should provide an opportunity to petitioners by furnishing a copy of the Forensic Audit Report and allow the petitioners a reasonable opportunity to submit a representation before declaring the petitioners as willful defaulters which admittedly as borne on record had not been followed in the present case even as per the averments made by the respondent in the counter affidavit filed at para 5 (referred to and extracted above).

10. A bare perusal of the averments made in the counter affidavit filed on behalf of the respondent bank in particular, paras 5 (referred to and extracted above)



clearly indicates that Forensic Audit Report had not been furnished to the petitioners prior to passing of the impugned orders dated 28.07.2021 and 23.02.2022 declaring the petitioners as willful defaulters and the same is contrary to the relevant procedure to be followed by the respondent bank for conducting the proceedings for willful defaulters declaration and the same clearly indicates that the respondent bank admittedly committed a mistake.

11. A bare perusal of the record also indicates that without providing an opportunity of personal hearing to the petitioners, the petitioners had been declared as willful defaulters and the same is evident on perusal of the letter dated 04.02.2021 issued by the respondent bank and the action of the respondent bank is in clear violation of the principles of natural justice and the rule of *audi alteram partem* which clearly entails that an entity against whom evidence is collected must be provided an opportunity to explain the evidence against it and be informed of the proposed action and be allowed to represent why the proposed action should

not be taken which however, did not take place in the present case since petitioners had not been provided an opportunity of personal hearing.

**12. Taking into consideration:**

(a) the law and the view laid down by the Apex Court in the judgment reported in 2023 (6) Supreme Court Cases page 1 at paras 81 and 95 in State Bank of India v Rajesh Agarwal and applying the said principles to be followed before classifying borrowers account as fraud in principle to the facts of the present case as necessary principles to be followed by the respondent bank prior to declaring the petitioners herein as willful defaulter's,

(b) duly taking into consideration the aforesaid facts and circumstances of the case,

(c) duly considering the interim orders granted in favour of the Petitioners dated 28.09.2022 which are in force as on date,

(d) duly considering the averments made in the counter affidavit filed on behalf of the respondent bank, in particular, para 5 (referred to and extracted above),

(e) duly considering the contents of the letter dated 04.02.2021 issued by the respondent bank the impugned orders dated 28.07.2021 passed by the 2<sup>nd</sup> respondent and 23.02.2022 passed by the 3<sup>rd</sup> respondent.

**The Writ Petition is allowed as prayed for.**

13. It is however, observed that the Respondent Bank would be at liberty to reinitiate the proceedings afresh for declaration of the petitioners as willful defaulters, if so advised, in accordance to law in conformity with principles of natural justice. However, there shall be no order as to costs.

Miscellaneous petitions, if any, pending shall stand closed.

**SUREPALLI NANDA, J**

Dated: 15.04.2024

Note: L.R. copy to be marked

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