IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE GULZAR AHMED
MR. JUSTICE DOST MUHAMMAD KHAN
MR. JUSTICE QAZI FAEZ ISA

CRIMINAL APPEAL NOs. 274 TO 279 OF 2006
ALONG WITH
CRIMINAL PETITION NOs. 78-L AND 79-L OF 2004
(On appeal from the judgment dated 8.7.2003 in Cr. Appeal Nos. 1092/2001, 1075/2002 and 29/2002 passed by the Lahore High Court, Lahore)

Criminal Appeal Nos. 274 to 276/2006

The State through Chairman NAB
….Appellant

Versus

Muhammad Asif Saigol
….Respondent

Criminal Appeal Nos. 277 to 279/2006

Muhammad Asif Saigol
….Appellant

Versus

The State through Chairman NAB
….Respondent

Criminal Petition No. 78-L/2004

Mohib Fabrics Limited
….Petitioner

Versus

The State
….Respondent

Criminal Petition No. 79-L/2004

Mohib Exports Limited
….Petitioner

Versus

The State
….Respondent

For the State / ***(NAB)*** : Mr. Muhammad Akbar Tarrar
Additional Prosecutor General NAB
Mr. M. S. Khattak,
Advocate-on-Record

For ***Muhammad Asif Saigol*** : Mr. Aitzaz Ahsan,
And the Companies Senior Advocate Supreme Court
Muhammad Asif Saigol (in person)

Date of hearing : 7th April 2016

JUDGMENT

QAZI FAEZ ISA, J. A learned Division Bench of the Lahore High Court at Lahore through a common judgment dated 8th July 2003 ("**the impugned judgment**") had dismissed three criminal appeals filed by Muhammad Asif Saigol ("**MAS**") against his conviction by the Accountability Court, Lahore in the three separate references filed by the Chairman, National Accountability Bureau ("**NAB**"), but reduced the sentences of imprisonment to what he had already undergone. The fines imposed by the Accountability Court, which were ordered to be recovered from MAS, the High Court directed, "*to be recovered under section 386 of the Cr.P.C. and from the assets of the Companies*".

2. That against the impugned judgment both MAS and the NAB filed petitions seeking leave to appeal before this Court and by a common order dated 8th May 2006 leave was granted to *inter alia*, examine the following:

> "i. As to whether prosecution has established guilt against the convict by producing convincing evidence, if not so, what would be its effects?
>
> ii. As to whether in presence of incriminating material brought against convict, learned High Court was justified under the law to reduce the sentence without taking into consideration that prosecution has established guilt against him."

Two of the companies have also filed petitions for leave to appeal because the High Court ordered that the fine should be recovered from the sale of their properties. Vide order dated 8th May 2006 notice was also issued in respect of these two petitions and they were ordered to be fixed along with the above mentioned appeals.

3. By this common judgment the three appeals filed by MAS, the three appeals filed by the NAB and the two petitions filed by two of the companies are being decided together because all of the cases arise out of the same common impugned judgment.

4. MAS was the Chief Executive of Mohib Textile Mills Limited, Mohib Fabrics Industries Limited and Mohib Exports Limited (hereinafter collectively referred to as "**the Companies**") when three separate complaints were submitted by three different financial institutions to the NAB under the National Accountability Bureau Ordinance, 1999 ("**NAB Ordinance**"). The complaints, mentioned hereunder, were investigated by the NAB and subsequently references were submitted by the Chairman NAB to the Accountability Court.

(1) Complaint dated 11th December 1999 was filed by the Pakistan Industrial Leasing Corporation Limited ("**PILCORP**") before the NAB alleging that PILCORP had provided a lease finance facility to Mohib Textiles Mills Limited, however, the company failed to meet its obligations in respect of the payment of lease rentals under the terms of the lease agreement. Reference No. 10 of 2000 was submitted by the Chairman NAB to the Accountability Court, which charged MAS under section 9 (a) (viii) read with item No.1 (a) of the 'Schedule of Offences' to the NAB Ordinance pertaining to *wilful default.*

(2) Complaint dated 13th December 1999 was submitted by Allied Bank Limited to the NAB, wherein it was alleged that the Bank had provided finance facilities to Mohib Fabrics Limited, which were to be repaid as per the agreed schedule, but the company did not make payments as had been agreed. Reference No. 17 of 2000 was submitted by the Chairman NAB to the Accountability Court, which charged MAS under section 9 (a) (viii) read with item No. 1 (a) of the 'Schedule of Offences' to the NAB Ordinance.

(3) Complaint dated 7th December 1999 was filed by Askari Commercial Bank Limited before the NAB, which stated that Mohib Exports Limited had not repaid the

amount that had accumulated on account of the financial facilities provided by the Bank to the company. Reference No. 18 of 2000 was submitted by the Chairman NAB to the Accountability Court, which charged MAS under section 9 (a) (viii) read with item No. 1 (a) of the 'Schedule of Offences' of the NAB Ordinance.

The particulars of the abovementioned cases are as under:

	Mohib Textiles Mills Limited	**Mohib Fabrics Limited**	**Mohib Exports Limited**
Complainant	Pakistan Industrial Leasing Corporation Limited	Allied Bank Limited	Askari Commercial Bank Limited
Complaint Date	11.12.1999	13.12.1999	7.12.1999
Reference Date	No. 10 of 2000 14th February 2000	No. 17 of 2000 12th April 2000	No. 18 of 2000 12th April 2000
Accountability Court judgment date	7th July 2001	17th June 2002	4th August 2001
Cr. Appeal filed by MAS before the High Court	No. 1092 of 2001	No. 1075 of 2001	No. 29 of 2002
Cr. Appeal filed by MAS before Supreme Court	No. 277 of 2006	No. 278 of 2006	No. 279 of 2006
Cr. Appeal filed by NAB before Supreme Court	No. 275 of 2006	No. 276 of 2006	No. 274 of 2006
Cr. Petition filed by Mohib Fabrics Limited before Supreme Court		No. 78-L of 2004	
Cr. Petition filed by Mohib Exports Limited before Supreme Court			No. 79-L of 2004

5. Mr. Aitzaz Ahsan, the learned senior counsel representing MAS and the two companies, stated that MAS was arrested on 16th November 1999, the very date the Ordinance was promulgated, without prior determination of the purported liability of the Companies. He submitted that MAS was not at the helm of the affairs of the Companies for some time as he was busy with the treatment of his wife as she was

suffering from cancer, from which she could not recover and passed away in April 1996, before the filing of the References by the Chairman NAB. He stated that the courts below did not appreciate that on the dates the purported crimes of *wilful default* were committed, or even on the dates that the complaints were submitted, the phrase *wilful default* had not been statutorily defined, which was defined by the National Accountability Bureau (Amendment) Ordinance, 2000 ("**Ordinance IV of 2000**"), by inserting a new clause (r) to section 5 of the NAB Ordinance, which had the effect of virtually equating *wilful default* with a simple default. The three complaints, on the basis whereof the References were filed by the Chairman NAB, predated the insertion of the said clause (r) which was done on 3rd February 2000, therefore, the learned counsel contended, *wilful default* as it was subsequently defined would not be relevant to determine the guilt of MAS and instead *wilful default* was to be given its ordinary meaning. He further stated that it was also not the case of the prosecution that any loan or financial facility provided by the financial institutions was diverted by MAS for his or any other person's personal benefit or use or that it had not been utilized by the Companies. According to the learned counsel, it is a fairly common aspect of business that companies default in the repayment of loans for factors completely beyond the management's control, consequently, against such defaulters civil cases may be instituted for the recovery of outstanding amounts or such companies may be wound-up or liquidated, but this did not mean that the management was guilty of any crime. Reliance was also placed upon the following cases: Waqar Azim v State (2002 YLR 1811), Munir Ahmed v State (2004 P Cr. L J 2012, the orders of this court whereby the judgments in these two cases were upheld, Khan Asfandyar Wali v Federation of Pakistan (PLD 2001 Supreme Court 607), Ismail Dossa v Monopoly Control Authority (PLD 1984 Karachi 315) and Federation of Pakistan v Hasham Ali Shah (PLD 1954 Lahore 769).

6. On the other hand, Mr. Muhammad Akbar Tarrar, the learned Additional Prosecutor General NAB, stated that the crime of *wilful default* was fully established

and MAS was rightly convicted and sentenced by the Accountability Court, whose conviction was upheld by the High Court, and the facts of the cases did not justify reduction in his sentences. He sought restoration of the sentences imposed by the Accountability Court which, according to him, were reduced on the basis of no recognized legal principle. Rebutting Mr. Aitzaz Ahsan contention with regard to the offence of *wilful default*, the learned Additional Prosecutor General said that, the definition of *wilful default* was changed through Ordinance No. IV of 2000 whereby clause (r) was added to section 5 of the NAB Ordinance; the amendment defined *wilful default* and the facts of these cases came within the four corners of the said definition. He further stated that in the case of Asfandyar Wali (above) this Court had upheld the retrospective operation of the NAB Ordinance. He next contended that, if the determination by the financial institutions of the outstanding liabilities of the Companies was not correct there was nothing preventing MAS from submitting his own version thereof, but he did not do so, therefore, the contention of Mr. Aitzaz Ahsan, that there was no prior determination of liabilities of the Companies, is of no significance. It was lastly stated that the offence of *wilful default* is one of strict liability and does not require any element of *mens rea* and to constitute such offence it is sufficient that the outstanding amount was not paid as per the agreements between the parties.

7. We have heard the learned counsel in court at considerable length and with their assistance have also gone through the relevant record. An opportunity was also provided to both sides to augment their submissions by submitting written arguments within a period of a week. Mr. Aitzaz Ahsan submitted 'Synopsis of Arguments' belatedly on 26th April 2016.

8. The question that requires determination is whether the criminality of the offence is to be determined on the basis of the phrase *wilful default* contained in the (original) NAB Ordinance or as the term was subsequently defined pursuant to the insertion of clause (r) in section 5 of the NAB Ordinance. If criminality is to be

determined on the basis of the offence of *wilful default* before the said amendment was made then the elements of both *wilful* and *default,* which constitute the offence, have to be present and it must be established that in addition to a *default* there was also *wilful* intent. A simple or mere *default* on its own would not constitute the offence. If, on the other hand, criminality is to be considered in the light of the post amendment scenario then the burden of the prosecution has been considerably lessened as the *wilful* aspect of the crime has been diluted, if not altogether eliminated.

9. MAS was charged under section 9 (a) (viii) read with item No.1 (a) of the Schedule of Offences to the NAB Ordinance. Initially there was no clause (viii) to section 9 (a) of the NAB Ordinance, which, along with clause (r) to section 5, were inserted on 3rd February 2000 by Ordinance IV of 2000. MAS was convicted under the said provisions, we therefore need to examine as they originally stood in the NAB Ordinance and how they were changed subsequently. The said provisions in the original NAB Ordinance and the changes made thereto are reproduced hereunder:

The original text of the NAB Ordinance:

> "9 (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practice."

Addition made on 3rd February 2000 by Ordinance IV of 2000:

> "(viii) if he commits an offence of wilful default;"

The original text of the NAB Ordinance:

> "Schedule of Offences"
>
> 1. "Corruption and Corrupt Practices"
>
> > "(a) wilful default in repayment of outstanding dues to a Bank or a financial Institution shall be an offence or deemed to be an offence of corruption and / or corrupt practices."

Addition made on 3rd February 2000 by Ordinance IV of 2000:

> "Section 5 (r):
>
> "wilful default": a person is said to commit an offence of wilful default under this Ordinance if he does not pay or return or repay the amount to any bank, financial institution, cooperative society, or a Government department or a statutory body or an authority established or controlled by a Government on the date that it became due according to the laws, rules, regulations, instructions, issued or notified by a bank, including the State

> Bank of Pakistan, financial institution, cooperatives society, Government Department, statutory body or an authority established or controlled by a Government, as the case may be, and a period of thirty days has expired thereafter:
>
> Provided that it is not wilful default under this Ordinance if the accused was unable to pay, return or repay the amount as aforesaid on account of any wilful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution, cooperative society or a Government department or a statutory body or an authority established or controlled by Government."

In addition to the aforesaid proviso ("**the first proviso**") two further provisos ("**the second proviso**" and "**the third proviso**" respectively) were added to section 5 (r) of the NAB Ordinance by the National Accountability Bureau (Amendment) Ordinance, 2001 ("**Ordinance XXXV of 2001"**) promulgated on 10th August 2001, which are reproduced hereunder:

> "Provided further that in the case of default concerning a bank or a financial institution a seven days notice has also been given to the defaulter by the Governor, State Bank of Pakistan:
>
> Provided further that aforesaid thirty days or seven days notice shall not apply to cases pending trial at the time of promulgation of the National Accountability Bureau (Amendment) Ordinance, 2001."

10. The complaints against MAS were submitted before any of the aforesaid amendments had been made and the amendments brought about by Ordinance XXXV of 2001 were made after the References were filed by the Chairman NAB before the Accountability Court. Therefore, whether the amendments were given retrospective effect would be relevant to determine the question of liability in these cases. It is also to be noted that the third proviso (inserted by Ordinance XXXV of 2001), itself, states that the requirement of serving notices would not apply to pending cases. However, Ordinance IV of 2000 did not state that the amendments brought about by it to the NAB Ordinance would have retrospective application.

11. In Asfandyar Wali's case, this Court had issued certain directions, including the requirement of obtaining a report from the Governor, State Bank of Pakistan with regard to whether or not the matter was one of *wilful default.*

Consequent to the said directions, the NAB Ordinance was amended on 5th July 2000 by the National Accountability Bureau (Second Amendment) Ordinance, 2000 ("**Ordinance XXIV of 2000**") and section 31D was incorporated into the NAB Ordinance, which provided that a report from the Governor of the State Bank of Pakistan had to be obtained before any inquiry or proceeding could be initiated or conducted by the NAB or any other action taken under the NAB Ordinance. However, in these cases no report was received from the Governor of the State Bank of Pakistan because the said amendment was inserted in the NAB Ordinance after the References had already been filed by the Chairman NAB, and, as the said provision stated, its operation was not retrospective. The said section 31D of the Ordinance is reproduced hereunder:

> "**31D**. Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan:
>
> Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan."

The requirement to obtain a report from the Governor of the State Bank acted as a safeguard against the misuse by financial institutions of the NAB Ordinance to seek recovery of their outstanding amounts and also acted as a check on overzealous officers of the NAB. However, the benefit of this important safeguard was not available to MAS as the effect of this provision was not made retrospective.

12. The offence of 'wilful default' was defined, for the first time, on 3rd February 2000 by Ordinance IV of 2000 which inserted clause (r) in section 5 of the NAB Ordinance. Mr. Tarrar urged, that applying the *ratio* of Asfandyar Wali (above), section 5 (r) has to be given retrospective effect, from the date of the promulgation of the NAB Ordinance itself. Mr. Ahsan also relies upon the same judgment but for the purpose of determining as to what constitutes *wilful default*. The judgment in

Asfandyar Wali's case considered the constitutionality of the NAB Ordinance and particularly whether it offended Article 12 of the Constitution of the Islamic Republic of Pakistan ("**the Constitution**"), which provides protection against retrospective punishment. It also considered the definition of the words *wilful* and *default*, including the phrase *wilful default*, as interpreted in local and foreign cases and as defined in legal dictionaries, however, there was no determination with regard to the offence of *wilful default* wherein complaints were submitted and / or the proceedings commenced before the insertion of clause (r) in section 5 of the NAB Ordinance. Article 10 of the Constitution provides that, "*No law shall authorize the punishment of a person - (a) for an act or omission that was not punishable by law at the time of the act or omission*". There is no reason for us to limit the ambit of this *fundamental right* and / or to extend the *ratio* of the judgment in the case of Asfandyar Wali by giving the phrase *wilful default*, as it came to be subsequently defined, retrospective effect from the date that the NAB Ordinance was promulgated. The phrase *wilful default* was statutorily defined on 3rd February 2000, therefore, it is from this date that it is to be given effect as per the definition; and, even more so when, neither the said provision nor the Ordinance IV of 2000, through which it was inserted, had stipulated that it will be applied retrospectively.

13. That having determined that in these cases the phrase *wilful default* is to be given its ordinary meaning (and not how it came to be subsequently defined by clause (r) to section 5 of the NAB Ordinance) it has to be considered whether MAS had committed the offence of *wilful default*. However, before we proceed to do so, we need to understand what the phrase *wilful default* means. In the case of Waqar Azim v State (2002 YLR 1811), a Division Bench of the Lahore High Court considered the phrase *wilful default* and held (paragraph 17 at page 1832) that it required a *deliberate and calculated refusal to pay*, as under:

> "Mere non-payment or default cannot be equated with wilful default so as to bring it within the ambit of section 5 (r) of the Ordinance. As discussed above, the Company was genuinely formed with an ambitious plan to produce High Tech Printed Circuit Boards and it was reasonably hoped that the Company

> would go into production in the month of April, 1990. However, their ambitious plan was frustrated due to the failure of the bank to provide finance for two L.Cs., for release of the imported raw-material. The appellants' learned counsel has rightly urged that the prosecution must provide mens rea on the part of the accused before making them penally liable for the offence of wilful default. The offence of wilful default denotes deliberate and calculated refusal to pay the loan amount. If a person is unable to return or pay the amount due to circumstances beyond his control or the failure of the Bank or financial institution to fulfil its contractual liability in the matter of providing financial facility to the accused, then he may be held liable for default alone not amounting to the offence of "wilful default" as defined under section 5 (r) of the Ordinance."

An Appeal against the above mentioned judgment was preferred by the State (Criminal Appeal No. 44 of 2004) which was dismissed (on 14th January 2015 by a common judgment), wherein this Court held, that:

> "As regards the respondents in Criminal Appeal No. 44 of 2004 the said respondents were the Directors of the relevant company which had obtained a financial facility and through an elaborate discussion the High Court had reached a conclusion that the prosecution had failed to establish that the said respondents had formed an intention at the very beginning of the transaction not to return the amount obtained through the financial facility inasmuch as after obtaining the said amount they had constructed a building and had imported some machinery and had also installed the same. According to the High Court in the absence of initial dishonest intent the charge against the said respondents could not stick. We have applied our independent minds to the facts and circumstances of the case and have found that the conclusions reached by the High Court *vis-à-vis* the respondents in Criminal Appeals No. 43 and 44 of 2004 were neither arbitrary nor whimsical and the same did not suffer from any perversity warranting interference in the matter of acquittal of the said respondents. The said appeals are, therefore, dismissed."

In the case of Munir Ahmed v State (2004 P Cr. L J 2012) a Division Bench of the High Court of Sindh at Karachi held (at page 2020) that the amount outstanding has to be ascertained before seeking its recovery, as under:

> "Thus, the accounts were not settled between the parties from the year 1994 even before the promulgation of Ordinance, 1999. When the dues are not determined as per law, rules and regulations, then the question of recovery of such dues does not arise. Hence the case would not be covered within the definition of wilful default."

A petition for leave to appeal was filed against the abovementioned judgment, but the judgment of the High Court was upheld in Criminal Petition No. 527 of 2003 by this Court vide judgment dated 16th June 2009.

In the case of Ismail Dossa v Monopoly Control Authority (above), Saleem Akhtar J, when he was a Judge of the Sindh High Court, considered the significance of the word 'wilful' when it preceded the word 'default' as appearing in the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance of 1970, and held (at pages 332-333) that it had to constitute a *wrongful or intentional* failure, as under:

> "There is a sharp difference in the meaning of the word "default" and "wilful default" or "wilful failure". There can be no cavil with the meaning of "default" as stated by the learned Authority, but will this meaning apply to "wilful default" or "wilful failure". The fact that the word "failure" has been qualified by the word "wilful" indicates that the 'failure' or 'default' should be wrongful or intentional. 'Wilful failure' as it is apparent, will occur when a party has purposely failed to comply with the provisions or intentionally avoided to comply, knowing full well that he is duty-bound to do so. In such cases the party knows that he has to do a certain act but intentionally persists to follow a different course. If the failure is without any intention it will be a "default" or "failure" simpliciter, but if it is intentional it will amount to "wilful default" or "wilful failure". In this regard reference can be made to *Horabin v. British Overseas Airways* Corporation ((1952) 2 AER 1016), where the meaning of "wilful misconduct" has been explained in the following manner:
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> > "Wilful misconduct is misconduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however, gross that negligence or carelessness may be. The will must be a party to the misconduct, and not merely a party, to the conduct of which complaint is made. As an example if the Pilot of an Aircraft knowingly does some thing which subsequently a Jury find amounted to mis-conduct, that fact alone does not show that he was guilty of wilful misconduct. To establish wilful misconduct on the part of this imaginary Pilot, it must be shown not only that he knowing (and in that sense wilfully) did the wrongful act, but also that, when he did it, he was aware that he was committing misconduct."
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> Barry, J., has illustrated it in the following words:
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> > "The same act may amount on one occasion to mere negligence, and on another to wilful misconduct. Two men driving motor cars may both pass traffic right after they have changed from yellow to red. In both cases there are the same act, a same traffic light, the cross-road, and the same motor-car. In the first case the man may have been driving a little too fast. He may not have been keeping a proper look-out, and he may not have seen the light (although he ought to have seen them) until be was too close to them and was unable to stop, and, therefore, crossed the road when the light was against him. He was not intending to do anything wrong, to disregard the provisions of the Road Traffic Act or to endanger the lives of any one using the road, but he was careless in not keeping a proper look-out, and in going too fast, and as a result, without intending

> to do anything wrong he committed an act which was clearly an act of misconduct. The second driver is in a hurry. He knows all about the lights, and he sees in plenty of time that they are changing from yellow to red, but he says to himself; "Hardly any traffic comes out of this side road which I am about to cross. I will go on. I am not going to bother to stop." He does not expect an accident to happen but he knows that he is doing something wrong. He knows that he should stop, and he is able to stop, but does not and he commits exactly the same act as the other driver. But in that frame of mind no Jury would have very much difficulty to the conclusion that be had committed an act of wilful misconduct."

> While determining whether the appellant has wilfully failed, the finding that he has defaulted, will not be sufficient to impose penalty unless it is established that he has intentionally and purposely defaulted knowing full well that he had to get himself registered."

In the case of Federation of Pakistan v Hasham Ali Shah (above) Ortcheson, J, as a judge of the Lahore High Court in a Division Bench, explained the word *wilful*, appearing in the phrase *wilful misconduct* in the Railways Act, 1890, to mean *grosser forms of misconduct* (at page 782), as under:

> " "Misconduct" may be *intentional conduct* inasmuch as the act of omission may have the feature of voluntariness included in it but it should still be distinguishable from intentional or *wilful misconduct.* To my mind, "misconduct" includes any highly improper or wrong conduct involving something more than mere negligence and "culpable neglect of an official in regard to his office" in the words of the Oxford Dictionary, would be one form of it. Misconduct, on the one side, has to be something more than negligence simpliciter and on the other less than "wilful misconduct", at least while fixing the lower boundary of the scope of its connotation. This may be a matter of some nicety in the circumstances of a particular case but the line has to be drawn somewhere consistently with the provisions of the statute and the language of the risk-note. The expression used in Risk Note B may be regarded as a term of art in as much it is meant to be a compendious term covering inter alia the commission of an offence like mischief, criminal misappropriation, criminal breach of trust or theft by a Railway servant. These grosser forms of misconduct (if I might so describe them) which may be taken as corresponding to the "wilful misconduct" of English law, would a *fortiori* be included within the term "misconduct" and consequently the necessity for equating "misconduct" with "wilful misconduct" vanishes."

The appeal filed by the Railways was allowed since the negligence by the administration / servants of the Railways fell short of 'wilful misconduct', therefore, it was not liable to reimburse the damage caused to the perishable goods (onions) of the respondent.

14. In addition to the above cases cited by Mr. Aitzaz Ahsan the phrase *wilful default* has also received judicial consideration in other cases too. In the case of Arsalan Hafeez v Election Tribunal (PLD 2003 Supreme Court 355), this Court considered the difference between the word 'misconduct' as compared to 'wilful misconduct' and stated that when the act was not done "*intentionally, knowingly and purposely*" it would not be 'wilful'; it was held (at page 361), that:

> "The allegation against the respondent No.2 related to an irregularity in the distribution of Zakat fund and the perusal of the proceedings of District Zakat and Ushr Committee would show that the irregularity in question happened due to the lack of proper vigilance of the respondent which was not a deliberate and wilful act to constitute actionable misconduct. The misconduct in general terms means to manage badly, improper conduct, the doing of something by a person inconsistent with the conduct expected from him by rules of an institution or an organization but if the will of a person is not party to his action, it is not a wilful misconduct. The misconduct can be distinguished from wilful misconduct and unless an act is not done by a person intentionally, knowingly and purposely, it is not wilful misconduct which is distinct from an act done carelessly or inadvertently."

In the case of Saadat Pervaz Sayan v Chief Secretary, Government of Punjab (2003 PLC (C.S.) 1277) the significance of the word 'wilful' when added to the word 'negligence' meant that it added *an element of bad faith* (at page 1281), as under:

> "9. The appellant was definitely negligent in performing his duty but there was no evidence on the record to suggest element of bad faith in the negligence or that it was intentional and the appellant had some personal interest in the transaction. There is difference between the 'negligence' and 'willful negligence'. Negligence is the failure to exercise the degree of care demanded by the circumstances and the want of the care which the law prescribes under the particular circumstances existing at the time of the act or omission which is involved. It is an omission to do something which a reasonable man, guided by those considerations which ordinarily regulate human affairs, would do, or doing something which a prudent, and reasonable man would not do. Willful negligence is a negligent act which is done intentionally and knowingly with some motive and is deliberate but a willful act may not necessarily have an evil purpose behind it. The appellant while depending on subordinate staff undoubtedly acted negligently but the procedural irregularity in the sanction of mutation without any consideration of personal interest or involving an element of bad faith with the intention to extend favour to his senior colleague at the cost of causing loss to any other person or to the public exchequer, would not be deliberate act and consequently the negligence of the appellant may not be willful."

The case of S. Sundaram v V. R. Pattabhiraman (AIR 1985 Supreme Court 582) required the interpretation of *wilful default* in a law pertaining to lease and rent control. The Indian Supreme Court (at page 589) pronounced that, the addition of the word *wilful* meant that the default *must be intentional, deliberate, calculated and conscious,* as under:

> "21. Before, however, going into this question further, let us find out the real meaning and content of the word 'wilful' or the words 'wilful default'. In the book 'A Dictionary of Law' by L.B. Curzon, at page 361 the words 'wilful' and 'wilful default' have been defined thus:
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> > 'Wilful' - deliberate conduct of a person who is a free agent, knows what he is doing and intends to do what he is doing.
> >
> > 'Wilful default' - Either a consciousness of negligence or breach of duty; or a recklessness in the performance of a duty.
>
> 22. In other words, 'wilful default' would mean a deliberate and intentional default knowing full well the legal consequences thereof."
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> "24. In Black's Law Dictionary (4th Edn.) at page 1773 the word 'wilful' has been defined thus:
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> > "Wilfulness" implies an act done intentionally and designedly; a conscious failure to observe care; Conscious; knowing; done with stubborn purpose, but not with malice.
> >
> > The word "reckless" as applied to negligence, is the legal equivalent of "willful" or "Wanton".
>
> 25. Thus, a consensus of the meaning of the words 'wilful default' appears to indicate that default in order to be wilful must be intentional, deliberate, calculated and conscious, with full knowledge of legal consequences flowing there from."

In the English case of The Queen v Senior ([1899] 1QB 283) the question for consideration was whether a father, who belonged to a sect called the "Peculiar People", whose religious doctrine prevented the treatment of the sick, believing it would express want of faith in the Lord, was rightly convicted under the Prevention of Cruelty to Children Act, 1894, as he had withheld the treatment of his infant child of eight or nine months. The child died as a result of diarrhea and pneumonia. The question for consideration was whether in withholding treatment the father was guilty

of *wilfully* neglecting his child under the terms of the Prevention of Cruelty to Children Act, 1894. The conviction was upheld as the father was found to be guilty of wilful neglect because he *deliberately and intentionally*, and not by accident or inadvertence, had withheld the treatment. The word *wilfully* was analyzed by the Court, as under:

> " "Wilfully" means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care - that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind - that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps."

The aforesaid portion from the said judgment was cited with approval in a Division Bench judgment of the Lahore High Court which was authored by S. A. Mahmood, J. in the case of Pak-American Fertilizers Ltd. v Industrial Court (PLD 1966 (W.P.) Lahore 822).

15. The three complaints filed against MAS set out in considerable detail when the financial facilities were provided to the Companies, the agreements executed in this regard and the failure of the Companies to honour their commitments, however, significantly not a word was stated with regard to how or why any loan / financial facility was *wilfully* not repaid or how it was misused or diverted. It was also not alleged that the Companies and / or MAS had the requisite monies to settle the outstanding dues but *wilfully* did not do so. The prosecution evidence repeated what was stated in the complaints. In other words, the cases were of simple default for which recourse may be had to the statutes that have from time to time been enacted for this purpose, instead of resorting to the NAB Ordinance. We have also noted that MAS was not at the helm of affairs of the Companies when his wife was suffering from cancer, to which she eventually succumbed, and that MAS was arrested by the NAB on 16th November 1999, the very day that the NAB Ordinance was promulgated, however these are not the reasons that have persuaded us to acquit MAS.

16. The offence of *wilful default* in these cases was required to be considered in the light of the law at the time, which was before the insertion of clause (r) into section 5 of the NAB Ordinance. At that juncture to constitute the offence of *wilful default* the prosecution, in addition to establishing the subsistence of a *default*, had to also prove that the default was *wilful*. The aforesaid case law confirms that in order to constitute a *wilful* default, there must be a deliberate and calculated refusal to pay, i.e. a conscious and intentional act. The mere inability to pay did not constitute the offence of *wilful default*. The prosecution however made no attempt to establish that the default was *wilful*.

17. That since the element of *wilful* was absent, MAS could not be convicted for the offence of *wilful default*. Interestingly enough, the High Court had also found that the default was not *wilful*, but surprisingly still upheld MAS's convictions. In this regard the learned judges had castigated the Investigating Officer (paragraph 36 of the impugned judgment) as he had failed to gather evidence of *wilful default*, as under:

> "We have seen the statements of the Investigating Officer which have been reproduced above. These statements are disappointing rather shocking. It is unfortunate that the Investigating Officer who investigated all these three cases acted so callously although he claims himself to be an educated man and did not even bother to collect the statement of the appellant or record his defence version or to visit the spots or gather sufficient evidence for ascertaining whether these were cases of wilful default."

They further found that, MAS had acted positively, however, as the NAB Ordinance had been promulgated the complaints were lodged because, "*default had been committed*", disregarding the fact that, to constitute the offence of *wilful default*, the default must be *wilful*. Paragraph 43 of the impugned judgment, where this is stated, is reproduced hereunder:

> "The explanations given by the appellant in all these three references are suggestive of efforts on his part to revive the business and industry of the group under reference. In this connection, those who came to support the prosecution case had also suggested likewise but as a new law had come into being and default had been committed, the complaints were lodged…".

The High Court also disregarded another cardinal principle of criminal law, which is to grant the benefit of any doubt to the accused, instead, the benefit of doubt

was given to the prosecution, as can be seen from paragraph 44 of the impugned judgment, reproduced hereunder:

> "44. Our own view is that these are borderline cases of wilful default or default simplicitor. The default mainly took place at a time when this law was not there and the general atmosphere was such that things were being taken easy because civil liabilities were not allowed to be converted into criminal liabilities as is the case."

18. That for the aforesaid reasons, we can safely conclude that the prosecution had failed to establish that Muhammad Asif Saigol had committed the offence of *wilful default*, therefore, after setting aside his convictions he is acquitted of the charges and the appeals filed by him are allowed. Consequently, the appeals filed by the National Accountability Bureau, seeking enhancement of sentences, are dismissed. Since the appeals filed by Muhammad Asif Saigol have been allowed, therefore, the petitions filed by Mohib Fabrics Limited and Mohib Exports Limited are converted into appeals and also allowed.

Judge

Judge

Judge

Announced in open Court
At Islamabad

On 4th May 2016

By Justice Qazi Faez Isa

APPROVED FOR REPORTING
(Zulfiqar)