

(2014) 12 CAL CK 0100

Calcutta High Court

Case No: Writ Petition No. 942 of 2014

Kingfisher Airlines Limited

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Dec. 24, 2014

Acts Referred:

- Banking Regulation Act, 1949 - Section 21A, 35A, 46
- Companies Act, 1956 - Section 108
- Constitution of India, 1950 - Article 14, 19, 21

Citation: (2015) 1 CompLJ 165 : (2015) 130 SCL 517

Hon'ble Judges: Debangsu Basak, J

Bench: Single Bench

Advocate: S. Pal, Siddharta Mitra, Sr. Advocates, Mousumi Bhattacharya and Soumitra Dutta, Advocate for the Appellant; HIRAK MITRA, Sr. Advocate, Rishad Medora, Prantik Gharai and Prantar Basu Chowdhuri, Advocate for the Respondent

Judgement

Debangsu Basak, J.

The writ petitioners were declared as wilful defaulters by the Grievance Redressal Committee on declaration of Wilful Defaulter of the United Bank of India by its Order dated September 1, 2014. This decision of the Grievance Redressal Committee of United Bank of India is under challenge in this writ petition.

2. Mr. S. Pal, learned Senior Advocate for the writ petitioners commences his submissions by contending that the Master Circular on Wilful Defaulters issued by the Reserve Bank of India is not a piece of subordinate legislation and, therefore, it is not binding on a bank carrying on banking business in India. He submits that, the Master Circular does not have statutory force.

3. Without prejudice to his first contention, he submits that, the Master Circular requires two committees to be formed by a bank. In the instant case, according to him, the compositions of the two committees were not in accordance with the

Master Circular. He contends that, the procedure established by the Master Circular was not followed by United Bank of India. He refers to the first committee under the Master Circular as the Identification Committee. He submits that, the Identification Committee did not consider any document required of it to consider under the Master Circular when it recommended that the writ petitioners should be declared as a wilful defaulter.

4. He submits that, Kingfisher Airlines Limited (KAL) was enjoying credit facilities from a consortium of bankers. United Bank of India is a member of such consortium. State Bank of India is the lead banker of the consortium. KAL faced financial difficulties at a given point of time. Such financial difficulties emanated out of factors external to the management of KAL. He contends that, in the fact of this case, KAL cannot be classified as a wilful defaulter within the meaning of the Master Circular of the Reserve Bank of India. He contends that the term "wilful default" has been defined in the Master Circular and that neither KAL nor any of the writ petitioners can be classified as a wilful defaulter within the meaning of the Master Circular. In support of such contention he refers to the letter dated January 31, 2012 issued by the lead banker, State Bank of India to the Reserve Bank of India. The lead banker had opined on January 31, 2012 that KAL was making every effort to achieve satisfactory performance of its operations. The lead banker had enumerated various reasons due to which the account of KAL had become irregular. All of such reasons were external to the management of the KAL. At least none of those reasons fall within the definition of wilful default under the Master Circular. Mr. Pal contends that, the bank had to take such factor into consideration while evaluating the writ petitioners as wilful defaulters within the meaning of the Master Circular of the Reserve Bank of India. He points out that, the bank and the Identification Committee had overlooked the contents of the letter dated January 31, 2012 of the lead banker in this regard. He refers to the letter dated May 28, 2014 by which the bank expressed its intention to proceed against the writ petitioners under the Master Circular of the Reserve Bank of India to declare the writ petitioners as wilful defaulters. He points out that, no reasons were given in that letter. That letter cannot be construed to be in accordance with Regulation 3 of the Master Circular.

5. He points out that KAL had replied to the letter dated May 28, 2014 by its letter dated June 10, 2014. He contends that, the reply was elaborate and that any apprehension harboured by the bank with regard to wilful default within the meaning of the Master Circular of the Reserve Bank of India was dispelled. Mr. Pal, thereafter, referring to the letter dated June 10, 2014 of the bank submits that, the bank could not have written such letter in view of the contents of the lead banker's letter dated January 31, 2012. According to him, nothing had happened between January 31, 2012 and May 28, 2014 for the bank to initiate proceedings to declare the writ petitioners as wilful defaulters under the Master Circular of the Reserve Bank of India. Referring to the reply dated July 4, 2014 of KAL, he submits that, KAL elaborately dealt with the allegations leveled against KAL in the letter dated June 23,

2014 of the bank. He refers to the three minutes of the consortium meeting held on November 12, 2011, December 2, 2011 and January 9, 2012 and submits that, the bank was present in such consortium meeting and that the minutes of such meeting will demonstrate that, the writ petitioners cannot be classified as wilful defaulters under the Master Circular of the Reserve Bank of India. He points out that, the State Bank of India as the lead bank was operating the Trust Retention Account. KAL had no control over such account. It had every intention to repay the sum of Rs. 7.5 crores taken as loan from the bank. It was the State Bank of India who did not make over the funds to the bank from out of the Trust Retention Account. The writ petitioners cannot be foisted with the default of State Bank of India in not paying the sum of Rs. 7.5 crores to the United Bank of India. He contends that, there were sufficient funds in the Trust Retention Account with State Bank of India to pay the United Bank of India. With regard to the second charge contained in the letter dated June 28, 2014 as to the operation of bank account of HDFC, he contends that, the lead banker, the State Bank of India had issued a no objection on January 11, 2012 to KAL to operate such HDFC account. In view of such no objection, the charge of wilful default on the ground of operating a bank account outside the consortium, with HDFC, cannot be sustained.

6. Referring to the decision of the Grievance Redressal Committee, Mr. Pal contends that, the decision of the Grievance Redressal Committee was vitiated due to unfairness and breach of the principles of natural justice. He contends that, the prayer for deferment of the hearing made on behalf of the writ petitioners by two several letters of the Advocate of the writ petitioners were not construed correctly. The Grievance Redressal Committee proceeded to reject the prayer for deferment of hearing on the ground that, the writ petitioners were contemplating filing a Special Leave Petition against the judgment and order of the Division Bench while in fact the writ petitioners had filed the Special Leave Petition and an interim application therein. The filing of the Special Leave Petition and the interim application therein were put on record by the two letters written by the Advocate of the writ petitioners. The decision of the Grievance Redressal Committee in disallowing the prayer for accommodation was vitiated due to the Grievance Redressal Committee misappreciating a material fact with regard thereto. Moreover, he contends that, the Grievance Redressal Committee by refusing the adjournment as prayed for over reached the Hon"ble Supreme Court of India and had rendered a Special Leave Petition filed by the writ petitioners infructuous.

7. Mr. Pal contends that, the guidelines laid down in the Master Circular of the Reserve Bank of India are vitiated by breach of principles of natural justice. The decision making process laid down for identifying and declaring a borrower as a wilful defaulter under the Master Circular is such that, the decision as to whether a constituent is a wilful defaulter or not is left to the bank itself. The bank is an interested party in this decision. The bank is allowed to judge its own cause by the Master Circular. He contends that, the decision making process laid down under the

guidelines of the Master Circular of the Reserve Bank of India is vitiated by biasness. He submits that, all that the writ petitioners are required to establish is that there is a reasonable apprehension of biasness. In support of such contention, he relies upon [Life Insurance Corporation of India Vs. Escorts Ltd. and Others,](#) [Union of India and Another Vs. Tulsiram Patel and Others,](#) and [Ranjit Thakur Vs. Union of India \(UOI\) and Others,](#). Mr. Pal contends that, the Master Circular of the Reserve Bank of India should be declared to be violative of Article 14 of the Constitution of India. He contends that, the fundamental right to carry on business under Article 19 of the Constitution of India is sought to be abridged unreasonably by the Master Circular. Article 21 of the Constitution of India recognizes the right to reputation of a citizen of India. The Master Circular if allowed to stand, will infringe upon such right of a citizen of India.

8. Mr. Pal refers to the subject matter of the first writ petition and submits that, the only issue raised in the first writ petition was the entitlement of the writ petitioners to a representation by lawyers before the Grievance Redressal Committee. The Trial Judge negated such contention. On appeal, the Division Bench concurred with the finding of the Trial Court. He points out that, the Division Bench denied a lawyer's representation on the ground that evidence was not required to be taken before the Grievance Redressal Committee. He contends that, notwithstanding such finding being returned by the Division Bench, the Grievance Redressal Committee of the bank proceeded to take evidence. It was unfair on the part of the Grievance Redressal Committee of the bank to take evidence in view of the decision rendered by the Division Bench. Moreover, since the Grievance Redressal Committee had taken evidence on record, it should have allowed lawyers' representation to the writ petitioners at the hearing in all fairness.

9. Mr. Pal contends that, the decision of the Grievance Redressal Committee in declaring the writ petitioners as wilful defaulters is perverse. The Grievance Redressal Committee did not take into consideration the letter dated January 31, 2012 of the lead banker. Such letter was material to the subject under consideration by the Grievance Redressal Committee.

10. Mr. Pal points out that, there were persons in excess of the number prescribed under the Master Circular of the Reserve Bank of India present at the relevant meeting of the Grievance Redressal Committee. Such excess person, according to him, vitiated the proceedings before the Grievance Redressal Committee. He points out that, the minutes of the Grievance Redressal Committee does disclose the contribution of each of the individual members present in the meeting of the Grievance Redressal Committee. The person who is in excess of the prescribed limit is not identified in the minutes of the Grievance Redressal Committee.

11. Mr. Pal contends that, the Grievance Redressal Committee not only acted in breach of the principles of natural justice and mala fide, it acted in unseemingly haste. It failed to take into consideration the letters dated August 29, 2014 and August 30,

2014 making a request for accommodation on the ground of pendency of a Special Leave Petition before the Supreme Court of India. There was no emergency before the Grievance Redressal Committee to deny such accommodation. In any event, the Grievance Redressal Committee refused such prayer of accommodation on a misappreciation of a material fact. The Grievance Redressal Committee proceeded on the basis that the writ petitioners were contemplating filing a Special Leave Petition while in effect by the letters dated August 29, 2014 and August 30, 2014 to the bank the Advocate for the writ petitioners amply specified that a Special Leave Petition against the judgment of the Division Bench and an interim application in connection therewith had already been filed. He relies Upon [Bahadursinh Lakhubhai Gohil Vs. Jagdishbhai M. Kamalia and Others,](#) , [Dr. S.P. Kapoor Vs. State of Himachal Pradesh and Others,](#) and 2006 Volume 11 Supreme Court Cases page 56 (Inderpreet Singh Kahlon & Ors. v. State of Punjab & Ors.) in this regard. He also refers to 1923 All England Law Reports Reprint page 253 (R. v. Sussex Justices), [A.K. Kraipak and Others Vs. Union of India \(UOI\) and Others,](#) , [J. Mohapatra and Co. and Another Vs. State of Orissa and Another,](#) , [Smt. Isabella Johnson Vs. M.A. Susai,](#) and [Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant and Others,](#) and submits that, the presence of an extra person vitiates the proceedings before the Grievance Redressal Committee.

12. Referring to [G. Sarana Vs. University of Lucknow and Others,](#) Mr. Pal contends that, the Grievance Redressal Committee records considering 30 documents by it. Such documents were not made over by the writ petitioners at any point of time. He points out that, even in the affidavit used by the bank in the present writ petition, such documents have not been made over to the writ petitioners. He contends that, the writ petitioners are entitled to copies of the documents which were placed before the Grievance Redressal Committee and which was taken into consideration by such committee. He contends that, non-disclosure of those documents by the bank, vitiates the entire proceedings.

13. Mr. Hirak Mitra, learned Senior Advocate for the United Bank of India contends that, the Master Circular of the Reserve Bank of India is binding on the parties. He points out that, the Master Circular was issued under Section 35A of the Banking Regulation Act, 1949. He refers to a subsequent Circular issued by the Reserve Bank of India which specifies that, the Master Circular on Wilful Defaulter was issued under Section 35A of the Banking Regulation Act, 1949. Mr. Mitra contends that, the entirety of the Master Circular is not mandatory. A bank governed by the provisions of the Banking Regulation Act, 1949 is entitled to play at the joints with regard to a Circular such as the subject Master Circular issued by the Reserve Bank of India. In the Master Circular under consideration in the writ petition, when the Reserve Bank of India specified composition of the two committees by a particular number of "higher functionaries", he contends that, the number specified in the Master Circular in this regard is the basic minimum number of "higher functionaries" who must be present in the two committees. He contends that, the Master Circular does

not debar a bank from having more members in the two committees. The aspects that a bank should bear in mind while deciding on the composition of the two committees in terms of the Master Circular are that the number of members in the committees should not be unwieldy and that the member appointed in the two committees should be qualified to be appointed in the two committees in accordance with the qualification prescribed by the Master Circular.

14. Mr. Mitra contends that, in the facts of this case, the provisions of Regulations 3(i) and (ii) has been complied with. In any event, the writ petitioners cannot be allowed to urge the point of non-compliance of Regulations 3(i) and (ii) in view of such challenge being given up in the first writ petition. Although such points were available to the writ petitioners, the writ petitioners in the first round of writ petitioner limited there challenge to the right of representation by lawyers before the Grievance Redressal Committee only. Mr. Mitra contends that, the number of personnel specified in the Master Circular is not mandatory. The Court should not read words into the Master Circular which are absent. The Master Circular does not use the word "only" while specifying the numbers. There is no negative clause in the Master Circular stating that any breach of such compliance will visit the bank with any penalty. These aspects indicate that the members prescribed are not mandatory.

15. Mr. Mitra contends that, the applicability of the principles of natural justice has to be viewed in the facts of each case. A writ petitioner cannot be allowed the luxury of making unsubstantiated allegations with regard to the breach of the principles of natural justice. He refers to [Kanwar Natwar Singh Vs. Director of Enforcement and Another](#), , All India Reporter [Gopal Chandra Vs. Bepin Behari](#), and [The Chairman, Board of Mining Examination and Chief Inspector of Mines and Another Vs. Ramjee](#), in this regard.

16. On the score that the bank did not provide the 30 documents placed before the Grievance Redressal Committee, he contends that, the same cannot be construed to be a breach of any principle of natural justice. He contends that, any writ petitioner appearing before the Grievance Redressal Committee on September 1, 2014 would have been made over copies of the 30 documents placed before the Grievance Redressal Committee. He contends that the Master Circular does not require the documents to be made over to the writ petitioners prior to the hearing before the Grievance Redressal Committee. Making over such documents in course of the hearing before the Grievance Redressal Committee as and when the same were sought to be relied upon before the Grievance Redressal Committee would have been sufficient compliance of the principle of natural justice. In this regard he refers to [Bank of India and Others Vs. T. Jogram](#), .

17. Mr. Mitra points out that, no case of bias has been made out in the writ petition. Only two grounds in the writ petition remotely allege bias. He contends that, the grounds of bias have to be made out by the writ petitioners in this petition for the

Court to consider it in any earnest. He submits that, no particular of any biasness has been pleaded in the writ petition. It is not pointed out by the writ petitioners as to which person was biased. Those particulars are essential and have to be pleaded and established for a Court to return a finding of biasness. On the principle of natural justice he submits that there is no likelihood of the same being breached by the procedure for declaration of Wilful Defaulters as laid down in the Master Circular. He relies upon [Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram \(Co-education\) Higher Secondary School and others,](#) in this regard. He contends that a direction issued by the Reserve Bank of India under Section 21A and Section 35A of the Banking Regulation Act, 1949 is binding on a banker continuing in banking in India. He relies upon [Central Bank of India Vs. Ravindra and Others,](#) , [Sardar Associates and Others Vs. Punjab and Sind Bank and Others,](#) and [Punjab and Sind Bank Vs. Allied Beverages Company Pvt. Ltd. and Others,](#) in this regard. On the point that, the Master Circular and the numerical strength of the two committees prescribed by the Master Circular are directory and not mandatory, Mr. Mitra relies on All India Reporter [Mannalal Khetan and Others Vs. Kedar Nath Khetan and Others,](#) and All India Reporter [Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur,](#) . Mr. Mitra relies on the "Principles of Statutory Interpretation" 15th Edition by Justice G.P. Singh page 389 to 405 on the issue that when a statutory provision can be said to be mandatory and when it can be said to be directory in nature.

18. Mr. Mitra distinguishes the authorities cited by Mr. Pal on the point of biasness and submits that, each of the individual cases cited by Mr. Pal would show in the facts of such case that a person interested in the proceedings was a part of the decision making process, therefore, vitiating the entire decision making process. In the instant case, there is no question of the decision making process being vitiated due to biasness as the bank has acted in terms of the guidelines of the Master Circular of the Reserve Bank of India.

19. Mr. Mitra relies on 1988 Calcutta Law Journal page 20 (Smt. Molina Ghosh v. State of West Bengal & Ors.) in support of the proposition that, the writ petitioners were entitled to raise all these issues in the first writ petition and not having done so, cannot be allowed to urge the same on the basis of the principles of constructive res judicata.

20. Mr. Utpal Bose, learned Senior Advocate for the Reserve Bank of India submits that, his client is neither a necessary nor a proper party to the writ petition. No relief is claimed against the Reserve Bank of India. Mr. Bose submits that, the Master Circular has been issued under Section 35A of the Banking Regulation Act, 1949. He contends that, whether a statute is mandatory or directory can be deduced in accordance with the ratio laid down in All India Reporter [Delhi Airtech Services Pvt. Ltd. and Another Vs. State of U.P. and Another,](#) .

21. In reply Mr. S. Pal, learned Senior Advocate for the writ petitioners accepts that, the Master Circular is a piece of subordinate legislation under the relevant

provisions of the Banking Regulation Act, 1949 and that the same is binding upon the parties. He submits that, in such view, the composition of the two committees in the instant case stands vitiated as there were excess members than the number prescribed by the Master Circular present in the two committees dealing with KAL under the Master Circular.

22. I have considered the rival contentions of the parties and the materials made available on record.

23. After elaborate hearing of the writ petition spanning over several days the issues falling for consideration in the petition are

(i) Whether the Master Circular of Reserve Bank of India dated July 1, 2013 and updated on July 1, 2014 is binding on the banks and financial institutions carrying on banking business in India?

(ii) Are the numbers of "higher functionaries" constituting the Identification Committee and the Grievance Redressal Committee prescribed in Regulations 3(i) and 3(iii) mandatory?

(iii) Could the Bank of India initiate proceedings for declaring the petitioners as wilful defaulters in view of the letter dated January 31, 2012 of the State Bank of India?

24. There are five writ petitioners before me. KAL is the first writ petitioner. When the writ petition was moved, on the prayer of the writ petitioners, the first respondent being the Union of India was deleted as a party respondent as it had an office outside the territorial jurisdiction of the Original Side of this Court by the Order dated September 26, 2014, so as to comply with Rule 4 of the Writ Rules of this Hon"ble Court.

25. KAL had an airlines business. KAL claims that it was one of the largest domestic airlines in terms of market share at a given point of time. KAL enjoyed credit facilities from diverse banks and financial institutions under a consortium agreement. The respondent no. 2, United Bank of India was one of the members of such consortium. State bank of India was the lead banker of such consortium. KAL suffered financial difficulties. It ultimately went out of the business of airlines. When KAL was facing financial difficulties, State Bank of India as the lead banker undertook a debt restructuring exercise for KAL. A Master Debt Recast Agreement was entered into. One of the conditions of such agreement was that, all transactions of KAL will be routed through a Trust Retention Account to be maintained with the State Bank of India. KAL will not open any new account and have any financial dealings with any bank or financial institution without the expression consent of the consortium or at least the lead banker of the consortium.

26. At a given point of time, KAL faced a threat of suspension by International Air Transport Association. In order to tide over such suspension KAL approached

various banks including United Bank of India to make a remittance of U.S. Dollars 52,27,588 in order to avoid suspension. In course of its business, KAL approached United Bank of India for temporary overdraft for such purpose. United Bank of India allowed temporary overdraft to KAL. KAL utilized the same. This temporary overdraft facility was over and above the exposure of United Bank of India had on account of KAL in the consortium.

27. United Bank of India consented to provide immediate financial assistance for a sum of U.S. Dollars 52,27,588 to KAL the Rupee equivalent being Rs. 7.5 crores. Recording such consent of the United Bank of India to provide such financial assistance, KAL by its letter dated January 10, 2012 addressed to State Bank of India made a request to State Bank of India to transfer the rupee equivalent of U.S. Dollars 52,27,588 to United Bank of India from the funds coming into the Trust Retention Account on January 13, 2012. State Bank of India by its letter dated January 10, 2012 informed KAL that, the balance in the Trust Retention Account was not sufficient for the requested transfer of funds. State Bank of India however assured that it will make payment as and when money is received into the Trust Retention Account for such purpose. By a letter dated January 11, 2012 KAL informed United Bank of India that, the temporary accommodation granted by United Bank of India will be squared up before the end of January 2012 positively.

28. United Bank of India did not receive the promised remittance by the end of January 2012. By a letter dated February 2, 2012, United Bank of India called upon KAL to make the promised payment. This was followed up by a letter dated October 10, 2012 to State Bank of India for payment. A further request was made on April 2, 2013. State Bank of India by its letter dated April 8, 2013 informed United Bank of India that, the commitment of payment made by KAL to United Bank of India was that of KAL and that, the State Bank of India was not in a position to make the payment. The net result was that, United Bank of India did not receive payment for the temporary overdraft of Rs. 7.5 crores from KAL.

29. United Bank of India initiated proceedings to identify KAL and the other writ petitioners before me as wilful defaulters by a letter dated May 28, 2012. United Bank of India followed this up by another letter dated June 23, 2014. In its letter dated June 23, 2014, United Bank of India charged KAL with opening an account with HDFC bank, a non-consortium bank, for cash management of KAL without the consent of the consortium banks. The second charge was failure of KAL to repay United Bank of India the sum of Rs. 7.5 crores in spite of KAL having the capacity to pay such sum.

30. KAL approached the Writ Court challenging this course of action of United Bank of India in W.P. No. 19247(W) of 2014. KAL limited its challenge in the first writ petition to the question whether KAL was entitled to legal representation before the Grievance Redressal Committee or not. The challenge in such writ petition being limited to such question is recorded in paragraph 10 of the judgment and order

dated July 10, 2014 disposing of W.P. No. 19247(W) of 2014. The Writ Court negated the right of KAL to have legal representation before the Grievance Redressal Committee. It allowed United Bank of India and its Grievance Redressal Committee to proceed to decide the issue upon service of 72 hours advance notice to KAL and its directors. KAL carried an appeal being A.S.T. No. 320 of 2014. The appeal and the stay application connected therewith were dismissed by a judgment and order dated August 28, 2014.

31. United Bank of India issued a notice dated August 29, 2014 to KAL allowing KAL and its directors to appear before the Grievance Redressal Committee on September 1, 2014 at 10.30 a.m. The notice dated August 29, 2014 was e-mailed on such date at 11.01 a.m. KAL claims that its directors received the notice dated August 29, 2014 at 12 noon on September 1, 2014. The writ petitioners before me caused their Advocate to address a letter dated August 28, 2014 to United Bank of India informing that it being aggrieved by the judgment and order dated August 28, 2014 passed by the Division Bench, had filed a Special Leave Petition before the Hon"ble Supreme Court of India and sought for deferment of the hearing before the Grievance Redressal Committee till the disposal of the Special Leave Petition. This was followed up by another letter dated September 30, 2014 where the Advocate for the writ petitioners claimed that the bank was acting in undue haste. The United Bank of India was informed of an interim application being filed before the Hon"ble Supreme Court of India and a request was made for deferment of the hearing before the Grievance Redressal Committee till the disposal of the interim application and the Special Leave Petition by the Hon"ble Supreme Court of India.

32. None of the writ petitioners turned up for hearing before the Grievance Redressal Committee on September 1, 2014 at the appointed time or at all. Mr. Hirak Mitra rightly points out that, out of the five writ petitioners, the third writ petitioner has a residence in Kolkata. No ground has been disclosed as to why the third writ petitioner could not make himself available for the hearing by the Grievance Redressal Committee if the writ petitioners were serious in pursuing their right of hearing before the Grievance Redressal Committee. This conduct of the writ petitioners cast serious doubts as to the genuinity of the prayer for adjournment of hearing made to United Bank of India and to the Grievance Redressal Committee.

33. The Grievance Redressal Committee of United Bank of India upon consideration of relevant materials, came to the finding that the writ petitioners before me should be declared as wilful defaulters and did so by the order impugned dated September 1, 2014. The order was communicated to the writ petitioners simultaneously. The Special Leave Petition of KAL was dismissed by the Hon"ble Supreme Court of India by an Order dated September 2, 2014 as in the opinion of the Hon"ble Supreme Court of India the petition had become infructuous in view of the decision rendered by the Grievance Redressal Committee in the meantime.

34. On the first two issues Mr. S. Pal, learned Senior Advocate after attacking the two Master Circulars not to be pieces of subordinate legislations, ultimately conceded that they were so. According to him, the Master Circulars were issued under the Banking Regulation Act, 1949 and were binding on the banks and financial institutions carrying on banking business in India. According to him, the number of personnel specified in Regulation 3(i) and 3(iii) are mandatory as are the rest of the Circulars. Since the Identification Committee and the Grievance Redressal Committee in the facts of this case were constituted by four personnel, and that number being in excess of the mandatory prescribed number under the Wilful Defaulters Circular, he contends that, the decision making process stands vitiated and, therefore, the ultimate decision should be quashed.

35. Mr. Hirak Mitra, learned Senior Advocate contends that, the Master Circular being issued under Section 35A of the Banking Regulation Act, 1949 is binding on a bank and a financial institution carrying on business in India.

36. Sections 21A and 35A of the Banking Regulation Act, 1949 and the strength of the directions issued by the Reserve Bank of India came up for consideration in Ravindra & Ors. (supra). The Supreme Court has held that, the rate of interest and the period of rest for calculating interest can be determined on the basis of circulars issued by Reserve Bank of India under the Banking Regulation Act, 1949. It goes on to hold that, circulars issued by Reserve Bank of India under Sections 35A and 21A of the Banking Regulation Act, 1949 have statutory force. It is held in paragraph 51 as follows:-

"51. The Banking Regulation Act, 1949 empowers the Reserve Bank of India, on it being satisfied that it is necessary or expedient in the public interest or in the interest of depositors or banking policy so to do, to determine the policy in relation to advances to be followed by banking companies generally or by any banking company in particular and when the policy has been so determined it has a binding effect. In particular, the Reserve Bank of India may give directions as to the rate of interest and other terms and conditions on which advances or other financial accommodation may be made. Such directions are also binding on every banking company. Section 35A also empowers the Reserve Bank of India in the public interest or in the interest of banking policy or the interests of depositors (and so on) to issue directions generally or in particular which shall be binding. With effect from 15.2.1984 Section 21A has been inserted in the Act which takes away power of the Court to reopen the transaction between a banking company and its debtor on the ground that the rate of interest charged is excessive. The provision has been given an overriding effect over the Usury Loans Act, 1918 and any other provincial law in force relation to indebtedness."

In paragraph 55(7) of the report it is held as follows:-

"Any interest charged and/or capitalized in violation of RBI directives, as to rate of interest, or as to periods at which rests can be arrived at, shall be disallowed and/or excluded from capital sum and be treated only as interest and dealt with accordingly."

37. In *Allied Beverage Co. Pvt. Ltd.* (supra) the Supreme Court notes the principles formulated by the Constitution Bench in *Ravindra & Ors.* (supra). In *Sardar Associates & Ors.* (supra) it is held by the Supreme Court that a bank was bound to follow the guidelines issued by Reserve Bank of India. It notes the dicta laid down by the Constitution Bench in *Ravindra & Ors.* (supra) as,

"56.....RBI directives have not only statutory flavour, any contravention thereof or any default in compliance therewith is punishable under sub-section (4) of Section 46 of the Banking Regulation Act, 1949."

38. The Reserve Bank of India itself has clarified by a notification that the Master Circular on Wilful Defaulters was issued under Section 35A of the Banking Regulation Act, 1949. Secondly, in view of such authoritative pronouncements of the Hon'ble Supreme Court in the three authorities cited above, the irresistible conclusion is that, the Master Circulars in question are binding on United Bank of India and its constituents.

39. Thirdly, it is agreed at the bar that the Master Circulars being issued under Section 35A of the Banking Regulation Act, 1949 are binding upon the banks and financial institutions carrying on banking business in India. The first issue is, therefore, answered accordingly in the affirmative.

40. On the second issue, Mr. Mitra contends that, the number of personnel prescribed in Regulations 3(i) and (iii) are directory and should not be considered as mandatory.

41. In *Mannalal Khetan* (supra) the Supreme Court considered the provisions of Section 108 of the Companies Act, 1956. It was of the view that negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. Their Lordships found the provisions contained in Section 108 of the Companies Act, 1956 to be mandatory.

42. In *Raja Buland Sugar Co. Ltd.* (supra) the Supreme Court has laid down that, the question whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it uses the word "shall" or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provisions is the determining factor. Mr. Mitra has relied upon the 15th Edition of "Principles of Statutory Interpretation" by Justice G.P. Singh page 389 to 405. Such treaties say that interpretation of a statute to find out whether a provisions is mandatory or directory cannot be laid down in a straight jacket formula and will depend on the

fact of each case regard being had to the object the statute seeks to achieve and other circumstances.

43. Mr. Utpal Bose, learned Senior Advocate for the Reserve Bank has relied upon M/s. Delhi Airtech Services Pvt. Ltd. & Anr. (supra). In particular he has placed paragraphs 97 onwards of the judgment with regard to the principles for interpretation of a statute.

44. Mr. Mitra has referred to the recovery policy of the United Bank of India and the Board Resolution of the United Bank of India in support of his contention that, the numbers prescribed are not mandatory. The recovery policy of United Bank of India refers to the Master Circular and claims that, the recovery policy to be in terms of the Master Circular. The extract of the Board Resolution placed records appointment of four personnel in the Identification Committee. The interpretation of United Bank of India and its understanding of the Master Circular that the number of personnel prescribed is directory and not mandatory, I am afraid, will not assist a Court to arrive at a conclusion that the numbers prescribed in the Master Circular are directory and not mandatory.

45. Mr. Mitra submits that a bank and financial institution has the liberty to play at the joints in deciding the members prescribed. I would agree with Mr. Mitra to the limited extent on this score. The Reserve Bank of India in Regulation 3(i) of the Master Circular allows a bank or a financial institution to play at the joints when it allows General Managers/Deputy General Managers to constitute the Identification Committees along with the Executive Director.

46. The last of the Master Circulars on Wilful Defaulters of the Reserve Bank of India is dated July 1, 2014. The Master Circular dated July 1, 2014 specifies the purpose of such Master Circulars. The purpose specified is to put in place a system to disseminate credit information pertaining to wilful defaulters for cautioning banks and financial institutions so as to ensure that further banking finance is not made available to wilful defaulters. The Master Circular defines the term "wilful default". The terms "diversion of funds" and "siphoning of funds" are also defined by the Master Circular. The Master Circular contemplates that once a constituent is identified as a wilful defaulter, such constituent will be prevented from accessing to the capital markets by forwarding the list of such wilful defaulter to Securities and Exchange Board of India by the Reserve Bank of India and to Credit information Bureau (India) Limited. The Master Circular requires a bank and a financial institution to take measures in identifying and reporting instances of wilful default. These measures are enumerated in Regulation 3 under the heading of Grievances Redressal Mechanism of the Master Circular.

47. Regulation 3 of the Master Circular of the Reserve Bank of India is as follows:-

"3. Grievances Redressal Mechanism

Banks/FIs should take the following measures in identifying and reporting instances of wilful default:

- (i) With a view to imparting more objectivity in identifying cases of wilful default, decisions to classify the borrower as wilful defaulter should be entrusted to a committee of higher functionaries headed by the Executive Director and consisting of two GMs/DGMs as decided by the Board of the concerned bank/FI.
- (ii) The decision taken on classification of wilful defaulters should be well documented and supported by requisite evidence. The decision should clearly spell out the reasons for which the borrower has been declared as wilful defaulter vis-a-vis RBI guidelines.
- (iii) The borrower should thereafter be suitably advised about the proposal to classify him as wilful defaulter along with the reasons therefor. The concerned borrower should be provided reasonable time (say 15 days) for making representation against such decision, if he so desires, to a Grievance Redressal Committee headed by the Chairman and Managing Director and consisting of two other senior officials.
- (iv) Further, the above Grievance Redressal Committee should also give a hearing to the borrower if he represents that he has been wrongly classified as wilful defaulter.
- (v) A final declaration as "wilful defaulter" should be made after a view is taken by the committee on the representation and the borrower should suitably be advised."

48. Regulation 3 requires a bank to set up a two tier mechanism to identify a wilful defaulter. The first tier is the Identification Committee who will identify a wilful defaulter on the basis of cogent evidence. Its finding is required to be reasoned and well documented. This finding of the Identification Committee is then required to be considered by the second tier, namely, the Grievance Redressal Committee after affording the borrower proposed to be declared as a wilful defaulter a reasonable opportunity of hearing by the Grievance Redressal Committee. The bank is also required to make over the decision of the Identification Committee along with all evidence considered by it to the borrower proposed to be declared as a wilful defaulter for such borrower to make a representation on the subject to the Grievance Redressal Committee within the time frame allowed, if he chooses to. Regulation 3(i) of the Master Circular under the heading of Grievances Redressal Mechanism requires a bank and a financial institution to entrust the duty of identifying cases of wilful default and the decision to classify a borrower as wilful defaulter to a committee of higher functionaries headed by the Executive Director and consisting of two General Managers and Deputy General Manager and decided by the Board of the concerned bank or financial institution. The Reserve Bank of India has used the word "should" in Regulation 3(i) when it is requiring a bank and financial institution to entrust the exercise of identifying and deciding to classify a borrower as wilful defaulter to a committee of higher functionaries. "Should" is the

past tense of "shall". It is a requirement of Reserve Bank of India of a bank and a financial institution to act in terms of the Master Circular issued under Section 35A of the Banking Regulation Act, 1949. This requirement can be no less than mandatory.

49. Similarly in Regulation 3(iii), the Reserve Bank of India uses the word "should" while requiring the bank and financial institution to allow the borrower identified to be declared as a wilful defaulter reasonable time for making a representation against such decision, if he so desires, to a Grievance Redressal Committee headed by the Chairman and Managing Director and constituting of two other senior officials. In Regulation 3(iii) of the Master Circular the word "should" governs the period of time allowed by Reserve Bank of India to a borrower to make a representation to the Grievance Redressal Committee against the decision of the Identification Committee to classify such borrower as a wilful defaulter. In Regulation 3(iii) the words used are such, it would be apparent that, the time provided to make representation to a borrower is flexible. No fixed time period is provided in Regulation 3(iii). Reserve Bank of India requires reasonable time to be provided. It suggests 15 days for the purpose of making the representation. This time period to allow a borrower to make a representation is directory and not mandatory. In the facts of this case, in the earlier writ petition, the Court allowed 72 hours to the borrower to make a representation to the Grievance Redressal Committee. The words used in Regulation 3(iii) however, do not suggest that, the number of personnel prescribed by such Regulation to constitute the Grievance Redressal Committee is directory.

50. The submission of Mr. Mitra that the numbers prescribed for the two committees are directory, can be considered in another perspective. Assuming, it is held that, such prescribed number is directory, then, no upper limit is fixed by the Regulation. The regulation does not provide a band width of the numbers that can constitute the two committees. In absence of any guideline to such effect being issued by the Reserve Bank of India, it would be improper to read the Master Circular to say that, on this aspect the Master Circular is directory. If such an interpretation is allowed, then a bank and a financial institution will have unbridled and unguided power in its hand to constitute the Identification Committee and the Grievance Redressal Committee with such numbers as they may choose. Across the banking sector, there would be different composition of the two committees leading to a situation where a constituent could claim with some amount of justification to be discriminated against by a bank in relation to another bank on the basis of the number of persons constituting the two committees. A borrower can be a constituent of a number of banks and financial institutions at the same time as in the instant case. KAL is a constituent of a number of banks under a consortium agreement. In such an event, the borrowers would also get a footing to claim that the bank must constitute the two committees in a particular manner to suit their convenience. That a borrower gets to have a say in the constitution of the two

committees cannot be culled out from the reading of the Regulation 3 of the Master Circular as it stands. Reading the Master Circular in the manner as suggested by Mr. Mitra with all due respect, will lead to uncertainty. An interpretation leading to uncertainty cannot be preferred over one that leads to certainty. Accepting the interpretation of Mr. Mitra would also do violence to the language used in the Master Circular and defeat its purpose of expeditious identification of wilful defaulters and expeditious dissemination of information with regard thereto so that the capital market and the borrowing market gets to deal with such wilful defaulters commensurate with their status.

51. The Master Circular being issued under Section 35A of the Banking Regulation Act, 1949, has a binding effect on a bank or a financial institution. When a Master Circular has such binding effect to try and find out portions of it and that too crucial portions and hold that such portions are directory, would be against the intention of the legislature when the legislature prescribes that a Circular issued by the Reserve Bank of India under Section 35A of the Banking Regulation Act, 1949 is binding on a bank and financial institution governed by it.

52. The direction of the Reserve Bank of India contained in Regulations 3(i) and 3(iii) as to the qualification of the persons constituting the members of the two committees is mandatory. Both Mr. Pal and Mr. Mitra agree with this reading of the Master Circular. If that be so, and in fact it is so, then to read the numbers prescribed in the same clause of the Master Circular to be directory would require words in that clause to suggest the same. The wordings in the two clauses referred to do not permit one to arrive at a conclusion that the number of persons constituting the two committees can be increased at the discretion of the bank.

53. In view of such circumstances, it would be prudent to accept the contention of Mr. Mitra that the numbers prescribed by the Master Circular for composing the two committees are directory and not mandatory.

54. In view of the authoritative pronouncement of Ravindra & Ors. (supra) the second issue is answered by holding that the number prescribed for constituting the Identification Committee and the Grievance Redressal Committee in Regulations 3(i) and 3(iii) of the Master Circular dated July 1, 2014 is mandatory.

55. United Bank of India disclosed the minutes of the Identification Committee in its supplementary affidavit. The Identification Committee held a meeting on May 22, 2014 to identify constituents as wilful defaulters. It was constituted by four members with one Executive Chairman, a Chief General Manager and two General Managers being present. This is in excess of the number of three personnel prescribed in Regulation 3(i) of the Master Circular on wilful defaulters issued by the Reserve Bank of India. In such circumstances the decision arrived at by such Identification Committee is a nullity. Consequently, all steps taken by United Bank of India subsequent to such so-called identification are also a nullity. Significantly, the

Grievance Redressal Committee also constituted by four members. This is also in violation of Regulation 3(iii) of the Master Circular issued by the Reserve Bank of India.

56. The third issue revolves around the letter dated January 31, 2012 of the lead banker of the consortium. The letter dated January 31, 2012 of State Bank of India is a request to the Reserve Bank to relax the restructuring guidelines so as to facilitate the restructuring of the accounts of KAL. This letter dated January 31, 2012 is not a declaration of any of the two committees under the Master Circular of any bank declaring any of the writ petitioners not to be wilful defaulters. The contents of the letter dated January 31, 2012 does not by itself negate the requirement of considering the writ petitioners as wilful defaulters under the Master Circular on Wilful Defaulters by an individual bank under the consortium. A lead banker has no jurisdiction to do so. The letter dated January 31, 2012 of State Bank of India and its contents may or may not be a relevant factor for consideration by the two committees of a bank in arriving at the decision that the writ petitioners are wilful defaulters or not in respect of such bank or financial institution. The letter dated January 31, 2012 cannot be stretched to mean to be a Holy Grail which absolves all sins of wilful defaults in terms of the Master Circular of the Reserve Bank of India for all times to come in respect of all the writ petitioners or any of them. Any bank forming a part of the consortium is well within its right to invoke the provisions of the Master Circular to find out and declare the writ petitioners as wilful defaulters under the Master Circular. In fact it must do so as expeditiously as possible and preferably within the closest proximate time of an account becoming a non-performing asset. The object of the Master Circular is to identify a borrower as a wilful defaulter if such borrower otherwise satisfies the conditions for such purpose so that such borrower is dealt with in a manner commensurate with a declaration of such status by the two committees.

57. The Master Circular on Wilful Defaulters of the Reserve Bank of India requires every bank to undertake the exercise of identifying and declaring a borrower as a wilful defaulter if he is so. This exercise should be undertaken independent of the view expressed by a member bank of the consortium or any other bank. This is so as the account of the borrower has to be adjudged under the Master Circular in relation to the transactions that the borrower had with the concerned bank. Once a borrower is declared to be a wilful defaulter by a bank, the rigours under the Master Circular would kick in. Non-declaration of wilful defaulter even after an enquiry to such effect under the Master Circular being undertaken by a bank will not bind any other bank with such view as a borrower has to be adjudged as a wilful defaulter in relation to the transactions that the borrower had with the considering bank. Viewed in such context the letter of State Bank of India is of little consequence. In fact, State Bank of India is required to undertake the exercise under the Master Circular also notwithstanding its letter. The letter is not by the Grievance Redressal Committee of State Bank of India.

58. The Master Circular requires the banks and financial institutions to undertake such exercise expeditiously and to report on the same so that a wilful defaulter is dealt with in a manner commensurate with its status. Therefore, every individual banker under the consortium will be entitled to proceed and deal with the writ petitioners under the Master Circular notwithstanding the contents of the letter dated January 31, 2012 of the lead banker. The letter dated January 31, 2012 will not impede State Bank of India itself to invoke the provisions of the Master Circular. Such letter, therefore, by no stretch of imagination can be held to impede the invocation of the Master Circular by other members of the consortium.

59. In such circumstance the third issued is answered in the affirmative and in favour of United Bank of India.

60. This will not prevent the United Bank of India to proceed against the writ petitioners to classify them as wilful defaulters under the relevant Circulars of the Reserve bank of India in accordance with law and in terms of the orders passed in the earlier writ petition.

61. The decisions of the Identification Committee and the Grievance Redressal Committee are quashed. W.P. No. 942 of 2014 is allowed to such extent. No order as to costs.