

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 17th December, 2015**

+ **LPA 589/2014, CMs No.14796/2014 (for stay) & 14798/2014 (for filing additional documents)**

PUNJAB NATIONAL BANK & ORS **Appellants**

Through: Mr. Yashraj Singh Deora, Adv.

Versus

KINGFISHER AIRLINES LIMITED & ORS **Respondents**

Through: Mr. Rajiv Nayar, Sr. Adv. with Mr. Diwakar Maheshwari, Mr. Saurabh Seth, Mr. Karun Mehta, Mr. Vinam Gupta & Mr. Muhammad Umar Khan, Advs. for R-1.

Mr. Anil Soni, CGSC with Mr. Naginder Benipal, Advs.

AND

+ **LPA No.113/2015 & CM.No.3742/2015 (for stay)**

STATE BANK OF INDIA **Appellant**

Through: Mr. Jitendra Kumar, Adv.

Versus

M/S JAH DEVELOPERS PRIVATE LIMITED & ORS **Respondents**

Through: Mr. I.S. Alag with Mr. R.S. Bisht, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The Reserve Bank of India (RBI), from time to time, issued a number of Circulars to Banks and Financial Institutions (FIs), containing instructions on matters relating to wilful defaulters. To enable the Banks / FIs to have all the existing instructions on the subject at one place, a Master Circular dated 1st July, 2013, incorporating all the instructions / guidelines issued on cases of wilful default, was issued. The purpose thereof was defined as, to put in place a system to disseminate credit information pertaining to wilful defaulters for cautioning Banks / FIs so as to ensure that further bank finance is not made available to them. The said Circular *inter alia* provides for submission by Banks / Financial Institutions of data of wilful defaulters to RBI on a quarterly basis and preparation of a list of wilful defaulters by the RBI and communication thereof to the Securities Exchange Board of India (SEBI) and to Credit Information Bureau (India) Ltd. (CIBIL). The said Circular requires all the Scheduled Commercial Banks and All India Notified Financial Institutions to identify cases of wilful default and to constitute a committee of higher functionaries headed by the Executive Director and consisting of two General Managers / Deputy General Managers as decided by the Board of the concerned Bank / FI, to

decide on the classification of the borrower as a wilful defaulter. The Circular also requires the Banks / FIs to i) advise the borrower about the proposal to classify him as wilful defaulter along with the reasons therefor; ii) give the borrower time of fifteen days for making representation against proposed decision; iii) constitute a Grievance Redressal Committee (GRC) headed by the Chairman and Managing Director and two other senior officials of the Bank / FI, to hear the person sought to be classified as a wilful defaulter, if he so desires; and, iv) thereafter take a decision in that regard.

2. The question for adjudication before us is, whether a person who is proposed to be classified as a wilful defaulter by a Bank / FI and who, in accordance with the RBI's Circular aforesaid, has availed of opportunity to be heard by the GRC of the said Bank / FI to oppose such a proposal, has a right to be represented by an Advocate in the said hearing.

3. The appellant Punjab National Bank (PNB) in LPA No.589/2014 proposed to so classify the respondents No.1 to 3 i.e. Kingfisher Airlines Limited, United Breweries (Holdings) Ltd. and Dr. Vijay Mallya as wilful defaulters and gave an opportunity to the said respondents to represent thereagainst; the respondents, besides representing, sought a hearing. The

GRC of the appellant PNB though gave a hearing, as mandated by the Circular aforesaid of the RBI, but during the said hearing objected to the said respondents being represented by a Senior Advocate.

4. This led to the filing by the respondents of W.P.(C) No.5532/2014 from which the LPA No.589/2014 arises. The said writ petition came up before the learned Single Judge of this Court on 28th August, 2014 when the counsel for the appellant PNB appeared on advance notice and contended that the GRC of the appellant PNB, which was to give a hearing, comprised of the Executive Director, Chairman-cum-Managing Director and a General Manager of the appellant PNB and none of the said members were Law Graduates and therefore the respondents were not entitled to be represented by an Advocate. It was further submitted that similar notices had been issued to a large number of other borrowers for declaring them also as wilful defaulters and that if the defaulting borrowers are permitted to be represented by an Advocate, the GRC would be severely impeded in disposing of those cases.

5. The learned Single Judge disposed of the writ petition vide order dated 28th August, 2014, finding / observing / holding:

- (i) that it is settled law that in a case where a person is pitted against legally trained mind, denial of representation through a legal practitioner would violate an essential principle of natural justice;
- (ii) that this does not necessarily imply that where the adjudicating authority is not legally trained, representation through a legal practitioner ought to be denied;
- (iii) that undisputedly an adverse decision by the GRC would be highly prejudicial to the interest of the respondents / writ petitioners and would have significant implications;
- (iv) that though the effort of the appellant Bank to expeditiously dispose of the matter is appreciable but the idea of preventing adequate representation to the affected parties for such disposal is unacceptable;
- (v) that the right to be represented by a Advocate is not an integral part of natural justice and it is not necessary that in all cases before domestic forums representation through a legal practitioner should be permitted; however the Courts have leaned towards allowing representation through legal practitioners to obviate any handicap that the person may feel in representing his case;

- (vi) that in cases where adverse decision would have serious civil and pecuniary consequences, denial of representation through a legal practitioner may in given facts be violative of natural justice;
- (vii) that indisputably the consequences of holding the respondents / writ petitioners as wilful defaulter would be serious for them and they ought to be afforded adequate opportunity to represent;
- (viii) that the apprehension expressed by the counsel for the appellant PNB that the respondents / writ petitioners were seeking to delay the proceedings, could be allayed by fixing timelines.

The writ petition was accordingly disposed of *inter alia* by fixing the date of hearing and by clarifying that the respondents / writ petitioners would have a right of representation in the said hearing through an Advocate or a Senior Advocate but with the condition that the oral submissions will be confined to six hours and the hearing would be concluded on 22nd September, 2014 itself. The respondents / writ petitioners were however given liberty to file written submissions and documents.

6. Aggrieved therefrom LPA No.589/2014 was filed along with an application for stay of the order of the learned Single Judge. Notice of the

appeal was issued and the hearing before the GRC was stayed, more so in the light of the fact that the respondents / writ petitioners in the meanwhile had already been declared as a wilful defaulter by another Bank. Though, in the light of the same, we enquired from the counsels, whether not the appeal had become infructuous, inasmuch as it matters not, whether a person is classified as a wilful defaulter by one Bank / FI or by more than one Bank / FI but on the contention of all the counsels that the issue involved is of general importance and is likely to arise in future as well, we proceeded to hear the appeal and reserved judgment.

7. The counsel for the appellant PNB argued, i) that the hearing before the GRC is in the nature of a domestic enquiry and if legal representation is allowed in such enquiries the same would unduly delay the decision on whether the person proposed to be declared as wilful defaulter is to be so declared or not; the delay caused by the respondents / writ petitioners in this case was pointed out; ii) that the Supreme Court even in the context of an opportunity of representation under Sections 13(2), (3) & (3A) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) has held that there is no right of hearing; iii) that the petition from which this appeal arises,

notwithstanding the judgment of the Division Bench of the Calcutta High Court, was filed by way of a wager. Reliance was placed by the counsel for the appellant PNB on the following judgments:

(A) *N. Kalindi Vs. M/s. Tata Locomotive and Engineering Co. Ltd. Jamshedpur* AIR 1960 SC 914 laying down that a workman against whom an enquiry is held by the management has no right to be represented at such enquiry by a representative of his union, though the employer in his discretion may allow so; it was reasoned that if the enquiry is unfair, the workman can always in an industrial dispute challenge its validity (we may however notice that the said view was based on the general practice then prevalent of the person accused conducting his own case);

(B) *J.K. Aggarwal Vs. Haryana Seeds Development Corporation Ltd.* (1991) 2 SCC 283, in the context again of departmental enquiry, holding that right of representation by a lawyer “may not” in all cases be held to be a part of natural justice except when a man’s reputation or livelihood is at stake and that the discretion in this regard is to be exercised taking into consideration, whether there is likelihood of the combat being unequal, entailing a miscarriage or failure of justice and

a denial of a real and reasonable opportunity for defence by the reason of one being pitted against a presenting officer who is trained in law;

(C) ***National Seeds Corporation Ltd. Vs. K.V. Rama Reddy*** (2006)

11 SCC 645 laying down that in domestic / departmental enquiry, there is no right to representation by somebody else, unless the rules and regulations or standing orders concerned specifically recognise such a right and provide for such a representation; the reasons given in that case for permitting representation, of the misappropriated amount being very large, number of documents and witnesses being numerous and workman being not able to get assistance of any other able co-worker, were held to be irrelevant;

(D) ***D.G., Railway Protection Force Vs. K. Raghuram Babu***

(2008) 4 SCC 406 also laying down that ordinarily in a domestic / departmental enquiry, the person accused of misconduct has to conduct his own case, inasmuch as, such an inquiry is not a suit or criminal trial where a party has a right to be represented by a lawyer and that it is only if there is some rule which permits the accused to be represented by somebody else that such a right can be claimed;

(E) *A.S. Motors Private Limited Vs. Union of India* (2013) 10 SCC 114, in the context of hearing in pursuance to a show cause notice issued prior to termination of contract, holding that there was no need to give an opportunity to cross-examine, as the inquiry was primarily in the realm of contract, aimed at finding out whether the noticee had committed any violation of the contractual stipulations and in the absence of any allegation of *mala fides*, the said inquiry could not be held to be in violation of principles of natural justice;

(F) *Poolpandi Vs. Superintendent, Central Excise* (1992) 3 SCC 259 where the contention, that since there was no statutory provision in the Customs Act, 1962 prohibiting the presence of a counsel during the interrogation of a person concerned, a request in that regard, if made cannot be legitimately refused, was rejected;

(G) judgment dated 28th August, 2014 of a Division Bench of the High Court of Calcutta in AST No.320/2014 titled *Kingfisher Airlines Limited Vs. Union of India*, in similar circumstances as the present, holding that by refusing permission to engage Advocate, the bank did not commit any wrong (SLP(C) CC No.14755/2014 preferred thereagainst was disposed of vide order dated 2nd

September, 2014 as infructuous, in view of the fact that the GRC of that bank had already passed the order declaring the appellant in that case as a wilful defaulter);

8. Per contra, the senior counsel for the respondents / writ petitioners, argued:

(I) that no prejudice is caused to the appellant Bank from the impugned judgment, as the interest of the appellant Bank has been sufficiently protected by fixing a time bound schedule of hearing;

(II) that the RBI should be a party, since the Master Circular of the RBI is being interpreted / construed (however we had pointed out to the senior counsel that the present appeal arises from a writ petition filed by the respondents / writ petitioners and it was for the respondents / writ petitioners to implead the RBI, as a party thereto and they cannot now oppose the appeal on this ground);

(III) attention was invited to Clause 2.5(b) of the Master Circular of the RBI which provides that the Banks / FIs should also initiate criminal proceedings against wilful defaulters, whenever necessary and it was contended that in view of such a serious consequence, the representation through an Advocate is essential (however we had

drawn the attention of the senior counsel to *Superintendent of Police (C.B.I) Vs. Deepak Chowdhary* (1995) 6 SCC 225 laying down that no opportunity of hearing is required to be given before the grant of sanction for prosecution under the Prevention of Corruption Act, 1988 etc.);

(IV) attention was invited to Section 303 of the Code of Criminal Procedure, 1973 (CrPC) conferring the right to be defended by a pleader of his choice to any person accused of an offence before a Criminal Court or against whom the proceedings are instituted under the CrPC; (however, we had pointed out that the same can have no application as the GRC does not accuse the person proposed to be declared as wilful defaulter of any offence and does not prosecute him and Clause 2.5(b) supra of the Master Circular merely provides that against wilful defaulters, criminal proceedings may be initiated, if necessary);

(V) attention was invited to Clause 4.3 of the Master Circular providing that it should also be ensured that the penal provisions are used effectively and determinedly but after careful consideration and due caution and advising the Banks / FIs to put in place a transparent mechanism for initiating criminal proceedings based on facts of each

case and it was argued that for the sake of complete transparency also, representation through an Advocate is necessary;

(VI) attention was invited to Clause 3 of the Master Circular aforesaid providing that the GRC should comprise of the Chairman and Managing Director and two other senior officials and it was contended that the senior officials can also be a Legal Director or a Legal Manager and that thus to maintain the balance, it is necessary to allow representation through Advocate also to the person proposed to be declared as a wilful defaulter;

(VII) that wherever it has been held that there is no right of representation through Advocate, there is an express prohibition against the appearance of the Advocate as under the Family Courts Act, 1984 and the Industrial Disputes Act, 1947 or under the Co-operative Societies Act, 2003; there is no such bar under the Master Circular;

(VIII) that the appellant Bank in the notice issued to the respondents / writ petitioners proposing to declare them as wilful defaulters relied upon and referred to the investigative report of Ernst & Young LLP (EY) being an external agency; similarly assistance to the noticee of

an external agency i.e. an Advocate should also be permitted.

9. We had during the hearing on 13th October, 2014 invited the attention of the counsels to Section 30 of the Advocates Act, 1961 which though earlier had not been notified and was thus not in operation, has been notified on 19th June, 2011 and is as under:

“30. Right of advocates to practise—Subject to provisions of this Act, every advocate whose name is entered in the [State roll] shall be entitled as of right to practise throughout the territories to which this Act extends,—

- (i) in all courts including the Supreme Court;*
- (ii) before any tribunal or person legally authorised to take evidence; and*
- (iii) before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.”*

and enquired whether the right of the Advocates to practise thereunder extended to before the GRC of the Bank.

10. The senior counsel for the respondents / writ petitioners on the next date of hearing relied on:

- (a) ***Aeltemesh Rein Vs. Union of India*** (1988) 4 SCC 54 laying down that we have travelled a long distance from the days when it was considered that the appearance of a lawyer on one side would

adversely affect the interests of the parties on the other side and that now the Legal Aid and Advice Boards functioning in different States can be approached by the people belonging to weaker sections for legal assistance and for providing services of competent lawyers to appear on their behalf before the Courts and Tribunals in which they have cases and in the light thereof, there appeared to be no justification for not bringing into force Section 30 of the Advocates Act;

(b) ***N.K. Bajpai Vs. Union of India*** (2012) 4 SCC 653 and invited attention to paras 20, 21, 24 to 27, 36, 38 and 70 thereof and contended that in the present case, the RBI has not deemed it expedient to bar the appearance of Advocate in the hearing provided for to the person sought to be declared as a wilful defaulter;

(c) ***DLF Qutub Enclave Complex Educational Charitable Trust Vs. State of Haryana*** (2003) 5 SCC 622 to, by analogy, contend that bar cannot be implied and must be express;

(d) ***Santanu Ghosh Vs. The State Bank of India*** 2013 SCC Online Cal 11603 holding that considering the severe consequences that befall a person upon being found to be a wilful defaulter, the

function of the GRC is more quasi-judicial than administrative and finding the order of GRC same to be not stating any reason, setting aside the same;

(e) ***India Photographic Company Ltd. Vs. Saumitra Mohon Kumar alias Saumitra Kumar*** 1983 SCC Online Cal 156 holding that no general rule can be laid down regarding right of legal representation and it must be left for consideration in the light of facts of each individual case;

(f) ***PETT Vs. Greyhound Racing Association Ltd.*** 1969 1 Q.B. 125 laying down that where there is a right of audience and when the charge concerns a person's reputation and his livelihood, there is a right to appoint an agent and once a person has a right to appear as an agent, there is no reason why that person should not be a lawyer (however the counsel for the appellant PNB contended that this judgment has been dissented from in ***Enderby Town Football Club Ltd. Vs. Football Association Ltd.*** 1971 1 Chancery 591;

(g) ***Pannalal Binjraj Vs. Union of India*** AIR 1957 SC 397 para 31 to contend that since the Master Circular supra does not deal with the issue of representation by the Advocate at the hearing

contemplated therein, the same cannot be presumed to be taking it away, and;

(h) attention was invited to Section 35A of the Banking Regulation Act, 1949 empowering the RBI to give directions and it was contended that the Master Circular has been issued in the exercise of power thereunder and the said section also does not deal with the right of representation.

11. With reference to Section 30 of the Advocates Act, we had further enquired from the counsels, what is the definition of a Tribunal within the meaning of Clause (ii) thereof and whether the GRC of the Bank could be considered as a Tribunal.

12. The counsel for the appellant PNB in rejoinder contended that the GRC could not be construed as a Tribunal; a Tribunal entails judicial power and which is not conferred on the GRC. Attention in this regard was invited to paras 38 to 45 of *Union of India Vs. Madras Bar Association* (2010) 11 SCC 1. It was contended that the GRC is not legally authorized to receive evidence. Attention was invited to Section 11 of the Industrial Disputes Act constituting the Labour Court as a Tribunal and giving powers thereto of a Civil Court and it was contended that it was for this reason, since lawyers

would have been entitled as a matter of right to appear before it, that the need for prohibiting them by Section 36(3) arose. Attention was also invited to *Zonal Manager, Life Insurance Corporation of India Vs. City Munsif, Meerut* AIR 1968 Allahabad 270 where without noticing that Section 30 of the Advocates Act had not been brought into force, it was held that an Inquiry Officer in a departmental enquiry is not a Tribunal. Notice was also taken of the fact that in British India there is no common law right in a party to be represented by counsel and that if the client is expressly denied the privilege of being heard by a counsel, the Advocate's right of audience would be also excluded. Attention was also invited to para 10.033 of Volume 2 of Halsbury's Laws of India, 1999 Edition, summarising that the right to practice granted by the Advocates Act does not confer on a litigant the right to be represented by an Advocate. It was further argued that *India Photographic Company Ltd.* supra relied upon by the respondents / writ petitioners is contrary to the law laid down by the Supreme Court. To answer our query, whether a lawyer could appear before the GRC as an agent of the noticee, reference was made to Chapter X on Agency in Pollock & Mulla's The Indian Contract and Specific Relief Acts, 14th Edition (on the basis of *K.K. Khadilkar Vs. Indian Hume Pipe*

Co. Ltd. AIR 1967 Bombay 521) opining that right of audience before a Tribunal cannot be delegated to an agent. It was further contended that ***DLF Qutub Enclave Complex Educational Charitable Trust*** supra was in relation to land and would have no application.

13. The senior counsel for the respondents / writ petitioners in sur-rejoinder handed over a copy of the Advocate (Amendment) Bill.

14. After we reserved judgment in LPA No.589/2014, LPA No.113/2015 entailing same controversy was listed and the counsels therein stated that they would be bound by the judgment to be delivered in LPA No.589/2014. Accordingly, judgment therein also was reserved.

15. While the judgment was reserved, the Division Bench of the High Court of Bombay in ***Kingfisher Airlines Ltd. Vs. Union of India*** MANU/MH/1768/2015, faced with a similar controversy, largely relying on the judgment of the High Court of Calcutta has also held that a proposed wilful defaulter who has been given an opportunity of hearing by the concerned Bank does not have a right to be represented by a lawyer before the GRC. However notwithstanding having held so, the High Court, to avoid further delay, permitted the petitioner in that case to be represented before the GRC by a lawyer. Though the State Bank of India carried the

matter to the Supreme Court by way of SLP(C) Nos.26420-26421/2015 but the Supreme Court vide order dated 18th September, 2015 declined to interfere as the legal question had been decided in favour of the Bank and for the reason that the High Court while permitting the petitioner in that case to be represented by a lawyer had directed the hearing to be concluded in one day. The Supreme Court further clarified that its order will not constitute a precedent.

16. Thus as of now there is no pronouncement from the Supreme Court on the subject and the view of the Calcutta High Court followed by the Bombay High Court is that there is no right of representation through an advocate before the GRC.

17. Having given our thoughtful consideration to the matter, we, with respect are unable to concur with the view taken by the High Courts of Calcutta and Bombay and for the reasons hereafter appearing hold that a proposed wilful defaulter, in the hearing before the GRC, would have a right of representation though an advocate.

(A) The ramifications of a person being labelled as a wilful defaulter are wide and drastic. Such declaration sounds the commercial death knell of the borrower in the sense that credit

facilities would no longer be available to such borrower. Not only would such a borrower be deprived of credit facilities from banks and financial institutions but is likely to be also deprived of credit from any other person with whom it may be having financial / commercial dealings. The suppliers of goods and raw materials to such borrowers would stop supplying goods and raw materials on credit and would insist upon delivery against payment. Not only so, such declaration as a wilful defaulter, which is put in public domain, is also injurious to commercial goodwill and reputation of the borrower, likely to make anyone weary of dealing with the borrower. All this is likely to lead to cessation of the business of such a borrower.

- (B) Supreme Court in ***Kotak Mahindra Bank Ltd. Vs. Hindustan National Glass and Ind. Ltd.*** (2013) 7 SCC 369 has held that the purpose of the Master Circular is to caution banks and financial institutions from giving any bank finance to a wilful defaulter. It was held that credit information could not be confined to only wilful defaults made by existing borrowers of the bank but would also cover constituents of banks who had

defaulted in their dues under banking transactions with banks and who intended to avail further finance from the banks. Non-funded facilities such as guarantees were held to be covered by a Master Circular. It was further held that confidentiality of any credit information either by virtue of any other law or by virtue of any agreement between the banks and its constituent cannot be a bar for disclosure of credit information under Section 45C(1) of the Reserve Bank of India Act, 1934.

- (C) It is perhaps for the reason of said serious consequences which follow declaration of a borrower as a wilful defaulter that the Master Circular has provided for the Banks / FIs notifying the borrower proposed to be so declared as a wilful defaulter of the intention to do so and to give an opportunity to represent against such proposal and a right of hearing before a GRC headed by Chairman and Managing Director of the Bank / FI.
- (D) As per the Master Circular the decision to classify the borrower as a wilful defaulter is to be entrusted to a committee of higher functionaries headed by Ex-Director and consisting of two General Managers / Deputy General Managers, as decided by

the Board of Directors of Bank / FI and the decision to be based on objective facts and to be well documented and supported by requisite evidence and should clearly spell out the reasons for which the borrower is intended to be declared as a wilful defaulter. It is thereafter that the borrower is to be notified of the said decision, to be given an opportunity to represent thereagainst and if so desires, to be given a hearing before the GRC. A final declaration as wilful defaulter is to be made after a view is taken by the GRC on the representation of the borrower.

- (E) It would thus be seen that before the borrower is notified, a committee of high functionaries of Bank/FI has already collected and documented evidence and recorded reasons for proposing to declare him as a wilful defaulter. What follows before the GRC is not an inquiry, as is the case in a departmental proceeding in employment disputes, judgments with respect where to have been cited by the Bank. Here, before the borrower is called upon to represent and if so desires be heard, the Bank / FI has already conducted its inquiry and

reached a reasoned conclusion supported by evidence albeit *ex parte* of the borrower qualifying as a wilful defaulter. The borrower is then called upon to represent thereagainst. The borrower, during the opportunity provided to represent thereagainst and of hearing would axiomatically be required to meet and rebut the evidence on the basis whereof and the reasons for which the high level committee of the Bank has concluded that the borrower be declared as a wilful defaulter. Resultantly, the GRC would be required to consider and weigh the evidence and the reasons on the basis of which the bank has arrived at the decision vis-a-vis the rebuttal evidence and arguments of the borrower and thereafter take a view. The proceedings before the GRC are thus not inquisitorial as in the case of departmental proceedings *supra* but are rather adversarial and the decision of GRC is final, against which no remedy is provided as distinct from the report of inquiry officer in departmental proceedings validity whereof can be challenged in a industrial dispute. The judgments relating to departmental proceedings cited by the counsel for Bank thus

have no applicability to the proceedings before GRC.

- (F) The Master Circular also defines wilful default and then proceeds to define the ingredients of wilful default. It further provides that the decision, whether a particular instance amounts to siphoning of funds would have to be a judgment of lenders based on objective facts of the case.
- (G) We are of the view that a borrower himself or his workers / officials may not be well versed to, during the hearing before the GRC, support or explain the representation made against the proposal of the bank and may not be able to answer any query or give clarification as is sought by members of GRC with respect to contents of representation filed and which is likely to be prepared by professionals including advocates. It cannot also be lost sight of that declaration of wilful default extends to non-funding transactions with the Banks also and the question, whether the borrower besides having defaulted in repayment obligation, has also not utilised the fund for the purpose availed or has diverted or siphoned off the same or disposed off its assets may not be simple as may appear to be but have

complex financial and legal implications. We cannot also be unmindful of complexity of today's financial transactions which are invariably structured by experts including law firms and not by the borrowers themselves. To require the borrower in such circumstances to explain or unravel the same himself may, in our view undo the very purpose of giving an opportunity of being heard and infringe the 'fairness' of the process.

(H) Supreme Court, in ***Kulja Industries Limited Vs. Chief General Manager W.T. Project BSNL*** AIR 2014 SC 9, in the context of blacklisting has held:

- (i) that though a freedom to contract or not to contract is unqualified in the case of private parties but any such decision is subject to judicial review when the same is taken by the State or any of its instrumentalities;
- (ii) this implies that any such decision will be open to scrutiny not only on the touchstone of principles of natural justice but also on the doctrine of proportionality;

- (iii) a fair hearing to the party being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto;
- (iv) reasonableness, fairness and proportionality of the order to the gravity of the offence is examinable by a writ Court;
- (v) that though the right of the petitioner is in the nature of a contractual right but the manner, method and motive behind the decision of the authority whether or not to enter into a contract is subject to judicial review on the touchstone of fairness, relevance, natural justice, non-discrimination, equality and proportionality.

- (I) In our view the above parameters would be applicable to the declaration under the Master Circular of a borrower as a wilful defaulter also. Just like the State and its instrumentalities cannot refuse to enter into a contract with a private party without giving such private party an opportunity of being heard

and which hearing has to satisfy the criteria of fairness, similarly the banks and FIs cannot by declaring a borrower as wilful defaulter deprive the borrower of credit / banking facilities from all Banks / FIs by though giving a hearing but without the element of fairness therein.

- (J) Supreme Court in *Smt. Kavita Vs. State of Maharashtra* (1981) 3 SCC 558 reiterated in *Nand Lal Bajaj Vs. State of Punjab* (1981) 4 SCC 327 emphasized that adequate legal assistance is essential for the protection of Fundamental Rights guaranteed by the Constitution and valuable rights may be jeopardised and reduced to mere nothing without adequate legal assistance in the light of the intricacies of the problems involved and other relevant factors. In the context of provision of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 disentitling a detenu from claiming as of right to be represented by a lawyer, it was held that whether or not a legal assistance should be afforded must necessarily depend upon the merits of each individual case.

- (K) Again, in *Crescent Dyes and Chemicals Ltd. Vs. Ram Naresh Tripathi* (1993) 3 SCC 115 it was held that refusal to be represented by an agent of choice may amount to denial of natural justice and that ordinarily it is considered desirable not to restrict this right of representation by counsel or an agent of one's choice. Though a restriction by law can be imposed.
- (L) We had during the hearing wondered whether not depriving the borrower the right of legal representation may also result in discrimination in proceedings before GRC vis-a-vis different borrowers.
- (M) We had in this context enquired from the counsel for the Bank whether not an advocate / senior advocate if on the Board of Directors of a borrower company proposed to be declared as a wilful defaulter and / or a advocate though not practicing but employed in the borrower company proposed to be declared as a wilful defaulter would be entitled to represent the borrower company in the hearing before the GRC. The counsel for the Bank fairly answered in the affirmative. We are of the view that if an advocate in his capacity as a Director on the Board of

the borrower company and / or as an employee of such a company would be entitled to so represent the borrower before the GRC, not permitting an advocate as a professional to so represent the borrower who has no advocate on its Board or in its employment would cause discrimination.

- (N) The present times are times of specialization and outsourcing. Though in olden times large business houses / companies (and it is generally they who are likely to be declared as wilful defaulters) were known to have an established legal department employing several legal brains, however with the evolvement of the legal profession over the years and the coming into being of the law firm culture, today a number of such business houses instead of maintaining a law department of their own are outsourcing the entire legal work. To allow a company / business house which maintains a legal department and lawyers on board, to be represented by such lawyers and to not allow a business house / a company which instead of maintaining its own legal department relies on external professionals therefor would in our opinion amount to discrimination not based on

any reasonable criteria and not having any rationale nexus to the object sought to be achieved.

- (O) The way in which businesses are conducted and transacted today has also undergone a drastic change. Today, we have companies who are marketing and selling goods worth crores of rupees but who are not manufacturers of such goods and may not themselves have title or custody of the said goods at any point of time. Such companies may not have any tangible assets even and being purely e-commerce companies may not have a large workforce also. In our view, prohibiting representation before GRC through professionals would also unduly prejudice such companies vis-a-vis the old fashioned brick and mortar companies employing a workforce of thousands.
- (P) We cannot also be unmindful of the fact that notwithstanding the bar contained in the Industrial Disputes Act, 1947, practicing advocates have continue to appear before the Labour / Industrial Court save for the fact that they appear not as advocates wearing black coats and robes but as agents of the

employer. This Court cannot shut its eyes to the reality of life and we are of the view that the law may rather be in consonance with the practice than such which is practiced in breach.

- (Q) That takes us to Section 30 of the Advocates Act supra conferring in the advocates a right to practice. Chief Justice of India Justice T.S. Thakur speaking for the High Court of Karnataka in *M/s. Kothari Industrial Corporation Limited Vs. The Coffee Board* MANU/KA/0414/1999 held that the right of an advocate to practice before any Court or Tribunal, contained in Section 30 of the Advocates Act, necessarily means that a litigant before any such Court, Tribunal, Authority or person will have a right to engage and avail the services of an advocate.
- (R) Supreme Court in *N.K. Bajpai* supra after noticing Section 30 of the Advocates Act held that the right to practice is not only a statutory right but would also be a fundamental right under Article 19(1)(g) of the Constitution.

- (S) Supreme Court in *Dr. D.C. Saxena, Contemnor Vs. Hon'ble the Chief Justice of India* (1996) 5 SCC 216 held that advocacy touches and asserts the primary value of freedom of expression so dear in a democracy. It was further held that freedom of expression produces the benefit of the truth to emerge and assists stability by tempered articulation of grievances and plays its part in securing the protection of fundamental human rights.
- (T) However to invoke Section 30 supra, the GRC constituted under the Master Circular supra would have to satisfy the test thereof.
- (U) GRC is definitely not a Court within the meaning of Clause (i) of Section 30 and neither the Master Circular nor any other legislation within the meaning of Clause (iii) of Section 30 entitles an advocate to practice before the GRC. What remains to be considered is whether the GRC qualifies as a “Tribunal or a person legally authorized to take evidence” within the meaning of Clause (ii) of Section 30.

- (V) We have in this context wondered whether the words “legally authorized to take evidence” qualify both “Tribunal” as well as “person” preceding the same but separated by the word “or”.
- (W) Supreme Court recently in *Star Industries Vs. Commissioner of Customs (Imports)* MANU/SC/1150/2015 quoted with approval Justice G.P. Singh’s Statutory Interpretation 12th Edition 2010 authoring that the word “or” is normally disjunctive. This was reiterated in *Spentex Industries Ltd. Vs. Commissioner of Central Excise* MANU/SC/1142/2015. It was so held earlier also in *Guru Nanak Dev University Vs. Sanjay Kumar Katwal* (2009) 1 SCC 610. Thus the existence of the word “or” between the words “Tribunal” and “person” in Clause (ii) of Section 30 supra is indicative of the words “legally authorized to take evidence” qualifying the word “person” only and not the word “Tribunal”.
- (X) Though the counsel for the respondents, from Clause 3(ii) of the Master Circular requiring the decision taken on classification as a wilful defaulter to be well documented and supported by requisite evidence contended that the GRC is

authorized to take evidence but we find the words ‘legally authorized to take evidence’ meaning, authorized to compel presence of any person as a witness and which we do not find the GRC to be authorized to. It thus cannot be said that the GRC is legally authorized to take evidence.

(Y) The only question which thus remains for consideration to attract the applicability of Section 30 supra is, whether the GRC can be called a ‘Tribunal’ within the meaning of Clause (ii) of Section 30 of the Advocates Act.

(Z) Tribunal is a Latin word meaning “a raised platform on which the seats of the Tribunals or Magistrates are placed” (Refer *State of M.P. Vs. Anshuman Shukla* (2008) 7 SCC 487).

(AA) Article 136 of the Constitution of India, while conferring in the Supreme Court the power to grant special leave to appeal, provides for a special leave to appeal from any judgment, decree, determination, sentence or order passed by any Court or Tribunal.

(BB) Supreme Court in *The Engineering Mazdoor Sabha Representing Workmen Employed Under the Hind Cycles*

Ltd. Vs. The Hind Cycles Ltd., Bombay AIR 1963 SC 874, in the context of Article 136 held that while the expression “Court” in the technical sense is a Tribunal constituted by the State as a part of ordinary hierarchy of Courts which are invested with the State's inherent judicial powers, the “Tribunal” as distinguished from the Court, exercises judicial powers and decides matters brought before it judicially or *quasi-judicially*, but it does not constitute a Court in the technical sense. It was held that purely administrative Tribunals are outside the scope of the word “Tribunal” within the meaning of Article 136 of the Constitution – the Tribunals contemplated by Article 136(1) are clothed with some of the powers of the Courts, *inter alia* their decisions must be consistent with the general principles of law i.e. they must be acting judicially and reach their decisions in an objective manner and cannot proceed purely administratively or base their conclusions on subjective tests or inclinations. A Tribunal within the meaning of Article 136 was held to include within its ambit all adjudicating bodies provided they are constituted

by the State and are invested with judicial as distinguished from purely administrative or executive functions. The test was held to be whether the adjudicating body has been constituted by the State and has been invested with the State's judicial power which it is authorised to exercise.

(CC) In *Jaswant Sugar Mills Ltd. Vs. Lakshmi Chand* AIR 1963 SC 677 while reiterating that the essential test of being a Tribunal is that it should have been constituted by the State and invested with judicial as distinguished from purely administrative or executive functions, it was explained that duty to act judicially upon an authority does not necessarily clothe the authority with the judicial power of the State as even administrative or executive authorities are required to act judicially in dealing with questions affecting the rights of citizens. It was further explained that in deciding whether an authority required to act judicially would be regarded as a Tribunal or not the principle incident is the investiture of a trappings of a Court such as authority to determine matters in cases initiated by parties, sitting in public, power to compel attendance of witnesses and

to examine them on oath and duty to follow fundamental rules of evidence, provision for imposing sanctions by way of imprisonment, fine, damages or mandatory or prohibitory orders to enforce obedience to their commands.

(DD) In *Associated Cement Companies Ltd. Vs. P.N. Sharma* AIR 1965 SC 1595, Justice R.S. Bachawat in his concurring judgment held that an authority other than a Court may be vested by a statute with judicial power in widely different circumstances and the proper thing is to examine and ascertain whether the powers vested in the authority can be truly described as judicial functions or judicial power of the State. Any outside authority empowered by the State to determine conclusively the rights of two or more contending parties with regard to any matter in controversy between them was held to satisfy the test of an authority vested with the judicial power of the State and to be regarded as a Tribunal within the meaning of Article 136. It was held that a power of adjudication implies that the authority must act judicially and must determine the dispute by ascertainment of relevant facts on the materials

before it and by application of the relevant law to those facts. It was further held that though an authority or body deriving its power of adjudication from an agreement of the parties, such as a private arbitrator or a tribunal acting under section 10-A of the Industrial Disputes Act, 1947 would not satisfy the test of a Tribunal but a State Government deciding an appeal under the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952 vested with the powers to confirm the punishment or set it aside and pass consequential orders and determine the civil rights of the parties with regard to matters in controversy between them would be a Tribunal.

(EE) Supreme Court in *Mrs. Sarojini Ramaswami Vs. Union of India* (1992) 4 SCC 506, on a conspectus of the case law held that one of the considerations which has weighed with the Courts for holding a statutory authority to be a Tribunal under Article 136 is finality or conclusiveness and the binding nature of the determination by such authority.

(FF). Mention may though be made of *Gujarat Steel Tubes Ltd. Vs. Gujarat Steel Tubes Mazdoor Sabha* (1980) 2 SCC 593 where

it was observed that the word ‘Tribunal’ simpliciter has a sweeping signification and does not exclude Arbitrator.

(GG) Seen in this conspectus, the GRC has been constituted by the Master Circular. Such Circulars of the Reserve Bank of India (RBI) have in, *ICICI Bank Ltd. Vs. Official Liquidator of APS Star Industries Ltd.* (2010) 10 SCC 1 and in *Peerless General Finance & Investment Co. Limited Vs. Reserve Bank of India* (1992) 2 SCC 343 been held to have a statutory character and force of law. The GRC thus satisfies the test aforesaid of having been constituted by the State.

(HH) In our view, the GRC also satisfies the test of having been invested with the State’s judicial power and having the trappings of a Court i.e. the authority to determine whether the Bank’s/FIs proposal to classify a borrower as a wilful defaulter is in accordance with the requirements of the Master Circular and if so satisfied, to declare the borrower as a wilful defaulter and which declaration vitally affects the rights and reputation of the person so declared. Not only does the Master Circular so provide but we have already noted above the dicta of the

Supreme Court in *Kulja Industries Limited* supra holding that the hearing in this regard has to satisfy the requirement of fairness.

(II) Supreme Court in *Anshuman Shukla* supra was concerned with the Arbitral Tribunal constituted under the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 to resolve the disputes and differences pertaining to works contract or arising out of or connected with execution, discharge or satisfaction of any such works contract. The said Arbitral Tribunal was held, for all intent and purport to be a Court having been constituted to determine a lis between the parties. The contention that the determination by the Arbitral Tribunal was an administrative adjudication as distinct from judicial adjudication was rejected. It was held that though not fulfilling the criteria of a law Court as is ordinarily understood, the Tribunal was a specialized Court which was required to decide as per law.

(JJ) In *All Party Hill Leaders' Conference, Shillong Vs. Captain W.A. Sangma* (1977) 4 SCC 161, the Election Commission

deciding the question of a symbol to the parties contesting the election was held to be a Tribunal.

(KK) Recently in *Columbia Sportswear Company Vs. Director of Income Tax, Bangalore* (2012) 11 SCC 224 while holding the Authority for Advanced Rulings (Income Tax) constituted under the Income Tax Act, 1961 to be a Tribunal, it was reiterated that Tribunals are bodies of men appointed to decide controversies arising under certain special laws and among the powers of the State is included the power to decide such controversies.

(LL) We are therefore of the opinion that the GRC satisfies the tests prescribed to qualify as a Tribunal.

(MM) Once the GRC is held to be a Tribunal within the meaning of Section 30 of the Advocates Act, the advocates would have a right to practice before it and axiomatically the borrower before such GRC will have a right to engage and avail the services of an advocate.

(NN) A Division Bench of the High Court of Punjab and Haryana in *Paramjit Kumar Saroya Vs. Union of India*

MNU/PH/0765/2014, in the context of the provision in the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 debarring representation through an advocate before the Tribunals constituted under the said Act, held that after the coming in to force of Section 30 of the Advocates Act, there cannot be an absolute bar to the assistance by legal practitioner to before a Tribunal.

(OO) A Full Bench of the High Court of Punjab and Haryana in ***Smt. Jaswant Kaur Vs. The State of Haryana*** AIR 1977 P&H 221 held Section 20A of the Haryana Ceiling of Land Holdings Act, 1972 prohibiting advocates from appearing before the authorities constituted under the said Act to be bad in the light of Section 30 of the Advocates Act, without of course noticing Section 30 of the Act to be not in force.

(PP) In ***Lingappa Pochanna Appelwar Vs. State of Maharashtra*** (1985) 1 SCC 479 the challenge to the vires of Section 9A of the Maharashtra Restoration of Lands to Schedule Tribes Act, 1974 prohibiting advocates from appearing in proceedings under the Act on the ground of restricting the right to practice

the provision was negated only on the ground of Section 30 of the Advocates Act having not been brought into force and though it was observed such a right is no doubt conferred thereby.

(QQ) It thus follows that the restriction placed by the GRC of the appellant banks to appearance on behalf of borrowers of advocates before it, not by any law but otherwise, cannot be sustained and has to be held to be bad.

(RR) We are also of the view that the entire opposition of the GRC of the appellant banks to appearance of is based on an illogical presumption of the same delaying the proceedings before it. We do not find any basis for such apprehension. There is no basis for the Bank / FIs to form an opinion that while the defaulting borrower and / or his representatives would not delay the proceedings, an advocate appearing for them would. Moreover the members of GRC can always control and guide the proceedings before it and as per the exigencies limit the time of hearing.

(SS) We therefore conclude that the GRC of the appellant banks erred in denying representation through the advocates to the respondent. We further hold that the borrowers or the Banks/FIs who are proposed to be classified/ declared as wilful defaulters and are given an opportunity of hearing before the GRC are entitled to be represented therein through advocates. We however hasten to clarify that the GRC would be fully empowered to control including as to the duration and guide the hearing and if finds dilatory and vexatious tactics being adopted, to take suitable consequential actions.

18. The appeals are accordingly dismissed. The appellant banks to proceed to fix a date of hearing before their GRC, to proceed with their proposal for declaring the respondents as wilful defaulters.

No costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

DECEMBER 17, 2015

Bs/gsr..