
(2019) 05 CAL CK 0011

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 7471 (W) Of 2019

Atlantic Projects Ltd. & Ors

APPELLANT

Vs

Allahabad Bank & Ors

RESPONDENT

Date of Decision : 03-05-2019

Acts Referred:

Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2)
Banking Regulation Act, 1949 — Section 21, 21(2), 21(3), 35A
Companies Act, 2013 — Section 2(60)
Central Sales Tax Act — Section 8(2)(b)
Representation Of Peoples Act — Section 81
Constitution Of India, 1950 — Article 19(1)(g)

Citation : (2019) 05 CAL CK 0011

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Saktinath Mukherjee, Satyaraj Banerjee, Syed Nurul Arefin, Om Narayan Rai, Soumashree Ghosh

Final Decision : Disposed Off

Judgement

Debangsu Basak, J

The petitioners have assailed a show-cause notice dated July 24, 2018 issued by the Deputy General Manager (Recovery) of Allahabad Bank under the Master Circular of the Reserve Bank of India relating to the declaration of Wilful Defaulters. The petitioners have also sought a direction upon the Bank to allow the petitioners to be represented before the Wilful Defaulter Identification Committee by an advocate.

Learned Senior Advocate appearing for submitted that, the impugned show-cause jurisdiction. He has referred to the Master the petitioners has notice is without Circular on Wilful Defaulters dated July 1, 2015 and submitted, referring to Clause 3 of such Master Circular that, the Identification Committee is required to issue the show-cause notice by itself. It cannot delegate such function to any

other person. The impugned show-cause notice has been issued by a person who is not a member of the Identification Committee. Therefore, the impugned show-cause notice is bad in law. In support of his contentions that, a show-cause notice under Clause 3(b) of the Master Circular on Wilful Defaulters is required to be issued by the Identification Committee alone, learned Senior Advocate appearing for the petitioners has relied upon the judgment and order dated February 5, 2019 passed in W.P. No. 1399 (W) of 2019 (Pawan Kumar Patodia & Ors. v. Union Bank of India & Ors.) in support of such contentions. He has relied upon Shackleton on the Law and Practice of Meetings, seventh edition and referred to the paragraph with the heading prescribed manner. He has submitted that, the notice of a meeting has to be given in the manner prescribed by the regulation. In the present case, the Master Circular on Wilful Defaulters requires the Identification Committee to issue the notice.

Relying upon All India Reporter 1956 Supreme Court page 604 (Ravulu Subba Rao & Ors. v. Commr. of Income-tax, Madras) learned Senior Advocate appearing for the petitioners has submitted that, when the law does not prohibit a person to be represented by an agent, then, the petitioners are entitled to be represented by an advocate before the Identification Committee. He has relied upon the Master Circular on Wilful Defaulters and submitted that, the provisions of such Master Circular does not debar a person required to be heard by the Identification Committee, to be represented by an advocate. The Master Circular does not take away the right of the petitioner to appoint an agent. The petitioner can appoint any person and even an Advocate as his agent. Therefore, the petitioner should be allowed to be represented by an advocate before the Identification Committee, if, the Court is pleased not to find that the impugned show-cause notice is not bad in law.

Learned Advocate appearing for the Bank has submitted that, the proceedings under the Master Circular for Wilful Defaulters have been held to be administrative in nature. He has relied upon All India Reporter 2016 Calcutta page 303 (Dynametic Overseas Private Limited & Anr. v. State Bank of India & Ors.) in support of such contentions. According to him, since, the action by the Bank under the Master Circulars for Wilful Defaulters, being administrative in nature, delegation is permissible. The individual members constituting the Identification Committee can delegate the ministerial act of issuance of notice to any person. In the present case, the Deputy Manager has been delegated with the ministerial act of issuing the show-cause notice. He has submitted that, the Identification Committee is required to consider the materials produced before it by the Bank under the Master Circular. The Identification Committee thereafter after considering such materials arrives at a prima facie finding as to whether there is any wilful default as defined in the Master Circular or not. Such finding is minuted. Therefore, once such finding is minuted, the ministerial act of issuing the show-cause notice can be delegated. Moreover, when a person is entitled to delegate, such a person is also entitled to ratify the action taken. In the present case, the Identification Committee has ratified the action of issuance of the show-

cause notice by the Deputy General Manager. There is no infirmity in the impugned show-cause notice on such score.

Relying upon 1974 Volume 4 Supreme Court Cases page 98 (Gwalior Rayon Silk Mfg. (WVG.) Co. Ltd. v. The Asstt. Commissioner of Sales Tax & Ors.) learned Advocate appearing for the Bank has submitted that, delegation is not the complete handing over or transference of a power from one person or body of persons to another. In the present case, the Identification Committee did not abrogate its duties when it required the Deputy General Manager to issue the show-cause notice. He has relied upon 2014 Volume 16 Supreme Court Cases page 248 (Siddhartha Sarawgi v. Board of Trustees for the Port of Kolkata & Ors.) for the proposition that, the burden of performing the ancillary and clerical task need not be shouldered by the primary delegate. Ministerial acts can be delegated. Issuance of a show-cause notice is a ministerial act which is capable of being delegated. The Identification Committee cannot be faulted for having done so. Relying upon All India Reporter 1956 Supreme Court page 285 (Pradyat Kumar Bose v. The Hon'ble The Chief Justice of Calcutta High Court) learned Advocate appearing for the Bank has submitted that, a statutory functionary exercising administrative powers cannot be said to have delegated his functions merely by deputing a responsible and confident official to enquire and report. Relying upon All India Reporter 2007 Cal 49 (Asset Reconstruction Company India Ltd. v. Amit Ventures Private Ltd. & Ors.) learned Advocate appearing for the Bank has submitted that, the Bank can avail of the services of an advocate to issue a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. On the same analogy, the Identification Committee can delegate the ministerial act of issuing notice to the delinquent.

Learned Advocate appearing for the Bank has relied upon All India Reporter 1956 Calcutta 662 (A.R.S. Choudhury v. The Union of India & Ors.) and submitted that, a charge sheet must contain the charge or charges, may contain particulars of the proposed punishment or may not do so. However, the charge sheet must be issued in the name of the punishing authority and must consist of the particulars of the alleged offence with the object of affording the delinquent an opportunity of meeting it. In the present case, the show-cause notice contains the particulars of the charges and, the noticee had reasonable opportunity of responding to it. A show-cause notice can be issued by any person having the approval or consent of the punishing authority. In support of such contention, learned Advocate appearing for the Bank has relied upon All India Reporter 1958 Calcutta 633 (K.K. Murty v. The General Manager, South Eastern Railway & Anr.). Learned Advocate appearing for the Bank has submitted that, the purpose of the show-cause notice is to afford opportunity of hearing to the person against whom a proceeding is contemplated. In support of such contention, he has relied upon 1987 Volume 2 Supreme Court Cases page 179 (State of Uttar Pradesh v. Brahm Datt Sharma & Anr.). Learned Advocate appearing for the Bank has submitted that, the Master Circular on Wilful Defaulters received the consideration of the

Hon'ble Supreme Court in 2013 Volume 7 Supreme Court Cases page 369 (Kotak Mahindra Bank Limited v. Hindustan National Glass & Industries Limited & Ors.). The Hon'ble Supreme Court did not find the Master Circular to have violated any fundamental right under Article 19(1)(g) of the Constitution of India. Referring to the impugned show-cause notice, learned Advocate appearing for the Bank has submitted that, the Identification Committee can ratify the issuance thereof. On the power of the Identification Committee to ratify the show-cause notice, learned Advocate appearing for the Bank has relied upon 2006 Volume 5 Supreme Court Cases page 96 (Maharashtra State Mining Corpn. v. Sunil) and 2015 Volume 1 Supreme Court Cases page 669 (National Institute of Technology & Anr. v. Pannalal Choudhury & Anr.).

Learned Advocate appearing for the Bank has submitted that, a person who is sought to be proceeded under the Master Circular for Wilful Defaulters, is not entitled to be represented by an Advocate before the Identification Committee. He has relied upon a Judgment and Order dated August 28, 2014 rendered in A.S.T. No. 320 of 2014 (Kingfisher Airlines Limited v. Union of India & Ors.) and an Order dated March 10, 2017 passed in W.P. No. 125 of 2017 (Allied Vyapar Pvt. Ltd. & Ors. v. State Bank of India & Ors.) in support of his contentions.

Relying upon 2007 Volume 3 Calcutta High Court Notes page 178 (Pijush Kanti Chowdhury v. State of West Bengal & Ors.) learned Advocate appearing for the Bank has submitted that, even if there is an order of stay in a pending appeal, the same does not amount to any declaration of law. Such an order of stay is binding upon the parties to the proceedings. Such interim order does not destroy the binding effect of the judgment under appeal as a precedent. Learned Advocate appearing for the Bank has submitted that, Lawyers' assistance can never be claimed as a matter of right.

He has relied upon 2018 Supreme Court Cases Online Cal 4508 (Convent of Our Lady of Providence Girl's High School & Ors. v. Anita Nigam & Ors.). He has drawn the attention of the Court to the pleadings in the writ petition and submitted that, the writ petitioners do not claim that, they are incompetent to appear and defend their case before the Identification Committee. According to him, the writ petitioner does not make out a case for grant of assistance of an advocate to the petitioners.

In reply, learned Senior Advocate appearing for the petitioner has submitted that, the petitioner is seeking a right to appoint an agent to represent the petitioner before the Identification Committee, and such right has not been prohibited by statute. Even if, the notification of the Reserve Bank of India on Wilful Defaulters is construed to have statutory force, such notification, does not debar a representation by an advocate. The Court in Kingfisher Airlines Limited and Allied Vyapar Pvt. Ltd. & Ors. (supra) did not have the benefit of considering the ratio laid down in Ravulu Subba Rao & Ors. (supra). Therefore, there is no impediment in the Court granting the petitioner the right to appoint an advocate as an agent before the Identification Committee. Learned Senior Advocate

appearing for the petitioner has relied upon the provisions of Section 21(2) and (3) of the Banking Regulation Act, 1949 as well as Section 35A thereof. He has submitted that, the notification on Wilful Defaulters issued by Reserve Bank of India is binding upon the Bank. Since, such a notification is binding on the Bank, it is also binding upon the Identification Committee. The bank has to act in accordance with the circular or not at all. Clause 3 of the Circular on Wilful Defaulters requires the Identification Committee to issue a show-cause notice. The Identification Committee cannot delegate the issuance of show-cause notice to any other person. In the context of the Circular on Wilful Defaulters, it cannot be said that, issuance of the show-cause notice is a ministerial act, and capable of being delegated. The question therefore of the Identification Committee ratifying such an action does not arise as, the Identification Committee is not capable of delegating its authority to issue a show-cause notice. Ratification will arise only when, a person is entitled in law, to delegate. He has submitted that, the impugned show-cause notice being bad in law should be quashed. All steps taken pursuant to such show-cause notice should also be quashed. However, in the event, the Court is pleased not to quash the show-cause notice, then, the petitioner be afforded the right to appoint an Advocate as an agent to represent the petitioner before the Identification Committee.

Learned Senior Advocate appearing for the petitioner has relied upon 2013 Volume 4 WBLR (Cal.) 919 (Santanu Ghosh & Ors. v. The State of West Bengal) and submitted that, even if decision of the Grievance Redressal Committee is treated as an administrative order, it must be appreciated that the decision was rendered in a quasi judicial proceeding and that, the decision affects the rights of the petitioner. The petitioner is therefore entitled to appoint an agent to represent itself at the hearing given by the Identification Committee.

The issues that have fallen for consideration in the present writ petition are as follows:-

- (i) Can the Identification Committee acting under the Master Circular for Wilful Defaulters dated July 1, 2015 delegate its power to issue a show-cause notice?
- (ii) Is a borrower receiving a show-cause notice under the Master Circular on Wilful Defaulters dated July 1, 2015 entitled to be represented by an agent before the Identification Committee?
- (iii) If the answer to the second issue is in the affirmative, then can an Advocate be appointed?
- (iv) To what relief or reliefs are the parties entitled to?

Actions taken by a bank under the Master Circular on Wilful Defaulters dated July 1, 2008 issued by the Reserve Bank of India are the subject-matter of the present writ petition. Reserve Bank of India and in fact, the entire banking sector was and still are grappling with the issue of defaults by borrowers. In order to check increase in defaults and to provide a mechanism to prevent such defaults

from occurring, Reserve Bank of India formulated a scheme for identification of accounts where defaults occur. It also prescribed suitable measures to be taken with regard thereto. Master Circular on Wilful Defaulters was issued by Reserve Bank of India on July 1, 2008. It defines a wilful default. It prescribed a cut of limit and required a banker to look into the end use of the funds while deciding an incidence of wilful default. It prescribed penal measures to be taken when a wilful default was detected. It also laid down a grievance redressal mechanism so far as identification of wilful defaults were concerned. Reserve Bank of India came out with a fresh circular dated July 1, 2015 relating to wilful defaults. The Master Circular dated July 1, 2015 issued by Reserve Bank of India, provides the definitions of lender, unit and wilful default. It prescribes cut of limits, defines end use of funds and the penal measures to be taken.

It lays down a mechanism for identification of Wilful Defaulters. The mechanism is provided in Clause 3 thereof which is as follows:-

"3. Mechanism for identification of Wilful Defaulters

The mechanism referred to in paragraph 2.5 above should generally include the following:

(a) The evidence of wilful default on the part of the borrowing company and its promoter / whole-time director at the relevant time should be examined by a Committee headed by an Executive Director or equivalent and consisting of two other senior officers of the rank of GM / DGM.

(b) If the Committee concludes that an event of wilful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the promoter / whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of wilful default and the reasons for the same. An opportunity should be given to the borrower and the promoter / whole-time director for a personal hearing if the Committee feels such an opportunity is necessary.

(c) The Order of the Committee should be reviewed by another Committee headed by the Chairman / Chairman & Managing Director or the Managing Director & Chief Executive Officer / CEOs and consisting, in addition, to two independent directors / non-executive directors of the bank and the Order shall become final only after it is confirmed by the said Review Committee. However, if the Identification Committee does not pass an Order declaring a borrower as a wilful defaulter, then the Review Committee need not be set up to review such decisions.

(d) As regard a non-promoter / non-whole time director, it should be kept in mind that Section 2(60) of the Companies Act, 2013 defines an officer who is in default to mean only the following categories of directors:

(i) whole-time director

(ii) where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iii) every director, in respect of a contravention of any of the provisions of Companies Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings and who has not objected to the same, or where such contravention had taken place with his consent or connivance.

Therefore, except in very rare cases, a non-whole time director should not be considered as a wilful defaulter unless it is conclusively established that:

I. he was aware of the fact of wilful default by the borrower by virtue of any proceedings recorded in the minutes of meeting of the Board or a Committee of the Board and has not recorded his objection to the same in the Minutes; or,

II. the wilful default had taken place with his consent or connivance.

The above exception will however not apply to a promoter director even if not a whole time director.

(iv) As a one-time measure, Banks / FIs, while reporting details of wilful defaulters to the Credit Information Companies may thus remove the names of non-whole time directors (nominee directors / independent directors) in respect of whom they already do not have information about their complicity in the default / wilful default of the borrowing company. However, the names of promoter directors, even if not whole time directors, on the board of the wilful defaulting companies cannot be removed from the existing list of wilful defaulters.

(e) A similar process as detailed in sub-paragraphs (a) to

(c) above should be followed when identifying a non-promoter / non-whole time director as a wilful defaulter."

Wilful default is defined in the Master Circular dated July 1, 2015 as follows:-

"2.1 Definition of wilful default

The term "wilful default" would be deemed to have occurred if any of the following events is noted:-

(a) The unit has defaulted in meeting its payment/repayment obligations to the lender even when it has the capacity to honour the said obligations.

(b) The unit has defaulted in meeting its payment/repayment obligations to the lender and has not utilised the finance from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purposes.

(c) The unit has defaulted in meeting its payment/repayment obligations to the

lender and has siphoned off the funds so that the funds have not been utilised for the specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.

(d) The unit has defaulted in meeting its payment/repayment obligations to the lender and has also disposed off or removed the movable fixed assets or immovable property given by him or it for the purpose of securing a term loan without the knowledge of the bank/lender."

Reserve Bank of India has issued the Master Circular on Wilful Defaulters dated July 1, 2015 exercising powers under the Banking Regulation Act, 1949. Sections 21 and 35A of the Act of 1949 makes the directions/guidelines issued by Reserve Bank of India binding upon a banking company. Sections 21 and 35A of the Act of 1949 are as follows:-

"21. Power of Reserve Bank to control advances by banking companies.-

(1) Where the Reserve Bank is satisfied that it is necessary or expedient in the public interest [or in the interests of depositors] [or banking policy] so to do, it may 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, all banking companies or the banking company concerned, as the case may be, shall be bound to follow the policy as so determined.

(2) Without prejudice to the generality of the power vested in the Reserve Bank under sub-section (1), the Reserve Bank may give directions to banking companies, either generally or to any banking company or group of banking companies in particular, [as to-

(a) the purposes for which advances may or may not be made,

(b) the margins to be maintained in respect of secured advances,

(c) the maximum amount of advances or other financial accommodation which, having regard to the paid-up capital, reserves any deposits of a banking company and other relevant considerations, may be made by that banking company to any one company, firm, association of persons or individual,

(d) the maximum amount up to which, having regard to the considerations referred to in clause (c), guarantees may be given by a banking company on behalf of any one company, firm, association of persons or individual, and

(e) the rate of interest and other terms and conditions on which advances or other financial accommodation may be made or guarantees may be given.

(3) Every banking company shall be bound to comply with any directions given to it under this section.

35A. Power of the Reserve Bank to give directions (1) Where the Reserve Bank is satisfied that-

(a) in the [public interest]; or

[(aa) in the interest of banking policy; or]

(b) to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company; or

(c) to secure the proper management of any banking company generally; it is necessary to issue directions to banking companies generally or to any banking company in particular, it may, from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.

(2) The Reserve Bank may, on representation made to it or on its own motion, modify or cancel any directions issued under sub-section (1), and in so modifying or cancelling any direction may impose such conditions as it thinks fit, subject to which the modification or cancellation shall have effect."

The Master Circular on Wilful Defaulters dated July 1, 2015 being issued in exercise of powers under the Act of 1949, such Master Circular, has statutory force. It is binding upon any legal entity carrying on banking business with the permission of RBI. The bank herein is bound by the Master Circular on Wilful Defaulters dated July 1, 2015. It has not been contended by the bank herein that, it is not bound by such Master Circular.

The mechanism for identification of Wilful Defaulters as stipulated in the Master Circular on Wilful Defaulters dated July 1, 2015 requires a bank to have an Identification Committee consisting of the quantity and quality of personnel stipulated in the Master Circular. It also requires a Review Committee to review the decision of the Identification Committee. The composition of the Review Committee has also been prescribed in the Master Circular on Wilful Defaulters dated July 1, 2015. Clause 3 of the Master Circular on Wilful Defaulters dated July 1, 2015 requires a bank to place any evidence that the bank has, on wilful default of a borrower, before the Identification Committee. That is the mandate of Clause 3(a). Clause 3(b) requires the Identification Committee to arrive at a finding as to whether the evidence produced by the bank on wilful default by a borrower, constitute sufficient ground to arrive at a prima facie finding that, there is a wilful default on the part of the borrower or not. If the Identification Committee arrives at a prima facie finding that, there is an event of wilful default then, a notice is required to be issued to the borrower calling for the submission of the borrower. The submissions of the borrower, if there be any, are then considered by the Identification Committee. The Identification Committee has the discretion to grant personal hearing to the borrower if it feels that such an opportunity is necessary. The Identification Committee then decides on the issue of wilful default and renders its finding to the parties. Such is the mechanism under Clause 3(b). Clause 3(c) allows the order of the Identification Committee to be reviewed by the Review Committee. Not all orders of the Identification

Committee are amenable to review by the Review Committee. Only such orders of the Identification Committee which arrives at a finding that there is a wilful default can be placed before the Review Committee. The rest of the sub-clauses of Clause 3 are not relevant for the purpose of the instant litigation at the present moment.

The Master Circular on Wilful Defaulters casts few duties on the bank and on the agencies required to be created by the bank. It requires the bank amongst others, to constitute the Identification Committee and the Review Committee as prescribed. Clause 3(b) of the Master Circular on Wilful Defaulters dated July 1, 2015, cast few duties on the Identification Committee to discharge. Firstly, the Identification Committee has to assess the evidence of wilful default placed before it by the bank. On the basis of such evidence, the Identification Committee is required to conclude as to whether, there exist any incidence of wilful default or not. Wilful default is defined in the Master Circular on Wilful Defaulters dated July 1, 2015. Once, the Identification Committee finds that, there is an incidence of wilful default, then, it is required to hear the delinquent borrower. The hearing may be a personal hearing also, if, the Identification Committee feels that such a procedure of hearing is necessary. The Identification Committee is required to issue a notice to the borrower calling for submissions from the borrower on the issue of wilful default. The issue raised is whether, Identification Committee can have such notice to the borrower issued on its behalf by any other person or not. Issuance of a show-cause notice is a requirement under Clause 3(b). As Clause 3(b) of the Master Circular on Wilful Defaulters dated July 1, 2015 stands, the Identification Committee by itself can issue the show-cause notice. In the facts of the present case, the Identification Committee by itself did not issue the show-cause notice. It was issued by a Deputy General Manager. The Deputy General Manager can at best be the delegatee of the Identification Committee. It is not the Identification Committee nor a member thereof. Whether the same is permissible or not, is one of the issues that has fallen for consideration.

The Master Circular on Wilful Defaulters dated July 1, 2008 had received the consideration of the Supreme Court in Kotak Mahindra Bank Limited (supra). While considering such Master Circular, the question as to whether such Master Circular violates the right of a person under Article 19(1)(g) of the Constitution of India was kept open. The constitutional validity of the Master Circular dated July 1, 2015 is not under challenge in the present writ petition.

Pawan Kumar Patodia & Ors. (supra) has considered a show-cause notice issued under the provisions of the Master Circular on Wilful Defaulters dated July 1, 2015. In that case, the show-cause notice was issued by a person other than the Identification Committee. It has held, after considering Clause 3 of the Master Circular on Wilful Defaulters dated July 1, 2015 laying down the mechanism for identification of Wilful Defaulters, as follows:-

"3. Mechanism for identification of Wilful Defaulters The mechanism referred to in

paragraph 2.5 above should generally include the following: (a) The evidence of wilful default on the part of the borrowing company and its promoter/ whole-time director at the relevant time should be examined by a Committee headed by an Executive Director or equivalent and consisting of two other senior officers of the rank of GM/DGM. (b) If the Committee concludes that an event of wilful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the promoter/ whole-time director and call for their submissions and after considering their submissions issue an order recording the fact of wilful default and the reasons for the same. An opportunity should be given to the borrower and the promoter/whole-time director for a personal hearing if the Committee feels such an opportunity is necessary."

Asset Reconstruction Company India Ltd. (supra) has held that, a notice under Section 13(2) of the Act of 2002 can be issued by an advocate. To my mind provision of Section 13(2) of the Act of 2002 and the Master Circular cannot be put on the same pedestal. For me, Section 13(2) is a statute while the Master Circular is a direction issued by RBI having statutory force. Section 13(2) of the Act of 2002 which requires a notice to be issued to the borrower calling upon the borrower to discharge, in full, his liabilities to the secured creditor within 60 days from the date of notice. It does not prescribe any designated authority of the secured creditor to take a decision as to whether such notice is required to be issued or not. Section 13(2) is dependent upon a default being made by the borrower and the account of the borrower being classified as a non-performing asset. Classification of non-performing assets is governed by the prudential norms issued by the Reserve Bank of India, from time to time. Section 13(2) of the Act of 2002 does not require a decision to be taken after affording the borrower an opportunity of hearing. Clause 3(b) of the Master Circular on Wilful Defaulters dated July 1, 2015 requires the Identification Committee to arrive at its finding after affording an opportunity of hearing to the borrower. The secured creditor is not discharging the same duties as that of Section 13(2) of the Act of 2002 when it is acting in terms of the Master Circular on Wilful Defaulters dated July 1, 2015. Under Section 13(2) of the Act of 2002, a secured creditor is trying to recover its dues from a borrower who is in default and has its account classified as a non-performing asset (NPA). Only such borrowers whose accounts stand classified as a NPA are amenable to be proceeded against under the Act of 2002.

Dynametic Overseas Private Limited & Anr. (supra) has held that, the proceedings under the Master Circular for Wilful Defaulters does not involve any lis being decided. It is an administrative decision. The Division Bench in Kingfisher Airlines Limited (supra) has held that, no lis is decided by the Grievance Redressal Committee acting under the Master Circular dated July 1, 2013. Considering an earlier RBI Master Circular for Wilful Defaulters namely, the Circular dated July 1, 2008, Santanu Ghosh & Ors. (supra) has held that, even if the decision of the Grievance Redressal Committee is regarded as an administrative order, it must be appreciated that the distinction initially made by

Courts between administrative orders and quasi-judicial orders has now been judicially recognised to have been "blurred and thinned down and virtually reached a vanishing point", relying upon, the observations made in 2010 Volume 9 Supreme Court Cases page 496 (Kranti Associates Pvt. Ltd. v. Mashud Ahmed Khan). Santanu Ghosh & Ors. (supra) has also noted that, the consequence of a person being classified as a wilful defaulter is grave and the individual or the company involved would scarcely qualify thereafter to be able to obtain the credit facilities from banks and financial institutions.

The gravity of the decision taken by the Identification Committee has to be kept in mind while deciding whether, the Identification Committee can delegate any of its powers or not. The Identification Committee cannot delegate its decision making power. It is called upon to decide at the first stage, the materials placed before it and arrive at a finding as to whether, the materials constitute a wilful default by the borrower under the Master Circular on Wilful Defaulters dated July 1, 2015 or not. If it comes to the finding that, there are materials constituting wilful default, then, it has to give an opportunity to the borrower to make his submissions and consider the submissions of the borrower. It is required to arrive at a final decision as to whether the borrower is to be classified as a wilful defaulter or not. In this decision making process, there is a requirement to give notice to the borrower. According to the respondents, the Identification Committee has two options before it. One is that, the Identification Committee itself can issue the notice. There is no bar in the Master Circular on Wilful Defaulters dated July 1, 2015 in the Identification Committee doing so. The other option is that, the Identification Committee can minute its decision while it is at the first stage of deciding whether, the materials placed before it constitute wilful default under the Master Circular on Wilful Defaulters dated July 1, 2015 or not. Once the decision of the Identification Committee is minuted, then, the Identification Committee can delegate the function of communicating such a decision for the purpose of calling upon the borrower to make his submissions in terms of the Master Circular on Wilful Defaulters dated July 1, 2015.

Whether the Identification Committee has the benefit of the second option, that is, power to delegate its function of issuing the show-cause notice, requires consideration.

Gwalior Rayon Silk Mfg. (WVG.) Co. Ltd. (supra) has considered Section 8(2)(b) of the Central Sales Tax Act, 1956 in the perspective as to whether the same suffers from the vice of excessive delegation or not. So far as the concept of delegation is concerned, it has held as follows:-

"37. In this context it is necessary to have a clear idea of the concept of delegation. Delegation is not the complete handing over or transference of a power from one person or body of persons to another. Delegation may be defined as the entrusting, by a person or body of persons, of the exercise of a power residing in that person or body of persons, to another person or body of persons, with complete power of revocation or amendment remaining in the grantor or

delegator. It is important to grasp the implications of this, for, much confusion of thought has unfortunately resulted from assuming that delegation involves or may involve, the complete abdication or abrogation of a power. This is precluded by the definition. Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative. The ultimately power always remains in the delegator and is never renounced."

Siddhartha Sarawgi (supra) has considered the issue of delegation in the context of Major Port Trust Act, 1963. It has noted the distinction between delegation of legislative powers and delegation of non-legislative/administrative powers. It has held as follows:-

"2. Delegation is the act of making or commissioning a delegate. It generally means parting of powers by the person who grants the delegation and conferring of an authority to do things which otherwise that person would have to do himself. "Delegation" is defined in Black's Law Dictionary as:

"The act of entrusting another with authority or empowering another to act as an agent or representative."

In P. Ramanatha Aiyar's The Law Lexicon, "delegation is the act of making or commissioning a delegate. Delegation generally means parting of powers by the person who grants the delegation, but it also means conferring of an authority to do things which otherwise that person would have to do himself."

3. Mathew, J. in Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. CST has succinctly discussed the concept of delegation. Para 37 reads as follows:

"37. ... Delegation is not the complete handing over or transference of a power from one person or body of personsto another. Delegation may be defined as the entrusting, by a person or body of persons, of the exercise of a power residing in that person or body of persons, to another person or body of persons, with complete power of revocation or amendment remaining in the grantor or delegator. It is important to grasp the implications of this, for, much confusion of thought has unfortunately resulted from assuming that delegation involves or may involve, the complete abdication or abrogation of a power. This is precluded by the definition. Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative. The ultimate power always remains in the delegator and is never renounced."

4. There is a subtle distinction between delegation of legislative powers and delegation of non-legislative/administrative powers. As far as delegation of power to legislate is concerned, the law is well settled: the said power cannot be sub-delegated. The legislature cannot delegate essential legislative functions which consist in the determination or choosing of the legislative policy and formally enacting that policy into a binding rule of conduct. Subordinate legislation which is generally in the realm of rules and regulations dealing with the procedure on implementation of plenary legislation is generally a task entrusted to a specified

authority. Since the legislature need not spend its time for working out the details on implementation of the law, it has thought it fit to entrust the said task to an agency. That agency cannot entrust such task to its subordinates; it would be a breach of the confidence reposed on the delegate.

5. Regarding delegation of non-legislate/administrative powers on a person or a body to do certain things, whether the delegate himself is to perform such functions or whether after taking decision as per the terms of the delegation, the said agency can authorise the implementation of the same on somebody else, is the question to be considered. Once the power is conferred, after exercising the said power, how to implement the decision taken in the process, is a matter of procedure. The legislature may, after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of that policy. So long as the essential function of decision making is performed by the delegate, the burden of performing the ancillary and clerical task need not be shouldered by the primary delegate. It is not necessary that the primary delegate himself should perform the ministerial acts as well. In furtherance of the implementation of the decision already taken by the primary delegate as per the delegation, ministerial or clerical tasks may be performed by authorised officers. The complexity of modern day administration and the expansion of functions of the State to the economic and social spheres have made it necessary that the legislature gives wide powers to various authorities when the situation requires it. Today's governmental functions are a lot more complex and the need for delegation of powers has become more compelling. It cannot be expected that the head of the administrative body performs each and every task himself.

6. The issue was considered by this Court in *Jamal Uddin Ahmad v. Abu Saleh Najmuddin and Another* in the context of the procedure for filing of the election petitions under Section 81 of the Representation of Peoples Act, 1951. It was held that the ministerial or administrative functions of the authority on whom the powers are conferred by the statute can be exercised by the authorized officers. It was held that:

"13. The functions discharged by a High Court can be divided broadly into judicial and administrative functions. The judicial functions are to be discharged essentially by the Judges as per the Rules of the Court and cannot be delegated. However, administrative functions need not necessarily be discharged by the Judges by themselves, whether individually or collectively or in a group of two or more, and may be delegated or entrusted by authorization to subordinates unless there be some rule of law restraining such delegation or authorisation. Every High Court consists of some administrative and ministerial staff which is as much a part of the High Court as an institution and is meant to be entrusted with the responsibility of discharging administrative and ministerial functions. There can be "delegation" as also there can be "authorization" in favour of the Registry and the officials therein by empowering or entrusting them with authority or by

permitting a few things to be done by them for and on behalf of the Court so as to aid the Judges in discharge of their judicial functioning. Authorization may take the form of formal conferral or sanction or may be by way of approval or countenance. Such delegation or authorization is not a matter of mere convenience but a necessity at times. The Judges are already overburdened with the task of performing judicial functions and the constraints on their time and energy are so demanding that it is in public interest to allow them to devote time and energy as much as possible in discharging their judicial functions, relieving them of the need for diverting their limited resources of time and energy to such administrative or ministerial functions, which, on any principle of propriety, logic, or necessity are not required necessarily to be performed by the Judges. Receiving a cause or a document and making it presentable to a Judge for the purpose of hearing or trial and many a functions post-decision, which functions are administrative and ministerial in nature, can be and are generally entrusted or made over to be discharged by the staff of the High Court, often by making a provision in the Rules or under the orders of the Chief Justice or by issuing practice directions, and at times, in the absence of rules, by sheer practice. The practice gathers the strength of law and the older the practice the greater is the strength..."

7. Practical necessities or exigencies of administration require that the decision making authority who has been conferred with statutory power, be able to delegate tasks when the situation so requires. Thus, the maxim *delegatus non potest delegare*, gives way in the performance of administrative or ministerial tasks by subordinate authorities in furtherance of the exercise of the delegated power by an authority." Pradyat Kumar Bose (*supra*) has considered the power of the Chief Justice of a High Court in exercising disciplinary jurisdiction over the employees of the High Court. In such context, it has held that, the Chief Justice of a High Court has disciplinary powers and can delegate the power of making an enquiry to any other Judge of the High Court. A.R.S. Choudhury (*supra*) has dealt with a disciplinary proceedings. It has held that, a charge sheet must be issued in the name of the punishing authority and must consist of the particulars of the alleged offence with the object of affording the delinquent an opportunity of meeting it. K.K. Murty (*supra*) has considered a disciplinary proceedings of a railway employee. It has held that, a charge sheet can be issued in the name of the punishing authority. It can be issued with the authority of the punishing authority or with the consent or approval of the punishing authority. Once the punishing authority, authorises the issuance of the charge sheet or consents to its issuance or approves of the same, then, the charge sheet or the issuance cannot be faulted on the ground that the same was issued without authority. Brahm Datt Sharma & Anr. (*supra*) has considered a departmental enquiry. It has held that, Courts should be reluctant to interfere at the stage of a show-cause notice unless, it is shown to the Court that the show-cause notice was issued palpably without any authority of law. In the facts of that case, it has observed that, the authority issuing a show-cause notice is yet to take a final decision on

the subject. At the show-cause stage, it is open to the authority to consider the matter in the light of the facts and submissions placed by the delinquent and take a final decision thereon. Interference by the Court before a final decision is taken has been held to be premature. *Sunil (supra)* has considered the power of a Board of Directors of a company incorporated under the provisions of the Companies Act, 1956 to ratify a decision taken by the Managing Director. In the facts of that case, it has found that, the Managing Director's order of dismissing the employee from service was ratified by the Board of Directors of the company. It has held that, the Board of Directors has the power to terminate the services of the employee. In the facts of that case, the Court has found that, the ratification of the decision taken by the Managing Director was valid. *Pannalal Choudhury & Anr. (supra)* has considered the principle of ratification in the context of service law. It has noticed *Sunil (supra)*.

The power of delegation if at all is vested with the Identification Committee under the Master Circular on Wilful Defaulters dated July 1, 2015 or not would depend upon the nature of proceedings that the Identification Committee is required to deal with. As noted above, *Dynametic Overseas Private Limited & Anr. (supra)* and *Kingfisher Airlines Limited (supra)* have held that, no lis is decided

by the Identification Committee. *Kingfisher Airlines Limited (supra)* was based on the Master Circular dated July 1, 2013. *Santanu Ghosh & Ors. (supra)* again as noted above, relying upon the Supreme Court pronouncement in *Kranti Associates Pvt. Ltd. (supra)* has held that, the distinction between administrative orders and quasi judicial orders have become blurred and virtually reached a vanishing point. If, the decision of the Identification Committee is held to be one of quasi judicial in nature then, the question of delegation of its powers does not arise. If however, it is administrative in nature, then, the question of delegation with the question of ratification needs to be entered into in a fact scenario of a given case.

Kingfisher Airlines Limited (supra) is a pronouncement of a Division Bench. It has held that, no lis is decided by the Grievance Redressal Committee acting under the Master Circular dated July 1, 2013. The Master Circular on Wilful Defaulters dated July 1, 2015 came into being subsequently. The subsequent Master Circular governs the impugned transactions. The mechanism for identification on wilful default as stipulated in the Master Circular on Wilful Defaulters dated July 1, 2015 is such that, the Identification Committee after having concluded that, the evidence placed by the bank before it, discloses occurrence of an event of wilful default, it is to issue a show-cause notice to the concerned borrower and call for their submissions. After the submissions are received, the Identification Committee has considered the same. In the process of consideration of the submissions, if the Identification Committee finds it necessary to give a personal hearing to the borrower, it can do so. The Identification Committee is required to pass an order recording the fact of wilful default and the reasons for the same.

All administrative functions cannot be delegated. Where law requires an identified administrative authority to decide on a particular issue or subject, such administrative authority cannot delegate its power to decide. The Master Circular on Wilful Defaulters dated July 1, 2015 prescribes and identifies the decision making authorities. It also prescribes the issues required to be decided by the identified decision making authorities. Issuance of the show-cause notice is an integral part of the decision making process in the issue prescribed to be decided by the stipulated decision making authority. In the scheme of the decision making process as prescribed under the subject Master Circular, in my view, the function of issuance of show-cause notice cannot be delegated. Treating the decision that, the Identification Committee takes in terms of Clause 3(b) of the Master Circular on Wilful Defaulters dated July 1, 2015, to be an administrative order, then also, certain functions of the Identification Committee cannot be delegated such as, its considerations of the materials placed by the bank at the initial stage, the considerations of the submissions by the Identification Committee, and the taking of the decision and recording the reasons for arriving at such decision that an event of wilful default has occurred. It also cannot delegate its function of taking a decision as to whether, the delinquent borrower is required to be given a personal hearing or not before passing the final order on the event of wilful default. In my understanding, the words used in Clause 3(b) of the Master Circular on Wilful Default dated July 1, 2015 are such that, they do not allow the Identification Committee to delegate any of their functions to any other authority. If the functions noted above cannot be delegated, in my view, the requirement of issuance of the show-cause notice cannot also be delegated. That requirement, must be discharged by the Identification Committee. Preparation of the minutes of its decision on the materials first placed before the Identification Committee in terms of the first portion of Clause 3(b) of the Master Circular on Wilful Defaulters dated July 1, 2015 will not permit the Identification Committee to delegate its functions of issuance of the show-cause notice based upon such minutes or its conclusion that, an event of wilful default has occurred on the strength of the materials placed by the bank before it. Clause 3(b) requires application of mind by the Identification Committee at all stages. It is required to apply its mind on the contents of the show-cause notice also as it is a crucial stage in the whole process. The delinquent must have the entirety of the materials that were placed before the Identification Committee for the delinquent to give a meaningful submission. Right of oral hearing is not automatic as the words of Clause 3(b) stands. Therefore, it is imperative that the Identification Committee applies its mind to the contents of the show-cause notice so that the delinquent is not deprived of a meaningful opportunity to defend itself.

In view of the discussions above, the first issue is answered in the negative and against the bank.

The Division Bench in Kingfisher Airlines Limited (supra) has considered the question whether, a noticee in a proceedings before the Grievance Redressal Committee formulated under the Master Circular on Wilful Defaulters dated July

1, 2013 is entitled to engage an advocate before the Grievance Redressal Committee of the bank or not. It has held that, the proceeding before the Grievance Redressal Committee constituted under the Master Circular dated July 1, 2013 is between a lender and a borrower. The Grievance Redressal Committee is not to decide any lis between the parties. It is not to adjudicate any dispute. It is not to enquire into any charge and record its finding. It is only to take a view on the noticee's representation against the proposal of the bank, based on the records of the bank related to the noticee's loan account, to classify a noticee as a wilful defaulter. It lays down that, the test as to whether, an advocate can be engaged or not, should be whether the refusal will defeat the purpose of the hearing or not. It has held that, refusing permission to engage advocate was not wrong. *Allied Vyapar Pvt. Ltd. & Ors. (supra)* has considered a challenge to a show-cause notice dated June 16, 2016 issued by the bank proposing to classify the petitioner as a wilful defaulter. It has also considered a notice of personal hearing issued by the bank. It has noticed *Dynametic Overseas Private Limited & Anr. (supra)* and *Kingfisher Airlines Limited (supra)* and followed the ratio laid down therein. *Pijush Kanti Chowdhur (supra)* has considered the effect of an order of stay granted in appeal. It has held that, an order of stay does not amount to any declaration of law. It is binding upon the parties to the proceedings. The order under appeal is not destroyed as a precedent.

Convent of Our Lady of Providence Girl's High School & Ors. (supra) has considered the circumstances where a lawyer's assistance is required to be granted to a noticee in a proceedings. It has held that, lawyer's assistance can never be claimed as of right, unless specifically provided in the rules governing the enquiry. In a case calling for exercise of discretion, the Court has to apply its mind on the materials on record for arriving at a finding as to whether discretion has been properly exercised by the employer or the enquiry officer as the case may be, and an appropriate decision has been taken after giving reasonable opportunity, which is real, was extended to the delinquent.

As noted above, right of hearing is not automatic under Clause 3(b) of the Master Circular on Willful Defaulters dated July 1, 2015. It is dependent upon the formation of opinion of the Identification Committee as to whether, oral hearing is required or not. Therefore, the petitioner cannot as a matter of right claim that, it is entitled to oral hearing. The question of being represented by an advocate at the oral hearing will arise only if, the petitioner is granted an opportunity of oral hearing.

Kingfisher Airlines Limited (supra) is a pronouncement of the Division Bench. It has considered the requirement as to representation by an advocate before the Grievance Redressal Committee constituted under the Master Circular on Wilful Defaulters dated July 1, 2013. *Kingfisher Airlines Limited (supra)* being a binding precedent, no view contrary thereto can be taken.

In the given situation, the concerned borrower required to be proceeded against under the Master Circular on Wilful Defaulters may be a legal entity. In such a

situation, the promoter/whole time director of the legal entity is to be given the show-cause notice under Clause 3(b) when the legal entity is a company, and the partners of the partnership firm when the legal entity involved in an unlimited partnership firm. In view of Kingfisher Airlines Limited (supra) appointment of agent, and that too, an advocate is not permissible.

In view of the discussions above, the second and the third issues are answered in the negative.

So far as the fourth issue is concerned, the impugned show-cause notice issued by the bank, is quashed. All consequential decisions taken pursuant to such show-cause notice are also quashed. This judgment and order will however not prevent the bank from initiating appropriate proceedings for declaration of the petitioners as wilful defaulters, in accordance with law.

W.P. No. 7471(W) of 2019 is disposed of accordingly. No order as to costs.

Urgent certified website copies of this judgment and order, if applied for, be made available to the parties upon compliance of the requisite formalities.