
(2011) 10 DEL CK 0191

In the Delhi High Court

Case No : IA No. 10686 of 2011 in CS (OS) No. 1656 of 2011

M/s Richa Industries Ltd. and Others

APPELLANT

Vs

ICICI Bank Limited and Another

RESPONDENT

Date of Decision : 14-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 8 Rule 6, 3, 9
Constitution of India, 1950 — Article 226, 227
Contract Act, 1872 — Section 23, 30
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 19, 19(10), 19(11)
Reserve Bank of India (Amendment) Act, 2006 — Section 4
Reserve Bank of India Act, 1934 — Section 45U, 45V

Citation : (2012) 1 AD 204 : (2012) 190 DLT 500

Hon'ble Judges : Manmohan Singh, J

Bench : Single Bench

Advocate : Sandeep Sethi and Mr. Tanmay Mehta, for the Appellant; S. Ganesh Mr. Bharat Sangal, Sachin, Ms. Vernika Tomar and Ms. Srijana Lamba, for the Respondent

Final Decision : Dismissed

Judgement

Manmohan Singh, J.—The Plaintiffs (hereinafter referred to as Plaintiff) have filed the suit for declaration, permanent injunction and damages against the defendants (hereinafter referred to as Defendant). Along with the suit, an application under Order XXXIX, Rules 1 and 2 CPC has been filed wherein the following prayers are sought by the Plaintiff:

(a) Pass an ex parte ad interim order restraining Defendant No. 1 from enforcing any rights arising out of the derivatives trades executed on 27.09.2007 and 10.10.2007;

(b) Pass an ex parte ad interim order restraining the Defendant No. 1 from declaring the Plaintiff as a willful defaulter and from proceeding further with any

measures to declare the Plaintiff as a willful defaulter;

(c) Pass an ex parte ad showing the status of the Plaintiff/Plaintiff's account interim order restraining Defendant No. 2 from classifying and as "Sub Standard" and from showing the status of the Plaintiff/Plaintiff's account as "Sub Standard" in its records or on its website or in any manner whatsoever;

(d) Pass an ex parte ad interim order restraining the Defendant No. 1 from publishing or communicating in any manner whatsoever, any material defamatory to the reputation, goodwill and creditworthiness of the Plaintiff;

(e) Pass an ex parte ad interim order restraining Defendant No. 1 from enforcing the personal guarantees of Plaintiff Nos. 2 and 3;

(f) Confirm the orders passed in terms of (a) to (d) above;

(g) Pass any other order which this Hon"ble Court may deem fit in the interests of justice, equity and good conscience.

2. The relevant facts are that the Plaintiff Nos. 2 and 3 are promoters shareholders and directors of Plaintiff No. 1. Defendant No. 1 is a scheduled bank within the meaning of the provisions of the Reserved Bank of India Act, 1934. Defendant No. 2 is a company incorporated under the Companies Act, 1956 which is engaged in the business of collecting, collating and disseminating credit information pertaining to both commercial and consumer borrowers to its members.

3. It is stated in the plaint that on 24.08.2007, Defendant No. 1, by way of a Credit Arrangement Letter, inter alia sanctioned a cash credit facility with a limit of Rs. 10 crores and a derivatives facility with a limit of Rs. 11.7 crores in favour of the Plaintiff. It is contended that the validity period of the "limits", for both the cash credit and derivatives facility was one year.

4. It is mentioned in the plaint that the first, account No. 008351000019 was opened in respect of the cash credit leg of the transaction. The security offered for the cash credit limit including a charge on assets.

5. It is submitted that in respect of the derivatives transaction, another account namely 008305006312 was opened. There was no charge on the assets in so far as the derivatives limits were concerned. The periodic interest payouts under the derivatives leg of the transaction were required to be credited to account No. 008305006312 as it was specifically provided for in the derivatives trade term sheets/contracts for trades dated 27.09.2007 and 10.10.2007.

6. Therefore, as per the Plaintiff the accounts were distinct and separate from each other and not interlinked in any manner.

7. These accounts were opened at the Faridabad branch of ICICI Bank i.e. ICICI Bank Ltd., District Centre, Sector-16, Faridabad, Haryana.

8. According to the Plaintiff, Defendant No. 1 took the signatures of the

representatives of the Plaintiff on a large number of blank proforma printed documents and signatures on several of these documents were taken after the actual trades had already been executed. The blanks in these documents were subsequently filled in by the officials of the Defendant No. 1 in their own handwriting.

9. Admittedly, an ISDA Agreement was signed between the Plaintiff and Defendant No. 1 on 11.9.2007 which was to govern any trades in derivatives as per the agreement entered into the Plaintiff and the Defendant No. 1. After the execution of the ISDA Agreement, there were two derivative trade transactions executed on 27.09.2007 and 10.10.2007.

First Transaction

10. The Trade dated 27.09.2007 was identified with the number FC 179984 OP 179986/88/90. The details of the trade as follow:

a. The spot reference rates at the time of the trade were stated as follows:

i. USD/INR: 39.77 i.e. 39.77 INR buys 1 USD

ii. USD/JPY: 115.66 i.e. 115.66 JPY buys 1 USD

11. The Plaintiff submits that the transaction was a principal only swap. Upon maturity of the transaction, the Querist was to receive INR 238.62 million and pay JPY 693.96 million. The transaction was however not only INR vis-?-vis JPY, but rather followed the pattern of INR-JPY, the same has been as per their own version explained by the Plaintiff in para 13 of the plaint which reads as under:

(i) At the time of execution of the trade, it was decided that the notional equivalent of INR 238.62 million and JPY 693.96 million, was USD 6 million. In other words, to satisfy its payout liability, the Querist would have to purchase 6 million USD on the maturity date, and then depending how many JPY the said 6 million USD could purchase, the liability of the Plaintiff would be determined. If the USD-JPY exchange rate was such that USD 6 million could purchase more than JPY 693.96 million, there would be no loss. But if the JPY appreciated against the USD such that 6 million USD could purchase less than JPY 693.96 million.

(ii) The Plaintiff was protected against INR/USD fluctuations but as far as USD-JPY fluctuations was concerned the protection was only to a limited extent. In other words, irrespective of the level of appreciation of the USD against the INR, the Plaintiff was assured that at maturity, it had the option to buy USD 6 million at 40.77 if USD/INR traded above 40.77.

(iii) However as far as USD/JPY was concerned, the Plaintiff had the right to sell USD 6 million at 115.66 only so long as the USD/JPY did not trade at or below 98 between August 16, 2010 and September 15, 2010. The protection knocked out if the JPY appreciated against the USD such as the reference rate for USD/JPY went below 98 i.e. if JPY appreciated against USD (i.e. the same number of USD

can purchase lesser JPY) to below 98, the Querist would have to make up the deficit by making additional payouts depending on the actual appreciated exchange rate as opposed to the rate of 115.66. This is because under the agreement, the swap was INR 238 million-USD 6 million - JPY 693 million and it was the obligation of the Querist to satisfy the notional threshold of JPY 693 million at maturity.

(iv) The transaction was a purely notional one i.e. only the difference based on exchanged rates of the currencies on the date of maturity would be payable. There is no underlying real asset. The term loans totalling approx 40.5 crores with Indian Overseas Bank, which were the purported foundation/ underlying exposure of the swap agreement, were and continue to be payable to Indian Overseas Bank in INR currency. The said loan was never converted into JPY or USD. The loan value therefore served only notional purposes.

(v) Significantly, any benefit under the transaction went to defendant No. 1. If the JPY depreciated against the USD i.e. if the USD/JPY went above 115.66(or in other words, the same amount of USD could purchase more than JPY 115.66), the Querist would not obtain any benefit and would still be obligated to sell USD 6 million at 115.66. The benefit would go purely to Defendant No. 1.

(vi) Thus, there was no hedging of risk in the said transaction. The Plaintiff was only entitled to a semi annual interest payment of 1.6%. Any loss would have to be borne by it, and any benefit would be of the Defendant No. 1. An analysis of the above would reflect that protection in respect of USD/INR was clearly insufficient, since there was a large exposure to risk in respect of USD/JPY. The contract itself stated that if the JPY appreciated beyond 98, the payout could increase by about 3.7 crores and this figure would keep on increasing relative to the appreciation of JPY against USD below 98. On the other hand, any benefit of appreciation would be available only to ICICI Bank.

Second Transaction

12. The second trade dated 10.10.2007 was on exactly the same terms and conditions except that the sums involved were different. Even in the trade dated 10.10.2007, the transaction was purely notional and there was no underlying real asset.

a. The spot reference rates at the time of the trade were stated as follows:

i. USD/INR : 39.31 i.e. 39.31 INR buys 1 USD

ii. USD/JPY : 117.34 i.e. 117.34 JPY buys 1 USD

iii. JPY/INR : 0.3350

b. The notional values were INR 157.24 million/USD 4 million/JPY 469.36 million.

c. The underlying asset, for purely notional value, were purportedly term loans with Indian Overseas Bank to the tune of approx. 40.5 crores.

13. On 10th September, 2008 with reference to the cash credit facilities, the Plaintiff asked the Defendant No. 1 for a closure of account No. 008351000019, in reply to said letter the Plaintiff received communication dated 02.12.2008 demanding additional margin in respect of the derivative contracts. The Plaintiff had requested for enhancement of the derivatives limits to Rs. 15.7 crores and also agreed for a lien be marked in the existing cash credit account to the limited extent of Rs. 13 lac. Admittedly, the letters demanding additional margin continued by the Defendant No. 1.

14. In March and April 2009, the Plaintiff wrote to the Defendant No. 1 asking for:

a. Closure of account No. 008351000019, transfer of the balance in account No. 008351000019 to current account No. 008305006312;

b. Issuance of a no dues certificate in respect of account No. 008351000019 and issuance of a satisfaction of charge (as under the credit arrangement dated 24.08.2007, there was charge created on the assets in so far as the cash credit facility was concerned.)

15. By a letter dated 13.03.2009, Defendant No. 1 sent the swap settlement advice to the Plaintiff in respect of the trades executed on 27.09.2007 and 10.10.2007.

16. The Defendant No. 1 by e-mail dated 24.4.2009 responded to the demands of the Plaintiff for closure of account No. 008351000019 and issuance of No Dues Certificate and the Plaintiff was also informed that since the derivative transactions had negative mark to market valuation, Defendant No. 1 had withheld the amounts in the account (i.e. Cash Credit Account No. 008351000019) to the extent of outstanding Mark to Market exposure as on 24.4.2009 and during first week of May, 2009, the Defendant No. 1 also blocked account No. 008351000019.

17. The Plaintiff stated that the payouts due under the derivatives contracts have also not been credited to account No. 008305006312 which account was meant specifically for this purpose except the first two payouts were credited to the correct account i.e. account No. 008305006312 and thereafter, the payouts have been credited to the wrong account i.e. Cash Credit Account No. 008351000019. The submission of the Plaintiff is that the Defendant No. 1 was not entitled to retain a lien over the cash credit account for derivatives related transactions. Derivatives transactions do not fall within the ordinary course of banking business and hence no general lien of bankers is exercisable in respect of derivative transactions.

18. The Plaintiff alleged that as the demands for deposit of margins were illegal and contrary to the contractual terms and conditions on 07.08.2009, the Plaintiff lodged a complaint with the Banking ombudsman regarding the conduct of the Defendant No. 1.

19. By way of letters dated 21st and 23rd September, 2010, Defendant No. 1

informed the Plaintiff that the derivative trades executed on 27.09.2007 and 10.10.2007 had matured with losses of 10,53,68,562.52 and 7,40,06,926.07 respectively. The letters also stated that there was an overdue balance in account No. 008351000019 to the tune of Rs. 16,96,98,997.04. This figure regarding overdue balance was arrived at by deducting the positive balance in account No. 008351000019 i.e. 96,76,492.54 from the sum total of 10,53,68,562.52 and 7,40,06,926.07.

20. By letters dated March 1st 2011 and March 25th 2011, the Defendant informed the Plaintiff that as on 28.02.2011, a sum of Rs. 18.33 crores was due from the latter inclusive of interest. The Plaintiff was called upon to show cause as to why it should not be classified as a willful defaulter. The Plaintiff was also given an option of approaching the Grievance Redressal Committee of the Defendant No. 1. This notice was given in terms of the Master Circular of the RBI dated 01.07.2010.

21. The letters dated 01.03.2011 and 25.03.2011 were replied by the plaintiff by way of letter dated 09.04.2011. It was submitted in the said letter that the Master Circular, pursuance of which the show cause notice was issued, was inapplicable to Derivative Transactions and the Plaintiff informed the bank that the Plaintiff was not a willful defaulter and reiterated that the Derivative Transaction was an unsecured one.

22. On 13.04.2010, the Banking Ombudsman gave its decision stating that it was not the appropriate forum for redressal of the grievance. The representatives of the Plaintiff appeared before the Grievance Redressal Committee of the Defendant No. 1 and explained their position as to why they cannot be classified as willful defaulter. After the hearing, the decision in this regard was pending.

23. The Plaintiff assails both the transactions dated 27.9.2007 and dated 10.10.2007 before this Court by way of present suit seeking a declaration that the said transactions are null and void being unenforceable in law and injunction thereof. The challenge is laid on the transactions on the following counts:

The only permitted purposes for which derivative transactions can be entered into are to hedge exchange rate/interest rate exposure or to transform long term INR liability into a foreign currency liability (RBI Circular dated 28.12.2010, Master Circular dated 02.07.2010 and Comprehensive Guidelines on Derivatives dated 20.04.2007). The Plaintiff's case does not fall in either of the permissible criterion which enables the bank to conduct such derivative transactions. This has been explained by the Plaintiff in the following terms:

? It is argued that the above said trades were not intended to hedge any foreign currency exposure. The Plaintiff has no foreign currency external commercial borrowings. Its foreign exchange requirements are also minimal. In any event, this particular transaction was not intended for any of the said purposes.

? The notional basis of the transaction was an underlying term loan with Indian

Overseas Bank. That loan was and continues to be payable in INR. There is no transformation of the said loan into a foreign currency loan. The loan was only for purely notional purposes.

? It is argued that the transaction does not involve any hedging i.e. reduction or extinguishing of risk. In fact, it only increases the risk for the Plaintiff since the entire benefit under the transaction would be that of the Defendant and the loss if any would be of the Plaintiff. The only entitlement of the Plaintiff was a periodic interest payout, in terms of the RBI Circular dated 02.07.2007, a derivative transaction should not increase in risk in any manner.

24. It is submitted by the Plaintiff that the transactions do not fall within either of the criteria for which foreign currency swaps are permissible under RBI Regulations. They also do not provide hedging against any risk. Rather they increase the risk for the Plaintiff. They are therefore not permissible in law and therefore not enforceable in law u/s 23 of the Contract Act, 1872 being contracts which are beyond the law and this Court can draw inference by looking into the illegality in the said contracts and their purpose.

25. The Plaintiff states that the agreement or the transactions are not valid that the Defendant was never authorized to do the derivative transactions on behalf of the Plaintiff. It is submitted on behalf of the Plaintiff that the Defendant has got some template contracts signed from the Plaintiff whereof entered into the transactions on its behalf without proper information and guidance. It is argued that there was no consensus ad idem to enter into any such contract of authorizing the Defendant to enter into derivative transaction and the same is vitiated by the consensus ad idem and consent of the Plaintiff. The said consent must be taken from the Plaintiff by way of informed consent and not by just getting the documents signed without informing the purpose for which they are taken from the Plaintiff.

26. The Plaintiff is also aggrieved by the fact that the Defendant is seeking to declare the Plaintiff as willful defaulter. The Plaintiff challenges the Defendant's letter dated 28.02.2011, whereby show cause was issued as to why it should not declare the Plaintiff as willful defaulter. The Plaintiff states that the same cannot be done by the Defendant on account of the following:

a) The Plaintiff cannot be declared as willful defaulter in the event of the Defendant's or bank's legal debt, once the Defendant's transaction are challenged and shown by the Plaintiff as invalid in law, the Plaintiff cannot be declared prematurely as willful defaulter till the time the legality of the transactions done by the bank/ Defendant is decided.

b) The Plaintiff also cannot be declared as willful defaulter as the Defendant has not stated that the Plaintiff has funds but it is not paying the debt which is one of the criteria for willful defaulter. But in fact the same is not the truth as the Plaintiff's liabilities exceed its assets.

For all these reasons, the Plaintiff states that it cannot be declared as willful defaulter.

27. Learned Counsel for the Plaintiff submits that the said transactions are illegal and this would be evident from the fact that Reserve Bank of India has recently imposed heavy penalties on several banks including the Defendant No. 1 bank for contravention of various instructions issued by the Reserve Bank of India in respect of derivatives.

28. The Plaintiff submits that the Defendant has not properly explained the concept of margin. Under the original credit sanction letter dated 24.08.2007, the derivatives limit was 11.7 crores. This was the margin i.e. as long as the losses of the Plaintiff remained within 11.7 crores, there would be no need to deposit any additional sums of money. However, if the loss payout exceeded 11.7 crores, then the Defendant would be entitled to demand that the Plaintiff brings in additional sums of money. This additional sum of money is essentially a collateral security.

Thus, the increase in margin is not something good for the Plaintiff as has been sought to be projected by the Defendant. When the Plaintiff sought for increase in margin limits, it was because the losses had increased beyond 11.7 crores and it did not have enough funds at that time to further infuse by way of collateral. Hence if the derivatives limit was increased to 15.6 crores, it would mean that losses up to 15.6 crores could be reached without the Plaintiff having to deposit additional money by way of collateral. Thus, the asking for increase in margin, was not something positive, but rather something negative from the business point of view.

29. The Plaintiff has referred the expert opinion of Sh. A.V. Rajwade who is a renowned personality and expert who has taken the view that the transactions in question are illegal as being contrary to RBI Circulars.

30. It is also stated by the Plaintiff that Defendant No. 1 has engaged in conduct which is defamatory towards the Plaintiff and which lowers its reputation, goodwill and credit worthiness in the eyes of the general public and specially in the eyes of its lenders/banks and financial institutions, and its business partners and the Defendant should be prohibited from doing so. This has been explained by the Plaintiff by putting reliance on the letter dated 16.05.2011, which the Defendant No. 1 wrote to the Bankers of the Plaintiff stating that the Plaintiff had incurred losses in derivative transactions, that legitimate dues of Defendant No. 1 had remained unpaid for more than 6 months and that the account of the Plaintiff had been classified as a Non performing Asset. The letter also stated that the Defendant No. 1 had initiated proceedings before the Debt Recovery Tribunal, Mumbai and also had initiated proceedings for declaring the Plaintiff as a willful defaulter.

31. The Defendant has filed the reply in which it has resisted the injunction application by raising the following submissions:

a) It is stated by the Defendant that the suit filed by the Plaintiff is barred by the provisions of Sections 17 & 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The Plaintiff has filed the present suit with its malafide attempt to avoid payment of the amount of Rs. 195.8 million as on 30.06.2011 under the terms of the I.S.D.A. Master Agreement which amount is debt in terms of Section 2(g) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993;

b) The Plaintiff is guilty of suppression of facts in order to procure the interim relief from this Court and have not come before this Court with clean hands, as the relief sought by the Plaintiff in the present application is on the basis of the same grounds by challenging the said two transactions which have been taken by the Plaintiff before Debt Recovery Tribunal-III, Mumbai in the case filed by Defendant No. 1 by filing of reply;

c) That derivative transactions are specifically permitted and governed by Indian legislation, viz. (i) the Securities Control (Regulations) Act, 1956; (ii) the Reserve Bank of India Act, 1934 and the guidelines framed and circulars issued there under; & (iii) the Foreign Exchange Management Act and the Regulations framed thereunder. Such legislations being later and specific, therefore, the same would not result in derivative contracts being treated as wagers/illegal and/or void. The Courts across the country have upheld legality of the derivative transactions and have come to the conclusion that the derivative transactions are not in the nature of wagering contracts and neither void u/s 23 or Section 30 of the Contract Act.

d) In compliance with the said mandatory RBI Circular, the Defendant No. 1 has already sent CIBIL a list of all willful defaulters as on 29.07.2011 which included the Plaintiff No. 1 who is already declared as willful defaulter during the pendency of the present suit. After the said compliance, all banks are already aware that the Plaintiff is a willful defaulter within the meaning of the RBI Circular. The contention of Mr S. Ganesh, the learned Senior Counsel, is that in fact it was in compliance of the said Circular, otherwise it was not done on its own and the said list has been put by CIBIL on the internet and in case there is further requirement under the RBI Circular, the bank has no intention to issue any further such letters against the Plaintiff.

e) It is also the case of the Defendant that the Plaintiff's stand qua the informed consent is bad as the Plaintiff was all the time aware of the nature of transactions entered by it. It is stated that for the purposes of entering into such derivative transactions, the Plaintiff company has passed the resolution to the same effect, furthermore the Plaintiff has made several declarations before entering into such transaction which have been relied upon by the Defendant to urge that the same shows the complete understanding of the Plaintiff about the transaction and the ground taken about lack of consensus ad idem is baseless.

f) The Defendant has also informed that the Plaintiff cannot claim that it has

been deceived and the argument of the Plaintiff that the Defendant ought to have made an investigation is no obligation of the Defendant bank.

g)The Defendant bank has also informed the court that the Plaintiff contention that the Defendant bank cannot enter into the derivative transactions on behalf of the Plaintiff as the Plaintiff's liability is confined to the loan which has been taken in Indian rupee and therefore question of entering into derivative transaction does not arise is completely baseless as the circular of RBI dated 1.7.2010 expressly provides about the same.

The Defendant accordingly prays for the dismissal of the injunction application in view of false nature of the pleas taken by the plaintiff to maintain the present suit.

32. The matter comes up for hearing before this Court when Mr. Sandeep Sethi, learned Senior Counsel appearing on behalf of the Plaintiff, makes his submissions which are outlined as under:

? Firstly, Mr. Sethi, learned senior counsel submits that the present suit challenges the legality of the transactions dated 27.9.2007 and 10.10.2007 which has to be only looked into by this Court and not by the debt recovery tribunal. It is argued that it is claim of the Plaintiff that the said transactions and trades done in view thereof are violative of Section 23 of the Indian contract Act and thus the bar of jurisdiction of the court u/s 17 and 18 of DRT Act will not operate in the present as the same does not come within the domain of the debt recovery tribunal and it cannot adjudicate or comment upon the legality of the transaction.

33. To support his submission, learned senior counsel for the plaintiff has placed reliance upon the judgment passed by the Apex Court in the case of Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, wherein the apex court observes as under:

85. If the Tribunal was to be treated to be a civil court, the debtor or even a third party must have an independent right to approach it without having to wait for the bank or financial institution to approach it first. The continuance of its counterclaim is entirely dependent on the continuance of its counterclaim is entirely dependent on the continuance of the applications filed by the bank. Before it no declaratory relief can be sought for by the debtor....

97. A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of Section 17 thereof and not beyond the same. The civil court, therefore, will continue to have jurisdiction.

108. Although some arguments have been advanced before us whether having regard to the provisions of Sections 17 and 18 of the Act the civil court

jurisdiction is completely ousted, we are of the view that the jurisdiction of the civil court would be ousted only in respect of the matters contained in Section 18 which has a direct co-relation with Section 17 thereof, that is to say that the matter must relate to a debt payable to a bank or a financial institution. The application before the Tribunal would lie only at the instance of the bank or the financial institution for the recovery of its debt. It must further be noted in this respect that had the jurisdiction of the civil courts been barred in respect of counterclaim also, the statute would have said so and Sections 17 and 18 would have been amended to introduce the provision of counterclaim.

34. Therefore, as per learned senior counsel for the Plaintiff, there is no ouster of jurisdiction and rather this Court is competent to adjudicate the present dispute.

? Secondly, Mr. Sethi, learned senior counsel for the Plaintiff proceeded to explain as to how the trades dated 29.7.2007 and 10.10.2007 are illegal. Mr. Sethi argued that there are permissible criterion for entering into the derivative transactions which are:

a) To hedge any foreign currency exposure - That is to restrict the

risk of foreign currency exposure. In the present case, as per Mr. Sethi, the Plaintiff has no foreign currency external borrowings and therefore the said transaction could not have been entered into by the Defendant bank as it is beyond the said purpose.

b) To transform the long term INR liability into a foreign currency-The only basis of the transaction was the loan with Indian Overseas Bank and the said loan was payable in Indian Rupees. Thus, there was no occasion for contemplating any foreign currency exposure or for that matter hedging of the foreign currency exposure.

c) Further, it has been explained by Mr. Sethi, learned senior counsel that the transaction nowhere reduces the risk of the Plaintiff and rather the said transaction increases the risk of the Plaintiff. This is due to the reason that the profit entitlement out the same accrues to the Defendant and the loss is suffered by the Plaintiff if any.

35. As per Mr. Sethi, learned senior counsel for the Plaintiff, since the transactions are outside the purview of the permissible criterion for entering such derivative transactions, the said transactions done by the Defendant become illegal and thereby the transactions are violative of the provisions u/s 23 of Indian Contract Act and the same are unforceable in law.

? Thirdly, Mr. Sethi has argued that this Court should also consider the expert opinion of Mr. A.V. Rajwade who is an expert and is a professor of IIM Ahmedabad who has also opined that the transactions entered into by the Defendant are illegal and contrary to RBI Circulars.

? Fourthly, Mr. Sethi, learned senior counsel for the Plaintiff has argued that the

Defendant should be prevented by the orders from this court so as to declare the Plaintiff as willful defaulter. Learned Senior Counsel for the Plaintiff has stated that the Plaintiff cannot be categorized as willful defaulter due to following reasons:

a) The basis on which the Defendant bank can declare any person as a willful defaulter are:

(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 utilized 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.

Admittedly, the Plaintiff is falling only within the first criteria. The said provision is also not applicable as the Plaintiff is not amongst the person who has funds and it is not paying the debt and rather the Plaintiff's liabilities exceed its assets, which has been admitted by the Defendant as per the Plaintiff. Therefore, the Plaintiff does not fall within the parameters of the prescribed provisions, which enables the banks to categorize the Plaintiff as willful defaulter. Thus, this Court can prevent the Defendant from doing so and if already has been done from further doing so as the same tarnishes the reputation of the Plaintiff in the trade.

b) The Defendant can otherwise also cannot declare the Plaintiff as willful defaulter as the debt or claim must exist valid in law. In the present case, it is the case of the Plaintiff that the said transaction is illegal and once that the said transaction is found to be illegal, the Defendant has no business to declare the Plaintiff as willful defaulter.

Therefore, as per the learned senior counsel for the Plaintiff, this court should issue preventive orders calling upon the Defendant to stop writing to other banks that the Plaintiff is the willful defaulter.

36. Thus, as per Mr. Sethi, the Plaintiff cannot be estopped from challenging the transactions if they are otherwise illegal solely on the ground that the Plaintiff has participated in the transaction in any manner. Mr. Sethi has also argued that there is no informed consent at the time of entering into the contracts with the Plaintiff by the Defendant. The Defendant has just got some blank contract

signed from the Plaintiff without explaining the meaning and risk element involved in it. Thus, there is no consensus ad idem and the contract with the Defendant to enable him to enter into the derivative transaction is also vitiated by the lack of consent.

37. Learned senior counsel by making the above stated submissions pressed for the interim relief. Learned senior counsel although while arguing the matter orally stated that he may not press for prayer (a) in the interim application, although in written submissions, Learned Counsel for the Plaintiff has elaborated the meaning of not pressing the prayer (a) by dissecting into two parts and went ahead to state that the Plaintiff is interested and is pressing for the prayer (a) to the extent that this Court should decide the validity of the transaction in law.

38. Per contra, Learned senior counsel Mr. S. Ganesh appearing on behalf of the Defendant has made his submissions which can be outlined in the following manner:

? Firstly, Mr. Ganesh, learned senior counsel for the Plaintiff has submitted that the subject matter which is legality of the transactions as contended by the Plaintiff is the matter which is pending before DRT and it is the matter which DRT shall decide. As per learned senior counsel for the Defendant, the same question cannot be adjudicated upon by this Court as well as DRT simultaneously. Therefore, the present suit is barred within the provisions of Section 17 and 18 of the DRT Act.

? Secondly, Mr. Ganesh, learned senior counsel for the Defendant submits that as regards the Plaintiff's claim seeking restraint orders against the Defendant for the purposes of declaring it as willful defaulter is concerned, the Defendant is under obligation by the RBI circular dated July 1, 2010 to intimate to Credit Information Bureau Ltd the quarterly list of suits filed against the willful defaulters. The said circular is mandatory and has the force of the law. Therefore, the issuance of restrain order against the object of the circular which is that all the banks should be aware about the willful defaulters would be rather preventing the banks from knowing about the status of the willful defaulters.

39. Mr. Ganesh has placed reliance upon the circulars passed by RBI from time to time to banks and financial institutions containing instructions on matters relating to willful defaulters. The instructions were issued in the circular dated 1st July 2009. It has been argued that one of the main purposes of issuance of the circular in relation to willful defaulters was to intimate the banks and financial institutions in order to ensure that further bank finance is not made available to them. The introductory part of the circular contains that information were received from the Central Vigilance Commission for the collection of information on willful defaults of Rs. 25 lac and above by the Reserve Bank and for dissemination to reporting banks and to financial institutions.

40. The master circular on willful defaulters issued on 1st July, 2009 was in this background. The expression "willful default" has been defined in the circular as

follows:

A "willful default" has been redefined in supersession of the earlier definition as under:

(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 utilized 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.

41. It is also argued by the learned senior counsel Mr. Ganesh that the information regarding the Plaintiff being the willful defaulter has already been provided to the CIBIL by a letter dated 29.7.2011 and therefore, the prayers in the Plaintiff's interim application are now meaningless.

42. Mr. Ganesh also argued that the question of the Plaintiff's status as a willful defaulter is a resultant affect of the derivative transaction, the legality of which is under question before the Debt Recovery Tribunal, accordingly, the Plaintiff stands to get the same adjudicated independently is not correct and nor this Court should independently delve into such inquiry as the same is question which is dependent upon the decision of the legality of the transaction which has to be seen by the Debt Recovery Tribunal.

43. Mr. Ganesh, learned senior counsel for the Defendant, has also made submissions in order to support the legality of the derivative transaction though he has argued that the same has to be looked into by the Debt Recovery Tribunal. The said submissions can be discussed in the following terms:

a. The transaction between the Plaintiff and Defendant are covered by the Section 45U of the Reserve Bank of India Act which reads as under:

45U. Definitions. For the purposes of this Chapter,--.

(a) "derivative" means an instrument, to be settled at a future date, whose value is derived from change in interest rate, foreign exchange rate, credit rating or credit index, price of securities (also called "underlying"), or a combination of more than one of them and includes interest rate swaps, forward rate agreements, foreign currency swaps, 1 Ins. by Section 4 of the RBI

(Amendment) Act, 2006 (Act No. 26 of 2006) (w.e.f. 9.1.2007). foreign currency-rupee swaps, foreign currency options, foreign currency-rupee options or such other instruments as may be specified by the Bank from time to time;

(b) "money market instruments" include call or notice money, term money, repo, reverse repo, certificate of deposit, commercial usance bill, commercial paper and such other debt instrument of original or initial maturity up to one year as the Bank may specify from time to time;

(c) "repo" means an instrument for borrowing funds by selling securities with an agreement to repurchase the securities on a mutually agreed future date at an agreed price which includes interest for the funds borrowed;

(d) "reverse repo" means an instrument for lending funds by purchasing securities with an agreement to resell the securities on a mutually agreed future date at an agreed price which includes interest for the funds lent;

(e) "securities" means securities of the Central Government or a State Government or such securities of a local authority as may be specified in this behalf by the Central Government and, for the purposes of "repo" or "reverse repo", include corporate bonds and debentures.

Section 45V also provides for non obstante clause which reads as under:

45 V Transactions in derivatives. (1) Notwithstanding anything contained in the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or any other law for the time being in force, transactions in such derivatives, as may be specified by the Bank from time to time, shall be valid, if at least one of the parties to the transaction is the Bank, a scheduled bank, or such other agency falling under the regulatory purview of the Bank under the Act, the Banking Regulation Act, 1949 (10 of 1949), the Foreign Exchange Management Act, 1999 (42 of 1999), or any other Act or instrument having the force of law, as may be specified by the Bank from time to time.

(2) Transactions in such derivatives, as had been specified by the Bank from time to time, shall be deemed always to have been valid, as if the provisions of subsection (1) were in force at all material times.

A careful reading of the aforesaid provisions as per Mr. Ganesh makes it clear that the derivative transactions entered into by the banks are permissible and there is no illegality in the said transactions.

44. So far as the submission of the Plaintiff on the purpose of the transaction is concerned, as per learned senior counsel Mr. Ganesh, the same is also misconceived as the a person having liability in the Indian Rupee can still enter into the derivative transaction. This is by virtue of clause 6(b) of the above mentioned circular of RBI dated 1.7.2010 that such transactions can be entered into even when under laying basis is of Rupee liability or loan. The circular of 2008 also contains the similar Clause 2(ii) which reads as under:

(ii) A person resident in India, who has a foreign exchange or rupee liability, may enter into a contract for foreign currency - Rupee Swap with an AD Category - Banks in India to hedge long term exposure under the following terms and conditions:

a) No swap transactions involving upfront payment of the rupees or its equivalent in any form shall be undertaken.

b) Swap transactions may be undertaken by AD category - banks as intermediaries by matching the requirements of corporate counter parties.

c) While no limits are placed on the AD category - I Banks for undertaking swaps to facilitate customer to hedge their foreign exchange exposures, limits have been put in place for swap transactions facilitating customers to assume a foreign exchange liability, thereby resulting in supply in the market. While matched transactions may be undertaken, a limit of USD 50 million is placed for net supply in the market on account of these swaps. Positions arising out of cancellation of swaps by customers need not be reckoned within the cap.

d) With reference to the specified limited limits for swap transactions facilitating customers to assume a foreign exchange liability, the limit will be reinstated on account of cancellation/ maturity of the swap and on amortization, up to the amounts amortized.

e) The above transactions, if cancelled, shall not be rebooked or reentered by whatever name called.

45. Therefore, as per Mr. Ganesh, there is no force in the contention of the Plaintiff that the derivative transactions entered into by the Defendant are illegal or beyond the prescribed purpose.

46. Mr. Ganesh also submitted that so far the consensus ad idem is concerned, it is argued that the Plaintiff was all the time aware of the transactions. This can be seen by closely having look at the events including the resolution passed by the Plaintiff company specifically authorizing the personnel to enter into such derivative transactions.

47. Further, the Plaintiff continued to write to the Defendant from time to time for credits of the amounts in favour of the Plaintiff. Thus, it cannot be argued by the Plaintiff that it was not aware of such transactions once the Plaintiff itself has participated in the same.

For all these reasons, as per the learned senior counsel for the Defendant, the transactions entered by the Defendant cannot be faulted with and suffers from no illegality.

48. The learned Senior Counsel for the Defendant No. 1, states that in view of the above said position, the Plaintiff possibly cannot say that it was deceived into entering into the said transactions and the Plaintiff did not understand the same. The said transactions are legal and valid and since the requirements laid down by

the RBI Circulars in respect of said transactions were not were not fulfilled, therefore, the bank had rightly relied upon the said declaration made by the Plaintiff and now the Plaintiff cannot take advantage of its own wrong by claiming that the said transactions were null and valid. In support of his submissions, the learned Senior Counsel for the Defendant has referred to the judgment of the Madras High Court in the case of Rajshree Sugars and Chemicals Limited Vs. AXIS Bank Limited, formerly known UTI Bank Limited, . He therefore submits that the Plaintiff is not entitled to raise the issue of validity of the said transactions before this Court.

49. The learned Senior Counsel on behalf of the Defendant submits that under the guidelines of RBI dated 19.09.2008, the Defendant No. 1 is bound to inform all banks which are dealing with the Plaintiff if the plaintiff's operation of its account and its facilities with the Defendant No. 1 are below par and specifically it is declared to be non performing asset. Therefore, the letter dated 16.05.2011 was issued by the bank to the other banks under the said Circulars.

50. In reply to the submissions made by Mr Ganesh, Mr Sandeep Sethi, the learned Senior Counsel for the Plaintiff, has argued that in case this Court finds that the transactions are illegal and void, then no plea of estoppel or acquiescence can be entertained by this Court as it is settled law that there is no estoppel against the statute. Even assuming that the transaction was entered into with the consent of the Plaintiff, the Plaintiff cannot be precluded from raising a plea of invalidity. Therefore, there cannot be a valid waiver or estoppel in the fact of a legislative prohibition, if same is against the public policy as the same would be violative of Section 23 of the Contract Act. Mr Sethi has referred to the following judgments in support of his submissions:

- a. Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co., .
- b. State of Punjab (Now Haryana) and Others Vs. Amar Singh and Another, .
- c. Union Carbide Corporation, etc., etc. Vs. Union of India, etc. etc., .

51. It is submitted by the Plaintiff that in fact when even a compromise decree, passed on the basis of the consent of the parties by a Court, can be set aside on the ground of violation of a statutory provision. There is no reason why a contract cannot be so declared null and void, even assuming but not conceding that the Plaintiff had given its consent to the same.

52. In reply to Section 45V of the RBI Act, it is stated by the Plaintiff that the said provision is a non obstante provision only qua other statutes. Thus, it would save the invalidity of transactions if the invalidity alleged is on account of violation of other statutes. However, Section 45V does not permit violation of directives of RBI itself. In fact, the provision is based on the assumption that the transactions are permitted by the RBI. Thus, since the Plaintiff has shown that the transactions are violative of RBI directives, protection of Section 45V is not available.

53. The next submission of Mr Sethi is that the Plaintiff does not fall within the category of persons who can be declared willful defaulter in view of the admission made by the Defendant No. 1 itself. It is contended by the Plaintiff that as per the Defendant No. 1's own admission, the Plaintiff does not fall within the category (b), (c) and (d) because the Defendant's own case is that the Plaintiff is only covered by category (a), i.e., the Plaintiff has funds and it is not paying the debt. However, in its Original Application before the DRT, the Defendant No. 1 bank has itself admitted that the liability of the Plaintiff exceeds its assets. Even this admission, according to the Plaintiff, is on the face of it negates the argument of the bank that the Plaintiff has funds and is yet not paying the debt. Therefore, on the basis of the admission made by the Defendant No. 1, the Plaintiff cannot be declared as willful defaulter. It is also stated by Mr Sethi that the order of willful defaulter was passed by the bank after filing the present suit and it appears that it is an afterthought.

54. In so far as allegation of the Defendant No. 1 that the Plaintiff has concealed the fact is concerned, the contention of the Plaintiff is that it is a false plea as it is apparent from the facts stated in paras 48 and 49 of the plaint. The Plaintiff did not deny the existence of DRT proceedings but rather denied the validity of the claims made before it. Therefore, the Defendant No. 1 is not entitled to read out the para 48 of the plaint out of context.

55. In reply to the judgment Rajshree Sugars & Chemicals Ltd. (supra) referred to by the Defendant No. 1, it is stated by the Plaintiff that the said judgment is distinguishable as in para 10 of that judgment, it was mentioned that the company in that case had external commercial borrowings. The Plaintiff in the present case does not have any external commercial borrowings and the said transactions are specifically meant to hedge against exchange rate fluctuations on account of foreign exchange currency fluctuations.

56. Lastly, it is argued by the Plaintiff that the balance of convenience is in favour of the Plaintiff and irreparable loss would be caused to the Plaintiff in case the relief sought by the Plaintiff is not granted as the Defendant No. 1 has only monetary claims against the Plaintiff which can always be adjusted subject to final decision of the suit. It is also stated that in the letter dated 29.07.2011 the Plaintiff has only mentioned, which was handed over in Court, that the Plaintiff has been declared as willful defaulter as on 30.06.2011 although the Plaintiff has not been informed of this development and the said act of the Defendant No. 1 is highly improper as the said information was given during the pendency of the suit. In view of the above said reasons, it is argued by the Plaintiff that the application be allowed and the operation of the letter dated 29.07.2011 thereby declaring the Plaintiff willful defaulter be stayed till the disposal of the suit.

57. I have gone through the plaint and documents filed by the parties and have duly considered the submissions made by the parties at the bar. I shall now be dealing with the submissions of the parties point wise.

58. Firstly, the question was raised on the maintainability of the suit in view of the bar of Section 17 of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993. It would be wiser to go through the said section. Sections 17 and 18 of the said Act read as under:

17. Jurisdiction, powers and authority of Tribunals.-(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

18. Bar of Jurisdiction.-On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17.

59. On bare reading of the provisions, it becomes amply clear that the tribunal is vested with the jurisdiction to entertain, decide applications from the banks and financial institutions for recovery of the debts due to such banks and financial institutions. Section 18 bars the jurisdiction of all courts in relation to the matters specified in Section 17.

60. The conjoint reading of both Sections 17 and 18 would also reveal that the tribunal has been given the limited jurisdiction to decide the applications from the banks or financial institutions for recovery of debts due to such banks. Thus, the bar of the jurisdiction which has been expressly provided u/s 18 in relation to the matters specified in Section 17 would operate to the extent the exercise of jurisdiction which has been given to Debt Recovery Tribunal and not beyond the same. Therefore, the other kinds of reliefs which may be sought by party contesting the claims of the banks like declaratory reliefs, recoveries from the banks by the debtors in common law (incases where the banks have not filed the applications before the Debt Recovery Tribunal) are still falling within the domain of the civil court as they are not covered expressly within the ambit of Section 17 and therefore the DRT may not be able to grant such reliefs. The Hon''ble Supreme Court of India also had an occasion to deal with the said issue in relation to the derivative transaction wherein the invalidity of the transaction has been sought by the parties contesting the claims of the banks and the banks sought the transfer of the cases to DRT (Debt Recovery Tribunals). The Hon''ble Apex Court while deciding the appeals from the transfer application decided by the High Court and transfer petitions in the case of Nahar Industrial Enterprises Ltd (supra), has made observations in relation to the jurisdiction of the civil court in such cases in its illuminating judgment. The Apex Court observed thus:

85. If the Tribunal was to be treated to be a civil court, the debtor or even a third

party must have an independent right to approach it without having to wait for the Bank or Financial Institution to approach it first. The continuance of its counter-claim is entirely dependant on the continuance of the applications filed by the Bank. Before it no declaratory relief can be sought for by the debtor. It is true that claim for damages would be maintainable but the same have been provided by way of extending the right of counter-claim.

(Emphasis Supplied)

86. Debt Recovery Tribunal cannot pass a decree. It can issue only recovery certificates. [See Sections 19(2) and 19(22) of the Act]. The power of the Tribunal to grant interim order is attenuated with circumspection. {See *Dataware Design Labs. v. State Bank of India*, {[2005] 12 Comp. Cas. 176 (Ker) 184}.Concededly in the proceeding before the Debt Recovery Tribunal detailed examination; cross-examinations, provisions of the Evidence Act as also application of other provisions of the CPC like interrogatories, discoveries of documents and admission need not be gone into. Taking recourse to such proceedings would be an exception. Entire focus of the proceedings before the Debt Recovery Tribunal centers round the legally recoverable dues of the bank.

96. The Tribunal was constituted with a specific purpose as is evident from its statement of objects. The preamble of the Act also is a pointer to that too. We have also noticed the scheme of the Act. It has a limited jurisdiction. Under the Act, as it originally stood, did not even have any power to entertain a claim of set off or counter-claim. No independent proceedings can be initiated before it by a debtor.

97. A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of Section 17 thereof and not beyond the same. The Civil Court, therefore, will continue to have jurisdiction.

(Emphasis Supplied)

98. Even in respect of set off or counter-claim, having regard to the provisions of Sub-sections (6) to (11) of Section 19 of the Act, it is evident:

- a) That the proceedings must be initiated by the bank
- b) Some species of the remedy as provided therein would be available therefor.
- c) In terms of Sub-section (11) of Section 19, the bank or the financial institution is at liberty to send a borrower out of the forum.
- d) In terms of the provisions of the Act, thus, the claim of the borrower is excluded and not included.
- e) In the event the bank withdraws his claim the counter-claim would not survive

which may be contrasted with Rule 6 of Order VIII of the Code.

f) Sub-section (9) of Section 19 of the Act in relation thereto has a limited application.

g) The claim petition by the bank or the financial institution must relate to a lending/borrowing transaction between a bank or the financial institution and the borrower.

h) The banks or the financial institutions, thus, have a primacy in respect of the proceedings before the Tribunal. i) An order of injunction, attachment or appointment of a receiver can be initiated only at the instance of the bank or the financial institution. We, however, do not mean to suggest that a Tribunal having a plenary power, even otherwise would not be entitled to pass an order of injunction or an interim order, although ordinarily expressly it had no statutory power in relation thereto.

j) It can issue a certificate only for recovery of its dues. It cannot pass a decree.

k) Although an appeal can be filed against the judgment of the Tribunal, pre-deposit to the extent of 75 % of the demand is imperative in character.

l) Even cross-examination of the witnesses need not be found to be necessary.

m) Subject to compliance of the principle of natural justice it may evolve its own procedure.

n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. `Rather, the Tribunal can travel beyond the CPC and the only fetter that is put on its powers is to observe the principles of natural justice."[See The Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and Others,]

The Tribunal, therefore, would not be a Civil Court

105. The Civil Court indisputably has the jurisdiction to try a suit. If the suit is vexatious or otherwise not maintainable action can be taken in respect thereof in terms of the Code. But if all suits filed in the Civil Courts, whether inextricably connected with the application filed before the DRT by the banks and financial institutions are transferred, the same would amount to ousting the jurisdiction of the Civil Courts indirectly. Suits filed by the debtor may or may not be counter claims to the claims filed by banks or financial institutions but for that purpose consent of the Plaintiff is necessary.

(Emphasis Supplied)

106. It is furthermore difficult to accept the contentions of the Respondents that the statutory provisions contained in section 17 and 18 of the DRT Act have ousted the jurisdiction of the civil court as the said provisions clearly state that

the jurisdiction of the civil court is barred in relation only to applications from banks and financial institutions for recovery of debts due to such banks and financial institutions.

107. A civil court is entitled to decide the respective claims of the parties in a suit. It must come within the purview of the hierarchy of courts as indicated in Section 3 of the Code. It will have jurisdiction to determine all disputes of civil nature unless the same is barred expressly by a statute or by necessary implication.

108. Although some arguments have been advanced before us whether having regard to the provisions of Sections 17 and 18 of the Act the civil court jurisdiction is completely ousted, we are of the view that the jurisdiction of the civil court would be ousted only in respect of the matters contained in Section 18 which has a direct co-relation with Section 17 thereof, that is to say that the matter must relate to a debt payable to a bank or a financial institution. The application before the Tribunal would lie only at the instance of the bank or the financial institution for the recovery of its debt. It must further be noted in this respect that had the jurisdiction of the civil courts been barred in respect of counterclaim also, the statute would have said so and Sections 17 and 18 would have been amended to introduce the provision of counterclaim.

117. The Act, although, was enacted for a specific purpose but having regard to the exclusion of jurisdiction expressly provided for in Sections 17 and 18 of the Act, it is difficult to hold that a civil court's jurisdiction is completely ousted. Indisputably the banks and the financial institutions for the purpose of enforcement of their claim for a sum below Rs. 10 lakhs would have to file civil suits before the civil courts. It is only for the claims of the banks and the financial institutions above the aforementioned sum that they have to approach the Debt Recovery Tribunal. It is also without any cavil that the banks and the financial institutions, keeping in view the provisions of Sections 17 and 18 of the Act, are necessarily required to file their claim petitions before the Tribunal. The converse is not true. Debtors can file their claims of set off or counter-claims only when a claim application is filed and not otherwise. Even in a given situation the banks and/or the financial institutions can ask the Tribunal to pass an appropriate order for getting the claims of set-off or the counter claims, determined by a civil court. The Tribunal is not a high powered tribunal. It is a one man Tribunal. Unlike some Special Acts, as for example Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 it does not contain a deeming provision that the Tribunal would be deemed to be a civil court.

118. The liabilities and rights of the parties have not been created under the Act. Only a new forum has been created. The banks and the financial institutions cannot approach the Tribunal unless the debt has become due. In such a contingency, indisputably a civil suit would lie. There is a possibility that the debtor may file preemptive suits and obtain orders of injunction, but the same alone, in our opinion, by itself cannot be held to be a ground to completely oust

the jurisdiction of the civil court in the teeth of Section 9 of the Code. Recourse to the other provisions of the Code will have to be resorted to for redressal of his individual grievances.

(Emphasis Supplied)

119. It is also difficult to accept the contention of leaned counsel for the banks that the civil court's jurisdiction is not in consonance with the Act. We do not find the same to be correct. On the ground of inconsistency in the procedures contained in the two Acts alone, the jurisdiction of the civil court cannot be said to have been ousted.

61. The aforementioned observations of the court can be summarized in the following manner:

a) The jurisdiction of civil court in the matter relating to DRT is barred only to the extent of the jurisdiction which has been conferred upon DRT to decide the claims of the banks as per Section 17 of the Act. However, the reliefs available to the parties contesting the claims of the bank including counter claim (incase the bank has not preferred the application), declaratory reliefs are still within the domain of the civil court as they are neither expressly barred nor by necessary implication.

b) The Apex court has made it clear that the tribunal cannot be equated with the civil court, the civil court has got wider powers in its ambit including the one to grant declaratory relief and thus such suit by the contesting parties seeking declarations are entertainable by the civil court.

c) The Supreme Court has also expressed its opinion about the manner of the entertaining the suits by the civil court by expressing the same in the following words:

The Civil Court indisputably has the jurisdiction to try a suit. If the suit is vexatious or otherwise not maintainable action can be taken in respect thereof in terms of the Code.

There is a possibility that the debtor may file preemptive suits and obtain orders of injunction, but the same alone, in our opinion, by itself cannot be held to be a ground to completely oust the jurisdiction of the civil court in the teeth of Section 9 of the Code. Recourse to the other provisions of the Code will have to be resorted to for redressal of his individual grievances.

62. As a matter of understanding and comprehension, the following propositions can be discerned after analyzing above observations of the court:

a) The civil court will have jurisdiction to entertain the suits seeking declaration as to invalidity of transactions including the derivative transaction in the present case as the same falls within the exclusive domain of the civil court.

b) The Supreme Court in Nahar Industrial Enterprises Ltd (supra) has also laid

down the guideline about the entertaining of the suit by stating that the court may howsoever frivolous the suit may be, entertain such suit and give the treatment as per the procedure envisaged under code. All these observations are elucidative of the finding of entertaining the suit which do not necessarily mean that the court must proceed in the suit in a given format. It is one thing to say that the suit can be entertained by the civil court. However, it is altogether another thing to say that the court should necessarily decide conclusively about the validity of the transaction at the interim stage and cannot await for trial considering the overall surrounding circumstances including the disputed questions of facts involved in the case, the timing of suit especially when the applications made before the DRT are pending consideration, prima facie appearance of validity of debt claim, etc. Ultimately, the said suit is for declaratory relief seeking declaration that the transactions are invalid and consequential relief of the injunction which are all the matter of the final relief. Therefore, the court while at the same time can proceed to entertain the suit does not mean ipso facto that the interim relief must follow. In the given case where the court finds prima facie that the matter relates to a valid debt of the banks, the court can then await the outcome of decision of DRT and trial to conclude in order to form conclusive opinion as to whether the transactions are valid or invalid.

c) The Apex court in Nahar Industrial Enterprises Ltd (Supra) has made the observations about the civil court jurisdiction which is not barred in the given sets of facts wherein in the cases of preemptory nature wherein the Banks or financial institutions have not raised their claim before the DRT and the aggrieved party intending to raise their claim, the civil suit has been held to be maintainable. It however does not mean that the court will not entertain the cases involving similar reliefs when the timing of the suits is pursuant to the banks have approached DRT. But certainly, the court is not powerless to draw inference and also to consider whether the matter which is urged before it pertains to the debt and its comments on the validity of the transaction at the stage prior to the decision of DRT and more so when the DRT claim is filed by the banks prior in point of time can lead to grant of final relief to the party contesting the claim of the bank or the Plaintiff which may affect the banks claim prejudicially without even giving the full opportunity to the parties to prove their case in trial.

63. Accordingly, following Nahar Industrial Enterprises Ltd (supra), I find that the present suit is maintainable as the suit pertains the declaratory relief where in the prayers have been sought from this Court to declare the transactions dated 27.09.2007 and 10.10.2007 as illegal and void and consequential reliefs of injunctions which is well within the jurisdiction of the this Court to decide. I also hold that this Court can entertain the present suit but simultaneously can also examine the overall circumstances in the matter wherein it may come to the prima facie opinion of validity of transactions on the basis of the material placed on record for the purposes of disposing of injunction application, but can await

the conclusion of trial in order to form conclusive opinion about the validity of the transaction or claim. This is due to the reason that the parties must be given full opportunity to prove their case on trial on the disputed questions of fact. Furthermore, the interim relief must not also lead to grant of final relief.

64. Let me now consider the rival submissions of the parties in view of my aforementioned on other points argued by them.

65. Before arriving my findings in this respect as to whether the Plaintiff at this stage is entitled to get relief, it is necessary to mention the following admitted positions in the matter:

a. The Plaintiff has also challenged the validity of the above mentioned two transactions before the DRT.

b. The pleadings in this matter are yet to be completed.

66. Admittedly, the bank has dealt with the Plaintiff on principal to principal basis. The relevant clauses of the master ISDA Agreement executed by the Plaintiffs with the bank. The relevant extract reads as under:

(vi) Relationship between parties: Each party will be deemed to represent to the other party on the date on which it enters into a Transaction that (absent a written agreement between the parties that expressly imposes obligations to the contrary for that transaction):

(a) No Reliance: It is acting for its own account, and it has made its own independent decision to enter into that Transaction and as to whether that Transaction is appropriate or proper for it based upon its own judgment and upon advice from such advisers as it has deemed necessary. It is not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into that Transaction; it being understood that information and explanations related to the terms and conditions of a Transaction shall not be considered investment advice or a recommendation to enter into that Transaction. No communication (written or oral) received from the other party shall be deemed to be an assurance or guarantee as to the expected results of that Transaction.

(b) Assessment and Understanding: It is capable of assessing the merits of and understanding (on its own behalf or through independent professional advice), and understands and accepts, the terms, conditions and risks of that Transaction. It is also capable of assuming, and assumes, the risks of that Transaction.

(c) Status of Parties: Each party is entering into this Agreement and performing its obligation hereunder solely as principal on its own behalf and not as an agent on behalf of any third party or is not acting as a fiduciary for or an adviser to the other party in respect of that Transaction.

67. The ISDA Agreement also provides for a lien on the other accounts of the Plaintiff for any dues which arise out of the present derivative transactions. The

relevant clause reads as under:

(f) Set Off: Party B shall have the paramount right of set - off and lien, irrespective of any other lien or charge, present as well as future on the deposits of any kind any nature (including fixed deposits) held/balance lying in any accounts of the Party A, whether in single name or joint name(s) and on any monies, securities, bonds and all other assets, documents and properties held by/ under the control of Party B (whether by way of security or otherwise pursuant to any contract entered/to be entered into by the Party A in any capacity) to the extent of all outstanding dues, whatsoever, arising as a result of any Party B's services extended to and/or used by Party A and/or as a result of any other facilities that may be granted by Party B to Party A. Party B is entitled without any notice to Party A to settle any indebtedness whatsoever owned by Party A to Party B, (whether actual or contingent, or whether primary or collateral, or whether joint/or several) hereunder or under any other document/agreement, by adjusting, setting off any deposit (s) and/or transferring monies lying to the balance of any account (s) held by Part A with Party B notwithstanding that the deposit(s)/balances lying in such account(s) may not be expressed in the same currency as such indebtedness. Party B's rights hereunder shall not be affected by Party A's bankruptcy or winding up. It shall be Party A's sole responsibility and liability to settle all disputes/objections with any such joint account holders.

In addition to the above mentioned right or any other right which Party B may at any time be entitled whether by operation of law, contract or otherwise, Party A authorizes Party B; (a) to combine or consolidate at any time all or any of the accounts and liabilities of Party B with or to any branch of Party B; (b) to sell any of Party A's securities or properties held by Party B by way of public or private sale without having to institute any judicial proceeding whatsoever and retain/ appropriate from the proceeds derived there from the total amounts outstanding to Party B from Party A, including costs and expenses in connection with such sale; and (c) in case of cross currency set off, to convert an obligation in one currency to another currency at a rate determined at the sole discretion of Party B.

68. The document relating to each derivative transaction also contained the following declaration made by ICICI:

ICICI Bank has not taken any steps to ensure that the transaction contemplated hereunder is suitable for the Customer and ICICI Bank is acting as principal and not as the Customer's adviser or in a fiduciary capacity in respect of this proposed transaction or any other transaction unless otherwise specifically agreed in writing. Accordingly, this document does not have regard to the specific investment objectives, financial situation and the particular needs of any specific person who may receive this document and does not constitute investment, legal accounting or tax advice, or a representation that any investment is suitable or appropriate to any specific person's individual circumstances or otherwise constitute and personal recommendation to any

specific person.

The information herein is not to be taken in substitution for the exercise of judgment by the Customer who should obtain separate investment legal accounting, tax or financial advice, before entering into any transaction, the Customer should take steps to ensure that he/she/they understands/understand the transactions contemplated hereunder and risks thereof and has/have made an independent assessment of the appropriateness of the transactions contemplated hereunder in the light of the customer's own specific investment objectives, financial situation and particular needs. In particular, the customer may wish to seek advice from a licensed or exempt finance adviser or make such independent investigations, as he/she/they considers/consider necessary or appropriate for such purposes. ICICI Bank, its related companies, their Directors and/or employees may have interests or positions in, any may effect transactions in the underlying product (s) mentioned in this document.

69. The Plaintiff made the declarations and he has referred to the following specific declarations:

(i) That as on date and as on the date of the maturity of the Transaction the Counterparty has and shall have the underlying exposure for which the Transaction has been entered into as a hedge and as on date there is no other hedge already in place for the said exposure. The details of the underlying exposure are as follows:

(ii) That the notional principal amount of the Transaction does not exceed the outstanding amount of the underlying transaction which, the counterparty seeks to hedge vide the transaction;

(iii) That the maturity of the hedge does not exceed the unexpired maturity of the underlying transaction;

(iv) That in case the underlying exposure for the transaction pertains to balance held in EEFC accounts, the transaction shall not be cancelled.

(v) That in case the underlying exposure for the transaction pertains to a foreign currency loan or bond, all requisite approvals for the same have been taken including approvals from RBI or allocation of loan identification number;

(vi) That in case this Transaction does not have a specific underlying and is being booked on past performance basis, booking of this transaction will not result in breach of the counterparty's aggregate past performance limits.

(vii) That the Board of Directors of the Counterparty has drawn up a risk management policy and laid down guidelines in accordance with the Master Circular on Risk Management and Inter Bank Dealings (Master Circular No. 06/2005-06 dated July 1, 2005) issued by Reserve Bank of India (the "Master Circular"). The Counterparty undertakes to provide periodical review reports and annual audit reports referred to in the Master Circular upon the request of ICICI

Bank from time to time; and

(viii) That in entering into the Transaction and performing its obligations there under the Counterparty is in full compliance with all applicable RBI/FEMA Regulations and the counterparty shall do all acts and furnish to ICICI Bank all required documents in order to ensure compliance with such Regulations.

70. The Plaintiff is a company and before entering into derivate transactions with the bank, the Board passed following resolution for the said purpose:

Certified true copy of the resolution passed by the Board of Directors of the Company in its meeting held on 25August, 2007.

The Chairman informed the Board that the Company intends to enter into derivative transactions with ICICI Bank.

The Chairman accordingly requested the Board to pass the following resolutions for the above mentioned purpose, which after careful considerations and some discussions were passed.

RESOLVED THAT the Company do enter into ISDA Agreement ("Agreement") with ICICI Bank for the purpose of entering into derivative transactions from time to time and the Company do accept such terms, Regulations, conditions laid down by ICICI Bank for the purpose.

FURTHER RESOLVED THAT any of the following directors Mr. Sushil Gupta, Managing Director, Mr. Sandeep Gupta, Jt. Managing Director & Mr. Manish Gupta, Director of the Company be and is hereby authorized to sign the Agreement or any other document with ICICI Bank, on behalf of the Company for entering into derivative transactions, execute such deeds, documents and other writings as may be necessary or required for this purpose and to deliver any other document, including a copy of the risk management policy of the company, as and when requested by ICICI Bank and to affix the common seal of the company on any such document wherever necessary, in accordance with the Articles of Association of the Company.

FURTHER RESOLVED THAT any of the following directors Mr. Sushil Gupta, Managing Director, Mr. Sandeep Gupta, Jt. Managing Director and Manish Gupta, Director of the Company be and are hereby authorized to enter into transactions pursuant to and under the Agreement on behalf of the Company from time to time and do all other related acts, deeds and things, including cancellation, rebooking or amendment of the transactions and to deliver the necessary documents as required for and on behalf of the Company.

FURTHER RESOLVED THAT ICICI Bank be and is hereby authorized to accept as instructions and all necessary documents from any of the above authorized persons with respect to the transactions entered/cancelled/amended between the Company and ICICI Bank pursuant to the Agreement. The Company does agree to hold ICICI Bank harmless and their interest protected on account of acting

upon such instructions by the above signatories in the manner provided.

FURTHER RESOLVED THAT Chairman of the Board/Secretary of the Company be and is hereby authorized to furnish a copy of the resolution certified as true to ICICI Bank Group. Certified as a true copy of the original.

71. Firstly, the submissions have been made by the parties on the validity of the transactions dated 27.09.2007 and dated 10.10.2007. It has been argued at length the derivative transactions are not made by the Defendant under the prescribed purpose. It has also been argued by the Plaintiff that the derivative transactions in generality are void and illegal against the public policy.

72. I have given due consideration to the submission advanced by the parties on validity of the transaction. I find that the submissions that the transactions are invalid on account of being beyond the permissible criterion as to hedge the foreign currency exposure and the notional amount are mixed questions of fact and law. It is the Plaintiff's case that it is beyond the prescribed criterion as there is no hedging of risk and also no transformation of long term liability. On the otherhand, the Defendant contends that it is perfectly justified in entering in to valid transaction as there is no bar of entering into such transactions on the basis of the loans taken from bank and it is not beyond the permissible norms laid down by RBI. To support its contention, bank also relies upon the provisions which provide that the derivative contracts entered into by the banks for specific purposes are valid. Thus, it becomes a disputed question of fact and law. It is thus wiser to relegate the parties to trial to prove this question in order to enable this Court to form the conclusive opinion about the validity or invalidity of the transaction and ultimate entitlement of the Plaintiff to the declaration.

73. Secondly, one should also not forget that DRT is already is in seisen of the dispute and the Plaintiff has raised the same defences which it is urging before this Court on the aspect invalidity of the said transactions which are yet to be examined. The comments from this Court finding favour to the either side's contentions in relation to the legality of the transaction will render DRT claim in my view valueless exercise or useless formality. This is another reason for this Court to await the trial and examine the matter by doing in depth analysis after trial rather than prematurely without having written statement giving conclusive finding as to the validity of the transaction.

74. Thirdly, this Court is deciding the injunction application on the basis of the suit for declaration that the transactions are invalid. The prima facie case has to be seen for the grant of the interim injunction. There is no apparent illegality on the face of the transactions which appears so glaringly which persuades this Court to take prima facie view of invalidity. Therefore, the interim relief application must be decided within the parameters for the grant of injunction in order to grant or refuse interim injunction and the court should desist from granting final relief under the interim relief application.

75. The other factor which militates against the forming of the conclusive opinion

on the legality or illegality of the two transactions is conduct of the Plaintiff as it has approached this Court only once the recovery proceedings are launched before the DRT. The Plaintiff has also filed suit in Faridabad court seeking similar relief prior to the filing of present suit which ultimately was withdrawn during the pendency of the present suit. Thus, the whole sole intention of the Plaintiff seems to be to seek declaration as to invalidity of the transactions which may affect the case of the recovery before the Debt Recovery Tribunal. Of course, the Plaintiff is entitled to seek declaration under the law that the transactions are not valid, but the timing to approach this Court when the DRT is already seized of the matter does not persuade this Court to go into the question of legality at this stage in addition to the existence of disputed question of facts warranting trial. The Plaintiff has been communicating with the Defendant bank for the last more than three years. The Plaintiff if at all was finding fault in the transactions ought to have immediately approached the court at the time when the transaction was in currency, more so when the transaction was completed or even prior to the launch of recovery proceedings before DRT as a matter of preemptive measure. However, the Plaintiff waited all along till the time recovery proceedings are launched before DRT and have approached this Court belatedly seeking declaration of invalidity of such transaction and stay of proceedings of the DRT so that the recovery proceedings before DRT may be prejudicially affected. The said relief due to the same reasons also cannot be granted.

76. Suffice it to say at this stage for the purposes of forming a prima facie opinion, the submission of the Plaintiff that the derivative transactions cannot be entered into by the banks in cases of Rupee liability or otherwise in cases of loan is not correct as the bare perusal of the provisions which are cited at the bar including Section 45U and 45V of RBI Act, circular dated 1.7.2010 of RBI, during the course of hearing itself make it evident that the Defendant or the other banks are empowered to enter into the derivative transactions on behalf of the client/ Plaintiff. Further, the clients like the Plaintiffs having Rupee liability in the form of loan to the banks can authorize the banks enter into such derivative transactions on their behalf. There is no such apparent illegality on face of it at this prima facie stage, which persuades this Court to interfere and grant injunctory relief in the present case against the proceedings pending before DRT or to hold that the transactions are illegal.

77. The arguments of the Plaintiff that there is no consensus ad idem at the time of entering such derivative contracts can be also be fairly examined at the time hearing of the claims before DRT tribunal. For the purposes of the prima facie view, it is observed that there is a resolution passed by the Plaintiff company which has been relied upon by the Defendant to show that the Plaintiff is made aware of the transaction and the same is also evident from the letters from the record wherein the Defendant is called upon to credit the earnings arising from the transactions made from time to time. Thus, at this prima facie stage from the material shown on the record, it cannot be said that the contract of derivative transaction is vitiated by the consent. It is made clear that this point is different

from the issue of legality of the transactions and trades made beyond the purposes which is to be decided by DRT and that is reason the same is being commented upon by the court.

78. I find that there is also no force in the argument of the Plaintiff that prayer (a) in the injunction application is partly given up to the extent of stay of proceedings of DRT and partly pressed to the extent of adjudicating illegality of the transaction. The answer to this is my finding that in the event, this Court will delve into enquiry of adjudicating the legality or illegality of the said transaction, the claims before the DRT which is the appropriate forum will be adversely affected. Therefore, the request for consideration of prayer (a) of injunction application in part cannot be acceded to.

79. Many submissions made by the Plaintiff before this Court on the aspect of the Defendant to be called upon to refrain from declaring the Plaintiff as a willful defaulter. The argument advanced by the Plaintiff to elaborate the submission of willful defaulter is that the debt must be valid in law in order to call Plaintiff as willful defaulter and therefore, this Court must first decide the validity of the debt in law.

80. I have given careful consideration to the submission of the Plaintiff and am of the view that in view of my finding that there is no apparent illegality on the fact of it in the transactions as the bank/defendant is empowered to enter into the derivative transaction on behalf of the clients. Even otherwise, the said issue has to go into detailed analysis about the legality or illegality of transactions, of which the DRT is seized of the matter.

81. This question that the outstanding dues/ overdues arising from the non performing assets or derivative transactions are to be treated as debts of the banks and therefore the Banks can proceed to declare the defaulters as willful defaulters on the basis of grounds mentioned in the circular being meted out is no longer res integra. The Division Bench of Bombay High Court in the recent case of *Finolex Industries Limited and Anr. v. Reserve Bank of India and Ors.* Writ Petition (Lodg.) No. 345/2011, decided on 23/24.08.2011, who after doing careful analysis provisions of RBI Act and circulars has articulated this proposition in the following words:

The Reserve Bank of India Act of 1934, as noted earlier, was amended on 9 January 2007 to provide inter alia for the Regulation of transactions in derivatives and money market instruments. As an incident of its regulatory power the Reserve Bank of India issued diverse circulars from time to time. These circulars inter alia cover the field of laying down (i) Prudential norms for off balance-sheet transactions; (ii) Exposure norms; (iii) Norms pertaining to non performing assets, among others. A brief review of those circulars would be necessary:-

i) On 8 August 2008, the Reserve Bank of India issued a circular to enunciate prudential norms for off balance-sheet exposures of banks. The Reserve Bank of

India clarified that initially only amounts due to a bank under derivative contracts which remained unpaid in cash for a period of ninety days or more from the specified date of payment would be classified as non-performing assets. The circular laid down in paragraph 2.1 the method of computing a credit exposure arising on account of interest rate and foreign exchange derivative transactions and gold using the current exposure method as set out therein. Norms for capital adequacy were also spelt out in paragraph 2.2 of the circular;

ii) On 13 October 2008 the Reserve Bank of India in a circular addressed to all the commercial banks revisited the prudential norms for off balance-sheet exposures. The circular specifically dealt with the asset classification status of over due payments in respect of derivative transactions. Paragraph 2.1 of the circular inter alia was as follows:

2.1 Asset Classification

(i) The overdue receivables representing positive mark-to-market value of a derivative contract will be treated as a non-performing asset, if these remain unpaid for 90 days or more. In that case all other funded facilities granted to the client shall also be classified as nonperforming asset following the principle of borrower-wise classification as per the existing asset classification norms;

(ii) If the client concerned is also a borrower of the bank enjoying a Cash Credit or Overdraft facility from the bank, the receivables mentioned at item (i) above may be debited to that account on due date and the impact of its non-payment would be reflected in the cash credit/overdraft facility account. The principle of borrower-wise asset classification would be applicable here also, as per extant norms.

The circular emphasized that overdues remaining unpaid over more than ninety days under a derivative contract would be treated as a non-performing asset. Moreover, other funded facilities granted to the client would also be classified as non-performing assets following the principle of borrower wise classification. Further if the client was also a borrower enjoying a cash credit or overdraft facility, it was specified that the receivables under a derivative transaction would be debited to that account. The principle of a borrower wise classification was therefore applied by the Reserve Bank of India to clearly include within its sweep the dues owing to commercial banks on account of derivative transactions;

(iii) On 29 October 2008 the Reserve Bank of India in a circular addressed to scheduled commercial banks clarified that on a review of the matter it has been decided to confine the applicability of the principle of a borrower wise asset classification to the overdues arising only from forward contracts and what was described as "Plain Vanilla Swaps and options". The bank clarified that the dues under foreign exchange derivative contracts (other than forward contracts and Plain Vanilla Swaps and options) would be parked in a separate account to be maintained in the name of a client/ counter party. This amount even if overdue for a period of ninety days or more, not render the other funded facilities

provided to the client as non-performing assets on account of the principle of a borrower wise asset classification;

(iv) On 9 April 2009 the Reserve Bank of India addressed a circular to the Chief Executive Officers of all primary urban co-operatives banks. The circular prescribed formats for the declaration of information by the borrower at the time of applying for a credit facility and the format for exchange of information among banks as regards borrowers enjoying credit facilities from more than one bank. The existing formats were revised to reflect information relating to derivative transactions entered into by banks with borrowers and the unhedged foreign currency exposures of borrowers. The circular leaves no manner of doubt that in seeking declarations in relation to credit information pertaining to borrowers, the Reserve Bank of India intended to bring within its purview credit information pertaining to outstandings under derivative transactions. Annexure I is the format prescribed by the Reserve Bank of India for information to be declared by borrowing entities while seeking finance under multiple banking arrangements. Heading A requires details of borrowing arrangements from other banks to be furnished. Among the details of borrowing arrangements are derivative contracts entered into. The overdue position is to include amounts due under derivative contracts;

(v) On 1 July 2010 the Reserve Bank of India issued a master circular on exposure norms to all scheduled commercial banks. The master circular provided a framework of rules, Regulations and instruments issued by the Reserve Bank of India relating to credit exposure limits for individual and group borrowers and credit exposure to specific industry or sectors and for the capital market exposure of banks. This circular was conceived as a prudential measure aimed at better risk management and avoidance of concentration of credit risks. Paragraph 2.1.3 of the circular defined the expression "exposure" to include credit exposure (funded and non funded credit limits) and investment exposure including underwriting and similar commitments. Paragraph 2.1.3.2 required banks for the purposes of the exposure norms to compute their credit exposures arising on account of interest rate and foreign exchange derivative transactions and gold, using the current exposure method as detailed therein;

(vi) On 1 July 2010 the Reserve Bank of India issued a master circular on prudential norms on income recognition, asset classification and provisioning pertaining to advances. The circular clarified that in line with the international practices and in pursuance of the recommendations made by the Narasimhan Committee, the Reserve Bank of India had introduced in a phased manner prudential norms to bring in greater consistency and transparency in public accounts. Paragraph 2.1.2 of the circular defines non-performing assets as a loan or an advance which fulfills the description contained in Clauses (i) to (vii). Sub Clause (vii) specifically incorporates dues under a derivative transaction as follows:-

vii. In respect of derivative transactions, the overdue receivables representing

positive mark-to-market value of a derivative contract, if these remain unpaid for a period of 90 days from the specified due date for payment.

The Reserve Bank of India clearly stipulated a non-performing asset to be loan or advance where dues under a derivative transaction remained unpaid for a period of ninety days or more. Paragraph 4.2.7 stipulates that the asset classification would be borrower wise and not facility wise. That was because it was difficult to envisage a situation where only facility to a borrower or one investment in any of the securities issued by the borrower becomes a problem and not the others. The Reserve Bank of India was of the view that all securities issued by a borrower would have to be treated as nonperforming assets and not merely the particular facility or investment which has become irregular. As regards derivative transactions, paragraph 4.2.7 stipulated that overdues remaining unpaid for more than ninety days would be treated as non-performing assets. Where the overdues arose on account of forward contracts and plain vanilla swaps and options and had become non-performing assets, all other funded facilities granted to the client were also classified as non-performing assets following the principle of borrower wise classification. On the other hand, in respect of foreign exchange derivative contracts other than those specified above, which were already entered into between 2007-08, the amount receivable would be parked in a separate account and would not render other funded facilities provided to the client as non-performing assets.

25. Now it is in this background, that it would be necessary to advert to the language which has been used in paragraph 2.1 of the master circular on willful defaulters. The essence of Clause (a) of paragraph 2.1 is a default in meeting payment or repayment obligations despite the existence of a capacity to honour the obligation. Clause (a) therefore does not bring within its purview a mere default but a default which is coupled by a capacity to honour obligations. The use of the expression "lender" cannot be regarded in the restrictive sense as postulating that a willful default can arise only where there is a relationship of a borrower and lender and to exclude cases of a debt due to a bank or financial institution under a derivative transaction. The language of the Reserve Bank of India is in an administrative circular and in construing that language the Court must give a purposive interpretation by which the circular is read in the context of an overall regulatory scheme imposed by the Reserve Bank of India of ensuring financial discipline on the part of commercial banks and other financial institutions. While analyzing the regulatory circulars of the Reserve Bank of India, all of which are contemporaneous in nature, it has become evident before the Court that in imposing norms for disclosure, prudential norms for off balancesheet transactions and norms in regard to computing nonperforming assets, the Reserve Bank of India has expressly brought within the purview of its requirements overdues which are payable under derivative transactions. Obviously, overdues under derivative transactions have a significant impact on overall outstandings of counter parties to banks and financial institutions and have a material bearing both on creditworthiness and the amount of exposure of

the bank, or as the case may be, the financial institution. There would be no conceivable reason for the Reserve Bank of India, while dealing with the issue of willful defaulters, to exclude a default which had arisen out of derivative transactions. Significantly, the terms of the circular use the expression "payment / repayment obligations". Consequently, the use of the word "lender" in paragraph 2.1 has not been in a restrictive sense so as to confine the application of the circular only to a situation where the relationship of a borrower and lender existed between the bank and its client under which a loan or advance had been granted to the borrower.

(Emphasis Supplied)

29. Counsel appearing on behalf of the Petitioners submitted that the views which have been expressed by the Reserve Bank of India on affidavit cannot be relevant to the construction of a circular. Counsel placed reliance on a decision of a Full Bench of this Court in *Awdhesh Narayan K. Singh v. Adarsh Vidya Mandir Trust*⁷ which held that interpretation of a statutory provision is a judicial function and it is not open to the executive arm of the government to insist that its interpretation should be accepted by the Court. That position in law is indeed settled. Equally, when the Court is dealing with a circular issued by an expert body, particularly such as the Reserve Bank which has been vested with a critical function of ensuring financial and monetary stability, the Court would be justified in considering the views which have been expressed by the expert body vested with the statutory power to regulate and control the banking system. Where those views are clearly in conflict with a statutory provision or a circular made in exercise of a statutory power, the view of the body, however expert, cannot override a statutory prescription. But in a case such as the present, the views of the Reserve Bank of India are, as we have said earlier, relevant to construe the reason for the Regulation, the object of the Regulation, the ills that were sought to be remedied and the purpose of bringing derivative transactions within the fold of regulatory compliance. In our view, the Court would be justified in placing a great deal of deference on the views which have been expressed by the Reserve Bank of India. Those views have in any event accorded with the interpretation that has been placed by the Court on the relevant terms of the circular.

33. For these reasons, we have come to the conclusion that the master circular on defaulters issued by the Reserve Bank of India must for the purposes of Clause (a) of paragraph 2.1 comprehend within its purview dues arising out of derivative transactions. Dues owing to banks and financial institutions under derivative transactions constitute a debt due and owing and form part of the assets. The circulars issued by the Reserve Bank of India demonstrate that these dues would fall for classification as nonperforming assets. There is no reason or justification to read Clause (a) of paragraph 2.1 of the master circular so as to exclude dues arising out of derivative transactions.

82. From the reading of the above observation of Bombay High Court in *Finolex*

Industries Limited and Anr. (supra), it is beyond a cavil of any doubt to hold that the overdues arising from the non performing assets like derivative transactions are called as debts of the banks. The said relationship between the bank and the client is of borrower and lender. Therefore, the submission of the Plaintiff that the debt in those circumstances must be a valid one so as to come within the purview of willful defaulter cannot be accepted. Rather, by its very nature if the said money becomes due, the same is called as debt and the failure to pay the same shall be categorized as default. The said debt if becomes a subject matter of challenge before the suit court, it cannot be argued that by the very challenge itself, the banks should stop calling the Plaintiff or defaulters as willful defaulters. Ultimately, it is a matter of commerce and RBI has to examine under the law by supervising the creditworthiness of the persons taking loans and advances from time to time. Therefore, the monies of the other banks cannot be put to stake by stopping the banks/ Defendant in the present case from performing their/its legal obligations to declare the defaulters as willful defaulter on the mere basis of the challenge of the debt when this Court does not find any patent illegality on the face of it on prima facie view leaving the question of legality of the transactions to be decided before the DRT.

83. Further, it has been argued on behalf of the Plaintiff that the Plaintiff cannot be categorized as willful defaulter under Clause (a) of the circular as the one having the funds and it is not paying the debt. This has been argued by the putting reliance of some statements made by the Defendant bank in the DRT tribunal that the liabilities of the Plaintiff exceeds the assets, therefore, as per the Plaintiff, it cannot be categorized as the willful defaulter. I do not find concurrence with the submission advanced by the Plaintiff due to following reasons:

a) Firstly, it is factual enquiry as to whether the Plaintiff infact has the funds to pay the debt or he is incapable of paying the same. Some statement of bank made before the DRT in its application would be little assistance to believe or disbelieve unless it is examined thoroughly that the Plaintiff in fact do not means or capacity to meet such dues. The said factual enquiry and fact finding can be appropriately done by DRT before which such application is made by the Defendant bank and the statement is made thereof. All the grounds of arguments in order to enable the Plaintiff to argue the issue of willful defaulter are left open.

b) Secondly, it has been argued by the Plaintiff that the Defendant's own showing before DRT reveals that its liabilities exceeds its assets, that by itself also cannot make this Court to believe that the Plaintiff is incapable of making good of the debts due in the present case. There is difference in saying that the liability of the Plaintiff exceeds the assets and the Plaintiff is incapable of paying debt on account of lack of funds. Further, the Plaintiff is a private limited company, this Court is not sure as to whether by prioritizing the liabilities, the Plaintiff is capable of paying the debts in the present case.

All this, therefore, becomes factual enquiry as it cannot be said with certainty at

this stage as to whether the Plaintiff actually does not possess means to meet the debts. Therefore, it is apt to confine at this stage that there is a valid debt on prima facie view for the purposes of declaring the Plaintiff as willful defaulter.

84. The arguments have been advanced by the Plaintiff about the duty to mitigate loss by the Defendant. The Defendant disputes the same as it is under no obligation to reduce the loss. This again becomes a fact finding which has to be gone into by the DRT. The said argument will come to the aid of the Plaintiff only at the time of deciding the claim and the amount of claim which is to be awarded by the DRT. Therefore, the examination of the submission becomes immaterial at this stage.

85. No submission of the parties remains unaddressed. It is appropriate to discuss the three cardinal rules of the grant of temporary injunction which are:

a) Prima facie case

b) Balance of convenience

c) Irreparable loss

86. The Plaintiff has failed to show any prima facie case for grant of injunction in its favour as the question of legality of the transactions can be conclusively determined after the trial pursuant to examining the defence of the Defendant and evidence of the parties as the same is disputed question of fact and law. Therefore, no prima facie case of injunction has been made by the Plaintiff.

87. As far as the balance of convenience and irreparable loss are concerned, it is argued by the Learned Counsel for the Plaintiff that the liabilities of the Plaintiff are more than the assets and the Defendant No. 1 is aware and pleaded the same before DRT. Further, the Defendant No. 1 only on 29.07.2011 has informed that the Plaintiff w.e.f. 30.06.2011 has been declared as willful defaulter, i.e. after filing of the present suit. In order to strike the balance at this stage, the Plaintiff has also filed an affidavit before this Court on 12.08.2011 informing the Court that the Plaintiff is willing to furnish a bank guarantee to the tune of Rs. 1.25 crores before this Court for the purpose of securing the prayer (b) of the interim application which would be without prejudice to the rights and contentions of the Plaintiff to contest the matter on merit.

88. This Court is not satisfied with the submission of the Plaintiff on this aspect as it is not denied by the Plaintiff that the Plaintiff is running its business. It is yet to be examined as to whether the Plaintiff's statement, that its liabilities are more than its assets, is correct. Further, as the Plaintiff is carrying on its business, it is for the Plaintiff to choose its priority. As such contention of the Plaintiff on this aspect cannot be accepted. As far as declaration of two transactions to be null and void as sought by the Plaintiff is concerned, this Court has already come to the conclusion that prima facie the question of legality of transactions can be conclusively determined after trial.

89. As far as the question of willful defaulter is concerned, prima facie it is found that the order has been passed by the Defendant No. 1 in compliance with the rules and bylaws made by the RBI. Therefore, merely on deposit of token amount as a security, the relief sought by the Plaintiff cannot be granted unless the Plaintiff deposits the entire principal amount due by way of bank guarantee in order to secure the interest of the Defendant No. 1, if so advised, the Plaintiff may deposit the said amount and file an application before Court for modification of the order.

90. It is made clear that the DRT shall decide the claim pending before uninfluenced by the findings of this Court. The challenge to the transactions dated 27.9.2007 and 10.10.2007 shall also be made available to the Defendant which may be urged before the DRT and the tribunal shall decide the said claim considering the rival contentions of the parties.

91. The observations made herein are tentative in nature and shall not have any bearing at the time of deciding the suit after the trial. Accordingly, IA No. 10686/2011 is dismissed. No costs.