Kotak Mahindra Bank Ltd vs Hindustan National Glass & Ind.Ltd.& ... on 11 December, 2012

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Bench: A.K. Patnaik, Swatanter Kumar

.Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 8916 OF 2012
(Arising out of SLP (C) NO. 29599 of 2009)

Kotak Mahindra Bank Ltd. … Appellant

Versus

Hindustan National Glass & Ind. Ltd.
& Ors. …
Respondents

WITH

CIVIL APPEAL No. 8917 OF 2012
(Arising out of SLP (C) NO. 27730 of 2011)

Emcure Pharmaceuticals Ltd. & Anr. … Appellants

Versus

ICICI Bank Ltd. & Ors. … Respondents

AND

CIVIL APPEAL No. 8918 OF 2012
(Arising out of SLP (C) NO. 28477 of 2011)

Finolex Industries Limited & Anr. … Appellants

Versus

Reserve Bank of India & Ors. … Respondents

J U D G M E N T

A. K. PATNAIK, J.

CIVIL APPEAL No. 8916 OF 2012
(Arising out of SLP (C) NO. 29599 of 2009)

Leave granted.

2. This is an appeal against the order dated 01.09.2009 of the Calcutta High Court in Writ Petition No. 7729(W) of 2009.

3. The facts very briefly are that the appellant-bank sanctioned Derivatives/Forward Contracts facility to respondent no.1 upto a limit of Rs.2,00,00,000/- (rupees two crores) only for the purpose of hedging foreign currency exposures by its letter dated 10.01.2006. On behalf of the respondent no.1-company, its Joint Managing Director acknowledged the receipt of the sanction letter dated 10.01.2006 of the appellant and accepted and agreed to be bound by the terms and conditions of the sanction letter as well as the annexures thereto being authorized by the resolution of the Board of Directors of the respondent no.1-company. Thereafter, on 17.01.2006 the appellant and the respondent no.1 entered into the International Swaps and Derivatives Association (ISDA) Master Agreement. Between January, 2006 to January, 2007 the appellant executed nine derivative transactions with the respondent no.1. On the request of the respondent no.1, the appellant enhanced the limit of Derivatives/Forward Contracts facility of the respondent no.1 to Rs. 10,00,00,000/- (rupees ten crores) only for the purpose of hedging adverse foreign exchange fluctuations and to enter into derivative transactions by letter dated 31.01.2007. During January, 2007 to August, 2007, the appellant executed various derivatives transactions with respondent no.1. In August, 2007, on the request of respondent no.1, the appellant once again increased the limit for Derivatives/Forward Contracts facility to Rs.20,00,00,000/- (rupees twenty crores) only for the purpose of hedging adverse foreign exchange fluctuations and entering into derivative transactions by letter dated 09.08.2007. On 06.09.2007, the appellant entered into derivative transactions FXOPT 20536, 20540 and 20544. Thereafter, on 05.03.2008 and 12.03.2008 the appellant informed the respondent no.1 that a sum of Rs.2,43,12,000/- (rupees two crores forty three lacs and twelve thousand) only had become due and payable on 10.03.2008 by the respondent no.1. The respondent no.1, however, did not pay the sum. On 01.07.2008 the Reserve Bank of India (for short 'the RBI') issued the Master Circular on Wilful Defaulters.

4. The Master Circular on Wilful Defaulters (for short "the Master Circular") contained instructions of the RBI to banks and financial institutions regarding reporting of wilful defaulters to other banks

and financial institutions and the measures to be imposed on wilful defaulters by such banks and financial institutions. By letter dated 22.10.2008, the appellant intimated the respondent no.1 that it had classified the respondent no.1 as a wilful defaulter as it had defaulted to pay an amount of Rs.2,76,01,908.79 and interest thereon totalling to Rs.14,62,61,186.69 and respondent no.1 by its replies dated 04.11.2008 and 21.11.2008 through its Advocate contended that neither the appellant was a "lender" nor the respondent no.1 was a "borrower" within the meaning of "wilful default" in the Master Circular and, therefore, action under the Master Circular cannot be taken against the respondent no.1. By letter dated 02.02.2009, the appellant informed the respondent no.1 that the replies dated 04.11.2008 and 21.11.2008 of the respondent no.1 have been referred to the Grievance Redressal Committee of the appellant-bank for consideration and the Grievance Redressal Committee has fixed a meeting on 25.02.2009 at 10.00 A.M. at the office of the bank at Nariman Point, Mumbai, and that the respondent no.1 can represent its case in the hearing before the Grievance Redressal Committee. The respondent no.1 then made a representation dated 06.03.2009 before the Grievance Redressal Committee of the appellant-bank contending that the Master Circular does not apply to foreign exchange derivative transactions and was restricted only to the acts of lending by the bank and borrowing by the bank's constituents and as there was no lending by the appellant-bank to the respondent no.1 in any manner from the appellant-bank, the entire proceedings against the respondent no.1 under the Master Circular should be dropped. While the matter was pending before the Grievance Redressal Committee, the respondent no.1 filed Writ Petition No.269 of 2009 before the Calcutta High Court and by order dated 27.03.2009 the Calcutta High Court dismissed the writ petition taking a view that the matter was pending before the Grievance Redressal Committee. Thereafter, on 07.04.2009, the Grievance Redressal Committee of the appellant-bank after hearing the respondent no.1, declared the respondent no.1 as a wilful defaulter under the Master Circular and further resolved that the respondent no.1-company and its directors be reported to the Credit Information Bureau (India) Ltd., RBI or such other institution/agency as may be required by RBI in terms of its Master Circular. The appellant accordingly intimated the aforesaid decision of the Grievance Redressal Committee of the appellant-bank to the respondent no.1 and the RBI by two separate letters dated 07.04.2008. Aggrieved, the respondent no.1 filed Writ Petition No.7729 (W) of 2009 in the Calcutta High Court and by the impugned judgment, the Calcutta High Court held that the Master Circular applied only to lending transactions of a bank or financial institution and as in the foreign exchange derivative transactions between the appellant and respondent no.1, there was no such lending transactions and the appellant was not the lender and the respondent no.1 was not the borrower, the respondent no.1 could not be declared as a wilful defaulter in terms of the Master Circular and accordingly no action could be taken against the respondent no.1 under the Master Circular. By the impugned judgment, the Calcutta High Court, therefore, set aside the decision dated 07.04.2009 of the appellant-bank and allowed the writ petition of the respondent no.1. Aggrieved, the appellant has filed this appeal.

5. Mr. C.A. Sundaram, learned senior counsel appearing for the appellant, submitted that the High Court has not correctly interpreted the Master Circular. He referred to the counter affidavit filed on behalf of the RBI before the High Court to show that the Master Circular had been issued by the RBI inter alia in exercise of its powers under the Banking Regulation Act, 1949 (for short 'the 1949 Act') and that Sections 21 and 35A of the 1949 Act make it clear that the directions/guidelines issued by the RBI are mandatory and binding on the clients. He argued that Paragraph 2.1 of the Master

Circular defines the term "Wilful Default" as a default by a unit in meeting its payment/repayment obligations to the lender, but the word "lender" has not been defined in the Master Circular. He submitted that the RBI, which has issued the Master Circular, has in its counter affidavit before the High Court stated that the intention of the RBI while issuing the Master Circular was to cover all eventualities where "payment/repayment obligations" exist and therefore the Master Circular would cover all banking transactions including off balance-sheets transactions, such as, derivatives, guarantees, Letters of Credit, etc. He referred to Sections 45U of the Reserve Bank of India Act, 1934 (for short 'the 1934 Act'), which defines in Clause (a) the word "derivative" and also to Section 45V of the 1934 Act which is titled "Transactions in derivatives" and submitted that the derivative transactions with banks had been declared to be valid by law. He submitted that the word "borrower" has been defined in Clause (b) of Section 45A of the 1934 Act to mean any person to whom any credit limit has been sanctioned by any banking company and has been still more widely defined in Clause (b) of Section 2 of the Credit Information Companies (Regulation) Act, 2005 (for short 'the 2005 Act') to mean not only a person who has been granted loan or any other credit facility by the credit institution, but also a client of a credit institution. He referred to the definition of "Client" in Clause (c) of Section 2 of the 2005 Act to show that "Client" includes a person who has not only obtained or seeks to obtain financial assistance from a credit institution, but also obtains assistance in any other form or manner. He submitted that Clause (d) of Section 2 of the 2005 Act defines the expression "credit information" more widely to include not only loans but any other non-funding based facility granted to all its borrowers as well as any other matter which the RBI may consider necessary for inclusion in the credit information to be collected. He submitted that the Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 (for short 'the FEMA Regulations') had been made by the RBI under Section 47 of the Foreign Exchange Management Act, 1999 (for short "the FEMA") and Regulation 2(v) of the FEMA Regulations defines "foreign exchange derivative contract" to mean a financial transaction or an arrangement in whatever form and by whatever name called, whose value is derived from price movement in one or more underlying assets. He referred to Schedule-I of the FEMA Regulations to show that foreign exchange derivative contract was permissible for a person resident in India. Mr. Sundaram vehemently argued that as the purpose of the Master Circular is to ensure that the clients of the banks who had defaulted in their payment/repayment obligations of the dues to the banks are not given additional finance, a client of the bank who had defaulted in not paying its dues to the bank under a foreign exchange derivative transaction would also be covered under the Master Circular. He submitted that as the respondent no.1 had defaulted in making payment of Rs.1,56,08,084.70 as on 29.12.2008 on account of foreign exchange derivative transactions, the appellant was required by the instructions of the RBI in the Master Circular to report the case to the RBI as well as other banks and financial institutions as a wilful defaulter. He submitted that the High Court was, therefore, not right in setting aside the decision dated 07.04.2009 of the appellant-bank and allowing the writ petition of the respondent no.1.

6. Mr. Bhaskar P. Gupta, learned senior counsel for the respondent no.1, on the other hand, submitted that under the Master Circular a wilful default can arise only out of a lender –borrower relationship between the bank and its constituent and, therefore, unless the bank has given a loan or an advance to its constituent, the question of wilful default under the Master Circular does not arise. He submitted that a reading of the Master Circular would show that a declaration of a wilful

defaulter has severe consequences for the party declared as a wilful defaulter, such as squeezing of credit under clause 2.5(a) of the Master Circular and criminal liability under clause 4.3 of the Master Circular. He argued that considering the severe consequences that follow a declaration of wilful defaulter, the definition of "wilful default" in the Master Circular which refers to defaults in repayment obligations to a "lender" has to be strictly construed. He cited the decisions of this Court in Bijaya Kumar Agarwala v. State of Orissa [(1996) 5 SCC 1] and Sakshi v. Union of India & Ors. [(2004) 5 SCC 518] for the proposition that a statute enacting an offence or imposing a penalty is to be strictly construed. He submitted that a derivative transaction does not involve lending of funds by way of a loan or an advance by the bank to its constituent and, therefore, the dues under a derivative transaction will not fall in any of the sub- clauses (a) to (d) of clause 2, which defines a wilful defaulter for the purpose of the Master Circular. He argued that there is a fundamental difference between a loan/advance and a derivative transaction and the fundamental difference is that in the case of a derivative transaction, either party could be required to effect payment depending on the change in interest rate, foreign exchange rate credit rating or credit index, price of securities as will be clear from Section 45U of the 1934 Act, whereas in the case of a loan or an advance, it is the borrower alone which has to effect payment. He submitted that in none other circulars issued after the Master Circular of 01.07.2008 there is any change in the definition of 'wilful defaulter' so as to bring in defaulters of payment of dues under the derivative transactions within the meaning of 'wilful defaulters'. In this context, he referred to the Master Circulars dated 01.07.2009, 01.07.2010, 01.07.2011 and 01.07.2012. He vehemently argued that if the RBI intended to include defaulters of dues under the derivative transactions within the meaning of the expression "wilful defaulter", the RBI could have changed the definition of "wilful defaulter" in the subsequent Master Circulars.

7. Mr. Bhaskar P. Gupta next submitted that the stand of the RBI before the High Court in the affidavits filed on its behalf was that the question as to whether there was a lender-borrower relationship between the appellant and the respondent no.1 under the contract between them and whether there was a legally enforceable obligation between the appellant and the respondent no.1 are issues which can be determined by a civil court in a properly instituted suit in accordance with law and it is not possible for the RBI to interpret the contract between the appellant and the respondent no.1 and express any opinion in that regard and that determination of such issues arising under a contract cannot be done in a proceeding under Article 226 of the Constitution and hence the writ petition of the respondent no.1 was liable to be dismissed. He submitted that the RBI cannot now take a stand before this Court in this appeal that the respondent no.1 was a wilful defaulter covered by the Master Circular inasmuch as it had not paid its dues to the appellant under the derivative transactions. He submitted that if the RBI was aggrieved by the finding in the impugned judgment of the Calcutta High Court that the Master Circular did not apply to dues under a derivative transaction, it could have filed a Special Leave Petition under Article 136 of the Constitution against the impugned judgment of the Calcutta High Court, but the RBI has not done so. According to him, therefore, the impugned judgment of the Calcutta High Court should be sustained by this Court in this appeal.

CIVIL APPEAL No. 8917 OF 2012 (Arising out of SLP (C) NO. 27730 of 2011)

8. Leave granted.

9. This is an appeal against the judgment dated 23/24.08.2011 of the Bombay High Court in Writ Petition (Lodg.) No. 204 of 2011.

10. The facts very briefly are that the appellant no.1, a pharmaceutical company, agreed to enter into foreign exchange derivative transactions with respondent no.1-bank to hedge its foreign currency risks arising out of export of its products and for this purpose executed an International Swaps and Derivative Association (ISDA) Master Agreement on 29.08.2005. During 2006-2008, the appellant and respondent no.1-bank entered into nine foreign exchange derivative transactions, out of which four were foreign currency swap transactions and five were foreign currency option transactions. On 01.07.2010, the Reserve Bank of India (for short 'the RBI') issued a Master Circular on Wilful Defaulters (for short 'the Master Circular'). The Master Circular contained instructions of the RBI to banks and financial institutions regarding reporting of wilful defaulters to other banks and financial institutions and the measures to be imposed on wilful defaulters by such banks and financial institutions. Respondent no.1 issued a notice dated 15.10.2010 to the appellant no.1 to show-cause why the respondent no.1 should not classify the appellant no.1 as a wilful defaulter under the Master Circular, as the appellant no.1 had not paid the dues to the tune of of Rs.2.92 Crores under three of the derivative transactions. In the said show- cause notice, the appellant no.1 was also informed that it can make a representation against the decision of the respondent no.1 to classify the appellant no.1 as wilful defaulter to the Grievance Redressal Committee of the respondent no.1-bank. The appellant no.1 submitted its reply dated 20.11.2010 to the respondent no.1-bank contending that the Master Circular was applicable to dues arising out of a lender-borrower relationship and as the alleged dues arise under the derivative transactions and not against a credit facility sanctioned by the bank, there was no lender-borrower relationship between the respondent no.1-bank and the appellant and, therefore, the Master Circular was not applicable to the case of the appellant. The Grievance Redressal Committee of the respondent no.1-bank considered the reply of the appellant no.1 and by its decision dated 28.01.2011 held that the appellant no.1 was a wilful defaulter covered by the Master Circular as it had defaulted in its obligations to the bank towards the derivative transactions. The appellant no.1 filed Writ Petition No. 204 of 2011 challenging the decision dated 28.01.2011 of the Grievance Redressal Committee of the respondent no.1-bank and by order dated 24.08.2011, the Bombay High Court quashed the order dated 28.01.2011 of the Grievance Redressal Committee of the respondent no.1-bank on the ground that the order was passed in breach of principles of natural justice inasmuch as the appellant no.1 was not heard before the order was passed. The Bombay High Court, however, held in the impugned judgment dated 24.08.2011 that the Master Circular covered default by a party in complying with the payment obligations under derivative transactions and observed that it will be open to the Grievance Redressal Committee to pass fresh orders in accordance with law after complying with the principles of natural justice. Aggrieved by the finding of the Bombay High Court in the impugned judgment that the Master Circular covers defaults in complying with the payment obligations under derivative transactions, the appellants have filed this appeal.

11. Mr. Soli J. Sorabjee, learned counsel for the appellant, submitted that the High Court has not correctly interpreted the Master Circular and has erroneously recorded a finding that wilful default covers defaults in complying with payment obligations under derivative transactions by relying on circulars issued by the RBI on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010

which do not relate to wilful defaults but relate to prudential norms, assets classification as non-performing assets, etc. He submitted that it is a settled principle of statutory interpretation that a definition in one Act should not be imported into another Act and referred to the decision of this Court in Commissioner of Sales Tax, M.P. v. Jaswant Singh Charan Singh [1967 (2) SCR 720] in which a reference to other Acts to construe an Act has been critically commented by Lord Loreburn in Macbeth v. Chislett [(1910) A.C. 220, 224] as a "new terror in the construction of Acts". He vehemently submitted that the Master Circular should be construed on its own terms and language and so construed, it will be clear that the basic postulate and the underlying assumption of the Master Circular is existence of a lender-borrower relationship and that the Master Circular does not contemplate nor cover a creditor and debtor relationship. He relied on the decisions of this Court in Bombay Steam Navigation Co. (1953) Private Ltd. v. C.I.T., Bombay [1965 (1) SCR 770], C.I.T., Lucknow v. Bazpur Co-operative Sugar Ltd. [1989 Supp. (2) SCC 240] and Ram Ratan Gupta v. Director of Enforcement, Foreign Exchange Regulation & Anr. [1966 (1) SCR 651] in which the distinction between a loan and a debt has been judicially brought out to say that whereas a loan of a money results in a debt, every debt is not a loan. He submitted that in a loan transaction, therefore, there is a lender and a borrower, but in a transaction which is not a loan there is no lender and no borrower, but there may be a creditor and a debtor. He submitted that in a derivative transaction the dues payable by a party to the bank may be a debt and the bank may be a creditor and such party may be a debtor, but the bank in a derivative transaction is not a lender and such party from whom the dues are payable to the bank is not a borrower. He further submitted that the interpretation given by the RBI to the Master Circular cannot be accepted by the Court by recourse to the doctrine of contemporanea expositio as this doctrine was applicable to ancient statutes and has no application to modern statutes as has been noted in Principles of Statutory Interpretation (12th Edn. 2010) by Justice G.P. Singh at pages 341-349. He further submitted that if the doctrine of contemporanea expositio is applicable, the interpretation given by the RBI in the Master Circular may have some weight, but cannot be decisive as interpretation of the Master Circular, in the facts of the present case, is a judicial function to be performed by the Court. In support of this proposition, he relied on Bhuwalka Steel Industries Ltd. v. Bombay Iron & Steel Labour Board & Anr. [(2010) 2 SCC 273]. He submitted that the RBI could have issued a Circular or a Press Note and made a public declaration that a defaulter of payment obligations under a derivative transaction to the bank is also covered by the Master Circular before the matter reached the Court. He submitted that after the matter reaches the Court, the RBI cannot file affidavits taking a stand that defaulters of dues under derivative transactions to the bank are covered by the Master Circular.

12. Mr. Sorabjee referred to Section 6 of the 1949 Act to show that a bank can engage in several businesses other than lending such as deal in derivatives and such business will not fall within the core banking business of the bank under clauses (a) to (o) of Section 6 of the 1949 Act and it will also not constitute lending. He referred to the decision in ICICI Bank Ltd. v. Official Liquidator of APS Star Industries Ltd. [(2010) 10 SCC 1] in which this Court has broadly categorised the functions of the banking company into two parts, namely, core banking of accepting deposits and lending and miscellaneous functions and services. Accordingly to him, derivative is a part of the miscellaneous parts of functions and services provided by the bank and do not create a lender-borrower relationship. He submitted that the Master Circular contemplates grave consequences affecting the right of a person under Article 19(1)(g) of the Constitution of India to carry on any trade, business or

occupation and should be strictly construed as otherwise it will be exposed to the challenge of unconstitutionality. In support of this argument, he relied on the decisions of this Court in Tolaram Relumal & Anr. v. State of Bombay [1955 (1) SCR 158], Chandigarh Housing Board v. Major General Devinder Singh & Anr. [(2007) 9 SCC 67], Delhi Airtech Services Private Limited & Anr. v. State of Uttar Pradesh & Anr. [(2011) 9 SCC 354] and Shah & Co., Bombay v. State of Maharashtra & Anr. [1967 (3) SCR 466].

13. Mr. Dushyant Dave and Mr. S. Ganesh, learned senior counsel appearing for respondent no.1-bank, submitted that the derivative transactions between the appellant no.1 and respondent no.1 are swaps and options and the liability of the appellant no.1 to the respondent no.1 under these transactions arose on the settlement date. They referred to the decision of the Madras High Court in Rajshree Sugars & Chemicals Ltd. v. Axis Bank Ltd. [(2008) 8 MLJ 261] in which four categories of derivative transactions have been described including swaps and options. In this decision, the Madras High Court has taken note of the fact that a swap is an agreement made between two parties to exchange payments on regular future dates and the option gives the holder the right to buy or sell an underlying asset at a future date at a predetermined price. They also referred to the ISDA agreement between the appellant no.1 and the respondent no.1 to explain the nature of the derivative transactions between the appellant no.1 and the respondent no.1. They submitted that as the appellant no.1 did not pay dues amounting to Rs.29.2 million under the derivative transactions, the respondent no.1 issued a notice to the appellant dated 15.10.2010 to show cause why the respondent no.1 should not classify the appellant as a wilful defaulter under the Master Circular and also informed the respondent no.1 that it could make a representation against the decision to classify it as a wilful defaulter to the Grievance Redressal Committee of the respondent no.1-bank. They submitted that the appellant no.1 did make a representation and was also subsequently heard, but the Grievance Redressal Committee held that the appellant was a wilful defaulter under the Master Circular.

14. They further submitted that the RBI has always treated a derivative transaction as a facility granted by a bank to its customer in order to enable the customer to manage its risks arising from fluctuations in foreign exchange and interest rates. They referred to the Master Circular as well as the other Circulars dated 02.07.2007, 13.10.2008, 08.12.2008 and 09.04.2009 to show that a derivative transaction is a non-funded credit facility enjoyed by a borrower from a bank. They submitted that both Section 45A(b) of the 1934 Act and Section 2(c) of the 2005 Act define a "borrower" as covering a person to whom "any credit facility" has been granted, including any credit facility other than a loan. They submitted that, therefore, the word "borrower" in the Master Circular covers not only a loanee but also any other customer of the bank enjoying a credit facility such as a derivative transaction. They submitted that the Master Circular is an administrative circular issued by the RBI in exercise of its regulatory power and, therefore, can be clarified by the RBI where a doubt arises as to whether derivative transactions are covered under the Master Circular and the RBI has clarified in its affidavit filed before this Court that the derivative transactions are covered by the Master Circulation. They cited the decision of this Court in Desh Bandhu Gupta and Co. and others v. Delhi Stock Exchange Association Ltd. [(1979) 4 SCC 565] that an administrative construction placed by the authority or officers charged with executing a statute generally should be clearly wrong before it is overturned and is entitled to considerable weight. They also referred to the

decision of this Court in Peerless General Finance & Investment Co. Ltd and another v. Reserve Bank of India [(1992) 2 SCC 343] wherein it has been held that Courts are not to interfere with economic policy which is the function of the expert bodies and submitted that the view taken by the RBI that dues under derivative transactions covered by the Master Circular should not be disturbed by this Court.

CIVIL APPEAL No. 8918 OF 2012
(Arising out of SLP (C) NO. 28477 of 2011)

15. Leave granted.

16. This is an appeal against the judgment dated 23/24.08.2011 of the Bombay High Court in Writ Petition (Lodg.) No. 345 of 2011.

17. The facts briefly are that the appellant no.1 carries inter alia the business of PVC pipes and PVC resins and the appellant no.2 is its Assistant Managing Director and Chief Officer. The appellant no.1 entered into several derivative transactions with respondent no.3-bank named as USD/JPY Target Profit Forward Transactions during the years 2007-2008. On 01.07.2009, the Reserve Bank of India (for short 'the RBI'), respondent no.1, issued a Master Circular on Wilful Defaulters (for short 'the Master Circular'). The Master Circular contained instructions of the RBI to the banks and financial institutions regarding reporting of wilful defaulters to other banks and financial institutions and the measures to be imposed on wilful defaulters by the said banks and financial institutions. The respondent no.3-bank issued a demand notice dated 20.08.2009 to the appellant no.1 calling upon the appellant to pay USD 20,821,480.40 with interest thereon as dues of the appellant no.1 to the respondent no.3-bank under the derivative transactions. As the appellant no.1 did not pay the said dues, the respondent no.3 issued a notice dated 19.04.2010 to the appellant to show cause why the appellant will not be classified as a wilful defaulter under the Master Circular. The appellant no.1 replied vide its letter dated 10.05.2010 denying the allegations made by the respondent no.3-bank in the notice dated 19.04.2010 and requesting the respondent no.3-bank to give a fair and reasonable opportunity to place its representation before the Grievance Redressal Committee of the respondent no.3-bank before a final decision is taken to classify the appellant no.1 as a wilful defaulter. The Grievance Redressal Committee of the respondent no.3-bank heard the appellant no.1 on 13.12.2010, but passed an order on 20.01.2011 declaring the appellant no.1 as a wilful defaulter. Aggrieved, the appellants filed Writ Petition (lodg.) No. 345 of 2011 before the Bombay High Court challenging the order dated 20.01.2011 of the Grievance Redressal Committee. By the impugned judgment, the Bombay High Court held that the Master Circular covers the outstanding claims of respondent no.3- bank against the appellant no.1 arising out of the foreign exchange derivative transactions. The High Court, however, left it open to the Grievance Redressal Committee to pass fresh orders after complying with the principles of natural justice. The appellants have, therefore, filed this appeal.

18. Dr. A.M. Singhvi, learned senior counsel appearing for the appellants, submitted that in the

present case the respondent no.3-bank has not sanctioned any credit or other facility for derivative transactions in favour of the appellant no.1 and as such there was no International Swaps and Derivatives Association (ISDA) agreement between the appellant and the respondent no.3 for the derivative transactions. He submitted that a foreign exchange derivative contract means a financial transaction or an arrangement whose value is derived from price movement in one or more underlying assets. He submitted that under the FEMA Regulations any authorized person including an authorized dealer, a money changer, a financial banking unit, or any other person can deal with foreign exchange derivatives and thus foreign exchange derivative transactions are not essentially banking transactions. He explained that the banks have to get a separate licence to be an authorized person to deal with foreign exchange derivatives. He submitted that Chapter III-A of the 1934 Act relates to the collection and furnishing of credit information and a reading of Section 45A in Chapter III-A would show that credit information covers only information in relation to borrowers to whom any credit limit has been sanctioned by any banking company. He vehemently argued that in any case Section 45E in Chapter III-A of the 1934 Act clearly provides that any credit information contained in any statement submitted by a banking company under Section 45C or furnished by the bank to any banking company under Section 45D shall be treated as confidential. He submitted that any information relating to a derivative transaction entered into by a customer of the bank cannot, therefore, be disclosed by the bank either to the RBI or to any other bank. He also cited the decision of the King's Bench in Tournier v. National Provincial and Union Bank of England [(1924) 1 KB 461] for the proposition that there is an implied contract between the bank and the customer that the bank will not disclose any information relating to the customer to any third party. He submitted that any disclosure of information relating to the defaults made by the customer of his obligations under a derivative transaction will be breach of the implied contract of confidentiality between the bank and its customer. He submitted that similarly the 2005 Act covers only the "credit information" as defined in the 2005 Act and as dues under a foreign exchange derivative transaction is not "credit information" within the meaning of the expression as defined in the 2005 Act, any disclosure of information relating to foreign exchange derivative transactions by the bank with its customer is not authorized under the 2005 Act. He submitted that the FEMA and the 'FEMA Regulations' which comprehensively deal with the foreign exchange derivatives and the 1949 Act also do not authorize disclosure of any information relating to derivative transactions affecting the customer of the bank.

19. Mr. Singhvi reiterated the arguments of Mr. Sorabjee that the Master Circular covers the dues under the borrower-lender relationship between the customer and the bank. He submitted that as derivative transactions did not involve a borrower-lender relationship at all, it could not become a borrower-lender subsequently on default of payment of the demand made by the bank under the derivative transaction. He submitted that the RBI has not given any definite opinion as to whether the dues under a derivative transaction would be covered under the Master Circular and in any case the opinion of the RBI is not consistent and is in conflict with the statutory provisions. He cited Desh Bandhu Gupta and Co. and Others v. Delhi Stock Exchange Association Ltd. [(1979) 4 SCC 565] to submit that the interpretation given by the RBI to the Master Circular could not have any controlling effect on the Courts and if occasion arises, will have to be disregarded by the Courts for cogent and persuasive reasons. He finally submitted that if the Master Circular is construed to cover derivative contracts it will have the effect of black listing the customers who resist demands made by the banks towards their alleged dues under the derivative transactions and will ruin their business

as well as their reputation and the Master Circular will become arbitrary and violative of Article 14 of the Constitution. He submitted that as the Master Circular has a penal effect, it has to be strictly construed and so construed, it will cover only a lender-borrower relationship and not the relationship between the bank and its customer in a derivative transaction. He submitted that the impugned judgment of the High Court therefore should be set aside.

20. Mr. Ashok Desai, learned senior counsel appearing for the respondent no.3, in reply, submitted that the Master Circular has been issued by the RBI in exercise of its powers under the 1934 Act and, therefore, for interpreting the Master Circular, the functions of the RBI under the 1934 Act have to be kept in mind. He referred to the preamble of the 1934 Act to show that the RBI has been constituted to inter alia operate the credit system of the country to its advantage. He also referred to the statement of objects and reasons of the Amendment Act of 26 of 2006 in which a reference has been made to the crucial role that derivative plays in re- allocating and mitigating the risks of corporates, banks and other financial institutions. He submitted that it is by the Amendment Act 26 of 2006 that various provisions were introduced in the 1934 Act in Chapter III- D for regulation of transactions in derivatives. He submitted that transactions in derivative therefore have an important bearing on the credit policy or credit system of the country and the views of the RBI whether the Master Circular would cover the dues under derivative transaction are decisive and should not be discarded by the Court.

21. He cited Ganesh Bank of Kurundwad Ltd. & Ors. v. Union of India & Ors. [(2006) 10 SCC 645] for the proposition that when two views are possible, the view of the regulating body, such as the RBI, should be accepted by the Court in matters falling within the domain of the RBI. He also relied on Joseph Kuruvilla Vellukunnel v. Reserve Bank of India [1962 Supp (3) SCR 632] in which the functions of the RBI including the functions relating to operation of the credit system of the country to its advantage have been discussed. He cited Peerless General Finance & Investment Company Ltd. and Another v. Reserve Bank of India and others [(1992) 2 SCC 343] in which this Court has held that the RBI has a large contingent of expert advice relating to matters affecting the economy of the country and nobody can doubt the bonafides of the RBI in issuing directions to the banks and it is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. He also relied on ICICI Bank Ltd. v. Official Liquidator of APS Star Industries Ltd. and others (supra) in which this Court has discussed the power of the RBI under the 1934 Act to regulate the business of banking companies and to control their management in certain situations. He submitted that in the aforesaid decision, reference has also been made to the permission of the RBI required if a banking company seeks to deal in derivative. He submitted that in Desh Bandhu Gupta and Co. and others v. Delhi Stock Exchange Association Ltd. [(1979) 4 SCC 565] in which the principle of contemporanea expositio applied to interpretation of statutes or any other document has been discussed. He submitted that in Common Cause (A Registered Society) v. Union of India and Another [(2010) 11 SCC 528] this Court has held that it is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or not and submitted that these comments were made by the Court while dealing with the issue of reduction of non- performing assets in the books of banks.

22. Mr. Desai also referred to the provisions of Chapter III-A of the 1934 Act on Collection and Furnishing of Credit Information and in particular Section 45A(b) and 45A(c) and submitted that information regarding dues under derivative transactions will come within the expression "credit information". He submitted that disclosure of such credit information is not hit by Section 45E of the 1934 Act as has been made clear in the language of the said section. He submitted that the Bombay High Court, therefore, has correctly interpreted the Master Circular and held that it also applies to dues under derivative transactions and the narrow view taken by the Calcutta High Court that the Master Circular will only apply to dues under a lender-borrower relationship is not correct.

The stand of the RBI in the three Civil Appeals:

23. Mr. Jaideep Gupta, learned senior counsel appearing for the RBI, submitted that the RBI did not challenge the judgment of the Calcutta High Court because it was not necessary for the RBI for two reasons: (i) one of the parties, namely Kotak Mahindra Bank Limited, had challenged the judgment of the Calcutta High Court and the RBI was a respondent in the Special Leave Petition filed by the Kotak Mahindra Bank Limited and (ii) the issue was also pending before the Bombay High Court which could take a view different from that of the Calcutta High Court. He submitted that at no stage, therefore, the RBI has accepted the judgment of the Calcutta High Court that the Master Circular did not cover wilful default of dues under derivative transactions. He submitted that the Bombay High Court has taken the correct view that the Master Circular will apply to the dues receivable by a bank under derivative transactions.

24. He referred to the language of the Master Circular to show that it covered both funded facilities such as loans and advances and non-funded facilities such as bank guarantees and derivative transactions. He referred to clause 2.6 of the Master Circular to show that when bank guarantees were invoked and are not honoured by the defaulting units on whose behalf the bank guarantee has been furnished, the defaulters are to be treated as wilful defaulters under the Master Circular. He argued that similarly when dues become payable under derivative transactions but the customer does not pay the dues, the customer becomes a wilful defaulter. He submitted that the definition of wilful defaulter in clause 2.1 of the Master Circular makes it clear in sub-clause (a) that a wilful default will cover also a case where a unit has defaulted in meeting its payment obligations to the lender even if it has a capacity to honour the said obligation. He submitted that in a lender-borrower relationship, there may be a repayment obligation to the lender but no payment obligation, whereas in a non-funded facility such as bank guarantee or a derivative transaction, there is no repayment obligation but a payment obligation. He submitted that a unit which has defaulted in meeting its payment obligation under a derivative transaction is thus covered under the Master Circular. He also referred to sub-clause (d) of clause 2.1 of the Master Circular in which the expression "bank/lender" finds place. He submitted that this sub- clause would show that the words "bank" and "lender" have been used interchangeably in the Master Circular and therefore the expression "lender" in the definition of sub-clauses (a), (b), (c) & (d) would include a bank. He submitted that the word "lender" in sub-clauses (a), (b), (c) &

(d) of the definition of wilful defaulter would therefore mean the bank and not the bank as a lender.

25. Mr. Jaideep Gupta submitted that a reading of Section 45V of the 1934 Act would show that transactions in a derivative, as may be specified by the RBI from time to time, shall be valid and therefore derivative transactions are under the regulatory purview of the RBI. He submitted that the Master Circular has to be interpreted keeping in view this regulatory power of the RBI and a purposive interpretation is to be given to the Master Circular. He cited the decisions of this Court in Securities and Exchange Board of India v. Ajay Agarwal [(2010) 3 SCC 765] in which the purpose of the Act was taken into consideration while interpreting the provisions of the Act. He also relied on Executive Engineer, Southern Electricity Supply Company of Orissa Ltd. (SouthCo) and another vs. Sri Seetaram Rice Mill [(2012) 2 SCC 108] in which this Court while interpreting the provisions of the Electricity Act, 2003, held that a construction which will improve the workability of the statute and make it more effective and purposive, should be preferred to any other interpretation which may lead to undesirable results.

26. He submitted that the definition of wilful defaulter in the Master Circular need not be altered by the RBI as and when new products such as the derivatives come into market as according to the RBI the definition of wilful defaulter is wide enough to cover such new products which come into market with the growth of the economy. He referred to the observations of this Court in Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) by L.Rs and Others [(1991) 3 SCC 67] that the legislature has often failed to keep pace with the changing needs and values and to provide for all contingencies and eventualities and it is, therefore, not only necessary but obligatory on courts to step into fill the lacuna. He also placed reliance on the comments of G.P. Singh's Principles of Statutory Interpretation (11th Edition) at p. 328 in this regard. He also relied on the observation of this Court in ICICI Bank Limited v. Official Liquidator of APS Star Industries Ltd. and Others (supra) that while interpreting the Banking Regulation Act, 1949, one needs to keep in mind not only the framework of the banking law as it stood in 1949 but also the growth and the new concepts that have emerged in the course of time. He submitted that when a Master Circular was issued, it contemplated all kinds of wilful defaulters of dues to the bank and when new products such as derivative transactions come into economy, the Courts will have to interpret the Master Circular in an expansive way so as to cover dues to the bank under such new products.

Interpretation of the Master Circular by the Court:

27. In these appeals, the only question that we are called upon to decide is whether a wilful default in meeting payment obligations to a bank under a derivative transaction will be covered under the Master Circular. The definition of wilful default is in para 2.1 of the Master Circular dated 01.07.2008 and the Master Circular dated 01.07.2009 and is the same. We, therefore, extract clause 2.1 of the Master Circular dated 01.07.2008, hereinbelow:

> "2.1 Definition of wilful default The term "wilful default" has been redefined in supersession of the earlier definition as under:
>
> A "wilful default" would be deemed to have occurred if any of the following events is noted:-

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

(b) The unit has defaulted in meeting its payment/repayment obligations to the lender and has not utilized 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 of 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."

28. We find from the definition of wilful default in the Master Circular quoted above that a wilful default would be deemed to have occurred in any of the events mentioned in sub-clauses (a), (b), (c) and (d) of clause 2.1.

These sub-clauses use the word "lender" and for this reason the Calcutta High Court has taken a view in the impugned judgment that the Master Circular applies only to a lender-borrower relationship and thus only a wilful default by a borrower to the bank which has lent funds by way of loans and advances would be covered under the Master Circular and a party who has not borrowed any money from a bank and has availed the facility of derivative transaction from a bank and has defaulted in meeting its payment obligation to the bank under the derivative transaction is not covered by the Master Circular. The Calcutta High Court, therefore, has gone by a literal interpretation of the word "lender" in sub-clauses (a), (b), (c) and (d) in the definition of wilful default in clause 2.1 of the Master Circular.

29. This approach of the Calcutta High Court in interpreting the Master Circular, in our considered opinion, is not correct because it is a settled principle of interpretation that the words in a statute or a document are to be interpreted in the context or subject-matter in which the words are used and not according to its literal meaning. In Principles of Statutory Interpretation, 13th Edition, 2012, Justice G.P. Singh has given this explanation to the rule of literal construction at page 94:

"When it is said that words are to be understood first in their natural, ordinary or popular sense, what is meant is that the words must be ascribed that natural, ordinary or popular meaning which they have in relation to the subject-matter with reference to which and the context in which they have been used in the statute. Brett, M.R. called it a "cardinal rule" that "Whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the

> subject-matter with regard to which they are used". "No word", says Professor H.A. Smith "has an absolute meaning, for no words can be defined in vacuo, or without reference to some context". According to Sutherland there is a "basic fallacy" in saying "that words have meaning in and of themselves", and "reference to the abstract meaning of words", states Craies, "if there be any such thing, is of little value in interpreting statutes". In the words of Justice Holmes: "A word is not a crystal transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used." Shorn of the context, the words by themselves are "slippery customers". Therefore, in determining the meaning of any word or phrase in a statute the first question to be asked is – "What is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the Legislature, that it is proper to look for some other possible meaning of the word or phrase. The context, as already seen, in the construction of statutes, means the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy." We will, therefore, have to interpret the word "wilful default" in the Master Circular by reading the Master Circular as a whole, looking at the provisions of the 1934 Act and the 1949 Act under which the RBI has powers to issue circulars and instructions to the banks, the purpose for which the Master Circular was issued and the mischief that the Master Circular intends to remedy because these constitute the context and the subject-matter in which the definition of wilful default finds place in the Master Circular.

30. The Bombay High Court, on the other hand, has come to the conclusion in the impugned judgment that the Master Circular covers also a default in complying with the payment obligations under derivative transactions by relying on the language of not only the Master Circular dated 01.07.2009 but also of the circulars issued by the RBI on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 which do not relate to wilful default but relate to prudential norms, assets classification as non- performing assets, etc. This approach of the Bombay High Court in interpreting the Master Circular, in our considered opinion, is also not correct because the subject matter of these circulars of the RBI issued on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 do not relate to wilful default but relate to prudential norms, assets classification as non-performing assets etc. These circulars issued by the RBI on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 may have been issued by the RBI but these are not circulars amending or clarifying the definition of wilful default in the Master Circular. The circulars issued by the RBI on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 on which the Bombay High Court has relied on while interpreting the definition of wilful default in the Master Circular do not constitute the context or the subject-matter in which the definition of wilful default in the Master Circular has to be construed. The context will only include pari materia circulars issued by the RBI, but will not include circulars issued by the RBI on subject-matters other than wilful default.

31. On a reading of the paragraph in the Master Circular titled "Introduction", we find that pursuant to the instructions of the Central Vigilance Commission for collection of information on wilful defaults of Rs.25 lakhs and above, a scheme was framed by the RBI with effect from 01.04.1999 under which the banks and notified All India Financial Institutions were required to submit to the RBI the details of the wilful defaulters. Hence, the Master Circular originated pursuant to the instructions of the Central Vigilance Commission and these instructions are contained in a communication dated 27.11.1998 of the Central Vigilance Commission on the subject "improving vigilance administration in banks". The instructions have been issued by the Central Vigilance Commission in exercise of its powers under Section 8(1)(h) of the Central Vigilance Commission Ordinance, 1998, whereunder it exercises superintendence over the vigilance administration of the various Ministries of the Central Government or Corporations established by or under any Central Act, Government Companies, Societies and local authorities owned or controlled by the Central Government. Para 2.3 of the aforesaid instructions issued by the Central Vigilance Commission is extracted hereinbelow:

> "2.3 Lack of communication between Banks
>
> 1. All cases of willful default of Rs.25 lakhs and above will be reported by all banks to RBI as and when they occur or are detected.
>
> 2. Whether a matter is a case of willful default will be decided in each bank by a Committee of Officers.
>
> 3. The RBI will circulate the information received from the banks of wilful default, every three months. The data with the RBI will also be accessible directly by the banks concerned after the WAN is installed in position.
>
> 4. There should be greater intra bank communication about willful default, frauds, cheating cases etc. so that the same bank does not get exploited in different branches by the same defaulting parties."

32. It will be clear from the language of the aforesaid instructions issued by the Central Vigilance Commission that all cases of wilful default of Rs.25 lakhs and above were to be reported by all the banks to the RBI as and when they occur or are detected and the RBI was required to circulate the information received from the banks of wilful default every three months and there was to be greater intra bank communication about the wilful defaults. These instructions of the Central Vigilance Commission covered to "all cases of wilful default of Rs.25 lakhs and above" and were not confined to only wilful default by a borrower of his dues to the bank in a lender-barrower relationship. Thus, it will be clear from the aforesaid instructions of the Central Vigilance Commission that all cases of wilful defaults of Rs.25 lakhs and above were to be reported by the banks to the RBI and not just cases of defaults by borrowers of loans or advances from banks and the mischief that was sought to be remedied was that banks are not exploited by parties who have the capacity to pay

their dues to the banks but who willfully avoid paying their dues to the banks.

33. Pursuant to the aforesaid instructions of the Central Vigilance Commission, the RBI circulated a Scheme for Collection and Dissemination of information on cases of wilful default of Rs.25 lacs and above which was to come into force with effect from 01.04.1999. Sub-para (ii) of the scheme in Para 2 of the Circular dated 20.02.1999 is extracted hereinbelow:

"2(ii) The scheme will cover all non-performing borrowal accounts with outstandings (funded facilities and such non-funded facilities which are converted into funded facilities) aggregating Rs.25 lakhs and above." It will be clear from the language of sub-para (ii) of Para 2 of the scheme quoted above that the scheme was to cover not only funded facilities, but also non-funded facilities which are converted into funded facilities. Thus, the scheme relating to Collection and Dissemination of information on cases of wilful default of Rs.25 lacs and above was to cover not only loans and advances which are funded facilities, but also facilities which do not relate to loans and advances.

34. When we look at the Master Circular, we find that the purpose of the Master Circular is "to put in place a system to disseminate credit information pertaining to wilful defaulters for cautioning banks and financial institutions so as to ensure that further bank finance is not made available to them". Hence, the purpose of the Master Circular is to have a system to disseminate credit information pertaining to wilful defaulters amongst banks and financial institutions so that no further bank finance is made available to such wilful defaulters from such banks and financial institutions. The expression "credit information" has not been defined in the Master Circular, but has been defined in Section 45A(c) of the 1934 Act as follows:

"45A(c). "credit information" means any information relating to–

(i) the amounts and the nature of loans or advances and other credit facilities granted by a banking company to any borrower or class of borrowers;

(ii) the nature of security taken from any borrower or class of borrowers for credit facilities [granted to him or to such class;

(iii) the guarantee furnished by a banking company for any of its customers or any class of its customers;

(iv) the means, antecedents, history of financial transactions and the credit worthiness of any borrower or class of borrowers;

(v) any other information which the Bank may consider to be relevant for the more orderly regulation of credit or credit policy.] It will be clear from the language of

> sub-clause (v) of Section 45A(c) of the 1934 Act quoted above that credit information means not only any information relating to matters in sub-clauses (i),(ii),(iii) and (iv), but also relates to any other information which the bank considers to be relevant for the more orderly regulation of credit or credit policy.

Hence, "credit information" is not confined to information relating to a borrower of the bank, but may also relate to a constituent of the bank who intends to take some credit from the bank. The purpose of the Master Circular being to caution banks and financial institutions from giving any further bank finance to a wilful defaulter, credit information cannot be confined to only the wilful defaults made by existing borrowers of the bank, but will also cover constituents of the bank, who have defaulted in their dues under banking transactions with the banks and who intend to avail further finance from the banks.

35. Keeping in mind the mischief that the Master Circular seeks to remedy and the purpose of the Master Circular, we interpret the words used in the definition of 'wilful default' in clause 2.1 of the Master Circular to mean not only a wilful default by a unit which has defaulted in meeting its repayment obligations to the lender, but also to mean a unit which has defaulted in meeting its payment obligations to the bank under facilities such as a bank guarantee. According to us the word 'lender' in sub-clauses

(a), (b), (c) and (d) means the "bank" because "payment obligations" mentioned in clause (a) do not ordinarily refer to obligations to a lender and clause (d) has used the expression "bank/lender". Moreover, the instructions of the Central Vigilance Commission pursuant to which the scheme relating to Collection and Dissemination of credit information on wilful defaulters was formulated by the RBI were to cover "all cases of wilful defaults of Rs.25 lakhs and above". Also Paragraph 2.6 of the Master Circular states inter alia that in cases where a letter of comfort and/or the guarantees furnished by the companies within the group on behalf of the willfully defaulting units are not honoured when invoked by the banks/financial institutions, such group companies should also be reckoned as wilful defaulters. It is, thus, clear that non-funded facilities such as a guarantee is covered by the Master Circular and when a guarantee is invoked by a bank/financial institution but is not honoured, the defaulting constituent of the bank is treated as a wilful defaulter even though it may not have borrowed funds from the bank in the form of advances or loans.

36. The scheme of Collection and Dissemination of information on cases of wilful default of Rs.25 lakhs and above was framed by the RBI in the year 1999 when the derivative transactions were not part of the country's economy. Under the FEMA Regulations, 2000 only the banks were authorized to deal with the derivative transactions. Section 45V introduced along with other provisions of Chapter IIID in the 1934 Act by the Reserve Bank of India (Amendment) Act, 2006 declared that transactions in derivatives, as may be specified by the RBI 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 RBI under the 1934 Act, FEMA Act or any other Act or instrument having the force of law, as may be specified by the RBI from time to time. Derivative transactions in India thus were valid only if they were with any bank or any other agency falling under the regulatory purview of the RBI because they would have a substantial bearing on the credit

system and credit policy in respect of which the RBI has regulatory powers under the 1934 and 1949 Acts. Such derivative transactions may not involve a lender-borrower relationship between the bank and its constituent, but dues by a constituent remaining unpaid to a bank may affect the credit policy and the credit system of the country. Information relating to defaulters of dues under derivative transactions who intend to take additional finance from the bank obviously will come within the meaning of credit information under Section 45A(c)(v) of the 1934 Act.

37. We do not find force in the submission of Dr. A.M. Singhvi that any information relating to a party who has defaulted in payment of its dues under derivative transactions cannot be disclosed by a bank to the RBI or any other bank because of an implied contract between the bank and its customer or by Section 45E of the 1934 Act. Sections 45C and 45E of the 1934 Act are extracted hereinbelow:

> "45C. Power to call for returns containing credit information.—(1) For the purpose of enabling the bank to discharge its functions under this chapter, it may at any time direct any banking company to submit to it such statements relating to such credit information and in such form and within such time as may be specified by the Bank from time to time.
>
> (2) A banking company shall, notwithstanding anything to the contrary contained in any law for time being in force or in any instrument regulating the constitution thereof or in any agreement executed by it, relating to the secrecy of its dealings with its constituents, be bound to comply with any direction issued under sub-

section (1)." "45E. Disclosure of information prohibited.—(1) Any credit information contained in any statement submitted by a banking company under Section 45C or furnished by the bank to any banking company under Section 45D shall be treated as confidential and shall not, except for the purposes of this Chapter, be published or otherwise disclosed.

(2) Nothing in this section shall apply to—

(a) the disclosure by any banking company, with the previous permission of the bank, of any information furnished to the bank under Section 45C;

(b) the publication by the bank, if it considers necessary in the public interest so to do, of any information collected by it under section 45C, in such consolidated form as it may think fit without disclosing the name of any banking company or its borrowers;

c) the disclosure or publication by the banking company or by the bank of any credit information to any other banking company or in accordance with the practice and usage customary among bankers or as permitted or required under any other law:

> Provided that any credit information received by a banking company under this clause shall not be published except in accordance with the practice and usage

customary among bankers or as permitted or required under any other law.

d) The disclosure of any credit information under the Credit Information Companies (Regulation) Act, 2005 (30 of 2005) (3) Notwithstanding anything contained in any law for the time being in force, no Court, Tribunal or other authority shall compel the bank or any banking company to produce or to give inspection of any statement submitted by that banking company under section 45C or to disclose any credit information furnished by the bank to that banking company under Section 45D." We have already held that information relating to a party who has defaulted in payment of its dues under derivative transactions to the bank is credit information within the meaning of Section 45A(c)(v) of the 1934 Act. Sub-

section (1) of Section 45C of the 1934 Act provides that the RBI may at any time direct any banking company to submit to it such statements relating to such credit information and in such form and within such time as may be specified by the RBI from time to time. Hence, information relating to a party, who has defaulted in payment of its dues under derivative transactions being credit information may be called for from the banking company by the RBI under sub-section (1) of Section 45C of the 1934 Act. Sub-section (2) of Section 45C of the 1934 Act further provides that the banking company shall, notwithstanding anything to the contrary contained in any law for time being in force or in any instrument regulating the constitution thereof or in any agreement executed by it, relating to the secrecy of its dealings with its constituents, be bound to comply with any direction issued under sub-section (1). Sub-section (1) of Section 45E says that such credit information shall be treated as confidential and shall not be published or otherwise disclosed "except for the purposes of this Chapter", but sub-section (2)(a) of Section 45E clearly provides that nothing in Section 45E shall apply to the disclosure by any banking company, with the previous permission of the RBI, of any information furnished to the RBI under Section 45C. Thus, confidentiality of any credit information either by virtue of any other law or by virtue of any agreement between the bank and its constituent cannot be a bar for disclosure of such credit information including information relating to a derivative transaction of the RBI under sub-section (1) of Section 45C.

38. We do not also find any force in the submission of Mr. Mr. Bhaskar P. Gupta that the Master Circular has penal consequences and, therefore, has to be literally and strictly construed. Clause 4.3 of the Master Circular, which contemplates criminal action by banks/financial institutions, is extracted hereinbelow:

"4.3 Criminal Action by Banks/Fls It is essential to recognize that there is scope even under the exiting legislations to initiate criminal action against wilful defaulters depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the Indian Penal Code (IPC) 1860. Banks/Fls are, therefore, advised to seriously and promptly consider initiating criminal action against wilful defaulters or wrong certification by borrowers, wherever considered necessary, based on the facts and circumstances of each case under the above provisions of the IPC to comply with our instructions and the recommendations of JPC.

> It should also be ensured that the penal provisions are used effectively and determinedly but after careful consideration and due caution. Towards this end, banks/Fls are advised to put in place a transparent mechanism, with the approval of their Board, for initiating criminal proceedings based on the facts of individual case." All that the aforesaid clause 4.3 of the Master Circular states is that there is scope even under the exiting legislations to initiate criminal action against wilful defaulters depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the Indian Penal Code, 1860 and the banks and financial institutions are strictly advised to seriously and promptly consider initiating criminal action based on the facts and circumstances of each case under the above provisions of the IPC. Thus, the Master Circular by itself does not have penal consequences, whereas Sections 403 and 415 of the IPC have penal consequences. The provisions of Sections 403 and 415 of the IPC obviously have to be strictly construed as these are penal provisions and will get attracted depending on the facts and circumstances of each case, but the provisions of the Master Circular need not be strictly construed. As we have held, the Master Circular has to be construed not literally but in its context and the words used in the definition of "wilful defaulter" in the Master Circular have to draw their meaning from the context in which the Master Circular has been issued.

39. We are also not impressed with the argument of Mr. Soli J. Sorabjee that the Master Circular contemplates grave consequences affecting the right of a person under Article 19(1)(g) of the Constitution of India to carry on any trade, business or occupation and should be strictly construed as otherwise it will be exposed to the challenge of unconstitutionality. No challenge was made by the writ petitioners before the Bombay High Court to the constitutionality of the Master Circular and the challenge by the writ petitioners before the Calcutta High Court was to the constitutionality of only Paragraph 3 of the Master Circular relating to the Grievance Redressal Mechanism. Hence, we are not called upon to decide in these appeals whether the Master Circular violates the right of a person under Article 19(1)(g) of the Constitution of India. Similarly, we cannot consider in these appeals, the contention raised by Dr. A. M. Singhvi that the Master Circular has the effect of black listing a bank's client and would, therefore, be arbitrary and violative of Article 14 of the Constitution. In these Civil Appeals, we are concerned with the interpretation of the Master Circular and on interpretation of the Master Circular, we find that the Master Circular covers not only wilful defaults of dues by a borrower to the bank but also covers wilful defaults of dues by a client of the bank under other banking transactions such as bank guarantees and derivative transactions.

40. In the result, we hold that wilful defaults of parties of dues under a derivative transaction with a bank are covered by the Master Circular and this we hold not because the RBI wants us to take this view, because this is our judicial interpretation of the Master Circular. The impugned judgment of the Calcutta High Court is set aside and the impugned judgment of the Bombay High Court is sustained. We make it clear that we have not expressed any opinion on the individual transactions between the bank and the parties and our judgment is based solely on the interpretation of the Master Circular. Accordingly, the appeal filed by Kotak Mahindra Bank Ltd. against the judgment of the Calcutta High Court is allowed and the appeals filed against the judgment of the Bombay High Court by different parties are dismissed. The parties, however, shall bear their own costs.

I.A. for intervention stands disposed of.

.....J. (A. K. Patnaik) .....J. (Swatanter Kumar) New Delhi, December 11, 2012.
