(2014) 09 GUJ CK 0006

In the Gujarat High Court

Case No : Special Civil Application Nos. 645 and 10120 of 2014

Ionic Metalliks APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34
Banking Regulation Act, 1949 — Section 21, 22, 22(4), 35, 35(A)
Companies Act, 1956 — Section 58A
Constitution of India, 1950 — Article 12, 13, 13(2), 14, 17
Contract Act, 1872 — Section 23
General Clauses Act, 1897 — Section 3(29)
Income Tax Act, 1961 — Section 119, 132, 179
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 42, 43
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2(g)
Reserve Bank of India Act, 1934 — Section 39, 41A, 42(6)(a)(iii), 45H, 45I
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(13), 13(2), 13(4), 17, 18
State Financial Corporations Act, 1951 — Section 32G

Citation : (2015) 2 GLH 156

Hon'ble Judges : J.B. Pardiwala, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Masoom K. Shah, Vishwas K. Shah and Mitul Shelat, Advocate for the Appellant; S.N. Soparkar, Sr. Advocate with Amar N. Bhatt, Nalini S. Lodha, Advocate for the Respondent

Judgement

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J.B. Pardiwala, J.—Since the legal issues raised in both the writ applications are more or less the same, those were heard together and are being disposed of by this common judgment.

2. The challenge in both the above captioned writ applications is to the legality and validity of a Master Circular dated 2nd July 2012 issued by the Reserve Bank of India in respect of "willful defaulter" and the notices were issued by the respective banks, calling upon the petitioners to show-cause as to why they

should not be declared as willful defaulters in terms of the Reserve Bank of India''s Master Circular.

Special Civil Application No. 645 of 2014:

3. The petitioner no. 1 is a proprietary firm. The petitioner no. 2 is a company registered under the Indian Companies Act, 1956, having its Registered Office within the State of Gujarat. The petitioner no. 3 is the Director of the petitioner no. 2 Company and the petitioner no. 4 is the Guarantor and also a Director of the Petitioner no. 2 Company.

4. The petitioners availed of a loan facility from the respondent no. 2 Punjab National Bank. The respondent no. 2 Bank noticed that the loan account of the petitioners was a Non-Performing Asset (NPA) since 30th June 2012 with the outstanding of Rs. 1027 lac (as on the date of the NPA) including the interest at the applicable rate.

5. Despite regular reminders from the bank for payment of the dues, no steps were taken by the petitioners in that regard. Therefore, the respondent no. 2 Bank issued a show-cause notice dated 19th February 2013 followed by a second show-cause notice dated 14th May 2013 and a final notice dated 8th January 2014 on the premise that the petitioners had defaulted in repayment of the loan amount and the funds borrowed from the Bank were siphoned off and not used for the purpose for which the amount of the loan was disbursed, for which the petitioners were called upon to show-cause as to why they should not be declared as ''willful defaulters'' in terms of the RBI Master Circular DBOD No. CID-BC. 1/20.16.2003/2011-12.

6. Such action of the Bank is the subject matter of challenge in the petition including a prayer to declare the RBI Master Circular dated 2nd July 2012 referred to above as ultra vires the Constitution of India and/or the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Act No. 54 of 2002) and/or the Reserve Bank of India Act, 1934 and/or the Banking Regulation Act, 1949 and/or the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 and/or the Credit Information Companies (Regulation) Act, 2005 and/or the Indian Contract Act.

Special Civil Application No. 10120 of 2014:

7. The petitioners availed of the facility of the Home Saver Account vide sanction letter dated 30th September 2010 to the tune of Rs. 3,45,87,900/- in Account No. 48111724 from the respondent no. 2-Standard Chartered Bank. The petitioners availed one more facility of the Home Saver Account by sanction letter dated 30th September 2010 of Rs. 1,45,12,100/- vide Account No. 48134899 from the respondent no. 2-Standard Chartered Bank. The Account No. 48134899 was declared as NPA on 1st December 2013 whereas the Account No. 48111724 was declared as NPA on 10th January 2013.

8. On 3rd April 2014, the petitioners addressed a letter to the respondent no. 2

Bank requesting for a closure of both the accounts.

9. On 20th May 2014, the petitioners were served with the notices under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

10. On 20th June 2014, the petitioners were served with the impugned notices under the RBI Circular DBOD No. CID. BC. 1/20.16.2003/2011-12 dated 1st July 2012, calling upon them to show-cause as to why they should not be declared as the willful defaulters. The petitioners replied to the said notices on 1st July 2014.

11. In the aforesaid background, the petitioners have prayed to declare the RBI Master Circular dated 1st July 2011 as ultra vires the Constitution of India and various other enactments. The petitioners have also prayed that the notice dated 20th June 2014 issued by the Respondent no. 2 Bank under the RBI Master Circular be also quashed and set-aside.

Submissions on behalf of the petitioners:

12. Mr. Vishwas Shah and Mr. Mitul Shelat, the learned advocates appearing for the respective petitioners made the following submissions:

The RBI Master Circular dated 1st July 2011 as well as the RBI Master Circular dated 2nd July 2012 in respect of the willful defaulters and the instructions contained therein are beyond the legislative competence of the RBI. The circular does not refer to any provision of law under which it has been issued.

13. It has been submitted that the stance of the Reserve Bank of India that issuance of the Master Circular is in exercise of the powers conferred under Section 21 and Section 35A of the Banking Regulation Act, 1949, is completely misplaced and erroneous. To fortify such submission, strong reliance has been placed on the decision of the Supreme Court in the case of Indian Banks'' Association, Bombay and Others Vs. Devkala Consultancy Service and Others, .

14. The impugned provisions of the Circular are substantive provisions affecting the rights of the citizens. The substantive provisions can only be by way of a legislative enactment and not by exercise of powers to issue directions.

15. It is submitted that to prescribe a particular conduct by a borrower as a "willful default", to impose the penalty for such a "willful default" and to prescribe a procedure for adjudication of the lis regarding the "willful default" are beyond the scope and ambit of Section 35(A) of the Banking Regulation Act, 1949.

16. The Chief General Manager has no power, authority and locus to issue the Master Circular, however, the circular issued by the Chief General Manager would not constitute a policy decision under Sections 21 and 35A of the Banking Regulation Act, 1949. The said Circular is required to have the phrase "in public interest" or "in interest of depositors" or "in interest of banking policy" and should indicate relevant materials and reasons that the Circular was being issued after considering the interest of all the above and for such reasons.

17. In support of such submission, strong reliance has been placed on a decision of the Karnataka High Court in the case of E. Sathyanarayanan and others v. Reserve Bank of India and others, reported in (2002)112 Company Cases 272.

18. The impugned Circular is violative of Article 14 of the Constitution as it has the effect of almost blacklisting the petitioners from obtaining any new loan from any other bank or financial institution and it attaches a social stigma on the Directors who may not be concerned in any manner as regards the day-to-day affairs and management of the company.

19. It is submitted that none of the provisions of the Reserve Bank of India Act or the Banking Regulation Act, 1949 confers any power upon the Reserve Bank of India to impose any penalty relating to a particular conduct of a borrower. The circular confers uncanalized, unbridled and untrammeled power upon the banks to decide the future of any borrower and makes the bank a judge in its own cause and also the decision whether the other banks should lend money to the borrower declared as a willful defaulter.

20. According to the learned advocates appearing on behalf of the petitioners the policy decision of the Reserve Bank of India in the form of a Master Circular is nothing but a direct infringement of Article 19(1)(g) of the Constitution which provides for right to trade, business or profession. A person may fail in one business, but he cannot be debarred or prohibited from doing any other business for which he may have to raise the necessary funds by obtaining loan from a bank or any other financial institution.

21. The Circular pre-supposes a default, which is otherwise required to be proved in accordance with law before the Debts Recovery Tribunal established under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (Act No. 51/1993) or any other competent forum. The word "debt" is defined under Section 2(g) of the RDBI Act, 1993. The question whether there exists any debt or not is a question the bank is obliged to prove and satisfy before the Debts Recovery Tribunal under the RDBI Act, 1993, against the borrower. It has been submitted that the impugned circular which seeks to delegate the function of making a judicial inquiry and issue a declaration regarding the conduct of a borrower as a "willful default" entails serious consequences. Such adjudication is essentially judicial in nature as it involves adjudication of a lis. Such an essential primary function cannot be delegated to a non-judicial authority like a private bank or even a nationalized bank.

22. In support of such submission, strong reliance has been placed on the decision of the Supreme Court in the case of Ram Prasad Narayan Sahi and Another Vs. The State of Bihar and Others, , and Sri Sadasib Prakash Brahmachari Vs. The State of Orissa, .

23. The provisions of the impugned circular violate the doctrine of "due process" and the concept of a "just, fair and reasonable law". The doctrine of due process is enshrined in Article 21 of the Constitution of India. In support of such

submission, strong reliance has been placed on the decisions of the Supreme Court in the case of (i) Directorate of Revenue and Another Vs. Mohammed Nisar Holia, ; (ii) State of Punjab Vs. Dalbir Singh, ; (iii) State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, and (iv) J.G. Engineers Pvt. Ltd. Vs. Union of India (UOI) and Another, .

Challenge to the validity of the Notice:

24. Apart from the challenge to the Constitutional validity of the Master Circular issued by the Reserve Bank of India, the petitioners have also challenged the proposed action on the part of the Bank.

25. It has been vehemently submitted by the learned advocates appearing on behalf of the petitioners that having regard to the contents of the notice it could be said that the Bank has already taken a decision to declare the petitioners as willful defaulters without disclosing any reasons in the show-cause notice and the show-cause notice is also bereft of the necessary particulars and details. In the absence of the necessary details and the reasons, the petitioners would not be able to effectively put forward their case.

26. Mr. Mitul Shelat, the learned advocate appearing for the petitioners of Special Civil Application No. 10120 of 2014, submitted that although the impugned action is at the instance of a private bank, viz. Standard Chartered Bank, yet the same figures as a scheduled bank in the Second Schedule of the Reserve Bank of India Act, 1934, and therefore, would be amenable to the writ jurisdiction of this Court under Article 226 of the Constitution so far as the challenge to the notice is concerned.

27. In support of his submission that the Standard Chartered Bank is amenable to the writ jurisdiction of this Court under Article 226 of the Constitution being a State or an instrumentality of a State within the meaning of Article 12 of the Constitution of India, Mr. Shelat has placed reliance on the following decisions:

(i) Electronics Corporation of India Limited Vs. Commissioner of Income Tax and Another, ;

(ii) The Praga Tools Corporation Vs. Shri C.A. Imanual and Others, ;

(iii) Apex Electricals Ltd. Vs. ICICI Bank Ltd., ;

(iv) M/s A-One Mega Mart P. Limited and Others Vs. HDFC Bank and Another, ;

(v) Inder Surgical Vs. Union of India, .

28. In such circumstances referred to above, it has been prayed that the petitions merit consideration and the reliefs prayed for in the respective petitions be granted.

Stance of the Reserve Bank of India:

29. In response to the notice served upon the Reserve Bank of India, an affidavit-

in-reply has been filed in the Special Civil Application No. 645 of 2014 on behalf of the same duly sworn by its Assistant General Manager, Department of Banking Supervision, Reserve Bank of India, Ahmedabad. The stance of the Reserve Bank of India as could be deduced from the averments made in the reply is thus:-

The petition is not maintainable against the Reserve Bank of India. There is no violation of any fundamental, legal or statutory rights of the petitioners by the RBI. The RBI has been constituted by the Reserve Bank of India Act, 1934, inter alia, for regulating the issue of bank notes and for keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country to its advantage. The RBI acts as the central bank of the country, exercises supervisory and regulatory powers as contemplated under the Reserve Bank of India Act, 1934 (RBI Act) as well as the Banking Regulation Act, 1949 (BR Act). The RBI has been conferred with the power to determine policy in relation to advances to be followed by banking companies. The RBI is conferred with wide powers for issue of directions/ guidelines to banks under the provisions of the Banking Regulation Act, 1949. It is the duty of the RBI to ensure development of banking in India in an orderly manner. As the banking regulator and supervisor in the country, the RBI has been issuing guidelines/directions to banks from time to time, and the banks are duty bound to implement the same.

30. Section 5(ca) of the Banking Regulation Act defines "banking policy" as any policy which is specified from time to time by the Reserve Bank of India in the interest of the banking system or in the interest of monetary stability or sound economic growth, having due regard to the interests of the depositors, the volume of deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources. Section 6 of the Banking Regulation Act specifies the forms of business in which banking companies may engage.

31. In terms of Section 21 of the Banking Regulation Act, where the RBI is satisfied that it is necessary or expedient in the public interest or in the interests of depositors or banking policy so to do, it may determine the policy in relation to the advances to be followed by the banking companies generally or by any banking company in particular and the concerned banking companies shall be duty bound to follow the policy so determined.

32. In terms of Section 22 of the Banking Regulation Act, no company can carry on banking business in India, unless it holds a license issued in that behalf issued by the RBI. In terms of Section 22(4) of the Banking Regulation Act, the RBI can cancel the license of the banking company. In terms of Section 35 of the Banking Regulation Act, the RBI has the power to conduct statutory inspection of any banking company or cause a scrutiny of the affairs of a banking company and its books of accounts.

33. The RBI has the powers to issue directions under Section 35A of the Banking

Regulation Act to the banking companies generally or to any banking company in particular in public interest or in the interest of the banking policy or to prevent the affairs of the banking company being conducted in a manner detrimental to the interest of its depositors or in a manner prejudicial to the interest of the banking company. The Banking Regulation Act envisages action to be taken by the RBI when RBI is satisfied that circumstances warrant such action. Section 36(1) of the Banking Regulation Act empowers the RBI to caution or prohibit banks against entering into certain transactions and generally give advice to any bank.

34. As regards the issuance of directions/guidelines/circulars etc. by the RBI, the necessary actions as empowered under the law and as considered appropriate and essential in a given situation have always been issued from time to time keeping in view the larger interest of a banking company, its depositors and the banking sector as a whole.

35. The former Finance Minister, in his budget speech in February 1994, had announced that in order to alert the banks and financial institutions and put them on guard against the borrowers who had defaulted in their dues or other lending institutions, the RBI was putting in place arrangements for circulating amongst the banks/financial institutions, the names of defaulting borrowers above a threshold limit. The objective of putting such a reporting mechanism in place was to arrest the increase of Non-Performing Assets of the banks. He had further mentioned that the RBI would also publish a list of defaulting borrowers against whom suits had been filed by banks and FIs.

36. In April 1994, the Reserve Bank of India framed a scheme of Disclosure of Information on Defaulting Borrowers of Banks and the Financial Institutions (FIs) for collection/dissemination of information from/to "banking companies". The "banking company" for the purpose also includes the "financial institutions" that may be notified by the Central Government in this behalf. Under the Scheme, the banks and the notified FIs were advised on 23rd April 1994 to furnish to the RBI the prescribed details of defaulting borrowers with outstanding amount (both funded and non-funded) of one crore and above which were classified as ''Doubtful'' and/or ''Loss'' and suit filed accounts on half yearly basis (September and March). The Scheme had the following objectives;

i) To alert the banks and FIs and to put them on guard against the borrowers who had defaulted in their dues to other lending institutions.

ii) To make public the name of the defaulting borrowers against whom suits had been filed by the banks/FIs.

37. At a meeting convened by the Central Vigilance Commission with the bankers on 24th November 1998, it was decided that the banks would report all cases of willful default of Rs. 25 lac and above to the RBI, which in turn, would circulate such lists to all banks on a quarterly basis. Pursuant to the instructions of the Central Vigilance Commission, the RBI introduced a scheme under which banks

and notified All India Financial Institutions were required to submit to the RBI the details of willful defaulters with outstanding of Rs. 25 lac and above. The Scheme came into force with effect from 1st April 1999. Accordingly, banks and financial institutions started reporting such cases of willful defaults which occurred or were detected after 31st March 1999 on a quarterly basis to the RBI.

38. Taking into consideration the concern expressed over the persistence of the ''willful default'' in the financial system in the 8th Report of the Parliament''s Standing Committee on Finance (Standing Committee), the RBI, in consultation with the Government of India, constituted a Working Group on Willful Defaulters (WGWD) under the Chairmanship of Shri S.S. Kohli, the then Chairman of the Indian Banks'' Association in May 2011 for examining some of the recommendations of the 8th Report on the Parliament''s Standing Committee on Financial Institutions. The Group submitted its report in November 2001. The recommendations of the Working Group of Willful Defaulters were further examined by an In-House Working Group constituted by the RBI. Accordingly, the banks/financial institutions were advised on 30th May 2002 for implementation of such recommendations with immediate effect.

39. Pending the passing of the legislation in respect of Credit Information Companies, the RBI, in terms of its circular DBOD No. DL. BC. 11/20.16.001/2001-02 dated 4th June 2002, advised the banks and financial institutions to submit a list of willful defaulters (of suit filed accounts) of Rs. 25 lac and above as on 31st March 2003 onwards, to the Credit Information Bureau (India) Ltd. (hereinafter referred to as "CIBIL") only and not to the RBI. The RBI continues to disseminate exclusively to the banks and financial institutions for their confidential use the credit information regarding willful defaulters of Rs. 25 lac and above (non-suit filed accounts) in a consolidated manner as reported for the purpose by the banks and financial institutions.

40. The Reserve Bank has been issuing various circulars from time to time to the scheduled commercial banks and All India Notified Financial Institutions with regard to dissemination of credit information pertaining to the willful defaulters for cautioning the banks and the financial institutions including action required to be taken against the willful defaulters. All these circulars were consolidated in the Master Circular on Willful Defaulters dated 1st July 2013 (Master Circular) issued by the RBI. The Master Circular was prepared to ensure that all the existing instructions on the subject were incorporated and consolidated in a single document and are available for the use of the banks and the financial institutions as also on the website of the RBI. The Circular on Willful Defaulters has been issued by the RBI under Sections 21 and 35A of the Banking Regulation Act, 1949 and are mandatory and binding on the banks.

41. The Master Circular on Willful Defaulters contains definition of the term "willful defaulter" and it also provides guidance as to how the terms "diversion of funds" and "siphoning of funds" are to be construed in the case of "willful default". The Master Circular specifically requires the banks and financial

institutions (FIs) to put in place a transparent mechanism for the entire process so that the provisions of the Master Circular are not misused and the scope of the discretionary powers conferred upon the banks and FIs are kept to the barest minimum. The Master Circular also requires the banks and FIs to ensure that a solitary or isolated instance is not made the basis for imposing any penalty on the willful defaulters. The Master Circular clearly prescribes the measures required to be adopted by the banks and FIs in identifying and reporting the instances of willful default. Paragraph 3 of the Master Circular stipulates that the decision to classify a borrower as willful defaulter should be entrusted to a committee of higher functionaries of the bank/FI concerned headed by the Executive Director and consisting of two GMs/DGMs as decided by the Board of the Bank/FI. Further, the decision taken on classification of the willful defaulters should be well documented and supported by requisite evidence and should clearly spell out the reasons for which the borrower has been declared as willful defaulter in terms of the guidelines issued by the Bank. The bank/FI is also required to advise the borrower concerned about the proposal to classify him as willful defaulter along with the reasons therefor. The bank/FI is also required to provide a reasonable time to the borrower for making representation against the decision to a committee headed by the Chairman and Managing Director of the bank/FI concerned. The Bank has prescribed a detailed procedure for classification of a particular borrower as a willful defaulter and such classification is required to be done by the higher authorities in the bank/FI concerned with a second screening at the level of the highest authority when a representation is made by the borrower. The procedure prescribed by the Bank provides ample opportunity to the borrower to present their case before the highest authorities in the bank/FI concerned before a decision is taken on his classification as a willful defaulter.

42. The process listed out in the Master Circular has been carefully designed by a body of experts. The objective is to built up an adequate, comprehensive and reliable information system on borrowers so that such willful defaulters are barred from further institutional credit in terms of the penal measures listed out therein. The Master Circular provides at the end of Para 2.5 that-

"it would be imperative on the part of the banks and FIs to put in place a transparent mechanism for the entire process so that the penal provisions are not misused and the scope of such discretionary powers are kept to the barest minimum. It should also be ensured that a solitary or isolated instance is not made the basis for imposing the penal action".

43. The Master Circular sets out the broad guidelines and the banks/FIs are expected to follow them dealing with individual cases. The Master Circular takes every possible care to make the process transparent and objective. Para 3 of the Master Circular prescribes the broad framework within which the banks/FIs are mandated to constitute and operate the Grievance Redressal Committees, leaving certain amount of flexibility for each banks/FIs to prescribe its detailed

process, if found necessary, before declaring its borrower as a willful defaulter. Further, the mechanism provided under para 3 requires involvement of higher functionaries so that an objective view is taken. The process is also transparent through a detailed documentation supported by requisite evidence and clear mentioning of reasons for classification of a borrower as willful defaulter. It also gives ample opportunity to the borrower to represent itself against the proposed action, followed by a personal hearing, if required. In short, the principles of natural justice are followed in the said para 3 of the Master Circular.

44. The Reserve Bank of India has been continuously issuing guidelines on ''Willful Defaulters'' in a phased manner commencing from 20th February 1999 to discourage the banks and financial institutions from granting any further financial aid to the willful defaulters, so as to act as a deterrent for the ''willful defaulters'' and in order to safeguard banks from the risks of loan repayments, interest and liquidity. The guidelines contained in the impugned Master Circular have been issued at the instance of the Central Vigilance Commission and pursuant to the recommendations of the Working Groups. The instructions contained in the Master Circular are aimed at curbing the menace of non-performing assets in banks. The RBI, by issuing the said Circular, has taken few positive steps to protect the interests of banks and financial institutions and to ensure that a list of willful defaulters is known and made available to other banks and financial institutions. The said purpose cannot be said to be arbitrary and unjustified. The RBI''s circulars on ''willful defaulters'' are in consonance with the law of the land and are meant for ensuring transparency and providing accountability so that the bank''s funds are not misused by the unscrupulous elements.

Submissions on behalf of the Reserve Bank of India:

45. Mr. S.N. Soparkar, the learned senior advocate assisted by Mr. Amar Bhatt, the learned advocate appearing on behalf of the Reserve Bank of India, made the following submissions:

Mr. Soparkar, at the outset, submitted that so far as the Standard Chartered Bank is concerned, the same is a private bank. Although the same is a Scheduled Bank and figures in Schedule-II to the Reserve Bank of India Act, yet it cannot be termed as an institution or a company carrying on any statutory or public duty. Therefore, in such circumstances although the petitioners of Special Civil Application No. 10120 of 2014 may be entitled to challenge the constitutional validity of the Master Circular issued by the Reserve Bank of India, yet no writ could be issued by this Court under Article 226 of the Constitution in so far as the proposed action pursuant to the issue of show-cause notice is concerned. In support of his submission, Mr. Soparkar has placed strong reliance on the decision of the Supreme Court in the case of the Federal Bank Ltd. v. Sagar Thomas and others, (2003)10 SC 737.

46. Mr. Soparkar further submitted that the contention raised on behalf of the petitioners as regards the absence of power on the part of the Reserve Bank of

India to issue the impugned Master Circular is also devoid of any merit. According to Mr. Soparkar, the Reserve Bank of India being one of the watchdogs of finance and economy of the nation derives the power from the provisions of Sections 21 and 35A of the Banking Regulation Act, 1949.

47. In response to our specific query as regards the control of the RBI upon the non-banking financial institutions, Mr. Soparkar drew our attention to Chapter-IIIB of the Reserve Bank of India Act, 1934, i.e. the provisions relating to Non-Banking Institutions receiving deposits as Financial Institutions. Mr. Soparkar invited our attention to Sections 45H and 45I of the Act, 1934. Section 45I(c) defines "financial institution" which means any non-banking institution which carries on as its business or part of its business any of the activities enumerated in clauses (i) to (f).

48. Mr. Soparkar also invited our attention to Section 45JA which relates to the power of the bank to determine any policy and issue directions.

49. Mr. Soparkar submitted that the Reserve Bank of India being a monetary regulator frames the banking policy. The Master Circular impugned in the two petitions is a part of the banking policy. Such banking policy is specified by the Reserve Bank of India from time to time in the interest of the banking system or monetary stability or sound economic growth. While formulating any banking policy, the Reserve Bank of India has to give due regard to the interest of the depositors and other resources of the bank.

50. Mr. Soparkar submits that the court sitting in a writ jurisdiction under Article 226 of the Constitution may not examine the merits of the policy to find out, whether there could have been a better policy and interfere with such policy. Banking policy requires economic and fiscal expertise. According to Mr. Soparkar, the experts who are qualified to address the issues are the best people to take an appropriate decision in the interest of the entire economy of the nation.

51. Mr. Soparkar laid much stress on the fact that the NPA accounts are a big threat to the economy of the nation. The borrowers, at times, misuse the amount disbursed by the bank and thereby cause immense loss to a particular bank. On matters affecting policy and those requiring expertise, the court should be slow and circumspect to interfere unless such policy is contrary to the statutory provisions, arbitrary or otherwise unconstitutional.

52. Mr. Soparkar submitted that the issue of the Master Circular by the Reserve Bank of India relating to "willful default" and "willful defaulters" does not travel beyond the scope of the delegated legislation. Having regard to the nature of duties, functions and the role which the Reserve Bank of India plays as a premier financial institution of the country it was within the scope and powers of the RBI to issue such a circular in the interest of the banking system and the economy of the country.

53. Mr. Soparkar submitted that a mere possibility of an abuse of any provision

of law, rule, regulation or a circular like the one in the present case, by itself, would not be sufficient to condemn the same as ultra vires the provisions of the Constitution of India or other banking enactments.

54. Mr. Soparkar submitted that the contention of bias and the bank being a judge in its own cause, is also devoid of any merit. Mr. Soparkar submits that the maxim "nemo judex in causa sua" constitute the basic elements of a fair hearing and is sought to be applied mechanically without any basis for such an apprehension.

55. According to Mr. Soparkar, the policy decision of the Reserve Bank of India to issue such a circular cannot be condemned on mere application of the doctrine referred to above. In a given case, if the action pursuant to such a policy decision is found to be tainted with bias, then in such circumstances, the Court can always correct such an arbitrary action. However, that by itself would not render the policy decision bad in law.

56. Mr. Soparkar in support of his submission has placed strong reliance on a decision of the Supreme Court in the case of Union of India (UOI) and Others Vs. Vipan Kumar Jain and Others, , and in the case of Delhi Fin. Corpn. and Another Vs. Rajiv Anand and Others, .

57. Mr. Soparkar submitted that the contention as regards the unreasonable restriction imposed on a promoter/director of a company being in direct infringement of the Article 19(1)(g) of the Constitution of India is absolutely devoid of any merit. According to Mr. Soparkar, although the right to do business is a fundamental right guaranteed under Article 19(1)(g) of the Constitution, yet this right is subject to a reasonable restriction under Article 19(6) of the Constitution. The reasonableness of the restriction has to be determined in an objective manner and has to be seen from the point of view of interest of the general public and not merely from the point of view of person upon whom the restrictions are imposed.

58. Mr. Soparkar, therefore, submits that there being no merit in both the writ-applications, the same deserves to be rejected.

ANALYSIS:

59. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration in these petitions is, whether the petitioners are entitled to any of the reliefs as prayed for in their petitions.

60. It is a settled position of law that a statute can be invalidated or held unconstitutional-

(i) if it is ultra vires the Patent Act;

(ii) if it is contrary to the statutory provisions other than those contained in the Parent Act;

(iii) if law making power has been exercised in bad faith;

(iv) if it is not reasonable and it goes against the legislative policy; and

(v) if it does not fulfill the object and purpose of the enabling Act.

61. It is also well-settled that while examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. There is a presumption in favour of constitutionality and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt. A statute should not be declared unconstitutional merely because in the opinion of the Court it violates one or more of the principles of liberty, of the spirit of the Constitution, unless such principles and that spirit are found in the terms of the Constitution.

FEW SALIENT FEATURES OF THE MASTER CIRCULAR:

62. Since the issue revolves around the legality and validity of the Master Circular issued by the Reserve Bank of India, we deem it necessary to look into the same in little details.

63. The need and necessity to issue the Circular has been explained in the Master Circular, which reads as under:

"Pursuant to the instructions of the Central Vigilance Commission for collection of information on willful defaults of Rs. 25 lakhs and above by RBI and dissemination to the reporting banks and FIs, a scheme was framed by RBI with effect from 1st April 1999 under which the banks and notified All India Financial Institutions were required to submit to RBI the details of the willful defaulters. Willful default broadly covered the following:

a) Deliberate non-payment of the dues despite adequate cash flow and good networth;

b) Siphoning off of funds to the detriment of the defaulting unit;

c) Assets financed either not been purchased or been sold and proceeds have been misutilised;

d) Misrepresentation/falsification of records;

e) Disposal/removal of securities without bank''s knowledge;

f) Fraudulent transactions by the borrower.

Accordingly, banks and FIs started reporting all cases of willful defaults, which occurred or were detected after 31st March 1999 on a quarterly basis. It covered 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 identified as willful default by a Committee of higher functionaries headed by the Executive Director and consisting of two GMs/DGMs. Banks/FIs were advised that they should examine all cases of willful defaults of Rs. 1.00 crore and above for filing of suits and also consider criminal action wherever instances of cheating/fraud by the defaulting borrowers were detected. In case of consortium/multiple lending, banks and FIs were advised that they report willful defaults to other participating/financing banks also. Cases of willful defaults at overseas branches were required be reported if such disclosure is permitted under the laws of the host country."

64. The term "willful default" as contained in clause (2.1) has been redefined in supersession of the earlier definition as under:

"2.1 Definition of willful default

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

A "willful default" would be deemed to have occurred if any of the following events is noted:-

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

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

(c) The unit has defaulted in meeting its payment/repayment obligations to the lender and has siphoned off the funds so that the funds have not been utilised for the specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.

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

65. The terms "diversion of funds" and "siphoning of funds" have also been defined in the impugned Master Circular. They read as under:

"2.2 Diversion and siphoning of funds

The terms "diversion of funds" and "siphoning of funds" should construe to mean the following:-

2.2.1 Diversion of funds, referred to at para 2.1(b) above, would be construed to include any one of the under noted occurrences:

(a) utilisation of short-term working capital funds for long-term purposes not in conformity with the terms of sanction;

(b) deploying borrowed funds for purposes/activities or creation of assets other than those for which the loan was sanctioned;

(c) transferring funds to the subsidiaries/Group companies or other corporates by whatever modalities;

(d) routing of funds through any bank other than the lender bank or members of consortium without prior permission of the lender;

(e) investment in other companies by way of acquiring equities/debt instruments without approval of lenders;

(f) shortfall in deployment of funds vis-?-vis the amounts disbursed/drawn and the difference not being accounted for.

2.2.2 Siphoning of funds, referred to at para 2.1(c) above, should be construed to occur if any funds borrowed from banks/FIs are utilised for purposes un-related to the operations of the borrower, to the detriment of the financial health of the entity or of the lender. The decision as to whether a particular instance amounts to siphoning of funds would have to be a judgment of the lenders based on objective facts and circumstances of the case.

The identification of the willful default should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/incidents. The default to be categorised as willful must be intentional, deliberate and calculated."

66. The Circular explains the term "cut-off limits" for use of funds and stipulates the "penal measures" which are required to be taken to prevent the access to the capital markets by the willful defaulters. The Master Circular enumerates the "penal measures" which can be initiated by a bank against the willful defaulters. The said "penal measures" read as under:

"The following measures should be initiated by the banks and FIs against the willful defaulters identified as per the definition indicated at paragraph 2.1 above:

a) No additional facilities should be granted by any bank/FI to the listed willful defaulters. In addition, the entrepreneurs/promoters of companies where banks/ FIs have identified siphoning/diversion of funds, misrepresentation, falsification of accounts and fraudulent transactions should be debarred from institutional finance from the scheduled commercial banks, Development Financial Institutions, Government owned NBFCs, investment institutions etc. for floating new ventures for a period of 5 years from the date the name of the willful defaulter is published in the list of willful defaulters by the RBI.

b) The legal process, wherever warranted, against the borrowers/guarantors and foreclosure of recovery of dues should be initiated expeditiously. The lenders may initiate criminal proceedings against willful defaulters, wherever necessary.

c) Wherever possible, the banks and FIs should adopt a proactive approach for a change of management of the willfully defaulting borrower unit.

d) A covenant in the loan agreements, with the companies in which the banks/ notified FIs have significant stake, should be incorporated by the banks/FIs to the effect that the borrowing company should not induct a person who is a promoter or director on the Board of a company which has been identified as a willful defaulter as per the definition at paragraph 2.1 above and that in case, such a person is found to be on the Board of the borrower company, it would take expeditious and effective steps for removal of the person from its Board."

67. Immediately after mentioning the penal measures in the Master Circular, it has been stated that it would be imperative on the part of the banks and financial institutions to put in place a transparent mechanism for the entire process so that the penal measures are not misused and the scope of such discretionary orders are kept to the barest minimum.

68. To ensure that the identification of a willful defaulter is transparent and objective so as not to cause any inconvenience to the borrowers, the Master Circular, in clause (3), has set out Grievances Redressal Mechanism. The said clause reads as under:

"3. Grievances Redressal Mechanism

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

(i) With a view to imparting more objectivity in identifying cases of willful default, decisions to classify the borrower as willful defaulter should be entrusted to a Committee of higher functionaries headed by the Executive Director and consisting of two GMs/DGMs as decided by the Board of the concerned bank/FI.

(ii) The decision taken on classification of willful defaulters should be well documented and supported by requisite evidence. The decision should clearly spell out the reasons for which the borrower has been declared as willful defaulter vis-?-vis RBI guidelines.

(iii) The borrower should thereafter be suitably advised about the proposal to classify him as willful defaulter along with the reasons therefor. The concerned borrower should be provided reasonable time (say 15 days) for making representation against such decision, if he so desires, to a Grievance Redressal Committee headed by the Chairman and Managing Director and consisting of two other senior officials.

(iv) Further, the above Grievance Redressal Committee should also give a hearing to the borrower if he represents that he has been wrongly classified as willful defaulter.

(v) A final declaration as ''willful defaulter'' should be made after a view is taken by the Committee on the representation and the borrower should be suitably advised."

69. A bare perusal of the aforesaid clause indicates that the safeguards have been provided to protect the borrowers by ensuring that the decision to classify a borrower as a willful defaulter is entrusted to a committee, which is headed by the Executive Director of the concerned banks/financial institutions. Before a borrower is classified as a willful defaulter, he is required to be issued a notice along with documents and other evidence. The borrower is to be provided with a reasonable time to make representation against such proposed action. Thereafter, a decision has to be taken, whether a borrower is to be declared as a willful defaulter and the borrower is to be informed. Thus, there are number of stipulation and safeguards in the impugned Master Circular to protect the interest of the borrowers.

70. The object and purpose behind issuing the Master Circular appears to be plain and simple. The Master Circular has been issued to take care of the defects and problems experienced in the past. It is a policy decision which seems to have been taken after thorough examination of the problems faced by the banks and the financial institutions. The foundation of a scheme has been explained in the Master Circular, which reads as under:

"2. Guidelines issued on willful defaulters

Further, considering the concerns expressed over the persistence of willful default in the financial system in the 8th Report of the Parliament''s Standing Committee on Finance on Financial Institutions, the Reserve Bank of India, in consultation with the Government of India, constituted in May 2001 a Working Group on Willful Defaulters (WGWD) under the Chairmanship of Shri S.S. Kohli, the then Chairman of the Indian Banks'' Association, for examining some of the recommendations of the Committee. The Group submitted its report in November 2001. The recommendations of the WGWD were further examined by an In House Working Group constituted by the Reserve Bank. Accordingly, the Scheme was further revised by RBI on May 30, 2002.

The above scheme was in addition to the Scheme of Disclosure of Information on Defaulting Borrowers of banks and FIs introduced in April 1994, vide RBI Circular DBOD. No. BC/CIS/47/20.16.002/94 dated 23 April 1994."

POWER OF THE RESERVE BANK OF INDIA:

71. We now proceed to deal with the first contention raised on behalf of the petitioners as regards the power of the Reserve Bank of India to issue the Master Circular. According to the learned advocates appearing on behalf of the petitioners the instructions contained in the Master Circular are beyond the legislative competence of the Reserve Bank of India. The Circular does not refer to any provision of law under which it has been issued.

72. We are not impressed by such submission canvassed on behalf of the petitioners. The statutory scheme of the Banking Regulation Act, 1949, and the

Reserve Bank of India Act, 1934, was enacted by the Parliament for the regulation of banking business which, unlike any other business, is a special kind of business. Banking business is the business of acceptance of withdrawable deposits of money from the public for the purpose of lending of investment. While that describes the ordinary nature of banking, that activity in a developing society and economy has acquired an evolutionary nature, in that the essence of banking business in such an economy involves banks operating as basic financial intermediaries and playing a key role in the country''s economy in general and mobilisation and distribution of the country''s savings in particular. Banks are the largest repositories of the nation''s savings. The conduct and affairs of the banks influence the various sectors of the economy. The economic development of the country depends largely on the safety and soundness of banking institutions. Banks are also the principal means for transmitting the credit policies of the country. Having regard to the delicate position of a bank in the country''s economy, the failure of one bank can have a disastrous effect on the whole banking system, having the potential of leading to systematic crisis with prejudicial effect on the economy as a whole. In view of all these considerations, the banking sector has been a highly regulated area all over the world. These principles governing the banking business have been embodied in the banking laws of India, viz. the Reserve Bank of India Act, 1934, and the Banking Regulation Act, 1949.

73. The significance of the Reserve Bank''s position as the central bank of the country needs no emphasis. As the central bank and as the primary regulator of the banking business, the Reserve Bank has been vested with very wide powers and is also charged with certain duties as reflected in the preambles to and the provisions of the two legislations referred to above. The preamble to the Reserve Bank of India Act states that the bank is established, inter alia, generally to operate the currency and credit system of the country to its advantage. The powers under the Reserve Bank of India Act as also under the Banking Regulation Act have been conferred on the bank with a view to fulfill these objectives. The various powers under the Banking Regulation Act are related to public interest or the interest of banking policy. The expression "banking policy" has been defined in clause (ca) of section 5 of the Banking Regulation Act as under:

"(ca) ''banking policy'' means any policy which is specified from time to time by the Reserve Bank in the interest of monetary stability or sound economic growth, having due regard to the interests of the depositors, the volume of deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources."

74. This definition and power conferred thereunder on the Reserve Bank to specify the policy clearly reflect the object that the banks truly become the instruments of transmitting economic policies including the credit policies of the country in a manner expected of them and serve the cause of public interest. It

is the Reserve Bank''s function to ensure, as best as it can, that the said object is achieved. Further, in view of the adverse effect that a bank''s failure may have on the economy, the statutes also aim that the Reserve Bank''s powers are exercised not only to effectively handle the crisis in the affairs of a banking company, but also to prevent a perceived failure or crisis in the affairs of the banking company. In respect of such matters, Parliament has vested full discretion in the Reserve Bank and the Central Government so that it should be open for these authorities to decide, depending upon the contingencies, the various alternatives or combination of them as provided by law to ensure protection of the interest of the depositors, the public interest and the interest of banking policy.

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

(1) Where the Reserve Bank is satisfied that it is necessary or expedient in the public interest or in the interests of depositors or banking policy so to do, it may determine the policy in relation to advances to be followed by banking companies generally or by any banking company in particular, and when the policy has been so determined, all banking companies or the banking company concerned, as the case may be, shall be bound to follow the policy as so determined.

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

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

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

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

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

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

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

"35A: Power of the Reserve Bank to give directions

(1) Where the Reserve Bank is satisfied that-

(a) in the [public interest]; or

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

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

(c) to secure the proper management of any banking company generally;

it is necessary to issue directions to banking companies generally or to any banking company in particular, it may from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.

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

75. It is beyond dispute that banks, as financial instrumentalities are required to strive to fulfill, not only the object of achieving commercial efficiency, but also to serve the object of public interest. In fact, without serving public interest, no bank can legitimately claim any right to exist. It is inconceivable that a bank, as an instrumentality of, and also being capable of, wielding powerful weapons for transformation of the socioeconomic structure of the society, can act without taking into account the public interest and can act for furtherance of private interests of a limited group of persons.

76. It also needs to be appreciated that with the liberalisation in the economy, the banking sector is widely expanding necessitating basic changes in the profiles of the banks in relation to the pattern of their shareholding, capital structure, management composition, as also operational systems, and even the very manner of conduct of banking business. The past failures of some private sector banks and huge losses of public sector banks have only underlined the need for such changes. Taking note of this, and the changing economic scenario as also the emerging competitive environment, it has become imperative for the banks to become more professionally managed, widely capital based, to have more diversified activities, to be more technically advanced. This, in turn, has also resulted, in a policy by the Reserve Bank for consolidation of the banking system and other measures in the interest of the banking system of the country as a whole. Further, the past failures of some banks raising concern for the banking system have constrained the Reserve Bank to take many steps to strengthen the financial soundness of the banking system. Increasing the capital base of the banks is one such measure. Similarly, various other policy measures have been initiated to ensure better quality of assets, induction of professional management, diversified credit portfolio, improved accounting systems, transparency in balance-sheets, etc.

77. The question for our consideration is, whether it will be open for this court to

review the decisions which have been taken by a specialised body like the Reserve Bank of India and arrive at different conclusions. The scope of jurisdiction in such matters has been settled by various judgments of the Supreme Court and the same may be referred to at this stage.

78. In Joseph Kuruvilla Vellukunnel Vs. The Reserve Bank of India and Others, , the position of the Reserve Bank of India is clearly stated in the following paragraphs which are referred to at pp. 1379-80 and 1382 as under:

"But the most important function of the Reserve Bank is to regulate the banking system generally. The Reserve Bank has been described as a bankers'' bank. Under the Reserve Bank of India Act, the scheduled banks maintain certain balances and the Reserve Bank can lend assistance to those banks ''as a lender of the last resort''. The Reserve Bank has also been given certain advisory and regulatory functions. By its position as a central bank, it acts as an agency for collecting financial information and statistics. It advises Government and other banks on financial and banking matters, and for this purpose, it keeps itself informed of the activities and monetary position of scheduled and other banks and inspects the books and accounts of scheduled banks and advises Government after inspection whether a particular bank should be included in the Second Schedule or not. Every scheduled bank is required to send to the Reserve Bank and to the Central Government a weekly return of its position in a form, which is prescribed. Sometimes, however, the Reserve Bank allows a particular bank to send its returns once a month instead of every week. From these returns, the Reserve Bank prepares and publishes consolidated statements showing the monetary position in the country. The inclusion of a bank in the Second Schedule is the function of the Reserve Bank, and under sections 42(6)(a)(iii) and (b)(ii) it satisfies itself, inter alia, that the affairs of the particular bank are not being conducted in a manner detrimental to the interests of its depositors. The Reserve Bank has further the power to prohibit any scheduled bank from receiving, after a week, any fresh deposits.

The above analysis of some of the provisions of the Reserve Bank of India Act show that the Reserve Bank of India has been created as a central bank with powers of supervision, advice and inspection, over banks, particularly those desiring that they be included in the Second Schedule or those scheduled already. The Reserve Bank thus safeguards the economy and the financial stability of the country. No doubt, the board is composed of nominated members; but from the nature of things, it could not be otherwise. Neither election nor competitive examinations can effectively take the place of nominations, if the board is to be composed of men of proven worth and standing, and there is no other method which can even be contemplated. No doubt, the members of the board are subject to removal, but neither integrity nor efficiency is secured only by such guarantee, and we have no reason to think that the Reserve Bank acted in this case, or acts in other cases under pressure or from oblique motives. As was pointed out in another connection by this court in

All India Bank Employees'' Association Vs. National Industrial Tribunal and Others, :

"If it was not the Reserve Bank of India, the only other authority that could be entrusted with the function would be the Finance Ministry of the Government of India and that department would necessarily be guided by the Reserve Bank having regard to the intimate knowledge which the Reserve Bank has of the banking structure of the country as a whole and of the affairs of each bank in particular."

....

Nor do the powers of the Reserve Bank end there. The Reserve bank not only has powers over banking companies while they are functioning, but it has also powers when the banking companies wish or are forced to cease to function. If a banking company wants to suspend its business and applies to the High Court for a moratorium, the application is not maintainable, unless it is accompanied by a report of the Reserve Bank indicating that in the opinion of the Reserve Bank the banking company will be able to pay its debts. When the High Court grants the reliefs without such report, it has to call for a report from the Reserve Bank. The High Court is also required to have regard to the interests of the depositors, and even during the period of moratorium granted by the High Court, the Reserve Bank can apply for the winding up of the banking company. Sections 39 and 41A give special powers to the Reserve Bank in winding up proceedings. Even in voluntary winding up of a banking company, the Reserve Bank has to certify that the banking company is able to pay in full all its debts to its creditors, as they accrue. In amalgamation of banking companies, the scheme has to be approved by the Reserve Bank. Similarly, in compromises or arrangements between the banking company and its creditors, the Reserve Bank has to be satisfied. In all these matters, the satisfaction, inter alia, must be as to the interests of the depositors. In reconstruction of banking company after an application by the Reserve Bank for an order of moratorium, the Reserve Bank has to satisfy itself and prepare a scheme, which inter alia must be in the interests of the depositors."

79. The feasibility and practicability of granting hearing, recording of reasons and communicating the same to the parties has been explained at pp. 1383 and 1387-88 as under:

"That leaves over the second and third arguments, which proceed upon the same materials. In this connection, the main grounds of attack have already been set out in this judgment. Before we deal with the central point, we shall deal with certain others which proceed said so to speak, from the side lines. The objection that the Reserve Bank gives no hearing, records no reasons in writing and does not communicate them is met at least in this case by the admitted facts. The numerous inspection reports and directions issued by the Reserve Bank over a period of nearly nine years, together with the application filed in this case, prove amply that there was enough hearing of and enough communication of the grounds of action to the Palai Bank. The Bank had also sufficient time and opportunity to establish its own point of view before the Reserve Bank. It was impossible that the Reserve Bank, with the run on the bank, would sit down to decide after hearing whether to take action or not, while withdrawals were being at the rate of Rs. 7 lakhs per day. The emergency of the situations which may arise, is itself the justification for the procedure open under the Act and taken in this case. In our opinion, these grounds cannot be entertained. It is difficult to imagine that the Reserve Bank would act differently in another case.

....

The learned Attorney General, on the other side, drew our attention to Virendra v. State of Punjab, where it has been pointed out that in judging the reasonableness of any particular law ''the surrounding circumstances in which the impugned law came to be enacted, the underlying purpose of the enactment and the extent and urgency of the evil sought to be remedied'' must also be considered. That case concerned the freedom of speech and its alleged curtailment by the Punjab Special Powers (Press) Act, 1956. In judging the reasonableness of the law from the angle of the exclusion of courts, this court observed:

"Legislature had to ask itself the question: who will be the appropriate authority to determine at any given point of time as to whether the prevailing circumstances require some restriction to be placed on the right to freedom of speech and expression and the right to carry on any occupation, trade or business and to what extent? The answer was obvious, namely, that as the State Government was charged with the preservation of law and order in the State, as it alone was in possession of all material facts it would be the best authority to investigate the circumstances and assess the urgency of the situation that might arise and to make up its mind whether any and, if so, what anticipatory action must be taken for the prevention of the threatened or anticipated breach of the peace. The court is wholly unsuited to gauge the seriousness of the situation, for it cannot be in possession of materials which are available only to the executive Government. Therefore, the determination of the time when and the extent to which restrictions should be imposed on the Press must of necessity be left to the judgment and discretion of the State Government and that is exactly what the Legislature did by passing the statute... Quick decision and swift and effective action must be of the essence of these powers and the exercise of it must, therefore, be left to the subjective satisfaction of the Government... To make the exercise of these powers justiciable and subject to the judicial scrutiny will defeat the very purpose of the enactment."

80. These observations lay down clearly that there may be occasions and situations in which the Legislature may, with reason, think that the determination of an issue may be left to an expert executive like the Reserve Bank rather than the courts without incurring the penalty of having the law declared void.

81. The scope of powers of the Reserve Bank of India is further amplified in the judgment reported as Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India, may be reproduced as under:

"30. Before examining the scope and effect of the impugned paragraphs (6) and (12) of the Directions of 1987, it is also important to note that the Reserve Bank of India which is bankers'' bank is a creature of statute. It has a large contingent of expert advisers relating to matters affecting the economy of the entire country and nobody can doubt the bona fides of the Reserve Bank in issuing the impugned directions of 1987. The Reserve Bank plays an important role in the economy and financial affairs of India and one of its important functions is to regulate the banking system in the country. It is the duty of the Reserve Bank to safeguard the economy and financial stability of the country. While examining the power conferred by section 58A of the Companies Act, 1956, on the Central Government to prescribe the limits up to which, the manner in which and the conditions subject to which deposits may be invited or accepted by non-banking companies, this court in Delhi Cloth and General Mills Co. Ltd. and Others Vs. Union of India (UOI) and Others, , observed as under:

"Mischief was known and the regulatory measure was introduced to remedy the mischief. The conditions which can be prescribed to effectuate this purpose must, a fortiori, to be valid, fairly and reasonably, relate to checkmate the abuse of juggling with the depositors/investors hard earned money by the corporate sector and to confer upon them a measure of protection namely availability of liquid assets to meet the obligation of repayment of deposit which is implicit in acceptance of deposit. Can it be said that the conditions prescribed by the Deposit Rules are so irrelevant or have no reasonable nexus to the objects sought to be achieved as to be arbitrary? The answer is emphatically in the negative. Even at the cost of repetition, it can be stated with confidence that the rules which prescribed conditions subject to which deposits can be invited and accepted do operate to extend a measure of protection against the notorious abuses of economic power by the corporate sector, to the detriment of depositors/ investors, a segment of the society which can be appropriately described as weaker in relation to the mighty corporation. One need not go so far with Ralph Nader in America incorporated to establish that political institutions may fail to arrest or control this ever-widening power of corporations. And can one wish away the degree of sickness in private sector companies? To the extent companies develop sickness, in direct proportion the controllers of such companies become healthy. In a welfare State, it is the constitutional obligation of the State to protect socially and economically weaker segments of the society against the exploitation by corporations. We, therefore, see no merit in the submission, that the conditions prescribed bear no relevance to the object or the purpose for which the power was conferred under section 58A on the Central Government."

31. The function of the court is to see that lawful authority is not abused but not

to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. 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. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts.

52. This court in Joseph Kuruvilla Vellukunnel Vs. The Reserve Bank of India and Others, held that the RBI is ''a bankers'' bank and ''lender of the last resort''. Its objective is to ensure monetary stability in India and to operate and regulate the credit system of the country. It has, therefore, to perform a delicate balance between the need to preserve and maintain the credit structure of the country by strengthening the rule as well as apparent credit structure of the banks operating in the country and the interest of depositors. In an underdeveloped country like ours, where majority of the population are illiterate and poor and are not conversant with banking operations and in underdeveloped money and capital market with mixed economy, the Constitution charges the State to prevent exploitation and so the RBI would play both promotional and regulatory roles. Thus the RBI occupies a place of ''pre-eminence'' to ensure monetary discipline and to regulate the economy or the credit system of the country as an expert body. It also advises the Government in public finance and monetary regulations. The banks or non-banking institutions shall have to regulate their operations in accordance not only with the provisions of the Act but also the rules and directions or instructions issued by the RBI in exercise of the power thereunder. Chapter 3-B expressly deals with regulations of deposit and finance received by the RNBCs. The directions, therefore, are statutory regulations."

82. Thus, from the above, the law is well-settled that the Reserve Bank of India, which is described as the supreme bank of the country, is empowered to regulate the banking system and certain regulatory functions have been assigned to it by the provisions of the Reserve Bank of India Act, 1934 and the Banking Regulation Act, 1949. It is in exercise of such powers that the Reserve Bank of India has thought fit to issue the impugned Master Circular.

83. We are also not impressed by the submission canvassed on behalf of the petitioners that the source of power has not been indicated in the Master Circular and there is no reference of any public interest in the impugned Circular. In short, the submission on behalf of the petitioners is that, if the Master Circular has been issued by the Reserve Bank of India in public interest, then it should have been stated in so many words along with the statutory provisions under which the Reserve Bank of India derives the power.

84. It is well-settled that if source of power is traceable, exercise of such power cannot be set-aside merely because the same has not been disclosed. In this

context, we may profitably refer to a decision of the Supreme Court in the case of Union of India and Another Vs. Azadi Bachao Andolan and Another, . The issue before the Supreme Court was, whether the impugned circular issued under the Income Tax Act was ultra vires Section 119 of the Act. The Supreme Court in para 46 observed thus, which, in our opinion, answers the contention canvassed on behalf of the petitioners:

"46. While commenting adversely upon the validity of the impugned circular, the High Court says "that the circular itself does not show that the same has been issued under Section 119 of the Income-tax Act. Only in a case where the circular is issued under Section 119 of the Income-tax Act, the same would be legally binding on the revenue. The circular does not deal with the power of the ITO to consider the question as to whether although apparently a company is incorporated in Mauritius but whether the company is also a resident of India and/or not a resident of Mauritius at all."

85. It is trite law that as long as an authority has power, which is traceable to a source, the mere fact that source of power is not indicated in an instrument does not render the instrument invalid.

86. Although the learned advocates appearing on behalf of the petitioners have placed strong reliance on a decision of the Karnataka High Court in the case of E. Sathyanarayanan (supra), yet with due deference we are unable to subscribe to the views expressed by His Lordship, more particularly, when there are Supreme Court decisions on the issue.

DELEGATED LEGISLATION:

87. The above takes us to deal with the submission as regards the scope and power of the Reserve Bank of India to issue the Master Circular in exercise of powers under the delegated legislation.

88. It is true that a delegated legislation can be challenged before the Courts on the ground of being ultra vires the parent Act. The Courts can adjudge the legality and validity of delegated legislation by applying the doctrine of ultra vires. The doctrine of ultra vires has two aspects: substantive and procedural. When delegated legislation goes beyond the scope of the authority conferred by, or it is in conflict with, the parent statute it is invalid and this is known as substantive ultra vires. When the regulation-making authority deviates from the procedure, if any, prescribed by the parent statute for making regulations, it is known as procedural ultra vires. In these writ petitions, what is urged is the substantive ultra vires only and not procedural ultra vires. Whenever any person or body of persons, exercising statutory authority acts beyond the powers conferred upon him or them by statute, such acts become ultra vires and, accordingly, void. In other words, substantive ultra vires means the delegated legislation goes beyond the scope of the authority conferred on it by the parent statute. It is a fundamental principle of law that a public authority cannot act outside the powers i.e., ultra vires, and it has been rightly described as the

central principle and foundation of large part of administrative law by Prof. Wade in his Treatise on Administrative Law. The act which is for any reason in excess of power is ultra vires.

89. In Indian Express Newspapers (Bombay) Private Ltd. and Others Vs. Union of India and Others, , E.S. Venkataramaiah, J. (as he then was) stated (para 73):

"A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent Legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary".

90. In the same case, the Court also opined that the power delegated by the statute to the delegate is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted and on relevant consideration of material facts. It has also stated that all his decisions must be in harmony with the Constitution and other laws of the land; if they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation, Court might well say, Legislature never intended to give authority to make such regulations, they are unreasonable and ultra vires. Thus, delegated legislation or subordinate legislation can be held valid only if it conforms exactly to the power granted. Regulations, whether made under the Constitution or a statute, must be intra vires the parent law under which power has been delegated. If the regulation-making power is conferred and the regulations made are in excess of that power the regulation would be void even if the Act provided that they shall have effect as if enacted in the Act. The validity of the regulation is always open to challenge on the ground that it is unauthorised. The validity of the delegated legislation is a question of vires, that is, whether or not the power has been exceeded or otherwise wrongfully exercised or is inconsistent with the parent Act.

91. The doctrine of ultra vires quite often is one of the recognised principles/ grounds to invalidate a delegated legislation. The basic principle of this doctrine is that an authority being the creature of the law it has only such powers as are granted to it by the law.

92. Declaring a rule in the Karnataka Motor Vehicle Rules, 1963 ultra vires the Motor Vehicles Act, 1939 as the rule was inconsistent with a section in the Act, the Supreme Court, in State of Karnataka and Another Vs. H. Ganesh Kamath and Others, , held that the rule-making power cannot include within its scope the power to make a rule contrary to the provisions of the Act conferring the rule-

making power and that conferment of rule-making power by an Act does not enable the rule-making authority to make a rule which travels beyond the scope of the enabling Act or which is inconsistent therewith or repugnant thereto. The Apex Court in State of U.P. and Others Vs. Renusagar Power Co. and Others, :

"If the exercise of power is in the nature of subordinate legislation, the exercise must conform to the provisions of the statute. All the conditions of the statute must be fulfilled. Thus, delegated legislation repugnant to, or inconsistent with or in contravention of, or in excess of, or overriding the provisions of, the parent Act is ultra vires."

93. Thus, it is clear that if power is conferred to legislate only with respect to certain topics or for certain purposes or in certain circumstances, the limits of the power must not be crossed. For this purpose, the phraseology of the delegating provision becomes relevant. In applying the doctrine, the Court has a three-fold task: first, to determine the meaning of the words used in the Act itself to describe the delegated legislation which the delegate is authorised to make; secondly, to determine the meaning of the subordinate legislation itself, and, finally, to decide whether the subordinate legislation complies with that description.

94. It also needs to be emphasised before proceeding further to deal with the contention of the learned counsel for the petitioner, that in evaluating the vires of the delegated legislation, the Courts start with the presumption of constitutionality, competence and reasonableness of the delegated legislation impugned before it just as the Courts do in respect of primary legislation by the legislature. As a general proposition, delegated legislation is regarded as validly made, and part of the law of the land, until a Court decides otherwise.

95. In Hoffman-La Roche v. Secretary of State for Trade and Industry, (1975) AC 295, Lord Diplock speaking for the House of Lords referred to this aspect and observed:

"......the presumption that subordinate legislation is intra vires prevails in the absence of rebuttal, and that it cannot be rebutted except by a party to legal proceedings in a Court of competent jurisdiction who has locus standi to challenge the validity of the subordinate legislation in question."

96. Thus, the Court while reviewing the validity of a delegated legislation, should presume such delegated legislation prima facie to be intra vires and it is for the person aggrieved to prove affirmatively that the presumption in favour of constitutionality, competence, fairness and reasonableness is unsustainable as held by the Apex Court in The State of Uttar Pradesh and Others Vs. Babu Ram Upadhya, . The onus of establishing invalidity is on the challenger.

97. The question whether a particular delegated legislation is in excess of the power of the supporting legislation conferred on the delegate, has to be determined with regard not only to specific provisions contained in the relevant

statute conferring the power to make rule or regulation, but also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It would be wholly wrong for the Court to substitute its own opinion as to what principle or policy would best serve the objects and purposes of the Act, nor is it open to the Court to sit in judgment of the wisdom, the effectiveness or otherwise of the policy, so as to declare a regulation to be ultra vires merely on the ground that, in the view of the Court, the impugned provision will not help to carry through the object and purposes of the Act. The Supreme Court reiterated the legal position, well established by a long series of decisions, in Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others, as under:

"So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations. It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the Court to examine the merits or demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the statute."

98. Applying the aforenoted test, we are unable to hold that the impugned circular amounts to impermissible delegation of legislative power. An overall responsibility to find out the well being of a Banking Company, in improving monetary stability and economic growth as well as keeping in view the interests of depositors, the Reserve Bank of India has to formulate its policy vis-?-vis Banking Companies. ''Banking'' as defined in Section 5(b) only gives a grammatical meaning of the transactions of a bank and nothing more. If any management or supervision is to be done over the banking activities of a bank, it will have to be governed by banking policy. The ''banking policy'' and ''banking'' are not independent but coordinating subjects and both are covered within the supervisory powers of the Reserve Bank of India within the meaning of Section 35A of the Banking Regulation Act. Even otherwise, the directions issued by the Reserve Bank of India are in the larger interest of the public and it being a body of experts in banking, the directions given by it should not be lightly brushed aside.

STATUTORY STATUS OF THE CIRCULAR:

99. The above takes us now to deal with the submission as regards the statutory status of the Master Circular.

100. It has been strenuously contended before us by the learned advocates appearing on behalf of the petitioners that the impugned Master Circular has no force in law and cannot be termed as a statutory circular. In short, the sum and substance of the submission canvassed on behalf of the petitioners is that, if the Reserve Bank of India wanted to issue a Master Circular laying down a policy for declaring the borrowers as willful defaulters and the consequences of the same, then the same could have been done only by enacting a law within the meaning of Article 13 of the Constitution of India, otherwise a circular will have no force of law.

101. We are not impressed even by such submission as we have already indicated in our earlier part of the judgment the source of power and the exercise of the same by the Reserve Bank of India in the interest of banking and banking policy.

102. It is clear that the Master Circular has been issued with a particular object. Whether a circular issued by a statutory authority would be binding or not, or whether the same has a statutory force or not, would depend upon the nature of the statute. For the said purpose, the intention of the Legislature must be considered.

103. The Supreme Court, in the case of Sudhir Shantilal Mehta Vs. C.B.I., , had the occasion to consider an identical issue. In that case, the circular was issued by the Reserve Bank of India exercising control over the banking companies. The Supreme Court made the following observations, which are worth noting:

"...Having regard to the fact that the Reserve Bank of India exercises control over the Banking Companies, we are of the opinion that the said Circular letter was binding on the Banking Companies. The officials of UCO Bank were, therefore, bound by the said circular letter.

The Madhya Pradesh High Court in The State of Madhya Pradesh Vs. Ramcharan, held:

"6. Although the Constitution does not contain any generic definition of law, it defines "law" for purposes of Article 13 to include "any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law". Article 366(10) of the Constitution also defines the expression "existing law" to mean "any law, Ordinance, Order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any legislature authority or person having power to make such law, Ordinance, order, bye-law, rule or regulation". Another definition which is relevant here is the definition of the expression "Indian law" in the General Clauses Act, 1897. Section 3(29) of this Act defines "Indian Law" to mean "any Act, Ordinance, regulation, rule, order or bye-law, which before the commencement of the Constitution had the force of law in any Province of India or part thereof and hereafter has the force of law in any Part A State or Part C State or part thereof, but does not include any Act of Parliament of the United Kingdom or any Order in Council, rule or other instrument made under such Act". These definitions go to confirm that under our legal order "law" does not include only legislative enactments but it also includes rules, orders, notifications etc. made or issued by the Government or any subordinate authority in the exercise of delegated legislative power.

... 7. The question relating to a post-constitution order or notification in the context whether it amounts to law was considered by the Supreme Court in Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others, ...The Court further observed as follows:

"This is not to say that every order issued by an executive authority has the force of law. If the order is purely administrative, or is not issued in exercise of any statutory authority it may not have the force of law. But where a general order is issued even by an executive authority which confers power exercisable under a statute, and which thereby in substance modifies or adds to the statute, such conferment of powers must be regarded as having the force of law."..."

104. The issue as regards the statutory force of a circular is no longer res integra. The Supreme Court, in the case of B.O.I. Finance Ltd. Vs. Custodian and Others, , and Central Bank of India Vs. Ravindra and Others, , has examined such issue at length. While examining the Securities Contracts (Regulation) Act and the Banking Regulation Act in B.O.I. Finance Ltd. (supra), the Supreme Court specifically dealt with the provisions of Section 36(1)(a) which empowers the RBI to auction or prohibit the banking companies generally or any banking company in particular against entering into any particular transaction and generally to give advice to any banking companies, and held that a circular issued by the RBI which stated that the banks were advised to follow the Guidelines given thereunder, the word ''advised'' cannot be read in isolation and the said document was meant to be binding on the banking companies.

105. In the case of Central Bank of India (supra), the Supreme Court observed that the RBI is a prime banking institution of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. It was further observed as below:

"...RBI has been issuing directions/circulars from time to time which, inter alia, deal with rate of interest which can be charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy."

''NEMO JUDEX IN CAUSA SUA'':

106. The above takes us to deal with the contention as regards the validity of the Master Circular on the basis of the application of the maxim ''nemo judex in causa sua''. The substance of the argument of the learned advocates appearing on behalf of the petitioners is that the bank itself will be a judge in its own cause, and in such circumstances, there will always be an element of personal bias which ultimately would affect the interest of the borrowers.

107. Natural justice as is well-known is founded on two basic principles:

(a) Audi alteram partem.

(b) Nemo judex in causa sua.

108. The duty to act fairly is the theme of the principles of natural justice. However, the extent of the duty to act fairly will normally be very limited where the authority exercises a function which does not culminate in a binding decision. The rule generally applies, at least with full force, only to the conduct leading directly to a final act of the decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded. (see Halsbury''s Laws of England, Vol. 1(i), 4th Edition, paras 85 and 94.)

109. The standard of fairness may be different where the proceedings are in inquisitorial form.

110. Bias can be classified under three different heads:

(a) a legal interests which mean that the Judge is "in such a position that a bias must be assumed."

(b) pecuniary interest.

(c) personal bias.

111. Law in this regard has expanded to a great extent. In J.F. Garner''s Administrative Law, it was stated:

"The natural justice ''bias'' rule looks to external appearances rather than to proof of actual improper exercise of power. If the reasonable observer would have the requisite degree of suspicion of bias in the decision-maker then that decision can be challenged. It is a matter of the courts ensuring that ''justice is seen to be done''. Since successful challenge is based on appearances, it is natural that the types of matter to which the rule applies is somewhat confined. As we shall see it clearly applies to judicial and disciplinary functions but not generally more widely to administrative decision-making and actions."

112. In Manak Lal Vs. Dr. Prem Chand, , the Supreme Court observed (at p.429):--

"But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice. It would always by a question of fact to be decided in each case. ''The principle'', says Halsbury, ''nemo debet esse judex in causa propria sua precludes a justice, who is interested in the subject-matter of a dispute, from acting as a justice therein''. In our opinion, there is and can be no doubt about the validity of this principle and we are prepared to assume that this principle applies not only to the justice as mentioned by Halsbury but to all tribunals and bodies which are given jurisdiction to determine judicially the rights of parties".

113. In The Andhra Pradesh State Road Transport Corporation, Hyderabad and Another Vs. Sri Satyanarayana Transports (Private) Ltd., Guntur and Others, , the Supreme Court held that the elementary rule of natural justice that person trying a cause, though in a quasi-judicial proceeding, should not suffer from a personal bias. In this case the proceedings before the bank of inquiry is not a quasi-judicial proceedings. The Apex Court stated (at p.1307):

"We ought, however, to add that in the light of the general considerations which we have set out, it is of utmost importance that in appreciating evidence, the Court ought to adopt a very cautious, circumspect, and careful approach. If the evidence led by the parties in such a case is tested by cross-examination, it would be easier to determine where truth lies. But in the absence of cross-examination, appreciating the effect of competing affidavits is not an easy matter. In such a case, the Court must always enquire on which side the probabilities lie and must scrutinise the affidavits very critically to determine which of them deserves to be believed. Naturally, in dealing with such a question of fact in appeal, we are normally inclined to attach importance to the findings of fact recorded by the High Court itself."

114. Recently, in the case of Union of India (UOI) and Others Vs. Vipan Kumar Jain and Others, , the Supreme Court held that an officer who had carried out a search under Section 132 of the Income Tax Act, 1961, was competent to act as an assessing officer and there was no inherent infirmity or defect in permitting the assessing officer to gather information and assess the value of the information himself. The Supreme Court referred to a decision of the U.S. Supreme Court in the case of Harold Withrow v. Duane Larken and observed thus:

"Even though it could be said that in a sense since the Assessing Officer was acting on behalf of the Revenue, in discharging the functions as an Assessing Officer, he was a party to the dispute, nevertheless there is no presumption of bias in such a situation. As said in H.C. Narayanappa and Others Vs. The State of Mysore and Others, :

"It is also true that the Government on whom the duty to decide the dispute rests, is substantially a party to the dispute but if the Government or the authority to whom the power is delegated acts judicially in approving or modifying the scheme, the approval or modification is not open to challenge on a presumption of bias. The Minister or the officer of the Government who is invested with the power to hear objections to the scheme is acting in his official capacity and unless there is reliable evidence to show that he is biased, his decision will not be liable to be called in question, merely because he is a limb of the Government.""

115. In Delhi Fin. Corpn. and Another Vs. Rajiv Anand and Others, , the Supreme Court examined the said principle, with reference to Section 32G of the State Financial Corporation Act, 1951, as the State Government had appointed the Managing Director of the State Financial Corporation as the authority to adjudicate the claims of the State Financial Corporation and issue certificates of recovery. In Delhi Financial Corporation (supra) after referring to the several case laws on the subject, it was held as under:

"9. Faced with this authority, it was submitted that the observations made by the Constitution Bench are per incuriam inasmuch as this authority has not taken note of the judgment in Gullapalli Nageswara Rao case. We are unable to accept this submission. It is to be seen that there is a big difference in the facts of the two cases. The doctrine that ''no man can be a judge in his own cause'' can be applied only to cases where the person concerned has a personal interest or has himself already done some act or taken a decision in the matter concerned.

Merely because an officer of a corporation is named to be the authority, does not by itself bring into operation the doctrine ''no man can be a judge in his own cause''. Of course, in individual cases bias may be shown against a particular officer but in the absence of any proof of personal bias or connection merely because officers of a particular corporation are named as the authority does not mean that those officers would be biased. As has been held by the Constitution Bench, a Managing Director is a high-ranking officer. He is not personally interested in the transaction. There is no question of any bias or conflict between his interest and his duty.

In Gullapalli Nageswara Rao case the Secretary who had framed the Scheme then proceeded to hear the objections and advise the Chief Minister. It is because of the personal involvement of the Secretary that the majority took the view. Even then two Judges held that it did not follow that he was an improper person to hear the objections.

14. Thus, the authorities disclose that mere appointment of an officer of the corporation does not by itself bring into play the doctrine that ''no man can be a judge in his own cause''. For that doctrine to come into play it must be shown that the officer concerned has a personal bias or a personal interest or has personally acted in the matter concerned and/or has already taken a decision one way or the other which he may be interested in supporting. This being the law it will have to be held that the decision of the Delhi High Court is erroneous

and cannot be sustained and the view taken by the Punjab and Haryana High Court is correct.

It will, therefore, have to be held that Managing Director of a financial corporation can be appointed as an authority under Section 32G of the Act."

116. Thus, from the above, if we are permitted to add, it makes a little difference, whether "likelihood" could be equated with "possibility" or "probability". It all depends upon how the court looks with the judicial hindsight at the adjudicating authority and in particular at his behaviour in conducting the proceedings, his attitude towards the aggrieved party, his attachment to the cause and his frame of mind, whether preconceived or not. After getting the sum total of all these, the court must ask, whether it would be enough to erode the detachment and impartiality of the adjudicating authority. If there was any likelihood of such erosion, the decision complained of must be struck down so that the streams of justice may be kept clear and pure, which is the basic requirement of administration of justice. Therefore, it would all depend on a case to case basis. In a given case, if the court finds the action to be tainted with malafides or bias, then the same could always be condemned and set at right. However, only on the apprehension of misuse of such provision, an otherwise valid statute should not be struck down or condemned.

117. It is equally well-settled that a mere possibility or likelihood of abuse of power does not make the provision ultra vires or bad in law. In the aforesaid context, we may quote with profit a decision of the Supreme Court in the case of People''s Union for Civil Liberties and Another Vs. Union of India (UOI), , wherein the challenge was with regard to the constitutional validity of Prevention of Terrorism Act (15 of 2002) (POTA). The Supreme Court observed that a mere possibility of abuse or misuse of POTA could not be a ground to declare it unconstitutional. The court cannot go into and examine the need of POTA. The Supreme Court observed that it was a matter of policy. Once the legislation was passed, the Government had an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, mere possibility of abuse could not be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional.

118. The Supreme Court in the case of Sushil Kumar Sharma Vs. Union of India (UOI) and Others, , held as under:

"16. As observed in Maulavi Hussein Haji Abraham Umarji v. State of Gujarat, Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corpn. and Padma Sundara Rao v. State of T.N. while interpreting a provision, the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary."

119. In a nine-Judge Bench decision of the Supreme Court in the case of I.R. Coelho (Dead) By LRs. Vs. State of Tamil Nadu and Others, , the Supreme Court

made the following observations, which are worth noting:

"It is also contended that the power to pack up laws in the Ninth Schedule in absence of any indicia in Article 31B has been abused and that abuse is likely to continue. It is submitted that the Ninth Schedule which commenced with only 13 enactments has now a list of 284 enactments. The validity of Article 31B is not in question before us. Further, mere possibility of abuse is not a relevant test to determine the validity of a provision. The people, through the Constitution, have vested the power to make laws in their representatives through Parliament in the same manner in which they have entrusted the responsibility to adjudge, interpret and construe law and the Constitution including its limitation in the judiciary. We, therefore, cannot make any assumption about the alleged abuse of the power."

ARTICLE 19(1)(g) -UNREASONABLE RESTRICTION:

120. The above takes us to deal with the submission as regards the imposition of an unreasonable restriction upon the promoters/entrepreneurs/directors in the form of debarring them from availing of any additional facilities for floating a new venture for a period of five years from the date the name of the willful defaulter is published in the list of ''willful defaulters'' by the Reserve Bank of India. Such unreasonable restriction, according to the petitioners, is violative of Article 19(1)(g) of the Constitution of India i.e. the right to carry on any profession, or to carry on any occupation, trade or business.

121. According to the learned advocates appearing on behalf of the petitioners, even if it is accepted that the Reserve Bank of India has the power to issue the impugned circular as a policy decision to curb the menace of the NPA and in larger public interest, yet the Reserve Bank of India cannot debar any other bank or financial institution from lending money to the promoter of the company for a new venture or a project.

122. It is true that right to do business is a fundamental right guaranteed under Article 19(1)(g) of the Constitution of India, but this right is subject to reasonable restriction under Article 19(6) of the Constitution of India.

123. To test the reasonability of a restriction, the court must see the subject matter, extent of restriction, the mischief which it seeks to check, etc.

124. In the aforesaid context, we may quote with profit a decision of the Supreme Court in the case of Md. Murtaza and Others Vs. State of Assam and Others, . The Supreme Court considered the issue as regards Article 19(1)(g) of the Constitution of India although in an altogether different factual background, yet the principle propounded and explained would be applicable to the case at hand. The observations of the Supreme Court in paragraphs 10 to 18 are worth noting:

"10. It may be mentioned that to test the reasonability of a restriction we have to see the subject matter, extent of restriction, the mischief which it seeks to check, etc. The reasonableness of the restriction has to be determined in an objective manner and has to be seen from the point of view of the interest of the general public and not merely from the point of view of the persons upon whom the restrictions are imposed vide Mohd. Hanif Quareshi and Others Vs. The State of Bihar, . Moreover, the impugned action of the authorities cannot be said to be unreasonable merely because in a given case, they may operate harshly, vide State of Gujarat Vs. Shantilal Mangaldas and Others, . As observed by the Supreme Court in Laxmi Khandsari and Others Vs. State of U.P. and Others, ; D.K. Trivedi and Sons and Others Vs. State of Gujarat and Others, ; State of Madras Vs. V.G. Row, ; Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India, ; and Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others, etc., the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed and the extent and urgency of the evil sought to be remedied thereby, disproportion of the imposition, prevailing conditions at the time etc., are the relevant considerations for determining whether the restriction is reasonable.

11. Further, as held in Jyoti Pershad Vs. The Administrator for The Union Territory of Delhi, , the standard of reasonableness must also vary from age to age and be related to the adjustments necessary to solve the problems which communities face from time to time. In adjudging the validity of the restriction the Court has necessarily to approach the question from the point of view of the social interest which the State action intends to promote, vide Pathumma and Others Vs. State of Kerala and Others, ; P.P. Enterprises and Others Vs. Union of India (UOI) and Others, and Jyoti Pershad v. Union Territory of Delhi (supra), etc.

12. Judged by these standards the impugned action of the authorities cannot be faulted on the ground of lack of reasonableness. As stated in the counter-affidavits filed in these cases, the existing wholesale markets have become the cause of immense traffic congestion in the city, apart from causing diseases, pollution etc. Hence, shifting the wholesale markets to the outskirts of the City or beyond is clearly reasonable.

13. It must be remembered that certain matters are by their very nature such as had better be left to the administrative authorities instead of Courts themselves seeking to substitute their own views and perceptions as to what is the best solution to the problem. The present is clearly an instance where this Court should not interfere with the steps taken by the respondents to resolve a pressing problem. In matters of policy the Courts have a limited role and it should only interfere with the same when it is clearly illegal. That clearly is not the case here. The impugned action is a salutary step for undoing a mischief, which was crying out for redress for a long time, and it is not illegal.

14. As observed by the Supreme Court in Mohd. Hanif Quareshi and Others Vs. The State of Bihar, , the Court must presume, that the legislature understands and correctly appreciates the need of its own people. The legislature is free to recognize degrees of harm, and may confine its restrictions to those where the

need is deemed to be the clearest. In our opinion, the same principle would apply to executive action also, unless there is clear violation of a statute or a constitutional provision.

15. In our opinion, the State should not be hampered by the Court in dealing with evils at their point of pressure. All legislation, including delegated legislation (such as the kind we are examining) and executive action is essentially ad hoc. Since, social problems nowadays are extremely complicated, this inevitably entails special treatment for distinct social phenomena. If legislation or executive action is to deal with realities it must address itself to variations in society. The State must, therefore, be left with wide latitude in devising ways and means of social control and Regulation, and the Court should not, unless compelled by the law, encroach into this field.

16. As Justice Frankfurter of the U.S. Supreme Court observed in American Federation of Labour v. American Sash and Door Co., 335 US 538 (1949):-

"Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a Court debilitates popular Democratic Government. Most laws dealing with social and economic problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. But, even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed by the legislature than that the law should be aborted by judicial fiat. Such, an assertion of judicial power defeats responsibility from those on whom in a democratic society it ultimately rests. Hence, rather than exercise judicial review Courts should ordinarily allow legislatures to correct their own mistakes wherever possible."

In our opinion the same principle would apply to executive action too.

17. Similarly, in his dissenting judgment in New State Ice Co. v. Liebemann, 285 U.S. 262 (1932), Mr. Justice Brandeis, the celebrated Judge of the U.S. Supreme Court observed that the government must be left free to engage in social experiments. Progress in the Social Sciences, as in the Physical Sciences, depends on "a process of trial and error" and Courts must not interfere with necessary experiments.

18. Justice Brandeis also observed:-

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.""

125. Thus, from the above, it could be said that having regard to the object with which the Reserve Bank of India issued the Master Circular and the policy decision to declare the promoters of the company as willful defaulters, it could not be said that the same is an unreasonable restriction violating Article 19(1)(g) of the Constitution of India.

126. To sum up, the impugned circular does not suffer from the vice of lack of power. It has been issued in the interest of the banking business and is, thus, in public interest. It seeks to ensure greater transparency and uniformity in identification and treatment of the willful defaulters. It targets defaulters of dues in excess of Rs. 25 lac, thus laying down the threshold limit for application of the circular. It applies to only those defaulters who can be categorized as "willful" as defined in the circular. It, thus, does not cover those borrowers who are unable to pay the debt without there being any element of willfulness. Surely, no borrower can claim a vested right to seek financial assistance from a bank or a financial institution no matter how willful or chronic his defaults in repayment of past dues may have been. The circular, therefore, in general terms, is not arbitrary.

127. However, the matter does not rest over here. There is a grey area which we have been able to identify so far as the issue of unreasonable restriction and arbitrariness in the policy decision of the Reserve Bank of India is concerned.

128. We have noticed that the Master Circular which provides for the guidelines pertaining to "willful default" and "willful defaulter" embraces within it even the directors of the company.

129. We may, once again, at the cost of repetition, highlight few provisions of the Circular which, in our opinion, deserve consideration. In clause (2.5), which relates to penal measures, sub-clause (d) reads as under:

"(d) A covenant in the loan agreements, with the companies in which the banks/ notified FIs have significant stake, should be incorporated by the banks/FIs to the effect that the borrowing company should not induct a person who is a promoter or director on the Board of a company which has been identified as a willful defaulter as per the definition at paragraph 2.1 above and that in case, such a person is found to be on the Board of the borrower company, it would take expeditious and effective steps for removal of the person from its Board."

130. Clause (5) is with regard to reporting names of the directors. Clauses (5.1) and (5.2) read as under:

"5.1 Need for Ensuring Accuracy

RBI/Credit Information Companies disseminate information on non-suit filed and suit filed accounts respectively, as reported to them by the banks/FIs and responsibility for reporting correct information and also accuracy of facts and figures rests with the concerned banks and financial institutions. Therefore, banks and financial institutions should take immediate steps to update their records and ensure that the names of current directors are reported. In addition to reporting the names of current directors, it is necessary to furnish information about directors who were associated with the company at the time the account was classified as defaulter, to put the other banks and financial institutions on guard. Banks and FIs may also ensure the facts about directors, wherever possible, by cross-checking with Registrar of Companies.

5.2. Position regarding Independent and Nominee directors

Professional Directors who associate with companies for their expert knowledge act as independent directors. Such independent directors apart from receiving director''s remuneration do not have any material pecuniary relationship or transactions with the company, its promoters, its management or its subsidiaries, which in the judgment of Board may affect their independent judgment. As a guiding principle of disclosure, no material fact should be suppressed while disclosing the names of a company that is a defaulter and the names of all directors should be published. However, while doing so, a suitable distinguishing remark should be made clarifying that the concerned person was an independent director. Similarly the names of directors who are nominees of government or financial institutions should also be reported but a suitable remark ''nominee director'' should be incorporated. Therefore, against the names of Independent Directors and Nominee Directors, they should indicate the abbreviations "Ind." and "Nom" respectively in brackets to distinguish them from other directors."

131. Thus, the above makes it clear that all the directors irrespective of their type are brought within the purview of the circular for the purpose of declaring them as willful defaulters. Although in clause (5.2), the Reserve Bank of India has tried to clarify the position as regards the independent and nominee directors, yet a plain reading of clause (5.2) would suggest that even the independent and nominee directors are not spared but it would be within the discretion of the committee of high functionaries headed by the Executive Director to take a decision as regards the role of the independent and nominee directors.

132. The circular speaks about "director" and "independent and nominee director". The classification of the directors under the Companies Act is as under:

"A. Classification under the Companies Act Categories of Directors

The Companies Act refers to the following two specific categories of Directors:

1. Managing Directors; and

2. Whole-time Directors.

A Managing Director is a Director who has substantial powers of management of the affairs of the company subject to the superintendence, control and direction of the Board in question. A Whole-time Director includes a Director who is in the whole-time employment of the company, devotes his whole-time of working hours to the company in question and has a significant personal interest in the company as his source of income.

Every public company and private company, which is a subsidiary of a public company, having a share capital of more than Five Crore rupees (Rs. 5,00,00,000/-) must have a Managing or Whole-time Director or a Manager.

Further classification of Directors

Based on the circumstances surrounding their appointment, the Companies Act recognizes the following further types of Directors:

1. First Directors: Subject to any regulations in the Articles of a company, the subscribers to the Memorandum of Association, or the company''s charter or constitution ("Memorandum"), shall be deemed to be the Directors of the company, until such time when Directors are duly appointed in the annual general meeting ("AGM").

2. Casual vacancies: Where a Director appointed at the AGM vacates office before his or her term of office expires in the normal course, the resulting vacancy may, subject to the Articles, be filled by the Board. Such person so appointed shall hold office up to the time which the Director who vacated office would have held office if he or she had not so vacated such office.

3. Additional Directors: If the Articles specifically so provide or enable, the Board has the discretion, where it feels it necessary and expedient, to appoint Additional Directors who will hold office until the next AGM. However, the number of Directors and Additional Directors together shall not exceed the maximum strength fixed in the Articles for the Board.

4. Alternate Director: If so authorized by the Articles or by a resolution passed by the company in general meeting, the Board may appoint an Alternate Director to act for a Director ("Original Director"), who is absent for whatever reason for a minimum period of three months from the State in which the meetings of the Board are ordinarily held. Such Alternate Director will hold office until such period that the Original Director would have held his or her office. However, any provision for automatic re-appointment of retiring Directors applies to the Original Director and not to the Alternate Director.

5. ''Shadow'' Director: A person, who is not appointed to the Board, but on whose directions the Board is accustomed to act, is liable as a Director of the company, unless he or she is giving advice in his or her professional capacity. Thus, such a ''shadow'' Director may be treated as an ''officer in default'' under the Companies Act.

6. De facto Director: Where a person who is not actually appointed as a Director, but acts as a Director and is held out by the company as such, such person is considered as a de facto Director. Unlike a ''shadow'' Director, a de facto Director purports to act, and is seen to the outside world as acting, as a Director of the company. Such a de facto Director is liable as a Director under the Companies Act.

7. Rotational Directors: At least two-thirds of the Directors of a public company or of a private company subsidiary of a public company have to retire by rotation and the term "rotational Director" refers to such Directors who have to retire (and may, subject to the Articles, be eligible for re-appointment) at the end of

his or her tenure.

8. Nominee Directors: They can be appointed by certain shareholders, third parties through contracts, lending public financial institutions or banks, or by the Central Government in case of oppression or mismanagement. The extent of a nominee Director''s rights and the scope of supervision by the shareholders, is contained in the contract that enables such appointments, or (as appropriate) the relevant statutes applicable to such public financial institution or bank. However, nominee Directors must be particularly careful not to act only in the interests of their nominators, but must act in the best interests of the company and its shareholders as a whole. The fixing of liabilities on nominee Directors in India does not turn on the circumstances of their appointment or, indeed, who nominated them as Directors. Chapter 4 and Chapter 5 that follow set out certain duties and liabilities that apply to, or can be affixed on, Directors in general. Whether nominee Directors are required by law to discharge such duties or bear such liabilities will depend on the application of the legal provisions in question, the fiduciary duties involved and whether such nominee Director is to be regarded as being in control or in charge of the company and its activities. This determination ultimately turns on the specific facts and circumstances involved in each case.

B. Classification under the Listing Agreement

The Securities Contracts (Regulation) Act, 1956, read with the rules and regulations made thereunder, requires every company desirous of listing its shares on a recognized Indian stock exchange, to execute a listing agreement ("Agreement") with such Indian stock exchange. This Agreement is in a standard format (prescribed by the Securities Exchange Board of India ("SEBI")), as amended by SEBI from time to time. The Agreement provides for the following further categories of Directors:

Categories under Listing Agreement

1. Executive Director;

2. Non-executive Director; and

3. Independent Director.

Executive and non-executive Directors

An Executive Director can be either a Whole-time Director of the company (i.e., one who devotes his whole time of working hours to the company and has a significant personal interest in the company as his source of income), or a Managing Director (i.e., one who is employed by the company as such and has substantial powers of management over the affairs of the company subject to the superintendence, direction and control of the Board). In contrast, a non-executive Director is a Director who is neither a Whole-time Director nor a Managing Director. Clause 49 of the Agreement prescribes that the Board shall have an optimum combination of executive and non-executive Directors, with not less than fifty percent (50%) of the Board comprising non-executive Directors. Where the Chairman of the Board is a non-executive Director, at least one-third of the Board should comprise independent Directors and in case he is an executive Director, at least half of the Board should comprise independent Directors. Where the non-executive Chairman is a promoter of the company or is related to any promoter or person occupying management positions at the Board level or at one level below the Board, at least one-half of the Board of the company shall consist of independent Directors.

Independent Directors

The Agreement defines an "Independent Director" as a non-executive Director of the company who:

a. apart from receiving Director''s remuneration, does not have material pecuniary relationships or transactions with the company, its promoters, its Directors, its senior management, or its holding company, its subsidiaries, and associates which may affect independence of the Director;

b. is not related to promoters or persons occupying management positions at the board level or at one level below the board;

c. has not been an executive of the company in the immediately preceding three (3) financial years;

d. is not a partner or an executive or was not a partner or an executive during the preceding three (3) years, of any of the following:

i. the statutory audit firm or the internal audit firm that is associated with the company, and

ii. the legal firms and consulting firms that have a material association with the company;

e. is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect the independence of the Director; or

f. he is not a substantial shareholder of the company, i.e., owning two percent (2%) or more of the block of voting shares; and

g. he is not less than twenty-one (21) years of age.

Nominee directors appointed by an institution that has invested in, or lent money to, the company are also treated as independent Directors."

133. In our opinion, all the directors cannot be held liable for the default in repayment of the loan which might be for varied reasons beyond the control of such directors. We find some element of arbitrariness in the policy of the Reserve Bank of India.

134. We may profitably refer to the decision of the Supreme Court in the case of Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, , wherein it was held that the State actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The observations of His Lordship, Sabyasachi Mukherjee, J. (As the learned Chief Justice then was) made in paragraph 25 are worth noting.

"......... Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14.........."

135. In Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, , the Supreme Court made the following observations in paragraphs 36 and 37:

"36. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you. This is what men in power must remember, always.

37. Almost a quarter century back, this Court in S.G. Jaisinghani v. Union of India indicated the test of arbitrariness and the pitfalls to be avoided in all State actions to prevent that vice, in a passage as under:

"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principle or without any rule it is where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (see Dicey, Law of Constitution, 10th edn. Introduction, cx). Law has reached its finest moments, stated Douglas, J. in United States v. Wunderlich, when it has freed man from the unlimited discretion of some ruler and . Where discretion is absolute, man has always suffered. It is in this sense that the rule of law may be said to be sworn enemy of caprice. Discretion, as Lord Mansfield stated it is classic terms in the case of John Wilkes, ''means sound discretion guided by law. It must be governed by rule, not humour: it must not be arbitrary, vague and fanciful''.""

(Emphasis supplied).

136. It is well-settled that a company, be it a private or public, being a juristic person, is different from an individual as a citizen. For all acts of the company each and every director need not be held responsible. It would depend upon the role of each of the directors so far as the day-to-day management and affairs of the company are concerned.

137. We may give one simple example. Even when any penal liability is to be fastened upon the company, provisions have been made in different enactments like the Negotiable Instruments Act, the Prevention of Food Adulteration Act, the Essential Commodities Act, the Drugs and Cosmetics Act, etc. relating to offences by companies providing that if the person committing an offence is a company, every person who, at the time the offence was committed, was incharge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. All the directors of the company, irrespective of their role in the day-to-day affairs and functioning of the company, cannot be made liable unless the statute otherwise makes them liable for the same. This is where the concept of piercing of the corporate veil is applied by the courts in various situations. Two situations where such principle is consistently applied are, one where the statute itself so permits or provides for it, and the second, where due to glaring facts established on record it is found that a complex web has been created only with a view to defraud the revenue interest of the bank, thereby the revenue interest of the State.

138. We may quote with profit a Division Bench decision of this Court, to which one of us (Akil Kureshi, J.) was a party, in the case of Pravinbhai M. Kheni Vs. Assistant Commissioner of Income Tax and Others, , wherein it has been explained in details the concept of lifting or piercing the corporate veil. His Lordship (Akil Kureshi, J.) observed thus:

"....The principle of lifting or piercing the corporate veil is neither new nor unknown. It is however, not possible of any precise definition or application in a straitjacket formula. We may notice some of the authorities dealing with such a concept.

1) In case of The State Trading Corporation of India Ltd. and Others Vs. The Commercial Tax Officer, Visakhapatnam and Others, , nine Judge Bench of the Supreme Court considered the question whether a company can be considered a citizen and be permitted to approach Supreme Court under Article 32 of the Constitution of India for asserting its fundamental right under Article 19(1) of the

Constitution. By majority judgment it was held that company being a juristic person is different from a citizen. Hidayatullah, J in his concurring but separate judgment made following observations on the question of effect of incorporation of a company:

"29. We are dealing here with an incorporated company. The nature of the personality of an incorporated company which arises from a fiction of law, must be clearly under stood before we proceed to determine whether the word ''citizen'' used in the Constitution generally or in Article 19 specially, covers an incorporated company. Unlike an unincorporated company, which has no separate existence and which the law does not distinguish from its members an incorporated company has a separate existence and the law recognises it as a legal person separate and distinct from its members. This new legal personality emerges from the moment of incorporation and from that date the persons subscribing to the memorandum of association and other persons Joining as members are regarded as a body corporate or a corporation aggregate and the new person begins to function as an entity. But the members who form the incorporated company do not pool their status or their personality. If all of them are citizens of India the company does not become a citizen of India any more than if all are married the company would be a married person. The personality of the members has little to do with the persona of the incorporated company. The persona that comes into being is not the aggregate of the personae either in law or in metaphor. The corporation really has no physical existence; it is a mere ''abstraction of law'' as Lord Selborne described it in G.E. Rly. Co. v. Turner (1872) 8 Ch A 149 at p.152 or as Lord Macnaghten said in the well-known case of Salomon v. Salomon and Co. Ltd. 1897 AC 22 at page 51. it is "at law a different person altogether from the subscribers to the memorandum of association." This distinction is brought home if one remembers that a company cannot commit crimes like perjury, bigamy or capital murder''. This persona dicta being a creature of a fiction, is protected by natural limitations as pointed out by Palmer in his Company Law (20th edn.) p.130 and which were tersely summed up by counsel in R. v. City of London, (1632) 8 SV Tr. 1087 at p.1138 when he asked "Can you hang its common seal?". It is true that sometimes the law permits the corporate veil to be lifted, but of that later."

In the later portion of the judgment, learned Judge dealt with the question of lifting of corporate veil in that case, for benefit of the company and observed as under:

"65. The next question is whether the State Trading Corporation is a department or organ of Government notwithstanding the formality of incorporation. On behalf of the Corporation it is contended that if the corporate veil is pierced one sees that the right to invoke Art. 19(1)(f) and (g) is being claimed by three persons who are admittedly citizens of India namely the President of India and the two secretaries. The contention on the other side is that the corporate veil cannot be pierced at all and that if it is, then behind that veil there is the Government of

India.

In my judgment it is not possible to pierce the veil of incorporation in our country to determine the citizenship of the members and then to give the corporation the benefit of Art. 19. If we did pierce the veil and saw that the corporation was identical with Government there would be difficulty in giving, relief unless we held that the State can be its own citizen. Nor is it possible to raise an irrebuttable presumption about the citizenship of the members. I have given detailed reasons already in answer to the first question posed for our decision. If we go by the corporate entity then we must hold that Art. 19 applies to natural persons. On that subject I have said a great deal but what I have said sums up to the following passage from Ducat v. Chicago, (1868) 48 Ill 172 quoted by Farnsworth (op. cit.) at p.310 and approved by the United States Supreme Court:

"The term citizen can be correctly understood in no other sense than that in which it was understood in common acceptation when the Constitution was adopted, and as it is universally explained by writers on government, without exception. A citizen is of the genus homo, inhabiting, and having certain rights in some State or district............... these privileges attach to him in every State into which he may enter, as to a human being-as a person with faculties to appreciate them, and enjoy them, and not to an intangibility, a mere legal entity, an invisible artificial being, but to a man, made in God''s image.........""

"....From the above judicial pronouncements, it can be seen that concept of lifting or piercing the corporate veil as some times referred to as cracking the corporate shell, is applied by Courts sparingly and cautiously. It is however, recognised that boundaries of such principle have not yet been defined and areas where such principle may have to be applied may expand. Principally, the concept of corporate body being an independent entity enjoying existence independent of its directors, is a well known principle. Its assets are distinct and separate and distinct from those of its members. Its creditors cannot obtain satisfaction from the assets of its members. However, with ever developing world and expanding economic complexities, the Courts have refused to limit the scope and parameters or areas where corporate veil may have to be lifted.

Howsoever cautiously, the concept of piercing of corporate veil is applied by the Courts in various situations. Two situations where such principle is consistently applied are, one where the statute itself so permits or provides for and second where due to glaring facts established on record it is found that a complex web has been created only with a view to defraud the revenue interest of the State. If it is found that incorporation of an entity is only to create a smoke screen to defraud the revenue and shield the individuals who behind the corporate veil are the real operators of the company and beneficiaries of the fraud, the Courts have not hesitated in ignoring the corporate status and striking at the real beneficiaries of such complex design.

Section 179 of the Act itself is a statutory creation of piercing of corporate veil.

Ordinarily, directors of a company even that of a private company would not be answerable for the tax dues of the company. Under sub-section (1) of section 179 of the Act, however, subject to satisfaction of certain conditions, the directors can be held jointly and severally liable to pay the dues of the company.

(Emphasis supplied)

139. In re National Bank of Wales, Ltd., (1899)2 Ch 629, it was held that, "A director who is acting honestly himself is entitled to trust the officers of the company not to conceal from him what they ought to report to him, if he has no reasonable ground for suspecting that they are deceiving him." Directors are not liable for all their mistakes but only for negligence which is in a business sense culpable or gross. Nor is a director liable for untrue representations made to the share-holders if he honestly believed the representations to be true and had at the time reasonable grounds for his belief.

140. In Dovey v. Cory, (1901) AC 477, the House of Lords had before it a case in which Mr. Cory, a director of the company, was being made liable for misfeasance on the ground that he was guilty of neglect of duties. Dealing with the charge of neglect Lord Halsbury observed:

"The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairman were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management".

141. In re City Equitable Fire Insurance Co. Ltd., (1925)1 Ch 407, dividend had been paid out of capital and losses had been occasioned by unjustified

investments and loans. The liquidator sought to make the directors responsible for the loss on the ground that they had been guilty of breach of duty and their act on that account amounted to misfeasance. The five principles which Romer, J. laid down in connection with the duty of directors were:

(1) A director is only liable for gross or culpable negligence, this means that he does not owe a duty to his company, to take all possible care. It is some degree of care less than that. The care that he is bound to take has been described by Neville, J. in the case referred to above as "reasonable care" to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf.

(2) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.

(3) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so.

(4) In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

(5) Directors are not bound to examine entries in the company''s books.

142. The principles laid down in the above mentioned cases have been followed by Indian Courts also. Reference may be made by way of example to three cases, which will be found reported in S.C. Mitra v. Nawab Ali Khan, AIR 1926 Oudh 153, National Bank of Upper India, Lucknow v. Dina Nath Sapru, AIR 1926 Oudh 243 and T.S.Pl.S. Thinnappa Chettiar and Others Vs. G. Rajagopalan, Official Liquidator of Oriential Investment Trust Ltd. and Others, .

143. In our opinion, a director of a company other than the promoter or a direct borrower of the loan from the bank and could also be a director who has a limited role to play and not directly or indirectly responsible for the company going in a debt cannot be restrained, if he himself on his own, wants to start a business or a new venture, from approaching a bank for financial assistance. Apart from a social stigma, it is a direct infringement on the right of such a director to carry on trade or business under Article 19(1)(g) of the Constitution of India.

144. This provision in the circular shatters the concept of the identity of a company different and distinct from its directors without providing any safeguards. It does not distinguish between a director who is involved in the day-

to-day functioning of a company as against those who are not. The circular paints all directors with the same brush.

145. Therefore, we have reached to a conclusion that the Master Circular, so far as it is sought to be made applicable to all the directors of the company is arbitrary and unreasonable. We, at the cost of repetition, state that we are not questioning the power of the Reserve Bank of India to issue the Master Circular or even the policy decision regarding the same, but we are only concerned with the unreasonable restriction imposed on all the directors of the company. We find an element of arbitrariness in such policy decision. To this limited extent, we hold that the Master Circular is violative of Article 19(1)(g) of the Constitution of India and deserves to be struck down partially.

LEGALITY AND VALIDITY OF THE NOTICE:

146. Since we have dealt with all the submissions regarding the constitutional validity of the Master Circular, we shall now look into the legality and validity of the notice issued by the bank so far as the proposed action of declaring the petitioners as willful defaulters is concerned.

147. So far as the petitioners of Special Civil Application No. 645 of 2014 are concerned, they were served with a notice dated 19th February 2013, indicating that they had been availing the facilities from the branch office of the bank at Ahmedabad, the details have been stated in the notice. It has been further stated that their accounts were classified as "NPA" on 30th June 2012 with the outstanding balance of Rs. 10,27,23,076=00. They were informed that the bank had already taken the SARFAESI action and filed O.A. No. 200 of 2012 for recovery of Rs. 10.80 crore in D.R.T.-I, Ahmedabad. It is further stated that the bank proposed to classify them as a willful defaulters for the reasons stated in the notice, mainly default in meeting its payment/repayment obligation and siphoning of the funds by utilizing the same for other purpose rather than for the purpose for which the loan was obtained. Once again, a second show-cause notice dated 14th May 2013 was issued, calling upon the petitioners to show-cause as to why they should not be classified as "willful defaulters". The final notice is dated 8th January 2014, wherein it has been stated that the petitioners should appear personally before the Grievances Redressal Committee on 17th January 2014 for personal hearing in the matter.

148. According to Mr. Shah, the learned advocate appearing on behalf of the petitioners, the impugned show-cause notice fails to disclose any material against the petitioners. The notice also fails to give clear fifteen days'' time by way of an opportunity to meet with the same as stipulated in clause 3(iii) of the Circular.

149. We have perused the show-cause notices on record. We may only say that except stating that the accounts have been classified as "NPA" and that the unit has defaulted in meeting with its payment/repayment obligation to the bank, no other materials have been disclosed with a view to give an opportunity to the

petitioners to meet with the show-cause notice.

150. The show-cause notice is absolutely vague and contains no factual or other materials. We fail to understand on what basis the bank has alleged in the show-cause notice that the funds provided by the bank have been siphoned of and the same were used for the purpose other than the project for which the loan was sanctioned. If such are the nature of the allegations, then at least it is expected of the bank to provide some materials so that the petitioners can meet with the same. It has to be held that there is violation of the principles of natural justice. One of the facets of the principles of natural justice is fairness which, we do not find on the part of the bank in the proposed action.

151. We have noticed one thing that mere failure on the part of the borrower to repay the amount of loan by itself does not entail the liability of being termed as a "willful default" and thereby "willful defaulters". "Willful default" broadly covers the following:

(a) Deliberate non-payment of the dues despite adequate cash flow and good networth;

(b) Siphoning off of funds to the detriment of the defaulting unit;

(c) Assets financed either not been purchased or been sold and proceeds have been misutilised;

(d) Misrepresentation/falsification of records;

(e) Disposal/removal of securities without bank''s knowledge;

(f) Fraudulent transactions by the borrower.

152. The show-cause notice is absolutely silent regarding the same. It could be the case of the bank that there has been a deliberate non-payment of the dues despite adequate cash-flow and good net-worth but, before alleging, there has to be some material with the bank and the same should be prima facie disclosed to the borrower so that he could make good his case that there has been no deliberate non-payment of the dues. For example, if it is the case of the bank that there is adequate cash-flow and good net-worth and despite that the borrower has failed in repayment of the loan, then the bank should disclose the source of information regarding the adequate cash-flow and good net-worth.

153. We are not satisfied with the manner in which the bank wants to proceed against the petitioners. The bank can definitely proceed in accordance with the policy decision as reflected from the Master Circular, but the same has to be in accordance with law.

154. We are of the view that since the show-cause notice is bereft of basic details and material particulars, the same deserves to be quashed and set-aside. It would be open for the bank to once again issue a fresh show-cause notice incorporating the necessary materials and details on the basis of which it wants

to make good its allegations that the petitioners are willful defaulters within the meaning of the same as explained in the Master Circular.

155. The same is the problem so far as the show-cause notice issued to the petitioners of Special Civil Application No. 10120 of 2014 is concerned. However, the question is, whether we can look into the same and issue an appropriate writ, order or direction to a Standard Chartered Bank which, although is a scheduled bank figuring in a Second Schedule to the Reserve Bank of India Act, 1934, yet is a private bank. Such being the position, whether the Standard Chartered Bank would be amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India, is a question which we need to consider.

156. In the case of Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, , the Supreme Court laid down certain relevant tests for determining whether a company/society/corporation can be held to be an agency or instrumentality of the State Government. These tests are as under:--

"(1) One thing is clear that if the entire share capital of the corporation is held by Govt. it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford Some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor.... whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence of ''deep and pervasive State control may afford an indication that the Corporation is a State Agency or instrumentality.

(5) If the functions of the corporation of Public importance and closely related to governmental functions it would be a relevant factor in classifying the corporation as an instrumentality or agency of Govt.

(6) Specifically, if a department of Govt. is transferred to a corporation, it would be a strong factor supportive of this inference of the Corporation being an instrumentality or agency of Government."

157. Proceeding further, the Supreme Court held that it was immaterial whether the corporation was created by a statute or under a state. The test is whether it is an instrumentality or agency of the Government and not as to how it was created. In the said case their Lordships proceeded to observe that the Government may act through the instrumentality or agency of a natural person or it may employ the instrumentality or agency of juridical person to carry out its functions. The test is that it will be considered to be an agency and instrumentality of the State. It is true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well

as useful from the point of view of effective business management but behind the formal ownership which is cast in the corporate mould, the reality is very much the deeply pervasive presence of the Government, and it is in fact the Government which acts through the instrumentality or. agency of the corporation or the juristic person. If the instrumentality and agency of the Govt. discharges the Governmental functions it must be subject to same limitations in the field of constitutional law as the Government itself, though in the eye of the law it would be a distinct and independent legal entity. In Ajay Hasia''s case (supra), the Supreme Court was considering the obligations of instrumentalities and agencies of the Government to respect the fundamental rights of the citizens and they were held to be bound to enforce the fundamental rights guaranteed to the citizens of India under Part III of the Constitution of India. If this binding was not there, the fundamental rights in the opinion of the Supreme Court would then be reduced to an idle dream or a promise of unreality. Because in the constitution philosophy of a democratic socialist public Govt. has to undertake a multitude of socio-economic operations and the Govt. having regard to the practical advantages of functioning through the legal device of a corporation by resorting to create instrumentalities or agencies which will not exonerate the Govt. itself from obeying the fundamental rights of the citizens. In the context of enforcing fundamental rights, the Supreme Court laid emphasis that by process of judicial construction fundamental rights cannot be rendered futile and meaningless. Because in the opinion of the Apex Court, it is the fundamental rights which alone with the directive principles constitute the life force of the Constitution of India and they must be put into effective action by meaningful and purposeful interpretation. Therefore, it was observed that if a corporation or a company is the instrumentality or agency of Government, it must be held to be an authority within the meaning of Article 12 of the Constitution and subject to the same basic obligation to obey the fundamental rights as the Government.

158. Applying the test nos. 1 and 2 to the facts of the case on hand, no materials have been placed on record to even remotely indicate that the share capital of the bank is held by the Central Government or the State Government, or the bank is dependent upon the Government for financial assistance. There is nothing to even remotely suggest that the Standard Chartered Bank enjoys any monopoly status conferred by the State. With regard to the fourth test, there is nothing to indicate existence of "deep and pervasive State control". All that can be said is that the directives of the Reserve Bank of India are binding on the bank. With regard to the fifth test, although it has been very vociferously submitted by Mr. Shelat, the learned appearing on behalf of the petitioners, that the functions of the bank are of public importance and further the bank could be said to be discharging a public function which is akin to a Governmental function, yet this argument pales into insignificance in view of the decision of the Supreme Court in the case of Federal Bank Ltd. Vs. Sagar Thomas and Others, . We shall discuss the decision of the Supreme Court in the case of Federal Bank Limited (supra) a little later.

159. While dealing with the test based on functions of the Corporation of public importance, the Supreme Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , referred "to E.S. Evans v. Charles E. Newton, (1966)382 US 296 and Smith v. Allwright, (1943)32 US 649, and observed that the decisions show that the test of public or governmental character of the function is not easy of application and does not invariably lead to the correct inference because the range of governmental activity is broad and varied and merely because an activity may be such as may legitimately be carried on by Government, it does not mean that a Corporation which is otherwise a private entity, would be an instrumentality or agency of the Government by reason of carrying of such activity. In applying the test, therefore, a further precaution is to be taken and it is to be seen whether the public nature of the function is impregnated with governmental character or "tied or entwined with Government" or fortified by some other additional factor (vide observations in para 18 column 2 at page 641). In our view, therefore, the fifth test is also not satisfied.

160. Thus, so far as the tests laid down by the Supreme Court in the case of Ajay Hasia (supra) is concerned, none of the tests could be said to be fulfilled so as to make the Standard Chartered Bank, a private bank, amenable to the writ jurisdiction of this Court.

161. In Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, , the Supreme Court considered the issue as regards Article 12 of the Constitution of India at length. We quote the following observations of the Supreme Court:

"What is ''Authority'' and when includible in ''other authorities'', re: Article 12

We have, in the earlier part of this judgment, referred to the dictionary meaning of ''authority'', often used as plural, as in Article 12 viz. ''other authorities''. Now is the time to find out the meaning to be assigned to the term as used in Article 12 of the Constitution.

A reference to Article 13(2) of the Constitution is apposite. It provides--

"13(2). The State shall not make any law which takes away or abridges the right conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

Clause (3) of Article 13 defines ''law'' as including any Ordinance, order, bye-law, rule, regulation, notification, custom or uses having in the territory of India the force of law. We have also referred to the speech of Dr. B.R. Ambedkar in Constituent Assembly explaining the purpose sought to be achieved by Article 12. In RSEB''s case, the majority adopted the test that a statutory authority "would be within the meaning of ''other authorities'' if it has been invested with statutory power to issue binding directions to the parties, disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law".

In Sukhdev Singh''s case, the principal reason which prevailed with A.N. Ray, CJ for holding ONGC, LIC and IFC as authorities and hence ''the State'' was that rules and regulations framed by them have the force of law. In Sukhdev Singh''s case, Mathew J. held that the test laid down in RSEB''s case was satisfied so far as ONGC is concerned but the same was not satisfied in the case of LIC and IFC and, therefore, he added to the list of tests laid down in RSEB''s case, by observing that though there are no statutory provisions, so far as LIC and IFC are concerned, for issuing binding directions to third parties, the disobedience of which would entail penal consequences, yet these corporations (i) set up under statutes, (ii) to carry on business of public importance or which is fundamental to the life of the people ___ can be considered as the State within the meaning of Article 12. Thus, it is the functional test which was devised and utilized by Mathew J. and there he said,

"the question for consideration is whether a public corporation set up under a special statute to carry on a business or service which Parliament thinks necessary to be carried on in the interest of the nation is an agency or instrumentality of the State and would be subject to the limitations expressed in Article 13(2) of the Constitution. The State is an abstract entity. It can only act through the instrumentality or agency of natural or juridicial persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the Sate".

It is pertinent to note that functional tests became necessary because of the State having chosen to entrust its own functions to an instrumentality or agency in absence whereof that function would have been a State activity on account of its public importance and being fundamental to the life of the people.

The philosophy underlying the expansion of Article 12 of the Constitution so as to embrace within its ken such entities which would not otherwise be the State within the meaning of Article 12 of the Constitution has been pointed out by the eminent jurist H.M. Seervai in Constitutional Law of India (Silver Jubilee Edition, Vol. 1).

"The Constitution should be so interpreted that the governing power, wherever located, must be subjected to fundamental constitutional limitations............ Under Article 13(2) it is State action of a particular kind that is prohibited. Individual invasion of individual rights is not, generally speaking, covered by Article 13(2). For, although Articles 17, 23 and 24 show that fundamental rights can be violated by private individuals and relief against them would be available under Article 32, still, by and large, Article 13(2) is directed against State action. A public corporation being the creation of the State, is subject to the same constitutional limitations as the State itself. Two conditions are necessary, namely, that the Corporation must be created by the State and it must invade the constitutional rights of individuals"(Para 7.54). "The line of reasoning developed by Mathew J. prevents a large-scale evasion of fundamental rights by transferring work done in Govt. Departments to statutory Corporations, whilst retaining Govt. control. Company legislation in India permits tearing of the corporate veil in certain cases and to look behind the real legal personality. But Mathew J. achieved the same result by a different route, namely, by drawing out the implications of Article 13(2)" (Para 7.57 ibid).

The terms instrumentality or agency of the State are not to be found mentioned in Article 12 of the Constitution. Nevertheless they fall within the ken of Article 12 of the Constitution for the simple reason that if the State chooses to set up an instrumentality or agency and entrusts it with the same power, function or action which would otherwise have been exercised or undertaken by itself, there is no reason why such instrumentality or agency should not be subject to same constitutional and public law limitations as the State would have been. In different judicial pronouncements, some of which we have reviewed, any company, corporation, society or any other entity having a juridical existence if it has been held to be an instrumentality or agency of the State, it has been so held only on having found to be an alter ego, a double or a proxy or a limb or an off-spring or a mini-incarnation or a vicarious creature or a surrogate and so on __ by whatever name called __ of the State. In short, the material available must justify holding of the entity wearing a mask or a veil worn only legally and outwardly which on piercing fails to obliterate the true character of the State in disguise. Then it is an instrumentality or agency of the State.

It is this basic and essential distinction between an ''instrumentality or agency'' of the State and ''other authorities'' which has to be borne in mind. An authority must be an authority sui juris to fall within the meaning of the expression ''other authorities'' under Article 12. A juridical entity, though an authority, may also satisfy the test of being an instrumentality or agency of the State in which event such authority may be held to be an instrumentality or agency of the State but not the vice versa.

We sum up our conclusions as under:-

(1) Simply by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of ''other authorities'' in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to public. Further, the statute creating the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people __ their rights, duties, liabilities or other legal relations. If created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the

powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavour and clear indicia of power __ constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in Ajay Hasia enable determination of Governmental ownership or control. Tests 3, 5 and 6 are ''functional'' tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Unfortunately thereafter the tests were considered relevant for testing if an authority is the State and this fallacy has occurred because of difference between ''instrumentality and agency'' of the State and an ''authority'' having been lost sight of sub-silentio, unconsciously and un-deliberated. In our opinion, and keeping in view the meaning which ''authority'' carries, the question whether an entity is an ''authority'' cannot be answered by applying Ajay Hasia tests.

(2) The tests laid down in Ajay Hasia''s case are relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned. When an entity has an independent legal existence, before it is held to be the State, the person alleging it to be so must satisfy the Court of brooding presence of government or deep and pervasive control of the government so as to hold it to be an instrumentality or agency of the State."

(Emphasis supplied)

162. In Jatya Pal Singh and Others Vs. Union of India (UOI) and Others, , the Supreme Court reiterated the tests for considering, whether a body falls within the definition of State under Article 12 of the Constitution of India.

163. The tests propounded for determining as to when the Corporation will be said to be an instrumentality or agency of the Government as stated in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , were summarized as follows:

"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor ?. whether the corporation enjoys monopoly status which is State-conferred or State-protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government."

164. The aforesaid ratio in Ramana Dayaram Shetty (supra) has been consistently followed by the Supreme Court, as is evident from paragraph 31 of the judgment in Biswas (supra). Para 31 reads as under:

"31. The tests to determine whether a body falls within the definition of ''State'' in Article 12 laid down in Ramana with the Constitution Bench imprimatur in Ajay Hasia form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject which is apparent from a chronological consideration of the authorities cited."

165. The subsequent paragraphs of the judgment noticed the efforts made to further define the contours within which to determine, whether a particular entity falls within the definition of other authority, as given in Article 12. The ultimate conclusion of the Constitution Bench are recorded in paragraph 39 and 40 as under:-

"39. Fresh off the judicial anvil is the decision in The Mysore Paper Mills Ltd. Vs. The Mysore Paper Mills Officers'' Association and Another, , which fairly represents what we have seen as a continuity of thought commencing from the decision in Rajasthan Electricity Board in 1967 up to the present time. It held that a company substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public interest under the control of the Government is ''an authority'' within the meaning of Article 12.

40. The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be, whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the

body a State."

166. In our opinion, the functions of the Standard Chartered Bank as one of the Scheduled Banks under the Reserve Bank of India Act, 1934, cannot be regarded as Governmental or of essential public importance or as closely related to Governmental functions or being fundamental to the life of the people and duties and obligations to the public at large. The bank has its own resources to raise its funds without any contribution or shareholding by the State. It is not in dispute that it has its own Board of Directors. It works like any other private company in the banking business.

167. In the aforesaid context, it will be profitable for us to look into a decision of the Supreme Court in the case of Federal Bank Ltd. Vs. Sagar Thomas and Others, . In the said case, the respondent no. 1 was working as a Branch Manager in the Federal Bank. He was suspended on 29th May 1982 since a disciplinary inquiry was ordered into some charges of misconduct. The Inquiry Officer found him guilty of the charges and ultimately awarded punishment of dismissal. The respondent no. 1 challenged his dismissal by filing a writ petition in the High Court. A preliminary objection to the maintainability of the writ petition was taken by the appellant Bank, saying that it was a private bank and not a State or its agency or instrumentality within the meaning of Article 12 of the Constitution of India. The learned Single Judge of the High Court, however, found that the Federal Bank performed a public duty, and as such, it would get covered under the definition of ''other authority'' within the meaning of Article 12, and as such, the writ petition was maintainable. The order passed by the learned Single Judge was carried in appeal and the appeal was also dismissed. The Federal Bank challenged the order passed by the High Court, dismissing the appeal, before the Supreme Court. The question which fell for the consideration before the Supreme Court on appeal was, whether the appellant Bank was a private body or fell within the definition of a State or legal or other authorities under the control of the Government within the meaning of Article 12 of the Constitution of India.

168. The observations of the Supreme Court as contained in paragraphs 26 to 33 are worth noting:

"26. A company registered under the Companies Act for the purposes of carrying on any trade or business is a private enterprise to earn livelihood and to make profits out of such activities. Banking is also a kind of profession and a commercial activity, the primary motive behind it can well be said to earn returns and profits. Since time immemorial, such activities have been carried on by individuals generally. It is a private affair of the company though case of nationalized banks stands on a different footing. There may, well be companies, in which majority of the share capital may be contributed out of the State funds and in that view of the matter there may be more participation or dominant participation of the State in managing the affairs of the company. But in the present case we are concerned with a banking company which has its own resources to raise its funds without any contribution or shareholding by the State. It has its own Board of Directors elected by its shareholders. It works like any other private company in the banking business having no monopoly status at all. Any company carrying on banking business with a capital of five lacs will become a scheduled bank. All the same, banking activity as a whole carried on by various banks undoubtedly has an impact and effect on the economy of the country in general. Money of the shareholders and the depositors is with such companies, carrying on banking activity. The banks finance the borrowers on any given rate of interest at a particular time. They advance loans as against securities. Therefore, it is obviously necessary to have regulatory check over such activities in the interest of the company itself, the shareholders, the depositors as well as to maintain the proper financial equilibrium of the national economy. The Banking companies have not been set up for the purposes of building economy of the State on the other hand such private companies have been voluntarily established for their own purposes and interest but their activities are kept under check so that their activities may not go wayward and harm the economy in general. A private banking company with all freedom that it has, has to act in a manner that it may not be in conflict with or against the fiscal policies of the State and for such purposes, guidelines are provided by the Reserve Bank so that a proper fiscal discipline, to conduct its affairs in carrying on its business, is maintained. So as to ensure adherence to such fiscal discipline, if need be, at times even the management of the company can be taken over. Nonetheless, as observed earlier, these are all regulatory measures to keep a check and provide guideline and not a participatory dominance or control over the affairs of the company. For other companies in general carrying on other business activities may be manufacturing, other industries or any business, such checks are provided under the provisions of the Companies Act, as indicated earlier. There also, the main consideration is that the company itself may not sink because of its own mismanagement or the interest of the shareholders or people generally may not be jeopardized for that reason. Besides taking care of such interest as indicated above, there is no other interest of the State, to control the affairs and management of the private companies. The care is taken in regard to the industries covered under the Industries (Development and Regulation) Act, 1951 that their production which is important for the economy may not go down yet the business activity is carried on by such companies or corporations which only remains a private activity of the entrepreneurs/companies.

27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment say Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and

Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance of those provisions. For instance, if a private employer dispense with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and have issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

28. The six factors which have been enumerated in the case of Ajay Hasia (supra) and approved in the later decisions in the case of Ramana (supra) and the seven Judges Bench in the case of Pradeep Kumar Biswas (supra) may be applied to the facts of the present case and see as to those tests apply to the appellant bank or not. As indicated earlier, share capital of the appellant bank is not held at all by the government nor any financial assistance is provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant bank does not enjoy any monopoly status nor it can be said to be an institution having State protection. So far control over the affairs of the appellant bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant bank nor anyone of them is a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the malfunctioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purposes of maintaining the healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by the Reserve Bank of India under a Statute or the Central Government. Even if it was with the Central Government in place of the Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of All India Bank Employees'' Association (supra) does not advance the case of the respondent. It is only in case of malfunctioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In the times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general.

29. There are a number of such companies carrying on the profession of banking. There is nothing which can be said to be close to the governmental functions. It is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or commercial activity, may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, are such which do have impact on the economy of the country in general. But such activities cannot be classified one falling in the category of discharging duties, functions of public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of Ajay Hasia (supra). Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the government and transferred to the appellant company. For the sake of argument even if it may be assumed that one or the other test as provided in the case of Ajay Hasia (supra) may be attracted that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature. In this connection, observations made in the case of Pradeep Kumar Biswas (supra) quoted earlier would also be relevant.

30. We may now consider the two decisions i.e. Andi Mukta (supra) and the U.P. State Co-operative Land Development Bank Ltd. (supra) upon which much reliance has been placed on behalf of the respondents to show that a writ would lie against the appellant company. So far the decision in the case of U.P. State Co-operative Land Development Bank Ltd. (supra) is concerned, it stands entirely on a different footing and we have elaborately discussed it earlier.

31. The other case which has been heavily relied upon is Andi Mukta (supra). It is no doubt held that a Mandamus can be issued to any person or authority performing public duty, owing positive obligation to the affected party. The writ petition was held to be maintainable since the teacher whose services were terminated by the institution was affiliated to the university and was governed by the Ordinances, casting certain obligations which it owed to that petitioner. But it is not the case here. Our attention has been drawn by the learned counsel for the appellant to paragraphs 12, 13 and 21 of the decision (Andi Mukta) to indicate that even according to this case no writ would lie against the private body except where it has some obligation to discharge which is statutory or of public character.

32. Merely because the Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section 5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business of or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain

consequences follow as indicated in the Act itself. Provision regarding acquisition of a banking company by the Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for acquiring authority.

33. For the discussion held above, in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don''t find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor puts any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. Respondent''s service with the bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank. That being the position, the appeal deserves to be allowed."

(Emphasis supplied)

169. Thus, if we apply the ratio of the decision of the Supreme Court in the case of Federal Bank (supra), then we have no difficulty in arriving at the conclusion that a writ petition would not be maintainable at the instance of the petitioners against a private bank in so far as the challenge to the legality and validity of the notice is concerned.

170. We may quote one more decision of the Supreme Court, showing considerable law on the issue with which we are dealing with, in the case of Binny Ltd. and Another Vs. V. Sadasivan and Others, .

"10. The Writ of Mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the sovereign to subordinates. In England, in early times, it was made generally available through the Court of King''s Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporation which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities. The courts always retained the discretion to withhold the remedy where it would not be in the interest of justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. In the Administrative Law (Ninth Edition) by Sir William Wade and Christopher Forsyth, (Oxford University Press) at page 621, the following opinion is expressed:

"A distinction which needs to be clarified is that between public duties enforceable by mandamus, which are usually statutory, and duties arising merely from contract. Contractual duties are enforceable as matters of private law by the ordinary contractual remedies, such as damages, injunction, specific performance and declaration. They are not enforceable by mandamus, which in the first place is confined to public duties and secondly is not granted where there are other adequate remedies. This difference is brought out by the relief granted in cases of ultra vires. If for example a minister or a licensing authority acts contrary to the principles of natural justice, certiorari and mandamus are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases."

11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the government to run industries and to carry on trading activities. These have come to be known as Public Sector Undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in

social or economic affairs in the public interest. In a book on Judicial Review of Administrative Action (Fifth Edn.) by de Smith, Woolf and Jowell in Chapter 3 para 0.24, it is stated thus:

"A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including: rule-making, adjudication (and other forms of dispute resolution); inspection; and licensing.

Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd''s of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is important for the courts to "recognise the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted". Non-governmental bodies such as these are just as capable of abusing their powers as is government."

12. In Regina v. Panel on Take-overs and Merges, Ex parte Datafin Plc. And another (1987) 1 Queen''s Bench Division 815, a question arose whether the Panel of Takeovers and Mergers had acted in concert with other parties in breach of the City Code on Take-overs and Mergers. The panel dismissed the complaint of the applicants. Though the Panel on Take-over and Mergers was purely a private body, the Court of Appeal held that the supervisory jurisdiction of the High Court was adaptable and could be extended to any body which performed or operated as an integral part of a system which performed public law duties, which was supported by public law sanctions and which was under an obligation to act judicially, but whose source of power was not simply the consent of those over whom it exercised that power; that although the panel purported to be part of a system of self-regulation and to derive its powers solely from the consent of those whom its decisions affected, it was in fact operating as an integral part of a governmental framework for the regulation of financial activity in the City of London, was supported by a periphery of statutory powers and penalties, and was under a duty in exercising what amounted to public powers to act judicially; that, therefore, the court had jurisdiction to review the panel''s decision to dismiss the applicants'' complaint; but that since, on the facts, there were no

grounds for interfering with the panel''s decision, the court would decline to intervene.

13. Lloyd L.J., agreeing with the opinion expressed by Sir John Donaldson M.R. held:

"I do not agree that the source of the power is the sole test whether a body is subject to judicial review, nor do I so read Lord Diplock''s speech. Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If at the end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review."

14. In that decision, they approved the observations made by Lord Diplock in Council of Civil Service Unions vs. Minister for the Civil Service (1985) A.C. 374, 409 wherein it was held:

"For a decision to be susceptible to judicial review the decision-maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties) to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers which have one or other of the consequences mentioned in the preceding paragraph. The ultimate source of the decision-making power is nearly always nowadays a statute or subordinate legislation made under the statute; but in the absence of any statute regulating the subject matter of the decision the source of the decision-making power may still be the common law itself, i.e., that part of the common law that is given by lawyers the label of ''the prerogative.'' Where this is the source of decision-making power, the power is confined to executive officers of central as distinct from local government and in constitutional practice is generally exercised by those holding ministerial rank"

15. It is also pertinent to refer to Sir John Donaldson M.R. in that Take-Over Panel case:

"In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to is jurisdiction."

16. The above guidelines and principles applied by English courts cannot be fully applied to Indian conditions when exercising jurisdiction under Article 226 or 32 of the Constitution. As already stated, the power of the High Courts under Article 226 is very wide and these powers have to be exercised by applying the constitutional provisions and judicial guidelines and violation, if any, of the fundamental rights guaranteed in Part III of the Constitution. In the matter of employment of workers by private bodies on the basis of contracts entered into

between them, the courts had been reluctant to exercise the powers of judicial review and whenever the powers were exercised as against private employers, it was solely done based on public law element involved therein.

17. This view was expressly stated by this Court in various decisions and one of the earliest decisions is the The Praga Tools Corporation Vs. Shri C.A. Imanual and Others, In this case, the appellant company was a company incorporated under the Indian Companies Act and at the material time the Union Government and the Government of Andhra Pradesh held 56 per cent and 32 per cent of its shares respectively. Respondent workmen filed a writ petition under Article 226 in the High Court of Andhra Pradesh challenging the validity of an agreement entered into between the employees and the company, seeking a writ of mandamus or an order or direction restraining the appellant from implementing the said agreement. The appellant raised objection as to the maintainability of the writ petition. The learned Single Judge dismissed the petition. The Division Bench held that the petition was not maintainable against the company. However, it granted a declaration in favour of three workmen, the validity of which was challenged before this Court. This Court held at pages 589-590 as under:

"....that the applicant for a mandamus should have a legal and specific right to enforce the performance of those dues. Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or any inferior tribunal requiring him or them to do particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorizing their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities [Cf. Halsbury''s Laws of England (3rd Ed.), Vol. II p.52 and onwards].

The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company."

18. It was also observed that when the High Court had held that the writ petition was not maintainable, no relief of a declaration as to invalidity of an impugned agreement between the company and its employees could be granted and that

the High Court committed an error in granting such a declaration.

19. In VST Industries Ltd. Vs. VST Industries Workers'' Union and Another, , the very same question came up for consideration. The appellant-company was engaged in the manufacture and sale of cigarettes. A petition was filed by the first respondent under Article 226 of the Constitution seeking a writ of mandamus to treat the members of the respondent Union, who were employees working in the canteen of the appellant''s factory, as employees of the appellant and for grant of monetary and other consequential benefits. Speaking for the Bench, Rajendra Babu, J., (as he then was), held as follows:

"7. In de Smith, Woolf and Jowell''s Judicial Review of Administrative Action, 5th Edn., it is noticed that not all the activities of the private bodies are subject to private law, e.g., the activities by private bodies may be governed by the standards of public when its decisions are subject to duties conferred by statute or when by virtue of the function it is performing or possible its dominant position in the market, it is under an implied duty to act in the public interest. By way of illustration, it is noticed that a private company selected to run a prison although motivated by commercial profit should be regarded, at least in relation to some of its activities, as subject to public law because of the nature of the function it is performing. This is because the prisoners, for whose custody and care it is responsible, are in the prison in consequence of an order of the court, and the purpose and nature of their detention is a matter of public concern and interest. After detailed discussion, the learned authors have summarized the position with the following propositions:

(1) The test of a whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a "public" or a "private" body.

(2) The principles of judicial review prima facie govern the activities of bodies performing public functions.

(3) However, not all decisions taken by bodies in the course of their public functions are the subject matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function

(a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and

(b) Where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute.

20. Applying the above principles, this Court held that the High Court rightly held that it had no jurisdiction.

21. Another decision on the same subject is General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. Vs. Satrughan Nishad and Others, . The appellant was a cooperative society and was engaged in the manufacture of sugar. The respondents were the workers of the appellant and they filed various writ petitions contending that they had to be treated as permanent workmen. The appellant challenged the maintainability of those writ petitions and applying the principles enunciated in VST Industries'' case (supra), it was held by this Court that the High Court had no jurisdiction to entertain an application under Article 226 of the Constitution as the mill was engaged in the manufacture and sale of sugar which would not involve any public function.

22. In Federal Bank Ltd. Vs. Sagar Thomas and Others, , the respondent was working as a Branch Manager of the appellant Bank. He was suspended and there was a disciplinary enquiry wherein he was found guilty and dismissed from service. The respondent challenged his dismissal by filing a writ petition. The learned Single Judge held that the Federal Bank was performing a public duty and as such it fell within the definition of "other authorities" under Article 12 of the Constitution. The appellant bank preferred an appeal, but the same was dismissed and the decision of the Division Bench was challenged before this Court. This Court observed that a private company carrying on business as a scheduled bank cannot be termed as carrying on statutory or public duty and it was therefore held that any business or commercial activity, whether it may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money which do have an impact on the economy of the country in general, cannot be classified as one falling in the category of those discharging duties or functions of a public nature. It was held that that the jurisdiction of the High Court under Article 226 could not have been invoked in that case.

23. The counsel for the respondent in Civil Appeal No. 1976 of 1998 and for the appellant in the civil appeal arising out of SLP (Civil) No. 6016 of 2002 strongly contended that irrespective of the nature of the body, the writ petition under Article 226 is maintainable provided such body is discharging a public function or statutory function and that the decision itself has the flavour of public law element and they relied on the decision of this Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, . In this case, the appellant was a Trust running a science college affiliated to the Gujarat University under Gujarat University Act, 1949. The teachers working in that college were paid in the pay scales recommended by the University Grants Commission and the college was an aided institution. There was some dispute between the University Teachers

Association and the University regarding the fixation of their pay scales. Ultimately, the Chancellor passed an award and this award was accepted by the State Govt. as well as the University and the University directed to pay the teachers as per the award. The appellants refused to implement the award and the respondents filed a writ petition seeking a writ of mandamus and in the writ petition the appellants contended that the college managed by the Trust was not an "authority" coming within the purview of Article 12 of the Constitution and therefore the writ petition was not maintainable. This plea was rejected and this Court held that the writ of mandamus would lie against a private individual and the words "any person or authority" used in Article 226 are not to be confined only to statutory authorities and instrumentalities of the State and they may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists, mandamus cannot be denied.

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury''s Laws of England 3rd ed. Vol. 30, page-682,

"a public authority is a body not necessarily a county council, municipal corporation or other local authority which has public statutory duties to perform and which perform the duties and carries out its transactions for the benefit of the public and not for private profit."

There cannot be any general definition of public authority or public action. The facts of each case decide the point.

30. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. But nevertheless it may be noticed that the Government or Government authorities at all levels is

increasingly employing contractual techniques to achieve its regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce the contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably.

31. The decision of the employer in these two cases to terminate the services of their employees cannot be said to have any element of public policy. Their cases were purely governed by the contract of employment entered into between the employees and the employer. It is not appropriate to construe those contracts as opposed to the principles of public policy and thus void and illegal under Section 23 of the Contract Act. In contractual matters even in respect of public bodies, the principles of judicial review have got limited application. This was expressly stated by this Court in State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., and also in Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, . In the latter case, this Court reiterated that the interpretation and implementation of a clause in a contract cannot be the subject matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily, the remedy is not a writ petition under Article 226.

32. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not a State within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties."

171. Since we are on the issue of public functions, we may also quote with profit a portion of the decision of the Supreme Court in the case of Jatya Pal Singh (supra) as contained in paragraphs 48, 51 and 52, which read thus:

"48. Dr. K.S. Chauhan had also relied on the Human Rights Act, 1998 (Meaning of Public Function) Bill which sets out the factors to be taken into account in determining whether a particular function is a public function for the purpose of sub-section (3)(b) of Section 6 of the aforesaid Act. Section (1) enumerates the following factors which may be taken into account in determining the question as to whether a function is a function of public nature.

"1(a) the extent to which the state has assumed responsibility for the function in question;

(b) the role and responsibility of the state in relation to the subject-matter in question;

(c) the nature and extent of the public interest in the function in question;

(d) the nature and extent of any statutory power or duty in relation to the function in question;

(e) the extent to which the State, directly or indirectly, regulates, supervises or inspects the performance of the function in question;

(f) the extent to which the State makes payment for the function in question;

(g) whether the function involves or may involve the use of statutory coercive powers;

(h) the extent of the risk that improper performance of the function might violate an individual''s convention right."

For the avoidance of doubt, for the purposes of Section 6(3)(b) of the Human Rights Act, 1998, as per the said Bill a function of a public nature includes a function which is required or enabled to be performed wholly or partially at public expense, irrespective of:

"2. (a) the legal status of the person who performs the function, or

(b) whether the person performs the function by reason of a contractual or other agreement or arrangement."

51. This Court also quoted with approval the Commentary on Judicial Review of Administrative Action (Fifth Edn.) by de Smith, Woolf and Jowell in Chapter 3 para 0.24 therein it has been stated as follows:

"A body is performing a ''public function'' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.

Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd''s of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is important for the courts to ''recognize the realities of executive power'' and not allow ''their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted''. Nongovernmental bodies such as these are just as capable of abusing their powers as is Government."

52. These observations make it abundantly clear that in order for it to be held that the body is performing a public function, the appellant would have to prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so."

172. In Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti

Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, , on which strong reliance has been placed by Mr. Shelat in support of his submission regarding amenability, the Supreme Court dealt with the case of a science college at Ahmedabad, which was being which was being run by a Trust and has temporary affiliation to the Gujarat University under the Gujarat University Act, 1949, which, of course, later received permanent affiliation as amended by Gujarat Act VI of 1973. The University teachers and those employed in the affiliated colleges were paid in the pay scale recommended by the University Grants Commission. At one stage there was some dispute between the University area teachers Association and the University and the implementation of certain pay scales. That dispute by agreement of parties was referred to the Chancellor of the University for decision. The Chancellor gave his award holding that the revised pay scales should be applicable to all irrespective of the employment under the University and affiliated college. The State Government accepted the award of the Chancellor and issued directions to all affiliated colleges to pay their teachers in terms thereof. The trustees challenged the Government''s directive and approached the University to terminate the services of the teachers who were entitled to the revised scale of pay on the ground that they were surplus. The Vice-Chancellor, however, refused the request of the trustees. The trustees then decided to close down the college and surrendered the affiliation of the college to the University. Teachers moved the High Court. The trustees resisted the prayer on the grounds, inter alia: (1) the Trust is not a statutory body and is not subject to the writ jurisdiction of the High Court; (2) the resolution of the University directing payment to teachers in the revised pay scales was not binding on the trust; (3) the University had no power to burden the trust with additional financial liability by retrospectively revising the pay scales; (4) the claim for gratuity by retrenched teachers was untenable; and (5) Ordinance 120E prescribing closure compensation was ultra vires of the powers of the Syndicate.

173. The High Court rejected the above submissions and accepted the writ petitions. The trustees moved the Supreme Court. The Supreme Court has in the said judgment considered the question of maintainability of the writ petition under Article 226 of the Constitution in these words Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, at pp. 1610-1613):

"The essence of the attack on the maintainability of the writ petition under Art. 226 may now be examined. It is argued that the management of the college being a trust registered-under the Public Trusts Act is not amenable to the writ jurisdiction of the High Court. The contention in other words is that the trust is a private institution against which no writ of mandamus can be issued. In support of the contention, the counsel relied upon two decisions of this Court: (a) Executive Committee of Vaish Degree College, Shamli and Others Vs. Lakshmi Narain and Others, Deepak Kumar Biswas v. Director of Public Instruction. In the first of the two cases, the respondent institution was a Degree College managed by a registered co-operative society. A suit was filed against the college by the dismissed principal for reinstatement. It was contended that the Executive Committee of the college which was registered under the Co-operative Societies Act and Affiliated to the Agra University (and subsequently to Meerut University) was a statutory body. The importance of this contention lies in the fact that in such a case, reinstatement could be ordered if the dismissal is in violation of statutory obligation. But this Court refused to accept the contention. It was observed that the management of the college was not a statutory body since not created by or under a statute. It was emphasised that an institution which adopts certain statutory provisions will not become a statutory body and the dismissed employee cannot enforce a contract of personal service against a non-statutory body.

The decision in Vaish Degree College was followed in Deepak Kumar Biswas case. There again a dismissed Lecturer of a private college was seeking reinstatement in service. The Court refuse to grant the relief although it was found that the dismissal was wrongful. This Court instead granted substantial monetary benefits to the lecturer. This appears to be the preponderant judicial opinion because of the common law principle that a service Contract cannot be specifically enforced.

But here the facts are quite different and, therefore, we need not go thus far. There is no plea for specific performance of contractual service. The respondents are not seeking a declaration that they be continued in service. They are not asking for mandamus to put them back into the college. They are claiming only the terminal benefits and arrears of salary payable to them. The question is whether the trust can be compelled to pay by a writ of Mandamus?

If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellant-trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like Government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character (See The "Evolving Indian Administrative Law by M.P. Jain (1983) p.266). So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

The law relating to mandamus has made the most spectacular advance. It may be recalled that the remedy by prerogative writs in England started with very limited scope and suffered from many procedural disadvantages. To overcome the difficulties, Lord Gardiner (the Lord Chancellor) in pursuance of Section 3(1)(e) of the Law Commission Act, 1965, requested the law Commission to review the existing remedies for the judicial control of administrative acts and commissions with a view to evolving a simpler and more effective procedure. The Law Commission made their report in March, 1976 (Law Com No. 73) it was implemented by Rules of Court (Order 53) in 1977 and given statutory force in 1981 by Section 31 of the Supreme Court Act, 1981. It combined all the former remedies into one proceeding called judicial review. Lord Denning explains the scope of this "Judicial review":

"At one stroke the courts could grant whatever relief was appropriate. Not only certiorari and mandamus, but also declaration and injunction. Even damages. The procedure was much more simple and expeditious. Just a summons instead of a writ. No formal pleadings. The evidence was given by affidavit. As a rule no cross-examination, no discovery, and so forth. But there were important safeguards. In particular, in order to qualify, the applicant had to get the leave of a judge.

The statute is phrased in flexible terms. It gives scope for development. It uses the words "having regard to". Those words are very indefinite. The result is that the courts are not bound hand and foot by the previous law. They are to ''have regard to'' it. So the previous law as to who are-and who are not-public authorities, is not absolutely binding. Nor is the previous law as to this matters in respect of which relief may be granted. This means that the judges can develop the public law as they think best. That they have done and are doing." (see-The Closing Chapter by Rt. Hon. Lord Denning p.122)

There, however, the prerogative writ of mandamus confined only to public authorities to compel performance of public duty. The ''public authority'' for them means everybody which is created by statute-and whose powers and duties are defined by statute. So Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all ''public authorities''. But there is no such limitation for our High Courts to issue the writ ''in the nature of mandamus''. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to ''any person or authority''. It can be issued ''for the enforcement of any of the fundamental rights and for any other purpose."

Article 226 reads:

"226. Power of High Courts to issue certain writs.--

(1) Notwithstanding anything in Art. 32, every High Court shall have power throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority including in appropriate cases, any Government, within

those territories directions, orders or writs, including (writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari) or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose."

xxxx xxxx xxxx xxxx xxxx"

The scope of this article has been explained by Subba Rao, J., in Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, ,

This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Art. 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

"The term "authority" used in Art. 226, in the context, must receive a liberal meaning unlike the term in Art. 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art. 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "Any person or authority" used in Art. 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected_ party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.

In Praga Tools Corporation v. C.V. Imanual, this Court said that a mandamus can issue against a person or body to carry but the duties placed on them by the Statutes even though they are not public officials or statutory body. It was observed (at p.778 of 1969-3 SCR): (at pp 1309-10 of AIR):

"It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public officials or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also, to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities. (See Halsbury''s Law of England (3rd Ed. Vol. II p.52 and onwards)."

Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." (Judicial Review of Administrative Act 4th Ed. p.540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available to reach injustice whenever it is found". Technicalities should not come in the way of granting that relief under Art. 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

174. The ratio discernible from Shri Anadi Mukta Sadguru (supra) is that, the form of the body concerned is not very much relevant. What is relevant is the nature of duty imposed on the body. A writ of mandamus can be issued against a person or a body to carry out the duties placed on them by the statute, even though they are not public officials or statutory bodies.

175. In The Praga Tools Corporation Vs. Shri C.A. Imanual and Others, , the Supreme Court observed:

"Article 226 provides that every High Court shall have power to issue to any person or authority orders and writ, including writs in the nature of habeas corpus, mandamus, etc., or any of them for the enforcement of any of the rights conferred by Part-Ill of the Constitution and for any other purpose. But, it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest.

Therefore, the condition precedent for the issue of mandamus is that there is one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus, is, in form, a command directed to a person, corporation or inferior Tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person on the authority on whom the statutory duty is imposed need be a public official or an official body.

It is therefore, clear that a writ of mandamus is an extraordinary remedy. It is in form a command directed to a person, corporation or an inferior Tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. So long as the duty that is sought to be performed is in the nature of a public duty, it is not necessary that the person or the authority on which the duty is imposed should be a public official or an official body. It is further necessary that the person claiming a ''writ of mandamus must have a legal right to the performance of a legal duty by the one against whom the writ is sought."

176. What is discernible from an exhaustive review of the case-law, considered and discussed above, may be summed up thus:

(1) For issuing writ against a legal entity, it would have to be an instrumentality or agency of a State or should have been entrusted with such functions as are Governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence Governmental.

(2) A writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State Government; (ii) Authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any Statute, to compel it to perform such a statutory function.

(3) Although a private banking company like the Standard Chartered Bank with which we are concerned is duty bound to follow and abide by the guidelines provided by the Reserve Bank of India for smooth conduct of its affairs in carrying on its business, yet those are of regulatory measures to keep a check and provide guideline and not a participatory dominance or control over the affairs of the company.

(4) A private company carrying on banking business as a Scheduled bank cannot be termed as a company carrying on any public function or public duty.

(5) Normally, mandamus is issued to a public body or authority to compel it to perform some public duty cast upon it by some statute or statutory rule. In exceptional cases a writ of mandamus or a writ in the nature of mandamus may issue to a private body, but only where a public duty is cast upon such private body by a statute or statutory rule and only to compel such body to perform its public duty.

(6) Merely because a statue or a rule having the force of a statute requires a company or some other body to do a particular thing, it does not possess the attribute of a statutory body.

(7) If a private body is discharging a public function and the denial of any rights is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial but,

nevertheless, there must be the public law element in such action.

(8) According to Halsbury''s Laws of England, 3rd Ed. Vol. 30, p.682, "a public authority is a body not necessarily a county council, municipal corporation or other local authority which has public statutory duties to perform and which perform the duties and carries out its transactions for the benefit of the public and not for private profit". There cannot be any general definition of public authority or public action. The facts of each case decide the point.

177. We are again posing a question for our consideration. The answer to the same should put an end to the matter.

178. The Master Circular relating to the willful defaulters has been issued by the Reserve Bank of India in exercise of its powers under the Banking Regulation Act, 1949, and the Reserve Bank of India Act, 1934, very much binding to the Standard Chartered Bank, therefore, while acting under the Master Circular for the purpose of declaring a particular borrower as a willful defaulter, does the bank discharge a public duty.

179. To put it in other words, if a private bank has failed to perform its duty in the sense that it has gone beyond the scope of the regulations of the Master Circular, or in performance of the same, has violated any of the fundamental rights or any other legal rights of the borrower against whom the action is proposed, then whether such a borrower can legitimately maintain a writ-application before this Court under Article 226 of the Constitution of India.

180. A body, public or private, should not be categorized as "amenable" or "not amenable" to writ jurisdiction. The most important and vital consideration should be the "function" test as regards the maintainability of a writ application. If a public duty or public function is involved, any body, public or private, concerned or connection with that duty or function, and limited to that, would be subject to judicial scrutiny under the extraordinary writ jurisdiction of Article 226 of the Constitution of India.

181. In the case of Life Insurance Corporation of India Vs. Escorts Ltd. and Others, , it was contended before the Supreme Court that the Life Insurance Corporation was an instrumentality of the State, and was debarred by Article 14 from acting arbitrarily. It was also contended that it was obligatory upon the Corporation to disclose the reasons for its action complained of, namely, its requisition to call an extra-ordinary general meeting of the company for the purpose of moving a Resolution to remove some Directors and appoint others in their place. Such argument was opposed by the State, contending that the actions of the State or an instrumentality of the State, which do not properly belong to the field of public law but belong to the field of private law, were not subject to judicial review. Dealing with the said contentions, the Supreme Court observed:-

"While we do find considerable force in the contention of the learned Attorney-

General it may not be necessary for us to enter into any lengthy discussion of the topic, as we shall presently see. We also desire to warn ourselves against readily referring to English cases on questions of Constitutional law'' Administrative Law and Public Law as the law in India in these branches has forced ahead of the law in England, guided as we are by our Constitution and uninhibited as we are by the technical rules which have hampered the development of the English law. While we do not for a moment doubt that every action of the State or an instrumentality of the State must be informed by reason and that, in appropriate cases actions uninformed by reason may be questioned as arbitrary in proceedings under Art. 226 or Art. 32 of the Constitution, we do not construe Art. 14 as a charter for judicial review of State actions and to call upon the State to account for its actions in its manifold activities by stating reason; for such actions.

For example, if the action of the State is political or sovereign in character, the Court will keep away from it ''the Court will not debate academic matters or concern itself with the intricacies of trade and commerce. If the action of the State is related to contractual obligation or obligations arising out of the contract, the Court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the Court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is engaged when performing the action, the public law or private law character of then action and a host of other relevant circumstances. When the State or an instrumentality of the State ventures into the corporate world and purchases the shares of a company, it assumes to itself the ordinary role of a share holder, and dons the robes of a share-holder, with all the rights available to such a share-holder there is no reason why the State as a share-holder should be expected to state its reasons when it seeks to change the management, by a resolution of the Company, like any other shareholder.."

Distinction between ''public law'' and ''private law'':

Difficult as this distinction is and incapable of precise demarcation, it is yet necessary to keep the broad distinction in mind. Lord Denning in his book "The Closing Chapter" has this to say on the subject:

"The first thing to notice is that public law is confined to ''public authorities''. What are ''public authorities''? There is only one avenue of Approach. It is by asking, in the words of Section 31(2)(b) of the Supreme Court Act 1981:

What is the ''nature of the persons and bodies against whom relief may be granted by such orders'', that is, by mandamus, prohibition or certiorari?

These are divided into two main categories:

First, the persons or bodies who have legal authority to determine questions affecting the common law or statutory rights or obligations of other persons as individuals. That is the formula stated by Lord Justice Atkin in R. v. Electricity Commissioners, ex parte London Electricity Joint Committee Co., (1920) Ltd., (1924)1 KB 171/205 as broadened by Lord Diplock in O''Reilly v. Mackman (1982) 3, WLR 1096/1104).

Second, the persons or bodies who are entrusted by Parliament with functions, powers and duties which involve the making of decisions of a public nature....To which I would add the words of Lord Goddard, C.J. in R. v. National Joint Council for Dental Technicians, ex parte Neate (1953)1 QB 704/707):

"The bodies to which in modern times the remedies of these prerogative writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties which, when exercised, may lead to the detriment of subjects who may have to submit to their jurisdiction".

But those categories are not exhaustive. The courts can extend them to any other person or body of a public nature exercising public duties which it is desirable to control by the remedy of judicial review.

There are many cases which give guidance, but I will just give some illustrations.

Every body which is created by statute and whose powers and duties are defined by statute is a ''public authority''. So Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all ''public authorities''. So are members of a statutory tribunal or inquiry, and the board of visitors of a prison. The Criminal Injuries Compensation Board is a public authority. So also, I suggest, is a university incorporated by Royal charter; and the managers of a State School. So is the Boundary Commission and the Committee of Lloyd''s.

But a limited liability company incorporated under the Companies Acts is not a ''public authority''; (see Tozer v. National Greyhound Racing Club Ltd. (1983) Times, 16 May). Nor is an unincorporated association like the Jockey Club... ". (see pp. 122, 123, 124)

38. Sir Harry Woolf, a Lord Justice of Court of Appeal, points out the distinction in the following words:-

"I regard public law as being the system which enforces the proper performance by public bodies of the duties which they owe to the public. I regard private law as being the system which protects the private rights of private individuals or the private rights of public bodies. The critical distinction arises out of the fact that it is the public as a whole, or in the case of local government the public in the locality, who are the beneficiaries of what is protected by public law and it is the individuals or bodies entitled to the rights who are the beneficiaries of the protection provided by private law ". (see page 221 of his Article "Public Law Private Law: Why the Divide? A personal View (published in "Public Law" Summer (1986)").

The learned Law Lord stated further in the same Article, at page 223:

"While public law deals only with public bodies, this does not mean that the activities of public bodies are never governed by private law. Like public figures, at least in theory, public bodies are entitled to have a private life. There have been suggestions that in the commercial field public bodies should adopt different and higher ethical standards than private individuals, but this is not yet required as a matter of law and in relation to purely commercial transactions the same law is applicable, whether or not a public duty is involved. Prima facie, the same is true in relation to employment. The servant employed by a public body ordinarily has the same private rights as any other servant ".

The position may, however, be different pointed out the learned Law Lord if such relationship is circumscribed by a statutory provision.

39. In this context, it would be appropriate to refer to two important English decisions, where a public duty was implied even in the absence of a statutory provisions. They are R. v. Criminal Injuries Compensation Board, ex parte Lain (1967) 2 All ER 770, and R. v. Panel on takeovers (1987) 1 All ER 564. In Criminal Injuries Compensation Board, the relevant facts are the following: In the year 1964 the Government of Great Britian announced a Scheme in both Houses of Parliament providing for compensation to victims of violence and persons injured while assisting the police. It was a non-statutory scheme under which compensation was to be paid ex gratia. The scheme was to be administered by a Board, who were to be provided with money through a grant-in-aid, out of which payment would be made when the Board was satisfied that the compensation was justified. The widow of a Police Constable who was shot in the face by a suspect whom he was about to question, and who subsequently shot himself, applied to the Board for compensation. The Board awarded compensation, but made certain deductions, which was questioned by way of certiorari. The first question before the Court was "whether the Board are a body of persons amenable to the supervisory jurisdiction of this Court?". For the Board reliance was placed upon the well-known words of Atkin, L.J., in'' R. v. Electricity Commissioners (1924) 1 KB 171, at p.205 to the effect that the body of persons to be amenable to writ jurisdiction must have the legal authority to determine questions affecting the rights of subjects and who are under a duty to act judicially. The Court held that the said words of Atkin. L.J., were not supposed to be exhaustive of the situation where a certiorari may issue, and pointed out that the Board, though not set up under a statute, is set up by the executive Government, i.e., under the prerogative, and that its acts are no less lawful on that account. The Court observed:

"Indeed, the writ of certiorari has been issued not only to courts set up by statutes but also to courts whose authority was derived, inter alia, from the prerogative. Once the jurisdiction is extended, as it clearly has been, to tribunals as opposed to courts, there is no reason why the remedy by way of certiorari cannot be invoked to a body of persons set up under the prerogative. Moreover, the Board, though set up under the prerogative and not by statute, had in fact the recognition of Parliament in debate and Parliament provided the money to satisfy the Board''s awards....".

It was further observed:

"We have, as it seems to me, reached the position when the ambit of certiorari can be said to cover every case in which a body of persons, of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way, the Board in my judgment comes fairly and squarely within the jurisdiction of this Court. The Board are, as counsel for the Board said, "a servant of the Crown, charged by the Crown, by executive instructions, with the duty of distributing the bounty of the Crown". The Board are clearly, therefore, performing public duties. Moreover, the Board are quite clearly under a duty to act judicially".

The same idea was put forward by Diplock, L.J., in his separate opinion, where he said:

"If new tribunals are established by acts of Government, the supervisory jurisdiction of the High Court extends to them if they possess the essential characteristics on which the subjection of inferior tribunals to the supervisory control of the High Court is based...". Ashworth, J., justified the issue of certiorari in that case on the following basis:

"They (Board) were set up by the executive after the proposal to set them up had been debated in both Houses of Parliament, and the money needed to satisfy their awards is drawn from sums provided by Parliament. It can therefore be said that their existence and their functions have at least been recognized by Parliament, which to my mind has a twofold consequence: in the first place it negatives any notion that the Board are a private tribunal, and secondly it confers on the Board what I may call a public or official character. The number of applications for compensation and the amounts awarded by the Board alike show how greatly the general public are affected by the functioning of the Board....".

40. This decision has since been followed and applied in several English decisions. It would suffice to refer to R. v. Panel on Takeovers and Mergers, Ex Parte Datafin (1987) 1 All ER 564. The Panel on Take-overs and Mergers was a self-regulating unincorporated association which devised and operated the City Code on Take-overs and Mergers prescribing a Code of Conduct to be observed in the takeovers of listed public companies. The panel had no direct statutory, prerogative or common law powers, nor were its powers based solely on consensus; its acts were supported and sustained by certain statutory powers

and penalties introduced after the inception of the Panel. A decision of the panel was sought to be questioned by way of certiorari. One of the objections of the respondents was that the supervisory jurisdiction of the Court was confined to bodies whose power was derived solely from legislation or the exercise of the prerogative, and that the power of judicial review did not extend to a body such as the Panel on Takeovers. Overruling this objection, it was held that in determining whether the decisions of a particular body were subject to judicial review, the Court was not confined to considering the source of that body''s powers and duties, but could also look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions, the Court had jurisdiction to entertain an application for judicial review of that body''s decisions. It was held that, having regard to the wide-ranging nature and importance of the matters covered by the City Code on Take-overs and Mergers and to the public consequences of noncompliance with the Code, the Panel on Takeovers and Mergers was performing a public duty when prescribing and administering the Code and its rules and was subject to public law remedies. Accordingly, it was held that an application for judicial review would lie in an appropriate case. The approach to be adopted in such cases, it was stated by Sir John Donaldson, M.R., is "to recognize the realities of executive power". This is what the learned Master of Rolls stated:-

"In fact, given its novelty, the panel fits surprisingly well into the format which this court had in mind in R. v. Criminal Injuries Compensation Board (1967-2 QB 867). It is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centerpiece of his regulation of that market. The rights of citizens are indirectly affected by its decisions, some, but by no means all of whom, may in a technical sense be said to have assented to this situation, e.g., the members of the Stock Exchange. At least in its determination of whether there has been a breach of the Code, it has a duty to act judicially and it asserts that its raison d''etre is to do equity between one shareholder and another. Its source of power is only partly based on moral persuasion and the assent of institutions and their members, the bottom line being the statutory powers exercised by the Department of Trade and Industries and the Bank of England. In this context I should be very disappointed if the courts could not recognize the realities of executive power and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted...".

This rule was reiterated in yet another decision of the Court of Appeal in R. v. Panel on Take-overs and Mergers, ex parte Guinness, (1989) 1 All ER 509. This was indeed the approach indicated by Mathew, J. in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, , when the learned Judge spoke of "the governing power, wherever located" being subjected to "fundamental constitutional limitations". The learned Judge felt that "the need to subject the power centres to the control of the Constitution requires an expansion of the concept of State action". (see para 93 at p.1352).

182. Applying the above test, the Bank herein cannot be called a public body. It has no duty towards the public. It''s duty is towards its account holders, which may include the borrowers having availed of the loan facility. It has no power to take any action, or pass any order affecting the rights of the members of the public. The binding nature of its orders and actions is confined to its account holders and borrowers and to its employees. Its functions are also not akin to Governmental functions.

183. We may also quote with profit a Full Bench decision of the Bombay High Court in the case of The Shamrao Vithal Co-operative Bank Limited and another Vs. Padubidri Pattabhiram Baht and another, : The Shamrao Vithal Co-operative Bank Limited and another Vs. Padubidri Pattabhiram Baht and another, . The issue before the Full Bench of the Bombay High Court was whether the appellant-Bank was "State" within the meaning of Article 12 of the Constitution of India, and whether the writ-petition was maintainable against the appellants. In view of conflict of two decisions of the High Court, the matter was referred to a Larger Bench for determination. It was submitted that a Co-operative Bank, performed an important public function and that itself was sufficient for coming to the conclusion that it was a "State" under Article 12. It was also submitted that in a welfare State, the definition of "Governmental functions" had to be widened to include within its scope of functions, which were of public importance. Hence, any organization which performs a public function must be considered as a "State" under Article 12. The Full Bench took the view that it was too broad a proposition and sounded a note of caution considering the decision of the Supreme Court in the case of Ajay Hasai (supra). The Court took the view that every organization which carried out a function, which was of public importance, did not necessarily become "State" under Article 12. Conferment of "Statehood" depended upon various other factors also, such as the nexus of such organizations with the State, the extent of State control etc. The following observations of the Full Bench are worth taking note of:-

"There may be many functions of public importance which can be performed by private organisation also. We have a large number of organisations doing important social work vital to the community. There are, for example, organisations which look after, educate and train handicapped persons or the blind, provide them with jobs and rehabilitate them. There are private charitable organisations which may provide free or subsidies housing to the poor or free medical aid. They may supply text-books to poor students, freeships and scholarships. There may be private organisation engaged in transport of goods and men. They perform functions which are, undoubtedly of public importance; and they subserve a public need. But this does not necessarily make such organisations "State" under Art. 12. Banking is undoubtedly a function of public importance. In fact, the nationalised banks do carry out these functions under the control of the State. But that does not mean that banks which are not so controlled, or banks which are set up by private organisations or co-operative societies become" State" under Article 12. In a welfare State, many activities which are often carried on by private organisations are undertaken by the State. In such cases the Supreme Court has said that we must look at the overall position of the organisation in the light of the other tests also, especially when the function of the organisation is not such as can be carried on only by the State or is not connected with governmental functions."

184. What is complained before us is the procedural arbitrariness on the part of the bank. We have examined the constitutional validity of the Master Circular issued by the Reserve Bank of India at the instance of the petitioners of Special Civil Application No. 10120 of 2014, but it is difficult for us to also look into the proposed action on the part of the Standard Chartered Bank on the premise that the show-cause notice which has been issued is lacking in material particulars.

185. Such being the position, we hold that the Standard Chartered Bank being a private bank is not amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India.

186. If the petitioners are aggrieved in any manner with the mode and method of inquiry pursuant to the show-cause notice issued upon them, then it would be open for them to challenge the same in accordance with law before the appropriate authority.

187. We shall now look into the decisions on which strong reliance has been placed by the learned advocates appearing on behalf of the petitioners.

188. In the case of J.G. Engineers Pvt. Ltd. (supra), a works contract was awarded by the respondents in favour of the appellant. As the work was not completed within the contractual period, an extension was granted for the period specified, without levying any liquidated damages. The contractor continued the work even thereafter. At a later stage, finding the progress to be sold, the Government terminated the contract. The appellant filed writ petition challenging the cancellation. However, in view of the existence of an arbitration clause, the High Court referred the parties to arbitration. The dispute between the parties was adjudicated by the Arbitrator. Few counter-claims were also filed by the respondents, however, all those counter-claims were rejected. The respondents approached the District Court under Section 34 of the Arbitration and Conciliation Act, 1996, for setting aside the award. However, the court dismissed the petition. The High Court set-aside the award on certain grounds. In such circumstances, the contractor filed appeal before the Supreme Court. In the aforesaid factual background, the Supreme Court had the occasion to consider the question, whether one party has committed breach or not, cannot be decided by the party alleging breach. A contract cannot provide that one party will be the arbiter to

decide, whether he committed breach or the other party committed breach. Such question can only be decided by only the adjudicatory forum, i.e. a court or an Arbitral Tribunal. This decision of the Supreme Court has been relied upon to fortify the submission canvassed on behalf of the petitioners that the bank who alleges that a particular borrower has committed a willful default and deserves to be declared as a willful defaulter, such adjudication cannot be at the instance of the bank being the complainant itself. In our opinion, the aforenoted decision of the Supreme Court has no application to the case at hand for more than one reasons. In the case before the Supreme Court, there were two parties. One was the contractor and the second Union of India who assigned the contract in favour of the contractor. The disputes arose between the two parties regarding amounts to be claimed. Thus, it could be seen that the contractor had its own grievances. Both were interested in their respective claims. In such circumstances, the Supreme Court observed that whether the other party committed breach cannot be decided by the party alleging breach. Such observations of the Supreme Court should be read in context with the factual situation which was before the Supreme Court. In the case at hand, it is not a dispute as such between the petitioners and the bank by way of claims and counter-claims arising from a public works contract.

189. In the case of Sadashiv Prakash Brahmachari (supra), five petitions under Article 32 of the Constitution of India by the heads of five Madhs in the State of Orissa were filed challenging certain provisions of the Orissa Hindu Religious Endowments Act, 1951, as amended by the Orissa Act 18 of 1954, as unconstitutional and ultra vires. The main attack was in respect of Sections 42 and 79A of the Act relating to the schemes for religious of the kind as regards the procedure for framing of the scheme. In making the inquiry, the Commissioner and the person or persons associated with him therein were to consult the Trustee and the person having interest. After the scheme would be settled and the order determining the scheme would be published in the prescribed manner, the Trustee or any person having interest may, within six months of the date of such publication, institute a suit in the court to modify or set-aside such order. The effect of the provisions under challenge was that a scheme could be framed by the Commissioner alone on a report of the Assistant Commissioner on such inquiry as he would think fit and not by the Commissioner in association with one or more Government officers to be appointed for the purpose by the Government. Secondly, there was no right on suit for challenging the validity or the correctness of the scheme framed by the Commissioner, but there was an appeal provided directly to the High Court. In such circumstances, it was urged before the Supreme Court that the provisions were in the form of unreasonable restrictions and were ultra vires and unconstitutional. It is in the aforesaid background that the Supreme Court took the view that in order to judge, whether the provisions in the Act operated by way of unreasonable restrictions for the constitutional purposes, what was necessary to be seen was whether the person affected got a reasonable chance of presenting his entire

case before the original Tribunal which had to determine judicially, the question raised and whether he had a regular appeal to the ordinarily constituted court or courts to correct the error, if any, of the Tribunal of the first instance. Relying on such observations of the Supreme Court, it was sought to be contended that in the present case also the Master Circular relating to willful defaulters is by way of unreasonable restrictions as the bank itself would adjudicate the issue against which there is no provision for an appeal before any authority. In our opinion, this decision also is of no assistance to the petitioners as the facts of the case were altogether different. The Supreme Court noticed few salient features of the provisions of the Act and the scheme. The Supreme Court noticed that in the initial stage of the framing of the scheme under the provisions of the Act, there was, first of all, something in the nature of a preliminary inquiry by the judicial officer of the rank of the Munsiff followed by a regular and the full inquiry before the Commissioner who was of the rank of the subordinate judge. The Inquiry before the Commissioner was assimilated to and was governed by the provisions relating to the trial of suits by enjoining that as far as may be, the same had to be in accordance with the provisions of the Code of the Civil Procedure relating to the trial of suits. The Supreme Court further observed in the said case that, while under the prior Act, the inquiry before the Commissioner might well have been of the nature of an executive inquiry by an Executive Officer, the inquiry under the Amended Act by itself is in the nature of a judicial inquiry by the judicial officers followed up by right of regular appeal to the High Court. In the case at hand, there is no question of any judicial inquiry in accordance with the provisions of the Civil Procedure Code.

190. In the case of State of Karnataka (supra), the respondent entered into an agreement with the State of Mysore to purchase paddy on its behalf. Clause 12 of the agreement related to breach of conditions of the agreement and the consequences that would ensue on such breach. Disputes arose between the parties to the contract. In such circumstances, the Supreme Court observed that it could not be argued that a right to adjudicate upon a issue relating to breach of conditions of the contractor would flow from or was inhered as a right conferred to assess the damages arising from breach of conditions. The Supreme Court further observed that assuming for the sake of arguments that the terms of Clause 12 of the agreement afforded scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, it could not be thought of that the adjudication by the officer regarding the breach of the contract could be sustained under the law because a party to the agreement cannot be an arbiter in his own cause. The Supreme Court further observed that the interests of justice and equity required that where a party to the contract disputes the committing of any breach of conditions, the adjudication should be by an independent person or body and not by the other party to the contract. The position would be different only if there was no dispute or there was a consensus between the contracting parties regarding the breach of conditions. Here again, the case is one of contract

entered into between the two parties relating to purchase of paddy under the Paddy Procurement Scheme, 1959. Disputes arose between the parties to the contract and, in such circumstances, the observations noted above fell from the Supreme Court. This decision also, in our opinion, is of no assistance to the petitioners.

191. In the case of Indian Banks Association (supra), the issue before the Supreme Court was regarding the authority of the bankers to round up the then existing interest rate to 0.25%. The facts before the Supreme Court in brief were that the Interest Act was enacted by the Parliament w.e.f. 1st August, 1974 with an object of imposing of tax on the total amount of interest received by the Scheduled Bank/Credit Institutions on loans and advances. It was, however, withdrawn in the year 1978, but reintroduced in the year 1980; where after, it was again withdrawn in the year 1985. The said tax, however, was reintroduced w.e.f. 1st October, 1991, by reason of the Finance Act, 1991. The Reserve Bank of India, vide its circular letter dated 2nd September 1991, advised all the Scheduled Commercial Banks that the Incident or Interest tax should prorate be passed on to the borrowers where for a uniform practice should be followed in consultation with the appellant before the Supreme Court, viz. Indian Banks'' Association. The Indian Banks'' Association acted pursuant to the circular, as also with a view to formulate a structure of uniform interest rate chargeable after including interest tax payable, which was passed on to the borrowers by the bank concerned, advised them that the rate of interest be loaded with the interest tax of 3% and rounded-up to the next higher 0.25%. The Reserve Bank of India gave its approval to the proposal of the first appellant before the Supreme Court. Such action on the part of the appellants therein was questioned by the respondents in a public interest litigation filed before the Karnataka High Court, inter alia, on the ground that purported rounding up was illegal and without jurisdiction as thereby the tax elements came to be increased and as a result thereof the banks collected an additional sum of Rs. 723.79 crores annually by way of resorting to rounding up on the basis thereof. In the aforesaid factual situation, the Supreme Court took the view that the Reserve Bank of India was not an authority for construction of the statute, viz. Interest Act, 1974. Its functions were confined only to the provisions of the Reserve Bank of India Act and the Banking Regulation Act and not any other statute. It further observed that the Reserve Bank of India could not have interpreted the provisions of the Interest Act nor thereby could have empowered the banks to charge something more from the borrowers by the process of rounding up of interest. Ultimately, the Supreme Court dismissed the appeals, holding that the appellants and the Reserve Bank of India, with a view to touching the end of their own shadows in the guise of exercise of their contractual powers vis-?-vis the Banking Regulation Act, exceeded their jurisdiction in recovering the tax imposed on them by way of interest under the Parliamentary Act. This decision of the Supreme Court is sought to be relied upon to fortify the submissions canvassed on behalf of the petitioner that in the present case also the Reserve Bank of India could not have

issued direction in the form of a Master Circular relating to "willful default" and "willful defaulters". According to the petitioners, such policy decision of the Reserve Bank of India is beyond the scope of its powers under the Banking Regulations Act and the Reserve Bank of India Act. We are afraid, we are unable to understand how this decision of the Supreme Court is helpful to the petitioners. The Supreme Court took the view that the Reserve Bank of India should not have undertaken any exercise under the Interest Act, 1974. The functions of the Reserve Bank of India are confined only to the provisions of the Reserve Bank of India Act and the Banking Regulations Act and not any other statute. We have already explained in detail that the Master Circular is in exercise of the powers under the Reserve Bank of India Act and the Banking Regulation Act and not any other statute with which the Reserve Bank of India is in no way concerned. Thus, this decision is also, in no manner, helpful to the petitioners.

192. In the case of Directorate of Revenue (supra), the Supreme Court was dealing with a matter relating to the Narcotic Drugs and Psychotropic Substances Act, 1985. The Supreme Court, in view of the few draconian provisions under the Act, considered the right to privacy as embodied in Article 21 of the Constitution of India. The Supreme Court was considering the provisions of Sections 42 and 43 of the Act, 1985, which empowered the officers under the Act to make search and seizure of a person at all hours and at all places. Considering the draconian provisions which may lead to a harsh sentence, the Supreme Court explained the doctrine of "due process" as adumbrated under Article 21 of the Constitution of India which requires striking of balance between the need of law and enforcement thereof, on the one hand, and protection of a citizen from oppression and injustice, on the other. The Supreme Court, while interpreting the provisions of Sections 42 and 43 of the Act, 1985, observed that the interpretation which directs a balance between the enforcement of law and protection of the valuable human rights of the accused must be resorted to. A balance, thus, must be struck in regard to the mode and manner in which the statutory requirements are to be complied with vis-?-vis the place of search and seizure. This decision of the Supreme Court has been relied upon only with a view to highlight the doctrine of "due process". According to the petitioners, in the case at hand, the elements of the doctrine of "due process" is missing. The manner and the mode of inquiry at the end of the bank itself could not be termed as a "due process". We are afraid, this decision is also of no assistance to the petitioners. The aspect of the doctrine of "due process" has been well explained by us in the earlier part of our judgment.

193. In the case of Ramprasad Narayan Sahi (supra), the Supreme Court considered the prayer for a writ in the nature of mandamus, directing the opposite party not to take any action under an Act passed by the Bihar Legislative Assembly in 1950 and known as the "Sathi Lands (Restoration) Act" which was challenged as void and unconstitutional. His Lordship Patanjali Shastri, C.J. (as His Lordship then was) in a concurring judgment observed that the

dispute was purely between private parties and the matter for determination by duly constituted courts to which it is entrusted, in every free and civilized society, the important function of adjudicating on dispute legal rights, after observing the well established procedural safeguards which includes the right to be heard, the right to produce witnesses and so for. His Lordships observed that such was the protection which the law guaranteed equally to all persons, and the Constitution prohibited by Article 14 every State from denying such protection to anyone. Taking clue from such observations made by the Supreme Court, it is sought to be contended in the present case that having regard to the nature of the inquiry, more particularly the mode and the manner, it could not be said that the interest of the borrower is well protected. We are afraid, this decision is also of no assistance to the petitioners. The observations of the Supreme Court referred to above were altogether on a different factual context.

194. In M/s. A-One Mega Mart P. Limited (supra), a Division Bench of the Punjab and Haryana High Court was considering the challenge to the orders passed by the HDFC Bank rejecting the request of the petitioner for selling the mortgaged property under Section 13(13) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. A preliminary objection was raised on behalf of the respondents as regards the maintainability of the writ petition against a private bank. In support of such preliminary objection, reliance was placed on the decision of the Supreme Court in the case of Federal Bank Limited (supra). The Division Bench overruled the objection as regards the maintainability of the petition and took the view that the petition was maintainable even against a private bank. The Division Bench considered various decisions of the Supreme Court on the subject. However, what weighed with the Division Bench in taking the view that a petition against a private bank would be maintainable was that under Section 17 of the SARFAESI Act, an appeal would lie to the Debts Recovery Tribunal against the action of the bank, and against any order passed thereunder, an appeal is maintainable under Section 18 of the said Act to the Debts Recovery Appellate Tribunal. The Court took the view that an order passed by the DRAT is amenable to the writ jurisdiction of a High Court. The Court also considered Section 34 of the SARFAESI Act, which is significant in deciding the issue relating to the writ jurisdiction of a High Court. Section 34 bars the jurisdiction of a civil court in matters relating to actions where provisions of the SARFAESI Act have been invoked. The Division Bench of the Punjab and Haryana High Court took the view that the Constitution guarantees equality and strikes against any arbitrary action of an authority. It further observed that it could not be said that wherever any authority acted in a discretionary or unreasonable manner, the aggrieved party would be without any remedy either by way of a civil suit or by invoking the writ jurisdiction of a High Court. In such circumstances, the Court took the view that it could not be held that an action by the Scheduled bank, to which the provisions of the SARFAESI Act were applicable and had been invoked by it, would be immune from the extraordinary writ jurisdiction of that court. We are afraid, this decision of the

Punjab and Haryana High Court is also of no assistance to the petitioners. We are not concerned with a case wherein any action is taken or proposed to be taken under the SARFAESI Act. The circular of the Reserve Bank of India does not say that any decision as regards the declaration of willful defaulters will not be open to challenge before the civil court. There is no bar so far as the jurisdiction of civil court is concerned.

195. In Apex Electricals Limited (supra), a learned Single Judge of this Court had the occasion to consider an identical issue as regards the maintainability of a writ application against a private bank. In the said case, it was the ICICI Bank Limited against whom writ was prayed for by the petitioners. It was in context with the provisions of the SARFAESI Act that the learned Single Judge took the view that a writ petition was maintainable against a private bank like ICICI Bank to challenge any illegal action of the bank while taking steps under Section 13(4) of the SARFAESI Act. This decision also, in our opinion, is of no assistance to the petitioners.

196. The Supreme Court, in the case of Government of Karnataka and Others Vs. Smt. Gowramma and Others, , has pointed out [in paragraph 10] that Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclids theorems nor as provisions of the statute and that too taken out of their context. The following observations in paragraphs 12 and 13 of the said judgment are relevant, and are quoted below:-

"12. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

13. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

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Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path to justice clear of obstructions which could impede it.""

197. To sum up, our final conclusion is as under:

(1) The Reserve Bank of India was within its powers to issue the Master Circular relating to the willful default and willful defaulters as it is empowered to regulate the banking system and certain regulatory functions have been assigned to it by the provisions of the Reserve Bank of India Act, 1934, and the Banking Regulations Act, 1949.

(2) The Master Circular has been issued by the Reserve Bank of India in public interest. Although it has not been stated in so many words to have been issued in public interest and also the source of power, yet if the source of power is traceable, exercise of such power cannot be set-aside merely because the same has not been disclosed.

(3) The Master Circular does not suffer from the vice of impermissible delegation of a legislative power. It confirms exactly to the power granted.

(4) The Master Circular has the force of law and could be termed as a statutory circular.

(5) The application of the maxim "nemo judex in causa sua" on the part of the petitioners on the premise that the bank itself will be a judge in its own cause is completely misplaced. In a given case, if the court finds the action to be tainted with malafide or bias, then the same could always be condemned and set at right. On mere apprehension of misuse of such provision, an otherwise valid statute, should not be struck down or condemned. A mere possibility or likelihood of abuse of power does not make the provision ultra vires or bad in law.

(6) The Master Circular does not impose an unreasonable restriction upon the promoters/entrepreneurs, being violative of the Article 19(1)(g) of the Constitution of India as it has the effect of debarring them from availing of any additional facilities for floating a new venture for a period of five years from the date the name of the willful defaulter is published in the list of "willful defaulters" by the Reserve Bank of India.

(7) The Master Circular, so far as it is sought to be made applicable to all the directors of the company, is arbitrary and unreasonable. To this limited extent, we declare that part of the Master Circular as ultra vires the powers of the Reserve Bank of India and is violative of Article 19(1)(g) of the Constitution of India. However, as held in sub-para (6) above, these observations will not apply to the promoters/entrepreneurs.

(8) The Master Circular seeks to paint all the directors with the same brush. The provisions in the circular shatter the concept of identity of a company being different and distinct from its directors without providing any safeguards.

(9) The show-cause notice issued to the petitioners of Special Civil Application No. 645 of 2014 is held to be bad as it is bereft of the basic details and material particulars.

(10) The Standard Chartered Bank although has been included as one of the

Scheduled Banks in the Second Schedule to the Reserve Bank of India Act, 1934, yet, being a private bank, is not amenable to the writ jurisdiction of this Court. Merely because a company is carrying on the banking business, it cannot per se become a public authority nor can be considered as discharging public functions.

198. For the foregoing reasons, the Special Civil Application No. 645 of 2014 is partly allowed. The show-cause notices issued by the Punjab National Bank dated 19th February 2013, 14th May 2013 and 8th January 2014 respectively are quashed and set-aside. It will be open for the Punjab National Bank to proceed in accordance with law after issuing a valid show-cause notice to the petitioners.

199. The Special Civil Application No. 10120 of 2014 is partly allowed to the extent that the inclusion of all directors in the Master Circular is violative of Article 19(1)(g) of the Constitution of India.

200. So far as the grievance of the petitioners of the Special Civil Application No. 10120 of 2014 as regards the legality and validity of the notice is concerned, it cannot be gone into as we have taken the view that the Standard Chartered Bank being a private bank is not amenable to the writ jurisdiction of this Court. However, it would be open for the petitioners to seek appropriate legal remedy before the appropriate forum in accordance with law. No costs.

201. After the order is pronounced, our attention has been drawn by Mr. Shelat, the learned advocate appearing on behalf of the petitioner that in Special Civil Application No. 10120 of 2014 there is an interim order operating as on today restraining the bank from taking any further decision pursuant to the show cause notice issued earlier. Mr. Shelat prays for extension of the interim order passed earlier. In the facts and circumstances of the case, the interim order to the effect that, if any decision is taken by the bank on the basis of the two notices dated 20th June 2014 the same would not be given effect to for a period of fortnight, shall continue for a period of four weeks from today.

