**REPORTABLE**

# IN THE SUPREME COURT OF INDIA

## CIVIL ORIGINAL/APPELLATE JURISDICTION

**TRANSFERRED CASE (CIVIL) NO.66 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO.1399 OF 2018**

**DHARANI SUGARS AND CHEMICALS LTD. … PETITIONER**

**VERSUS**

**UNION OF INDIA & ORS. … RESPONDENTS**

**WITH**

**WRIT PETITION (CIVIL) NO.339 OF 2018**

**WRIT PETITION (CIVIL) NO.802 OF 2018**

**WRIT PETITION (CIVIL) NO.1086 OF 2018**

**WRIT PETITION (CIVIL) NO.1110 OF 2018**

**WRIT PETITION (CIVIL) NO.1124 OF 2018**

**WRIT PETITION (CIVIL) NO.1142 OF 2018**

**WRIT PETITION (CIVIL) NO.1138 OF 2018**

**WRIT PETITION (CIVIL) NO.1156 OF 2018**

**WRIT PETITION (CIVIL) NO.1153 OF 2018**

**WRIT PETITION (CIVIL) NO.1166 OF 2018**

**WRIT PETITION (CIVIL) NO.1206 OF 2018**

**WRIT PETITION (CIVIL) NO.1212 OF 2018**

**WRIT PETITION (CIVIL) NO.1236 OF 2018**

**WRIT PETITION (CIVIL) NO.1296 OF 2018**

**SLP(C) NO. 31421 OF 2018**

**WRIT PETITION (CIVIL) NO.1316 OF 2018**

**WRIT PETITION (CIVIL) NO.1308 OF 2018**

**WRIT PETITION (CIVIL) NO.1359 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.65 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1404 OF 2018**

**WRIT PETITION (CIVIL) NO.1363 OF 2018**

**WRIT PETITION (CIVIL) NO.1364 OF 2018**

**WRIT PETITION (CIVIL) NO.1374 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.71 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1283 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.73 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1285 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.72 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1284 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.75 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1287 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.76 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1288 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.74 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1286 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.70 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1403 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.69 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1402 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.68 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1401 OF 2018**

**TRANSFERRED CASE (CIVIL) NO.67 OF 2018**
**IN**
**TRANSFER PETITION (CIVIL) NO. 1400 OF 2018**

**WRIT PETITION (CIVIL) NO.1383 OF 2018**

**WRIT PETITION (CIVIL) NO.1402 OF 2018**

**WRIT PETITION (CIVIL) NO.1400 OF 2018**

**WRIT PETITION (CIVIL) NO.1391 OF 2018**

**WRIT PETITION (CIVIL) NO.1411 OF 2018**

**WRIT PETITION (CIVIL) NO.1410 OF 2018**

**WRIT PETITION (CIVIL) NO.1438 OF 2018**

**WRIT PETITION (CIVIL) NO.22 OF 2019**

**WRIT PETITION (CIVIL) NO.1502 OF 2018**

**WRIT PETITION (CIVIL) NO.8 OF 2019**

**WRIT PETITION (CIVIL) NO.9 OF 2019**

**WRIT PETITION (CIVIL) NO.14 OF 2019**

**WRIT PETITION (CIVIL) NO.36 OF 2019**

**WRIT PETITION (CIVIL) NO.50 OF 2019**

**WRIT PETITION (CIVIL) NO.81 OF 2019**

**WRIT PETITION (CIVIL) NO.117 OF 2019**

**WRIT PETITION (CIVIL) NO.246 OF 2019**

**WRIT PETITION (CIVIL) NO.278 OF 2019**

## JUDGMENT

**R.F. NARIMAN, J.**

1. The present batch of petitions and transferred cases raise questions as to the constitutional validity of Sections 35AA and 35AB of the Banking Regulation Act, 1949 ["**Banking Regulation Act**"] introduced by way of amendment w.e.f. 04.05.2017. The real bone of contention is a Reserve Bank of India ["**RBI**"] Circular issued on 12.02.2018, by which the RBI promulgated a revised framework for resolution of stressed assets. The important clauses of the aforesaid circular are set out hereinbelow:

“**Resolution of Stressed Assets – Revised Framework**

1. The Reserve Bank of India has issued various instructions aimed at resolution of stressed assets in the economy, including introduction of certain specific schemes at different points of time. In view of the enactment of the Insolvency and Bankruptcy Code, 2016 (IBC), it has been decided to substitute the existing guidelines with a harmonised and simplified generic framework for resolution of stressed assets. The details of the revised framework are elaborated in the following paragraphs.

## I. Revised Framework

### A. Early identification and reporting of stress

2. Lenders[1] shall identify incipient stress in loan accounts, immediately on default[2], by classifying stressed assets as special mention accounts (SMA) as per the following categories:

| SMA Sub-categories | Basis for classification – Principal or interest payment or any other amount wholly or partly overdue between |
|---|---|
| SMA-0 | 1-30 days |
| SMA-1 | 31-60 days |
| SMA-2 | 61-90 days |

3. As provided in terms of the circular DBS.OSMOS.No.14703/33.01.001/2013-14 dated May 22, 2014 and subsequent amendments thereto, lenders shall report credit information, including classification of an account as SMA to Central Repository of Information on Large Credits (CRILC) on all borrower entities having

[1] Lenders under these guidelines would generally include all scheduled commercial banks (excluding RRBs) and All India Financial Institutions, unless specified otherwise.

[2] ‘Default’ means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be. For revolving facilities like cash credit, default would also mean, without prejudice to the above, the outstanding balance remaining continuously in excess of the sanctioned limit or drawing power, whichever is lower, for more than 30 days.

aggregate exposure[3] of ₹ 50 million and above with them. The CRILC-Main Report will now be required to be submitted on a monthly basis effective April 1, 2018. In addition, the lenders shall report to CRILC, all borrower entities in default (with aggregate exposure of ₹ 50 million and above), on a weekly basis, at the close of business on every Friday, or the preceding working day if Friday happens to be a holiday. The first such weekly report shall be submitted for the week ending February 23, 2018.

## B. Implementation of Resolution Plan

4. All lenders must put in place Board-approved policies for resolution of stressed assets under this framework, including the timelines for resolution. As soon as there is a default in the borrower entity's account with any lender, all lenders − singly or jointly − shall initiate steps to cure the default. The resolution plan (RP) may involve any actions / plans / reorganisation including, but not limited to, regularisation of the account by payment of all over dues by the borrower entity, sale of the exposures to other entities / investors, change in ownership, or restructuring[4]. The RP shall be clearly documented by all the lenders (even if there is no change in any terms and conditions).

## C. Implementation Conditions for RP

5. A RP in respect of borrower entities to whom the lenders continue to have credit exposure, shall be deemed to be 'implemented' only if the following conditions are met:

a. the borrower entity is no longer in default with any of the lenders;

[3] Aggregate exposure under the guidelines would include all fund based and non-fund based exposure with the lenders.

[4] Restructuring is an act in which a lender, for economic or legal reasons relating to the borrower's financial difficulty (An illustrative non-exhaustive list of indicators of financial difficulty are given in the Appendix to Annex-I), grants concessions to the borrower. Restructuring would normally involve modification of terms of the advances / securities, which may include, among others, alteration of repayment period / repayable amount / the amount of instalments / rate of interest; roll over of credit facilities; sanction of additional credit facility; enhancement of existing credit limits; and, compromise settlements where time for payment of settlement amount exceeds three months.

b. if the resolution involves restructuring; then

i. all related documentation, including execution of necessary agreements between lenders and borrower / creation of security charge / perfection of securities are completed by all lenders; and

ii. the new capital structure and/or changes in the terms of conditions of the existing loans get duly reflected in the books of all the lenders and the borrower.

6. Additionally, RPs involving restructuring / change in ownership in respect of 'large' accounts (i.e., accounts where the aggregate exposure of lenders is ₹ 1 billion and above), shall require independent credit evaluation (ICE) of the residual debt[5] by credit rating agencies (CRAs) specifically authorised by the Reserve Bank for this purpose. While accounts with aggregate exposure of ₹ 5 billion and above shall require two such ICEs, others shall require one ICE. Only such RPs which receive a credit opinion of RP4[6] or better for the residual debt from one or two CRAs, as the case may be, shall be considered for implementation. Further, ICEs shall be subject to the following:

a. The CRAs shall be directly engaged by the lenders and the payment of fee for such assignments shall be made by the lenders.

b. If lenders obtain ICE from more than the required number of CRAs, all such ICE opinions shall be RP4 or better for the RP to be considered for implementation.

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## D. Timelines for Large Accounts to be Referred under IBC

[5] The residual debt of the borrower entity, in this context, means the aggregate debt (fund based as well as non-fund based) envisaged to be held by all the lenders as per the proposed RP.

[6] Annex – 2 provides list of RP symbols that can be provided by CRAs as ICE and their meanings.

8. In respect of accounts with aggregate exposure of the lenders at ₹ 20 billion and above, on or after March 1, 2018 ('reference date'), including accounts where resolution may have been initiated under any of the existing schemes as well as accounts classified as restructured standard assets which are currently in respective specified periods (as per the previous guidelines), RP shall be implemented as per the following timelines:

i. If in default as on the reference date, then 180 days from the reference date.

ii. If in default after the reference date, then 180 days from the date of first such default.

9. If a RP in respect of such large accounts is not implemented as per the timelines specified in paragraph 8, lenders shall file insolvency application, singly or jointly, under the Insolvency and Bankruptcy Code 2016 (IBC)[7] within 15 days from the expiry of the said timeline[8].

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12. For other accounts with aggregate exposure of the lenders below ₹ 20 billion and, at or above ₹ 1 billion, the Reserve Bank intends to announce, over a two-year period, reference dates for implementing the RP to ensure calibrated, time-bound resolution of all such accounts in default.

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## V. Withdrawal of extant instructions

18. The extant instructions on resolution of stressed assets such as Framework for Revitalising Distressed Assets, Corporate Debt Restructuring Scheme, Flexible Structuring of Existing Long Term Project Loans, Strategic Debt Restructuring Scheme (SDR), Change in Ownership outside SDR, and Scheme for Sustainable Structuring of Stressed Assets (S4A) stand withdrawn

[7] Applicable in respect of entities notified under IBC.

[8] The prescribed timelines are the upper limits. Lenders are free to file insolvency petitions under the IBC against borrowers even before the expiry of the timelines, or even without attempting a RP outside IBC.

> with immediate effect. Accordingly, the Joint Lenders' Forum (JLF) as an institutional mechanism for resolution of stressed accounts also stands discontinued. All accounts, including such accounts where any of the schemes have been invoked but not yet implemented, shall be governed by the revised framework.
>
> 19. The list of circulars/directions/guidelines subsumed in this circular and thereby stand repealed from the date of this circular is given in Annex - 3.
>
> 20. The above guidelines are issued in exercise of powers conferred under Section 35A, 35AA (read with S.O.1435 (E) dated May 5, 2017 issued by the Government of India) and 35AB of the Banking Regulation Act, 1949; and, Section 45L of the Reserve Bank of India Act, 1934."

2. It will be noticed that the salient features of this circular are that restructuring in respect of borrower entities *de hors* the Insolvency and Bankruptcy Code, 2016 ["**Insolvency Code**"] can only occur if the resolution plan that involves restructuring is agreed to by all lenders, i.e., 100 per cent concurrence. Secondly, what has been chosen to be the subject matter of the circular is debts with an aggregate exposure of INR 2000 crore and over on or after 01.03.2018. With respect to such debts, if default persists for 180 days from 01.03.2018, or if the date of first default is after 01.03.2018, then 180 days calculated with effect from that date, lenders shall file applications singly or jointly under the Insolvency Code within 15 days from the expiry of the aforesaid 180 days. In

short, unless a restructuring process in respect of debts with an aggregate exposure of over INR 2000 crore is fully implemented on or before 195 days from the reference date or date of first default, the lenders will have to file applications as financial creditors under the Insolvency Code. It will be noticed that the sources of power for issuance of the aforesaid circular have been stated to be Section 35A of the Banking Regulation Act read with the Central Government's circular dated 05.05.2017, Sections 35AA and 35AB of the said Act, and Section 45L of the Reserve Bank of India Act, 1934 ["**RBI Act**"]. It may be stated here that by an order dated 11.09.2018, this Court allowed various transfer petitions and made orders in Writ Petition No. 1086 of 2018, by which it was ordered that status quo as of today shall be maintained in the meantime. As a result, insofar as the petitions and transferred cases in this Court are concerned, the circular has, in effect, been stayed on and from 11.09.2018.

3. The charge on behalf of the petitioners was led by Dr. Abhishek Manu Singhvi, learned Senior Advocate. Dr. Singhvi appears on behalf of the Association of Power Producers, representing the power sector in general. According to the learned Senior Advocate, the Electricity Act, 2003 ["**Electricity Act**"] was enacted as a complete

code to regulate the private sector. According to him, unlike sectors such as the steel and cement sector, the power sector is fully regulated and tariffs that are fixed can only be after they are so determined / adopted by Electricity Regulatory Commissions under Section 62 or Section 63 of the Electricity Act. The power sector, therefore, is a player in a restricted market – power can only be purchased by distribution licensees or trading licensees under Section 12 of the Electricity Act, which can only be done with the prior approval of State Electricity Regulatory Commissions. Even transmission of power requires prior approval of transmission licensees, and therefore, substitutability of buyers is impossible since the means to supply power are not readily available. To buttress his submissions, Dr. Singhvi relied heavily upon the reports of the Parliamentary Standing Committees which were looking into the problems of the power sector from time to time. Thus, the 37$^{th}$ Parliamentary Standing Committee Report on Stressed / Non-performing Assets in the Electricity Sector dated 07.03.2018 recorded that in the private sector, there were 34 stressed projects amounting to 40,130 MWs out of 85,550.30 MWs which have a debt exposure of INR 1,74,468 crore. Out of these, non-performing assets [“**NPAs**”] amounting to 34,044 crores are primarily on account of Government

policy changes, failure to fulfil commitments by the Government, delayed regulatory response and non-payment of dues by DISCOMs. This Report, therefore, recommended the setting up of a task force to look into the NPA problem in the power sector.

4. Dr. Singhvi then went into non-availability of fuel and took us through the New Coal Distribution Policy of 18.10.2007, by which Thermal Power Projects were assured supply of 100 per cent coal. This changed drastically as a result of Government of India restrictions in 2013, which restricted supply of coal to only those Independent Power Producers (IPPs) with long term Power Purchase Agreements (PPAs) and otherwise limited supply to 65 per cent of coal requirement. Another setback occurred in August/September, 2014 as coal mines allocated to the power sector were cancelled by the Supreme Court by a judgment in **Manohar Lal Sharma v. Principal Secretary and Ors.**, (2014) 9 SCC 516. Remedial measures such as the SHAKTI Scheme were introduced only after three years of the Supreme Court judgment on 22.05.2017. Even this Scheme limited supply of coal to 75 per cent of the assured coal supply as against what was assured in 2007. All this was commented on by the 37th and 40th Parliamentary Standing Committee Reports.

In so far as the gas-based plants are concerned, the 42nd Parliamentary Standing Committee Report referred to the same tale of woe as in coal based power plants – gas, in which the power sector was originally given priority, was later placed in 2013-14 under a no-cut category, leading to drastic reduction in supply of gas to the power sector. Dr. Singhvi also referred to various reports showing that as on October, 2018, DISCOMs only paid INR 8,710 crore against dues of approximately INR 39,500 crore to generating companies. This situation gets exacerbated by delay in adjudication and consequent payment by DISCOMs. He then referred to preferential treatment that is given to power companies in the public sector as opposed to power companies in the private sector, and argued that against total stressed assets of 66,000 MWs in the private sector, stressed assets in the public sector amount to nil. Lack of PPAs being entered into was another cause of concern. Out of the total stressed capacity of 40,130 MWs identified in the 37th Parliamentary Standing Committee Report, PPAs have been executed only for the capacity of 17,708 MWs, as a result of which long term commitments *qua* fuel supply etc. are lacking. According to him, the impact of the RBI Circular was directly focused upon by the 40th Parliamentary Standing Committee Report. The 40th

Parliamentary Standing Committee has analysed the suitability and impact of the impugned RBI Circular after consultation with the RBI, major banks, and financial institutions as well as the power sector associations. Key observations in the Report are:

> "(a) As per Department of Financial Services, Ministry of Finance, "one size fits all" approach of the RBI is erroneous.
>
> (b) Lenders like the Rural Electrification Corporation and the State Bank of India have submitted that implementing an optimal solution is impossible within the 180-day time period specified by the impugned RBI Circular. The State Bank of India has stated that 12 months' time is required to implement a resolution plan. As per the prescribed timelines, every stressed project of the power sector will land in the NCLT.
>
> (c) Arriving at 100 per cent consensus of lenders for approval and implementation of the resolution plan is difficult, especially when there are projects with multiple lenders.
>
> (d) The Power Finance Corporation pointed out that even in case of a successfully running project like the Chhattisgarh project, they could only recover INR 2,500 crore out of a total of debt of INR 8,300 crore, i.e., 70 per cent haircut. Thus, there is significant value erosion.
>
> (e) The State Bank of India highlighted the need for synchronisation between the RBI's guidelines and resolution of the systemic issues of the electricity sector."

After due examination and enquiry, the 40th Parliamentary Standing Committee Report of August 2018 has made the following recommendations:

> "(a) Appropriate, relevant, and sector-specific measures should be explored to address the issues faced by power sector. Instead of adopting sector-agnostic approach for stress-resolution, the RBI should look at sector-friendly measures.
>
> (b) Revised framework introduced by the RBI has been done ignoring the prevailing realities.
>
> (c) Repayment of 20 per cent of the outstanding principal debt as per the RBI Circular is impracticable for power sector entities, and accordingly, the circular disincentivizes restructuring with the existing promoters.
>
> (d) Forced sale before the NCLT will cause a big sacrifice of public money without any benefit to the economy or the power sector.
>
> (e) The power sector should be protected since it is going through a transition phase from a low-demand-low-supply situation to a moderately-high-demand situation, which is temporary in nature."

5. Dr. Singhvi then referred to a challenge that was made to the RBI Circular in the Allahabad High Court in **Independent Power Producers Association of India v. Union of India and Ors.**, Writ - C No. 18170 of 2018. He referred to a copy of the order dated 31.05.2018, by which the Allahabad High Court ordered:

> "We request the Secretary, Ministry of Finance, Union of India, to hold a meeting in the month of June, 2018 of respondents 2 to 5 through their Secretaries and a representative of the petitioners' association to consider their grievance and see whether any solution to the problem is possible, in the light of observations made by the Thirty-Seventh Report of Standing Committee on Energy presented to Lok Sabha on 7.3.2018 with regard to stressed/non-performing assets in electricity sector. Though, we could not go through the report, our

attention was specifically drawn to some observations in Part-II of the report, which reads thus:

> "The Committee are of the considered view that providing finances, though vital, to the project is only one of the several factors essential for the commissioning of the project. As of now, commissioned plants worth of thousands of Mws are under severe financial stress and are currently under SMA-1/2 stage or on the brink of becoming NPA. This is due to fuel shortage, sub-optimal loading, untied capacities, absence of FSA and lack of PPA, etc. These projects were commissioned on the basis of national need/ demand of electricity, availability of all other essentials required in this regard. However, due to unforeseen circumstances, these plants are suffering from cash flows, credit rating, interest servicing etc. Hence, simply applying the RBI guidelines mechanically by the banks, financial institutions, joint lender forums will push these plants further into trouble without any hope of recovery."

It is needless to mention that the petitioners' representatives shall supply a copy of this order and of the writ petition with annexures to all the respondents within one week from today. We only observe that action may be avoided on the basis of the impugned circular dated 12.2.2018 issued by respondent no.2-Reserve Bank of India addressed to all Scheduled Commercial Banks and All India Financial Institutions, against members of the petitioners association, subject to condition that the member(s) is/are not wilful defaulter(s) till the meeting is conducted by the Secretary, Ministry of Finance, Union of India. We also observe that the Secretary, Ministry of Finance shall communicate the date and time of the meeting to all concerned, including the President of the petitioners' association, well in advance."

6. Dr. Singhvi then referred to the detailed order passed by the Allahabad High Court in the aforesaid case on 27.08.2018, in which he referred to the stand taken by the Union of India as follows:

> "**24.1.** …… As observed earlier, the Central Government is in favour of granting them some more time so as to save the power sector in the larger interest. Mr. Tushar Mehta, learned ASG, submitted that it is desirable, while considering the "sector (power) specific issues" that a timeline prescribed under the circular be made effective after 180 days from 27.08.2018 and subsequent steps be taken by the parties based upon the reports of the High Level Empowered Committee presided over by the Cabinet Secretary. He submitted, the time can be extended at this stage and not once process under IBC is set in motion."

He also referred to the fact that a High Level Empowered Committee is to be set up as follows:

> "**42.** In this backdrop, I am inclined to direct the High Level Empowered Committee to submit its report within two months from the date of its constitution. The Ministry of Power shall invite a senior officer of the RBI, after consultation with the Governor of RBI, as a member of the High Level Empowered Committee forthwith. In the meantime, I observe that the Central Government should consider whether it would like to issue directions under Section 7 of the RBI Act on the basis of the report and other material, including reports of the Standing Committee within 15 days from today in the light of the observations made in this order. In view thereof, it is not desirable to grant any interim relief at this stage. This shall not preclude the petitioner-Associations or its members from applying for urgent relief, if the circumstances so demand, placing the request and factual details in respect of such an action. This order shall not curtail the rights/powers of the financial

creditors under Section 7 of IBC or even of the RBI in issuing directions in specific case(s) under Section 35AA of BR Act to initiate corporate insolvency resolution process under Chapter II of Part II of IBC, in any given case, including the petitioners or members of the petitioners' Association."

7. Dr. Singhvi then referred to the Report dated 12.11.2018 of the High Level Committee so constituted. This Report made various recommendations. It stated:

> "1. Linkage coal may be allowed to be used against short term PPAs and power be sold through Discovery of Efficient Energy Price (DEEP) portal following a transparent bidding process.
>
> 2. A nodal agency may be designated which may invite bids for procurement of bulk power for medium term for 3 to 5 years in appropriate tranches, against pre-declared linkage by Coal India Limited (CIL).
>
> 3. NTPC can act as an aggregator of power, i.e., procure power through transparent competitive bidding process from such stressed power plants and offer that power to the DISCOMs against PPAs of NTPC till such time as NTPC's own concerned plants/units are commissioned.
>
> 4. Ministry of Coal may earmark for power, at least 60 per cent of the e-auction coal, and this should be in addition to the regular coal requirement of the power sector.
>
> 5. If there is a shortfall in the supply of coal and it is attributable to the Ministry of Coal or Railways; such shortfall need not lapse and be carried over to the subsequent months up to a maximum of three months.
>
> 6. Old and high heat rate plants not complying with new environment norms may be considered for retirement in a phased and timebound manner at the same time avoiding any demand/supply mismatch.

7. Public Financial Institutions (PFIs) providing the Bill Discounting facility may also be covered by the Tri-partite Agreement (TPA) i.e. in case of default by the DISCOM, the RBI may recover the dues from the account of States and make payment to the PFIs.

8. PPAs, Fuel Supply Agreements (FSA) and LTOA for transmission of power, EC/FC clearances, and all other approvals including water, be kept alive and not cancelled by the respective agencies even if the project is referred to NCLT or is acquired by any other entity. All of these may be linked to the plant and not the Promoter.

9. In order to revive gas based power plants, Ministry of Power and Ministry of Petroleum & Natural Gas may jointly devise a scheme in line with the earlier e-bid RLNG Scheme (supported by PSDF)."

Dr. Singhvi, therefore, argued that despite the fact that a representative of the RBI attended meetings of the Parliamentary Standing Committee, the RBI Circular was issued in complete disregard of the recommendations of such Reports, both before and after the impugned circular. According to him, therefore, to apply a 180-day limit to all sectors of the economy without going into the special problems faced by each sector would treat unequals equally and would be arbitrary and discriminatory, and therefore, violative of Article 14 of the Constitution of India. Also, picking up at random all defaults amounting to INR 2000 crore and above, as well as the fact that even a lender whose stake is only 1 per cent can stall a

resolution process *de hors* the Insolvency Code make the circular manifestly arbitrary and violative of Article 14 on this score as well.

8. Apart from the aforesaid submissions, Dr. Singhvi referred in great detail to the relevant sections of the Banking Regulation Act and the RBI Act, and argued that the impugned circular was *ultra vires* the provisions of those Acts. According to him, Section 35A and Section 35AB of the Banking Regulation Act cannot possibly be the source of power for the impugned circular. Section 35A was introduced by an Amendment Act of 1956 and cannot, therefore, be used to empower the RBI to relegate companies to insolvency under the Insolvency Code as it did not exist at the time, or to give directions for resolution of stressed assets. He strongly referred to and relied upon **Indian Banks' Association v. Devkala Consultancy Service**, (2004) 11 SCC 1 ["**Indian Banks' Association**"] for the proposition that the RBI's functions under Section 35A are confined to the boundaries of the RBI Act and the Banking Regulation Act and not to other statutes, such as the Insolvency Code. He also argued that Sections 35AA and 35AB are part of one composite scheme. Section 35AA alone refers to, and can alone be the source of power for directing banking and non-banking

companies to file applications under the Insolvency Code. Section 35AB clearly refers to resolution of stressed assets in a manner which is *de hors* the Insolvency Code. He then referred to the circular of the Central Government dated 05.05.2017 which empowered the RBI to issue directions *qua* individual defaults that are committed. This being so, a general circular applying to all defaults of loans above INR 2000 crore, without having reference to the facts of each individual case would, therefore, be *ultra vires* and bad in law. For this purpose, he strongly relied upon the Press Note that introduced Sections 35AA and 35AB as well as the Statement of Objects and Reasons introducing the said Sections by the Amending Act of 2017. He also argued that in any case, Sections 35AA and 35AB, being manifestly arbitrary provisions, are violative of Article 14 of the Constitution of India. Further, they are also arbitrary on the ground of excessive delegation of power.

9. Shri Mukul Rohatgi, Shri Sajan Poovayya, Shri K.V. Viswanathan, Shri Neeraj Kishan Kaul, Shri Navaniti Prasad Singh, Shri P.S. Narsimha, Shri Arvind P. Datar, and Shri Gopal Jain, learned Senior Advocates, and Shri Pulkit Deora, Smt. Purti Marwaha Gupta, and Shri E.R. Kumar, learned Advocates, have also supported

the submissions of Dr. Singhvi. These counsel have appeared in cases involving many other sectors, such as telecom, steel, infrastructure, sports infrastructure, sugar, fertiliser, shipyard, etc. Each of them has highlighted the difficulties faced as a result of Government policies and other reasons for financial stress in all these sectors, which have nothing to do with the efficiency of management of companies operating in these sectors. All of them have adopted the arguments of Dr. Singhvi in stating that, without looking into each individual sector's problems and attempting to solve them, the RBI circular applies down the board to good and bad alike, and, despite the fact that some corporate debtors are on the brink of resolution, the chopper of 180 days comes down on them and they are driven into the Insolvency Code. The Government has recognised that, for example, in the sports infrastructure sector, much larger gestation periods are necessary in which capital infrastructure investments take place and which consequently require long periods for resolution. They have also argued with various nuances of their own as to how the RBI circular is both arbitrary and *ultra vires* the Banking Regulation Act and the RBI Act.

10. Shri Rakesh Dwivedi, learned Senior Advocate appearing on behalf of the RBI, has taken us through various provisions of the RBI Act and Banking Regulation Act and has impressed upon us the fact that the regulatory regime laid down in these Acts must be construed broadly, being in public interest, in the interest of banking policy, and above all, in the interest of depositors. The RBI Act and the Insolvency Code are intricately related to the operation of the credit system of the country, and must therefore, be given an expansive interpretation. According to the learned Senior Advocate, the RBI Circular is only an attempt to tell banks that insofar as huge debts over INR 2000 crore are concerned, they will be given a reasonable period of six months within which to either resolve stress assets or otherwise, if they cannot do so, would only then have to move under the Insolvency Code. According to him, clause 4 of the RBI Circular makes it clear that greater flexibility is given in this period of six months for banking and non-banking financial institutions to resolve stressed assets even *de hors* earlier restrictive circulars that have been done away with by the circular dated 12.02.2018 so that an effort be made to resolve stressed assets within a reasonable period, after which it becomes incumbent on such institutions to move the Insolvency Code. According to him, the circular is not manifestly

arbitrary. On the contrary, it is in public interest and in the interest of the national economy to see that evergreening of debts does not carry on indefinitely. Therefore, these huge amounts that are due and owing should come back into the economy for further productive use. Either they can so come back within the six months' grace period granted by the circular or through the route of the Insolvency Code. He also made it clear that the Parliamentary Standing Committee Reports are for the purpose of Parliament, which must then act upon them. None of the Reports that have been referred to have been acted upon by Parliament, and therefore, that cannot take the matter much further. Also, it is important to notice that though the executive, i.e., the Government could also have acted in terms of these Reports, it has chosen not to do so. For this purpose, he relied upon Section 7 of the RBI Act, under which the Central Government may, from time to time, give such directions to the RBI that it may consider necessary in public interest, after consultation with the Governor of the RBI. The sheet anchor of the petitioners' case, therefore, disappears as all these Parliamentary Standing Committee Reports do not take the petitioners anywhere, not having been acted upon either by the Parliament or by the Central Government. This is for the very good reason that ultimately, it is in public interest to either resolve stressed

assets within a certain timeframe, or if incapable of such resolution, the route of the Insolvency Code should then be followed. So far as the vires of Sections 35AA and 35AB are concerned, Shri Dwivedi relied upon our recent judgment in **Swiss Ribbons Pvt. Ltd. and Anr. v. Union of India and Ors.**, 2019 (2) SCALE 5 ["**Swiss Ribbons**"], saying that great leeway must be given to Parliament to deal with the problems which affect the national economy as a whole. There is adequate guiding principle and there is no manifest arbitrariness in any of the aforesaid provisions. Further, there is no question of excessive delegation of power either, as guidance can be obtained from the Preamble of the Banking Regulation Act together with its provisions. Insofar as the RBI Circular is concerned, he argued that it is traceable to four sources of power, namely, Sections 21, 35A, 35AA and 35AB of the Banking Regulation Act. Insofar as non-banking financial companies are concerned, it is traceable to Section 45L of the RBI Act. According to the learned Senior Advocate, a general circular of this kind can certainly be issued in public interest and in the interest of the national economy. Any restrictive reading of any of these provisions will only do harm to the economy of the country as a whole. Broadly read, therefore, the RBI Circular cannot be said to be *ultra vires*.

11. Shri Tushar Mehta, learned Solicitor General for India, confined his submissions to the constitutional validity of Sections 35AA and 35AB of the Banking Regulation Act, and the validity of the Central Government circular dated 05.05.2017. According to the learned Solicitor General, Sections 35AA and 35AB are regulatory provisions made in public interest that cannot possibly be said to be manifestly arbitrary in any way. He relied heavily upon the judgment of **Swiss Ribbons** (supra). Further, the aforesaid Sections cannot be said to be unguided provisions as the RBI gets sufficient guidance from the Preamble as well as other provisions of the Banking Regulation Act. He further submitted that the authorisation of the Central Government with respect to Section 35AA has to be general in nature, after which, the RBI must exercise such power with due deliberation and with sector-specific care as the expert financial regulator and central bank of the country. He submitted that ideally, there ought to be a sector wise contingency analysis by the RBI before exercising power provided by the Central Government to it under Section 35AA. In any case, so far as the power sector is concerned, he was of the view that the RBI ought to have treated it differently from all other sectors in view of the steps that the Central Government is taking in order to bring back the power sector on its feet.

12. At this juncture, it is important to note the genesis of the impugned circular. By a press release dated 13.06.2017, the RBI identified certain accounts for reference by banks under the Insolvency Code. This press release reads as follows:

> "**RBI identifies Accounts for Reference by Banks under the Insolvency and Bankruptcy Code (IBC)**
>
> The Reserve Bank of India had issued a Press Release on May 22, 2017 outlining the steps taken and those on the anvil pursuant to the promulgation of the Banking Regulation (Amendment) Ordinance, 2017. The Press Release had mentioned inter alia that the RBI would be constituting a Committee comprised majorly of its independent Board Members to advise it in regard to the cases that may be considered for reference for resolution under the Insolvency and Bankruptcy Code, 2016 (IBC).
>
> 2. An Internal Advisory Committee (IAC) was accordingly constituted and it held its first meeting on June 12, 2017. The IAC, in the meeting, agreed to focus on large stressed accounts at this stage and accordingly took up for consideration the accounts which were classified partly or wholly as non-performing from amongst the top 500 exposures in the banking system.
>
> 3. The IAC also arrived at an objective, non-discretionary criterion for referring accounts for resolution under IBC. In particular, the IAC recommended for IBC reference all accounts with fund and non-fund based outstanding amount greater than ₹ 5000 crore, with 60% or more classified as non-performing by banks as of March 31, 2016. The IAC noted that under the recommended criterion, 12 accounts totaling about 25 per cent of the current gross NPAs of the banking system would qualify for immediate reference under IBC.

> 4. As regards the other non-performing accounts which do not qualify under the above criteria, the IAC recommended that banks should finalise a resolution plan within six months. In cases where a viable resolution plan is not agreed upon within six months, banks should be required to file for insolvency proceedings under the IBC.
>
> 5. The Reserve Bank, based on the recommendations of the IAC, will accordingly be issuing directions to banks to file for insolvency proceedings under the IBC in respect of the identified accounts. Such cases will be accorded priority by the National Company Law Tribunal (NCLT).
>
> 6. The details of the resolution framework in regard to the other non-performing accounts will be released in the coming days."

13. At this stage, as a first step, the Internal Advisory Committee ["**IAC**"] decided to consider the stressed assets within the top 500 exposures of the banking system as on 31.03.2017. This set of 500 accounts was arrived at as per the statement generated from the Central Repository of Information on Large Credits ["**CRILC**"] database. Of the said top 500 exposures, it was noted that 71 accounts had been partly or wholly classified as NPAs while the other 429 were not classified as NPA by any bank. For the purpose of this first list, the following criteria were applied:

a. Accounts where the funded plus non-funded outstanding was more than INR 5000 crore;

b. Accounts where more than 60 per cent of the total outstanding by value was NPA as on March 31, 2016.

Consequently, 12 accounts which met the above criteria were referred for resolution under the Insolvency Code *vide* RBI's direction dated 15.06.2017. It is pertinent to note that the accounts in the First List constituted around 25 per cent of the NPAs in the system and the cumulative fund-based and non-fund-based outstanding therein amounted to INR 197,769 crore.

14. The IAC subsequently met again and decided, on 25.08.2017, that out of the 59 remaining NPA accounts of the top 500 exposures, accounts which are materially NPA (i.e., where 60 per cent of the total outstanding has become NPA by 30.06.2017) may be given time till 13.12.2017 for resolution. If the banks fail to finalise and implement a viable resolution plan by the said date, banks will be required to file applications under Insolvency Code before 31.12.2017. The IAC noted that applying this criterion will cover 29 NPA accounts, with total outstanding of INR 135,846 crore and total fund-based NPAs of INR 111,848 crore as on 30.06.2017. It is pertinent to note that on 28.08.2017, the RBI issued a letter directing

banks to attempt resolution of the accounts in this Second List by 13.12.2017. As regards the residual accounts, out of the initially identified 71 NPA accounts, the IAC recommended that such accounts may be addressed through a steady-state framework for resolution of stressed assets in a time-bound manner and failing such resolution, the accounts be referred to for resolution under the Insolvency Code. Accordingly, the RBI formulated and issued the revised framework *vide* its circular dated 12.02.2018.

15. Meanwhile, the Ministry of Finance issued a notification dated 05.05.2017 under Section 35AA as follows:

> "**MINISTRY OF FINANCE**
> (Department of Financial Services)
> **ORDER**
> New Delhi, the 5th May, 2017
>
> S.O. 1435(E).—In exercise of the powers conferred by Section 35AA of the Banking Regulation Act, 1949 (10 of 1949), the Central Government hereby authorises the Reserve Bank of India to issue such directions to any banking company or banking companies which may be considered necessary to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016."

This happened to be on the very next day on which the Banking Regulation (Amendment) Ordinance, 2017 introduced Sections 35AA and 35AB as amendments to the Banking Regulation Act. A Press

Note of the Ministry of Finance of 05.05.2017 explains the genesis of the Ordinance thus:

"**Press Information Bureau**
**Government of India**
**Ministry of Finance**

05-May-2017

*The promulgation of Banking Regulation (Amendment) Ordinance, 2017 will lead to effective resolution of stressed assets, particularly in consortium or multiple banking arrangements.*

*The Ordinance enables the Union Government to authorise the Reserve Bank of India (RBI) to direct banking companies to resolve specific stressed assets.*

The promulgation of the Banking Regulation (Amendment) Ordinance, 2017 inserting two new Sections (*viz*. 35AA and 35AB) after Section 35A of the Banking Regulation Act, 1949 enables the Union Government to authorise the Reserve Bank of India (RBI) to direct banking companies to resolve specific stressed assets by initiating insolvency resolution process, where required. The RBI has also been empowered to issue other directions for resolution, and appoint or approve for appointment, authorities or committees to advise banking companies for stressed asset resolution.

This action of the Union Government will have a direct impact on effective resolution of stressed assets, particularly in consortium or multiple banking arrangements, as the RBI will be empowered to intervene in specific cases of resolution of non-performing assets, to bring them to a definite conclusion.

The Government is committed to expeditious resolution of stressed assets in the banking system. The recent enactment of Insolvency and Bankruptcy Code (IBC), 2016 has opened up new possibilities for time bound resolution of stressed assets. The SARFAESI and Debt Recovery Acts have been amended to facilitate recoveries. A comprehensive approach is being adopted

for effective implementation of various schemes for timely resolution of stressed assets."

(emphasis supplied)

The Banking Regulation (Amendment) Ordinance, 2017 was then enacted as follows:

"**MINISTRY OF LAW AND JUSTICE**

4th May, 2017

*An Ordinance further to amend the Banking Regulation Act, 1949.*

WHEREAS the stressed assets in the banking system have reached unacceptably high levels and urgent measures are required for their resolution;

AND WHEREAS the Insolvency and Bankruptcy Coe, 2016 has been enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders;

AND WHEREAS the provisions of Insolvency and Bankruptcy Code, 2016 can be effectively used for the resolution of stressed assets by empowering the banking regulator to issue directions in specific cases;

AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

NOW, THEREFORE, in exercise of the powers conferred by clause (*1*) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:

**1.** (1) This Ordinance may be called the Banking Regulation (Amendment) Ordinance, 2017.

(2) It shall come into force at once.

**2.** In the Banking Regulation Act, 1949, after section 35A, the following sections shall be inserted, namely:

'35AA. The Central Government may by order authorise the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016.

*Explanation*. – For the purposes of this section, "default" has the same meaning assigned to it in clause (*12*) of section 3 of the Insolvency and Bankruptcy Code, 2016.

35AB. (*1*) Without prejudice to the provisions of section 35A, the Reserve Bank may, from time to time, issue directions to the banking companies for resolution of stressed assets.

(2) The Reserve Bank may specify one or more authorities or committees with such members as the Reserve Bank may appoint or approve for appointment to advise banking companies on resolution of stressed assets."

(emphasis supplied)

This Ordinance was replaced by the Banking Regulation (Amendment) Bill, 2017 dated 14.07.2017. The Statement of Objects and Reasons for the aforesaid Bill reads as follows:

"**THE BANKING REGULATION (AMENDMENT) BILL, 2017**

XXX XXX XXX

STATEMENT OF OBJECTS AND REASONS

Stressed assets in the banking system, or non-performing assets have reached unacceptably high levels and hence, urgent measures are required for their speedy resolution to improve the financial health of

banking companies for proper economic growth of the country. Therefore, it was considered necessary to make provisions in the Banking Regulation Act, 1949 for authorising the Reserve Bank of India to issue directions to any banking company or banking companies to effectively use the provisions of the Insolvency and Bankruptcy Code, 2016 for timely resolution of stressed assets.

2. It was accordingly decided to make amendments to the Banking Regulation Act, 1949. Since Parliament was not in session and immediate action was required to be taken, the Banking Regulation (Amendment) Ordinance, 2017 was promulgated by the President on the 4th May, 2017.

3. The Banking Regulation (Amendment) Bill, 2017 which seeks to replace the Banking Regulation (Amendment) Ordinance, 2017, provides for the following, namely:—

(a) to confer power upon the Central Government for authorising the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016;

(b) to confer power upon the Reserve Bank to issue directions to banking companies for resolution of stressed assets and also allow the Reserve Bank to specify one or more authorities or committees to advise banking companies on resolution of

stressed assets; and

(c) to amend section 51 of the Act so as to make therein the reference of proposed new sections 35AA and 35AB.

4. The Bill seeks to replace the said Ordinance.

xxx xxx xxx

14th July, 2017."

(emphasis supplied)

Sections 35AA and 35AB were then legislatively introduced as follows:

"**THE BANKING REGULATION (AMENDMENT) ACT, 2017**

[25th August, 2017]

xxx xxx xxx

**2.** In the Banking Regulation Act, 1949 (hereinafter referred to as the principal Act), after section 35A, the following sections shall be inserted, namely:—

'35AA. The Central Government may, by order, authorise the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016.

Explanation.—For the purposes of this section, "default" has the same meaning assigned to it in clause (12) of section 3 of the Insolvency and Bankruptcy Code, 2016.

35AB. (*1*) Without prejudice to the provisions of section 35A, the Reserve Bank may, from time to time, issue directions to any banking company or banking companies for resolution of stressed assets.

(*2*) The Reserve Bank may specify one or more authorities or committees with such members as the Reserve Bank may appoint or approve for appointment to advise any banking company or banking companies on resolution of stressed assets'.

xxx xxx xxx"

**CONSTITUTIONAL VALIDITY**

16. The petitioners have argued that the aforesaid Ordinance and Amendment Act are unconstitutional on two grounds; (i) that the Sections introduced are manifestly arbitrary; and (ii) that they suffer

from absence of guidelines. Insofar as the first challenge is concerned, this Court has, in a recent judgment in **Swiss Ribbons** (supra), made it clear that economic legislation is to be viewed with great latitude. After referring to the Lochner era and its aftermath in paragraph 7 of the aforesaid judgment, this Court referred to various judgments of this Court in paragraph 8, and concluded as follows:

> "**85.** The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, 'trial' having led to repeated 'errors', ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners."

It is in this background that legislation affecting the economy is to be viewed. This Court, in **Shayara Bano v. Union of India**, (2017) 9 SCC 1 has made it clear that Article 14 may be infracted by

legislation on the ground of such legislation being manifestly arbitrary. This Court has said in this behalf:

> "**101.** It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

Short of throwing the mantra of manifest arbitrariness at us, none of the petitioners have been able to point out as to how either of these provisions is manifestly arbitrary. They are not excessive in any way nor do they suffer from want of any guiding principle. As a matter of fact, these amendments are in the nature of amendments which confer regulatory powers upon the RBI to carry out its functions under the Banking Regulation Act, and are not different in quality from any of the Sections which have already conferred such power. Thus,

Section 21 makes it clear that the RBI may control advances made by banking companies in public interest, and in so doing, may not only lay down policy but may also give directions to banking companies either generally or in particular. Similarly, under Section 35A, vast powers are given to issue necessary directions to banking companies in public interest, in the interest of banking policy, to prevent the affairs of any banking company being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the banking company, or to secure the proper management of any banking company. It is clear, therefore, that these provisions which give the RBI certain regulatory powers cannot be said to be manifestly arbitrary.

17. When it comes to lack of any guidelines by which the power given to the RBI is to be exercised, it is clear from a catena of judgments that such guidance can be obtained not only from the Statement of Objects and Reasons and the Preamble to the Act, but also from its provisions. Thus, in **Harishankar Bagla v. State of M.P.**, (1955) 1 SCR 380, this Court held:

> "**9.** The next contention of Mr. Umrigar that Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, amounts to delegation of legislative power outside the

permissible limits is again without any merit. It was settled by the majority judgment in the *Delhi Laws Act case* [1951 SCR 747] that essential powers of legislature cannot be delegated. In other words, the legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct. In the present case the legislature has laid down such a principle and that principle is the maintenance or increase in supply of essential commodities and of securing equitable distribution and availability at fair prices. The principle is clear and offers sufficient guidance to the Central Government in exercising its powers under Section 3. Delegation of the kind mentioned in Section 3 was upheld before the Constitution in a number of decisions of their Lordships of the Privy Council, vide *Russell* v. *Queen* [7 AC 829], *Hodge* v. *Queen* [9 AC 117] and *Shannon* v. *Lower Mainland Dairy Products Board* [1938 AC 708] and since the coming into force of the Constitution delegation of this character has been upheld in a number of decisions of this Court on principles enunciated by the majority in the *Delhi Laws Act case* [1951 SCR 747]. As already pointed out, the preamble and the body of the sections sufficiently formulate the legislative policy and the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the framework of that policy. Mr. Umrigar could not very seriously press the question of the invalidity of Section 3 of the Act and it is unnecessary therefore to consider this question in greater detail."

Similarly, in **Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. v. The Assistant Commissioner of Sales Tax and Ors.**, this Court observed:

> "**13.** It may be stated at the outset that the growth of the legislative powers of the Executive is a significant development of the twentieth century. The theory of *laissez faire* has been given a go-by and large and comprehensive powers are being assumed by the State with a view to improve social and economic well-being of the people. Most of the modern socio-economic legislations passed by the Legislature lay down the guiding principles and the legislative policy. The Legislatures because of limitation imposed upon by the time factor hardly go into matters of detail. Provision is, therefore, made for delegated legislation to obtain flexibility, elasticity, expedition and opportunity for experimentation. The practice of empowering the Executive to make subordinate legislation within a prescribed sphere has evolved out of practical necessity and pragmatic needs of a modern welfare State. At the same time it has to be borne in mind that our Constitution-makers have entrusted the power of legislation to the representatives of the people, so that the said power may be exercised not only in the name of the people but also by the people speaking through their representatives. The role against excessive delegation of legislative authority flows from and is a necessary postulate of the sovereignty of the people. The rule contemplates that it is not permissible to substitute in the matter of legislative policy the views of individual officers or other authorities, however competent they may be, for that of the popular will as expressed by the representatives of the people. As observed on p. 224 of Vol. I in *Cooley's Constitutional Limitations* 8th Edn.:
>
> > "One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or

> authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

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"**15.** The Constitution, as observed by this Court in the case of *Devi Das Gopal Krishnan* v. *State of Punjab* [AIR 1967 SC 1895 : (1967) 3 SCJ 557 : (1967) 20 STC 430] confers a power and imposes a duty on the Legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the Executive or any other agency. But there is danger inherent in such a process of delegation. An over-burdened Legislature or one controlled by a powerful Executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the Executive; it may confer an arbitrary power on the Executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a court to hold on a fair, generous and liberal construction of an impugned statute whether the Legislature exceeded such limits."

xxx xxx xxx

"**17.** The matter came up for the first time before this Court *In re The Delhi Laws Act*, 1912. [AIR 1951 SC 332 : 1951 SCR 747 : 1951 SCR 527] Although each one of the learned Judges who heard that case wrote a separate judgment, the view which emerged from the different judgments was that it could not be said that an unlimited right of delegation was inherent in the legislative power itself. This was not warranted by the provisions of the Constitution, which vested the power of legislation either in Parliament or State Legislatures. The legitimacy of delegation depended upon its being vested as an ancillary measure which the Legislature considered to be necessary for the purpose of exercising its legislative powers effectively and completely. The Legislature must retain in its own hands the essential legislative function. Exactly what constituted "essential legislative function" was difficult to define in general terms, but this much was clear that the essential legislative function must at least consist of the determination of the legislative policy and its formulation as a binding rule of conduct. Thus where the law passed by the legislature declares the legislative policy and lays down the standard which is enacted into a rule of law, it can leave the task of subordinate legislation like the making of rules, regulations or by-laws which by its very nature is ancillary to the statute to subordinate bodies. The subordinate authority must do so within the framework of the law which makes the delegation, and such subordinate legislation has to be consistent with the law under which it is made and cannot go beyond the limits of the policy and standard laid down in the law. As long as the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere with the discretion that undoubtedly rests with the Legislature itself in determining the extent of delegation necessary in a particular case [*see* observations of Wanchoo, C.J., in *Municipal Corporation of Delhi* v. *Birla Mills*.].

**18.** In *Harishankar Bagla* v. *State of Madhya Pradesh* [AIR 1954 SC 465 : (1955) 1 SCR 380 : 1954 Cri LJ

1322] this Court dealt with the validity of clause 3 of the Cotton Textile (Control of Movement) Order, 1948 promulgated by the Central Government under Section 3 of the Essential Supplies (Temporary Powers) Act, 1946. While upholding the validity of the impugned clause, this Court observed that the Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law, and where the Legislature has laid down such a principle in the Act and that principle is the maintenance or increase in supply of essential commodities and of securing equitable distribution and availability at given prices, the exercise of the power was valid."

The Statement of Objects and Reasons of the Banking Regulation Act, relevant for our purpose, is as follows:

"**STATEMENT OF OBJECTS AND REASONS**

The provisions of law relating to banking companies at present form a subsidiary portion of the general law applicable to companies and are contained in Part XA of the Indian Companies Act, 1913. These provisions, which were first introduced in 1936, and which have undergone two subsequent modifications, have proved inadequate and difficult to administer. Moreover while the primary objective of Companies Law is to safeguard the interests of the stock-holder, that of banking legislation should be the protection of the interests of the depositor. It has therefore been felt for some time that separate legislation was necessary for the regulation of banking in India. This need has become the more insistent on account of the considerable development that has taken place in recent years in banking, especially the rapid growth of banking resources and of the number of banks and branches. Regard must also be had to the fact that the banking system is likely in the post-war period to be more vulnerable by reason of the great expansion, both quantitatively and relatively, that has taken place in demand deposits, as compared with

> time deposits, during the war years. The enactment of a separate comprehensive measure has in consequence now become imperative."
>
> (emphasis supplied)

In particular, the main features of the Bill are as follows:

> "(i) A comprehensive definition of 'banking' so as to bring within the scope of the legislation all institutions which receive deposits, repayable on demand or otherwise, for lending or investment:
>
> xxx xxx xxx
>
> (x) Empowering the Central Government to take action against banks conducting their affairs in a manner detrimental to the interests of the depositors;
>
> (xi) Provision for bringing the Reserve Bank of India into closer touch with banking companies;
>
> xxx xxx xxx
>
> (xiv) Widening the powers of the Reserve Bank of India so as to enable it to come to the aid of banking companies in times of emergency;
>
> xxx xxx xxx"

Sections 14A, 17, 18, and 20 impose various restrictions on a banking company. Thus, it is prohibited from having a floating charge on assets; it has to maintain a reserve fund, and a cash reserve; and it cannot grant loans and advances on the security of its own shares, or on behalf of its directors, or any firm in which its directors are interested etc. A banking company is obligated to hold a license that is issued by the RBI, by which the RBI can impose such conditions as it thinks fit under Section 22 of the Act. Section 22(3), in particular, gives guidance as to how the banking company will run its business.

These and other regulatory sections such as Sections 25, 29, 30, and 31, all give guidance as to how the RBI is to exercise these powers under the newly added provisions. We, therefore, agree with Shri Dwivedi that there was no dearth of guidance for the RBI to exercise the powers delegated to it by these provisions. Consequently, the plea of constitutional validity fails.

**ULTRA VIRES**

18. Shri Dwivedi referred to and relied upon Sections 21, 35A, 35AA, and 35AB in order to sustain the validity of the impugned circular. Dr. Singhvi has argued that Section 35A cannot possibly be relied upon for the reason that it is an old provision, introduced in 1956. Whether or not to invoke the Insolvency Code was certainly not in Parliament's contemplation when it enacted Section 35A, and for this reason, Section 35A cannot possibly be looked at as a source of power authorising the RBI to issue the impugned circular.

19. Dr. Singhvi's argument raises an interesting question as to the "ongoing" interpretation of a statute. Generally, statutes are recognised as Acts of Parliament that should be deemed to be "always speaking". Thus, in **Senior Electric Inspector v. Laxminarayan Chopra**, (1962) 3 SCR 146, this Court held that the

expression “telegraph line” mentioned in the Indian Telegraph Act, 1885, is comprehensive enough to take in any wire used for the purpose of an apparatus for post and telegraph, and wireless stations, even though such wires and wireless stations were not in the contemplation of Parliament when the 1885 Act was enacted. The legal position was laid down thus:

> “…… The maxim *contemporanea exposition* as laid down by Coke was applied to construing ancient statutes, but not to interpreting Acts which are comparatively modern. There is a good reason for this change in the mode of interpretation. The fundamental rule of construction is the same whether the Court is asked to construe a provision of an ancient statute or that of a modern one, namely, what is the expressed intention of the Legislature. It is perhaps difficult to attribute to a legislative body functioning in a static society that its intention was couched in terms of considerable breadth so as to take within its sweep the future developments comprehended by the phraseology used. It is more reasonable to confine its intention only to the circumstances obtaining at the time the law was made. But in a modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made, for a modern Legislature making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them. We cannot, therefore, agree with the learned Judges of the High Court that the maxim

*contemporanea expositio* could be invoked in construing the word “telegraph line” in the Act.

For the said reasons, we hold that the expression “telegraph line” is sufficiently comprehensive to take in the wires used for the purpose of the apparatus of the Post and Telegraph Wireless Station.”

(at pp. 156-157)
(emphasis supplied)

20. Guidance on whether a statute can apply to new situations not in contemplation of Parliament when the statute was enacted was felicitously set out by Lord Wilberforce in his dissenting judgment in **Royal College of Nursing of the United Kingdom v. Department of Health and Social Security**, [1981] 1 All ER 545 [HL] as follows:

“In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament’s policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is

different in kind or dimension from that for which the legislation was passed."

(at pp. 564-565)

21. In **Comdel Commodities Ltd. v. Siporex Trade S.A.**, [1990] 2 All ER 552 [HL], Lord Bridge put it thus:

> "When a change in social conditions produces a novel situation, which was not in contemplation at the time when a statute was first enacted, there can be no *a priori* assumption that the enactment does not apply to the new circumstances. If the language of the enactment is wide enough to extend to those circumstances, there is no reason why it should not apply."
>
> (at p. 557)

22. The phrase "always speaking" is adverted to by the House of Lords in **McCartan Turkington Breen (A Firm) v. Times Newspapers Ltd.**, [2000] 4 All ER 913. Lord Steyn, speaking for the Court, stated as follows:

> "*The appeal to the original intent of the statute*
>
> There is another preliminary matter to be considered. Counsel for the solicitors emphasised that the wording of paragraph 9 can be traced back to the Law of Libel Amendment Act 1888. He observed that at that time the phenomenon of press conferences was unknown. This was an invitation to the House to say that press conferences could not have been within the original intent of the legislature. There is a clear answer to this appeal to Victorian history. Unless they reveal a contrary intention all statutes are to be interpreted as "always speaking statutes". This principle was stated and explained in *R v Ireland, R v Burstow* [1997] 4 All ER 225 at 233, [1998] AC 147 at 158. There are at least two strands covered by this principle. The first is that courts

must interpret and apply a statute to the world as it exists today. That is the basis of the decision in *R v Ireland* where 'bodily harm' in a Victorian statute was held to cover psychiatric injury. Equally important is the second strand, namely that the statute must be interpreted in the light of the legal system as it exists today. In the classic work of Sir Rupert Cross, *Statutory Interpretation* (3rd edn, 1995) pp 51-52, the position is explained as follows:

> "The somewhat quaint statement that a statute is "always speaking" appears to have originated in Lord Thring's exhortations to drafters concerning the use of the word "shall": "An Act of Parliament should be deemed to be always speaking and therefore the present or past tense should be adopted, and "shall" should be used as an imperative only, not as a future". But the proposition that an Act is always speaking is often taken to mean that a statutory provision has to be considered first and foremost as a norm of the current legal system, whence it takes its force, rather than just as a product of an historically defined Parliamentary assembly. It has a legal existence independently of the historical contingencies of its promulgation, and *accordingly should be interpreted in the light of its place within the system of legal norms currently in force*. Such an approach takes account of the viewpoint of the ordinary legal interpreter of today, who expects to apply ordinary current meanings to legal texts, rather than to embark on research into linguistic, cultural and political history, unless he is specifically put on notice that the latter approach is required." (My emphasis.)

In other words, it is generally permissible and indeed necessary to take into account the place of the statutory provision in controversy in the broad context of the basic principles of the legal system as it has evolved. If this proposition is right, as I believe it to be, it follows that on

ordinary principles of construction the question before the House must be considered in the light of the law of freedom of expression as it exists today. The appeal to the original meaning of the words of the statute must be rejected."

(at pp. 926-927)
(emphasis supplied)

23. This exposition of the law is to be read along with the judgment in **Birmingham City Council v. Oakley**, [2001] 1 All ER 385 [HL], where Lord Hoffmann cautioned thus:

"Mr. Supperstone argued that section 79(1)(a) must be construed in the light of modern conditions. When it speaks of a 'state ... prejudicial to health', this does not mean a state which would have been so regarded in 1846. It requires the application of modern knowledge and standards of hygiene. The words must be construed as 'always speaking' in the sense used by Lord Steyn in *R v Ireland, R v Burstow* [1997] 4 All ER 225 at 233, [1998] AC 147 at 158-159. I quite agree that when a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood. The content may change but the concept remains the same. The meaning of the statutory language remains unaltered. So the concept of a vehicle has the same meaning today as it did in 1800, even though it includes methods of conveyance which would not have been imagined by a legislator of those days. The same is true of social standards. The concept of cruelty is the same today as it was when the Bill of Rights 1688 (1 Will & Mary, sess 2, c 2) forbade the infliction of 'cruel and unusual punishments' (section 10). But changes in social standards mean that punishments which would not have been regarded as cruel in 1688 will be so regarded today.

This doctrine does not however mean that one can construe the language of an old statute to mean something conceptually different from what the contemporary evidence shows that Parliament must have intended. So, for example, in the recent case of *Goodes v East Sussex County Council* [2000] 3 All ER 603, [2000] 1 WLR 1356, the House of Lords decided that the statutory duty of highway authorities to 'maintain' the highway did not include the removal of ice and snow. Although the word 'maintain' was capable of including the removal of ice and snow and such removal might be expected by modern road users, the contemporary evidence showed that the concept of maintenance in the legislation was confined to keeping the fabric of the road in repair. To require the removal of ice and snow would not be to apply that concept in accordance with modern standards (such as requiring a metalled surface instead of gravel) but would be using the word 'maintain' to express a broader concept than Parliament intended. Such a change would not be in accordance with the meaning of the statute. Likewise it seems to me in this case that an extension of the concept of 'premises in such a state as to be prejudicial to health' to the absence of facilities, as such, is an illegitimate extension of the statutory meaning.

My Lords, it seems to me that the temptation to make such an extension should be resisted for much the same reasons as your Lordships in *Southwark London Borough Council v Mills* [1999] 4 All ER 449, [1999] 3 WLR 939 refused to extend the common law of nuisance and quiet enjoyment so as to require landlords to install soundproofing. Parliament has dealt expressly with the obligation to provide toilet facilities in different sections and usually in different Acts. Until 1991 it did not require a basin to be installed in the WC even in new constructions. It has never done so in respect of existing buildings. For the courts to give section 79(1)(a) an extended "modern" meaning which required suitable alterations to be made to existing houses would impose a substantial financial burden upon public and private owners and occupiers. I am entirely in favour of giving

> the 1990 Act a sensible modern interpretation. But I do not think that it is either sensible or in accordance with modern notions of democracy to hold that when Parliament re-enacted language going back to the 19th century, it authorised the courts to impose upon local authorities and others a huge burden of capital expenditure to which the statutory language had never been held to apply. In my opinion the decision as to whether or not to take such a step should be made by the elected representatives of the people and not by the courts."
>
> (at pp. 396-397)

24. A cursory reading of Section 35A makes it clear that there is nothing in the aforesaid provision which would indicate that the power of the RBI to give directions, when it comes to the Insolvency Code, cannot be so given. The width of the language used in the provision which only uses general words such as 'public interest' and 'banking policy' etc. makes it clear that if otherwise available, we cannot interdict the use of Section 35A as a source of power for the impugned RBI circular on the ground that the Insolvency Code, 2016 could not be said to have been in the contemplation of Parliament in 1956, when Section 35A was enacted. Dr. Singhvi's contention must, therefore, fail.

25. Dr. Singhvi then relied upon the judgment in **Indian Banks' Association** (supra). In this case, the power of the RBI under Section

35A of the Banking Regulation Act was held not to extend to granting approval to banks under a separate and distinct enactment, namely, the Interest Tax Act, 1974. In this context, this Court held:

> "**37.** The submission of the learned counsel for the appellants to the effect that they had been permitted to enhance the rate of interest by the Reserve Bank of India, is equally misconceived. The Reserve Bank of India apparently proceeded on the basis that the mode of calculation of rate of interest vis-à-vis the tax under the Act, as contended by Appellant 1, was correct. The Reserve Bank of India was not an authority for construction of a statute. Its functions are confined only to the provisions of the Reserve Bank of India Act and the Banking Regulation Act and not any other statute.
>
> **38.** Section 35-A of the Banking Regulation Act empowers the Reserve Bank of India to issue directions in relation to matters specified under Section 35-A and not for any other purpose. The contention of the appellants to the effect that rate of interest had been enhanced by them pursuant to or in furtherance of the directions issued by the Reserve Bank of India must be held to be self-contradictory inasmuch as according to them the Reserve Bank of India fixes only the minimum rate of interest leaving a determination thereof in the case of each individual borrower upon the bank concerned. If the matter relating to increase in the rate of the interest was within the power of the appellants, we fail to understand as to why the Reserve Bank of India was approached at all. The same being not permissible under the Act, any approval given by the Reserve Bank of India for the satisfaction of the members of the first appellant herein was futile."
>
> xxx xxx xxx
>
> "**40.** In any view of the matter, the purported directions contained in the letter dated 2-9-1991 of the Reserve Bank of India are not even in the nature of executive instruction under the said Act. It was not binding on the

> banks, far less on the borrowers. In any event, by reason of a misplaced and misapplied construction of statute, a third party cannot suffer.
>
> **41.** Furthermore, having regard to the provisions contained in Article 265 of the Constitution read with Article 366(28) thereof, the purported demand from the borrower for a higher amount of tax and consequently a higher amount of interest by way of rounding-up was wholly illegal and without jurisdiction. We also fail to understand as to why in this modern electronic age, this difficulty would be encountered while calculating the exact amount of tax.
>
> **42.** We, therefore, are of the opinion that the purported approval granted by the Reserve Bank of India was wholly without jurisdiction and ultra vires the provisions of the said Act."

Based on this judgment, Dr. Singhvi contended that the RBI cannot possibly give directions as to how the banks must exercise their discretionary power before filing applications under Section 7 of the Insolvency Code. Shri Dwivedi, however, distinguished this judgment by stating that this was a tax case and it must be remembered that the entries in the Seventh Schedule *qua* taxation are separate from general entries. Even otherwise, according to Shri Dwivedi, the RBI directions are at a stage anterior to the application of the provisions of the Insolvency Code, as a result of which, this judgment would have no application.

26. We are of the view that Shri Dwivedi is right. If a specific provision of the Banking Regulation Act makes it clear that the RBI has a specific power to direct banks to move under the Insolvency Code against debtors in certain specified circumstances, it cannot be said that they would be acting outside the four corners of the statutes which govern them, namely, the RBI Act and the Banking Regulation Act. On this score, therefore, Dr. Singhvi's contention must fail.

27. Shri Dwivedi has cited certain judgments stating that discretionary powers given to the RBI under the Banking Regulation Act generally, and under Section 35A, in particular, are broad and expansive, and have been expansively expounded upon by this Court. He relied, in particular, upon **Central Bank of India v. Ravindra**, (2002) 1 SCC 367. In particular, he relied upon paragraph 51 and paragraph 55 (5) which state:

> "**51.** The Banking Regulation Act, 1949 empowers the Reserve Bank, on it being satisfied that it is necessary or expedient in the public interest or in the interest of depositors or banking policy so to do, to 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 it has a binding effect. In particular, the Reserve Bank of India may give directions as to the rate of interest and other terms and conditions on which advances or other financial accommodation may be made. Such directions are also binding on every banking company. Section 35-

A also empowers the Reserve Bank of India in the public interest or in the interest of banking policy or in the interests of depositors (and so on) to issue directions generally or in particular which shall be binding. With effect from 15-2-1984 Section 21-A has been inserted in the Act which takes away power of the court to reopen a transaction between a banking company and its debtor on the ground that the rate of interest charged is excessive. The provision has been given an overriding effect over the Usury Loans Act, 1918 and any other provincial law in force relating to indebtedness.

xxx xxx xxx

**55.** During the course of hearing it was brought to our notice that in view of several usury laws and debt relief laws in force in several States private moneylending has almost come to an end and needy borrowers by and large depend on banking institutions for financial facilities. Several unhealthy practices having slowly penetrated into prevalence were pointed out. Banking is an organised institution and most of the banks press into service long-running documents wherein the borrowers fill in the blanks, at times without caring to read what has been provided therein, and bind themselves by the stipulations articulated by the best of legal brains. Borrowers other than those belonging to the corporate sector, find themselves having unwittingly fallen into a trap and rendered themselves liable and obliged to pay interest the quantum whereof may at the end prove to be ruinous. At times the interest charged and capitalised is manifold than the amount actually advanced. Rule of damdupat does not apply. Penal interest, service charges and other overheads are debited in the account of the borrower and capitalised of which debits the borrower may not even be aware. If the practice of charging interest on quarterly rests is upheld and given a judicial recognition, unscrupulous banks may resort to charging interest even on monthly rests and capitalising the same. Statements of accounts supplied by banks to borrowers many a times do not contain particulars or details of debit entries and when written in hand are worse than medical prescriptions putting to test the eyes

and wits of the borrowers. Instances of unscrupulous, unfair and unhealthy dealings can be multiplied though they cannot be generalised. Suffice it to observe that such issues shall have to be left open to be adjudicated upon in appropriate cases as and when actually arising for decision and we cannot venture into laying down law on such issues as do not arise for determination before us. However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under:

> xxx xxx xxx
>
> (*5*) The power conferred by Sections 21 and 35-A of the Banking Regulation Act, 1949 is coupled with duty to act. The Reserve Bank of India is the 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 the public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. The Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. RBI has been issuing directions/circulars from time to time which, inter alia, deal with the 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."

Similarly, in **Sudhir Shantilal Mehta v. Central Bureau of Investigation**, (2009) 8 SCC 1, he relied upon paragraphs 51 and 52 which state as follows:

> "**51.** In terms of Section 35-A of the 1949 Act, Reserve Bank of India is empowered to issue directions to the banks in public interest; or in the interest of banking policy; or 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 interest of the banking company; or to secure the proper management of any banking company generally.
>
> **52.** Reserve Bank of India in terms of Section 21 of the 1949 Act is empowered to control advances by banking companies and issue necessary directions in this behalf. Reserve Bank of India, therefore, has the requisite power to issue direction to banks in relation to discounting and rediscounting of bills of exchange and those directions issued by Reserve Bank of India have statutory force and, thus, can be termed as law in force. (See also *Corporation Bank* v. *D.S. Gowda* [(1994) 5 SCC 213] and *Central Bank of India* v. *Ravindra* [(2002) 1 SCC 367].) All public sector banks are bound thereby."

Also, in **ICICI Bank Ltd. v. APS Star Industries Ltd.**, (2010) 10 SCC 1, this Court, when it came to whether derivatives could be a business which banks could do, stated with respect to Sections 21 and 35A of the RBI Act as follows:

> "**35.** Section 21 deals with the power of RBI to control advances by banking companies. Section 21 empowers RBI to frame policies in relation to advances to be followed by banking companies. It further says that once

such policy is made all banking companies shall be bound to follow them. Section 21(1) is once again a general provision empowering RBI to determine policy in relation to advances whereas Section 21(2) empowers RBI to give directions to banking companies as to items mentioned there i.e. in Section 21(2). Under Section 21(3) every banking company is bound to comply with directions given by RBI at the peril of penalty being levied for non-compliance. Section 35-A says that where RBI is satisfied that in the interest of banking policy it is necessary to issue directions to banking companies it may do so from time to time and the banking companies shall be bound to comply with such directions. Thus, in exercise of the powers conferred by Sections 21 and 35-A of the said Act, RBI can issue directions having statutory force of law. Section 36 deals with further powers and functions of RBI. Under Section 39 it is RBI which shall be the Official Liquidator in any proceedings concerning winding up of a banking company."

xxx xxx xxx

"**38.** The BR Act, 1949 basically seeks to regulate banking business. In the cases in hand we are not concerned with the definition of banking but with what constitutes "banking business". Thus, the said BR Act, 1949 is an open-ended Act. It empowers RBI (regulator and policy framer in matter of advances and capital adequacy norms) to develop a healthy secondary market, by allowing banks inter se to deal in NPAs in order to clean the balance sheets of the banks which guideline/policy falls under Section 6(1)(*a*) read with Section 6(1)(*n*). Therefore, it cannot be said that assignment of debts/NPAs is not an activity permissible under the BR Act, 1949. Thus, accepting deposits and lending by itself is not enough to constitute the "business of banking". The dependence of commerce on banking is so great that in modern money economy the cessation even for a day of the banking activities would completely paralyse the economic life of the nation. Thus, the BR Act, 1949 mandates a statutory comprehensive and formal structure of banking regulation and supervision in India."

He also referred to the Statement of Objects and Reasons of the Amendment Act, 1956, which brought in Section 35A in order to tighten up control over banking companies so as to enable the RBI to give directions to banking companies in relation to matters of policy or administration affecting the public interest.

28. There is no doubt that Sections 21 and 35A do confer very wide powers on the RBI to give directions when it comes to the matters specified therein. However, this does not answer the precise question before us. This question can only be answered by referring to Sections 35AA and 35AB.

29. Section 35AA makes it clear that the Central Government may, by order, authorise the RBI to issue directions to any banking company or banking companies when it comes to initiating the insolvency resolution process under the provisions of the Insolvency Code. The first thing to be noted is that without such authorisation, the RBI would have no such power. There are many sections in the Banking Regulation Act which enumerate the powers of the Central Government vis-à-vis the powers of the RBI. Thus, Section 36ACA(1) provides as follows:

> "**36ACA. Supersession of Board of Directors in certain cases**.—(1) Where the Reserve Bank is satisfied, in consultation with the Central Government, that in the public interest or for preventing the affairs of any banking company being conducted in a manner detrimental to the interest of the depositors or any banking company or for securing the proper management of any banking company, it is necessary so to do, the Reserve Bank may, for reasons to be recorded in writing, by order, supersede the Board of Directors of such banking company for a period not exceeding six months as may be specified in the order:
>
> Provided that the period of supersession of the Board of Directors may be extended from time to time, so, however, that the total period shall not exceed twelve months.
>
> xxx xxx xxx"

This Section makes it clear that the RBI's satisfaction in superseding the board of directors of banking companies can only be exercised in consultation with the Central Government, and not otherwise. Similarly, under Sections 36AE and 36AF, the Central Government alone has the power to acquire undertakings of banking companies in certain cases, on receipt of a report from the RBI. Section 36AE(1) reads as follows:

> "**36AE. Power of Central Government to acquire undertakings of banking companies in certain cases**.—(1) If, upon receipt of a report from the Reserve Bank, the Central Government is satisfied that a banking company—
>
> (*a*) has, on more than one occasion, failed to comply with the directions given to it in writing

under Section 21 or Section 35-A, in so far as such directions relate to banking policy, or

(*b*) is being managed in a manner detrimental to the interests of its depositors,—

and that—

(*i*) in the interests of the depositors of such banking company, or

(*ii*) in the interest of banking policy, or

(*iii*) for the better provision of credit generally or of credit to any particular section of the community or in any particular area;

it is necessary to acquire the undertaking of such banking company, the Central Government may, after such consultation with the Reserve Bank as it thinks fit, by notified order, acquire the undertaking of such company (hereinafter referred to as the acquired bank) with effect from such date as may be specified in this behalf by the Central Government (hereinafter referred to as the appointed day):

Provided that no undertaking of any banking company shall be so acquired unless such banking company has been given a reasonable opportunity of showing cause against the proposed action.

*Explanation.*—In this Part,—

(*a*) "notified order" means an order published in the Official Gazette;

(*b*) "undertaking," in relation to a banking company incorporated outside India, means the undertaking of the company in India.

xxx xxx xxx"

Likewise, under Section 36AF, the Central Government may, after consulting the RBI, make a scheme for carrying out the purpose of

acquisition of such undertakings of banking companies. Section 36AF(1) reads as follows:

> "**36AF. Power of the Central Government to make scheme**.—(1) The Central Government may, after consultation with the Reserve Bank, make a scheme for carrying out the purposes of this Part in relation to any acquired bank.
> xxx xxx xxx"

Under Section 45Y, the Central Government may after consulting the RBI make rules for preservation of records as follows:

> "**45Y. Power of Central Government to make rules for the preservation of records**.—The Central Government may, after consultation with the Reserve Bank and by notification in the Official Gazette, make rules specifying the periods for which—
>
> (*a*) a banking company shall preserve its books, accounts and other documents; and
>
> (*b*) a banking company shall preserve and keep with itself different instruments paid by it."

Under Section 52(1), the Central Government may, after consultation with the RBI, make rules to give effect to the provisions of the Act as follows:

> "**52. Power of Central Government to make rules**.—(1) The Central Government may, after consultation with the Reserve Bank, make rules to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act and all such rules shall be published in the Official Gazette.
> xxx xxx xxx"

Importantly, the Central Government may, on the recommendation of the RBI, declare that all or any of the provisions of the Banking Regulation Act shall not apply to any banking company, either generally or for a prescribed period. Section 53(1) of the Act reads as follows:

> "**53. Power to exempt in certain cases**.—(1) The Central Government may, on the recommendation of the Reserve Bank, declare, by notification in the Official Gazette, that any or all of the provisions of this Act shall not apply to any banking company or institution or to any class of banking companies either generally or for such period as may be specified.
> xxx xxx xxx"

The power to remove difficulties is also vested in the Central Government under Section 55A of the Act, which reads as follows:

> "**55A. Power to remove difficulties**.—If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, as occasion requires, do anything (not inconsistent with the provisions of this Act) which appears to it to be necessary for the purpose of removing the difficulty:
> Provided that no such power shall be exercised after the expiry of a period of three years from the commencement of Section 20 of the Banking Laws (Amendment) Act, 1968."

A conspectus of all these provisions shows that the Banking Regulation Act specifies that the Central Government is either to exercise powers along with the RBI or by itself. The role assigned,

therefore, by Section 35AA, when it comes to initiating the insolvency resolution process under the Insolvency Code, is thus, important. Without authorisation of the Central Government, obviously, no such directions can be issued.

30. The corollary of this is that prior to the enactment of Section 35AA, it may have been possible to say that when it comes to the RBI issuing directions to a banking company to initiate insolvency resolution process under the Insolvency Code, it could have issued such directions under Sections 21 and 35A. But after Section 35AA, it may do so only within the four corners of Section 35AA.

31. The matter can be looked at from a slightly different angle. If a statute confers power to do a particular act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any manner other than that which has been prescribed. This is the well-known rule in **Taylor v. Taylor**, [1875] 1 Ch. D. 426, which has been repeatedly followed by this Court. Thus, in **State of U.P. v. Singhara Singh**, (1964) 4 SCR 485, this Court held:

> "The rule adopted in *Taylor* v. *Taylor* [(1875) 1 Ch D 426, 431] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a

> power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on Magistrates the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him."
>
> (at pp. 490-491)

Following this principle, therefore, it is clear that the RBI can only direct banking institutions to move under the Insolvency Code if two conditions precedent are specified, namely, (i) that there is a Central Government authorisation to do so; and (ii) that it should be in respect of specific defaults. The Section, therefore, by necessary implication, prohibits this power from being exercised in any manner other than the manner set out in Section 35AA.

32. Shri Dwivedi then argued relying upon the Finance Minister's speech that Section 35AA was really enacted by way of abundant caution inasmuch as there was a doubt as to whether such power

could be exercised generally or otherwise. He relied, in particular, on the following statement in the speech of the Finance Minister, Shri Arun Jaitley, while moving the Bill which introduced Sections 35AA and 35AB into the Banking Regulation Act. The Finance Minister stated:

> "This issue was discussed at length. There were two views that the general power may not include this power. One view was exactly what you are saying. The other view was this. It is a very short amendment. Therefore, to obviate any controversy, the RBI will direct the consortium of banks to go and move an IBC insolvency petition."

33. A Finance Minister's speech, introducing certain provisions, can certainly shed some light on such provisions, particularly in cases of ambiguity. In the present case, what is missed is the fact that two conditions precedent have been introduced in Section 35AA, without which, power cannot be exercised by the RBI. This itself shows that it is not possible to say that Section 35AA has been introduced *ex abundanti cautela*. Further, it is well settled that Parliament does not legislate where no legislation is called for. Thus, in **Utkal Contractors & Joinery (P) Ltd. v. State of Orissa**, (1987) 3 SCC 279, this Court held:

> "**9.** In considering the rival submissions of the learned Counsel and in defining and construing the area and the

content of the Act and its provisions, it is necessary to make certain general observations regarding the interpretation of statutes. A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. Parliament does not indulge in legislation merely to state what it is unnecessary to state or to do what is already validly done. Parliament may not be assumed to legislate unnecessarily. Again, while the words of an enactment are important, the context is no less important. For instance:

> “...the fact that general words are used in a statute is not in itself a conclusive reason why every case falling literally within them should be governed by that statute, and the context of an Act may well indicate that wide or general

> words should be given a restrictive meaning." [*Halsbury* 4th Edn., Vol. 44 p. 874]"

This contention of Shri Dwivedi must, therefore, fail.

34. Yet another contention of Shri Dwivedi is that concurrent powers have been given to the RBI on a combined reading of Sections 21, 35A, 35AA, and 35AB. Interestingly, when concurrent powers are given to the same or to two different authorities, the Banking Regulation Act expressly says so. Thus, Section 35(1) of the Act is an example of concurrent power given to the RBI as well as to the Central Government. Section 35(1) of the Act reads as follows:

> "**35. Inspection**.—(1) Notwithstanding anything to the contrary contained in Section 235 of the Companies Act, 1956, the Reserve Bank at any time may, and on being directed so to do by the Central Government shall, cause an inspection to be made by one or more of its officers of any banking company and its books and accounts; and the Reserve Bank shall supply to the banking company a copy of its report on such inspection.
> xxx xxx xxx"

When it comes to the inspection of books of accounts, the RBI may, either by itself or by being directed to do so by the Central Government, cause an inspection to be made of any banking company's books and accounts in the manner specified in the Section. This is to be contrasted with Section 35AA, which makes it clear that *de hors* the authorisation of the Central Government, the

RBI has no power to issue directions on its own, unlike Section 35. This argument also must, therefore, fail.

35. Shri Dwivedi then argued that Section 35AB uses the words "without prejudice" to indicate that the power granted under the said Section was to be read as additional to other powers granted by Sections 35A and 35AA. This Court, in **Bharat Sanchar Nigam Ltd. v. Telecom Regulatory Authority of India and Ors.**, (2014) 3 SCC 222, at paragraphs 90 to 97, has indicated that the words "without prejudice" appearing in a Section make it clear that powers that are enumerated are only illustrative of a general power and do not restrict such general power. Indeed, in **Union of India and Anr. v. Pfizer Ltd. and Ors.**, (2018) 2 SCC 39, this Court held:

> "**14.** Having heard the learned counsel for the parties, it is clear that Section 26-A has been introduced by an amendment in 1982. A bare reading of this provision would show, firstly, that it is without prejudice to any other provision contained in this Chapter (meaning thereby Chapter IV). This expression only means that apart from the Central Government's other powers contained in Chapter IV, Section 26-A is an additional power which must be governed by its own terms. Under Section 26-A, the Central Government must be "satisfied" that any drug or cosmetic is likely to involve (*i*) any risk to human beings or families; or (*ii*) that any drug does not have the therapeutic value claimed or purported to be claimed for it; or (*iii*) contains ingredients in such quantity for which there is no therapeutic justification. Obviously, the Central Government has to

> apply its mind to any or all of these three factors which has to be based upon its "satisfaction" as to the existence of any or all of these factors. The power exercised under Section 26-A must further be exercised only if it is found necessary or expedient to do so in public interest. When the power is so exercised, it may regulate, restrict or prohibit manufacture, sale or distribution of any drug or cosmetic."

Thus, the power to issue directions given by Section 35AB is in addition to the power that is given under Section 35A.

36. It is significant that the power to issue directions given by Section 35AB is without prejudice only to the provisions of Section 35A, i.e., it has to be read in conjunction with Section 35A. What is of even greater significance is that Section 35AB is not without prejudice to the provisions contained in Section 35AA. This being so, it is clear that the power under Section 35AB, read with Section 35A, is to be exercised separately from the power conferred by Section 35AA.

37. All the learned counsel appearing on both sides referred to external aids to construe the statute at hand. In **Eera (through Dr. Manjula Krippendorf) v. State (NCT of Delhi) and Anr.**, (2017) 15 SCC 133, Nariman, J. referred to what may be called the theory of creative interpretation. Instances of creative interpretation are when the Court looks at both the literal language as well as the purpose or object of the statute in order to better determine what the words used

by the draftsman of legislation mean [*see* paragraph 122]. He then concluded:

> "**127.** It is thus clear on a reading of English, US, Australian and our own Supreme Court judgments that the "*Lakshman Rekha*" has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of *Heydon* [*Heydon case*, (1584) 3 Co Rep 7a : 76 ER 637] , where the Court must have recourse to the purpose, object, text and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in *Heydon case* [*Heydon case*, (1584) 3 Co Rep 7a : 76 ER 637] , which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid-1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in *Heydon case* [*Heydon case*, (1584) 3 Co Rep 7a : 76 ER 637]."

This judgment has since been followed by this Court in **ArcelorMittal India (P) Ltd. v. Satish Kumar Gupta**, (2019) 2 SCC 1 [at paragraph 29]; **Asian Resurfacing of Road Agency (P) Ltd. v. Central Bureau of Investigation**, (2018) 16 SCC 299 [at paragraph 51.5]; **Macquarie Bank Ltd. v. Shilpi Cable Technologies Ltd.**, (2018) 2 SCC 674 [at paragraphs 27 and 30]; **State (NCT of Delhi) v. Brijesh Singh**, (2017) 10 SCC 779 [at paragraph 13].

38. The Press Note dated 05.05.2017, set out supra, explained the new Sections 35AA and 35AB as the grant of two distinct and

separate powers. Section 35AA has been inserted “to resolve specific stressed assets by initiating insolvency resolution process where required”. On the other hand, Section 35AB has been enacted so that the “RBI has also been empowered to issue other directions for resolution……” It is significant that Section 35AA is enacted exactly as it is in the Ordinance. So is Section 35AB, except for a minor addition in sub-section (1), which adds the words “any banking company or”. Indeed, even the Statement of Objects and Reasons introducing the same Sections by way of an Amendment Act makes it clear that the powers conferred for resolution of stressed assets, either by invoking the Insolvency Code or by other means, are separate and independent powers, as set out in paragraphs 3(a) and 3(b) of the said Statement of Objects and Reasons. Therefore, the scheme of Sections 35A, 35AA, and 35AB is as follows:

(a) When it comes to issuing directions to initiate the insolvency resolution process under the Insolvency Code, Section 35AA is the only source of power.

(b) When it comes to issuing directions in respect of stressed assets, which directions are directions other than resolving this problem under the Insolvency Code, such power falls within Section 35A read with Section 35AB. This also becomes clear

from the fact that Section 35AB(2) enables the RBI to specify one or more authorities or committees to advise any banking company on resolution of stressed assets. This advice is obviously *de hors* the Insolvency Code, as once an application is made under the Insolvency Code, such advice would be wholly redundant, as the Insolvency Code provisions would then take over and have to be followed.

39. When one section of a statute grants general powers, as opposed to another section of the same statute which grants specific powers, the general provisions cannot be utilised where a specific provision has been enacted with a specific purpose in mind. Thus, in **J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P.**, (1961) 3 SCR 185, this Court held:

> "**9.** There will be complete harmony however if we hold instead that clause 5(*a*) will apply in all other cases of proposed dismissal or discharge except where an inquiry is pending within the meaning of clause 23. We reach the same result by applying another well-known rule of construction that general provisions yield to special provisions. The learned Attorney-General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield

> to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect. In *Pretty* v. *Solly* (quoted in *Craies on Statute Law* at p.m. 206, 6th Edn.) Romilly, M.R., mentioned the rule thus: "The rule is, that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply". The rule has been applied as between different provisions of the same statute in numerous cases some of which only need be mentioned: *De Winton* v. *Brecon* [28 LJ Ch 598], *Churchill* v. *Crease* [5 Bing 177], *United States* v. *Chase* [135 US 255] and *Carroll* v. *Greenwich Ins. Co.* [199 US 401]."

This judgment has been followed in **Commercial Tax Officer, Rajasthan v. Binani Cements Ltd. and Anr.**, (2014) 8 SCC 319 [at paragraph 39].

40. Stressed assets can be resolved either through the Insolvency Code or otherwise. When resolution through the Code is to be effected, the specific power granted by Section 35AA can alone be availed by the RBI. When resolution *de hors* the Code is to be effected, the general powers under Sections 35A and 35AB are to be used. Any other interpretation would make Section 35AA otiose. In

fact, Shri Dwivedi's argument that the RBI can issue directions to a banking company in respect of initiating insolvency resolution process under the Insolvency Code under Sections 21, 35A, and 35AB of the Banking Regulation Act, would obviate the necessity of a Central Government authorisation to do so. Absent the Central Government authorisation under Section 35AA, it is clear that the RBI would have no such power.

41. Having grounded the power to issue directions to banking companies so far as the Insolvency Code is concerned, in Section 35AA, what is important to note is that the Section enables the Central Government to authorise the RBI to issue such directions in respect of "a default". Default, in the explanation to Section 35AA, has the same meaning assigned to it under Section 3(12) of the Insolvency Code. Section 3(12) of the Insolvency Code reads as under:

> "**3. Definitions**.—In this Code, unless the context otherwise requires,—
>
> xxx xxx xxx
>
> (12) "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be;
>
> xxx xxx xxx"

“Debt” has been defined under Section 3(11) of the Insolvency Code as follows:

> “**3. Definitions**.—In this Code, unless the context otherwise requires,—
> xxx xxx xxx
> (11) “debt” means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;
> xxx xxx xxx”

Also, “corporate debtor” has been defined under Section 3(8) of the Insolvency Code as follows:

> “**3. Definitions**.—In this Code, unless the context otherwise requires,—
> xxx xxx xxx
> (8) “corporate debtor” means a corporate person who owes a debt to any person;
> xxx xxx xxx”

A reading of these definitions would make it clear that default would mean non- payment of a debt when it has become due and payable and is not paid by the corporate debtor. Therefore, what is important to note is that it is a particular default of a particular debtor that is the subject matter of Section 35AA. It must also be observed that the expression “issue directions to banking companies generally or to any banking company in particular” occurring in Section 35A is conspicuous by its absence in Section 35AA. This is another good

reason as to why Section 35AA refers only to specific cases of default and not to the issuance of directions to banking companies generally, as has been done by the impugned circular.

42. This is clear also from the Press Note dated 05.05.2017, which introduced the Ordinance which specifically referred to resolution of "specific" stressed assets which will empower the RBI to intervene in "specific" cases of resolution of NPAs. The Statement of Objects and Reasons for introducing Section 35AA also emphasises that directions are in respect of "a default". Thus, it is clear that directions that can be issued under Section 35AA can only be in respect of specific defaults by specific debtors. This is also the understanding of the Central Government when it issued the notification dated 05.05.2017, which authorised the RBI to issue such directions only in respect of "a default" under the Code. Thus, any directions which are in respect of debtors generally, would be *ultra vires* Section 35AA.

43. However, Shri Dwivedi argued that "specific cases" would include specification by category or class. All the definitions given by him in his written argument, however, belie this. Thus, in the Oxford Dictionary, the word "specific" is defined as follows:

> "Specific / *adjective* 1. clearly defined. 2. relating to particular subject; peculiar. 3. exact; giving full details. 4. archaic (of medicine etc.) for a particular disease. *noun* 1. archaic specific medicine. 2. specific aspect."

Black's Law Dictionary also defines the word "specific" as follows:

> "*specific, adj.* 1. Of, relating to, or designating a particular or defined thing; explicit <specific duties>. 2. Of, relating to, or involving a particular named thing <specific item>. 3. Conformable to special requirements <specific performance>. – specificity, n. – specifically, adv."

Shri Dwivedi referred to **Maru Ram and Ors. v. Union of India and Ors.**, (1981) 1 SCC 107, to argue that specification by category would be something well-known to law. He relied upon paragraph 33 of the aforesaid judgment which reads as follows:

> "**33.** The anatomy of this savings section is simple, yet subtle. Broadly speaking, there are three components to be separated. Firstly, the Procedure Code generally governs matters covered by it. Secondly, if a special or local law exists covering the same area, this latter law will be saved and will prevail. The short-sentencing measures and remission Schemes promulgated by the various States are special and local laws and must override. Now comes the third component which may be clinching. If there is a specific provision to the contrary, then that will override the special or local law. Is Section 433-A a specific law contra? If so, that will be the last word and will hold even against the special or local law."

A reading of paragraph 33 would show that the specific provision to the contrary, referred to therein, would refer only to a particular

Section, as opposed to a category or Chapter which contains various Sections. This judgment, therefore, directly militates against the submission of Shri Dwivedi in this behalf.

44. Shri Dwivedi then relied upon Section 13 of the General Clauses Act, 1897 ["**General Clauses Act**"] to state that the singular would include the plural. There is no doubt whatsoever that this would be so unless the context otherwise requires, as is provided by Section 13 of the General Clauses Act itself. In the present case, the context of Section 35AA makes it clear, as has been correctly argued by Shri Tushar Mehta, learned Solicitor General, that the power to be exercised under the authorisation of the Central Government requires "due deliberation and care" to refer to specific defaults. This argument also does not take Shri Dwivedi very much further.

45. The impugned circular states as one of its sources, the power contained in Section 45L of the RBI Act insofar as non-banking financial institutions are concerned. Non-banking financial institutions are referred to in Section 45-I(c) as follows:

> "**45-I. Definitions**.—In this Chapter, unless the context otherwise requires,—
> xxx xxx xxx

(c) ‘‘financial institution’’ means any non-banking institution which carries on as its business or part of its business any of the following activities, namely:–

(i) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own;

(ii) the acquisition of shares, stock, bonds, debentures or securities issued by a Government or local authority or other marketable securities of a like nature;

(iii) letting or delivering of any goods to a hirer under a hire-purchase agreement as defined in clause (c) of section 2 of the Hire-Purchase Act, 1972;

(iv) the carrying on of any class of insurance business;

(v) managing, conducting or supervising, as foreman, agent or in any other capacity, of chits or kuries as defined in any law which is for the time being in force in any State, or any business, which is similar thereto;

(vi) collecting, for any purpose or under any scheme or arrangement by whatever name called, monies in lumpsum or otherwise, by way of subscriptions or by sale of units, or other instruments or in any other manner and awarding prizes or gifts, whether in cash or kind, or disbursing monies in any other way, to persons from whom monies are collected or to any other person,

but does not include any institution, which carries on as its principal business,–

(a) agricultural operations; or

(aa) industrial activity; or

*Explanation*.–For the purposes of this clause, ‘‘industrial activity’’ means any activity specified in sub-clauses (i) to (xviii) of clause (c) of section 2 of the Industrial Development Bank of India Act, 1964;

(b) the purchase or sale of any goods (other than securities) or the providing of any services; or

(c) the purchase, construction or sale of immovable property, so however, that no portion of the income of the institution is derived from the financing of purchases, constructions or sales of immovable property by other persons;

xxx xxx xxx"

Section 45L reads as follows:

"**45L. Power of Bank to call for information from financial institutions and to give directions**.—(1) If the Bank is satisfied for the purpose of enabling it to regulate the credit system of the country to its advantage it is necessary so to do, it may—

(*a*) require financial institutions either generally or any group of financial institutions or financial institution in particular, to furnish to the Bank in such form, at such intervals and within such time, such statements, information or particulars relating to the business of such financial institutions or institution, as may be specified by the Bank by general or special order;

(*b*) give to such institutions either generally or to any such institution in particular, directions relating to the conduct of business by them or by it as financial institutions or institution.

(2) Without prejudice to the generality of the power vested in the Bank under clause (*a*) of sub-section (1), the statements, information or particulars to be furnished by a financial institution may relate to all or any of the following matters, namely, the paid-up capital, reserves or other liabilities, the investments whether in Government securities or otherwise, the persons to whom, and the purposes and periods for which, finance

> is provided and the terms and conditions, including the rates of interest, on which it is provided.
>
> (3) In issuing directions to any financial institution under clause (*b*) of sub-section (1), the Bank shall have due regard to the conditions in which, and the objects for which, the institution has been established, its statutory responsibilities, if any, and the effect the business of such financial institution is likely to have on trends in the money and capital markets."

There is nothing to show that the provisions of Section 45L(3) have been satisfied in issuing the impugned circular. The impugned circular nowhere says that the RBI has had due regard to the conditions in which and the objects for which such institutions have been established, their statutory responsibilities, and the effect the business of such financial institutions is likely to have on trends in the money and capital markets. Further, it is clear that the impugned circular applies to banking and non-banking institutions alike, as banking and non-banking institutions are often in a joint lenders' forum which jointly lend sums of money to debtors. Such non-banking financial institutions are, therefore, inseparable from banking institutions insofar as the application of the impugned circular is concerned. It is very difficult to segregate the non-banking financial institutions from banks so as to make the circular applicable to them even if it is *ultra vires* insofar as banks are concerned. For these

reasons also, the impugned circular will have to be declared as *ultra vires* as a whole, and be declared to be of no effect in law. Consequently, all actions taken under the said circular, including actions by which the Insolvency Code has been triggered must fall along with the said circular. As a result, all cases in which debtors have been proceeded against by financial creditors under Section 7 of the Insolvency Code, only because of the operation of the impugned circular will be proceedings which, being faulted at the very inception, are declared to be non-est.

46. In view of the declaration by this Court that the impugned circular is *ultra vires* Section 35AA of the Banking Regulation Act, it is unnecessary to go into any of the other contentions that have been raised in the transferred cases and petitions. The transferred cases and petitions are disposed of accordingly.

**…..... J.**
**(R.F. NARIMAN)**

**…..... J.**
**(VINEET SARAN)**

**New Delhi;**
**April 2, 2019.**