HON'BLE SRI JUSTICE S.V. BHATT

W.P.No.36982 OF 2017

ORDER:

Heard Mr.Vikram Pooserla for petitioner, Ms. Varalakshmi Tadepally for respondent No.1 and Mr.S.Niranjan Reddy, learned senior counsel for respondent No.2.

M/s Golden Jubilee Hotels Private Limited, Madhapur, Hyderabad is the petitioner.

The petitioner prays for Mandamus declaring the action of 1st respondent in not complying with/following the guidelines issued by the Reserve Bank of India (RBI), in RBI/2013-14/503 DBOD.BP.BC.No.97/21.04.132/2013-14 dated 26.02.2014 as amended vide RBI/2016-17/299, DBR.B.P.BC.No.67/21.04.048/ 2016-17 dated 05.05.2017 in relation to Corrective Action Plan (CAP) taken by the Joint Lenders Forum (JLF) on 27.09.2017 for revival of stressed assets of petitioner as arbitrary, illegal and unconstitutional. The petitioner prays for direction to respondent/Bank of Baroda to forbear from taking coercive action of any nature against petitioner or not to deny to petitioner the benefits of revised one time settlement (OTS) proposal.

The averments, in brief, are that petitioner is the owner of a five star hotel situated at Madhapur, Ranga Reddy District. The petitioner has availed loan of Rs.688.75 crores (Rupees six hundred and eighty eight crores and seventy five lakhs only) from consortium banks. The 1st respondent is one of the consortium banks. The petitioner has become operational in the month of

September, 2013 and generating an income of 100 crores per annum. In this background and with these details, the petitioner states that it is devoted to make payment of instalments or clear the credit facilities/loans availed from the consortium banks. It is admitted that due to a few operational hurdles the petitioner had experienced, the devotion to pay instalments could not be translated into action. The petitioner alleges that Bank of Baroda/respondent No.1 is supposed to extend good amount of cooperation and provide comfort to the petitioner, such course would enable the petitioner to smoothly liquidate the credit facilities provided by consortium banks. However, respondent No.1 has been conducting its affairs vis-à-vis petitioner in such a way affecting the interest of petitioner and other consortium banks as well. As an illustration to this averment, the petitioner alleges that the 1st respondent interfered in the disputes between the petitioner and the management operator/respondent No.2.

On 26.08.2016, the 1st respondent issued notice under Section 13(2) of the SARFAESI Act, 2002 for re-payment of outstanding loan amount. In terms of guidelines of RBI, the consortium banks formed JLF. The petitioner refers to RBI guidelines vide RBI/2013-14/503 DBOD.BP.BC.No.97/21.04.132.2013-14 dated 26.02.2014 on framework for Revitalizing Distressed Assets in the Economy – Guidelines on JLF and CAP. The petitioner contends that the circular dated 26.02.2014 provides for rectification or restructuring of debts. It is stated that the decision agreed upon by a minimum of 75% of creditors by value and 60% creditors by number in the JLF would be binding on all the lenders as per circular dated

26.02.2014. The petitioner refers to amended circular vide RBI/2016-17/299 DBR.BP.BC.No.67/ 21.04.048/2016-17 dated 05.05.2017 on the change of 75% creditors by value to 60% and change of 60% of creditors by number to 50%. The petitioner refers to meetings of JLF dated 03.09.2016 and 15.03.2017 and the outcome thereof to state that JLF is, in fact, actively deliberating on ways and means to turn around the account of petitioner and respondent No.1 need not act in haste.

The allegation against the 1st respondent is that 1st respondent did not honour the decisions taken in the JLF meetings dated 03.09.2016 and 15.03.2017 and timelines for implementation of CAP were delayed and finalization of special audit report or techno economic viability report. On 03.08.2017, the petitioner claims to have requested for JLF/consortium meeting with high level participation from consortium banks to take forward the resolution plans adopted by JLF. On 17.08.2017, the 1st respondent called for JLF meeting and informed that the 1st respondent is inclined to take coercive action against the petitioner company. Now, the complaint against 1st respondent is that, being the lead bank, the respondent is frustrating the efforts of petitioner. The petitioner again on 25.09.2017 and 27.09.2017 renewed its request for conveying the meeting of JLF to discus OTS proposal of the petitioner. A few averments in this behalf are made on the feedback the petitioner has got from other banks of the consortium. I am not referring to those averments, for they do not have bearing on the issue on hand or the writ prayer.

The petitioner finally contends that the creditors, in the meeting held on 27.09.2017, approved the minutes of meeting, but the 1st respondent has not given its consent to the decisions taken therein. In view of the binding nature of guidelines of RBI dated 26.02.2014 and 05.05.2017, the 1st respondent is bound by the decision of the constituent members of JLF. The petitioner relies on the following decision dated 27.09.2017 of consortium of banks, signed by all, except the 1st respondent, and for brevity the same reads thus:

After the Lenders discussions, Company officials were called in the meeting.

- Mr.Barman informed Mr.Sharma that the Lenders except Bank of Baroda have in principally agreed to take up with their authorities for the OTS proposal, if the offer is improved. Bank of Baroda officials would consult with their higher ups at HO and revert back with their stand. However, Shri Barman insisted that the offer should be improved. Mr.Sharma informed that since March 2017, the Company has already paid around Rs.33 Cr to the Lenders' and the amount offered by him is the best he can do as the Investor may not be ready to give more than that value for the asset.
- After deliberations, the company officials gave revised tentative OTS as follows:

Particulars	Original proposal	Revised Proposal
Settlement Amount	Rs.480 Cr.	Rs.505 Cr.
Debt to the settled	Term loan, WCDL and FBWC limits (including invoked BG of J & K Bank)	Term loan, WCDL and FBWC limits (including invoked BG of J & K Bank)
Upfront Payment	25%	25%
Upfront payment time frame	Within 1 month from the date of sanction of all the banks	Within 15 days from the sanction of all the banks
Balance payment	3-6 months from the date of sanction of all the banks	3-6 months from the date of sanction of all the banks
NFB Limits (not devolved/invoked)	To be discharged/replaced in full	To be discharged/replaced in full. Or to provide 100% margin against the same.

Since Sharma informed that he shall talk to the investor on this revised proposal and showed reasonable confidence getting him on board for the same. The company however clarified that release of securities/no lien no cash flow shall be extended on full payment of agreed OTS. Further, if OTS amount is paid within 3 months, no interest shall be leviable. However, if it exceeds three months and paid within six months interest @ Bank One year MCLR+0.50% shall be paid from the date of deposit of 25% amount.

Accordingly, the following action points emerged:

1. The company was advised to submit the revised offer with detailed terms to all the banks so that the respective banks may take up with their authorities.
2. Company to finalize the Special Audit report in consultation with the lead bank. Further, the valuation reports pending since long also to be submitted to the consortium.
3. Existing TRA/Waterfall mechanism as already agreed to continue.
4. Company to submit the required information expeditiously to Concurrent Auditor for finalizing his monthly/quarterly reports.

Meeting ended with a vote of thanks to all participants."

In the above background, the petitioner contends that the RBI is a statutory authority and has power in controlling and supervising the Banks under the RBI Act, 1934 and the Banking Regulation Act, 1949. Hence, the master circulars and the guidelines issued by RBI are binding on 1st respondent. The petitioner alleges that the 1st respondent if takes coercive action against the petitioner, the coercive action would cripple the petitioner in its attempt to clear the outstanding loans or in complying with the revised OTS proposal of the JLF. The revised OTS proposal of Rs.505 crores is in the active consideration of other consortium banks. The 1st respondent cannot take coercive action denying the benefit of revised OTS proposal.

The sheet anchor of petitioner's case is that the decisions in the JLF dated 27.09.2017 read with master circulars dated

26.02.2014 and 05.05.2017 are binding on 1st respondent. The petitioner prays for direction to 1st respondent to abide by the revised OTS proposal referred in JLF meeting dated 27.09.2017. Hence, the writ petition.

The 1st respondent filed affidavit dated 11.11.2017 and also additional counter affidavit dated 2711.2017. The case of 1st respondent is that the writ prayers are not available to petitioner and the master circulars dated 26.02.2014 and 05.05.2017 provide framework for Revitalizing Distressed Assets in the Economy – Guidelines on JLF and CAP and these master circulars/guidelines have no application to the case on hand, for according to 1st respondent, the petitioner's account was already declared a Non-Performing Account (NPA) by the RBI during audit, as at 31.12.2015. The petitioner has chosen OTS instead of CAP. The 1st respondent explains the objection on maintainability of writ petition by contending that the master circulars/guidelines relate to known accounts which are identified and categorized as Special Mentioned Accounts (SMA) or stressed accounts to which CAP is proposed, but not to accounts which are categorized or declared as NPAs, wherein the borrower opts for OTS, close the loan account instead of pursuing CAP and continuing to honour its terms and conditions under the loan account. Respondent No.1 relies on Clause 2.1 of master circulars dated 14.02.2014 which read thus:

> **Formation of Joint Lenders' Forum:**
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> 2.1 As proposed in paragraph 2.1.1 of the Framework, **<u>before a loan account turns into a NPA,</u>** banks are required to identify incipient stress in the account by creating three sub-categories

under the Special Mention Account (SMA1) category as given in the table below:

SMA Sub-categories	**Basis for classification**
SMA-0	Principal or interest payment not overdue for more than 30 days but account showing signs of incipient stress (Please see Annex)
SMA-1	Principal or interest payment overdue between 31-60 days.
SMA-2	Principal or interest payment overdue between 61-90 days.

According to 1st respondent, the petitioner since has chosen not to go for CAP but opted for OTS and the petitioner's account is categorized as NPA. Hence, the master circulars or guidelines would be applicable to JLF while considering CAP but not for approving or disapproving OTS scheme.

The 1st respondent further alleges that the 1st respondent on 17.10.2017 moved the National Company Law Tribunal (NCLT) and the filing of application before NCLAT was informed to petitioner as well. The application was moved under Section 7 of the Insolvency and Bankruptcy Code, 2016 (for short 'the Code') read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. The filing of application under Section 7 of the Code cannot be termed a coercive step taken by 1st respondent. The 1st respondent further alleges that the petitioner has not provided effective measures on repayment to the satisfaction of lenders consortium, more particularly to the 1st respondent/lead banker and the remedy under the Code was pursued. The 1st respondent explains the scheme of consideration or adjudication before NCLT and states that the petitioner will have reasonable opportunity by the Interim Resolution Professional and the petitioner can come up with remedial measures/ mechanism to clear the outstanding debt for holding the application filed before NCLT. The petitioner in this background ought not to object for the step taken by 1st respondent before NCLT, much less treat the measures taken as coercive. The 1st respondent further states that the OTS can be placed before the Interim Resolution Professional under the Code for consideration and decision. Therefore, the fulcrum of 1st respondent's objection is that the master circulars/guidelines relied on are not applicable to the case on hand and that the 1st respondent has neither violated the master circulars nor the guidelines of RBI. The 1st respondent in the additional counter affidavit dated 27.11.2017 further alleges that the application filed under Section 7 of the Code is numbered as CP (IB) No.248/7/HDB/17 before NCLT and is pending admission. To bring home the alleged distress condition of petitioner, the 1st respondent refers to the winding up petitions filed and pending against petitioner at the instance of the creditors of petitioner. The 1st respondent refers to default of petitioner to Department of YATC, Government of Telangana and the difficulty, 1st respondent would be facing in the event of Department of YATC terminating the lease standing in favour of petitioner. Therefore, the 1st respondent prays for dismissing the writ petition.

This Court for brevity and convenience does not refer to the allegations or additional pleas of parties, for the sum and substance of the case of contesting parties is in a very limited sphere and the substance is already stated. While allowing the prayer of the

2nd respondent to come on record, it was made clear by this Court that the *inter se* disputes of petitioner and 2nd respondent are not considered in this writ petition. The 2nd respondent was allowed to come on record as respondent No.2, since a few averments are made in the affidavit against 2nd respondent and also that the JLF meeting dated 27.09.2017 refers to the disputes between petitioner and 2nd respondent. The other averments made in this behalf are not referred and the 2nd respondent is heard only on the applicability of guidelines and maintainability of to continue the application filed before NCLT.

Mr.Vikram Pooserla for petitioner contends that the master circulars/guidelines of RBI are statutory in nature, are binding on the 1st respondent-Bank and the guidelines have specific purpose of safeguarding the stressed assets from depletion in value. The guidelines cover CAP to NPA/sub-standard accounts as well. By referring to the details of OTS, he contends that the petitioner is devoted to discharge the credit facilities availed from consortium banks and if NCLT is moved at this stage, the petitioner suffers hardship and injury. According to him, the 1st respondent by not concurring with and signing the majority decision taken on 27.09.2012, deviated from the binding master circulars/guidelines. Further, as 60% of the creditors have agreed, the 1st respondent cannot and could not move application under Section 7 of the Code. The 1st respondent is under obligation to sail with JLF by implementing the decision of JLF. He relies on ICICI BANK LIMITED v.

OFFICIAL LIQUIDATOR OF APS STAR INDUSTRIES LIMITED[1], SARDAR ASSOCIATES v. PUNJAB AND SIND BANK AND OTHERS[2] and B.O.I FINANCE LIMITED v. CUSTODIAN AND OTHERS[3] for the proposition that the master circulars/guidelines of RBI are binding on respondent bank, and finally he prays for allowing the writ petition.

Ms. Varalakshmi Tadepally, appearing for 1st respondent, contends that the account of petitioner is treated as NPA by the RBI as at 31.12.2015. The 1st respondent bank provided financial assistance of Rs.167.12 crores to petitioner. The lenders categorized the loan account of petitioner as SMA-2 under intimation to RBI. The consortium banks constituted JLF to find ways for resolution of the stressed asset. The petitioner chose to avail rectification of its accounts under CAP assuring to induce 120 crores into the project. The project of petitioner was re-classified as infra project from non-infra. The date of commencement of commercial operations was extended from September, 2014 to September, 2015. The additional loan facility to an extent of Rs.28.78 crores was granted to petitioner. On account of admitted defaults, it is contended by 1st respondent that as at 31.12.2015, the petitioner has become NPA. The petitioner on receiving notice under the SARFAESI Act proposed restructuring and converting unsecured debts of 81 crores into equity within three months from the date of implementation of CAP, however, the assurance did not materialize. The counsel for 1st respondent by referring to circulars on the topic contends that the petitioner is treated as NPA as at

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[1] (2010) 10 SCC 1
[2] (2009) 8 SCC 257
[3] (1997) 10 SCC 488

31.12.2015. The account is treated as SMA before it slips into NPA. According to 1st respondent, the guidelines applicable to SMAs are not applicable to the case on hand, as the petitioner is treated as NPA. The 1st respondent contends that the petitioner preferred OTS to resolve the stress on the account, whereas CAP is a resolution process which attempts to cure the stress on the account. The use of word resolution and recovery by petitioner is misleading. According to 1st respondent, the mechanism under the Code is in *pari materia* with the RBI guidelines. Section 238 of the Code provides non obstante clause. In view of Section 238 of the Code beginning with non obstante clause, the remedy under Section 7 of the Code has overriding effect on guidelines etc. According to 1st respondent, the remedy under Section 7 is speedy, efficacious and a holistic view is taken in the interest of all stakeholders. The petitioner will be afforded fair and reasonable opportunity before NCLT under the Code. Hence, the petitioner cannot insist on following the JLF decision dated 27.09.2017.

She further contends that the application of master circulars by this Court, particularly having regard to the view of the Apex Court in SARDAR ASSOCIATES case (2 supra) is untenable. According to her, the petitioner through the instant prayer for Mandamus is claiming a legal right in it and corresponding legal duty on 1st respondent to accept the decision of JLF dated 27.09.2017. Such acceptance in the background of the Code is illegal, for the Act of Parliament has provided for consolidation of laws relating to re-organization and insolvency resolution of corporate persons in a time bound manner. The value of assets of such persons is preserved and it promotes availability of credit etc. The statutory right of petitioner to work out the remedy against petitioner (corporate debtor) under the Code cannot be denied. She places strong reliance on Section 238 of the Code, which reads thus:

> **Provisions of this Code to override other laws. -** The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

By relying on Section 238 of the Code, she contends that this Court need not go into the binding nature of master circulars/ guidelines, for even the master circulars/guidelines are treated as an instrument having the effect of law, still the provisions of the Code have overriding effect. She further submits that this Court does not possess expertise to determine what comes under SMA, SMA-0; SMA-01; SMA-02. She finally contends that the prayer of petitioner, if considered by this Court under Article 226 of the Constitution of India, there is no guarantee to the maximization of value of assets of petitioner herein.

She relies on M/s INNOVENTIVE INDUSTRIES LIMITED V. ICICI BANK AND OTHERS[4], STARLOG ENTERPRISES LIMITED V. ICICI BANK LIMITED[5] and unreported judgments in C.P.No.247/I & BP/NCLT/MAH/2017 and C.P.Nos.(IB) 70/ALD/2017 & (IB) 71/ALD/2017 of NCLT Mumbai and Allahabad Benches respectively and prays for dismissing the writ petition.

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[4] AIR 2017 SC 4084

[5] (2017) 139 CLA 8=(2017) 142 SCL 1

Mr.S.Niranjan Reddy, appearing for 2nd respondent which claims to have shareholding in petitioner company and also entered into operation and maintenance contract with petitioner, supports 1st respondent by contending that the master circulars/ guidelines do not entitle petitioner for any relief in view of statutory enactment by Parliament. By relying on Clause 2.1.2 of Prudential Norms on Income Recognition, Asset Classification and Provisioning pertaining to advances has no application. He relies on M/s INNOVENTIVE INDUSTRIES LIMITED's case (4 supra) for the limited purpose of detailing the scheme or working of the Code.

I have perused the record and noted the submissions of the counsel appearing for all the parties.

The following points arise for consideration of this Court:

1. Whether the right of respondent under the Code has overriding effect on master circulars/guidelines or not?

2. Whether the petitioner is entitled for Mandamus for implementation of master circulars/guidelines dated 26.02.2014 and 05.05.2017 and for implementation of CAP as decided by JLF in the meeting dated 27.09.2017 for revival of stressed assets of petitioner company or not?

Briefly stated, the case of petitioner is that the petitioner availed financial assistance from Banks, devoted to pay the instalments for clearing the credit facilities/loans availed by it from the consortium banks. The devotion of petitioner could not be translated into action due to operational difficulties encountered by it from 2015 onwards. The respondent issued notices under SARFAESI Act, 2002 and the consortium of banks/JLF was formed for revitalizing distressed assets of petitioner company with CAP. In the meeting held on 27.09.2017, except the 1st respondent, other consortium banks were prepared to accept the OTS of petitioner. The petitioner fairly states that the 1st respondent did not sign the minutes of the JLF meeting dated 27.09.2017, but it is contended that the 1st respondent has no option except to go with the majority of JLF. Therefore, the decision of JLF for CAP ought to be taken forward by the consortium banks but not legal remedies under the Code.

The case of 1st respondent is that the petitioner was provided credit facility of Rs.685 crores. The petitioner opted for rectification of its account under CAP assuring to induce Rs.120 crores of equity and the consortium banks classified petitioner as infra project from non-infra project. Even after change of classification, default in repayment continued and in the RBI audit, the account slipped into NPA as at 31.12.2015. The foremost contention of 1st respondent is that the master circulars/guidelines are not attracted to the case on hand, for the 1st respondent can treat the petitioner as an NPA as at 31.12.2015. The second limb of objection of 1st respondent is that the Code is in *pari materia* with the RBI guidelines and the statutory mechanism provided under the Code to deal with the issues relating to insolvency and bankruptcy resolution etc., under the Code have overriding effect by operation of Section 238 of the Code and pursuing legal remedy cannot be denied.

Before proceeding to consider the respective contentions, let me preface that the commencement of commercial operations of petitioner was extended from September, 2014 to September, 2015. It is not the case of petitioner that the petitioner did, in fact, pay any of the instalments to consortium banks. The affidavit is silent on this aspect. In other words, even after the commencement of repayment schedule for about two years, the petitioner is expressing its devotion to repay the credit facilities to the consortium banks and not repaying the instalment. Be that as it may, for this Court is not deciding the merits of the claim between parties. The petitioner rests its case on the following circumstances:

- The master circulars/guidelines of RBI have statutory force and are binding on 1st respondent
- The 1st respondent does not have discretion to refuse to go with the decision taken by the consortium of banks on 27.09.2017.

Therefore, the OTS proposal given by the petitioner is under active consideration and at this juncture, invocation of coercive steps, including moving an application under 7 of the Code is illegal and affects the right of petitioner. The emphasis of petitioner's case is more on the duty cast on 1st respondent by the master circulars/guidelines, but does not in so many words claim a legal right in itself. In other words, the duty or obligation, if any, fastened on 1st respondent is enforced as a right vested in petitioner. The petitioner relies on decisions already referred above.

In SARDAR ASSOCIATES case (2 supra), the Supreme Court had occasion to deal with the binding nature of master circulars/ guidelines issued by the RBI. The relevant paragraphs dealing with the binding nature of guidelines of the RBI are as follows:

> A bare perusal of Section 21 would clearly show that the Reserve Bank of India is entitled to formulate the policies which the banking companies are bound to follow. Sub-section (3) of Section 21 of the 1949 Act clearly mandates that every banking company shall be bound to comply with the directions given to it in terms thereof. Section 35A of the 1949 Act, which was inserted by the Banking Companies (Amendment) Act, 1956, empowers the Reserve Bank to issue directions inter alia in the interest of banking policy.
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> The respondent - Bank concededly is a public sector bank. It was, therefore, bound by the said guidelines. The salient features of the Guidelines are as under:
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> " * * *
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> "(c) The guidelines will cover cases on which the banks have initiated action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and also cases pending before Courts/DRTs/BIFR subject to consent decree being obtained from the Courts/DRTs/BIFR"
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> (ii) Settlement Formula - amount
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> a) NPAs classified at Doubtful or Loss as on 31.03.2004.
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> The minimum amount that should be recovered in respect of compromise settlement of NPAs classified as doubtful or loss as on 31.03.2004 would be 100% of the outstanding balance in the account as on the date on which the account was categorized as doubtful NPA.
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> b) NPAs classified as sub-standard as on 31.03.2004 which became doubtful or loss subsequently:
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> The minimum amount that should be recovered in respect of NPAs classified as sub-standard as on 31.02.2004 which became doubtful or loss subsequently would be 100% of the outstanding balance in the account as on the date on which

the account was categorized as doubtful NPAs plus interest at existing Basic Prime Lending Rate from 01.04.2004 till the date of final payment."

(iii) Payment

The amount of settlement arrived at in both the above cases, should preferably be paid in one lump sum. In cases where the borrowers are unable to pay the entire amount in one lump sum, at least 25% of the amount of settlement should be paid upfront and the balance amount of 75% should be recovered in installments within a period of one year together with interest at the existing Prime Lending Rate from the date of settlement up to the date of final payment.

* * *

(V) Non-discretionary treatment:

Banks shall follow the above guidelines for one time settlement of all NPAs covered under the scheme, without discrimination and a monthly report on the progress and details of settlement should be submitted by the concerned authority to the next high authority and their Central Office. Banks may go for wide publicity and also give notice by 31.01.2006 to the eligible defaulting borrowers to avail of the opportunity for one time settlement of their outstanding dues in terms of these guidelines. Adequate publicity to these guidelines through various means must be ensured.

* * *

4. Any deviation from the above settlement guidelines for any borrower shall be made only by the Board of Directors."

The said circular letter was issued by the Chief General Manager of the Reserve Bank of India. The High Court in its impugned judgment inter alia was of the opinion that he had no authority therefor.

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The question as to whether the guidelines issued by the Reserve Bank of India are binding or not now stands concluded by reason of a Constitution Bench Judgment of this Court in Central Bank of India v. Ravindra and Others [(2002) 1 SCC 367] in the following terms:

"55... (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."

> If in terms of the guidelines issued by the Reserve Bank of India a right is created in a borrower, we see no reason as to why a writ of mandamus could not be issued. **We would assume, as has been contended by Mr. Singh, that while exercising its power under Article 226 of the Constitution of India, the High Courts may or may not issue such a direction but the same, in our opinion, by itself, would not mean that the High Court would be correct in interfering with an order passed by the Appellate Tribunal which was entitled to consider the effect of such one time settlement.** *(Emphasis supplied)*

The petitioner prays for Mandamus directing 1st respondent to accept the CAP under deliberation or considered by JLF. The objection of respondent No.1, as already noted, is two fold. The enforceable right canvassed by petitioner basing on the circulars is taken up later and I would refer to the second objection i.e., overriding effect of the Code on circulars. According to 1st respondent, the Parliament enacted the Code and the statement of objects and reasons and the short title of the Code would clearly show that the Parliament by taking note of deficiencies in the working of Sick Industrial Companies (Special Provisions) Act, 1985, the Recovery of Debt Due to Banks and

Financial Institutions Act, 1993, the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the Companies Act, 2013 provided for separate code giving statutory regime for re-organization and insolvency resolution, maximization of value of assets of corporate debtors.

In INNOVENTIVE INDUSTRIES LIMITED's case (4 supra), the Hon'ble Supreme Court considered the scheme of the Code and paragraphs which are relevant for our purpose read thus:

> 27. The scheme of the Code is to ensure that when a default takes place, in the sense that a debt becomes due and is not paid, the insolvency resolution process begins. Default is defined in Section 3(12) in very wide terms as meaning non-payment of a debt once it becomes due and payable, which includes non-payment of even part thereof or an instalment amount. For the meaning of "debt", we have to go to Section 3(11), which in turn tells us that a debt means a liability of obligation in respect of a "claim" and for the meaning of "claim", we have to go back to Section 3(6) which defines "claim" to mean a right to payment even if it is disputed. The Code gets triggered the moment default is of rupees one lakh or more (Section 4). The corporate insolvency resolution process may be triggered by the corporate debtor itself or a financial creditor or operational creditor. A distinction is made by the Code between debts owed to financial creditors and operational creditors. A financial creditor has been defined under Section 5(7) as a person to whom a financial debt is owed and a financial debt is defined in Section 5(8) to mean a debt which is disbursed against consideration for the time value of money. As opposed to this, an operational creditor means a person to whom an operational debt is owed and an operational debt under Section 5 (21) means a claim in respect of provision of goods or services.
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> 28. When it comes to a financial creditor triggering the process, Section 7 becomes relevant. Under the explanation to Section 7(1), a default is in respect of a financial debt owed to any financial creditor of the corporate debtor – it need not be a debt

owed to the applicant financial creditor. Under Section 7(2), an application is to be made under sub-section (1) in such form and manner as is prescribed, which takes us to the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Under Rule 4, the application is made by a financial creditor in Form 1 accompanied by documents and records required therein. Form 1 is a detailed form in 5 parts, which requires particulars of the applicant in Part I, particulars of the corporate debtor in part II, particulars of the proposed interim resolution professional in part III, particulars of the financial debt in part IV and documents, records and evidence of default in part V. Under Rule 4(3), the applicant is to dispatch a copy of the application filed with the adjudicating authority by registered post or speed post to the registered office of the corporate debtor. The speed, within which the adjudicating authority is to ascertain the existence of a default from the records of the information utility or on the basis of evidence furnished by the financial creditor, is important.

This it must do within 14 days of the receipt of the application. It is at the stage of Section 7(5), where the adjudicating authority is to be satisfied that a default has occurred, that the corporate debtor is entitled to point out that a default has not occurred in the sense that the "debt", which may also include a disputed claim, is not due. A debt may not be due if it is not payable in law or in fact. The moment the adjudicating authority is satisfied that a default has occurred, the application must be admitted unless it is incomplete, in which case it may give notice to the applicant to rectify the defect within 7 days of receipt of a notice from the adjudicating authority. Under sub-section (7), the adjudicating authority shall then communicate the order passed to the financial creditor and corporate debtor within 7 days of admission or rejection of such application, as the case may be.

29. The scheme of Section 7 stands in contrast with the scheme under Section 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub-section (1), bring to the notice of the operational creditor the existence of a dispute or the record of the pendency of a suit or arbitration proceedings, which

is pre-existing – i.e. before such notice or invoice was received by the corporate debtor. The moment there is existence of such a dispute, the operational creditor gets out of the clutches of the Code.

30. On the other hand, as we have seen, in the case of a corporate debtor who commits a default of a financial debt, the adjudicating authority has merely to see the records of the information utility or other evidence produced by the financial creditor to satisfy itself that a default has occurred. It is of no matter that the debt is disputed so long as the debt is "due" i.e. payable unless interdicted by some law or has not yet become due in the sense that it is payable at some future date. It is only when this is proved to the satisfaction of the adjudicating authority that the adjudicating authority may reject an application and not otherwise.

31. The rest of the insolvency resolution process is also very important. The entire process is to be completed within a period of 180 days from the date of admission of the application under Section 12 and can only be extended beyond 180 days for a further period of not exceeding 90 days if the committee of creditors by a voting of 75% of voting shares so decides. It can be seen that time is of essence in seeing whether the corporate body can be put back on its feet, so as to stave off liquidation.

32. As soon as the application is admitted, a moratorium in terms of Section 14 of the Code is to be declared by the adjudicating authority and a public announcement is made stating, inter alia, the last date for submission of claims and the details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims. Under Section 17, the erstwhile management of the corporate debtor is vested in an interim resolution professional who is a trained person registered under Chapter IV of the Code. This interim resolution professional is now to manage the operations of the corporate debtor as a going concern under the directions of a committee of creditors appointed under Section 21 of the Act. Decisions by this committee are to be taken by a vote of not less than 75% of the voting share of the financial creditors. Under Section 28, a resolution professional, who is none other than an interim resolution professional who is appointed to carry out the resolution process, is then given wide powers to raise

finances, create security interests, etc. subject to prior approval of the committee of creditors.

33. Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority under Section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins.

34. On the facts of the present case, we find that in answer to the application made under Section 7 of the Code, the appellant only raised the plea of suspension of its debt under the Maharashtra Act, which, therefore, was that no debt was due in law. The adjudicating authority correctly referred to the non-obstante clause in Section 238 and arrived at a conclusion that a notification under the Maharashtra Act would not stand in the way of the corporate insolvency resolution process under the Code. However, the Appellate Tribunal by the impugned judgment held thus:

> "78. Following the law laid down by Hon'ble Supreme Court in "Yogendra Krishnan Jaiswal" and "Madras Petrochem Limited"

> we hold that there is no repugnancy between I&B Code, 2016 and the MRU Act as they both operate in different fields. The Parliament has expressly stated that the provisions of the I&B Code, 2016 (which is a later enactment to the MRU Act) shall have effect notwithstanding the provisions of any other law for the time being in force. This stipulation does not mean that the provisions of MRU Act or for that matter any other law are repugnant to the provisions of the Code.
>
> 79. In view of the finding as recorded above, we hold that the Appellant is not entitled to derive any advantage from MRU Act, 1956 to stall the insolvency resolution process under Section 7 of the Insolvency & Bankruptcy Code, 2016."

Chapter II of the Code deals with corporate insolvency resolution process. The scheme under the Code in the considered view of this Court is complete, comprehensive and one of the objects of the Code is maximization of value of assets of debtors. Chapter II, among other aspects, deals with - Persons who may initiate corporate insolvency resolution process (Section 6); Initiation of corporate insolvency resolution process by financial creditor (Section 7); Insolvency resolution by operational creditor (Section 8); Application for initiation of corporate insolvency resolution process by operational creditor (Section 9); Initiation of corporate insolvency resolution process by corporate applicant (Section 10); Persons not entitled to make application (Section 11); Time-limit for completion of insolvency resolution process (Section 12); Declaration of moratorium and public announcement (Section 13); Moratorium (Section 14); Public announcement of corporate insolvency resolution process (Section 15); Appointment and tenure of interim resolution professional (Section 16); Management of affairs of corporate debtor by interim resolution professional (Section 17); Duties of interim resolution professional(Section 18), Personnel to extend cooperation to interim resolution professional (Section 19); Management of operations of corporate debtor as going concern (Section 20); Committee of creditors (Section 21); Appointment of resolution profession (Section 22); Resolution profession to conduct corporate insolvency resolution process (Section 23); Meeting of committee of creditors (Section 24); Duties of resolution professional (Section 25); and Approval of resolution plan (Section 31).

The writ remedy is both an extraordinary and a discretionary remedy. The writ of Mandamus is not a writ of right and is not granted as matter of course. Its grant or refusal is at the discretion of the Court. The Court may refuse Mandamus unless it is shown that there is a clear right of the applicant or statutory duty of the respondent and there is no alternative remedy available to the applicant against such grievance. The discretion of the Court is exercised basing on the facts and circumstances of a case and also the discretion exercised fairly, reasonably and on sound and well established legal principles. The Court while exercising discretion examines the nature of relief that can be moulded depending upon the facts and circumstances of the case.

The decisions relied on by the petitioner are prior to the enactment of the Code. The counsel appearing for the petitioner did not place a binding precedent on the enforceability of guidelines against bank vis-à-vis the statutory rights/remedies available to a bank under present regime. The Code has overriding effect on guidelines and no exception to the remedy availed by 1st respondent can be taken by this Court. This Court also keeps in view the observations of the Hon'ble Supreme Court in SHIVASHAKTI

SUGARS LTD., v. SHREE RENUKA SUGAR LTD. & ORS[6] which proceeds to consider the case on hand. The operative portion reads thus:

> "Even in those cases where economic interest competes with the rights of other persons, need is to strike a balance between the competing interests and have a balanced approach. That is the aspect which has been duly taken care of in the instant case, as would be discernible from the concluding paragraph of this judgement.

The balancing act the Court is required to note in the case on hand is the enforceability of petitioner's right vis-à-vis the protective measures taken by respondent for maximization of asset value of petitioner by moving the NCLT. The 1st respondent, if as prayed by petitioner, is directed not to pursue remedies under the Code and the delay if results in loss of recovery not only to 1st respondent but also to other creditors, then the discretion exercised by the Court amounts to perceiving the right of petitioner, but not the loss the 1st respondent is likely to suffer by postponing the remedy under the Code to a later date. The petitioner without discharging the obligation to 1st respondent/Bank cannot enforce the right it perceives in the duty, if any, cast on 1st respondent by the guidelines.

The petitioner either attempts for OTS or presses for implementation of CAP basing on master circulars of the RBI. The 1st respondent prefers its statutory right under Section 7 of the Code against petitioner. Section 238 of the Code reads thus:

> **Provisions of this Code to override other laws. -** The provisions of this Code shall have effect, notwithstanding anything inconsistent therewith contained in any other law

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> for the time being in force or any instrument having effect by virtue of any such law.

From the plain reading of Section 238, this Court is of the view that even assuming that the master circulars/guidelines of RBI are binding, and have the force of law, still the overriding effect conferred by the Code cannot be overlooked while giving effect to master circulars/guidelines. This Court is in agreement with the submission of 1st respondent that the details of various figures submitted by petitioner or 1st respondent are required to be examined by a resolution professional, under Section 31 of the Code, a resolution plan can be accepted by 1st respondent, while availing the remedy under the Code. No prejudice would be caused to petitioner, if the steps already initiated are pursued. The master circulars/guidelines of RBI can also be relied on by the petitioner while the statutory mechanism is operated.

From the details given by both parties, this Court is of the view that the invocation of statutory remedy by 1st respondent is legal in the interest of 1st respondent. The 1st respondent is taking steps for maximization of value of assets of petitioner through the statutory mode. On the other hand, if timely action at the instance of petitioner or by any other intervention is taken, the 1st respondent is prevented from realizing the amount and ultimately the value of the asset diminishes and the 1st respondent suffers financial hardship. The details furnished by 1st respondent show that winding up petitions are filed and pending adjudication against petitioner. The application now filed by 1st respondent can bring all aspects under one umbrella for decision, including revival package.

Therefore, the petitioner by referring to circulars cannot restrict effective and efficacious statutory remedy or right of 1st respondent under the Code.

For the above reasons, this Court is the view that the object of writ remedy is to make functioning of administrative/statutory bodies in an efficient manner, by yielding the best results to the state, institutions, society and individuals without undue delay or cause. It is the duty of writ Courts to hold this process to strict adherence through the instrumentality of writ, more particularly by a writ of Mandamus. The prayer of petitioner, if accepted, this Court would for all purposes be stifling statutory remedies of 1st respondent under the Code. The disputed questions of fact viz., whether the petitioner is to be treated as NPA or SMA, ought not to undertake matters which require expertise, proper assistance and participation of all stake holders and cannot be adjudicated under Article 226 of the Constitution of India. Therefore, keeping in view the provisions of the Code and the facts and circumstances of this case, the petitioner failed to make out a case. The points are answered accordingly.

The writ petition fails and is, accordingly, dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending stand closed.

S.V.BHATT, J

21st December, 2017
Lrkm