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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order Reserved on 08.06.2021
Order Delivered on 02.07.2021

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THE HONOURABLE MR.JUSTICE V.PARTHIBAN

W.P.No.12381 of 2021
and
W.M.P.Nos.13159 & 13160 of 2021

Marg Limited
rep. By its Managing Directorate
Mr.G.R.K.Reddy,
having its registered office at
Sri Sai Subhodaya Apartments
Basement No.57/2B, East Coast Road,
Thiruvananthapuram, Chennai - 600 041.

...Petitioner

Vs

1. Karaikal Port Private Limited
Represented by its Chief Financial Officer
Having its registered office at Khezhavanjoor Village,
T.R.Pattinam, Karaikal,
Puducherry - 609 602.
2. Government of Puducherry,
rep. By the Secretary,
Fort Department, Chief Secretariat,
Puducherry - 605 001
3. Indian Bank,
Represented by its Assistant General Manager,
Harbour Branch,
New No.66, (Old No.31)
Rajaji Salai,
Chennai - 600 001.
4. Edelweiss Asset Reconstruction Company Limited,
Rep. By its Director,
Having its office at Edelweiss House,
Off CST Road, Kalina,
Mumbai - 400 098.
5. Reserve Bank of India,
Fort Glacis, No.16,
Rajaji Salai,
Chennai - 600 001.



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6. Phoenix ARC Private Limited,
Represented by its Director,
Having its office at 5th Floor,
Dani Corporate Park 158,
CST Road, Kalina, Santacruz (East),
Mumbai - 400 098.

...Respondents

Prayer:

Writ Petition filed under Article 226 of the Constitution of India praying Writ of Certiorarified Mandamus to call for the records of the 4th respondent culminated in the letter No.EdelARC/279/ 2021-22 dated 30th April 2021 and to quash the same and to consequently direct the 5th respondent to monitor and conduct the restructuring or disposal of loan by the 4th respondent in an open transparent and competitive manner taking into consideration the interest and benefit of all stakeholders of the 1st respondent.

For Petitioner : Mr.AR.L.Sundaresan,
Senior Counsel
for Mr.Akil Bhansali

For Respondents : Mr.P.H.Arvinth Pandian,
Senior Counsel
for Mr.Jeevandam Rajagopal for R1
for M/s. Fox Mandal & Associates.
Mr.V.Kumaran,
Additional Government Pleader
(Puducherry) for R2
Mr.Satish Parasaran,
Senior Counsel
for M/s.Anant Merathia for R4

ORDER

(The matter is taken up through web hearing.)

The relevant facts which form the basis for deciding the preliminary issue as to the maintainability of the Writ Petition are stated hereunder:

The petitioner is a Public Limited Company incorporated under the Companies Act, 1956. The Writ petition is filed against the letter of the 4th respondent dated 30.04.2021 calling upon the petitioner Company to forthwith pay Rs.1995,95,17,808/- (Rupees Nineteen hundred ninety five crore, ninety five lakhs, seventeen thousand, eight hundred and eight only) within 7 days as the outstanding due as on March 31, 2021, failing which, further action would be taken including revocation of



Restructuring Agreement entered into between the petitioner Company and the 4th respondent dated 26.07.2018. The 4th respondent herein is also a Company incorporated under the Companies Act, 1956 and is an Asset Reconstruction Company, hereinafter referred to as 'EARC'. The letter dated 30.04.2021, which is impugned in the writ petition, is a fall out of default committed by the petitioner Company towards discharge of the debts forcing the 4th respondent EARC, which company has been assigned the debts due to 9 Initial Lenders under various Agreements between July, 2015 and September, 2016.

2. The petitioner herein is one of the principal promoters of the 1st respondent Company, namely Karaikal Port Trust Limited. Originally, the 2nd respondent, the Government of Puducherry executed a Concession Agreement for the development of Karaikal Port Trust on 25.01.2006 whereby, the petitioner was granted Concession on a public private partnership of BOT (Building, Operate, Transfer) basis for developing and operating Greenfield Port in Union Territory of Puducherry. The term of Concession Agreement initially is stated to be for a period of 30 years which commenced from 01.06.2009 and subsequently on 06.11.2006, all the rights/interest, commitments, responsibilities and obligations were transferred from the petitioner to the 1st respondent.

3. The 1st respondent, in furtherance of the Concession Agreement had availed loans from consortium of Initial Lenders from Indian Bank, Oriental Bank of Commerce, Allahabad Bank, Indian Overseas Bank, Central Bank of India, Punjab National Bank, United Bank of India, Indian Bank, India Infrastructure Finance Company Limited, Syndicate Bank, Corporation Bank and State Bank of Hyderabad. Over a period of time, according to the petitioner, there was economic slowdown which resulted in the under utilisation of Karaikal Port's capacity, leading to financial stress and crunch. As a consequence of which, there was default in repayments of the debts resulting in the debt being restructured in 2012-13 and subsequently, out of the initial lenders, nine lenders had assigned the debts to be discharged against them to the 4th respondent EARC. Thereafter, in order to revitalise the Port activities, the 4th respondent entered into Master Restructuring Agreement, hereinafter referred to 'MRA'. The outstanding debt as on 26.07.2018, was restructured under MRA.

4. According to the petitioner, the payments due to the 4th respondent had been periodically made without any default. However, the 1st respondent for various reasons was facing hardship in its activities and more particularly, due to global outbreak of Corona pandemic. The 1st respondent, like all other businesses had also been affected and has been suffering loss



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due to drastic reduction in traffic/cargo due to Covid-19 situation from March 2020. In the said circumstances, the 1st respondent has sent communication to the 4th respondent requesting for restructuring of the debts repayments particularly in line with the relief package introduced by Reserve Bank of India, the 5th respondent herein. The Reserve Bank of India has announced moratorium, vide its circular dated 27.03.2020, which permitted all lending institutions to extend the benefit of moratorium for a brief period of three months payable between March and May 2020 in order to prevent any on going commercial business activity from being crippled or affected by the pandemic outbreak.

5. According to the petitioner in the face of the relief package announced by the 5th respondent, without considering the bonafide and genuine difficulties faced by the 1st respondent during the crisis period, the 4th respondent issued the impugned letter threatening the petitioner that they would be forced to revoke the restructuring agreement if the entire debts running to Rs.1995,95,17,808/- was not discharged in seven days. According to the petitioner, the 4th respondent, being an Asset Restructuring Company, which stepped into the shoes of the initial lenders is bound to follow the circular issued by the Reserve Bank of India, the 5th respondent herein, in order to ameliorate the adverse effects impacted on all business due to the onslaught of the corona virus.

6. Further, the petitioner case is that the impugned action of the 4th respondent amounted to throttling the Port activities of the 1st respondent which would have far reaching impact on the economy of the Region. The Port activities are meant to cater to the general public needs and if the activities are crippled or allowed to suffer, it will have irreparable adverse impact on public interest. Therefore, being aggrieved by the letter dated 30.04.2021 of the 4th respondent, the petitioner herein as a promoter and guarantor of the 1st respondent Company, has come forward with this writ petition assailing the action of the 4th respondent by invoking the Constitutional jurisdiction of this Court under Article 226 of the Constitution of India.

7. When the matter is taken up for admission, a preliminary objection was raised as to the maintainability of the writ petition, inter-alia on the ground that the issue that is sought to be agitated before this Court is purely a private civil dispute, as the relationship between the petitioner and the 4th respondent is entirely governed by contractual and commercial agreements and no public interest is involved. When the parties to the dispute are governed by Private Agreements and the 4th respondent is admittedly not a State or Instrumentality of the State and whether the public law remedy can be resorted to in



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iii) Thirdly, the unjust coercive action, if it is pursued vigorously pursuant to the impugned letter, it would only result in far reaching adverse implications on the financial stability and economy of the Region and such consequence would inevitably and gravely undermine public interest at large. This is more particularly so, when the Concession Agreement originally entered into between the 2nd respondent Government and the petitioner dated 21.01.2006 was to last for a period of 30 years and 18 years more left for the contract to conclude. In such situation, failure on the part of the 4th respondent to apply the moratorium package announced by the 5th respondent (RBI) amounted to disregarding its public duty and by such conduct, the action of the 4th respondent is liable to be interfered with by this Court in exercise of its writ jurisdiction by issuing a command to the 4th respondent to comply with the Circular issued by the 5th respondent, RBI in public interest.

9. The learned Senior Counsel would also submit that there was absolutely no necessity for the 4th respondent to act hastily by issuing the impugned notice during the pandemic crisis, when the admitted fact was that there was no default in repayment of debt upto March, 2020 and the instalments due upto September, 2020 had also been paid thereafter. If only the moratorium benefit as envisaged in the circulars of the RBI extended to the borrowers had been adhered to by the 4th respondent vis-a-vis the petitioner, there would not have been any necessity or scope for invoking the default Clause as contained in the MRA dated 26.07.2018 at all. The learned Senior Counsel would also add that even as per MRA, the moratorium as contemplated therein namely, 5 + 3 years is still not over. Hence, the impugned action of the 4th respondent is absolutely without any justification.

10. In support of the contention that the writ is maintainable against a private entity namely, the 4th respondent Asset and Reconstruction Company (ERAC), the learned Senior counsel would rely on the following decisions.

(1) In 2002(1) KCC R367 (Karnataka Bank limited vs. Rekha Rao and Ors. (MANU/KA/0849/2001), the learned Senior Counsel would draw the attention of this Court to paragraph Nos.10 and 11 of the decision rendered by the Division Bench of the Karnataka High Court which are extracted hereunder:

10. Though no limits are placed on the powers of the High Court under Article 226 (except territorial), the power should be exercised in accordance with well established principles. They are in this context, are as under:



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(a) A writ petition under Article 226 of the Constitution is maintainable, where a persons fundamental or legal right is infringed by (i) State or its instrumentalities; or (ii) a private person or private body, in exercise of a public duty [imposed either by Statute or contract or custom] or in the performance of a public function.

(b) An aggrieved cannot seek any remedy under Article 226 against a private person or private body, alleging infringement of a fundamental right or legal right, if (i) the private person or private body against whom the grievance is made, does not discharge any public duty or perform any public function; or (ii) the act complained of is by a private person or private body, not in the course of performance of a public duty or a public function (even though such a private person or private body may at other times or in other capacities may exercise public duties or perform public functions). In a nutshell, a writ petition can be maintained against a private individual or a private body, if the grievance is against the action of such private person or body, in exercise of a public duty or performance of a public function, and not otherwise.

11. A public duty is one in the discharge of which the public i.e., the community at large is interested, as affecting their legal rights and liabilities. Of course, public or community does not necessarily or always mean all the citizens of the Country or the State, but may also refer to a defined class of citizens. A duty will not be a public duty if it is to be performed to the benefit of a specified person or persons. On the other hand, a public function is a function traditionally reserved for the State. A private person is said to discharge a public function, if the private person performs a function that is so traditionally reserved for the State. Carrying on trade or business or profession or employing persons or doing acts in connection with or incidental to any trade or business or profession, is not performance of a public duty or a public function."

According to the learned senior counsel, the High Court has defined what is public duty and also observed that there are no limits on the powers to be exercised by the High Court under



Article 226 of the Constitution of India. Learned Senior Counsel would of course add that in that case, the Court held that there was no public duty or public function involved. Therefore, the Writ was found to be not maintainable.

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(2) In 2005(6) SCC 657 (Binny Ltd. vs. V.Sadasivam), learned Senior counsel would draw the attention of this Court to paragraph Nos. 9, 10 and 11, which are extracted hereunder.

9. The superior court's supervisory jurisdiction of judicial review is invoked by an aggrieved party in myriad cases. High Courts in India are empowered under Article 226 of the Constitution to exercise judicial review to correct administrative decisions and under this jurisdiction the High Court can issue to any person or authority, any direction or order or writs for enforcement of any of the rights conferred by Part III or for any other purpose. The jurisdiction conferred on the High Court under Article 226 is very wide. However, it is an accepted principle that this is a public law remedy and it is available against a body or person performing a public law function. Before considering the scope and ambit of public law remedy in the light of certain English decisions, it is worthwhile to remember the words of Subba Rao, J. expressed in relation to the powers conferred on the High Court under Article 226 of the Constitution in *Dwarkanath v. ITO* (SCR, Pp.540 G-541 A):

"This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Court to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution



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first place is confined to public duties and secondly is not granted where there are other adequate remedies. This difference is brought out by the relief granted in cases of ultra vires. If for example a minister or a licensing authority acts contrary to the principles of natural justice, certiorari and mandamus are standard remedies. But if a trade union disciplinary committee acts in the same way, these remedies are inapplicable: the rights of its members depend upon their contract of membership, and are to be protected by declaration and injunction, which accordingly are the remedies employed in such cases."

11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. In a book on Judicial Review of Administrative Action(5th Edn.) by de Smith, Woolf & Jowell in Chapter 3, para 0.24, it is stated thus:

"A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a



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

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

Learned Senior Counsel would submit that the Hon'ble Supreme Court in the above decision has held that the Writ of Mandamus would be issued for securing performance of public or a statutory duty and such writ could be issued even against private entity. Even in this case, the learned Senior Counsel, however would concede that the Hon'ble Supreme Court had ultimately found that the subject matter of Civil Appeal would not attract any public element and the dismissal of the writ petition on the ground of maintainability was eventually upheld.

(3) In MANU/SC/1351/2009 Civil Appeal Nos.4970 to 4971 of 2009 dated 31.07.2009 (Sardar Associates and Ors. Vs. Punjab and Sind Bank and Ors.), the learned Senior Counsel in extenso



relied on the submissions, discussions and observations in paragraph Nos.12, 15, 16, 36, 37, 40, 41 & 46, which are extracted hereunder:

12. Dr. Abhishek Manu Singhvi, learned senior counsel appearing on behalf of the appellants would contend that the scheme in relation to one time settlement having been issued by the Reserve Bank of India in exercise of its statutory power conferred upon it under Section 21 of the Banking Regulation Act, 1949 (for short "the 1949 Act"), the impugned judgment cannot be sustained.

The learned counsel in this behalf has furthermore drawn our attention to various correspondences exchanged by and between the parties to urge that the respondent - Bank entertained the said application asking for proposal from the appellants and, thus, they are estopped and precluded from contending that the Board of Directors of the respondent - Bank themselves had made a scheme which was required to be followed.

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15. The Parliament also enacted the 1949 Act to consolidate and amend the law relating to banking.

Section 5(1) of the 1949 Act defines "Reserve Bank" to mean the Reserve Bank of India constituted under Section 3 of the Reserve Bank of India Act, 1934.

By reason of various provisions of the 1949 Act, the Reserve Bank is empowered to control and supervise the functioning of the Scheduled Banks. The 1949 Act also provides for power of the Reserve Bank to control advances by banking companies in terms of Section 21 of the 1949 Act which reads as under:

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

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



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

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

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

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

(d) the maximum amount up to which, having regard to the considerations referred to in clause

(c), guarantees may be given by a banking company on behalf of any one company, firm, association of persons or individual, and

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

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

16. A bare perusal of the aforementioned provision 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



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Bank to issue directions inter alia in the interest of banking policy. Section 36 of the 1949 Act also provides for further powers and functions of the Reserve Bank of India; clause (d) of Sub-section (1) whereof reads as under:

"36. Further powers and functions of Reserve Bank - (1) The Reserve Bank may-

- | | | |
|-----|---------|-----|
| *** | (a) *** | *** |
| *** | (b) *** | *** |
| *** | (c) *** | *** |

(d) at any time, if it is satisfied that in the public interest or in the interest of banking policy or for preventing the affairs of the banking company being conducted in a manner detrimental to the interests of the banking company or its depositors it is necessary so to do, by order in writing and on such terms and conditions as may be specified therein-

(i) require the banking company to call a meeting of its directors for the purpose of considering any matter relating to or arising out of the affairs of the banking company; or require an officer of the banking company to discuss any such matter with an officer of the Reserve Bank;

(ii) depute one or more of its officers to which the proceedings at any meeting of the Board of directors of the banking company or of any committee or of any other body constituted by it; require the banking company to give an opportunity to the officers so deputed to be heard at such meetings and also require such officers to send a report of such proceedings to the Reserve Bank;

(iii) require the Board of directors of the banking company or any committee or any other body constituted by it to give in writing to any officer specified by the Reserve Bank in this behalf at his usual



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address all notices of, and other communications relating to, any meeting of the Board, committee or other body constituted by it;

(iv) appoint one or more of its officers to observe the manner in which the affairs of the banking company or of its offices or branches are being conducted and make a report thereon;

(v) require the banking company to make, within such time as may be specified in the order, such changes in the management as the Reserve Bank may consider necessary."

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36. 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 5-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



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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."

37. Yet again in *Corporation Bank v. D.S. Gowda and Another* [(1994) 5 SCC 213], this Court held:

"17...As pointed out earlier, under the Banking Regulation Act wide powers are conferred on the Reserve Bank to enable it to exercise effective control over all banks. Sections 21 and 35-A enable it to issue directives in public interest to regulate the charging of interest on loans or advances made from time to time..."

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40. 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.

41. The question pertaining to the present matter is regarding whether or not a circular issued by a statutory body for the governance and regulation of certain agreements confers a legal right upon the aggrieved party in case of non-compliance or complete and absolute deviation from the said guidelines by the body formulating such circulars. Alternately, can the aggrieved party, then, claim its right of judicial review under Article 32 or 226 to quash the said circular in case of discriminatory application of such rules/guidelines so mentioned in the circular.

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46. As regards the Reserve Bank of India guidelines, it was the direction of the Appellate Tribunal that the Respondent-Bank should settle the case of the appellants under the RBI guidelines through a One Time Settlement and should invite a proposal for settlement and recovery of the agreed amount.

The above judgment of the Hon'ble Supreme Court has been relied on in order to emphasise the legal position that the Reserve Bank of India guidelines are binding on all Financial Institutions. He would therefore add that once the RBI guidelines are held to be binding, the public duty is imposed upon the 4th respondent to follow the moratorium package as envisaged in RBI Circulars dated 27.03.2020 and 23.05.2020.

(4) In 2020 SCC Online Bombay 626 (Transcon Skycity Pvt.Ltd. And Others vs.ICICI Bank and Others), the learned Senior Counsel would draw the attention of this Court to paragraph Nos.3, 4, 5, 8, 9, 13, 37 & 38 which are extracted hereunder:

3. In summary, the Petitioners' case is this. The Petitioners had finance facilities from ICICI Bank. These were to be repaid in instalments. The manner of servicing of the debt was fixed by contractual agreement. There is no dispute that until December 2019 there was little or no significant default on the part of the Petitioners, or at least no default such as would or did trigger the declaration of the Petitioners' accounts with ICICI Bank as nonperforming assets or NPAs. In other words, if there were indeed any past defaults these seem to have been resolved at least until December 2019. The Petitioners agree that the amounts under the repayment schedule due on 15th January 2020 and again on 15th February 2020 were not paid. They accept that those two defaults did occur. The default amounts have not been paid until now. That, too, is undisputed. Now the consequences under the respective and applicable RBI circulars and notifications is that if payment is not made and the accounts are not regularised within 90 days of the date of default then the borrower's account gets classified as an NPA. Other consequences automatically follow. These include consequences to directors, associated companies, affiliates etc. The 90-day period in respect of 15th January 2020 default would take us to 15th April 2020. The 90-day period for the 15th February 2020 default would take us to 15th May 2020.

4. In the meantime, there has occurred this global coronavirus or Covid-19 pandemic. Many states, cities and countries have declared lockdowns for various durations and of varying degrees. In India itself there



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has been a national lockdown. This is presently in force. Whether or not it is to be extended, and if so for how long, is yet unknown. It is also not known whether the lockdown is going to be partially extended in some areas or across the nation as a whole.

5. In the meantime, mindful of these exigencies, the RBI has by various circulars and a press note, to which I will shortly make reference, said that there is to be a moratorium in regard to the repayments and classifications as NPAs. That directive from the RBI on the face of it applied to amounts due after the date of the lockdown. The RBI document itself would prima facie indicate that this moratorium operates with effect from, that is to say it starts from, 1st March 2020, and, as currently advised, goes on up to 31st May 2020.

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8. He also raises a question of maintainability of these Writ Petitions. I will first deal with the question of maintainability to the limited extent necessary today. I am only noting the rival submissions. I am not returning a final decision on this as yet. Mr Tulzapurkar submits that the decision of a Division Bench of this Court - one that is undoubtedly binding on me - and rendered on 5th March 2020 in the case of Chanda Deepak Kochhar v. ICICI Bank Ltd clearly states that a writ petition will not lie against a private bank such as ICICI Bank. The observations in paragraphs 12, 13, 22 and 24 of this decision are as follows:

12. The scope of Article 226 of the Constitution of India is wide. Writs and orders of diverse nature can be issued. The exercise of this power is not bound in technicalities. However same width is not to be implied as to whom the writs and directions can be issued under Article 226. Writs can be issued to the State; an authority; a statutory body; an instrumentality or agency of the State; a company financed and owned by the State; a private body run substantially on State funding; a private body discharging public duty or positive obligation of public nature; and a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function. A private company would normally not be amenable to the writ



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jurisdiction under Article 226 of the Constitution. However, there are legislations like the labour legislation or environmental legislation which mandate certain duties. A writ may lie for compliance such duties, for example, under the Industrial Disputes Act. A writ would not lie to enforce purely private law rights. Even if a body is performing a public duty and is amenable to writ jurisdiction, all its decisions would not be subject to judicial review. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. Before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such authority, is in the domain of public law as distinguished from private law. For a function to be of a public character, the function must be closely related to functions performed by the State in its sovereign capacity. A writ of mandamus or the remedy under Article 226 is a public law remedy and is not generally available as a remedy against private wrongs. Mandamus is limited to enforcement of public duty. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be statutory or otherwise, and the source of such power is immaterial, but there must be the public law element in such action.

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9. There is no doubt that I am indeed bound by this decision. The submission by Dr Saraf for the Petitioners is that Chanda Kochhar is entirely distinguishable on the facts of the case. That dispute was entirely contractual; a case of an employee, albeit at a very high position. What is being assailed here is not any action by the ICICI Bank on its own but a circular issued by the RBI, the 2nd Respondent, which is undoubtedly an instrumentality of the State within the meaning of Article 12 of the Constitution of India. That was never the case in Chanda Kochhar. That was a purely private contractual dispute. ICICI Bank itself is entirely bound by the directives, circulars,



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directions and guidelines issued periodically by the RBI. What the Petitioners, therefore, seek is not that the ICICI Bank should act in any particular manner that violates RBI directives or guidelines but, rather, an interpretation of those circulars and guidelines applicable to the moratorium period so as to bind ICICI Bank. What is being questioned here is a directive or set of directives issued by an instrumentality of the State - the RBI - and what the Petitioners seek is an interpretation of those directives and circulars to bring them into accord with their avowed objective. Indeed, there is no contractual dispute at all. The financing terms are undisputed. The default is undisputed. The consequence of the default running for 90-days is undisputed. But there intervenes, in globally extraordinary circumstances, directions issued by the RBI, and it is these directions, and their applicability and interpretation that the Petitioners have placed at the centre of these petitions. Dr Saraf's submission, as I understand it, is, therefore, that the reckoning of the moratorium period, the interpretation of the RBI circular and guidelines and its applicability to even pre-existing defaults but ones which have not already resulted in an NPA declaration are squarely matters of public law that are amenable to the jurisdiction of this Court.

...

...

13. As I said earlier, I do not intend to decide the question of maintainability at this ad-interim stage. I have taken up the matters because of the grave and extreme urgency so that there should not be by 15th April 2020, just a few days hence, an automatic rendering of the Petitioners' accounts as NPA with other attendant consequences. The question of maintainability is kept at large for an appropriate date.

In the above case, the Bombay High Court has held that the writ petition was maintainable against a Private Bank, particularly, in consideration of the moratorium benefits extended during the period of the present pandemic crisis. After elaborate discussion, the learned Judge of the Bombay High Court has held that the Mandamus could be issued to a Private Bank and would also direct the Private Bank to reckon the moratorium period for the purpose of readjustment of the repayment schedule. The learned Senior counsel would state that in similar circumstances, in this case also, such a direction could be issued to the 4th respondent and in that view of the matter, the writ petition cannot be stated to be not maintainable at all.



(5) In 2020 SCC Online Karnataka 835 (Velankani Information Systems Limited rep. by its Managing Director, Kiron D. Shan vs. Secretary, Ministry of Home Affairs, Government of India and Ors.), the learned Senior Counsel would draw the attention of this Court to paragraphs Nos.7.5, 7.6, 19, 19.1, 19.2, 19.3, 19.4.19.5 to 19.9, 20, 20.1, 20.2 & 20.19, which are extracted hereunder:

7.

7.5. It is further contended that RBI has issued a Policy and thereafter, it is for the Banks to implement it.

7.6. The RBI has also made it clear that the Banks would have to look at the spirit of the reliefs announced by the RBI in the wake of the economic fallout of the pandemic so that eligible borrowers should not have to worry about making debt payments during the lockdown period and the discretion on the part of the lending institutions has to be exercised in a proper and reasonable manner.

...
...

19.Sri. Basavaprabhu Patil, Learned Senior Counsel in reply, submitted that

19.1. This Court has the necessary jurisdiction to entertain a Writ Petition against the private Banks like Respondent Nos. 5 to 7 in connection thereto, he relies upon the decision of the Apex Court in the case of ANDI MUKTA SADGURU SHREE MUKTAJEE VANDAS SWAMI SUVARNA JAYANTI MAHOTSAV SMARAK TRUST v. V.R. RUDANI reported in (1989) 2 SCC 691 wherein at Para 22, it has been held as under:—

"22. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor De Smith states:"To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable



circumstances. Mandamus is a very wide remedy which must be easily available 'to reach injustice wherever it is found'. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

...
...

19.2. He has also relied on the decision of the Hon'ble Apex Court in the case of RAMESH AHLUWALIA v. STATE OF PUNJAB reported in (2012) 12 SCC 331, wherein at Paras 12 and 13, it has been held as under:

"12. We have considered the submissions made by the learned counsel for the parties. In our opinion, in view of the judgment rendered by this Court in Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust, there can be no doubt that even a purely private body, where the State has no control over its internal affairs, would be amenable to the jurisdiction of the High Court under Article 226 of the Constitution, for issuance of a writ of mandamus. Provided, of course, the private body is performing public functions which are normally expected to be performed by the State Authorities.

13. In the aforesaid case, this Court was also considering a situation where the services of a Lecturer had been terminated who was working in the college run by the Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust. In those circumstances, this Court has clearly observed as under (V.R. Rudani case. SCC pp.700-701. Paras 20 & 22):

"20. The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Article 225 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must



be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.

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

The aforesaid observations have been repeated and reiterated in numerous judgments of this Court including the judgment in Unni Krishnan and Zee Telefilms Ltd.(supra), brought to our notice by the learned counsel for the Appellant Mr. Parikh."

19.3. The RBI cannot take a hands-off approach, it is for the RBI to see to it that the Circular issued by the RBI is implemented in its true letter and spirit. The Union of India and State Governments cannot also wash off their hands since it is Union of India and the state governments who are responsible for the lockdown and therefore are responsible for the financial distress which has been caused to the Petitioner.

19.4. Neither the Union of India nor the RBI would take a hands-off approach and leave the Petitioner at the mercy of Respondent Nos. 5 who is acting as the infamous "Shylock" in the famous play "Merchant of Venice" authored by Sir William Shakespeare.

19.5. What is sought to be done by Respondent Nos. 5 and 6 at the cost of Respondent No. 7 is not only restricted to taking of a pound of flesh, but such taking of the flesh would kill the Petitioner inasmuch



as non-payment of dues to Respondent No. 7 would automatically result in the Petitioner's account being treated as an NPA.

19.6. The Circular issued by the RBI has to be implemented in its true letter and spirit. No technical defences or objections could be raised by the Banks which would come in the way of achieving the objectives of the Circular dated 27.03.2020 issued by the RBI inasmuch as the aim and objects of the Circular being to keep the economy and businesses running. The actions of Respondents 5 to 7 would have the effect of closing down the business of the Petitioner, which in today's economic condition would affect not only the Petitioner but also the economy as a whole.

19.7. The Policy is applicable even to the LRD loan and the loan amounts having been obtained by the Petitioner for the purposes of its business which is similar to that, as available under a term loan or a working capital loan.

19.8. As per the Board approved Policy produced by the Respondent No. 4, a moratorium is applicable to all retail loan customers who pay a fixed/structured EMI on monthly/bi-monthly/quarterly/half-yearly basis and on this basis, he contends that a structured loan like LRD is also covered under Guideline-1 to the Board approved Policy produced by the Respondent No. 5.

19.9. There being no dispute as regards the Petitioner's account is a standard account as on March 1st, 2020, all the due amounts having been paid thereof, he submits that the Petitioner became automatically eligible for availing a moratorium. Availing a moratorium is in the discretion of the Petitioner inasmuch as the Petitioner would continue to make payment of interest amounts even during the moratorium period. Only the payment of the principal amount is deferred for the moratorium period, the Petitioner is not seeking for any waiver of loan or reduction in the loan amount but only a deferment in payment schedule which would not in any manner adversely affect the Bankers like Respondent Nos. 5 to 7 and therefore, the contentions taken up by Respondent Nos. 5 and 6 ought, not to have come in the way of considering and approving the request of moratorium by the Petitioner.

.....

....



20.1. Whether a Writ of mandamus can be issued against a private bank to implement the Circular issued by the RBI dated 27.03.2020?

20.2. Is the Circular issued by the RBI dated 27.03.2020 mandatory, directory or discretionary?

....

....

21.19. Hence, a writ petition would be maintainable against the Respondents in the present facts and circumstances for the enforcement of the public duty under the Circular dated 27.03.2020.

11. According to the learned Senior counsel, the above decision of the High Court of Karnataka has held that a writ could be issued against a private Bank. Learned Judge, in fact, considered the package containing moratorium benefit issued by RBI during Covid 19 situation. By holding that the writ is maintainable, a direction was ultimately issued by the learned Judge directing the RBI to enforce the Recovery Package as contained in Circular dated 27.03.2020 and further quashed the recovery communications of the private Banks. The learned Judge also directed the private Banks to grant the benefit of moratorium to the borrowers therein.

12. Therefore, the learned Senior Counsel would submit that when the 4th respondent is admittedly, a financial institution under SARFAESI Act, having stepped into the shoes of initial lenders of 9 Nationalised Banks, has a public duty to follow RBI Circular and it cannot be gainsaid by the 4th respondent that the transaction is purely governed by Private Agreements on a private domain and therefore, no public element is involved and resist the writ petition on the ground of its maintainability. He would finally add that in an extraordinary situation like the present one, call for extraordinary, heightened remedy, in order to prevent miscarriage of justice and also to protect public interest, in the process.

13. Mr.P.H.Aravind Pandian, learned Senior Counsel appearing for the first respondent Company would submit that the writ petition is maintainable as the Courts have consistently held that writs can be issued against private entities also in certain circumstances. According to him, the first respondent handles more than 2000 ships every year and he would draw reference to the major customers of the Port are IL & FS, TANGEDCO, CPCL, TNPL, IFFCO, IPL, JSW, Ramco Cement, Chettinad Cement, India Cement, Dalmia Cement, Chemplast Sanmar etc.



14. According to him, more than 80 Million tonnes of Cargo has been handled by the Port annually comprising coal, iron ore or fertilizers, limestone, cement, clinker, wood pulp, slag, silica sand, sand, liquid cargoes such as crude oil, edible oil, agro products etc. The outcome of the services provided by the Port is in the nature of public service. He would also emphasize the fact that the Government of India has categorized that the service provided by Ports are 'essential services'. The first respondent currently has five operational berths with fully mechanized coal handling system and provides direct and indirect employment to thousands of persons in an around Karaikal and Nagapattinam region.

15. The learned Senior counsel, during the course of his arguments also submitted about the first respondent providing several welfare measures in discharge of its corporate social responsibilities and he also highlighted various facts relating to the financial stress during pandemic crisis and also the number of representations submitted by them to 4th respondent as well as RBI seeking clarification as to the extension of the moratorium package to the petitioner in the crisis period. In fact, learned senior counsel would particularly refer to the communication dated 07.06.2021 addressed to the 5th respondent by the 1st respondent seeking extension of loan term period citing force majeure pandemic crisis and also for long terms Restructuring of the loan. The learned Senior counsel would also refer to two decisions in support of his contention.

(i) 2008(2)ALT 611 (Ghanta Infrastructures Ltd. Vs. Asset Reconstruction Company (India) Ltd.) Learned counsel would rely on paragraph 50 of the said judgment, which reads as follows:

"50. On a careful analysis of the respective stands taken by the parties, the question to be decided is whether the action challenged in the Writ Petition is amenable to the writ jurisdiction of this Court for the purpose of judicial review or not. It is true that on the face, prima facie, the contentions advanced by the respondents on the aspect of maintainability appears to be attractive since it would fall under the realm of contractual field and even otherwise inasmuch as it is a lis concerned with such contract, the Writ Petition cannot be maintained. However, the question does not stop there. The 1st respondent-ARCIL, though it is discharging duties concerned with contractual transactions and commercial transactions, it cannot be forgotten that it is in a way is a creature of a statute or at any rate, definitely bound by the provisions of the Act and also further bound by the Reserve Bank of India directives. In the light of the same, it may not be laid down as a broad proposition that under no circumstances, the



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actions of such a party as the 1st respondent-ARCIL can be called in question before a writ Court. It is one thing to say that the Writ Petition itself is not maintainable and it is yet another thing to say that the power of judicial review not to be exercised inasmuch as a lis would fall within the realm of contractual field. This Court makes it clear that these are two different aspects altogether. When the governance of the statutory flavour on the operation of the actions and activities of the 1st respondent-ARCIL cannot be totally ruled out, then such actions to be in accordance with such provisions, guidelines or the rules and these infractions or violations, if any - may be just an irregularity or may be a grave illegality touching the very root of the transaction by virtue of which the action may be vitiated, such actions not to be arbitrary and to be rational and reasonable and not to be violative of Article 14 of the Constitution of India. At least, to this limited extent, a writ Court may examine the grounds of attack raised by the writ petitioner. On over-all appreciation of all the facts and circumstances, this Court is of the considered opinion that the Writ Petition cannot be thrown out at the threshold and cannot be dismissed in limine on the ground of non-maintainability."

According to the learned Senior counsel, the above succinct observation of the High Court of Andhra Pradesh would clear any legal misgiving as to the maintainability of the present writ petition. The 1st respondent carrying on essential service activity, a grave illegal action of the present nature albeit by the private company may certainly call for interference of this Court in the realm of public law remedy in appreciation of larger public interest involved in the transactions.

(ii) 2011 GHJ(1) 781 (Electroherm India Ltd. Vs. Asset Reconstruction Company (India) Ltd.. Learned Senior Counsel would rely on paragraphs 16, 17, 19 and 20, which are extracted hereunder.

"(16) We shall now deal with the second question as to whether the petition against ARCIL is maintainable or not. In short, whether ARCIL is a State within the meaning of Article 12 of the Constitution or an instrumentality of the State amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India.



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(17) In the case of State of Uttar Pradesh and Another v. Radhe Shyam Rai (2009) 5 SCC 577 while deciding the issue as to whether Uttar Pradesh Ganna Kishan Sansthan, a society registered under the Societies Registration Act is a State within the meaning of Article 12 of the Constitution, the Apex Court has observed in paragraphs 8, 9, 10, 11, 12, 13, 15 and 16 as under:

"8. Article 12 of the Constitution of India reads as under:- "12. Definition. In this part, unless the context otherwise requires, "the State includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India." Law in this behalf has developed a lot. With the changing societal conditions, a large number of bodies exercising public functions have been brought within the purview of the definition of "State. We need not dilate on the development of law in this regard in view of the decisions rendered by this Court beginning from Rajasthan State Electricity Board v. Mohan Lai [(1967) 3 SCR 377], Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722] and other decisions including a Seven - Judge Bench decision of this Court in Pradeep Kumar Biswas v. Indian Institute of Chemical Biology [(2002) 5 SCC 111].

9. We may also notice that P.K. Ramachandra Iyer and Others v. Union of India and Others [(1984) 2 SCC 141] wherein Indian Council for Agricultural Research (ICAR) was held to be a "State within the meaning of Article 12 of the Constitution of India, was distinguished in Chander Mohan Khanna v. National Council of Educational Research and Training. However, Chander Mohan Khanna (supra) was overruled in Pradeep Kumar Biswas (supra) to the extent it followed the decision in Sabhajit Tewary v. Union of India [(1975) 1 SCC 485].

10. In Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers Association and Another [(2002) 2 SCC 167] Mysore Paper Mills Ltd.



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was held to be a State within the meaning of Article 12 of the Constitution of India as it was substantially financed and controlled by the Government, managed by the Board of Directors nominated and removable at the instance of the Government and carrying on functions of public interest under its control.

11. In Pradeep Kumar Biswas (supra), the following tests for the purpose of determining the nature of activities which would make the body come within the definition of State have been laid down by a Seven-Judge Bench of this Court:- (i) Formation of the body. (ii) Objects and functions. (iii) Management and control. (iv) Financial aid, etc.

12. The dicta of Mathew, J. in Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi was quoted with approval in Pradeep Kumar Biswas (supra), which is in the following terms : "17. For identifying such an agency or instrumentality he propounded four indicia:

(1) 96..... A finding of the State financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as State action." (SCC p. 454, para 96).

(2) "97... Another factor which might be considered is whether the operation is an important public function. (SCC p. 454, para 97).

(3) "97... The combination of State aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a State agency. If a given function is of such public importance and so closely related to Governmental functions as to be classified as a Governmental agency, then even the presence or absence of State financial aid might be irrelevant in making a finding of State action. If the function does not fall within such a description, then mere addition of State money would not influence the conclusion." (SCC p. 454, para 97).

(4) "111.... The ultimate question which is relevant for our purpose is whether such a Corporation is an agency or instrumentality of the Government for



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carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the Corporation carrying on the business?" (SCC p. 454, para 111).

13. This Court referred to *Ajay Hasia* (supra) wherein the tests gathered from the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489] were stated in the following terms: "9.. (1) One thing is clear that if the entire share capital of the Corporation is held by Government, it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government. (SCC p. 507, para 14). (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the Corporation, it would afford some indication of the Corporation being impregnated with Governmental character. (SCC p. 508, para 15). (3) It may also be a relevant factor ... whether the Corporation enjoys monopoly status which is State conferred or State protected. (SCC p. 508, para 15). (4) Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality. (SCC p. 508, para 15). (5) If the functions of the Corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of Government. (SCC p. 509, para 16). (6) Specifically, if a Department of Government is transferred to a Corporation, it would be a strong factor supportive of this inference of the Corporation being an instrumentality or agency of Government." (SCC p. 510, para 18). 14. It was held in *Pradeep Kumar Biswas* (supra): "40. The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as established, the body is financially,



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functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State." 15. In *Virendra Kumar Srivastava v. UP. Rajya Karmachari Kalyan Nigam and Another*, this Court held the respondent therein to be a State within the meaning of Article 12 of the Constitution of India, applying the tests of administrative control, financial control and functional control. 16. The question as to whether the Board of Control for Cricket in India (BCCI) which is a private body but had a control over the sport of cricket in India is a State within the meaning of Article 12 of the Constitution of India came up for consideration before a Constitution Bench of this Court in *Zee Telefilms Ltd. and Another v. Union of India and Others* [(2005) 4 SCC 649] wherein the majority felt itself bound by the dicta laid down in *Pradeep Kumar Biswas (supra)* to opine that it was not a "State within the meaning of Article 12 of the Constitution of India. However, the minority view was as under: "70. Broadly, there are three different concepts which exist for determining the questions which fall within the expression "other authorities": i. The Corporations and the societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution where for the capital, infrastructure, initial investment and financial aid, etc. are provided by the State and it also exercises regulation and control thereover. ii. Bodies created for research and other developmental works which are otherwise Governmental functions but may or may not be a part of the sovereign function. iii. A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and controlling functions and activities which were otherwise the job of the



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Government. 71. There cannot be same standard or yardstick for judging different bodies for the purpose of ascertaining as to whether any of them fulfils the requirements of law therefor or not. 80. The concept that all public sector undertakings incorporated under the Companies Act or the Societies Registration Act or any other Act for answering the description of State must be financed by the Central Government and be under its deep and pervasive control has in the past three decades undergone a sea change. The thrust now is not upon the composition of the body but the duties and functions performed by it. The primary question which is required to be posed is whether the body in question exercises public function. 110. Tests evolved by the Courts have, thus, been expanded from time to time and applied having regard to the factual matrix obtaining in each case. Development in this branch of law as in others has always found differences. Development of law had never been an easy task and probably would never be." The majority despite holding that BCC1 is not a v State within the meaning of Article 12 of the Constitution of India

opined that a writ petition under Article 226 of the Constitution of India against it would be maintainable."

(18) We take notice of the fact that in the main petition there are no averments worth the name in this regard as to how ARCIL can be said to be a State within the meaning of Article 12 of the Constitution of India so as to make it amenable to the writ jurisdiction of this Court. It is only when the question was framed and the learned Counsel was called upon to answer that, by way of further affidavit dated 24th January 2011, the petitioner has tried to explain as to how the respondent - ARCIL is a State within the meaning of Article 12 of the Constitution of India. It appears that the petitioner has tried to gather some information about the respondent- Company from the website of the respondent-Company. It is submitted that the respondent is the first asset reconstruction Company set up in



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the country by leading banks in the Indian banking system. The official sponsors of the respondent Company were State Bank of India, ICICI Bank and IDBI Bank Limited. It is further averred that thereafter in the year 2004 Punjab National Bank joined by acquiring shareholding to the extent of 10%. It is submitted that majority of the shareholding are predominantly nationalised bank and private sector banks. It is submitted that the respondent Company is financially, functionally and administratively dominated by or under pervasive control of the public sector banks which are instrumentality of the State.

(19) We seriously called upon the learned Counsel for the petitioner to explain as to what is the material or evidence placed on record to substantiate the same that respondent - ARCIL is a State within the meaning of Article 12 of the Constitution of India so as to make it amenable to writ jurisdiction. Learned Counsel submitted that he has annexed some information regarding the Company from the website of the respondent Company. Except this, there is no other material or evidence to substantiate as regards whether respondent ARCIL is a State within the meaning of Article 12 of the Constitution of India. The law so far as subject of Article 12 is concerned has been reproduced in the preceding paragraphs as laid down by the Honourable Supreme Court from time to time in various matters, but even if the principles laid down by the Honourable Supreme Court are to be made applicable for determining this issue, we are unable to do it because of lack of evidence and pleadings in the present case. In our opinion, when a point which is ostensibly a point of law is required to be substantiated by fact, the party raising the point, if he is a writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition, the Court will not entertain the point. In this context, it would be expedient to rely upon a judgement of the Honourable Supreme



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Court in the case of Bharat Singh v. State of Haryana AIR 1988 SC 2181 where in paragraph 13 the Honourable Supreme Court has observed as under:

"In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter, affidavit, as the case may be, the Court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. So, the point that has been raised before us by the appellants is not entertainable."

(20) In that view of the matter, we are unable to give any definite finding as to whether the respondent - ARCIL is a State within the meaning of Article 12 of the Constitution of India or not. Even otherwise, this issue remains academic and would be decided in any other appropriate proceedings with the relevant material and evidence on record in this regard, but the fact that we have answered the first issue against the petitioner, the petition deserves to be rejected and the same is hereby rejected. In the facts and circumstances of the case, we also deem it fit and proper to impose a cost of Rs.25,000 upon the petitioner. We direct that the amount of cost of Rs.25,000 be paid to the Gujarat State Legal Services Authority within a period of 15 days from today. Petition stands rejected.

16. The learned Senior counsel would submit that the above decision would also highlight the legal position that the issuance of writ is per se is not a bar against private



entity. The learned Senior counsel would finally submit that being a Company which is benefited by the loan availed from the initial lenders and such loans being assigned to the fourth respondent Reconstruction Company, the 1st respondent would earnestly plead for continuance of its port operation without any coercive action being taken against the petitioner which may inevitably lead to paralysing the Port activities affecting the public interest at large

17. Per contra, Mr.Satish Parasaran, learned Senior counsel appearing on behalf of the contesting 4th respondent EARC would submit that the assignment of loans was made between July 2015 and September, 2016 in favour of the 4th respondent and thereafter, the default payments were rescheduled at the request of the petitioner by entering in a Master Reconstruction Agreement on 26.07.2018 (MRA). At that point of time itself, the discharge of debts by the petitioner was irregular, but in order to provide an opportunity to the petitioner for stabilising their business MRA was put in place. According to the learned Senior counsel, the dispute arising out of letter issued by the 4th respondent dated 30.04.2021 is entirely a private dispute governed by the contractual agreement dictated commercial consideration. While enforcing the contractual Clauses and seeking to recover the huge outstanding amounts from the petitioner, there is no public duty cast upon the lender nor any public interest is being undermined in the bargain. The simple and normal dispute between the borrower and the lender governed by the contractual terms and agreements on the private domain relationship is being unfortunately projected for collateral reasons as if the action taken by the 4th respondent amounted to affecting public interest and hence, the writ petition is maintainable.

18. The learned Senior counsel would submit that various contentions of the petitioner regarding the maintainability of the writ petition cannot be countenanced both in law and on facts. Firstly, the Reserve Bank of India's Circular is only a regulatory in nature and secondly, the Circular, even if it is to be followed mandatorily is not applicable to the present loan transactions governing the dispute. In this regard, the learned Senior counsel would refer to paragraph 2 of the Reserve Bank of India's clarification dated 25.06.2020 which reads as under.

Subject : Contact Us Alert - Clarification
sought by Karaikal Port Pvt.Ltd.

Dear Sir,

Please refer to your email dated March 29, 2020 seeking clarification on whether the loans obtained form ARCs are covered under the moratorium declared under the Bank's COVID-19 Regulatory Package



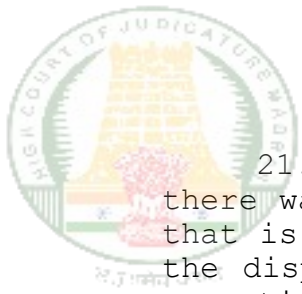
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2. In this connection, we wish to inform that since ARCs are permitted to acquire stressed assets in their own books and in terms of para 2(ii) of the Circular dated April 22, 2009, ARCs may deploy their funds for undertaking restructuring of acquired loan account with the sole purpose of realizing their dues. Therefore, ARCs step into the shoes of the lender in limited circumstances.

3. In terms of circular dated March 27, 2020, all lending institutions are permitted to grant moratorium to their eligible borrowers after framing a Board approved policy in this regard. Accordingly, ARCs may grant moratorium only where they stand as lenders in strict compliance with the instructions for lending institutions contained in the Bank's Covid-19 Regulatory Package.

19. According to the learned Senior counsel, only in the limited circumstances, in the event of deployment of their funds, the loans would be covered under the moratorium declared under Covid 19 Regulatory Package. As far as the 4th respondent Company is concerned, they have not deployed any funds at all and therefore, the principal contention of the maintainability of the writ petition on that premise would have no legal legs to stand on. Even otherwise, learned Senior counsel would submit that it is a discretion vested in the financial institutions to grant moratorium or not on the basis of the approved policies of the Board. According to the learned Senior counsel that the petitioner's loan account has been declared as NPA several years before the Covid-19 pandemic and with a view to help the petitioner to tide over those difficulties the loans were restructured in July 2018 (MRA) In such circumstances, the question of extension of the benefit of moratorium due to Covid 10 situation to the petitioner did not arise at all.

20. Even otherwise, factually the default in payments which necessitated the issuance of impugned notice to the petitioner occurred after October, 2020 consecutively. As a matter of fact, the default period fell outside the moratorium period contemplated in the RBI circular and therefore, the emphasis placed on the RBI Circulars as a ruse to maintain the writ petition is devoid of any merit. The present attempt by the petitioner to invoke the public law remedy where no public function or public character attached to the relationship nor any public duty is imposed on the 4th respondent to make it amenable to the writ jurisdiction of this Court, is intended to scuttle the legitimate action of the 4th respondent seeking to recover a huge outstanding debts of more than 1900 Crores in terms of the bilateral agreements.



21. According to the learned senior counsel Even assuming there was a failure to follow any guidelines issued by the RBI, that is a matter of adjudication before private law remedies as the disputes of this nature would involve enquiry into facts of competing claims and such exercise is certainly not possible before this Court under Article 226 of Constitution of India. The question whether the petitioner is entitled to the benefit of moratorium in terms of the circular of the RBI has to be gone into by letting in evidence as to the conduct of the borrowers towards the subsequent discharge of loans availed by them vis-a-vis the lender's rights to take recovery action in terms of the mutual agreement.

22. According to the learned Senior counsel, the petitioner was indeed given grace time as contemplated in the agreement and in terms of Clause 7 of the Original Concession Agreement dated 25.01.2006, the right has been exercised. Clause 7.3 reads as follows;

"7. Financing and Lenders' Rights

7.1....

7.2....

7.3. At any time during the Concession Period, the Lenders shall, in the event of a default by MCL under the Financing Documents and/or this Agreement and if such default is not cured within the cure period permitted under the Financing Documents and/or as the case may be, this Agreement, be entitled to appoint a Substitute Entity to take over the rights and obligations of MCL hereunder and GOP shall accept such appointment, provided that the Substitute Entity is eligible and meets all the requirements for grant of Clearances applied on a non-discriminatory basis. The Substitute Entity shall be entitled to exercise all rights of MCL and discharge all MCL's obligations hereunder. In the event of a default under the Financing Agreements and after the Lenders have commenced an enforcement action against MCL, GOP shall not terminate this Agreement."

23. The learned Senior counsel would submit that following the above agreement in terms of Master Reconstruction Agreement dated 26.07.2019, certain rights have been conferred upon the lenders under Clauses 17 and 18 and as per that the same, the right has been exercised and the notice was issued by the 4th respondent. He would particularly refer to Clauses 17 (17.1 to 17.2) & 18(1) (a to d) which read as follows;

"17. EVENTS OF DEFAULT

Each of the events or circumstances set out in this Clause 17 (Events of Default) is an Event of Default.

17.1. Non-Payment



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An Obligor does not pay on the due date any amount payable pursuant to a Restructuring Document, at the place at and in the currency in which it is expressed to be payable, unless such payment is made within 90 days of its original due date.

17.2. Other Obligations

An Obligor fails to comply with any material provision of the Restructuring Documents to which it is a party (other than those referred to in Clause 17.1 (Non-payment) unless such failure (Where capable of being remedied) is remedied or cured to the satisfaction of the Majority Restructuring Lenders within 60 dates of such failure having occurred.

....

18. RIGHTS UPON DEFAULT

18.1 Acceleration and enforcement of rights

On and at any time after the occurrence of an Event of Default, each Restructuring Lender (except as otherwise stated below) may:

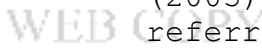
(a) with notice to the Borrower, declare that all or part of the Facilities (provided by that Restructuring Lender), together with accrued interest, and all other amounts accrued or outstanding under the Restructuring Documents be immediately due and payable;

(b) subject to approval of the Majority Restructuring Lenders, direct the enforcement of the Transaction Security with notice to the relevant Obligor which has created that Transaction Security (in accordance and if required under the relevant Security Document); and

(c) with notice to a Sponsor or a Personal Guarantor claim the Secured Obligations from the Sponsor or Personal Guarantor (as the case may be) pursuant to the relevant Restated Guarantee; and

(d) generally exercise all rights available to that Restructuring Lender under the Restructuring Documents and Applicable Law."

24. The 4th respondent Company acted in terms of the above agreements and exercised their right, and the exercise of the right has been agreed to by the petitioner. Therefore, he would submit that purely a private loan transaction is being masqueraded as having public element and the petitioner with a dishonest motive has invoked the writ jurisdiction of this Court for serving their own ends. The loan transactions between the petitioner and the 4th respondent company governed by commercial consideration but cleverly being brought within the realm of a public law remedy.



(1) Federal Bank Ltd., Vs. Sagar Thomas & Others reported in (2003) 10 SCC 733. The learned Senior counsel particularly referred to Paragraphs 26 to 29, 32 & 33 which are extracted hereunder;

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policies of the State and for such purposes, guidelines are provided by the Reserve Bank so that a proper fiscal discipline, to conduct its affairs in carrying on its business, is maintained. So as to ensure adherence to such fiscal discipline, if need be, at times even the management of the company can be taken over. Nonetheless, as observed earlier, these are all regulatory measures to keep a check and provide guideline and not a participatory dominance or control over the affairs of the company. For other companies in general carrying on other business activities may be manufacturing, other industries or any business, such checks are provided under the provisions of the Companies Act, as indicated earlier. There also, the main consideration is that the company itself may not sink because of its own mismanagement or the interest of the shareholders or people generally may not be jeopardized for that reason. Besides taking care of such interest as indicated above, there is no other interest of the State, to control the affairs and management of the private companies. The care is taken in regard to the industries covered under the Industries (Development and Regulation) Act, 1951 that their production which is important for the economy may not go down yet the business activity is carried on by such companies or corporations which only remains a private activity of the entrepreneurs/companies.

27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment say Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance of those provisions. For instance, if a private employer dispense with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and have issued the writ to the private bodies and the companies in that regard. But the



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difficulty in issuing a writ may arise where there may not be any non-compliance or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

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



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help the company to be out of the woods. In the times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general.

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

.....

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



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in public interest. It is now judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for acquiring authority.

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

(2) Radhakrishna Vs. Aditya Birla Finance Ltd., reported in (2020 SCC OnLine Orissa 189). The learned Senior counsel particularly referred to Paragraphs 9 to 11 which are extracted hereunder;

"9. In this context, it would be profitable to refer to the decision of the Supreme Court as rendered in the case of Federal Bank Ltd. Vs. Sagar Thomas, reported in AIR 2003 S.C. 4325. Though the said judgment is rendered in the context of a private company carrying on banking business, the ratio of the said decision can apply with equal force to non-banking financial company like opposite party No.1 which stands more or less on the same footing. There the Supreme Court has made it clear that a writ petition under Article 226 of the Constitution of India may be



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maintainable against (i) the State (Govt.); (ii) Authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature (viii) a person or a body under liability to discharge any function under any Statute, to compel it to perform such a statutory function. In such background, on the private banking company, the Supreme Court observed that the banking is a kind of profession and a commercial activity and the primary motive behind it is to earn returns and profits. It works like any other private company in the banking business having no monopoly status. These companies have been voluntarily established for their own purpose and interest but their activities are kept under check so that their activities may not go wayward and harm the economy in general. After discussing the provisions of the Reserve Bank of India Act and Banking Regulation Act, the Supreme Court held that the guidelines provided therein are to maintain proper fiscal discipline and if need arises, the management of the company can be taken over. Therefore, the above noted Acts as discussed earlier mainly contain regulatory provisions to keep a check on their functioning and provide guidelines and do not reflect participatory dominance or control over the affairs of such company. In such back ground, these private companies would normally not be amenable to the writ jurisdiction. But in certain circumstances, a writ may issue against such private bodies where these violate statutory provisions. When there is no violation of any statutory provisions, a writ may not be issued at all. It also made clear that there is nothing on the basis of which it can be said that carrying on the profession of banking as akin to carrying on governmental functions. Rather banking is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or commercial activity-may be banking or others no doubt have impact on the economy of the country in general, but such activities cannot be classified as one falling in the category of discharging of duties/functions of public nature. Merely because the Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability, it does not mean that private companies carrying on the business of banking, discharge any public function or



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public duty. Thus, ultimately, the Supreme Court held that the writ petition against Federal Bank is not maintainable.

10. Hence as indicated earlier on an analysis of different provision of the Reserve Bank of India Act, 1934, it is clear that the non-banking financial companies only indulge in ordinary business or commercial activities which cannot be described as akin to governmental function. Therefore, following the ratio of the above noted judgment, these activities cannot be classified as one falling under the category of discharging of public function or public duty. Thus the opposite party No.1 cannot be covered either under parameter (vii) or (viii) as delineated in Federal Bank case (supra). Admittedly other six parameters are not attracted to the present case. The above ratio has also been referred to in the decision of the Supreme Court in the case of Ramakrishna Mission and another Vs. Kago Kanya and others, reported in 2019 (5) SCALE 559.

11. Besides above, there exists no pleadings whatsoever to show that either the opposite party No.1 is a "State" within the meaning of Article 12 of the Constitution or is under an obligation to discharge any statutory function vis-à-vis the grievance raised. Rather Mr. Pal as indicated earlier has fairly submitted that there exists no statutory rule to take care of the grievance of the petitioner. In such background, this Court has no hesitation in coming to a conclusion that this writ petition as laid is not maintainable. Accordingly, the same stands dismissed. However, the petitioner is at liberty to seek appropriate remedy before the appropriate forum as permitted under law, if so advised, for redressal of its grievances."

(3) Rajpur Hydro Power Ltd., Vs. PTC India Financial Services Ltd., reported in (2017) SCC OnLine Delhi 8277. The learned Senior counsel referred to Paragraphs 19, 20, 21 & 29 which are extracted hereunder;

"19. In rejoinder, Mr. Malhotra submits that when the writ petition was preferred, action under Section 13(4) of the SARFAESI Act had not yet been initiated, and merely because the same was initiated subsequently, the issue of maintainability of the writ petition cannot be decided on the basis of such subsequent development.

20. We have heard learned counsels and given our thoughtful consideration to the matter. We have also gone through the impugned judgment.



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21. In Federal Bank (supra), the eight categories of bodies/ persons who may be found amenable to writ jurisdiction under Article 226 of the Constitution of India were stated as follows:

- i) the State (Government);
- ii) an authority;
- iii) a statutory body;
- iv) an instrumentality or agency of the State;
- v) a company which is financed and owned by the State;

- vi) a private body run substantially on State funding;

- vii) a private body discharging public duty or positive obligation of public nature; and

- viii) a person or a body under liability to discharge any function under any Statute, to compel it to perform such a statutory function.

.....

29. Reliance placed by Mr. Malhotra on Ajay Hasia and Ors. (supra) is out of place. Neither is it established that the entire share capital of the respondent is held by the government, nor is it established that the State exercises deep and pervasive control over the affairs of the respondent. There is nothing to show that the respondent is financially, functionally, or administratively dominated by or under the control of the government, much less to show that the said control is pervasive. At the highest, the control is merely regulatory - by the RBI, on account of nature of the business activities carried out by the respondent."

(4) Surinder Kumar Verma Vs. UOI & others reported in (2019) SCC OnLine Punjab & Haryana 1015. The learned Senior counsel referred to Paragraph No.5, which is extracted hereunder;

"5. The first hurdle to be crossed by the writ petitioners is regarding the maintainability of the writ petition. Admittedly, respondent No.3 is a nonbanking financial company as has been stated in para 2 of the writ petition. The business of such a company is regulated by the Reserve Bank of India and other statutory authorities. Itself, it is not a statutory authority and no funds have been infused in it by either the Central Government or the State Government. Its activities are purely commercial and no public duty is being performed by it. Thus, it is neither 'State'



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under Article 12 of the Constitution of India nor is it an 'Authority' within the meaning of Article 226 thereof. Respondent No.3 is only a financial institution as defined in Section 2(m) of the SARFAESI Act, 2002 and nothing more. Thus, the present writ petition is not maintainable. In this regard, we refer to with advantage to a Single Bench judgment dated 8.5.2017 passed by the Delhi High Court in WP(C) 8031 of 2016 M/s Rajpur Hydro Power Ltd. and others vs. M/s PTC India Financial Services Ltd.. After an exhaustive consideration of the law on the subject, it has been held that M/s PTC India Financial Services Ltd. (supra) is a public limited company and a non-banking financial company notified under the SARFAESI Act and not amenable to writ jurisdiction."

(5)Shanthini Vs. GM RBI & Others., reported in (2017) SCC OnLine Mad 19282. The learned Senior counsel referred to Paragraph No. 3, which is extracted hereunder;

"3.The prayer as it stands in the Writ Petition seeking a direction to the second respondent, who is admittedly a private Housing Finance Company, which is not maintainable to the writ jurisdiction of this Court. Further, no writ will lie against a private organization or establishment. In that view of the matter, the Writ Petition is not maintainable."

(6)Vaibhav Samuel Vs. UOI; reported in (2019) 4 RLW 3470. The learned Senior counsel referred to Paragraph No.8, which is extracted hereunder;

"8. In the case of Anandi Mukta Sadguru Shree Mukherjee Vandas Swami Suvarna Jayanti Mahotsava Smarak Trust and Ors. Vs. V.R. Rudani & Ors (supra), the Apex Court has held that any private organization which is performing public functions and is bound by the Rules framed by the State, would also be amenable to writ jurisdiction. In the case of M/s Zee Tele Flims Ltd. And another Vs. Union of India and ors. (supra), the Apex Court has also reiterated the same law. However, the question arises whether banking can be said to be a public function. Admittedly, banking is one of the commercial activities which may be performed by a statutory bank, nationalized bank, corporate bank formed under the Companies Act as well as by non-banking financial companies. Each of the above has a different constitution. They are governed by different provisions. While Banks formed under the statute are governed by the statute framed by the State and thus would fall within the definition of State and other authorities under Article 12, corporate Banks formed



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under the Companies Act or non-banking financial companies also formed under the Companies Act, would be governed by its Article of Association and they, therefore, have a separate Constitution altogether. Their share capital is also relevant as to who would be the controlling body. A private corporate bank may take decision which may not strictly be in conformity with the constitutional goals which a welfare State is required to achieve. There may be certain vested interests of each Bank. However, so far as the control of the Reserve Bank of India is concerned, the same is only limited to the extent that are guidelines controlling over all interests, method and manner of banking may be regulated. Merely because there is certain regulations from Reserve Bank of India, the concerned corporate Bank itself would not become an authority controlled by the Government or by the State and it will not have a statutory flavour."

26. In all the above decisions, both the Hon'ble Supreme Court and other High Courts have held that the writ petition is not maintainable against Private Company. According to the learned Senior counsel, in Federal Bank case, the Hon'ble Supreme Court has held that the regulation of the Reserve Bank of India are issued only in the interest of monetary stability and sound economy growth. Merely RBI lays down banking policies, in the interest of the banking system or monetary stability, it does not mean that private companies carrying on business or commercial activity of banking are discharging any public function or public duty.

27. The learned Senior counsel particularly emphasizes the fact that the Hon'ble Supreme Court in the said case had concluded that private company carrying on banking business cannot be termed as carrying on any statutory or public duty and therefore, not amenable to Writ Jurisdiction. The Orissa High Court has also held that a private finance company is not amenable to writ jurisdiction. The Delhi High Court has also held that NBFCs cannot be considered "State" or any other authority in terms of Article 12 and amenable to writ jurisdiction of the High Court. The Punjab and Haryana High Court has also held that the writ against NBFC is not maintainable and so is Rajasthan High Court. The above decisions have categorically held that Private Financial Institutions cannot be termed as an Authority amenable to the writ jurisdiction, merely because their banking activities are regulated by RBI guidelines.

28. The learned Senior Counsel would submit that the facts and the materials herein unequivocally demonstrate that the 4th respondent activities are private and commercial in nature and



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do not attract any public character or element and the transaction namely the agreement entered into by the 4th respondent with the petitioner herein is a private loan transaction governed by mutual agreement with liabilities, obligations and rights and any dispute touching upon such obligations, rights and liabilities do not come within the purview of the writ jurisdiction of this Court. The learned Senior counsel would finally submit that not a shred of public interest is involved nor any public duty is cast on the 4th respondent, in the circumstances of the case and therefore, invoking the writ jurisdiction of this Court is ex facie misconceived and the writ petition is liable to be rejected.

29. Mr.AR.L.Sundaresan, learned Senior Counsel, as a matter of reply would submit that the arguments advanced on behalf of the 4th respondent that the Circular would not apply as the 4th respondent has not deployed any funds in the 1st respondent Company, would amount to misreading of the clarification issued by the Reserve Bank of India. He would submit that the clarification does not say that the Company should deploy funds for the purpose of extension of the moratorium benefit.

30. Learned Senior counsel would further add that the Circular is to be interpreted in the larger interest of the economy of the region and the consequent impact on the public interest at large. He would finally submit that for enforcement of the Circular dated 27.03.2020, the remedy under Article 226 is available and there cannot be any doubt on that aspect, as the Courts have held that writ would lie against private entities for enforcement of Reserve Bank of India Circulars. Therefore, he would reiterate that the writ is maintainable in the facts and circumstances of the case as pleaded and demonstrated.

31. Heard, Mr.AR.L.Sundaresan,, learned Senior Counsel for the petitioner, P.H.Aravindh Pandian, learned Senior Counsel for the 1st respondent, Mr.V.Kumaran, learned Additional Government Pleader the 2nd respondent and Mr.Satish Parasaran, learned Senior Counsel appearing for the 4th respondent.

32. Learned Senior Counsels/counsel have addressed their detailed arguments with supportive pleadings/materials and citations advancing their respective positions in regard to the maintainability of the writ petition. The issue of maintainability of the writ petition would have to be confined in this case with reference to the relationship of the parties and the dispute arising thereunder and whether such dispute calls for a public remedial action or it must be relegated to the private law remedial recourse.



33. What is challenged in the writ petition is a communication dated 30.04.2021 issued by the 4th respondent, a private Company against the petitioner which is a private Company invoking certain clauses in terms of restructuring agreement of loan dated 26.07.2018 (MRA) between the contesting parties. As far as the maintainability of the writ against a private person or private legal entity is concerned, the legal position is no more res integra. There are numerous judgments of the Hon'ble Supreme Court and various High Courts holding that the issuance of writ cannot be denied merely because it is sought to be issued against a private person or private entity. Therefore, this Court does not wish to open up any fresh vista on the rudimentary understanding of the progressive expansion of public law jurisdiction in matters where the Court finds interplay of private interest and public duty. It is axiomatic that writ would lie against private person or private entity in certain circumstances scripted in various decisions of the Hon'ble Supreme Court and High Courts from time to time.

34. In the above circumstances, the 4th respondent's amenability to the writ jurisdiction of this Court being a private Company is beyond the pale of any legal controversy on a conceptional understanding of the settled legal position. This Court is not called upon to decide the amenability per se of the 4th respondent to the writ jurisdiction. The consideration of this Court is from the perspective of the nature of the dispute qua private parties. Therefore, the judicial endeavour is appreciation of the relationship of the parties, their mutual rights and obligations within the private and commercial frame work and in that relationship collaterally or concomitantly any public duty is imposed or public interest is involved to bring the dispute arising from such relationship within the mischief of writ jurisdiction of this Court or not?

35. On behalf of the petitioner, it was elaborately and vehemently argued by the learned Senior Counsel Mr.A.R.L.Sundaresan, that the writ is maintainable and his principal contentions are that the 4th respondent which stepped into the shoes of consortium of initial lenders namely 9 nationalised banks has failed to implement and comply with the Reserve Bank of India, 5th respondent herein, circulars before issuing the impugned communication dated 30.04.2021. According to the learned Senior counsel, the 4th respondent is under legal obligation and has a public duty to comply with the Reserve Bank of India circulars issued particularly, during the Covid-19 situation permitting the Banking Institutions to grant moratorium to all the loans availed by the individuals, companies, institutions etc. When there is a duty cast upon the banks and the financial institutions which admittedly included the 4th respondent, failure to follow the circulars amounted to



abdicating its public duty enjoined upon them and in that view of the matter, a command ought to be issued by this Court by way of a Writ for their compliance.

36. As a corollary to the above, it was also submitted that in a loan sanction of the present nature involving hundreds of crores, there is always public interest involved. Before any adverse or coercive action to be initiated, forcing a borrower to come to terms with such action, the Finance Institution is required to take into consideration not only mutual rights and obligations expressed under the agreement but importantly the impact of such action on the economy of the region and the consequent fall out of such as public interest. In this case such consideration is completely absent as it could be seen from the materials and therefore, this Court could step in and issue appropriate command to the 4th respondent for its compliance with public duty.

37. Learned Senior Counsel has also laid emphasis that the entire relationship is centered on the 1st respondent Port operations and any coercive action by the 4th respondent would spell far reaching consequences affecting the interest of the general public in very many ways. When the activities of the Port Trust are sought to be crippled by throttling the petitioner, who is the principal promoter of the 1st respondent, the same would have palpable impact on the Port activities leading to disruption of supply of essential goods and other materials meant for public consumption and use. Apart from that, the learned Senior Counsel also emphasised that the assignment of loans in favour of the 4th respondent was from 9 nationalised Banks. Therefore, the 4th respondent has assumed the character of a public institution and therefore, any action of its, could be brought within the realm of judicial review under Article 226 of the Constitution of India. The maintainability of the writ petition, thus, is premised on the above principal submissions, which need to be addressed either to uphold or to discountenance the same.

38. According to the 4th respondent, the benefit of moratorium as envisaged in Reserve Bank of India Circulars dated 27.03.2020 and 23.05.2020 are not applicable to the loan agreement for more than one reason. In fact, this position was emphasised by the learned Senior Counsel Mr. Satish Parasaran that in terms of a clarification issued by the Reserve Bank of India that a moratorium may be granted only when the Financial Institution is involved in the deployment of funds for undertaking restructuring of acquired loan account. In the present case, the 4th respondent did not deploy funds at all as the Master Restructuring Agreement (MRA) dated 26.07.2018 entered into only with the original assigned debt.



39. In the circumstances, the benefit of moratorium as envisaged in Reserve Bank of India Circulars is not available to the petitioner at all is the case of the 4th respondent. It was further argued that the grant of benefit of the moratorium in this case would not arise even otherwise, as the defaults in discharge of the loan occurred several years before the pandemic crisis which led to the Master Restructuring Agreement in 2018 and thereafter also, there had been defaults and even presently, the defaults had occasioned after August, 2020 i.e., beyond the permissible period of moratorium as envisaged in the Circulars issued by the Reserve Bank of India. The defaults of the petitioner initially cover the month of October & November, 2020 and the dues pertaining to those months had been settled only in March and April 2021 and from December 2020, the repayments are outstanding as on date. Therefore, the question of extending the benefit of moratorium to the petitioner did not arise at all.

40. Apart from the above submission, it was also vehemently argued that grant of extension of benefit of moratorium is the discretion extended to the lending institution and there is no compulsion or mandate for grant of moratorium across the board. In any event, it was submitted that mere non-compliance of the regulatory circulars cannot provide a relief to the petitioner in a public law remedy.

41. The bedrock of the triangular relationship, as between the 1st petitioner and 1st respondent on one hand and the 4th respondent on the other is indisputably a private and commercial consideration with no shred of public element involved in discharge of their mutual obligation and rights among them. The facts narrated supra, would unequivocally demonstrate that the petitioner has been extended loans to the tune of several hundred crores by various Nationalised Banks since 2006 when first concessional agreement was signed on 25.01.2006 and the subsequent agreement on 06.11.2006 between the 1st respondent and the initial lenders, namely consortium of nationalised/private Institutions and in terms of which, the repayments were scheduled and the functioning of the 1st respondent had been governed and monitored by the lending institutions i.e., by initial lenders through the 3rd respondent Indian bank as their Agent. Over a period of time, it appeared that the discharge of loans had become irregular and the consortium of banks ultimately, declared the loans extended to the petitioner herein being the principal promoter of the 1st respondent as Non-Performing Asset (NPA) and subsequently, the loans were negotiated and it was finally assigned vide assignment deeds entered into by 9 Banks with the 4th respondent between July 2015 and September, 2016.



42. Thereafter, there was a Master Restructuring Agreement (MRA) entered into on 26.07.2018 and the payments had been rescheduled at the instance of the petitioner and the 1st respondent. After July 2018, the schedule of payments being governed by MRA between the petitioner and the 4th respondent, the petitioner appears to have committed defaults on several occasions and therefore, the 4th respondent was constrained to issue the impugned communication invoking clause 18 of the Restructuring Agreement dated 26.07.2018 calling upon the petitioner to forthwith pay the entire outstanding to the tune of Rs.1995,95,17,808/- within 7 days, failing which, the agreement shall stand revoked.

43. In a contractual relationship purely governed by commercial consideration, enforcing the terms of contract/agreement by one party as against the other could be subjected to judicial scrutiny under writ jurisdiction of this Court is a knotty question and the answers are not be found on any definite legal principles or defined contours of factual circumstances. Today, the tentacles of judicial review in public law domain are extended to private domain as well. As a consequence of the march of law the judicial review is directed against the action, decision making process and not concerned with identity of the body as such. In the back drop of this understanding what is to be seen and found is that the impugned action herein of the 4th respondent could impel the Court to outreach or to observe self imposed restraint as part of constitutional behaviour is a matter of deconstruction of the facts as it presented.

44. The impugned communication has been issued by the 4th respondent in violation of the circulars issued by the Reserve Bank of India is what pleaded and argued on behalf of the petitioner. In this regard, this Court has to see whether the moratorium benefit as contemplated in the circulars is to be extended across the Board without any discretion accorded to the respective Banking Institutions vis-a-vis their customers or not? The circular dated 27.03.2020 which appeared to be the fulcrum of the petitioner's submission for maintaining the writ petition begins with the preamble that certain regulatory measures had been initiated and announced by the Reserve Bank of India for schedule of payment due to Covid-19 crisis. The circular envisages granting of moratorium that all payments due between March, 2020 and May, 2020 would be shifted by three months extending the period of the payment to August, 2020. The circular, while delineating the policy permitted the financial institutions to consider grant of the benefit of moratorium. The circular also envisages exemption from the benefit in regard to the loan accounts being declared as NPA. In the said



circumstances, admittedly individual financial institutions are given a latitude and discretion to take a call in regard to the extension of the moratorium benefit to its borrowers. In which event, the entitlement of the petitioner as to the benefit falls squarely within the contractual frame work as between the 4th respondent and the petitioner herein. When the relationship is founded on the Commercial and the contractual terms and understanding, the extension of the benefit of the moratorium by one party in favour of the other party, is dependant on various facts to be taken into consideration within the private and contractual precincts of such relationship.

45. In the above circumstances, when the very applicability of the Reserve Bank of India circular is being seriously questioned by the 4th respondent, the interpretation of the contents of the circular dated 27.03.2020 and the subsequent clarification issued by the RBI to the petitioner call for adjudication of factual controversies as between the 4th respondent and the petitioner. In that process, this Court inevitably would have to traverse and delve into the areas of factual conflicts entirely governed by contractual relationship in order to render findings as to what is deployment of funds, the definition of lenders as stated in the clarification letter dated 16.06.2020, the terms of MRA dated 26.07.2018 etc. If this Court were to investigate into the disputed areas of understanding between the private parties, it would certainly amount to pitch forking a public law jurisdiction into a private dispute arising under a valid contractual relationship between the parties.

46. The above apart, even assuming the Circulars of RBI need to be implemented across the spectrum, regardless of the nature of defaults by the defaulting party, merely because the 4th respondent has not complied with the circulars, can that failure alone provide a door way to the petitioner to invoke the extraordinary jurisdiction of this Court in the realm of public law remedy? The answer may have to be in the negative. It cannot be in dispute that the RBI circular is regulatory in nature for ensuring monetary stability across the country. It is again not in dispute that every financial institution is bound to follow the directives of the Reserve Bank of India issued from time to time for maintaining fiscal discipline. But that fact alone may not give rise to a right to have a recourse to public law remedy in the dispute unreservedly emanated from the commercial relationship of the parties. In this regard, the observations of the Hon'ble Supreme Court of India in Federal Bank case reported in 2003(10) SCC 733 (Federal Bank Ltd. vs. sagar Thomas and Ors.) in paragraphs 26 to 33 which have been extracted supra have clearly enunciated the legal position that merely because some regulatory measures are issued by the RBI, a



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private company carrying on banking business cannot be termed as discharging public function or public duty. The succinct observation of the Hon'ble Supreme Court is again extracted hereunder as a pointer to the maintainability issue.

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

47. In line with the above ruling, as far as the present case on hand is concerned, merely because circulars were issued during the pandemic crisis by the Reserve Bank of India it cannot change or transform the core character of the relationship of the parties and assume the coloration of public interest.

48. As stated above, the very applicability of the circulars in question itself is in doubt as far as the petitioner loan account is concerned and even assuming for a moment it is applicable that the circular would by itself can be pleaded as a shield against the action taken by the 4th respondent and consequently, project the dispute before a public law platform? If the arguments advanced on behalf of the petitioner in this regard are to be accepted, any loan transaction running to hundreds of crores between the parties can be brought within the realm of public law remedy seeking judicial review of the action taken by the private companies exercising its rights under the private agreement on the ground that there are instructions by the RBI and Government of India regulating the financial relationship of the parties. The ominous effect of such expansive outreach would only lead to serving feigned public interest and eventually end up serving private interests in the bargain.

49. In order to apply the legal principles evolved over the years that writ Courts could issue "command" against private person or private entities, if this Court finds any public character attached to the transaction/relationship, concomitantly, existence of public function or public duty is imposed under the relationship. In the case on hand is



concerned, this Court does not find any public character attached to the relationship of the parties. The transaction between them is plainly commercial without a tinge or shade of public function involved. This Court also does not apparently see any public duty imposed on the 4th respondent that is referable in the context of complying with certain provisions contained in the enactments like Industrial Disputes Act, Minimum Wages Act, the Factories Act or the Statutes relating to Pollution etc., or even certain duties which have been imposed by common law, custom, or even contract stretching the requirement in terms of the observation of the Supreme Court of India as under:

"22. Here again, we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract". [Ed. : S.A. de Smith, Judicial Review of Administrative Action (4th Edn., Stevens & Sons Ltd., London 1980) at p. 540.] We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice wherever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellant on the maintainability of the writ petition.'

The above observation was made by the Hon'ble Supreme Court in case of Ramesh Ahluwalia v. State of Punjab (2012(12) SCC 331).

50. Thus public duty becomes enforceable only when there is legal compulsion for its adherence. First of all, in this case, there is no compulsion imposed on the 4th respondent to extend the benefit of moratorium, regardless of the nature of the default and the nature of agreement between the parties. In the absence of any compulsion/ obligation or legal mandate to follow a particular course of action, then the right exercised by the 4th respondent within the four corners of the commercial agreements and the dispute arising thereof would certainly not come within the broad context of public law recourse.

51. It was argued on behalf of the 1st respondent Port that the activities of the Port substantially touch upon the public interest. It was submitted that more than 2000 vessels and 80



million tonnes of cargo are being handled by the 1st respondent Port every year. The cargo comprising coal, iron-ore, fertilizer, limestone, cement, crude oil, agro products, wheat, sugar etc. Major customers of the Port are TANGEDCO, India Cement, Ramco Cement, Dalmia Cement, Chemplast Sanmar etc. Any disruption of its activities by the adverse action of the 4th respondent would only lead to short supply of essential goods and ultimately, would only undermine the public interest. Further, it was also pleaded that the 1st respondent provided employment to thousands of employees directly or indirectly and the continuance of payments of salaries and other related obligations would also get affected as a consequence of the present action of the 4th respondent.

52. The submission regarding that the economy would be affected in the region, as the petitioner being a promoter of the Karaikal Port Trust, the 1st respondent herein and by reason of the impugned action, if the Ports activities are to be crippled, the shipments carrying essential assignment meant for public would be affected appears to be made out of desperation. The argument may appear to be attractive on a first blush on a precipitous understanding but if it is carefully examined, it could be seen that it is a furtive attempt by the petitioner to hide behind the 1st respondent to lend legitimacy for approaching this Court seeking judicial review of a private action. No doubt, Port activities are essential services to keep the public interest afloat, but the 1st respondent is again a private company. Its activities may touch upon public interest, nevertheless, the petitioner cannot be allowed to craftily project the port activities for the purpose of hitching on the public interest bandwagon.

53. This Court is unable to countenance the above arguments for the purpose of holding the writ petition maintainable. In fact, it has been submitted on behalf of the 4th respondent that there was no action initiated against the 1st respondent towards crippling of its operations. This Court, even otherwise, is of the view that if any action taken where the loan amounts involved to the tune of several hundreds of crores, there will always be a collateral issues like the present one but that does not mean that the petitioner herein can plead public interest and seek to wriggle out of the contractual imperatives binding upon them. This Court would certainly not countenance such arguments even at the instance of the 1st respondent as it is an attempt by the petitioner to stealthily subserve their private interest behind the facade of public interest citing port activities.



54. In fact, in the affidavit filed in support of the writ petition and also during the course of the oral submission, it was highlighted as to the bonafides of the petitioner in discharge of loan obligation promptly from the commencement of the agreements from 2006 and various loan transactions and the assignments of loans in favour of the 4th respondent, the various payments made and the restructuring of loan amount (MRA) etc. The consideration of these facts and its adjudication cannot be undertaken by this Court in a writ jurisdiction. On a wafer thin legal basis, contending RBI circulars being not followed, the writ petition is sought to be maintained. This Court is of the view that such slender premise is not good enough to maintain the writ petition in the circumstances of the case.

55. On behalf of the petitioner, decisions have been cited in extenso and the relevant paragraphs have also been extracted supra. As regards the first 2 decisions viz., 2002(1) KCC R367 (Karnataka Bank limited vs. Rekha Rao and Ors. (MANU/KA/0849/2001) and 2005(6) SCC 657 (Binny Ltd. vs. V.Sadasivam) are concerned, as stated in the preamble portion of this order, this Court has no difficulty in accepting the settled legal position that writ can be issued against private person or private entity. In Karnataka High Court decision, it was finally held that the writ petition was not maintainable against the private Bank in consideration of the facts of that case. As regards the Hon'ble Supreme Court's decision reported in 2005(6) SCC 657 (Binny Ltd. vs. V.Sadasivan) is concerned, the Hon'ble Supreme Court, even in this case, has held that a body or person performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. While observing as above, the Court cautioned that contractual duties cannot be enforced by way of Mandamus. Even in case of contractual matters in respect of public body, principles of judicial review have limited application as in para 10 of the judgment stated below:

The courts always retained the discretion to withhold the remedy where it would not be in the interest of justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. In the Administrative Law (Ninth Edition) by Sir William



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Wade and Christopher Forsyth, (Oxford University Press) at page 621, the following opinion is expressed:

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

56. In the above decision, the Hon'ble Supreme Court ultimately held that the remedy open for the appellant therein is to seek remedy other than judicial review in the realm of public law.

57. One other decision relied on is MANU/SC/1351/2009 (Sadar Associates and Ors. Vs. Punjab and Sind Bank and Ors.). It was the case that went from Debt Recovery Tribunal. While dealing with RBI guidelines, the Hon'ble Supreme Court referred to its Constitution Bench's decision reported in 2002(1) SCC 367 (Central Bank of India s. Ravindra and Ors.) and extracted its observation as under:

"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



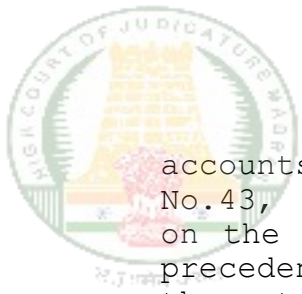
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and prejudice as also to secure the proper management of any banking company generally. The Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit 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."

In the above observation, it could be seen that transactions which are not squarely governed by Circulars of the RBI that Circulars to be treated as standards to judge the action taken by the private Banks is opposed to any public policy In the light of the observation and the ruling, the petitioner cannot compel this Court to issue a command, namely Mandamus and more so, Writ of Certiorari.

58. The other decision relied on by the petitioner namely, the decision of Bombay High Court reported in 2020 SCC Online Bom 626 (Transcon Iconica Pvt.Ltd. and Ors vs. ICICI bank and Ors. The facts in that case are almost identical as the borrower has approached the High Court of Bombay by invoking the writ jurisdiction on the ground that the respondent private Bank therein did not follow the circular issued by the Reserve Bank of India dated 27.03.2020 during Covid-19 crisis. The writ petition was entertained and directions were passed.

59. This Court has gone through the judgment but ultimately found that the case was decided on the basis of expediency by the learned Judge and eventhough, he left the principal issue of maintainability of the writ petition in such matters for future adjudication. In fact in paragraph No.13 of the order, the learned Judge has stated that "I do not intend to decide the question of maintainability at this ad-interim stage. I have taken up the matters because of the grave and extreme urgency so that there should not be by 15th April 2020, just a few days hence, an urgency automatic rendering of the petitioners'



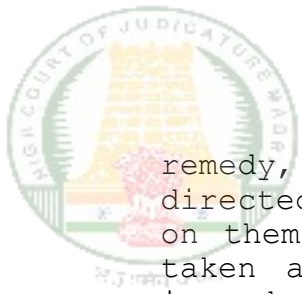
accounts as NPA and other attendant consequences". In paragraph No.43, the learned Judge finally held that was a case ordered on the basis of concession and it should not be treated as any precedent. This decision is also not of any significant use for the petitioner to advance their case on maintainability.

60. As far as the last decision is concerned, viz., 2020 SCC Online Kar 835 (Velankani Information Systems Limited rep. By its Managing Director Kiron D.Shah v. Secretary, Ministry of Home Affairs, Govt. of India) , it is also a case almost identical in nature decided during pandemic time on 08.07.2020. What was challenged in that writ petition was also action initiated by a private bank and the challenge principally was on the ground that the bank did not follow the Reserve Bank of India circular. The learned Judge has extensively dealt with the case and finally allowed the case of the petitioner therein by following a different set of judgments of the Hon'ble Supreme Court overlooking the law laid down by the Hon'ble Supreme Court in Federal Bank case (2003 (10) SCC 733). However, this Court finds that the learned Judge has delved pervasively into the factual disputes and held that the petitioner therein was entitled to the moratorium protection and in that context, RBI was directed to enforce the recovery package as contained in the Circular dated 27.03.2020 and consequently, the action initiated by the private lending institution came to be set aside.

61. With due respect to the learned Judge, this Court is unable to follow the judgment which has been entirely rendered on the factual matrix of that case. The two decisions relied on by the learned Senior Counsel for the first respondent have been rendered on the factual context of the respective transaction. In fact, in the 2nd decision of the Gujarat High Court, it was ultimately held that no definite facts were placed before the Court to hold that the private company therein is not discharging public functions.

62. Coming back to this case, the very entitlement of the benefit of moratorium is being questioned seriously and this Court is also prima facie of the view that there appears to be substantial force in the submission made on behalf of the 4th respondent in this regard. Therefore, the applicability of Reserve Bank of India circular itself being an unsure case of the petitioner, the question of maintaining the writ petition on that plank would have to necessarily fail.

63. On the other side of the legal spectrum, the judgments relied on by the learned Senior Counsel for the 4th respondent which have been extracted supra would on all fours cover the challenge to the maintainability of the writ petition. This Court in the course of the judicial discourse found that the decisions against the private entities rendered in the realm of public law



remedy, are pertaining to the issue of writ of mandamus, thus, directed the entities to perform a particular public duty imposed on them under a statute or otherwise. But the present case has taken a quantum leap of seeking a Writ of Certiorari to be issued for quashing of the communication of the 4th respondent dated 30.04.2021 in terms of the exercise of right by the lender against the borrower. The prayer further seeks a command from this Court to regulate the contractual relationship between the petitioner and the 4th respondent converting the Constitutional Court to act as a facilitator in the private loan transaction between the parties.

64. A letter by a contracting party to another contracting party invoking the terms of agreement, if it is to be subjected to the writ jurisdiction for its quashment, the power of writ would be needlessly stretched, resulting in protecting one private interest against the other. Such certiorari remedy would certainly not be made available to a private party under the specious plea of involvement of public interest. The already stretched boundaries of writ jurisdiction for advancing the bonafide constitutional goals cannot be further stretched to bring all private disputes within the fold of judicial review.

65. The examination of the issue of maintainability of the writ petition ought to be from the stand point of whose action under challenge and whose interest, it seeks to unsettle and in the process of any collateral effect of the impugned action cannot be the basis or reason to hold that the writ is maintainable. If this Court were to accept the above arguments, the same principle would have to be applied to all large loan transactions involving crores of rupees, as any adverse action initiated by the private lender, there would always be challenges galore from the defaulters in the realm of public law remedies. If the doors of public law remedy are to open to such defaulters, the public law remedy would become handy for the large borrowers to approach this Court for judicial review of action taken by the lenders in the realm of private and commercial relationship. Such contrived route to be adopted by the defaulters for serving their own commercial ends would certainly not be in public interest. Therefore, the plea of public interest in a private loan transaction is only a mask to conceal for petitioners' interest with a view to obstruct the enforcement of contractual obligation.

66. In exercise of writ jurisdiction, this Court would certainly not get involved in the commercial disputes entirely arising from the private relationship driven by commercial consideration and issue any command as that would amount to injudicious intrusion and invasive transgression into the defined areas of conflict governed by mutual rights, liabilities and obligations. If the doors of public law are to be thrown open for matters like the present one, it would only lead to opening the



pandora's box and all the private disputes would find a back door entry and have recourse to writ jurisdiction as a easier option for serving private ends. Such scenario would eventually lead to dilution of the essence of the writ jurisdiction namely, serving public interest.

67. For all the above reasons, this Court finds that the writ petition is not maintainable and hence, the same is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

vsi/mrm
To

1. The Chief Financial Officer
Karaikal Port Private Limited
Having its registered office at Khezhavanjoor Village,
T.R.Pattinam, Karaikal, Puducherry - 609 602.
2. The Secretary,
Government of Puducherry,
Fort Department,
Chief Secretariat,
Puducherry - 605 001
3. The Assistant General Manager,
Indian Bank,
Harbour Branch, New No.66(Old No.31),
Rajaji Salai, Chennai 600 001.
4. The Manager,
Reserve Bank of India,
Fort Glacis, No.16, Rajaji Salai,
Chennai - 1.

+1 CC to Mr. Akil Bhansali, Advocate, Sr 30901.
+1 CC to M/s. Fox Mandal & Associates, Sr 30741.
+1 CC to Mr. Anant Merathia, Advocate, Sr 30664.

Pre-delivery order made in
W.P.No.12381 of 2021

GPL(CO)
LS(26/07/2021)