

**IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH**

(30 connected cases)

Reserved on : 12.07.2023.
Date of Decision : 06.10.2023.

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REGIONAL DIRECTOR RBI AND ORS

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CWP-37495-2019, CWP-538-2020, COCP-1114-2020,
CWP-2949-2020, CWP-2989-2020, CWP-6849-2020,
COCP-1116-2020, CWP-7599-2020, CWP-17282-2020,
CWP-12705-2021, CWP-24842-2021, CWP-1978-2023
CWP-11392-2023 and CWP-12108-2023.

Ms. Satinder Kaur, Advocate, for the petitioner
in CWP-1671-2020, CWP-4874-2022, CWP-13356-2023 and
CWP-13279-2023.

Mr. H.S. Jalal, Advocate
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Mr. Bhavesh Aggarwal, Advocate
for the petitioner in CWP-24931-2019.

Mr. Rishu Mahajan, Advocate
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Mr. Sukhvir Gill, Advocate for
Ms. Nisha Rana, Advocate
for the petitioner in CWP-14934-2022.

Mr. Dilpreet Singh, Advocate
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Ms. Sartik Gupta, Advocate
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COCP-1116-2020.

Mr. Gagandeep Singh, Advocate
for the petitioner in CWP-12411-2023.
Mr. Daljeet Singh Virk, Advocate
for the petitioner in CWP-24672-2022 & CWP-24699-2022.

Mr. Jaswinder Singh Rana, Advocate for
Mr. Deepak Arora, Advocate
for the petitioner in CWP-3590-2021.

Mr. Aditya Sharda, Advocate
for the petitioners in CWP-13102-2023.

Mr. H.R. Bhardwaj, Advocate
for the petitioner in CWP-33031-2019 and
CWP-396-2021.

Mr. P.K.S. Phoolka, Advocate, for the petitioner
in CWP-4465-2022.

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Mr. Tushar Madaan, Advocate
for the petitioners in CWP-9146-2023 and
CWP-11170-2023.

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CWP-37495-2019, CWP-2949-2020, CWP-2989-2020
CWP-6849-2020, CWP-17282-2020, CWP-24931-2019
and CWP-33031-2019.

Ms. Lavanya Paul, DAG, Punjab
for respondent-State in CWP-396-2021, CWP-3590-2021,
CWP-12705-2021, CWP-4874-2022, CWP-24672-2022, CWP-
24699-2022, CWP-9352-2022 ,
CWP-9146-2023 and CWP-4465-2022.
Mr. Pankaj Mulwani, DAG, Haryana.

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in CWP-4874-2022.

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for respondents No.4 & 5 in CWP-24699-2022 and
for respondents No.3 and 4 in CWP-11392-2023.
Mr. Nakul Sharma, Advocate
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Mr. Shailender Kashyap, Advocate
for respondent in CWP-22613-2020.

Mr. D.S. Sidhu, Advocate for
Mr. Alok Jain, Advocate
for respondents No. 2 to 4 in CWP-13356-2023
and for respondents No.2 & 3 in CWP-13279-2023.

Mr. Harsh Chopra, Advocate
for respondents No.6 & 7 in CWP-17282-2020;
for respondents No.7 & 8 in CWP-6849-2020 and
for respondents No.1 and 2 in COCP-1116-2020.
for respondents No.7 & 8 in CWP-2989-2020.

Mr. Manish, Advocate
for respondents No.4 & 5 in CWP-12705-2021 &
for respondents No.7 & 8 in CWP-4465-2022.

Mr. G.S. Sandhu, Advocate
for respondent No.8 in CWP-24931-2019.

Mr. Sandeep Suri, Advocate and
Mr. Mohit Suri, Advocate for Tata Motors
in CWP-24842-2021, CWP-9146-2023.

Mr. Rohit Sud, Advocate
for respondents No.7 & 8 in CWP-538-2020 and
for respondents No.1 to 4 in COCP-1114 of 2020.

Ms. Sharmila Sharma, Senior Panel Counsel
for respondent No.1-Union of India in CWP-13102-2023.

Mr. Jaivir S. Chandail, Addl. Standing Counsel with
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Mr. Rajiv Vij, Addl. P.P. U.T. Chandigarh
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for respondents No.5 & 6 in CWP-33031-2019,
for respondents No.7 & 8 in CWP-7599-2020,
for respondents No.3 and 4 in CWP-396-2021,
for respondents No. 1 and 2 in CWP-5205-2022,
for respondents No. 3 & 4 in CWP-7706-2022,
for respondents No.4 & 5 in CWP-24672-2022 and
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CWP-29220-2019, CWP-37495-2019,
for respondents No. 7 & 8 in CWP-2949-2020
for respondents No. 3 & 4 in CWP-3590-2021,
for respondents No.1 & 2 in CWP-24285-2022,
for respondent No.4 in CWP-1978-2023,
for respondent No.7 in CWP-11170-2023 and
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CWP-12411-2023.

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Mr. Gaurav Sharma, Advocate, for respondent No.2
in CWP-1671-2020.

VINOD S. BHARDWAJ, J.

The present batch of 30 writ petitions raising a common question of law are being decided by a single judgment.

The question which arises for consideration before this Court is as regards the scope and maintainability of writ petition in the matters of re-possession of the vehicles financed by the Private Finance Companies/Private Banks.

For the facility of reference facts are being referred from **CWP No.7599 of 2020** titled as ‘**Gursharan Singh Vs. State of Punjab and others**’.

FACTS

The petitioner who is a transporter by profession had purchased a vehicle bearing Registration No.PB-23 T 4785 after obtaining finance from respondent No.7 i.e. HDB Financial Services (hereinafter referred to as the ‘Finance Company’) for a sum of Rs.19,25,000/-. The amount was to be repaid in 47 monthly installments of Rs.50,000/- each which were to commence w.e.f. 04.03.2017 and payable till 04.02.2021. It is averred that 35 installments amounting to a total of Rs.17,50,000/- were paid and that 12 installments were due. An additional amount of Rs.4 lakhs was financed for fabrication of the body of the vehicle for which 47 equated monthly installments of Rs.10,420x30=3,12,600/- were to be paid and 30 installments against the same were paid. Despite the installments being paid regularly, the vehicle in question was recovered by the recovery agents of respondents No.7 and 8-Finance Company on 07.03.2020 while it was on a commercial engagement carrying cargo.

Pursuant to the above said recovery, the petitioner approached the respondents and contended that he had been regularly paying the installments and as against the total financed amount of Rs.23,25,000/-, an amount of Rs.20,63,100/- already stands paid and the outstanding amount was a meager sum of Rs.2,61,900/-. A request was thus made for release of the vehicle which was however, declined.

The nationwide lockdown was however imposed w.e.f. 22.03.2020 due to which the petitioner could not pursue his remedies to seek return of his vehicle although he continued to make calls to the local branch, however, the Finance Company insisted on re-sale of the vehicle for recovery of its outstanding amount. A representation was thereafter made by the petitioner to the police Authorities against the respondent Finance Company on 18.05.2020 but no steps for redressal of the grievance of the petitioner were taken.

Reliance was also placed on Section 45 L of the Reserve Bank of India Act, 1934 which empowers the Reserve Bank of India to frame guidelines for Non-Banking Finance Companies/Institutions (NBFCs). The relevant Section is extracted as under:-

“45L. Power of Bank to call for information from financial institutions and to give directions.—

(1) If the Bank is satisfied for the purpose of enabling it to regulate the credit system of the country to its advantage it is necessary so to do, it may—

(a) require financial institutions either generally or any group of financial institutions or financial institution in particular,

to furnish to the Bank in such form, at such intervals and within such time, such statements, information or particulars relating to the business of such financial institutions or institution, as may be specified by the Bank by general or special order.

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

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

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

It is averred that the respondent Finance Company is registered as a Non-Banking Finance Company with the Reserve Bank of India and is thus ground by the said provision.

Further, in exercise of the powers conferred under Section 45 L of the Reserve Bank of India Act, 1934, a Notification bearing Circular No.RBI/2006-07/138 DNBS (PD) CC No.80/3.10.042/2005-2006 dated 28.09.2006 was issued by the Reserve Bank of India mandating the Finance Companies to formulate Fair Practice Code to lay down procedure/practices for dealing with business transactions. The relevant extract of disbursement of loans including changes in terms and conditions is reproduced hereinbelow as under:-

iii) Disbursement of loans including changes in terms and conditions

(a) The NBFCS should give notice to the borrower of any change in the terms and conditions including disbursement schedule, interest rates, service charges, prepayment charges etc. NBFCS should also ensure that changes in interest rates and charges are effected only prospectively. A suitable condition in this regard should be incorporated in the loan agreement.

(b) Decision to recall / accelerate payment or performance under the agreement should be in consonance with the loan agreement.

(c) NBFCS should release all securities on repayment of all dues or on realisation of the outstanding amount of loan subject to any legitimate right or lien for any other claim NBFCS may have against borrower. If such right of set off is to be exercised, the borrower shall be given notice about the same with full particulars about the remaining claims and the conditions under which NBFCS are entitled to retain the securities till the relevant claim is settled/paid.

(iv) General

(a) NBFCs should refrain from interference in the affairs of the borrower except for the purposes provided in the terms and conditions of the loan agreement (unless new information, not earlier disclosed by the borrower, has come to the notice of the lender).

(b) In case of receipt of request from the borrower for transfer of borrowal account, the consent or otherwise i.e. objection of the NBFC, if any, should be conveyed within 21 days from the date of receipt of request. Such transfer shall be as per transparent contractual terms in consonance with law.

(c) In the matter of recovery of loans, the NBFCs should not resort to undue harassment viz. persistently bothering the borrowers at odd hours, use of muscle power for recovery of loans, etc.

(v) The Board of Directors of NBFCs should also lay down the appropriate grievance redressal mechanism within the organization to resolve disputes arising in this regard. Such a mechanism should ensure that all disputes arising out of the decisions of lending institutions' functionaries are heard and disposed of at least at the next higher level. The Board of Directors should also provide for periodical review of the compliance of the Fair Practices Code and the functioning of the grievances redressal mechanism at various levels of management. A consolidated report of such reviews may be submitted to the Board at regular intervals, as may be prescribed by it.

(Emphasis supplied)

It is further averred that the mandatory guidelines of Fair Practices Code were required to be adhered to, however, the respondent Finance Companies' were not following the same. The grievance redressal mechanism is not effective and is usually pro-bank.

It is also averred that the respondent Finance Company also framed its Fair Practices Code wherein it is specifically prescribed that the Company would not resort to undue harassment for recovery of loans and the employees should act as per the Code of Conduct. The relevant part of the Fair Practices Code of the respondent Finance Company is extracted as under:-

“Recovery of Loans

The Company would not resort to undue harassment of recovery of loans. The employees of the company who contact customers for collections / recoveries will act as per the code of the conduct of the company.”

Further, the said Code also provided detailed procedure for taking repossession of the security. The same is as under:-

“Repossession of Security

The Company has a built in re-possession clause in the contract/loan agreement with the borrower. The Loan agreement shall cover the following points:

- *notice period before taking possession;*
- *circumstances under which the notice period can be waived;*
- *the procedure for taking possession of the security;*

- *a provision regarding final chance to be given to the borrower for repayment of loan before the sale / auction of the security;*
- *the procedure for giving repossession to the borrower*
- *the procedure for giving repossession to the borrower and the procedure for sale / auction of the security.”*

It is alleged that notwithstanding the aforesaid Fair Practices Code and requirements/procedures required to be followed before taking re-possession of the security, the recovery agents of the respondent finance Company have been violating the same and have deployed muscle power to take forcible possession of the security i.e. the vehicle in question instead of ensuring meticulous compliance of the practices and procedure incorporated in the above Code. A complaint dated 18.05.2020 was submitted by the petitioner highlighting the said breach, however, no action was taken thereupon. Reference was also made to the guidelines laid down by the Hon'ble Supreme Court as well as of this Court in a catena of judgments which shall be referred to in the later part of the judgment.

REPLY/WRITTEN STATEMENT

Written statement on behalf of respondents No.7 and 8-Finance Company had been filed by way of an affidavit of the Legal Officer. While taking objection against the maintainability of the writ petition, it was averred that the petitioner has not disclosed the complete and true facts in an attempt to mislead this Court. The procedure provided for recovery and repossession of security has been duly followed. The filing of the present writ petition is an abuse of the process of law

intending to defeat the contractual rights of the Finance Company by invoking sympathy despite being in default.

While acknowledging that loan agreement No.2095949 dated 31.12.2016 was executed between the parties, it is submitted that the total agreement value for the commercial vehicle was Rs.25,50,000/- which included the principal amount of Rs.19,25,000/- plus the financial charges to the tune of Rs.6,25,000/- to be paid in 51 monthly installments of Rs.50,000/- each. The loan agreement for financing for the fabrication of the body was Rs.5,31,420/- (which included principal amount of Rs.4,00,000/- and interest amount to the tune of Rs.1,31,420/-) to be paid in 51 equated monthly installments of Rs.10,420/-. Hence, the total amount required to be paid was Rs.30,81,420/-. It is averred that the petitioner was a chronic defaulter and 29 cheques issued by him in the loan account for purchase of the vehicle and 19 cheques issued towards the loan account of body fabrication were dishonoured. Hence, the Finance company issued two separate loan recall notices dated 14.10.2019 by terminating the loan agreements. It was categorically specified in the above said loan recall notices that as on 14.10.2019, an amount of Rs.9,46,891/- was due in Loan Agreement No.2095949 while an amount of Rs.2,00,062/- was outstanding in loan agreement No.2141514 (body fabrication). The petitioner was called upon to deposit the said amount and that in the event of failure on the part of the petitioner to do so, the Company would be at liberty to exercise its right to seek recovery of the financed vehicle as per Clause 14 (IV) of the Loan Agreement. Despite receipt of the said notice, no payment was made. As by 7th March, 2020, the petitioner was required to pay an

amount of Rs.4,30,504/- against the outstanding overdue installments along with late payment penalty and despite reminders, the petitioner did not pay any heed and continued to default. Having been left with no other alternative, the Finance company intimated the concerned Police Station Kansbahal, District Sundergarh, Odisha, before the vehicle was repossessed peacefully after a period of more than 05 months of the loan recall and in accordance with above clause of the loan agreement extracted hereinbelow:-

“14. Process of Repossession, Release, Sale of the Asset

(iv) In the event the Borrower(s) fails and/or neglects and/or refuses to make payment of the entire 'outstanding' as communicated or rectify and/or remedy the default as stated in the aforesaid notice within a period of 7 days from receipt thereof HDBFS shall be entitled to take repossession of the said Asset(s)/Vehicle(s) forthwith from wheresoever the same may be situated and for this purpose enter into any premises of the Borrower(s) or at such other places where the said asset(s)/vehicle(s) may be lying and to remove or take possession of the Asset(s)/vehicle(s) without being liable responsible to any person for trespass or otherwise, or take resource to any of the other rights of HDBFS as mentioned in this agreement without being required to give any further or other notice/intimation/communication of any nature whatsoever and thereafter to sell and/or cause to be sold or otherwise dispose of all or any part of the said Asset(s)/Vehicle(s) or any fittings thereof in such manner as described more fully and particularly in Clause 14.2 hereto or exercise its other rights as mentioned in this Agreement.”

It has been further averred that after obtaining peaceful possession of the financed vehicle, the Finance Company issued a pre sale notice dated 11.03.2020 to the petitioner in terms of clause 14 (vi) of the Loan Agreement pointing out the outstanding loan amount in loan account No.2095949 was Rs.9,21,317/- while in loan account No.2141514 was Rs.2,06,106/- and that the same may be deposited on or before 26.03.2020 failing which the financed possessed vehicle would be auctioned without any further notice. The petitioner chose not to respond to the same or to make good the deposit, whereupon the valuation of the said vehicle was got assessed through Adroit Inspection Services Pvt. Ltd. which reported the value of the vehicle to be Rs.13,50,000/-.

As the petitioner did not approach the Finance Company to clear the outstanding dues, the vehicle in question was put for auction in which the best price offered was Rs.10,75,000/-. The total outstanding loan amount however was Rs.11,27,423/-. The petitioner did not file any objection about the price or that he had a buyer for a better price. The sale was hence confirmed in favour of one Roshan Lal Garg son of Sh. Bal Mukand, resident of Bhagta Bhai Ka, Tehsil Rampura Phul, District Bathinda, Punjab on 26.05.2020.

The finance company has also referred to the RBI Master Circular No.RBI/2015-16/16 DNBR (PD) CC No.054/03.10.119/2015-16 dated 01.07.2015, issued to all Non-Banking Finance Companies and Residuary Non-Banking Companies on Fair Practices Code where the clarification has been issued and the same is extracted as under:-

*“(x) Clarification regarding repossession of vehicles financed
by NBFCs:-*

NBFCs must have a built in re-possession clause in the contract/loan agreement with the borrower which must be legally enforceable. To ensure transparency, the terms and conditions of the contract/loan agreement should also contain provisions regarding: (a) notice period before taking possession; (b) circumstances under which the notice period can be waived; (c) the procedure for taking possession of the security; (d) a provision regarding final chance to be given to the borrower for repayment of loan before the sale / auction of the property; (e) the procedure for giving repossession to the borrower; and (f) the procedure for sale / auction of the property. A copy of such terms and conditions must be made available to the borrower in terms of circular wherein it was stated that NBFCs may invariably furnish a copy of the loan agreement along with a copy each of all enclosures quoted in the loan agreement to all the borrowers at the time of sanction / disbursement of loans, which may form a key component of such contracts/loan agreements.”

(emphasis supplied)

The respondent Finance Company claimed that it complied with the aforesaid requirements of the Fair Practices Code and repossessed the vehicle as per law. Ample opportunities were granted to the petitioner to repay the outstanding amount or to clear the outstanding loan, however, no steps were taken by the petitioner. The loan agreement giving all the aforesaid information and clauses was always in possession of the petitioner. He was thus aware of his obligation to clear the outstanding amount on receipt of the notice and within the period prescribed therein. A second opportunity in pre-sale notice was also offered to the petitioner to

clear the dues, settle the accounts and take possession of the vehicle. However, without benefitting his obligations, the petitioner submitted representation to the police Authorities in May 2020 which is an abuse of the process of law by a defaulter. Reference was also made to certain judicial pronouncements, however, the same would be referred in the later part of the judgment.

Separate written statement had been filed on behalf of respondents No.4 to 6 wherein it is submitted that the petitioner never moved any application to the Senior Superintendent of Police, Khanna, on 18.05.2020 and that an application was moved on 02.06.2020 which was marked to DSP (Crime), Khanna and thereafter to the DSP, Khanna. Two notices (parwana) bearing No.639 dated 11.06.2020 and No.239 dated 12.06.2020 had been sent to the petitioner to join investigation, however, he failed to join the investigation on both the occasions whereas the statement of Tejinder Singh Chartered Accountant of the respondent was recorded on 15.06.2020 wherein it was informed that vehicle was impounded by the petitioner on 07.03.2020 through Punia Repo Agency at Kansabhal, District Sardoolgarh, Orissa and that the repossession as well as impounding was outside the territorial jurisdiction of the State of Punjab. It was further averred that the allegations leveled by the petitioner about the vehicle having been forcibly recovered at gun point at night on 07.03.2020 were prima facie found to be false. No attempt was made by the petitioner to inform on the control room or to seek any police assistance immediately on occurrence of the event. There was no contemporaneous evidence as would be indicative of a natural reaction to

support the claim made by the petitioner. The application invariably was an afterthought.

REPLICATION

Replication to the written statement filed by the respondents No.7 and 8/Finance company was filed by the petitioner wherein the averments raised in the writ petition were reiterated and the action of the respondent to liquidate the asset for a sum of Rs.10,75,000/- despite valuation at Rs.13,50,000/- was stated to be in an undue haste. An attempt was made to re-justify the claim about the outstanding dues and the interim order whereby the notice of motion was issued. Reference was made to certain judgments to support maintainability of the writ petition against the non-Banking Finance Companies. It was also averred that the vehicle recovery would not be justified in terms of Clause 14 and receipt of the notices was denied.

No replication to the written statement filed by the official respondents No.4 to 6 was, however, filed. There was also no denial of the averments made by the finance company that recovery of the vehicle took place in Orissa.

ARGUMENTS BY THE PETITIONERS

Learned counsel appearing for the petitioner(s) have vehemently argued that recovery of the vehicle through deployment of force module of recovery agents was illegal more-so when substantial amount had already been paid by the petitioner. It was further argued that the non-banking finance companies, being licencees' under the Reserve Bank of India Act, 1934, are amenable to supervisory control of the

Reserve Bank of India and that the guidelines issued by the Reserve Bank of India are binding on these Private finance companies. Non-compliance of the guidelines framed by the Reserve Bank of India would entail consequences against the finance companies and would vitiate the action taken by them. Various guidelines/directions have been issued by the Hon'ble Supreme Court of India as well as different High Courts from time to time for re-possession of vehicle and that such guidelines have been flouted. Besides, as the borrowers in the present case happens to be residing within the territorial jurisdiction of this Court and the finance had also been obtained through the branch offices situated within the territorial jurisdiction, hence, the respondents would be amenable to challenge raised against their action before this Court even though re-possession may be outside the territorial jurisdiction. Relevant judgments relied upon by the petitioner(s) to substantiate their arguments are extracted as under:-

Citicorp. Maruti Finance Ltd. Vs. S. Vijayalaxmi, reported as 2012 (1) SCC 1 (I.D. # 274701).

*“ 21. Since during the pendency of the Special Leave Petitions before this Court, the Appellant had complied with the orders of the District Forum and the National Commission had already set aside the punitive damages imposed by the State Commission, the reliefs prayed for on behalf of the Appellant had been rendered ineffective and the submissions were, therefore, channelled towards the question of whether the fora below were right in holding that the vehicles had been illegally and/or wrongfully recovered by use of force from the loanees. The aforesaid question has since been settled by several decisions of this Court and in particular in the decision rendered in **ICICI Bank Ltd. Vs. Prakash Kaur***

(supra). It is, not, therefore, necessary for us to go into the said question all over again and we reiterate the earlier view taken that even in case of mortgaged goods subject to Hire-Purchase Agreements, the recovery process has to be in accordance with law and the recovery process referred to in the Agreements also contemplates such recovery to be effected in due process of law and not by use of force. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by the Reserve Bank of India as well as the Appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by this Court, such an action cannot but be struck down.”

Manager, ICICI Bank Ltd. Vs. Prakash Kaur, reported as 2007 (2) SCC 711.

“15. Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognized by law to take possession of vehicles in cases where the borrower may have committed default in payment of the installments instead of taking resort to strong arm tactics.”

Reliance was also placed on the judgment of **ICICI Bank Vs. Shanti Devi Sharma and others, 2008 (7) SCC 532**, as well as Division Bench judgment of this Court in **CWP No.2196 of 2021 titled as Amarjit**

Kaur Vs. The Governor Reserve Bank of India and others, decided on 10.03.2022, to contend that the repossession by hiring goons is impermissible and that the Finance companies have to take recourse to the procedure recognized by law to take possession of the vehicles in cases where the borrower may have committed default in payment of installments, rather than strong arm-tactics. A default by the hire purchaser, who although is not the owner, but is in possession would not entitle the finance company to take forcible possession of the vehicle.

Reliance was also made to the judgment of this Court in the matter of **Gaurav Mago, Manager, Kotak Mahindra Prime Limited Vs. State of Punjab and others, passed in L.P.A. No.1304 of 2010 decided on 20.07.2011** as well as in the case of **Sukhwinder Singh Vs. State of Punjab and others bearing CWP No.1180 of 2010 decided on 14.07.2010.**

Reference was also made to the judgment of the Division Bench of Hon'ble Allahabad High Court in the matter of **Sri Ram Umrao Vs. Managing Director Indusland Bank Ltd. and others, reported as 2012 (41) RCR (Civil) 77;** the Division Bench judgment of Hon'ble Delhi High Court in the matter of **Dr. Amitabh Varma Vs. The Commissioner of Police and others, reported as 2003 (1) RCR (Criminal) 651** as well as in the matter of **Muthoot Leasing and Finance Ltd. Vs. M/s Vasudeva Publicity Service and another, reported as 2003 (4) RCR (Criminal) 259.** The relevant extract of the directions given by the Hon'ble Delhi High Court are reproduced as under:-

*“6. The trial court placed reliance on a Division Bench judgment of this Court in **Dr. Amitabh Varma v. The Commissioner of Police and Others, 2003(1) RCR***

*(Criminal) 651 (Delhi): 2003(1) Apex Decisions (Delhi) 329
wherein this Court gave the following guidelines:*

(1) The finance companies must inform the hirers regarding the details of instalments due and payable by a written communication.

(2) Even before repossession another written notice must be sent to the hirers and only thereafter the vehicles be repossessed.

(3) Finance companies are restrained from stopping the running vehicles on the roads and forcibly pulling out the driver and take possession of the vehicle against all provisions of law.”

While addressing on the issue of maintainability of a writ petition against the Finance Company, a reference was made to the judgment in the matter of **M/s A-One Mega Mart Pvt. Limited and others Vs. HDFC Bank and another, bearing CWP No.2250 of 2010, decided on 14.09.2012.** The relevant extract of the same reads thus:-

“28. From the above, it is concluded that ordinarily no writ would lie against a private Bank. However, where the Bank is a Scheduled Bank under Reserve Bank of India Act, 1934 and is governed by the provisions of Banking Regulation Act, 1949, it shall be amenable to writ jurisdiction of this Court where the Scheduled Bank takes recourse to the provisions of SARFAESI Act.”

Reliance was also placed on the judgment dated 19.05.2023 passed in the matter of **Dhananjay Seth Vs. The Union of India in Civil Writ Jurisdiction Case No.3456 of 2021** decided on 19.05.2023 by the Hon'ble Patna High Court. The relevant extract

“60. The Banks and the Finance Companies who are contesting these matters are under a constitutional obligation not to act in violation of law. They cannot act in conflict with the fundamental principles and policy of India which means that no person may be deprived of his livelihood and the right to live with dignity without following the established procedure of law. The right to recovery of these Banks and Financial Institutions if pitted against the constitutional right of 'life' of a person/petitioner to live with dignity and not to be deprived of without following the established procedure of law, the constitutional rights of the person/petitioners shall prevail. In this connection, this Court is tempted to reiterate that these are the rights conferred by Part III of the Constitution of India to 'a person' which are to be honoured by and also enforceable against, non-State actors. The private rights of the contesting respondents must be exercised within the constitutional limitations and in accordance with law.

61. In result, this Court finds that the action of the contesting respondents in seizure/re-possess the vehicle without following the RBI guidelines and the law as also the judicial pronouncements on the subject is wholly illegal. It is in violation of law and deprive the petitioners of their fundamental rights of livelihood and the right to live with dignity which are included in Article 21 of the Constitution of India.

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Observations and Directions

64. Having discussed the entire facts and circumstances of the case and the laws on the subject, this Court would make it clear that so far as the allegations against the Banks and Financial Institutions that they had forcibly seized/repossessed the vehicles is concerned, this Court, instead of dwelling much upon that issue in the present proceeding, leaves it open for the Investigating Agency to look into the complaints of the petitioners and investigate them independently and in accordance with law. This Court has mainly concentrated on the plea of the Banks and Financial Institutions that they can seize and repossess the vehicle without taking recourse to law and legal procedures as envisaged under the Act of 2002 and the Rules framed thereunder. Thus, even as the allegations of forceful seizure and possession has been taken note of, the same would not come in the way of an independent investigation. This Court has found that at least in one case (C.W.J.C. No. 16155 of 2021) a first information report being Sadar P.S. Case No. 22 of 2023 dated 08.01.2023 has been lodged by the petitioner's husband. In case other petitioners have also lodged any complaint with the respective police station, the same will be registered and duly investigated. It is still open to the petitioners to lodge their respective complaint with the jurisdictional police station within whose jurisdiction the vehicle in question has been seized and repossessed allegedly by use of force.

65. Since this Court has come to a conclusion that the covenants in the loan agreement of these cases are at best creating a 'security interest' in the 'secured asset' i.e. the vehicle in favour of the Banks and Financial Institutions, as the case may be, this Court directs that the Banks/Financial Institutions who are contesting respondents in these cases

shall henceforth, exercise their power to seize and repossess the vehicle only in accordance with the provisions of the Act of 2002, and the Rules framed thereunder and the RBI guidelines. Their right to seize or re- possess is not in question, it is the manner in which it is being exercised is illegal, hence, they cannot continue with the same.

66. The Superintendent of Police of all the districts in the State of Bihar are directed to ensure that within their jurisdiction no recovery agent of the Bank and Financial Institution may take the law into their hands, intercept the vehicles on way and takes possession of the vehicle in default without an order of the competent court of law. Any seizure/repossession of the vehicle in default may be given effect to only in accordance with the law and the procedure established by law;

67. In all such cases where the vehicles have not been sold, the petitioner(s) and the Bank/Financial Institution through it's authorized representative shall sit together and reconcile the account to determine the amount due in the loan account, however, the Bank/Financial Institution shall not charge any interest for the period during which the vehicle remained in seizure and they will treat the Covid-19 period in accordance with lockdown notification. Such reconciliation be made within a period of four weeks from today whereupon the petitioner(s) shall pay 30% of the outstanding amount and get release of the vehicle after giving an undertaking that he will pay the rest of the 70% of the outstanding amount with applicable interest from the date of handing over the possession of the vehicle till the date of payment in suitable installments as may be decided by the Banks/Financial Institutions. In the meantime, the petitioner(s) shall continue to pay the current EMI, failing which it will be open to the

Bank/Financial Institution to proceed against the petitioner(s) in accordance with the provisions of the Act of 2002 and the Rules framed thereunder to re-possess the vehicle.

68. In the cases where the vehicle has been sold to a third party and the Bank/Financial Institution is not in a position to restore the vehicle, they would be liable to pay the petitioner(s) to the extent of the value of the vehicle(s) as per their insurance value on the date of their seizure. The said amount shall be adjusted against the outstanding vehicle loan and thereafter if any surplus comes out the same will be made available to the petitioner. It will be open for the petitioners, if so advised to challenge the accounts furnished by the Banks/Financial Institutions and claim any compensation etc. for the loss arising out of seizure of their respective vehicles before appropriate court/forum.

69. Since the action of the Banks/Finance Companies are found illegal, the petitioners who have been made to contest this case shall be entitled for cost of litigation. Accordingly, this Court directs that each of the contesting respondents i.e. Banks/Financial Institutions would be liable to pay a sum of Rs. 50,000/- (fifty thousand) as cost of litigation to the respective writ petitioners within a period of 30 days from the date of receipt/production of a copy of this judgment.”

Reference was also made to the judgment of this Court in the matter of **Tarun Bhargava Vs. State of Haryana, reported as 2002 (3) RCR(Criminal) 312** as well as to the judgment in the matter of **Narinder Kumar Singla Vs. State of Punjab and another, reported as 2006 (3) RCR (Criminal) 890**; and **M/s Sundram Finance Limited, Chennai Vs.**

Raj Kumar and another, reported as 2011 (4) RCR (Criminal) 890; M/s Punjab Kashmir Finance Limited Vs. The State of Haryana and another, reported as 2008 (2) RCR (Criminal) 52; in the matter of Bhahuleyan Vs. State of Kerala and others, reported as 2007 (4) RCR (Criminal) 471; and also to the judgment in the matter of Dharmendra Kumar Yadav Vs. Manager Commercial Autos Sales (Pvt.) Ltd. Allahabad, 2010 SCC Online All 2348 on the above proposition.

SUBMISSIONS ON BEHALF OF RESPONDENTS

Learned counsel appearing on behalf of the respondent(s), on the other hand, have referred to the judgments of the Hon'ble Supreme Court in the matter of *M/s Magma Fincorp Ltd. Vs. Rajesh Kumar Tiwari, reported as (2020) 10 SCC 399*. The relevant extract of the said judgment reads thus:

“74. A hire-purchase is, however a more complex transaction where the owner enters into a transaction of hiring out goods on the terms and conditions set out in the agreement, and the option to purchase, exercisable by the customer on payment of all the instalments of hire, arises when the instalments are paid and not before. In such a hire-purchase agreement there is no agreement to buy goods; the hirer being under no obligation to buy, has an option either to return the goods or to become its owner by payment in full of the stipulated hire and the price for exercising the option. This class of hire-purchase agreements must be distinguished from transactions in which the customer is the owner of the goods and with a view to finance his purchase he enters into an arrangement which is in the form of a hire-purchase agreement with the financier, but in substance evidences a loan transaction,

subsequent to a hiring agreement, under which the lender is given the license to seize the goods.

75. In the aforesaid case, the majority of the judges were of the view that the intention of the appellants in obtaining the hirepurchase and allied agreements was to secure the return of the loans advanced to their customers and no real sale of the vehicle was intended by the customer to the appellants. The transactions were merely financial transactions. The judgment of this Court in Sundaram Finance Ltd. (supra) was rendered in the context of the liability of a hirer to pay sales tax on the goods acquired under the Hire Purchase Agreement.

76. In Sundaram Finance Ltd. (supra), Subba Rao, J delivered a dissenting judgment holding:-

“6. The object of the hire-purchase system was to help to finance the customer in order that he might purchase the property. Though that was the object, the transaction took the form of hire-purchase agreement. The main feature of the agreement, apart from small variations, was that the dealer or the financier continued to be the owner till the terms of the agreement were fully complied with by the customer and the option to purchase the same was exercised by him. If the terms were not complied with, the dealer or the financier, as the case may be, could terminate the agreement and take back the goods. In such a transaction, the common intention of the dealer, the financier and the customer was that the transaction should take the form of a hire-purchase agreement which would become a sale on the compliance of the terms of that agreement. No doubt the financing operation could have taken the form of a mortgage or pledge, but the parties, for

their mutual benefit and convenience, entered into a hirepurchase transaction.

7. In the absence of any fraud or undue influence, the question resolves itself into a simple question of intention. The transactions were in accordance with the mercantile usage. Both the financier and the customers with open eyes entered into the transactions of hire-purchase. Their intention was expressed in clear terms. They could have executed hypothecation bonds, but they did not, and instead entered into hire-purchase transactions. There was no reason to camouflage the real nature of the transactions. None was suggested. They were, therefore, bound by the terms of the agreements.”

77. The law which emerges from the judgments of the Court referred to above, is that goods are let out on hire under a Hire Purchase Agreement, with an option to purchase, in accordance with the terms and conditions of the Hire Purchase Agreement. The hirer simply pays for the use of the goods and for the option to purchase them.

78. Until the option to purchase is exercised by the hirer, upon payment of all amounts agreed upon between the hirer and the Financier, the financier continues to be owner of the goods being the subject of hire purchase. Till such time the hirer remains a trustee and/or bailee of the goods covered by the Hire Purchase Agreement.

79. The Financier continues to remain the owner of a vehicle, covered by a hire purchase agreement till all the hire instalments are paid and the hirer exercises the option to purchase. Thus, when the Financier takes re-possession of a vehicle under hire, upon default by the hirer in payment of

hire instalments, the Financier takes repossession of the Financier's own vehicle.

80. When the agreement between the Financier and the hirer permits the Financier to take possession of a vehicle financed by the Financier, there is no legal impediment to the Financier taking possession of the vehicle. When possession of the vehicle is taken, the Financier cannot be said to have committed theft.

81. Whether the transaction between a Financier and a purchaser/hirer is a hire purchase transaction, or a loan transaction, might be determined from the terms of the agreement, considered in the light of surrounding circumstances. However, even a loan transaction, secured by right of seizure of a financed vehicle, confers licence to the Financier to seize the vehicle.

82. *In this case, the agreement executed by and between the Financier and the Complainant is a Hire Purchase Agreement as will appear from the terms and conditions thereof. In any event, the fora under the Consumer Protection Act, have not arrived at any specific finding to the contrary. There is no discussion of the nature of the agreement between the Financier and the Complainant. Be that as it may, the agreement clearly permits the Financier to take possession of the vehicle, upon default in payment of instalments.*

83. In **ICICI Bank Ltd. v. Prakash Kaur & Ors. (2007) 2 SCC 711 53** cited on behalf of the complainant, this Court deprecated the practice of hiring. Recovery Agents, who were musclemen to take possession of vehicles in cases, where the borrower might have committed default in payment of instalments. This Court held:-

“16. Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognized by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics.”

84. The Judgment was rendered in the facts and circumstances of the case where it was alleged that possession of a truck had been taken, by engaging goons and musclemen as Recovery Agents. The disputes were settled before this Court in view of the submission of Counsel that the truck could be returned upon payment of a sum of Rs.50,000/-.

*85. In **Citicorp Maruti Finance Ltd. v. S. Vijaylaxmi (2012) 1 SCC** cited by the complainant, this Court held that the fora under the Consumer Protection Act, 1986 were right in holding that the vehicles had been illegally and wrongfully recovered by use of force from the loanees. The judgment was rendered in the facts and circumstance of the case and this Court deprecated the use of force. In this case, there was no allegation in the complaint of use of force. Significantly, in Citicorp Maruti Finance Ltd. (supra), Kabir, J. held:-*

“27. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back the possession of the vehicle by use of force. The guidelines which had been

laid down by Reserve Bank of India as well as the appellant Bank itself, it fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by this Court, such an action cannot be struck down.”

86. This Court held that the Financier continues to be the owner of the goods. There is an obvious typographical error in paragraph 27 of the judgment where hirer has been erroneously been typed in place of lender/financier.

87. The question raised by the Financier in this appeal, that is, whether the Financier is the real owner of the vehicle, which is the subject of a Hire Purchase Agreement, has to be answered in the affirmative in view of the law enunciated by this Court in **Haranjit Singh Chadha (supra), K.L. Johar & Co. (supra) and Anup Sarmah (supra).** The Financier being the owner of the vehicle which is the subject of a Hire Purchase Agreement, there can be no impediment to the Financier taking possession of the vehicle when the hirer does not make payment of instalments/hire charges in terms of the Hire Purchase Agreement. However, such repossession cannot be taken by recourse to physical violence, assault and/or criminal intimidation. Nor can such possession be taken by engaging gangsters, goons and musclemen as so called Recovery Agents.

88. Whether the service of proper notice on the hirer would be necessary for repossession of a vehicle, which is the subject matter of a Hire Purchase Agreement, would depend on the terms and conditions of the Hire Purchase Agreement, some of which may stand modified by the course of conduct of the parties. If the hire purchase agreement provides for notice on the hirer before repossession, such notice would be

mandatory. Notice may also be necessary, if a requirement to give notice is implicit in the agreement from the course of conduct of the parties.

89. If the hirer commits breaches of the conditions of a hire purchase agreement which expressly provides for immediate repossession of a vehicle without further notice to the hirer, in case of default in payment of hire charges and/or hire instalments repossession would not be vitiated for want of notice. In this case, however a duty to give notice to the Complainant before repossession, was implicit in the Hire Purchase Agreement. The Hire Purchase Agreement was a stereotype agreement in a standard form, prepared by the Financier. The same kind of agreements, containing, identical terms, except for minor modifications are executed by all hirers of vehicles, equipment, machinery and other goods, who enter into hire purchase agreements with the Financier. The Financier who set down the terms and conditions of the hire purchase, construed the hire purchase agreement to contain an implied term for service of notice and accordingly despatched a notice, but did not address it to the correct address of the Complainant as given in the hire purchase agreement.

90. In a case where the requirement to serve notice before repossession is implicit in the hire purchase agreement, non service of proper notice would tantamount to deficiency of service for breach of the hire purchase agreement giving rise to a claim in damages. The Complainant consumer would be entitled to compensatory damages, based on an assessment of the loss caused to the complainant by reason of the omission to give notice. Where there is no evidence of any loss to the hirer by reason of omission to give notice, nominal damages may be awarded.

91. A forum constituted under the Consumer Protection Act has, as observed above, the power to award punitive damages. Punitive damages should, however, be granted only in exceptional circumstances, where the action of the Financier is so reprehensible that punishment is warranted. To cite an example, where a Financier erroneously and/or wrongfully invokes the power to repossess without notice to the hirer, causing thereby extensive pecuniary loss to the hirer or loss of goodwill and repute, a forum constituted under the Consumer Protection Act may award punitive damages.

92. In the instant case, there is no evidence of any loss suffered by the complainant by reason of non-receipt of notice. Admittedly, several instalments, remained unpaid. After repossession the complainant contacted the Financier and was informed of the reasons for the repossession. He only made an offer to pay outstanding instalments and gave an assurance to pay future instalments in time. If the Financier was not agreeable to accept the offer, the Financier was within its rights under the hire purchase agreement. This is not a case where payment had been tendered by the hirer but not accepted by the Financier/lender. The Complainant had not tendered payment.”

(emphasis supplied)

Reliance is also placed on the judgment of Hon’ble the Supreme Court in the matter of **Phoenix ARC Private Limited Vs. Vishwa Bharati Vidya Mandir and others, reported as 2022 (5) SCC 345.** The relevant extract thereof reads thus:-

“5.1 Now, so far as the maintainability of the writ petition against the Assets Reconstruction Company (ARC) is

concerned, it is submitted that the writ petition is filed against the ARC complaining of infraction of Rule 8. It is submitted that the said rule imposes a statutory duty on the secured creditor - the ARC to act fairly while dealing with the security so as to secure the interest of the borrower as well as public at large (depositors). In support of aforesaid submission, reliance is placed on the decision of this Court in the case of **J. Rajiv Subramanian and Anr. Vs. Pandiyas and Ors., (2014) 5 SCC 651.** It is therefore submitted that as in the present case as the ARC has not performed the statutory duty cast upon it and there is a contravention of the statutory duty imposed under the Security Interest (Enforcement) Rules, 2002, a writ would lie against ARC against such an illegal action.

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12. Even otherwise, it is required to be noted that a writ petition against the private financial institution – ARC – appellant herein under Article 226 of the Constitution of India against the proposed action/actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable. In the present case, the ARC proposed to take action/actions under the SARFAESI Act to recover the borrowed amount as a secured creditor. The ARC as such cannot be said to be performing public functions which are normally expected to be performed by the State authorities. During the course of a commercial transaction and under the contract, the bank/ARC lent the money to the borrowers herein and therefore the said activity of the bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities. If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is

maintainable and/or entertainable. Therefore, decisions of this Court in the cases of Praga Tools Corporation (supra) and Ramesh Ahluwalia (supra) relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers.

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13.2 Applying the law laid down by this Court in the case of Mathew K.C. (supra) to the facts on hand, we are of the opinion that filing of the writ petitions by the borrowers before the High Court under Article 226 of the Constitution of India is an abuse of process of the Court. The writ petitions have been filed against the proposed action to be taken under Section 13(4). As observed hereinabove, even assuming that the communication dated 13.08.2015 was a notice under Section 13(4), in that case also, in view of the statutory, efficacious remedy available by way of appeal under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petitions. Even the impugned orders passed by the High Court directing to maintain the status quo with respect to the possession of the secured properties on payment of Rs.1 crore only (in all Rs.3 crores) is absolutely unjustifiable. The dues are to the extent of approximately Rs.117 crores. The ad-interim relief has been continued since 2015 and the secured creditor is deprived of proceeding further with the action under the SARFAESI Act. Filing of the writ petition by the borrowers before the High Court is nothing but an abuse of process of Court. It appears that the High Court has initially granted an ex-parte ad-interim order mechanically and without assigning any reasons. The High Court ought to have appreciated that by passing such an interim order, the rights of the secured creditor to recover the amount due and payable have been seriously prejudiced. The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. The stay

granted by the High Court would have serious adverse impact on the financial health of the secured 24 creditor/assignor. Therefore, the High Court should have been extremely careful and circumspect in exercising its discretion while granting stay in such matters. In these circumstances, the proceedings before the High Court deserve to be dismissed.”

(emphasis supplied)

Reliance was also placed on the judgment of **Praga Tools Corporation Vs. C.A. Imanuel and others, reported as 1969 (1) SCC 585**

and the relevant extract reads as under:-

“5. Thus the only question which arises in this appeal is whether in the view that it took that the writ petition was not maintainable against the company the High Court could still grant the said declaration.

6. In our view the High Court was correct in holding that the writ petition filed under Art. 226 claiming against the company mandamus or an order in the nature of mandamus was misconceived and not maintainable. The writ obviously was claimed against the company and not against the conciliation officer in respect of any public or statutory duty imposed on him by the Act as it was not he but the company who sought to implement the impugned agreement. No doubt, Art. 226 provides that every High Court shall have power to, issue to any person or authority orders and writs including writs in the nature of habeas corpus, mandamus etc., or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal

interest. Thus, an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. (see Sohan Lal v. Union of India) 1957 SCR 738. In Regina v. Industrial Court & Ors. (1965) 1 QB 377 mandamus was refused against the Industrial court though set up under the Industrial Courts Act, 1919 on the ground that the reference for arbitration made to it by a minister was not one under the Act but a private reference. "This Court has never exercised a general power" said Bruce, J., in R. v. Lewisham Union (1897) 1 QB 498 "to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal and a specific right to enforce the performance of those duties". Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the

purposes of fulfilling public responsibilities. (cf. Halsbury's Laws of England, (3rd ed.) Vol. 11, p. 52 and onwards).

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

(emphasis supplied)

Reliance was also placed on a Division Bench judgment of this Court in the matter of **M/s Fermina Developers Pvt. Ltd. and another Vs. Indiabulls Housing Finance Limited, passed in CWP-1806-2023 decided on 23.02.2023.** The relevant extract of the same reads thus:-

*“3. In deference to the directions issued by the Apex Court we have called upon counsel for the petitioners as also for the respondent/caveator to advance submissions as regards maintainability of the instant petition against the private entity/respondent as also on the aspect whether a petition under Article 226 of the Constitution of India ought to be entertained when an alternate remedy under Section 17 of the 2002 Act is available keeping in view the decision of the Supreme Court in **Phoenix ARC Private Limited versus Vishwa Bharati Vidya Mandir (2022) 5 SCC 645.***

4. Learned Senior counsel for the petitioners submit that the respondent is a Non-banking Financial Institution (NBFC) under the Reserve Bank of India Act, 1934 and as such is

empowered to lend money to the public as per provisions of the RBI Act. Further the respondent has obtained a registration under Section 45-1A of the RBI Act which obligates the respondent to work and manage its business in public interest. Further submitted that the respondent is an institution registered under the provisions of the National Housing Bank Act, 1987. By virtue of such registration under Section 29-A, the respondent is pre-supposed to proceed and operate in public interest. In terms of Section 21 of the Banking Regulation Act 1949, the respondent must also comply with the policies/directions issued by the RBI from time to time in public interest. Further contended that respondent is empowered to grant loan for the purposes of housing, by virtue of the Master Circular on housing finance dated 01.04.2022 issued by the Reserve Bank of India. It is emphasized that the respondent as such being a financial institution carries out public functions. Precise argument raised is that the loan agreement between the parties, even though in the realm of a private contract, has a statutory backing of RBI guidelines and Master Circulars and as such the respondent would be amenable to the writ jurisdiction of this Court. At this stage reference has been made to **Indiabulls Housing Finance Limited Vs. Union of India and others 2023 SCC OnLine BOM 180** to assert that the respondent herein itself had filed a case against Yes Bank claiming such private bank to be amenable to the writ jurisdiction under Article 226 of the Constitution of India. Reliance has also been placed upon the judgment in **St. Marry's Education Society & Anr. V. Rajendra Prasad Bhargava & ors. 2022 SCC OnLine SC 1091** to assert that a writ would be maintainable against the private institution if it discharges a public function.

6. *Learned Senior counsel for the petitioners have vehemently contended that the judgment of the Apex Court in Phoenix ARC (supra) is distinguishable on facts and as such would have no applicability. It is argued that the main issue in Phoenix ARC (supra) was not whether a private party was amenable to the writ jurisdiction of the High Court. It is asserted that only a passing reference had been made that the appellant therein was a private institution i.e. an Asset Reconstruction Company and as such was not amenable to the writ jurisdiction and the Apex Court did not take into consideration the judgments which lay down that a writ petition is maintainable against a private party if the monstrosity of the situation or other exceptional circumstances require timely judicial intervention to avoid grave injustice. It has been stressed that as per the factual premise in Phoenix ARC (supra) the borrower therein had defaulted on an outstanding amount of INR 117 crores and had not made any payments to the secured creditor and despite that the High Court had stayed the SARFAESI proceedings on the condition that the borrower should deposit rupees one crore. In complete contrast, the impugned recall notices in the present case have been issued on a mere technical ground that interest had not been deposited on a monthly basis. Learned Senior counsel would assert that in the present case there would be no dispute as regards the respondent having received payments including interest but the only objection is to the manner in which such interest payments had been made. It is argued that under such peculiar circumstances and wherein the default, if any, was miniscule as opposed to the glaring facts as also the nature of default in Phoenix ARC (supra), this Court ought to entertain the present writ petition. Learned Senior counsel has further contended that the judgment in Phoenix ARC (supra), was delivered on the assumption that the action taken by the*

*secured creditor therein was under Section 13 (4) of the 2002 Act and as such an alternate remedy was available under Section 17 of 2002 Act thereof. It is submitted that in the present case a notice has been issued under Section 13(2) of the 2002 Act and no action has till date been taken under Section 13 (4) and as such there is no alternate efficacious remedy available to the petitioner but to approach this Court by way of filing a writ petition under Article 226 of the Constitution of India. Reliance has also been placed upon a Division Bench of this Court in **Amrik Singh Vs. DCB Bank Limited and another (2022) 2 RCR (Civil) 791** to assert that a private bank is amenable to the writ jurisdiction and furthermore the plea of alternate remedy available under Section 17 of the 2002 Act, would not be available at the stage of issuance of a notice under Section 13 (2). It has also been argued that the Division Bench in Amrik Singh's case (supra), had taken a view that the judgment in Phoenix ARC (supra), was not applicable as in that case an Asset Reconstruction Company was involved as opposed to a private bank and as such a distinction between the two had been drawn. Parity in the same terms is sought even in the present case by taking a plea that the respondent is a Non-banking Financial Institution as opposed to an Asset Reconstruction Company.*

7. Per contra learned Senior counsel representing the respondent would contend that Indiabulls Housing Finance Limited does not discharge functions of the state and being a private entity is not amenable to the writ jurisdiction of this Court. The mere fact that a private entity carrying out commercial activities is governed by a regulation or a statute would not tantamount to such entity discharging public function or public duty. Heavy reliance is placed upon the judgment in Phoenix ARC (supra), to contend that a writ petition against a private financial institution/ARC under

Article 226 of the Constitution of India against proposed action/actions under Section 13 of the 2002 Act would not be maintainable. Reliance is also placed upon the Hon'ble Supreme Court judgment in **Federal Bank Vs. Sagar Thomas and others (2003) 10 SCC 733** wherein it had been held that writ petition would not be maintainable against the private entities unless there is a violation of a statutory duty/obligation.

8. Apart from the issue of maintainability of the writ petition against a private entity, it has been argued that the instant petition must also fail on the ground that an alternate remedy is available under Section 13 (3- A) of the 2002 Act against notice issued under Section 13 (2) of the 2002 Act. In this regard it is submitted that against the notice under Section 13(2) of the 2002 Act, a representation/objections may be filed under Section 13 (3-A) and which the lender/creditor is bound to consider in a time bound manner before proceeding further. It is argued that to permit the petitioner to file the instant petition against a notice issued under Section 13 (2) of the Act by way of a writ petition would amount to bye-passing the statutory provisions. In support of such contention reliance has been placed upon the judgment of the Apex Court in **Devi Ispat Limited and another Vs. State Bank of India and others (2014) 5 SCC 762.**

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12. The issue that falls for consideration is whether the respondent/Non-Banking Financial Institution by virtue of its statutory responsibilities under the provisions of the Reserve Bank of India Act 1934, National Housing Bank Act 1987 and circulars issued by Reserve Bank of India would be seen to be performing public functions so as to be amenable to the writ jurisdiction of this Court?

13. The issue culled out hereinabove is no longer res integra. In the case of Federal Bank (supra) the Hon'ble Supreme Court had considered whether a private bank that is regulated by the Banking Regulation Act 1949 discharges any public functions and had held thus:-

“33....In our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only whether 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 put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution.

14. Even though the judgement in Federal Bank's case (supra) was rendered in the backdrop of a service/employment dispute yet the rationale set out would be applicable to the present case as well.

15. In St. Mary's case (supra) the view taken in Federal Bank's case (supra) had been reiterated and it had been observed that merely because the State Government has the regulatory power, the same, by itself, would not confer any such status upon the institution nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution of India.

16. Similar view was taken in Phoenix ARC (supra) and it had been observed as under:-

18..... during the course of a commercial transaction and under the contract, the Bank/ARC lent the money to the borrowers herein and therefore the said activity of the Bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities.....”

*17. In the facts of the present case the controversy hinges upon adherence of a repayment structure/OTS letter dated 01.09.2021 (Annexure P-2). The same was clearly a settlement based on negotiation between private parties and merely for the reason that the respondent NBFC is governed by circulars/directives issued by the Reserve Bank of India would not tantamount to the repayment structure/OTS letter dated 01.09.2021 (Annexure P-2) to be placed at the pedestal of a statutory contract. The Hon'ble Supreme Court in case of **India Thermal Power Limited and ors. Vs. State of M.P. (2011) 9 SCC 1** had observed that if entering into a contract containing the prescribed terms and conditions is a must under the statute then the contract becomes a statutory contract. However, in the facts of the present case the repayment structure/OTS letter dated 01.09.2021 (Annexure P-2) had not been issued in furtherance of any statutory obligation cast upon the respondent/NBFC. The repayment structure/OTS letter dated 01.09.2021 (Annexure P-2) was only towards a mutual understanding and settlement having been arrived at between private parties and in furtherance of a commercial activity.*

18. We may observe that the respondent-NBFC is engaged in a commercial activity with the primary objective to earn returns and profits. We take it that the respondent has its own resources to raise its funds. It is not the case projected on behalf of the petitioner(s) that there is any contribution or share holding at the instance of the State.

19. NBFCs of the like of the respondent have not been set up for the purposes of building economy of the State but such companies have been voluntarily established for their own purposes and commercial interest. Be that as it may, the respondent/NBFC would have to act in a manner that it is not in conflict with or against the fiscal policies of the State and it is for such purpose, guidelines and directives are provided under various enactments including the Reserve Bank of India Act to ensure that a proper fiscal discipline is maintained. The pleadings on record are bereft of any averments to suggest that the respondent/NBFC is carrying out any public function.

20. In view of the discussion hereinabove and keeping in view the dictum laid down by the Supreme Court in Federal Bank (Supra), St. Mary (supra) and Phoenix ARC (supra) we have no hesitation in concluding that the respondent-NBFC would not be amenable to the writ jurisdiction of this Court under Article 226 of Constitution of India. The reliance placed by the petitioners on the judgment in Indiabulls Housing Finance Limited (supra) is misplaced. The challenge in such case was to a communication dated 14.03.2020 whereby the Administrator of Yes Bank Limited, informed the Bombay Stock Exchange (BSE) Limited and National Stock Exchange as regards the decision of writing off, the Additional Tier 1 Debenture Bonds. A writ under Article 226 of the Constitution of India was held to be maintainable against the private bank on the basis that the impugned action

runs contrary to the Information Memorandum in question which was a statutory contract. The facts of the present case are clearly distinguishable inasmuch as the repayment structure/OTS letter dated 01.09.2021 (Annexure P-2) as has been discussed hereinabove was in the realm of a pure private contract and not in furtherance of any statutory obligation.

*21. Insofar as reliance placed by the petitioners on a Division Bench judgment of this Court in Amrik Singh's case (supra) holding the private bank i.e. DCB Bank Limited amenable to the writ jurisdiction, it would suffice to observe that it is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. It would not be open for the High Court to question the correctness of a decision of the Supreme Court even though the point sought to be urged before the High Court had not been considered by the Supreme Court. A reference in this regard may be made to the judgment of the Supreme Court in **Suganthi Suresh Kumar Vs. Jagdeeshan (2002) 2 SCC 240.***

22. Even otherwise we are taking a view that the instant writ petition would not be maintainable in the light of judgment in Pheonix ARC (supra). In such matter, Vishwa Bharati Vidya Mandir as also St. Ann's Education Society had availed massive credit facilities from Saraswat Cooperative Bank Limited. On account of defaults committed by the borrowers, in the month of April 2013, the accounts of the borrowers were classified as Non-performing Asset (NPA) by the bank. As the borrowers failed and neglected to repay the outstanding dues to the bank, notice dated 01.06.2013 under Section 13 (2) of the 2002 Act was issued. In the month of March 2014, the NPA account of the borrowers with respect to the credit facilities availed by them was assigned by the

Bank in favour of Pheonix ARC Pvt. Ltd. i.e. an Asset Reconstructing Company. Pursuant to the assignment, the borrowers approached the Pheonix ARC with a request for restructuring the repayment of outstanding dues. A letter of acceptance dated 27.02.2015 was executed between the parties whereby the borrowers acknowledged and admitted the liability to repay the entire outstanding dues. Since the borrowers again committed defaults in payment of the outstanding dues, Pheonix ARC issued a letter dated 13.08.2015 intimating the borrowers that since despite issuance of Section 13 (2) notice dated 01.06.2013 and the subsequent execution of the letter of acceptance dated 27.02.2015, the borrowers have failed to repay the outstanding dues and as such Pheonix ARC would be proceeding to take possession of the mortgaged properties after expiry of 15 days. The positive stand on behalf of Pheonix ARC before the Supreme Court was that the communication dated 13.08.2015 cannot be said to be a notice under Section 13 (4) of the 2002 Act. As per Pheonix ARC after the notice under Section 13 (2) was issued in the year 2013 and despite the letter of acceptance dated 27.02.2015, since no further amount was paid, Pheonix ARC called upon the borrowers to make the payment within two weeks failing which further proceedings under Section 13(4) of the 2002 Act was proposed. In a nutshell categoric stand of Pheonix ARC was that the 13.08.2015 communication was only a proposed action and a writ petition filed against such proposed action was not maintainable/entertainable at all.

23. In Pheonix ARC (supra) the Supreme Court has held as under:-

If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the

borrower is aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable.

24. In Devi Ispat Limited (supra), a writ petition had been filed against notice under Section 13 (2) issued by the bank demanding outstanding liabilities and the same was dismissed by the Single Judge holding that a statutory remedy of making representation against such notice is provided under Section 13 (3-A) of the 2002 Act. Division Bench of the High Court dismissed the appeal. Matter having been carried to the Hon'ble Supreme Court it was held that the appellant having availed the statutory remedy of representation as such no interference is called for in the order of the High Court.

25. At this stage, it would be apposite to take note of a factual assertion that was made by counsel for the respondent/NBFC that against the recall notices dated 10.11.2022 (Annexure P-7) that had been issued to all the group companies, some of them have already filed representation under Section 13 (3-A) of the 2002 Act. Learned Senior counsel for the petitioners during the course of hearing have conceded to the same.

26. In the light of such factual position and in the light of dictum laid down in Pheonix ARC (supra) as also Devi Ispat's case (supra), the writ petition is held to be not maintainable/entertainable.

(emphasis supplied)

Reliance was also placed on the Division Bench judgment of this Court in the matter of **M/s Harinder Fabrics Vs. Shriram City Union**

Finance Ltd, bearing CWP No.10738-2022, decided on 04.05.2023. The relevant extract of the same reads thus:-

*“10. In SLP (Civil) Nos 22021-22022 of 2022 titled **M/s South Indian Bank Ltd. & others Vs. Naveen Mathew Philip & another**, decided on 17.04.2023, while taking into consideration the jurisdiction exercised by the Kerala High Court regarding Section 13(4) challenge, it was noticed that financial transactions were being entertained despite the settled proposition of law while taking into consideration the judgments passed in **Federal Bank Ltd. Vs. Sagar Thomas, (2003) 10 SCC 733 and State Bank of India Vs. Arvindra Electronics (P) Ltd., 2022 SCCOnline SC 1522** and it was held that the Tribunal is expected to go into the issues of fact and law including those of statutory violation and it had a wide range of powers to set aside all illegal orders and grant consequential reliefs, including re-possession and payment of compensation and costs. Resultantly, the question of law was again reiterated by holding as under:*

“18. While doing so, we are conscious of the fact that the powers conferred under Article 226 of the Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances in matters pertaining to proceedings and adjudicatory scheme qua a statute, more so in commercial matters involving a lender and a borrower, when the legislature has provided for a specific mechanism for appropriate redressal.”

11. In such circumstances, keeping in view the settled principle of law, once securitization proceedings have been initiated after taking recourse to Section 13(4), we are of the considered opinion that firstly the remedy would lie with the Tribunal. Only in exceptional cases this Court would exercise

its jurisdiction. Nothing has been shown to bring the case within the ambit of those exceptional circumstances, once on foreclosure of the account the outstanding now is Rs.1,05,22,171/-

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13. Similarly another aspect would have to be considered that the respondent-financial institution is a private institution and, therefore, the observations of the Apex Court in Phoenix ARC Private Limited Vs. Vishwa Bharati Vidya Mandir & others, 2022 (5) SCC 345 would also come into play, apart from the observations made in M/s South Indian Bank Ltd. & others (supra) that where the financial transactions are subject matter of consideration, the Writ Court would not exercise its jurisdiction. It is also to be noticed that the outstandings against the petitioner have now increased to Rs.1,05,22,171/-, as per the foreclosure made on 22.07.2022.

14. In view of the facts and circumstances of the present case and the ratio of the aforesaid decisions, the petitioner is not entitled to invoke the writ jurisdiction for seeking a relief of issuance of the direction to the respondent for One Time Settlement especially when alternate and efficacious remedy is available to the petitioner to challenge the proceedings under Section 13(4) of the Act.”

(emphasis supplied)

Reliance was also placed on the judgment of Hon'ble Allahabad Court in **CWP No.66283 of 2010 decided on 06.12.2010 titled as 'Dharmendra Kumar Yadav Vs. Manager Commercial Auto Sales (Pvt.) Ltd. Allahabad' reported as 2010 (44) RCR (Civil) 881.** Relevant

extract of the same reads thus:-

“6. As observed above, the only allegations made in the writ petition are against the Commercial Auto Sales Pvt Ltd, which is a private body and its agent who had once repossessed the vehicle. Although, an application for impleadment has been moved for impleading the State of U.P. and D.I.G. of Police, but there are no allegations of any kind made against any State Authorities or Police authorities so as to implead them in this writ petition. No case has been made out for impleading the State of U.P. and D.I.G. of Police, hence the Impleadment application is rejected.

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11. There cannot be any dispute to the proposition as laid down by the Apex Court in the above case. The Bank has to resort to the procedure recognised by law to take possession of the vehicle. However, in case the Bank commits any violation or commits an offence, it is always open for an aggrieved person to take such criminal or civil action as permissible under law.

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13. In view of the foregoing discussions, we are of the view that no grounds have been made out to issue any mandamus to a purely private body namely; 1.e. Commercial Auto Sales Pvt Ltd. in the facts of the present case. We, however, observe that it is open for the petitioner to take such civil or criminal action against the private body which may be permissible under law.”

(emphasis supplied)

Reference was also made to the Division Bench judgment of Hon’ble Orissa High Court in the matter **Anirudh Sahoo Vs. Commissioner, State Transport Authority, Orissa and others bearing**

W.P. (C) No.8697 of 2009 decided on 16.04.2010. The relevant extract of the same reads thus:-

“4. Admittedly, Opposite Party No. 3 represents a private company incorporated under the Companies Act engaged in the business of providing finance. Consequent upon a bilateral agreement entered into between the Petitioner & Opposite Party No. 3, Petitioner availed loan for purchasing the truck. Dispute between the Petitioner and Opposite Party No. 3 relates to default in re-payment of loan by way of E.M.Is. None of the prayers made in the Writ Petition is directed against any statutory authority. The rival contentions made by the parties relate to civil dispute concerning breach of commercial contract. Learned Counsel for the Petitioner sought to rely upon the decision in Manager, ICICI Bank Ltd. v. Prakash Kaur & Ors, AIR 2007 SC 1349 to urge that writ application is maintainable in cases of present nature. However, decision cited by Learned Counsel for the Petitioner was rendered by Hon'ble Supreme Court in Criminal Appeal No. 267 of 2007 arising out of order passed by Allahabad High Court in a Criminal Miscellaneous Petition directing SSP, Allahabad to ensure registration of F.I.R. & investigation on the basis of application submitted by the Writ Petitioner. Therefore, the decision is of no help to the Petitioner.

*5. As has been laid down by the Hon'ble Supreme Court in **Federal Bank Ltd. v. Sagar Thomas & Ors., AIR 2003 SC 4325** a Writ Petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Govt.); (ii) Authority; (ii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed & 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. A private company carrying on banking business 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. Such conditions are not 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 also 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. In **Pradeep Kumar Biswas v. Indian Institute of Chemical Biology & Ors., (2002) 5 SCC 111**, it has been pointed out that the question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally & administratively dominated by or under the control of the Government. Such control must be particular to the body in question & must be pervasive. If this is found then the body is a State within the meaning of 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.

6. The subject matter of the present Writ Petition relates to loan taken by the Petitioner from a private company. The remedy for the Petitioner for breach, if any, of agreement by Opposite Party No. 3 has to be availed by resorting to appropriate proceeding for resolution of civil dispute. The Petitioner having not made any grievance against any of the

authorities under the State or claimed relief from the State,
the writ application is not maintainable.”

(emphasis supplied)

Counsel for the respondent-Finance companies has argued that the petitioners in these cases are largely in default in paying the installments. In various cases, arbitration proceedings have already been invoked and award has been passed in favour of Finance Company. There is an arbitration/ADR clause in all those Commercial Contracts. Notwithstanding that non-payment of installment is a notice in itself, yet, the Finance Company has followed due procedure-contractually agreed upon between the parties. Vague and general allegations have been leveled in these petitions by referring to the RBI guidelines, but breach of any specific clause is neither pleaded nor established. Besides, if there is any allegation of breach, there are numerous alternative remedies available not only as per the agreement- i.e. Arbitration, but also under the Consumer Protection Act, 1986, Legal Services Authorities Act, 1987 and even before the Civil as well as Criminal Courts. No reasons have been given as to why the said remedies are not efficacious or be not resorted to. The petitioners have also failed to establish any public duty or public function being discharged by them. Being NBFC/Pvt. Banks. The Government does not exercise any Managerial; Administrative or financial contract. Being licensed by the RBI, the guidelines issued for mentioning financial discipline in economy cannot be continued for exercising managerial or administrative contract. Being a private entity; Public law remedies cannot be enforced against it.

It is further submitted that the petitioners have chosen not to make complete disclosures in various petitions with respect to the arbitration proceedings. The only defence raised is that the arbitration was being held at a place of convenience of the company and that it was not feasible for the petitioners to participate in the same and to defend their best interests. The same cannot be accepted as a valid response. Having agreed to a remedy as well as the seat of Arbitration, it cannot be permitted to resile for such clauses and conditions, which the petitioners were under an obligation to accept.

The short illustrative synopsis in a tabulated form as regards the proceedings before vehicles were re-posessed or sought to be re-posessed:-

<u>S.No</u> :	<u>Writ</u> <u>Petition</u> <u>no.</u>	<u>Loan</u> <u>Amount</u>	<u>Pending</u> <u>Due</u> <u>Payment</u> <u>at the</u> <u>time of</u> <u>Re-</u> <u>possession</u>	<u>Vehicle</u> <u>Recovery</u> <u>(Date &</u> <u>Place)</u>	<u>Vehicle</u> <u>Release or</u> <u>Not</u>	<u>Additional</u> <u>Remarks</u>
1	CWP No. 4874 of 2022	Rs. 10,13,300	Rs. 5,18,594.2 4	13.11.2021 at Malhni Supaul, Bihar	Vehicle sold for Rs. 3,36,300	Pre-sale notice was issued on 01.12.2021 & 02.12.2021
2	CWP No. 33031 of 2019	Not given in the petition	Rs. 9,07,930	Date not given – Ajmer Sharif - Rajasthan	Cannot be determined	Pre-sale notice was issued on 03.09.2019
3	CWP No. 24931 of 2019	Rs. 7,50,000	Rs. 73,569	07.07.2019 at Ambala	Cannot be determined	Pre-sale notice was issued on 09.07.2019
4	CWP No. 2949 of 2020	Rs. 13,54,497	Rs. 3,06,108	21.01.2020 at Jalandhar	Vehicle not released.	Vide order dated 30.09.2019 Ld. ADSJ, Mohali appointed receiver to

						recover the vehicle.
5	CWP No. 2989 of 2020	Rs. 22,00,000	Rs. 74,000	07.12.2019 - Place not given	Cannot be determined .	None
6	CWP No. 6849 of 2020 alongwith Contempt Petition No. 1116 of 2020	Rs. 33,53,017	Rs. 2,65,676	12.02.2020 at Pathankot	<u>Truck in possession of Police Officials</u>	Arbitration award dated 24.02.2020 against the petitioner passed at Chennai.
7	CWP No. 538 of 2020 alongwith Contempt Petition No. 1114 of 2020	Rs. 32,00,000	Rs. 1,114	23.12.2019 - Place not given	Vehicle not released.	Appointment of receiver vide order dated 12.10.2018 against the petitioner passed at Jalandhar.
8	CWP No. 22613 of 2020	Rs. 29,66,900	Rs. 1,19,026.80	09.12.2020 - Place not given	Vehicle not released.	Appointment of receiver vide order dated 07.01.2021 against the petitioner passed at Ludhiana.
9	CWP No. 6214 of 2017	Rs. 22,16,725	Rs. 1,71,000	10.10.2016 at Samana, Patiala	Vehicle already sold.	None
10	CWP No. 37495 of 2019	Rs. 41,68,088	Rs. 3,90,984	31.08.2019 at Moga – Faridkot Road.	Cannot be determined .	None
11	CWP No. 1671 of 2020	Rs. 41,52,421	Rs. 3,19,416	29.12.2019 at Riwa Road, Mirzapur	Cannot be determined .	None
12	CWP No. 396 of 2021	Rs. 31,15,900	Rs. 26,07,656	30.11.2020 at Siliguri, West Bengal	Vehicle sold for Rs. 14,50,000	Pre-sale notice was issued on 08.12.2020
13	CWP No. 3590 of 2021	Rs. 29,10,079.83	NA	NA	NA	NA
14	CWP No. 17282 of 2020	Rs. 25,54,126	Rs. 1,36,229	01.10.2020 at Sahnewal, Ludhiana	Vehicle not released.	Arbitration award dated 28.10.2022 against the petitioner passed at Chennai.
15	CWP No.	Rs. 18,57,145	Rs. 1,68,837	25.04.2021 at Kaithal,	Vehicle sold for	Pre-sale notice was

	24842 of 2021			Haryana	Rs. 13,10,000	issued on 30.04.2021
16	CWP No. 24285 of 2022	Rs. 30,83,830	Rs. 4,83,490	Cannot be determined	Cannot be determined	Loan Overdue Notice was issued on 10.02.2022
17	CWP No. 4874 of 2022	Rs. 10,13,300	Rs. 5,18,594.24	13.11.2021 at Malhni Supaul, Bihar	Vehicle sold for Rs. 3,36,300	Pre-sale notice was issued on 01.12.2021 & 02.12.2021
18	CWP No. 5205 of 2022	Rs. 17,26,443.68	Cannot be determined	04.03.2022 at Greater Noida, UP.	Cannot be determined	None
19	CWP No. 9352 of 2022	Rs. 26,10,612	Rs. 3,15,000	06.09.2017 at Nunkaran Sahib near Bikaner	Vehicle already sold.	Pre-sale notice was issued on 13.09.2017
20	CWP No. 14934 of 2022	Rs. 22,02,500	Cannot be determined	13.06.2022 at Sharanpur, UP.	Cannot be determined	None
21	CWP No. 25537 of 2022	Rs.9,50,000	Rs. 65,380	13.10.2022 – Place not given	Vehicle already sold for Rs. 6,00,000	Pre-sale notice was issued on 19.09.2022
22	CWP No. 9146 of 2023	Rs. 33,00,000	Rs. 17,00,000	06.04.2023 at Bokaro, Jharkhand	Vehicle not released	None
23	CWP No. 11170 of 2023	Rs. 35,10,525	Cannot be determined	4-5.4.2023 at Ranka, Jharkhand	Vehicle not released	None
24	CWP No. 13102 of 2023	Rs. 4,80,000	Rs. 1,67,882	26.05.2023 at Sector 29-B, Chandigarh .	Vehicle not released	Arbitration award dated 06.05.2023 against the petitioner passed at Delhi.
25	CWP No. 13102 of 2023	Rs. 21,14,800	Rs. 74,285	29.05.2023 at Hisar, Haryana	Vehicle not released	None
26	CWP No. 13356 of 2023	Rs. 36,66,006	Rs. 2,40,000	22.05.2023 at Salasar, Rajasthan	Vehicle not released	Pre-sale notice was issued on 24.05.2023
27	CWP No. 4465 of 2022	Rs. 28,56,017	Rs. 7,86,017	12.11.2021 – Place not mentioned.	Vehicle not released	None
28	CWP No. 1671 of 2020	Rs. 41,52,421	Cannot be determined	29.12.2019 at Mirzapur, UP.	Vehicle not released	None

The above said instances are only illustrative and not exhaustive. Some of the writ petitions have been filed on the presumption that a forcible possession of the vehicle shall be taken.

Learned counsel for the financial institutions contends that in large number of cases, the stand of the petitioners is same that no legal notices were sent to the borrowers in default with the pre and post re-possession information to the borrower or to the police about the repossession of the vehicle, which is incorrect. In fact, the pre-sale notices were sent to the defaulters before confirming the sale and that there was no complaint regarding the peaceful re-possession. The petitioners have also nowhere established that any better bidder was available. No offer has also been made to settle the dispute. The filing of the writ petition is thus mischievous and not intended for any bona-fide considerations. The institution of the writ petition post sale of the vehicle is filed only a means of harassment.

CONSIDERATION

I have heard the learned counsel for the respective parties and have also gone through the documents available on record as well as the judgments/judicial precedents relied upon by them in their favour.

A large number of cases are being repeatedly filed before this Court where the borrowers are seeking a pre-emptory injunction against NBFC/Pvt. Banks that re-possession of vehicles be not made except as per law and more so when forcible re-possession has been often reprimanded by Courts. Reference is made to certain regulatory circulars of RBI to pose

as if the same would change the nature of relationship and render the NBFC's/Pvt. Banks amenable to writ jurisdictions of the High Court. Very often such petitions have been entertained in peculiar circumstances and even order(s) were passed. In some cases, the respondents gave undertakings when these orders were passed, but not challenged on commercial wisdom or otherwise. The question as regards amenability of NBFC/Pvt. Banks to writ jurisdiction in such commercial agreements was either not considered or decided or was kept open. Entertainment of such petitions opened gates for all petitions to be filed here, mistaking a sympathetic indulgence as determination of law. The issue of jurisdiction got blurred as petitions raised issues about incidents that have taken place outside the territorial jurisdiction of this Court by placing reliance on the document defining relationship as a "cause of action"

Considering that a large number of cases where recovery of vehicles has been done, fall outside the territorial jurisdiction of this High Court and the petitioners have approached this Court claiming that they are ordinarily resident(s) of the State and that the amount was financed or agreement was executed within the territorial jurisdiction of this Court, conferring jurisdiction, it has become essential to first examine as to what would constitute a cause of action.

In its legal understanding, 'the cause of action' implies 'a right to sue.' Hence, the material facts which are imperative for the suitor who alleges and proves his right to sue and claim relief constitutes a cause of action. The facts that are ancillary or supportive and have no direct nexus to the relief prayed for cannot be said to give rise to a cause of action

conferring jurisdiction on the Court. Since cause of action is relevant and germane since a writ petition can only be instituted before a High Court within the territorial jurisdiction of which, the cause of action arose, wholly or in part hence, the jurisdiction of the High Court has to be seen from the accrual of cause of action.

It was held by the Hon'ble Supreme Court in the matter of ***Eastern Coal Fields Limited Vs. Kalyan, reported as 2008 (3) SCC 456,*** that a cause of action for the purposes of Article 226 (2) of the Constitution of India, for all intent and purport, must be assigned the same meaning as envisaged under Section 20 (c) of the Code of Civil Procedure, 1908. It is largely a bundle of facts required to be proved and not the bundle of facts required to be pleaded. Such facts which are required to be pleaded need not necessarily constitute a cause of action whereupon a writ petition may be allowed.

On the aforesaid legal principles, it needs to be tested as to whether the cause of action against repossession accrued as a result of entering into an agreement or on account of re-possession of the vehicle. The said fact of entering into an agreement, even though is necessary for pleadings and understanding the nature of relationship amongst the parties, however, the same may not constitute as a cause of action till such time the agreement or its terms are itself under challenge. In its restrictive sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action while in a wider sense, it may include all necessary conditions for the maintenance of suit including not only the infraction of right, but the infraction coupled with the right itself.

Every fact which is required to be proved, as distinguished from every piece of evidence which is necessary to prove each fact compromises a cause of action, as held by the Hon'ble Supreme Court in the matter of **Rajasthan Advocates Association Vs. Union of India, reported as 2001 (2) SCC 294.**

In matters relating to forcible repossession of a vehicle, the fact which is required to be established as giving rise to a cause of action is as to whether a vehicle had been forcibly repossessed in violation of the rule of law or not. An execution of the loan agreement as well as disbursement of loan would primarily only be a piece of evidence required to establish the legal relationship amongst the parties qua whom a fact in issue is required to be determined. Hence, a mere execution of an agreement within the territorial jurisdiction and/or a claimant residing within the territorial jurisdiction may not be sufficient to vest territorial jurisdiction in a High Court where a lis is brought. Such aspect thus needs to be determined on facts of each case, the relief claimed and what aspect directly decided to leading the institution accrued in its jurisdiction. Requirement to establish territorial jurisdiction is not a mere formality and is rather a critical and crucial task of administration of justice and puts an effective check on forum hunting. However, in large number of such cases, respondent Finance Companies have served the pre-repossession notices, pre/post loan recall notices/sale notices etc. Issuance of such notices and their due service before repossession/sale of the vehicle recovered to person who are residing within the territorial jurisdiction may have some semblance to giving rise to a cause of action. Since such issues are to be

determined on a case to case basis and the present petitions are being decided as a batch instead of micro examination of the facts of the each case, hence, this Court deems it appropriate to relax the test of cause of action for adjudication and maintaining of the present writ petitions.

In the said background, the question which comes up next is as to whether the writ petition would be maintainable against a Private Bank/Non-Banking Finance Company or not ?

The dispute brought before this Court in the present batch of writ petitions are being portrayed as a public law grievance necessitating framing of guidelines for larger public benefit, however, it is not in dispute that the above said issues do not pertain to failure on the part of the Financial Institution to either to discharge a public function or its failure to perform a public duty. The private finance institution/NBFCs are carrying on a business of lending and borrowing money for purely commercial purposes. They owe no statutory obligation to do the same for a mandatory socio-economic statutory object.

Even though, in the day to day running of the affairs, purely commercial obligations may be regulated by a statutory framework, however, a mere governance under the regulatory framework to carry out their operations and compliances would not cloak them as a 'Public Authority Discharging Public Functions'. While public sector banks have a shareholding of the Government and State may exercise deep and pervasive financial, managerial or supervisory control over such functions creating binding obligations against those public sector banks to share the financial burden or the vision of the State, however, no such obligation is

cast upon private sector bank/non-banking finance companies. They enjoy complete autonomy and independence in their financial matters and business transactions. While a public function is an activity where one performs and acts for and on behalf of State or its Institutions, public duty is a duty which the State, public or any community at large may owe to anyone else, The obligation which any entity owes to the public whether or not statutory or otherwise, would still have fallings of a subjugation under the writ jurisdiction, however, where both the said aspects are missing, their function becomes a purely private function propelled by profit orientation.

The Hon'ble Supreme Court held in the matter of **Kishore Madhukar Iglkar Vs. Automotive Research of India, 2022 Live law (SC) page 189**, that even the presence of some element of public duty or function would not by itself be sufficient for bringing a body within the net of Article 12 and as an Agency or instrumentality of the State and an overall holistic view of functions and duties including the primary functions should be taken into consideration. It is not a case in these petitions that the Non-Banking Finance Companies/private sector banks have taken up on their shoulders any duty to be discharged by the Sovereign and that extension of the finance has callings of a sovereign functions. While the finance companies are available in large numbers under the licences from the Reserve Bank of India, they are free to take their own decisions in financial matters subject to overall statutory compliances or safeguards in the larger public interest. These NBFCs have full autonomy to take decisions as regards their business

transactions/operations and affairs without any interference by the Regulatory Body. Hence, these institutions cannot be said to be the Agencies or instrumentalities of the State merely on account of regulatory framework having been notified and that the functionality test as emphasized by the Hon'ble Supreme Court to determine the real nature of a transaction and also the functions it discharges is still the prominent test for determination as to whether an entity can be subject to a writ jurisdiction under the public law remedy or would be subject to a private law remedy in matters relating to commercial laws i.e. the laws that govern the rights, relationships and conduct of people and business involved in commerce.

The consistency and expediency in adjudication of commercial disputes has always been crucial for laying a strong foundation for any country. The confidence of the market in the expeditious adjudication of commercial contractual disputes and minimization of interference in the commercial relationship entered between the parties, have always been crucial for a robust economy. While the inclination often reflected from the judicial decisions is largely borne against a financial institution and in favour of a borrower, however, a Court of law cannot assume that a borrower would always be a victim and the lender would always be the oppressor. Such underlying assumptions in judicial adjudication run contrary to the spirit of commercial laws. There have been huge concerns about the undue interference by constitutional Courts in matters of commercial contracts and domain leading to enunciation of laws which minimize interference of Courts and are intended to expedite

enforcement of commercial contractual obligations. The laws relating to SARFAESI Act, 2002; the Micro, Small and Medium Enterprises Development Act, 2006 and Arbitration and Conciliation Act, 1996; The Insolvency and Bankruptcy Code; and Commercial Courts Act, etc. are all intended to minimize judicial intervention in matters relating to commercial transactions between private entities. The Hon'ble Supreme Court has repeated it time and again that the High Courts should ordinarily refrain from interfering in commercial transactions that have been entered between private entities as any such interference modifies the terms of the contract executed between the parties. Notwithstanding the above mandate, the judicial intervention, as an equitable relief, has led to erosion of the objectives sought to be obtained by such Legislations. It would be an aberration in law and against equitable justice where the Courts assume the role as a negotiator under the garb of substantive justice and undo the contractual obligations entered into between the parties. The resultant effect not only causes a great hardship to the borrower in the form of a higher rate of interest in future transactions but also in more stringent conditions incorporated in the subsequent contractual obligations. It also forces the finance companies to reduce lending and make it more conditional so as to overcome the litigation costs and expenses that emanate therefrom. In the said process, what was initiated as a step towards easing the hardship of a borrower, crystallizes into creating further hardships for any potential or prospective borrower as the industry becomes wary of the recovery mechanism and the impediments that stand in its way. When any borrower approaches a finance company, he is under

no obligation to seek finance from any specific company and further, the above said finance is not being extended pursuant to any State directive. It is a purely commercial decision taken by the borrower, on his own wisdom. An evaluation of the respective terms and conditions is required to be done by the borrower along with assessing the risk that entail therefrom or are inherent. Even though, it cannot always be said that there is a equal bargaining power, however, the borrower not being under any obligation to obtain loan from the said finance company exercises a calculated discretion and executes such contracts for his commercial pursuits. It is even otherwise a common practice that contractual clauses and provisions would always be drawn in favour of the person who runs the risk. The additional safeguards are thus required to extend additional protection. Such an additional protection cannot ipso facto be construed as unconscionable. The borrower having obtained benefits under the said clause and having accepted terms thereof cannot seek to invoke sympathy after commission of default in payment and on giving rise to a corresponding right in the lender/finance company including a right to seek repossession.

There can be no presumption of the charges being illegal or without any authority or beyond the terms of the contract. Similarly, there cannot also be a presumption that every recovery and possession is preceded by use of brute force. These are the aspects which are required to be established by leading evidence. The fact required to be pleaded and established cannot be presumed when there is no such presumption under the Evidence Act. Every borrower who claims to be a victim has to

establish not only breach of procedure or the requirement of law but must also establish the damages that arises as a result thereof.

The present petitions are in the nature of seeking issuance of a writ in the nature of mandamus i.e. a writ issued to prevent disorder occasioned from a failure of justice and is used to compel a public authority for performance of a public duty. As per the reference quoted from the Halsbury Law of England, 4th Edition Vol. 1, in the judgment of the **Controller and the Auditor General of India Gian Parkash Vs. K.S. Jagannath**, the Hon'ble Supreme Court recorded that mandamus is a writ to remedy the defects of justice and are required to be issued so that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right has been prescribed. Existence of a right has been recorded as an essential pre-requisite for invoking and praying for a prerogative right of mandamus. The Hon'ble Supreme Court has held in the matter of **Director of Settlement Vs. Apparao reported as 2002 (4) SCC 638**

“..... It is therefore essentially a power upon the High Court for issuance of a high prerogative writ for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights which may come within the expression “for any other purpose.”

The powers of the High Courts under Article 226 of the Constitution of India though are discretionary and no limit can be placed upon their discretion, they must be exercised along the recognized lines and subject to certain self imposed limitations. The expression “for any

other purpose” in Article 226 makes the jurisdiction of the High Courts more extensive but yet the Courts must exercise the same with certain restraints and within some parameters. One of the conditions for exercising jurisdiction under Articles 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right which entitles him to any of the rights and that such right has been infringed.”

Further in the matter of *Joshi Technologies International Incorporation Vs. Union of India, reported as 2015 (7) SCC page 728*, it was held that where the rights, of which enforcement is sought, are purely of private character, no mandamus can be issued. Thus, even if the respondent is a part of “State”, the other condition which has to be satisfied for issuance of a writ of mandamus is the public duty. In the matter of private or purely contractual fee, no such public duty element is involvement, and, thus, mandamus will not lie. Hence, existence of a legal right in the writ petition and the corresponding legal obligation on the State other than a mere illegality having been committed, are to exist before the command of a Court can be invoked. Existence of a ‘public duty’ and the functions being a ‘public function’ is thus a parameter which is required to be ascertained and satisfied before a writ jurisdiction can be issued. Such public duties may be statutory or non-statutory and that failure to perform such duties is an act required to be ascertained. Thus, where any private party has acted in a manner which may be illegal and/or which may prejudice the right of any other person, a writ jurisdiction would not ordinarily be the remedy available.

The powers of a writ Court would not ordinarily be invoked in contractual matters unless there is a public law element involved. The jurisdiction would not ordinarily be invoked to modify the terms of the bargain which the parties had entered into at the stage of execution of the contract.

The Hon'ble Apex Court in the matter of St. Mary's Education Society and another Vs. Rajendra Prasad Bhargava and others, reported as (2023) 4 SCC 498, has discussed about Public duty and public function and the relevant part of the same is extracted as under:-

“37. This Court in Janet Jeyapaul v. SRM University & Ors., reported in 2015 (13) SCALE 622, held that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy, not only under the ordinary law, but also by way of a writ petition under Article 226 of the Constitution. In the case of Binny Ltd. (supra), this Court held that the Article 226 of the Constitution is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and that the decision sought to be corrected or enforced must be in the discharge of public function.

38. Paragraph 11 of the judgment in Binny Ltd. (supra) is reproduced below:-

"Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and that

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

(Emphasis supplied)

39. This Court considered various of its other decisions to examine the question of public law remedy under Article 226 of the Constitution. This Court observed in *Binny Ltd. (supra)* as under:-

"29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is preeminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory

authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies."

(Emphasis supplied)

40. In the penultimate para, this Court ruled as under:-

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

(Emphasis supplied)

41. In the background of the above legal position, it can be safely concluded that power of judicial review under Article 226 of the Constitution of India can be exercised by the High Court even if the body against which an action is sought is not State or an Authority or an Instrumentality of the State but there must be a public element in the action complained of.

42. A reading of the above extract shows that the decision sought to be corrected or enforced must be in the discharge of a public function. No doubt, the aims and objective of the appellant No. 1 herein is to impart education, which is a public function. However, the issue herein is with regard to the termination of service of the respondent No. 1, which is basically a service contract. A body is said to be 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.

43. In the case of Committee of Management, Delhi Public School & Anr. v. M.K. Gandhi, reported in (2015) 17 SCC 353, this Court held that no writ is maintainable against a private school as it is not a "State" within the meaning of Article 12 of the Constitution of India.

44. In the case of Trigun Chand Thakur v. State of Bihar & Ors., reported in (2019) 7 SCC 513, this Court upheld the view of a Division Bench of the Patna High Court which held that a teacher of privately managed school, even though financially aided by the State Government or the Board, cannot maintain a writ petition against an order of termination from service passed by the Management.

45. In the case of *Satimbla Sharma (supra)*, this Court held that the unaided private minority schools over which the Government has no administrative control because of their autonomy under Article 30(1) of the Constitution are not "State" within the meaning of Article 12 of the Constitution. As the right to equality under Article 14 of the Constitution is available against the State, it cannot be claimed against unaided private minority private schools.

46. The Full Bench of the Allahabad High Court in the case of *Roychan Abraham v. State of U.P.*, AIR 2019 All 96, after taking into consideration various decisions of this Court, held as under:-

"38. Even if it be assumed that an educational institution is imparting public duty, the act complained of must have direct nexus with the discharge of public duty. It is undisputedly a public law action which confers a right upon the aggrieved to invoke extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through petition under Article 226. Wherever Courts have intervened in exercise of jurisdiction under Article 226, either the service conditions were regulated by statutory provisions or the employer had the status of 'State' within the expansive definition under Article 12 or it was found that the action complained of has public law element."

(Emphasis supplied)

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61. Merely because a writ petition can be maintained against the private individuals discharging the public duties and/or

public functions, the same should not be entertained if the enforcement is sought to be secured under the realm of a private law. It would not be safe to say that the moment the private institution is amenable to writ jurisdiction then every dispute concerning the said private institution is amenable to writ jurisdiction. It largely depends upon the nature of the dispute and the enforcement of the right by an individual against such institution. The right which purely originates from a private law cannot be enforced taking aid of the writ jurisdiction irrespective of the fact that such institution is discharging the public duties and/or public functions. The scope of the mandamus is basically limited to an enforcement of the public duty and, therefore, it is an ardent duty of the court to find out whether the nature of the duty comes within the peripheral of the public duty. There must be a public law element in any action.

62. Our present judgment would remain incomplete if we fail to refer to the decision of this Court in the case of Ramakrishnan Mission v. Kago Kunya, (2019) 16 SCC 303. In the said case this Court considered all its earlier judgments on the issue. The writ petition was not found maintainable against the Mission merely for the reason that it was found running a hospital, thus discharging public functions/public duty. This Court considered the issue in reference to the element of public function which should be akin to the work performed by the State in its sovereign capacity. This Court took the view that every public function/public duty would not make a writ petition to be maintainable against an "authority" or a "person" referred under Article 226 of the Constitution of India unless the functions are such which are akin to the functions of the State or are sovereign in nature. Few relevant paragraphs of the said judgment are quoted as under for ready reference:-

22. *Following the decision in Andi Mukta [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691], this Court has had the occasion to revisit the underlying principles in successive decisions. This has led to the evolution of principles to determine what constitutes a "public duty" and "public function" and whether the writ of mandamus would be available to an individual who seeks to enforce her right.*

xxx xxx xxx

26. *In Federal Bank Ltd. v. Sagar Thomas [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733], this Court analysed the earlier judgments of this Court and provided a classification of entities against whom a writ petition may be maintainable : (SCC p. 748, para 18)*

18. *From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (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."*

63. *The aforesaid decision of this Court in Ramakrishnan Mission (supra) came to be considered exhaustively by a Full Bench of the High Court of Allahabad in the case of Uttam Chand Rawat v. State of U.P., reported in (2021) 6 All LJ 393*

(FB), wherein the Full Bench was called upon to answer the following question:-

(i) Whether the element of public function and public duty inherent in the enterprise that an educational institution undertakes, conditions of service of teachers, whose functions are a sine qua non to the discharge of that public function or duty, can be regarded as governed by the private law of contract and with no remedy available under Article 226 of the Constitution?"

64. The Full Bench proceeded to answer the aforesaid question as under:-

16. The substance of the discussion made above is that a writ petition would be maintainable against the authority or the person which may be a private body, if it discharges public function/public duty, which is otherwise primary function of the State referred in the judgment of the Apex Court in the case of Ramakrishnan Mission (supra) and the issue under public law is involved. The aforesaid twin test has to be satisfied for entertaining writ petition under Article 226 of the Constitution of India.

17. From the discussion aforesaid and in the light of the judgments referred above, a writ petition under Article 226 of the Constitution would be maintainable against

(i) the 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.

18. There is thin line between "public functions" and "private functions" discharged by a person or a private body/authority. The writ petition would be maintainable only after determining the nature of the duty to be enforced by the body or authority rather than identifying the authority against whom it is sought.

19. It is also that even if a person or authority is discharging public function or public duty, the writ petition would be maintainable under Article 226 of the Constitution, if Court is satisfied that action under challenge falls in the domain of public law, as distinguished from private law. The twin tests for maintainability of writ are as follows :

1. The person or authority is discharging public duty/public functions.

2. Their action under challenge falls in domain of public law and not under common law.

20. The writ petition would not be maintainable against an authority or a person merely for the reason that it has been created under the statute or is to governed by regulatory provisions. It would not even in a case where aid is received unless it is substantial in nature. The control of the State is another issue to hold a writ petition to be maintainable against an authority or a person."

(Emphasis supplied)

It is under these circumstances that it needs to be ascertained as to whether the activity of financing by a private sector bank/NBFC involves a public law element or not. Ordinarily understood, public law is

bunch of law which governs the relationship between individual and the State while private law is the area of law that governs the relationship between the private individuals. To understand the above said concepts, it must be borne in mind that the public law deals with the issues that are important to Society such as Human rights or National Security and is characterized by a superior-subordinate relationship creating a prominent unilateral binding regulation under the Statute and administrative acts whereas the private law deals with the issues that are specifically individuals such as contracts negotiations, property disputes etc. The relationships amongst individuals are brought about by relationship of a contract/cooperation or coordination.

The person aggrieved would be required to take recourse to the remedies provided under the alternative laws. Non-performance of any contractual obligations, may, lead to some semblance of a loss and be enlarged as infringing upon a right of the person and/or causing prejudice thereto. However, the ordinary remedy available would be in the form of taking recourse to the alternative statutory remedies rather than invoking the writ jurisdiction of the High Court under Articles 226/227 of the Constitution of India.

In the said background, it is deemed appropriate also to refer to the judgments relied upon by the petitioners to ascertain the issues raised in the same and as to whether the question of maintainability has been determined in favour of the borrower, as claimed.

Citicorp. Maruti Finance Ltd. (supra)

The issue before the Hon'ble Supreme Court was arising from proceedings under the Consumer Protection Act, 1986 and during the pendency of the said proceedings the appellant Citicorp. Maruti Finance Limited had complied with the judgment of the National Commission. The Hon'ble Supreme Court was not dealing with the issue of maintainability of a writ petition against repossession of vehicle by a private bank/non-banking finance company and it observed that a finance company would not be within its right to effect recovery of vehicle, on a default, in a manner other than the due process of law.

In so far as the judgment in the matter of **ICICI Bank Ltd. Vs. Prakash Kaur** (*supra*) are concerned, the same arose on account of a direction issued by the Allahabad High Court in a Crl. Misc. matter for registration of an FIR against the bank officials. The issue of maintainability of a writ petition was not involved, however, the FIR that had been registered against the bank was quashed by the Hon'ble Supreme Court. The guidelines were laid for future reference.

Similarly, the challenge in the matter of **ICICI Bank Vs. Shanti Devi Sharma and others** (*supra*), was also in reference to the initiation of criminal proceedings in a case of commission of suicide by the borrower and the reference made by the High Court in its order seeking report from the police. A clarification was, however, issued by the High Court vide order dated 11.08.2016 that the remarks ought not to influence the proceedings initiated against the bank or its employees.

In so far as the judgment of **Amarjit Kaur Vs. The Governor Reserve Bank of India and others** (*supra*) is concerned, the

same is in relation to the proceedings under the SARFAESI ACT, 2002 during the pendency of moratorium ordered by the Hon'ble Supreme Court. The respondent finance company had already released the vehicle and an application had been filed under Section 9 of the Arbitration and Conciliation Act, 1996 for seek permission to obtain orders for seizure of the vehicle, through Receiver, before the Additional Sessions Judge, Ludhiana. By referring to the specific evidence, it was noticed that the recovery of the vehicle was forcible. The same was thus allowed. The question of maintainability of the writ petition was neither raised nor adjudicated by the Hon'ble Division Bench.

Similarly, in the matter of **Gaurav Mago Vs. State of Punjab and others**, passed in LPA No.1304 of 2010, the issue before the Bench was against the directions to register FIR on noticing and pleading that fabricated documents had been prepared by the finance company for selling the vehicle. It was for the aforesaid reasons that the LPA against the order was dismissed.

In so far as CWP-1180 of 2010 decided on 14.07.2010 titled **Sukhwinder Singh Vs. State of Punjab** and others is concerned, the said writ petition had been disposed of without expressing any opinion on the merits and as such, the same does not lay down any ratio.

Reference to CWP-27089-2017 is by way of an interim order which does not lay any law.

So far as the Division Bench judgment of the Hon'ble Allahabad High Court in the matter of **Sri Ram Umrao Vs. Managing Director IndusInd Bank Ltd.** (supra) and others is concerned, the same

also does not deal with the issue of maintainability of a writ petition against the private bank/non-banking Finance company and a general reference is made to the Judgments of the Hon'ble Supreme Court that possession cannot be taken except in the manner known to law and that a bank must take recourse to the provisions of the SARFAESI ACT, 2002, for seeking possession. Further, as per the Division Bench judgment of Hon'ble Delhi High Court in Dr. Amitabh Varma Vs. The Commissioner of Police and others, (supra) which was in the nature of a criminal case proceeding, the possession of the vehicle had already been handed over by the financier and general guidelines were issued to stop recurrence of such offences. The same guidelines were reiterated in the judgment of Muthoot Leasing and Finance Ltd. Vs. M/s Vasudeva Publicity Service and another, which arose from the decree of District Judge. First appeal was thus being decided.

In so far as the judgment of **M/s A-One Mega Mart Pvt. Limited and others Vs. HDFC Bank and another**, (supra) is concerned, the said judgment in fact does not support the claim of the petitioner on the said issue, rather the said judgment holds that a writ petition was not maintainable against a private party and writ proceedings can be initiated only against a Scheduled Bank under the Reserve Bank of India Act, 1934 which is governed by the Banking Regulations Act, 1949 to the extent and that too not on the issues which are covered under the SARFAESI Act, 2002. The relevant extract of the same reads as under:-

“8. Examining the issue (a) relating to maintainability of writ petition against respondents No.1-Bank, inevitably the

reference is made to certain provisions of relevant statutes and also principles enunciated in the precedents laid down by the Hon'ble Apex Court and other High Courts.

9. Firstly, it may be noticed that Reserve Bank of India is a statutory authority. [Section 2\(e\)](#) of the Reserve Bank of India Act, 1934 (for brevity, '1934 Act') describes "Schedule Bank" to mean a bank included in the Second Schedule. A perusal of the second Schedule to the 1934 Act shows that respondent-HDFC Bank Limited is specified therein. The Reserve Bank of India being a statutory authority, exercises supervisory power in the matter of functioning of the Scheduled Banks. For the aforementioned purpose, the Reserve Bank is entitled to issue guidelines from time to time.

10. The Parliament enacted the [Banking Regulation Act](#), 1949 (in short, 'the 1949 Act') to consolidate and amend the law relating to banking. [Section 5\(l\)](#) of the 1949 Act defines "Reserve Bank" to mean the Reserve Bank of India constituted under [Section 3](#) of the 1934 Act. By reason of various provisions of the 1949 Act, the Reserve Bank is empowered to control and supervise the functioning of the Scheduled Banks.

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17. Further, having examined various statutory provisions, it would be apt to refer to certain pronouncements of the Hon'ble Apex Court and High Courts laying down principles relating to maintainability of writ petitions. The issue in the petition does not relate to whether the respondent-Bank falls within the meaning of "State" as defined in [Article 12](#) of the Constitution or is an instrumentality of the State or not. The core question is whether a writ petition under [Article 226](#) of the Constitution of India can be entertained against "any person", who is under statutory obligation to perform, where the reliefs claimed necessarily are not against the "State",

"Government" or "authority" or "instrumentality of the State".
The Hon'ble Supreme Court in [The Praga Tools Corporation vs. Shri C.V. Imanuel and others](#), AIR 1969 Supreme Court 1306 laid down that writ petition would be competent against any person or authority on whom the statutory duty is imposed. It was observed as under:-

".....It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can be issued, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings....."

18. [In Shri Anadi Mukta Sadguru Shree Muktajee Vandasjiswami Survarna Jayanti Mahotsav Smarak Trust and others v. V.R.Rudani and others](#), AIR 1989 Supreme Court 1607, the Supreme Court clearly laid down the principles in the following words:-

"19. 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 [Art. 32](#). [Article 226](#) confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as nonfundamental rights. The words "Any person or authority" used in [Article 226](#) are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of

the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

It was further observed as under:-

"21. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor De Smith states: "To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." (Judicial Review of Administrative 'Act 4th Ed. p. 540). We share this view. The judicial control over the fast expanding maze of bodies effecting the rights of the people should not be put into water-tight 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. The Supreme Court further explaining its decision in Anadi Mukta's case (supra) in [VST Industries Limited v. VST Industries Workers' Union](#), (2001) 1 SCC 298 noticed as follows:-

In Anadi Mukta case this Court examined the various aspects and the distinction between an authority and a person and after analysis of the decisions referred in that regard came to the conclusion that it is only in the

circumstances when the authority or the person performs a public function or discharges a public duty that [Article 226](#) of the Constitution can be invoked."

20. *Defining of scope of exercise of writ jurisdiction under [Article 226](#) of the Constitution of India by the High Court, the Supreme Court in [Binny Limited and another v. V.Sadasivan and others](#), (2005) 6 SCC 657 noted as follows:-*

*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 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 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 Subha Rao J. expressed in relation to the powers conferred on the High Court under [Article 226](#) of the Constitution in **Dwarkanath Vs. Income Tax Officer 1965 (3) SCR 536** at pages 540-41:*

"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 of India with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself."

It was concluded as under:-

"29. Thus, it can be seen that a writ of mandamus or the remedy under [Article 226](#) is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in [Article 226](#) of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is

determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England 3rd ed. Vol. 30, page-682, "a public authority is a body not necessarily a county council, municipal corporation or other local authority which has public statutory duties to perform and which perform the duties and carries out its transactions for the benefit of the public and not for private profit." There cannot be any general definition of public authority or public action. The facts of each case decide the point."

21. A Full Bench of this Court in [Miss Ravneet Kaur v. The Christian Medical College, Ludhiana](#), (1997) 2 PLR 320 delving into the scope of [Article 226](#) of the Constitution of India and issuance of 'Prerogative writs' in para 59 thereof had summarized as under:-

"59. In view of the above, we hold that :--

(i) Powers of the High Courts under [Article 226](#) of the Constitution are wider than those of the Court of King's Bench in England.

(ii) The power of the High Courts is not confined to the issue of prerogative writs as initially understood in England. The procedural restrictions which had been imposed on the Courts in England do not bind the High Courts in this country. The High Courts are empowered to

issue not only writs in the nature of certiorari, mandamus etc. but also orders and directions to enforce fundamental rights or for any other purpose.

(iii) The power under [Article 226](#) of the Constitution is not confined to the enforcement of fundamental rights like the power under [Article 32](#). Still further, the High Courts can issue writs, orders or directions even to any person or authority discharging a public duty for enforcement of the fundamental rights or for any other purpose.

(iv) The words "any person or authority" used in [Article 226](#) do not mean only State as defined in [Article 12](#) or statutory authorities. These cover any person or body performing a public duty.

(v) In view of the importance of 'health' to the Community, institutions providing medical education form a distinct class. These institutions perform a public duty and supplement the State's effort. By their affiliation to a University or any other statutory examining body, they become partners with the State. They are, thus, subject to the restrictions contained in Part III. They are bound to act in conformity with the provisions of the [Indian Medical Council Act, 1956](#) and the rules/regulations framed by the appropriate University/body. Whenever they act unfairly, arbitrarily or violate the prohibitions contained in Part III of the Constitution or the rules and regulations framed by the University etc., their actions can be corrected by issue of a writ of certiorari or any other appropriate writ, direction or order. Similarly, if it is found that an institution has failed to carry out an obligation under the Constitution or the rules/regulations framed by an appropriate body, it can be compelled to perform its duty by the issue of a writ of mandamus. This principle shall, however, not be attracted in case of every private school or college.

(vi) *The Full Bench decisions of this Court in Pritam Singh v. State of Punjab, (1982) 2 Serv LR 135 : (AIR 1982 Punj & Har 228) and Gurpreet Singh Sindhu v. The Punjab University, Chandigarh, AIR 1983 Punj & Har 70, do not contain a correct enunciation of law and are overruled."*

22. In Firozali Abdulkarim Jivani and another v. The Union of India and others, AIR 1992 Bombay 179, Bombay High Court following the principles enunciated by the Apex Court in *Praga Tools Corporation's case (supra)* held that writ against private person under Article 226 of the Constitution of India can be issued for enforcement of duties and obligations imposed upon them by statute. Observations made in para 25 which are relevant, read thus:-

"25. We need not go into this question as to whether respondent No. 6 Bank is a 'State' within the meaning of Art. 12. In the present case, what is sought to be enforced is the statutory duty imposed upon respondent No. 6 Bank and its returning officer respondent No. 7 by virtue of the provisions of S. 37. It is true that the returning officer is also a private individual, because in the Rules Regarding Electing Members of the Board of Directors, framed by respondent No. 6, a returning officer is required to be appointed by the Board of Directors. Nevertheless, the Act casts certain statutory duties and obligations on a returning officer as well as on respondent No. 6. For the enforcement of these statutory duties and obligations, a writ would lie. As observed by the Supreme Court in the case of Praga Tools Corpn. v. C. V. Imanual, (supra) -

".....It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a

public official or an official body. A mandamus can be issued, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings....." (p. 1309).

A writ is, therefore, maintainable."

23. A Division Bench of Delhi High Court in **Rahul Mehra v. Union of India, 2004(114) DLT 323** in the light of judgments of the Apex Court in *Anadi Mukta, VST Industries Limited and Federal Bank Limited's cases (supra)*, while adjudicating the issue whether Board of Control for Cricket in India (BCCI) was amenable to writ jurisdiction under [Article 226](#) of the Constitution of India, had noticed that High Court can issue writ, order or direction to "any person" for enforcement of any fundamental right or "for any other purpose" even where the State may not be directly involved in the dispute but the issue is of a public duty or performance of public function by a private body. It was observed as under:-

"7. The core question, therefore, is -- whether BCCI is amenable to the writ jurisdiction under [article 226](#) of the Constitution Sub-[article \(1\)](#) thereof reads as under:-

"226. POWER OF HIGH COURTS TO ISSUE CERTAIN WRITS.

(1) Notwithstanding anything in [article 32](#), every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or

any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

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A plain reading would suggest that the powers are plenary and the High Court can issue directions, orders or writs to "any person" for the enforcement of any fundamental right and "for any other purpose". However, these wide powers have been regulated by judicial pronouncements so as to avoid interference in matters where alternative remedies are available as also where the dispute is purely of a private nature having no "public law" element. The traditional view was that wherever the State or its instrumentality was involved, it was regarded as an issue within the domain of public law. Likewise, where individuals were at loggerheads, the remedy lay within the precincts of private law. This was all very well as long as governments stuck to governance and private persons or bodies confined their activities to pursuits of a private nature. But, when the state entered into the fields of commerce, industry and business and when private bodies took up public functions and duties, this distinction between public law and private law based on the public or private character of the institution was no longer clear-cut. Therefore, it was no longer safe to rely solely upon the character of the institution to decide whether it was amenable to writ jurisdiction or not. For instance, where there is a dispute of a purely contractual nature (not being a statutory contract), it does not matter that one of the parties is the "State" or a "statutory body" or "instrumentality of the State", such a matter falls within the arena of private law and judicial review under [article 226](#) would not lie. And, the converse would be equally true. In other words, a dispute in which the State is not directly involved may yet be a public law issue if a public duty or a public function is performed by a private

body. 8. Governments have ventured into the private arena and private bodies, likewise, have undertaken public duties or public functions. There is a degree of overlap and the distinction is no longer clear-cut or watertight. The law must be alive to these dynamics. Accordingly, the question of maintainability of a writ petition must not be addressed from the standpoint of amenability. Everybody is amenable to the jurisdiction of the High Courts under [article 226](#). However, Courts have exercised restraint and they exercise these powers only in cases which involve public law. Therefore, the "litmus" test for invoking the writ jurisdiction is whether the act complained of is in the discharge of a public duty or a public function. It matters little as to who discharges the public duty or performs the public function. And so too, the source of the power to discharge or perform such duty or function. Whether the person is empowered by statute or some governmental order or whether such person arrogates to himself the power to perform a public function or discharge a public duty, is of no consequence. What is to be seen is whether there is an infraction in the discharge of such duty or function. If there is, the High Court has power to correct it by issuing an order, direction or writ to any person. Funding is also not an issue. A privately funded private organisation but discharging a public duty would still be within the "net" of [article 226](#)."

24. Summarizing the conclusion, it was recorded:-

"17. At the cost of repetition, we may state that the whole "amenability" issue is misplaced. A body, public or private, cannot be categorised as "amenable" or "not amenable" to writ jurisdiction. The "function" test is the correct one to test maintainability. If a public duty or public function is involved, any body, public or private,

qua that duty or function, and limited to that, would be subject to judicial scrutiny under the extraordinary writ jurisdiction of [article 226](#). The BCCI which is the sole repository of everything cricket in India has attained this "giant" stature through its organisation, skill, the craze for the game in India and last but not the least by the tacit approval of the Government. Its objects are the functions and duties it has arrogated to itself. Many of these are in the nature of public duties and functions. Others may be in the field of private law such as private contracts, internal rules not affecting the public at large etc.,. Therefore, BCCI cannot be said to be beyond the sweep of [article 226](#) in all eventualities for all times to come. That is the certificate that BCCI wants from this court. We are afraid, we cannot grant that. Consequently, this petition cannot be thrown out on the maintainability issue. This does not necessarily mean that the petitioners would be entitled to the orders, directions or writs that they seek. That will have to be examined on merits."

25. The learned counsel for the petitioners had relied upon the following observations in Federal Bank's case (supra) where the Hon'ble Apex Court had broadly laid down the following principles relating to maintainability of writ petition:-

"A writ petition under [Article 226](#) of the Constitution of India may be maintainable against (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 a public duty or positive obligation of a public nature; and (viii) a person or a body under a liability to discharge any function under any statute, to compel it to perform such statutory function. It

is no doubt true that a mandamus can be issued to any person or authority performing public duty, owing positive obligation to the affected party."

It was further noticed as under:-

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

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28. From the above, it is concluded that ordinarily no writ would lie against a private Bank. However, where the Bank is

a Scheduled Bank under [Reserve Bank of India Act](#), 1934 and is governed by the provisions of [Banking Regulation Act](#), 1949, it shall be amenable to writ jurisdiction of this Court where the Scheduled Bank takes recourse to the provisions of [SARFAESI Act](#).”

As far as the judgment of the Patna High Court in the matter of **Dhananjay Seth Vs. The Union of India and others** (supra) is concerned, the Patna High Court did not deal with the issue of maintainability of the writ petition against the private financier or a private bank and proceeded to examine the issue on the precedent that the banks have taken recourse to the seizing possession of the vehicles without taking recourse to the procedure enshrined under the SARFAESI Act. The directions issued only reiterate the position of law that a forcible dispossession cannot be undertaken by the banks/finance companies.

So far as the judgment of this Court in the matter of **Tarun Bhargava Vs. State of Haryana** (supra) is concerned, the said criminal misc petition had been filed for seeking quashing of the FIR already registered. The issue of maintainability of a writ petition was thus not before this Court and the matter was being examined in the context as to whether a criminal case could be registered against the banking institutions where they have taken law into their own hands. The Court further observed that in the event the petitioner makes a statement before the trial Court that he will proceed for enforcing his right through the process of law, the criminal proceedings may be dropped. Similarly, the matter of **Narinder Kumar Singla Vs. State of Punjab and another**, (supra) also

arose on account of registration of the criminal case and sought quashing of the order granting Superdari of the truck in favour of the respondent No.2 i.e. the Finance Company. The judgment in the matter of M/s Sundram Finance Limited, Chennai Vs. Raj Kumar and another (supra), also examined the legality of criminal proceedings that had been instituted by way of a criminal complaint No.37 of 9.8.2004 titled 'Raj Kumar and others Vs. Sundram Finance Limited' before the Ilqa Magistrate at Ludhiana and the consequential summoning of the petitioner noticing the allegations leveled including the forcible dispossession of the vehicle and the requirement of a prima facie case, no illegality was noticed in the order of summoning and the same was affirmed. The case of M/s Punjab Kashmir Finance Limited Vs. The State of Haryana and another, (supra) also arose as a result of registration of a criminal case and seeking quashing thereof.

The above said judgments are thus not rendered in context to the controversy raised before this Court and the question as regards maintainability was neither examined nor answered. Similarly, the proceedings before the Hon'ble Kerala High Court in the matter of **Bhahuleyan Vs. State of Kerala and others, (supra)** also arose from the criminal proceedings and the order of release on superdari passed in favour of registered owner i.e. the financier. The arrangement/release of the vehicle in favour of the registered owner was upheld subject to certain additional directions so issued.

For a judgment to have a precedential value on a point of law, the same is required to decide the issue. The position of law based on the

judicial precedents cited by the petitioners is that a person who is in possession of a property either as a hire purchaser or as a loan cannot be divested or dispossessed except in a manner known to law.

It is thus evident that the judgments relied upon by the petitioners do not ipso facto rule on maintainability of a writ petition against a Private Bank and/or Non-Banking Finance company. Rather, the judgments relied upon arise on account of the proceedings from the National Commissions, SARFAESI Act or from the criminal proceedings that were initiated consequent upon recovery. While examining the said issue, the respective Courts recorded an observation against use of muscle power which was an illegal mode of recovery of vehicle, and emphasis that the recovery ought to take place in a manner known to law. The Courts thus refrained from interfering in the matters where forcible possession had been taken and criminal proceedings initiated. The mere fact that the High Court had entertained a writ petition in the interest of substantive justice cannot ipso facto be construed as an adjudication on the issue of maintainability by implied interference. A judgment can be cited as a precedent when it lays down a ratio. When such a ratio is not laid down, it is at best a decision on the lis to the extent of issues brought before it for determination. Drawing strength from the said orders and to advance an argument as regards the maintainability, despite said issue having not been raised, argued, examined or decided would be an improper way of reading the judgments. The judgment in the matter of **M/s A-One Mega Mart Pvt. Limited and others Vs. HDFC Bank and another (supra)** relied by the petitioners rather reiterates a finding against the petitioners in so far as the

maintainability of a writ petition against a private banking institutions and/or the NBFC is concerned.

It is further evident that the Hon'ble Supreme Court in the matter of **M/s Magma Fincorp Ltd. Vs. Rajesh Kumar Tiwari** (supra), while dealing with the judgments of *Citicorp. Maruti Finance Ltd.*; the **Controller and the Auditor General of India Gian Parkash Vs. K.S. Jagannath** and **M/s Sundram Finance Limited, Chennai Vs. Raj Kumar and another**, held that the above judgments are not rendered in context of determining a right of the financier to take possession of the vehicle and rather relied upon the judgment in the matters of *Anup Sarmah Vs. Bhola Nath Sharma and others (2013) 1 SCC 400*; *Orix Auto Finance (India) Lrd Vs. Jagminder Singh and another (2006) 2 SCC 598*; *K.A. Mathai alias Babu and another Vs. Kora Bibbikutty and another (1996) 7 SCC 212*; and a catena of other judgments to conclude that the financier would remain owner of the vehicle and when possession of such vehicle is taken on default by the hirer in payment of installments, there would be no legal impediment in doing so. Such an act cannot be said to be one of commission of theft. It was further held that even a loan transaction, secured by right of seizure of a financed vehicle, confers licence to the Financier to seize the vehicle. It is also specifically held that whether the service of a notice on the hirer would be necessary for repossession of a vehicle would be determined upon the terms and conditions of the hire purchase agreement some of which may stand modified by the course of conduct of the parties. The requirement of notice would be mandatory if such a condition is contained in the agreement and

implicit if it is reflected from the course of conduct of the parties. Whether there is breach committed by the borrower on the conditions of the agreement and a provision is contained for immediate repossession of the vehicle without further notice, such repossession would not be vitiated for want of notice. Considering that the agreement therein stipulated service of notice and that such notice was not sent to the correct address, Non-service of notice would tantamount to breach of terms and conditions giving rise to claim for damages, based on the assessment of the loss caused, before the competent Forum. Orders of consumer Court were thus set aside, however, a damage was awarded for deficiency in service in failing to give notice before taking repossession of the vehicle.

In so far as the judgment in the case of **Fedral Bank Ltd. Vs. Sagar Thomas and others, reported as 2003 (10) SCC 733** is concerned, the said judgment also ruled that the control of the Reserve Bank of India on the private banks running commercial activities is only for some limited purposes and not in their internal management. A writ petition against a private bank would not be maintainable for such purposes and is restricted only where a statutory obligation is sought to be enforced. Such banks are not an instrumentality or agency of State nor the State has its financial or administrative control over them. Reference may be made to following extract of the said judgment:-

“25. A company registered under the [Companies Act](#) for the purposes of carrying on any trade or business is a private enterprise to earn livelihood and to make profits out of such activities. Banking is also a kind of profession and a commercial activity, the primary motive behind it can well be

said to earn returns and profits. Since time immemorial, such activities have been carried on by individuals generally. It is a private affair of the company though case of nationalized banks stands on a different footing. There may, well be companies, in which majority of the share capital may be contributed out of the State funds and in that view of the matter there may be more participation or dominant participation of the State in managing the affairs of the company. But in the present case we are concerned with a banking company which has its own resources to raise its funds without any contribution or shareholding by the State. It has its own Board of Directors elected by its shareholders. It works like any other private company in the banking business having no monopoly status at all. Any company carrying on banking business with a capital of five lacs will become a scheduled bank. All the same, banking activity as a whole carried on by various banks undoubtedly has an impact and effect on the economy of the country in general. Money of the shareholders and the depositors is with such companies, carrying on banking activity. The banks finance the borrowers on any given rate of interest at a particular time. They advance loans as against securities. Therefore, it is obviously necessary to have regulatory check over such activities in the interest of the company itself, the shareholders, the depositors as well as to maintain the proper financial equilibrium of the national economy. The Banking companies have not been set up for the purposes of building economy of the State on the other hand such private companies have been voluntarily established for their own purposes and interest but their activities are kept under check so that their activities may not go wayward and harm the economy in general. A private banking company with all freedom that it has, has to act in a manner that it may not be in conflict with or against the fiscal policies of the State and for such purposes, guidelines are

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

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

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

27. 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.

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

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

of the decision (Andi Mukta) to indicate that even according to this case no writ would lie against the private body except where it has some obligation to discharge which is statutory or of public character.

30. Merely because the Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under [Section 5\(c\)\(a\)](#) of the Banking Regulation Act does not mean that the private companies carrying on the business of or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. Provision regarding acquisition of a banking company by the Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for acquiring authority.

31 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.

In the result, the appeal is allowed and the judgment and order passed by the High Court is set aside and the writ petition is held to be not maintainable. There will, however, be no order as to costs.”

Hence, the issue has been decided in the affirmative that a writ against a non-public function or duty discharged by a Private entity would not be maintainable merely because the Reserve Bank of India lays down certain guidelines in the interest of monetary stability. The private banks/companies carrying on business of commercial activity of banking do not necessarily discharge any public function or public duties. Laying down of regulatory measures for regulating the commercial activity in banking would entail remedies through ordinary private law remedy and not through the public law petitions. The functionality test was also relied upon in the matter of **Praga Tools Corporation (supra) and Ramesh**

Ahluwalia (supra) as well as in the matter of **Phoenix ARC Private Limited Vs. Vishwa Bharati Vidya Mandir and others** (supra). Even though the issue invariably in the above said writ petitions was also in relation to SARFAESI Act, 2002, the Hon'ble Supreme Court examined the issue of maintainability of a writ petition in matters and it was held that a writ petition would not be available to a defaulter as the Assets and Reconstruction Company could not be construed as to perform public functions expected to be performed by the State Authorities.

A Division Bench of this Court has already in the matter of **M/s Fermina Developers Ltd.** (supra) held against maintainability of a writ petition against the non-banking finance companies and it was held that non-banking finance companies are engaged in a commercial activity with the primary object to earn return and profits by using its own resources to raise funds. Such NBFCs had not been set up for the purposes of building economy of the State but were voluntarily established for their own purposes and commercial interests. The respondent-NBFC is obligated not to act in conflict with or against the fiscal policies of the State for maintaining a fiscal discipline, however, the same would not cloak the private non-banking finance companies as discharging public functions.

Similarly, the Division Bench of the Allahabad High Court in the matter of **Dharmendra Kumar Yadav Vs. Manager Commercial Autos Sales (Pvt.) Ltd. Allahabad**, (supra) had also held that where the consumer approaches the Court leveling allegations of forcible repossession, the person aggrieved is entitled to take recourse to criminal

or civil action as is permissible under law against the bank and that a writ petition would not be maintainable as the means of seeking restoration of the possession. The view against maintainability of the writ petition was further accepted by a Division Bench of this Court in the matter of **Harinder Fabrics Vs. Shriram City Union Finance Ltd**, (supra).

Further, a Division Bench of Hon'ble Orissa High Court in the matter of **Anirudh Sahoo Vs. Commissioner, State Transport Authority, Orissa and others** reported 2010 (110) CutLT 92, again held that respondent No.3 which is Magma Shrichi Finance Limited is a private company and remedy for breach if any of an agreement has to be availed by resorting to appropriate proceedings for resolution of civil dispute. The above said judgment examined the scope of action against breach of obligations by private entities. Significantly, all the aforesaid judgments have rule against the maintainability of the writ petition. The judgments relied upon by the petitioners, however, are not exactly on the question of maintainability of a writ petitions. Resultantly, the said judgments have no binding precedential value in so far as the issue of maintainability of a writ petition against NBFCs is concerned.

The issue in question was further under consideration before the Hon'ble Supreme Court in the matter of **SLP (Civil) Nos.22021-22022 of 2022 titled as M/s South Indian Bank Limited and others Vs. Naveen Mathew Philip and another** decided vide judgment dated **17.04.2023**, wherein the Hon'ble Supreme Court observed that the High Courts' ought not to exercise jurisdiction under Article 226 of the Constitution of India where other efficacious remedies are available. A

remedy of a writ is not expected to be a panacea against all violations. It comes into operation only when a State Agency against which the allegations are being leveled does not come to its rescue. Issuance of the prerogative writ of mandamus in the absence of any established legal right cannot lay foundation for exercising of the power. A greater introspection is required in a financial transaction, more particularly when one of the parties does not come under the purview of Article 226 of the Constitution of India. The attempt of the Court while exercising its power of judicial review should not be an attempt of circumventing the due process of law and to use the extra ordinary constitutional remedy as the primary and the only remedy.

Adverting to the submissions of the petitioners pertaining to hardships faced by them on account of the Arbitration Clause and their inability to pursue the same, it is observed that arbitration awards have been passed in a number of cases and that even the notices had been sent pre and post recovery and even before carrying out the auction proceedings of the repossessed vehicle. However, the borrowers preferred to wait for the entire duration when such proceedings were being initiated. There is no satisfactory explanation as to why the borrower chose not to take recourse to the remedies available in law and as agreed to between the parties under the contract. Having opted not to pursue the remedies or file objections against the same despite having been agreed upon, the borrower cannot be given a premium to violate the agreed terms and conditions on a plea of hardship raised at this stage especially when the agreements have remained in force for varied durations. The parties' autonomy has been the hallmark

of contractual relationship amongst the parties which have agreed to the Forum of arbitration for settlement of disputes. So far as any apprehensions with respect to the fairness and impartiality of an arbitrator is concerned, adequate safeguards have been prescribed under the Arbitration and Conciliation Act, 1996 as amended. Hence, any apprehension nourished by a borrower and which is not borne out of the relationship between the borrower and the lender cannot be the sole ground to impeach the impartiality and integrity of an arbitrator or any other alternative forum as may have been agreed upon between the parties. Any such apprehension is then required to be addressed as per the mechanism enshrined under the Statute. The writ jurisdiction under Article 226 of the Constitution of India cannot be devised as a primary mechanism or as a means to bye-pass the contractual obligations or statute.

It is also evident that even though the writ petitions are being filed alleging non-compliance of RBI guidelines they essentially remain directed against Private Banks/NBFC and more in the nature of mandatory/prohibitory injunction.

The undisputed facts which have emerged from a perusal of the present writ petitions are as under:-

- (1) the lender companies are known as non-banking companies/private sector financial institutions;
- (2) that the borrowers are undisputedly in default of the installments/overdue interest/penal charges in default/delayed payment of installments etc.;

- (3) The re-possession of the vehicle has been beyond the territorial jurisdiction of this Court in a large number of cases;
- (4) There is no contemporaneous evidence to establish that repossession of the vehicle was by any illegal means or by exercise of undue force or by way of commission of any criminal offence other than a self-serving statement which is not corroborated by any contemporaneous evidence.
- (5) That as is evident from the illustrative table extracted above, there have been awards; orders by the civil Courts; orders under Sections 9 or 17 of the Arbitration and Conciliation Act, 1996 as well as pre and post repossession notices including notices by the sale of the recovered security interest to the borrower. Even though there is a denial by the borrower of receipt of any such notices, however, a dispatch at the address given by the borrower himself is prima facie reflective of due intimation. However, such aspect is required to be established by the private party asserting absence of intimation.
- (6) That in various such cases, the arbitrator has passed an award or is at advance stage of the arbitration proceedings and the borrower has chosen not to participate in the arbitration proceedings or failed to challenge the same.
- (7) Having opted to a dispute resolution mechanism of arbitration, the borrower had an appropriate remedy before the competent authority for seeking redressal of his grievances. Having chosen not to pursue his remedies as per the Statute, the

borrower cannot opt to wriggle out of his contractual obligations by alleging the conditions to be onerous or not in favour of the borrower as a valid excuse.

(8) A writ jurisdiction would not ordinarily be extended unless there is a glaring violation of the law or rights of an individual by an agency discharging public functions or public duty.

(9) There can be no presumption that the alternative dispute redressal mechanism provided under the common law for redressal of grievances, are non-effective or expeditious. Such a presumption is likely to defeat the entire hierarchy of judicial system and to deplete the objective of providing expeditious and cost effective remedy at doorstep. The same may also render a gullible borrower to part away with his hard earned money and also lose valuable time in pursuing a remedy which is ordinarily not the appropriate remedy. The perception of a writ court being the sole panacea for all agencies cannot be the ground to bye-pass the common law remedies provided through various regulatory channels.

For the foregoing reasons and in view of the judicial precedents of the Hon'ble Supreme Court as well as of the Hon'ble Division of this Court as regards the non-maintainability of the writ petition against private institutions/non-banking finance companies, I am of the opinion that the present writ petitions seeking issuance of writ of mandamus restraining the respondent Private Banks/NBFC from seeking

repossession of the vehicle and to seek restoration of the possession of the vehicles are not maintainable.

While upholding the right of the financial institutions to seek repossession of the security interest in terms of the contract, it is incumbent that as per the law laid down by the Hon'ble Supreme Court as well as this Court in judicial precedents, such repossession is to be done in the manner known to law. However, the above said concept of "manner known to law" cannot be assigned a meaning as would render recovery of the loans/advance impermissible. The recourse to the process agreed upon between the parties at the time of signing of contract would be deemed to be a sufficient compliance. In the event such compliance is established, the consequent action would not ex facie be illegal.

The present writ petitions are hence not maintainable for the above said reasons and the same are accordingly disposed of. COCP-1114-2020 and COCP-1116-2020 are accordingly dismissed.

Since this Court has disposed of these petitions on the issue/aspect of maintainability, it would not be appropriate for this Court to comment on the individual merits of each case lest it should prejudice the rights of the respective parties in the event of their pursuing alternative remedies. The parties may if so advised pursue their alternative remedies as per law for seeking redressal of their grievances.

The period during which the present writ petitions have remained pending before this Court shall be taken into consideration by the forum which the petitioner(s) may opt for seeking redressal of his/their grievances.

Any interim protection that may have been granted by this Court vide interim orders shall enure in favour of the respective petitioner(s) for a period of one month from the receipt of a certified copy of this order to enable the petitioner to approach the competent forum for redressal of his grievance.

Pending misc. application(s), if any, in the present batch of writ petitions shall also stand(s) disposed of accordingly.

A photocopy of the order be placed on the file of each connected case.

October 06, 2023
raj arora

(VINOD S. BHARDWAJ)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No