***THE HON'BLE SRI JUSTICE V.V.S.RAO**
AND
THE HON'BLE SRI JUSTICE G.KRISHNA MOHAN REDDY

+ WRIT PETITION Nos.11760, 22259, 22265, 22465, 24887, 30244 OF 2010, 3037, 4300, 7236, 7402, 8037, 8375, 14489 AND 27955 OF 2011

% Dated: 27.04.2012

Between:

Smt Kadali Saroja

... Petitioner

and

ICICI Bank Limited, Mumbai.
And others.

... Respondents

! Counsel for the Petitioners: Sri Vedula Srinivas
Sri V.S.R.Anjaneyulu
Ms.Dyumani

^Counsel for the Respondents : Ambadipudi Satyanarayana,
B.Ravinder Reddy and
A.Gopal Rao

<Gist:

>Head Note:

? Citations:

1. (2002) 5 SCC 111
2. (2003) 10 SCC 733 : AIR 2003 SC 4325
3. (2004) 4 SCC 311 : AIR 2004 SC 2371
4. (2009) 8 SCC 366 : 2009 (8) SCJ 979 : AIR 2009 SC 2420
5. (2010) 8 SCC 110 : AIR 2010 SC 311

6. (2011) 2 SCC 782 : 2011 (8) SCJ 484
7. AIR 1967 SC 1857
8. (2009) 15 SCC 221
9. (1979) 3 SCC 489
10. AIR 1981 SC 212 : (1981) 1 SCC 449
11. (1981) 1 SCC 722 : AIR 1981 SC 487
12. AIR 1975 SC 1329
13. (1993) 1 SCC 645 : AIR 1993 SC 2178
14. (1987) 1 All.E.R. 564
15. [2002] 2 All ER 936
16. AIR 1989 SC 1607
17. (2009) 8 SCC 257
18. (1999) 1 SCC 741 : AIR 1999 SC 753
19. (2004) 7 SCC 112
20. (2005) 4 SCC 4 : AIR 2005 SC 2884
21. (2005) 4 SCC 649 : AIR 2005 SC 2677
22. (2005) 6 SCC 657
23. (2008) 1 SCC 125
24. AIR 2005 Mad 241
25. AIR 1999 SC 22 = (1998) 8 SCC 1
26. AIR 1961 SC 609
27. AIR 1957 AP 368
28. (1971) 3 SCC 20 = AIR 1970 SC 645
29. (1999) 9 SCC 17
30. (2010) 8 SCC 110 : AIR 2010 SC 3413
31. (2011) 2 SCC 782

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COMMON ORDER: (Per Hon'ble Sri Justice V.V.S.Rao)

These writ petitions are filed either by the borrowers or sureties who entered into loan transactions with banks/financial institutions (FIs). In a couple of cases, the petitions are filed

against Securitization and Reconstruction Companies (SRCs) in whose favour the loans were assigned. Similar questions of law that arise necessitating this common order are (1) Whether a writ petition under Article 226 of the Constitution of India would lie against private banks/FIs or SRCs; and (2) Whether it is not necessary for the petitioners to exhaust the effective and efficacious alternative remedy available to them. These questions arise in the context of recovery proceedings initiated by the private bodies for enforcement of security interest under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the SARFAESI Act or the Act).

Background Facts

It would be suffice to refer to three cases to notice the factual matrix illustratively.

W.P.No.24887 of 2010

W.P.No.24887 of 2010 is filed against the ICICI Bank Limited (ICICI) and Asset Reconstruction Management Services (ARMS) which is a division of Asset Reconstruction Company (India) Limited (ARCIL). The petitioner's son availed loan about Rs.16.39 lakhs for construction of house. The loan is secured by the insurance policy issued by ICICI Lombard Limited and mortgage on the property. The borrower was a software engineer in Mumbai. He died in suspicious circumstances. A Sessions Case being S.C.No.91 of 2008 on the file of the Sessions Judge, Alibagh in Maharashtra against the borrower's wife and others was pending. After death of his son, the petitioner got issued lawyer's notice dated 09.09.2006 requesting the ICICI to adjust the

insurance amount towards the loan. The ICICI responded by issuing notice of demand under Section 13(2) of the Act. The petitioner sent two more legal notices on 21.10.2008 and 06.02.2009 requesting ICICI to settle the insurance claim, in vain. The petitioner moved Banking Ombudsman, Mumbai who passed an order to the effect that since the criminal case was pending, the matter will be decided after conclusion of the criminal case. It appears ICICI Lombard denied liability on the ground that the insured committed suicide disentitling the nominee to claim insurance amount.

The notice of demand dated 04.09.2008 under Section 13(2) of the Act was not pursued by ICICI. It appears in 2009 or 2010, the loan was assigned to ARMS. They issued and delivered notice of possession under Section 13(4) of the Act duly affixing to the door of the house. It is alleged that their officers are regularly visiting the house in connection with recovery of loan. Challenging the possession notice, the petitioner filed the writ petition.

ARMS is contesting the matter. While objecting to the exercise of writ jurisdiction on the ground of non-exhaustion of alternative remedy, third respondent would submit as follows. Non-joinder of ICICI Lombard entails in dismissal of the writ petition; the petitioner is a co-borrower for the loan; the plea to adjust insurance amount is untenable; action was initiated by ARMS as per the provisions of the Act and respondents 1 and 2 have no role; the notice was sent to both the borrowers to the last known address; and also affixed outside the property which is deemed service and hence, possession notice is duly served. The petitioner did not pay any outstanding amount till date and an amount of Rs.28 lakhs is due as on the date of filing of the counter.

W.P.No.22259 of 2010

The petitioner's father purchased house site (205.7½ square yards) under registered sale deed dated 19.12.1952. After his death, the property devolved on owner's wife who appears to have executed a settlement deed in favour of petitioner's son on 21.07.1972 giving vested remainder. The respondents 3 and 4 availed loan from Dhanalakshmi Bank Limited. The petitioner's son was a guarantor. When the loan became a non-performing asset (NPA), the second respondent initiated action under the SARFAESI Act and Security Interest (Enforcement) Rules, 2002 (the Rules). After issuing possession notice, the bank also approached Chief Metropolitan Magistrate, Vijayawada who appointed an Advocate Commissioner to take physical possession from the petitioner and his tenants. Assailing the said action, the petitioner filed the instant writ petition seeking declaration and direction not to interfere with her possession. We may mention that W.P.Nos.22265 of 2010 and 7402 and 27955 of 2011 are also filed against Dhanalakshmi Bank when they initiated action under the SARFAESI Act.

W.P.No.30244 of 2010

Two incorporated companies filed the instant writ petition challenging the action initiated by the Axis Bank Limited. They prayed for declaration that the action of the said bank in not furnishing the necessary details as requested in the interim objections filed under Section 13(3A), in response to notice of demand issued under Section 13(2) of the SARFAESI Act to M/s.Prestige Avenue Limited (Prestige, for brevity) as illegal and arbitrary besides being contrary to the Banking Code and Standard Board of India and Guidelines issued by the Reserve Bank of India

and for further directions.

During the pendency, M/s.Phoenix ARC Private Limited, Mumbai filed W.P.M.P.No.6359 of 2012 seeking impleadment. They would contend that they are ARMS registered under the SARFAESI Act, in whose favour Axis Bank assigned the debt of the borrowers with underlying security interest in their favour. Phoenix further submits that when the loan taken by M/s.Prestige and the first petitioner, Axis Bank classified the asset as NPA and initiated steps for recovery. Further in terms of the assignment agreement dated 30.09.2011, Phoenix has become full and absolute legal owner entitled to receive/recover repayment of borrowed amounts by enforcing the mortgage and other security interests.

Other writ petitions are filed against Citi Bank, Federal Bank, Karur Vysya Bank, ICICI Home Finance Limited and Sundaram Bank. In all these, writ petitioners' grievance is about the alleged improper initiation of recovery under SARFAESI Act. The petitioners also submit that declaration of the loan amount borrowed by them as NPA is not according to the guidelines issued by the Reserve Bank of India.

The counsel for petitioners M/s.Vedula Srinivas, V.S.R.Anjaneyulu and Ms.Dyumani would submit as follows. The petitioners questioned the very jurisdiction of the banks invoking the provisions of the SARFAESI Act. Therefore, the writ petitions are maintainable against erroneous exercise of jurisdiction. The SARFAESI Act was enacted in furtherance of public policy and when there is improper implementation of such policy, as entrenched in the statute, the writ petitions are not barred. Lastly, they would submit that all the banks discharge important public functions in the interest of economy and therefore, they cannot be

excluded from the extraordinary jurisdiction under Article 226 of the Constitution of India.

The writ petitions are opposed by the counsel M/s.Ambadipudi Satyanarayana, B.Ravinder Reddy and A.Gopal Rao for various banks contending as follows. The writ petitions under Article 226 of the Constitution of India against private banks are not maintainable. They rely on **Pradeep Kumar Biswas v Indian Institute of Chemical Biology**[1], **Federal Bank v Sagar Thomas**[2] and **Mardia Chemicals Limited v Union of India**[3]. They also rely on the decisions of this Court. Secondly, they would contend that SARFAESI Act provides an effective and efficacious remedy under Section 17(1) and further appeal under Section 18 to Debts Recovery Tribunal (DRT) and Debts Recovery Appellate Tribunal (DRAT) respectively. Therefore, the writ petitions are barred. They rely on **Indian Overseas Bank v Ashok Saw Mill**[4], **United Bank of India v Satyawati Tondon**[5] and **Kanaiyalal Lalchand Sachdev v State of Maharashtra**[6]. The banks also question the maintainability of writ petitions. They also adverted to merits of each case which need not be summed up here.

Maintainability of writ petitions

Article 226 of the Constitution of India has two facets. It strikes at infringement of the constitutional rights, fundamental rights, statutory rights and common law rights. If a State as defined in Article 12 of the Constitution of India is guilty of any such violations, it is the duty of the High Court to issue writs to correct the executive excesses. A writ would also be issued if 'any person' entrusted with discharge of public functions acts illegally, unfairly and arbitrarily. These principles are well settled.

From **Rajasthan State Electricity Board v Mohan Lal**[7] till **Pradeep Kumar Biswas**, and thereafter the case law in this constitutional area is phenomenal (**M.P.State Cooperative Dairy Federation Limited v Rajnesh Kumar Jamindar**[8]). The quintessential tests to resolve dilemma whether a body is a State or not, came to be first indicated by Supreme Court in **Ramana Dayaram Shetty v International Airport Authority of India**[9]. In **Som Prakash Rekhi v Union of India**[10] and **Ajay Hasia v Khalid Mujib Sehravardi**[11], these tests were summed up as follows.

> 1. One thing is clear that if the entire share capital of the corporation is held by "the Court, it would go a long way towards indicating that the corporation is an instrumentality or agency or Government.
>
> 2. Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
>
> 3. Whether the corporation enjoys monopoly status which is State conferred or State protected would be relevant factor.
>
> 4. If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.
>
> 5. Specifically, if a department of Government is transferred to a corporation it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of the Government.
>
> 6. Whether the financial assistance of the State is so much as to meet almost entire expenditure of the corporation it would afford some indication of the corporation being impregnated with Governmental character.

The above tests can be categoried as under. (i) Pervasive State control test; (ii) financial participation/control test and (iii) supplemental government activity test. If there is deep and pervasive control by the Government in the establishment, management and organisation of the agency whether or not the functions discharged are sovereign functions or prerogative duties

or public duties, it would be State within the meaning of Article 12. If any instrumentality or agency has substantial share capital participation by the Government or financial assistance and grants, that would broadly satisfy the financial participation test. In applying the test of supplemental Government activity the fact that the Government Department is transferred to a corporation or that the corporation enjoys the monopoly or that the corporation or agency discharges public functions or sovereign functions would be relevant.

In **Pradeep Kumar Biswas**, a larger Bench again reconsidered Article 12 of the Constitution. The question was whether 'Council of Scientific and Industrial Research (CSIR)' is State. The majority reviewed the earlier case law and held that CSIR is a State and consequently overruled earlier Judgment in **Sabhajit Tiwari v Union of India**[12]. It was held as under.

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

In addition to **Som Prakash Rekhi/Ajay Hasia** tests, in subsequent decisions, emphasis shifted to supplemental Governmental activity tests. The liberalised economy with socialist pattern compelled less Parliamentary/legislative control of various activities and creation of autonomous entities viz., societies, corporations, associations etc., to undertake activities

hitherto done by the Government outsourcing of Governmental functions in the next stage came to be entrusted even to prior organisations especially in the fields of education and health. If any activity of Government undertakings or private undertakings is supplemental to the classical activity/functions of the Government, it is rebuttably presumed that public functions are discharged by such entities (**Unni Krishnan J.P. v State of Andhra Pradesh**[13]). In such a case, there would not be any difficulty in extending the extraordinary jurisdictional umbrella under Article 226 of the Constitution. Article 226 endows the High Court the power to issue writs in the nature of Habeas Corpus, mandamus, prohibition, quo-warranto and certiorari, which were hitherto issued by British Courts. By reason of Article 225, the High Court continues to have jurisdiction that existed in the High Court. Therefore, it may not be out of place to refer to the development of law in England, for the purpose we need to refer to three leading cases on the question of subjecting the body to judicial review.

In **R v Panel on Takeovers**[14] the Court of Appeal was considering the question whether the Panel on Takeovers and Mergers which was an unincorporated organisation without legal personality is amenable to judicial review. The Panel on Takeovers was a self-regulating organisation overseeing and regulating takeovers and mergers in corporate sector. The said panel, however, had no statutory, prerogative or common law powers. M/s. Datafin, for takeover of which company two other companies were vying with each other, complained to the Panel that both the companies acted in concert contrary to the terms of the takeover Code. The complaint was rejected by the Panel. The High Court refused to entertain an application for judicial review on the ground that it had no jurisdiction to entertain the application. Before the

Court of appeal, the Panel on Takeovers contended that the Courts' power of judicial review is confined to bodies whose power is derived solely from the Legislation or exercise the prerogative power. The contention was rejected holding that any body discharging public duties is amenable to judicial review. The noble and learned Master of the Rules, Sir John Donaldson (as he then was) observed:

> In determining whether the decisions of a particular body were subject to judicial review, the Court was not confined to considering the source of that body's powers and duties but could also look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions the Court had jurisdiction to entertain an application for judicial review of that body's decisions. Having regard to the wide-ranging nature and importance of the matters covered by the City Code on Takeovers and Mergers and to the public consequences of non-compliance with the code, the Panel on Takeovers and Mergers was performing a public duty when prescribing and administering the code and its rules and was subject to public law remedies. Accordingly, an application for judicial review of its decisions would lie in an appropriate case.

In **R (Heather) v LCF**[15], the Court of Appeal was considering this question. Section 6 of the Human Rights Act, 1998, made it mandatory that all 'public authorities' should strictly comply with the provisions of the said Act. A question arose before the Court of Appeal (Civil Division) as to whether Leonard Cheshire Foundation (LCF) which is a charitable foundation established for providing accommodation is a public authority within the meaning of Section 6(3)(b) of the Human Rights Act. The facts in brief as summarized in the editorial summary at p.936 are as follows.

Elizabeth Heather and Hilary Callin were claimants to whom the local authority owed a duty to provide accommodation under Section 21 of the National Assistance Act, 1948, which read as

under:

> The National Assistance Act 1948 places a duty on the relevant local authorities to provide accommodation for the claimants. Section 21(1) of the 1948 Act, as amended, provides.
>
> *'Duty of local authorities to provide accommodation* – (1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing – (a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them; and (aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.'

The local authority under the said Act made arrangements to accommodate both the claimants in a home run by the LCF. The claimants were indeed patients in the said home for about 17 years. LCF decided to cease to operate the home in the form in which it existed.

The residents who could not be accommodated at the home were to be relocated in community based units. They applied for judicial review of the decision of the LCF to close the home. They contended that while providing accommodation to them, LCF was exercising functions of a 'public nature' within the meaning of Section 6(3)(b0 of the Human Rights Act, 1998. Section 6(3)(b) defined 'public authority' for the purpose of Section 6 in these terms: "In this section, 'public authority' includes….(b) any person certain of whose functions are functions of a public nature…."

The Judge, before whom application for judicial review came up, dismissed the same holding that LCF was not a public authority within the meaning of Section 6(3) of the Human Rights Act. The Court of Appeal, by a unanimous decision rendered by Lord Woolf C.J. dismissed the appeal holding that LCF was not

local authority nor it can be said to exercise statutory powers in performing functions of a public nature i.e., maintaining a home. It was held (as summarized in the head note) as under.

> The role that the foundation was performing manifestly did not involve the performance of public function. The fact that it was a large and flourishing organization did not change the nature of its activities from private to public. While the degree of public funding of the activities of an otherwise private body was relevant to the nature of the functions performed, it was not by itself determinative of whether the functions were public or private. The foundation was not standing in the shoes of the local authority. Section 26 of the 1948 Act provided statutory authority for the actions of the local authority, but provided the foundation with no powers. The foundation was not exercising statutory powers in performing functions for the claimants. The fact that, if the foundation were not performing a public function, the claimants would not be able to rely on art 8 as against it could not change the appropriate classification of the foundation's function. Accordingly, the appeal would be dismissed, although it had been appropriate to bring to the court by way of judicial review the question whether the foundation was performing a public function.

In De Smith's 'Judicial Review of Administrative Act' (5th edn. By Lord Woolf and Jowell), '*public function'* is explained as under.

> A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. **Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation.**
>
> (emphasis supplied)

To reiterate, the question of maintainability of a writ petition under Article 226 does not always depend on resolving the question whether the respondent is a State or not. If the respondent is not a State, even then a writ would lie provided it is shown that they perform public functions. In **Shri Anandi Mukta**

SSMVSJMS Trust v V.R.Rudani[16], a two Judge Bench of the Supreme Court considered this question and held that the issue of mandamus under Article 226 of the Constitution confined to statutory authorities and instrumentalities of the State and that such a writ can be issued to any other person or authority performing public functions. The relevant placitum from the reported Judgment reads as under.

> The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental right as well as non-fundamental 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.**
>
> (emphasis supplied)

As pointed out by Professor De Smith, education, health care and social welfare provided from funds raised by taxation or deemed to be public goods or collective services and any body dispensing these forms public functions. Some of them are also supplemental Government functions or either way citizens and persons cannot be turned away by the judicial review Court.

Whether provision of banking services amounts to providing public goods or collective services.

A 'banking company', means any company which transacts business of banking in India [(Section 2(c) Banking (Regulation) Act, 1949] and 'banking' is defined as to mean the accepting, for the purpose of lending or investment, of deposits of money from

the public, repayable on demand or otherwise and withdrawal by cheque, draft, order or otherwise. Section 6 of the said Act enumerates the forms of business in which banking companies may engage. Section 6(1)(a) is so elaborate that receiving deposits, giving loans and recovery of loans form part of banking business.

A banking company is a legal entity specialising in banking business. It cannot undertake and is required to obtain a licence from RBI which exercises absolute control and regulation and banking operations. The rules and regulations and the guidelines of RBI are non-negotiable and non-discriminatory and are binding on all the banks which are included in the Second Schedule to Reserve Bank of India Act, 1934 (**Sardar Associates v Punjab & Sind Bank**[17])

A bank like any other company can issue shares to public, borrow loans, accept deposits and also engage in other permissible financial business. Do these characters and functions of a scheduled bank especially a private bank make it a body discharging public functions amenable to the jurisdiction under Article 226 of the Constitution?

In **Federal Bank**, the Supreme Court considered this question in great detail. The case arose in the context of dismissal of a Branch Manager of Federal bank from service after disciplinary enquiry. In the writ petition, learned single Judge came to the conclusion that the said bank performs public duty, which was confirmed by the Division Bench following **U.P.State Cooperative Land Development Bank Limited v Chandra Bhan Dubey**[18]. Before the Supreme Court, the bank contended that it does not perform any sovereign function nor does it exercise any public authority over third person; the nature of activity is that of commercial

undertaking; the management is in the hands of board of directors; and therefore being a private limited company/bank, it is neither State nor authority amenable to writ jurisdiction of the High Court. The Supreme Court considered the question with reference to two facets of Article 226, namely, whether the entity is a State and whether it performs public functions.

After reviewing the earlier case law on both the issues, the Supreme Court observed as follows. "*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. … 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 lakhs 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 the 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 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. … 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.

Examining the issues, with reference to six Ajay Hasia tests, the apex Court held that the share capital of a private bank is not held by the Government, it does not enjoy any monopoly status nor has State protection, there is no pervasive control over the bank except permissible regulations under the Act and it hardly makes any difference if supervisory vigilance is kept by RBI. Ultimately, it was held as under.

> 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 the Air (Prevention and Control of Pollution) Act, 1981 or the 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 with those provisions. For instance, if a private employer dispenses 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 has 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 with 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. … … Merely because Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section 5(*c*)(*a*) of the Banking Regulation Act does not mean that the private companies carrying on the business or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. As to the 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 a 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 the acquiring authority.

The counsel for petitioners made a desperate effort to distinguish **Federal Bank**. They rely on observations in **Mardia Chemicals**, **A.Umarani v Cooperative Societies**[19], **K.C.Sharma v Delhi Stock Exchange**[20], **Zee Telefilms Limited v Union of India**[21], **Binny Limited v V.Sadasivan**[22], **Transcore V Union of India**[23] and **M.P.State Cooperative Dairy** and to contend that Federal Bank is not an authority for proposition. We are afraid the submission is unacceptable. There is direct decision of the Supreme Court on the question whether a private scheduled bank is a State within the meaning of Article 12 and/or whether such private bank performs public functions by providing banking service is considered. The High Court cannot ignore the decision of the High Court and take a different view. Any such contra view of the High Court deviating from the ratio laid down by the Supreme Court would be a

Judgment *per incuriam* (**State of U.P. v Synthetics and Chemicals Limited**[24]). We do not intend to take such adventurous path. Further, the following observations in **Mardia Chemicals** which was also delivered by the same learned Judge who authored **Federal Bank** also supports the petitioners. (para 68 of SCC)

> The main thrust of the petitioners as indicated in the earlier part of this judgment to challenge the validity of the impugned enactment is that no adjudicatory mechanism is available to the borrower to ventilate his grievance through an independent adjudicatory authority. Access to justice, it is submitted, is the hallmark of our system. … So far as remedy under Article 226 of the Constitution of India is concerned, the submission is that it may not always be available since the dispute may be only between two private parties, the banking companies, cooperative banks or financial institutions, foreign banks, some of them may not be authorities within the meaning of Article 12 of the Constitution of India against whom a writ petition could be maintainable. Thus the position that emerges is that a borrower is virtually left with no remedy. Where access to the court is prohibited and no proper adjudicatory mechanism is provided such a law is unconstitutional and cannot survive. In support of the aforesaid contentions besides others, reliance has particularly been placed upon the case *L.Chandra Kumar* v *Union of India ((1997) 3 SCC 261)* and *Surya Dev Rai* v *Ram Chander Rai ((2003) 6 SCC 675)*. A reference has also been made to the decision of *Kihoto Hollohan v Zachillhu (1992 Supp (2) SCC 651).* In the case of *L. Chandra Kumar,* it is held, some adjudicatory process through an independent agency is essential for determining the rights of the parties, more particularly when the consequences which flow from the offending Act defeat the civil rights of a party.

After saying so, in paragraph 80(5) (of SCC) which contains the propositions, the Supreme Court held that.

> As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court.

Thus, in a narrow scope on limited grounds, if a suit is still maintainable if the conclusion with regard to the breach of contract by the bank is reached *de hors* the contract or in an arbitrary

manner, a writ petition as observed by **Mardia Chemicals** certainly bars against private bank.

The counsel brought to the notice of this Court an unreported decision of the Division Bench in W.P.No.200 of 2006, dated 27.02.2006, and an unreported Judgment of another Division Bench in W.A.No.412 of 2008, dated 24.09.2009 in support of the contention that a writ would still lie against a private bank. We are afraid we need not deal with this matter in view of the conclusion as above, which are based on binding decisions of the Supreme Court. We accordingly hold that the writ petitions filed against SRCs which are private bodies are not maintainable.

Exhaustion of Alternative Remedy

The finding on the maintainability may not conclude this order. The banks/FIs/SCRCs specifically raised an alternative plea that the writ petitions are also not maintainable for the reason that the petitioners do not exhaust alternative remedy. They also rely on binding decision of the Supreme Court. Therefore, we deem it appropriate to consider this aspect also.

The Courts have already become overburdened by this over liberal approach instead of following the settled legal principle that a writ petition should ordinarily be dismissed if there is an alternative remedy. The High Courts in India are already tottering and reeling under the burden of massive arrears which have flooded the dockets of the Court, and such kind of over liberal approach has only multiplied this problem manifold. If this approach is further continued a time will surly come when the High Courts will find it impossible to function. All this has happened because unfortunately some Courts have departed from well-settled legal principles (**Salam Khan v Tamil Nadu Wakf Board,**

Chennai[25]). But, as held in **Whirlpool Corporation v Registrar of Trade Marks, Mumbai**[26], the alternative remedy does not operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the *vires* of an Act is challenged.

SARFAESI Act provides for effective and efficacious remedy under Sections 17 and 18 of the Act; original application under Section 17(1) and appeal under Section 18 to Debts Recovery Tribunal (DRT) and Debts Recovery Appellate Tribunal (DRAT) respectively. They are vested with wide powers and can nullify and cure any arbitrary action by banks/FIs pursuant to Section 13(4). In cases arising under SARFAESI Act, the Supreme Court laid down that if any borrower and a third party has any tangible grievance against notice under section 13(4) or action taken under Section 14, such person should avail the remedy by filing an application under Section 17(1) of the Act and the High Court cannot entertain a petition under Article 226 (**United Bank of India v Satyawati Tondon**[27] and **Kanaiyalal Lalchand Sachdev v State of Maharashtra**[28]). In **Satyawati Tondon,** the position was elucidated as follows.

> There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression “any person” used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus

> evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. … Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

In **Kanaiyalal Lalchand Sachdev**, **Satyawavi Tandon** was quoted with approval. The order of the Bombay High Court dismissing the writ petition challenging the dispossession of the appellants from the secured properties under SARFAESI Act, was affirmed observing as follows.

> We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT. … … In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See *Sadhana Lodh* v *National Insurance Co. Ltd ((2003) 3 scc 524*, *Surya Dev Rai* v *Ram Chander Rai ((2003) 6 SCC 675)* and *SBI* v *Allied Chemical Laboratories ((2006) 9 SCC 252.). …* In *City and Industrial Development Corpn.* v *Dosu Aardeshir Bhiwandiwala ((2009) 1 SCC 168),* this Court had observed that: (SCC p. 175, para 30)
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> "*30*. The Court while exercising its jurisdiction under

Article 226 is duty-bound to consider whether:

(*a*) adjudication of the writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(*b*) the petition reveals all material facts;

(*c*) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(*d*) the person invoking the jurisdiction is guilty of unexplained delay and laches;

(*e*) ex facie barred by any laws of limitation;

(*f*) grant of relief is against public policy or barred by any valid law; and host of other factors."

This Court followed **Satyawati Tondon** and **Kanaiyalal Lalchand Sachdev** in number of cases and rejected the challenge to the notice of demand under Section 13(2), possession notice under Section 13(4), order of the Chief Metropolitan Magistrate/District Magistrate directing delivery of possession under Section 14, the auction/sale notice issued under Rules 8(1) and 8(6) of the Rules and confirmation of sale certificate. The cases on hand do not present any special circumstances or background to deviate from the dicta on exhaustion of alternative remedy.

We therefore leave all questions open to be decided by the DRT/DRAT, as the case may be, as and when the petitioners approached. We also observe that as the petitioners are pursuing their remedies, *ex debito justitiae*, the DRT/DRAT may entertain the applications/appeals and decide them on merits, provided the measures initiated under Section 13(4) of the SARFAESI Act are not completed i.e., auction/sale is not completed, as yet.

In the result, for the above reasons, the writ petitions, as also all the miscellaneous applications shall stand dismissed, with no order as to costs.

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(V.V.S.RAO, J)

(G.KRISHNA MOHAN REDDY, J)

.04.2012
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Note: LR copy be marked.
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[1] (2002) 5 SCC 111
[2] (2003) 10 SCC 733 : AIR 2003 SC 4325
[3] (2004) 4 SCC 311 : AIR 2004 SC 2371
[4] (2009) 8 SCC 366 : 2009 (8) SCJ 979 : AIR 2009 SC 2420
[5] (2010) 8 SCC 110 : AIR 2010 SC 311
[6] (2011) 2 SCC 782 : 2011 (8) SCJ 484
[7] AIR 1967 SC 1857
[8] (2009) 15 SCC 221
[9] (1979) 3 SCC 489
[10] AIR 1981 SC 212 : (1981) 1 SCC 449
[11] (1981) 1 SCC 722 : AIR 1981 SC 487
[12] AIR 1975 SC 1329
[13] (1993) 1 SCC 645 : AIR 1993 SC 2178
[14] (1987) 1 All.E.R. 564
[15] [2002] 2 All ER 936
[16] AIR 1989 SC 1607
[17] (2009) 8 SCC 257
[18] (1999) 1 SCC 741 : AIR 1999 SC 753
[19] (2004) 7 SCC 112
[20] (2005) 4 SCC 4 : AIR 2005 SC 2884
[21] (2005) 4 SCC 649 : AIR 2005 SC 2677
[22] (2005) 6 SCC 657
[23] (2008) 1 SCC 125
[24] (1991) 4 SCC 139
[25] AIR 2005 Mad 241
[26] AIR 1999 SC 22 = (1998) 8 SCC 1
[27] (2010) 8 SCC 110 : AIR 2010 SC 3413
[28] (2011) 2 SCC 782