

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL NO. 156 of 2007

In COMPANY APPLICATION NO. 489 of 2006

In OFFICIAL LIQUIDATOR REPORT NO. 88 of 2006

In COMPANY PETITION NO. 190 of 2003

With

CIVIL APPLICATION (OJ) NO. 260 of 2007

In

O.J.APPEAL NO. 156 of 2007

With

O.J.APPEAL NO. 157 of 2007

In

COMPANY APPLICATION NO. 539 of 2006

TO

O.J.APPEAL NO. 164 of 2007

In

CIVIL APPLICATION (OJ) NO. 165 of 2005

With

O.J.APPEAL NO. 167 of 2007

In

CIVIL APPLICATION (OJ) NO. 226 of 2006

TO

O.J.APPEAL NO. 190 of 2007

In

MISC. CIVIL APPLICATION (OJ) NO. 213 of 2006

With

O.J.APPEAL NO. 195 of 2007

In

COMPANY APPLICATION NO. 141 of 2007

With

CIVIL APPLICATION (OJ) NO. 261 of 2007

In

O.J.APPEAL NO. 157 of 2007

With

CIVIL APPLICATION (OJ) NO. 262 of 2007

TO

CIVIL APPLICATION (OJ) NO. 292 of 2007
with
CIVIL APPLICATION (OJ) NO. 240 of 2012

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE A.G.URAIZEE

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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KOTAK MAHINDRA BANK LTD.....Appellant(s)

Versus

O.L. OF M/S. APS STAR IND.LTD. & 19....Opponent(s)

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Appearance:

SINGHI & CO, ADVOCATE for the Appellant(s) No. 1

GOVERNMENT PLEADER for the Opponent(s) No. 19

MR BHAGYODAYA MISHRA, ADVOCATE for the Opponent(s) No. 3

MR INDRAVADAN PARMAR, ADVOCATE for the Opponent(s) No. 6

MR RAJESH P MANKAD, ADVOCATE for the Opponent(s) No. 17

MR RD DAVE, ADVOCATE for the Opponent(s) No. 18

MR YOGESH G DEV, ADVOCATE for the Opponent(s) No. 7

MS AMEE YAJNIK, ADVOCATE for the Opponent(s) No. 1

RULE SERVED for the Opponent(s) No. 5 , 8 , 11 - 12 , 15 - 16

RULE UNSERVED for the Opponent(s) No. 4 , 10

SERVED BY RPAD - (R) for the Opponent(s) No. 2 , 9 , 13 - 14 , 20

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 30/09/2014

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. The appellants had filed applications seeking substitution of appellants in place of respondent no. 20 (ICICI Bank Limited) in view of the fact that the applicants had taken over the debts of ICICI Bank Limited. The said applications were heard by learned Single Judge sitting as Company Judge and vide common judgement and order dated 05-06-09/07/2007 the applications came to be dismissed. This judgement was challenged by filing the present appeals which were decided on 12.01.2009. Against the said judgement passed by the Division Bench of this High Court, the matter was carried to the Apex Court by filing Civil Appeals No. 8393 of 2010 and allied matters. The Apex Court by order dated 30.09.2010 (reported as **ICICI Bank Limited vs. Official Liquidator of APS Star Industries Limited and Others reported in (2010) 10 SCC 1**) remanded the matters to the Division Bench of this High Court. While remanding and concluding the matter, the Apex Court observed as under:

“23. As stated above, by the impugned judgment, the Division Bench of the Gujarat High Court upheld the order of the Company Court only on one

ground, namely, assignment of debts by the banks inter se is an activity which is impermissible under the Banking Regulation Act, 1949. However, the Division Bench did not go into other issues which arose for determination before the Company Court, including applicability of the provisions of the Registration Act, 1908.

24. In the circumstances, we set aside the impugned judgment(s) on the question of assignment of debts as an activity permissible under the Banking Regulation Act, 1949. However, we remit these matters to the Division Bench of the High Court(s) for consideration of other issues raised in this batch of cases. Subject to above, the impugned judgment(s) is set aside and the civil appeals are allowed with no order as to costs. “

2. With the consent of the parties, the matters are taken up for final hearing today. The prayers in each application are set out as under:

KOTAK MAHINDRA BANK LIMITED

Sr. No.	Sr. No. as per the Cause list of 30.9.2014	Matter	Prayer made in the Company Application	Date of Sub. order of in DRT	Date of Decree passed in DRT
1.	47	OJA/156/2007 in COMA/489/2006 With OJCA/260/2007	A) That this Hon'ble Court may be pleased to allow the name of the applicant to be substituted in place of ICICI Bank	-	-

		Kotak Mahindra Bank Ltd. vs. OL of M/s. APS Star Industries Limited & ors.	Limited;		
2.	50	OJA/159/2007 in COMA No. 291 of 2006 With OJCA/263/2007 Kotak Mahindra Bank vs. State Bank of India & ors. (OL of Orient Chemicals Limited)	A) That this Hon'ble Court may be pleased to allow the name of the applicant to be substituted in place of the State Bank of India;	16.1.2007	-
3.	51	OJA/160/2007 in COMA No. 491 of 2006 With OJA/264/2007 Kotak Mahindra Bank vs. OL of M/s. Varun Seacon Limited & ors.	A) That this Hon'ble Court may be pleased to permit the applicant to be substituted for and in place of the ICICI Bank Limited as the secured creditor of the Company in Liquidation;	-	-
4.	52	OJA/161/2007 in COMA No. 620 of 2006 With OJCA/265/2007 Kotak Mahindra Bank vs. OL of Stanrose	A) That this Hon'ble Court may be pleased to permit the applicant to be substituted for and in place of the State Bank of India and State Bank of Saurashtra as the secured creditor of the Company in	-	10.7.2014

		Steels Limited (formerly Volvo Steels Limited) & anr.	Liquidation;		
5.	53	OJA/162/2007 in COMA No. 490 of 2006 With OJCA/266/2007 Kotak Mahindra Bank vs. Star Industrial & Textile Enterprise & ors.	A) That this Hon'ble Court may be pleased to allow the name of the applicant to be substituted in place of the ICICI Bank Limited;	-	-
6.	54	OJA/163/2007 in COMA No. 458 of 2006 With OJCA/267/2007 Kotak Mahindra Bank vs. OL of Arti Agro Industries Limited & ors.	A) That this Hon'ble Court may be please to direct the Official Liquidator to hand over possession of the assets of the Company in liquidation more particularly described in Annexure-I to the affidavit in support of this application within a period of two weeks or such other period as this Hon'ble Court deems fit to the Receiver appointed by the Debts Recovery Tribunal, Mumbai-I in Recovery Proceedings no. 325/2003 in Original Application	29.12.20 05	-

			No.757/2001, in the interest of justice and equity.		
7.	55	OJA/164/2007 in OJCA/165/2005 With OJCA/268/2007 Kotak Mahindra Bank vs. TLA & ors. (Aryodaya Ginning & Mfg. Co. Limited.)	B) Your Lordship be pleased to substitute opponent no. 4 with the Applicant in the interest of justice;	-	-
8.	56	OJA/167/2007 in OJCA No. 226 of 2006 With OJCA/269/2007 Kotak Mahindra Bank vs. TLA & ors. (New Gujarat Synthetics Limited)	B) Your Lordships be pleased to substitute opponent no. 4 with the Applicant in the interest of justice;	-	-
9.	57	OJA/168/2007 in OJCA No. 163 of 2005 With OJCA/270/2007 Kotak Mahindra Bank vs. TLA & ors. (Aryodaya Ginning & Mfg. Co. Limited.)	B) Your Lordships be pleased to substitute opponent no. 4 with the Applicant in the interest of justice;	-	-

		Limited)			
10.	58	OJA/169/2007 in COMA 23 of 2007 With OJCA/271/2007 Kotak Mahindra Bank vs. OL of Aryodaya Ginning & Mfg. Co. Limited & ors.	A) That this Hon'ble Court may be pleased to permit the applicant to be substituted for and in place of the ICICI Bank Limited as the secured creditor of the Company in Liquidation;	-	-
11.	59	OJA/170/2007 in OJCA No. 227 of 2006 With OJCA/272/2007 Kotak Mahindra Bank vs. TLA & ors. (New Gujarat Synthetics Limited)	B) Your Lordships be pleased to substitute opponent no. 5 with the Applicant in the interest of justice;	-	-
12.	60	OJA/171/2007 in COMA No. 363 of 2006 With OJCA/273/2007 Kotak Mahindra Bank vs. OL of M/s. Elcon Finlease & Industries Limited & ors.	a) That this Hon'ble Court may be pleased to permit the applicant to be substituted and taken on record in place of Laxmi Vilas Bank Limited, in OLR No. 4/2006 in Com. Pet. No. 151/2000	4.4.2007	26.8.2005
13.	61	OJA/172/2007 in	A) That this Hon'ble		

		COMA/487/2006 With OJCA/274/2007 Kotak Mahindra Bank Ltd. vs. OL of M/s. APS Star Industries Limited & ors.	Court may be pleased to allow the name of the applicant to be substituted in place of ICICI Bank Limited;	-	-
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STANDARD CHARTERED BANK

Sr. No .	Sr. No. as per the Cause list of 30.9. 2014	Matter	Prayer made in the Company Application	Date of Sub. order of in DRT	Date of Decree passed in DRT
14	48	OJA/157/2007 in COMA/539/2006 With OJCA/261/2007 Standard Chartered Bank vs. OL of A'bad Mfg. & Calico Prtg. Co. Limited.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Official Liquidator Report No. 9 of 2002 in Company Petition No. 157 of 1995;	25.4.2006	31.1.2007
15	62	OJA/173/2007 in COMA/540/2006 With OJCA/275/2007 Standard Chartered Bank vs. OL of A'bad Mfg. & Calico Prtg. Co. Limited.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 63 of 2004 in	25.4.2006	31.1.2007

			Company Petition No. 157 of 1995;		
16	63	OJA/174/2007 in COMA/541/2006 With OJCA/276/2007 Standard Chartered Bank vs. OL of A'bad Mfg. & Calico Prtg. Co. Limited.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 303 of 2004 in Company Petition No. 157 of 1995;	25.4.2006	31.1.2007
17	64	OJA/175/2007 in COMA/542/2006 With OJCA/277/2007 Standard Chartered Bank vs. OL of A'bad Mfg. & Calico Prtg. Co. Limited.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 274 of 2005 in Company Petition No. 157 of 1995;	25.4.2006	31.1.2007
18	65	OJA/176/2007 in COMA 543 of 2006 With OJCA/278/2007 Standard Chartered Bank vs. OL of GIL Hospitals Limited	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Official Liquidator's Report No. 66 of 2002 in Company Petition No. 152 of 1995;	12.3.2007	-
19	66	OJA/177/2007 in COMA 544 of 2006 With	(a) That this Hon'ble Court may be pleased to permit the applicant to be	-	-

		OJCA/279/2007 Standard Chartered Bank vs. OL of Amruta Mills Ltd. & ors.	substitute its name in place of ICICI Bank Limited in Company Application No. 416 of 2004 in Company Petition No. 72 of 1991;		
20	67	OJA/178/2007 in COMA 545 of 2006 With OJCA/280/2007 Standard Chartered Bank vs. OL of Ambica Mills Ltd. & ors.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 68 of 2005 in Company Petition No. 66 of 1988;	11.8.2006	30.1.2009
21	68	OJA/179/2007 in COMA/546/2006 With OJCA/281/2007 Standard Chartered Bank vs. OL of A'bad Mfg. & Calico Prtg. Co. Limited.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 210 of 2004 in Company Petition No. 157 of 1995;	25.4.2006	31.1.2007
22	69	OJA/180/2007 in COMA 547 of 2006 With OJCA/282/2007 Standard Chartered Bank vs. OL of	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 318 of 2004 in	11.8.2006	30.1.2009

		Ambica Mills Ltd. & ors.	Company Petition No. 66 of 1988;		
23	70	OJA/181/2007 in COMA 548 of 2006 With OJCA/283/2007 Standard Chartered Bank vs. OL of Ambica Mills Ltd. & ors.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 182 of 2001 in Company Petition No. 66 of 1988;	11.8.2006	30.1.2009
24	71	OJA/182/2007 in COMA 549 of 2006 With OJCA/284/2007 Standard Chartered Bank vs. OL of Ambica Mills Ltd. & ors.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 4 of 2002 in Company Petition No. 66 of 1988;	11.8.2006	30.1.2009
25	72	OJA/183/2007 in COMA 550 of 2006 With OJCA/285/2007 Standard Chartered Bank vs. OL of Ambica Mills Ltd. & ors.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 220 of 2002 in Company Petition No. 66 of 1988;	11.8.2006	30.1.2009
26	73	OJA/184/2007 in COMA 551 of	(a) That this Hon'ble Court may	11.8.2006	30.1.2009

		2006 With OJCA/286/2007 Standard Chartered Bank vs. OL of Ambica Mills Ltd. & ors.	be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 224 of 2002 in Company Petition No. 66 of 1988;		
27	74	OJA/185/2007 in COMA 552/2006 With OJCA/287/2007 Standard Chartered Bank vs. OL of Vallabh Glass Works Limited & ors.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 248 of 2006 in Company Petition No. 157 of 2000;	26.6.2006	20.11.2008
28	75	OJA/186/2007 in COMA/ 553 of 2006 With OJCA/288/2007 Standard Chartered Bank vs. OL of Ambica Mills Ltd. & ors.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 219 of 2000 in Company Petition No. 66 of 1988;	11.8.2006	30.1.2009
29	76	OJA/187/2007 in COMA 558 of 2006 With OJCA/289/2007	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in	15.9.2006	27.9.2007

		Standard Chartered Bank vs. OL of Rustom Mills & Industries Limited & ors.	Company Application No. 322 of 1998 in Company Petition No. 125 of 1993;		
30	77	OJA/188/2007 in COMA/559 of 2006 With OJCA/290/2007 Standard Chartered Bank vs. OL of Aryan Fine Fab Limited & ors.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Official Liquidator's Report No. 26 of 2002 in Company Petition No. 94 of 1996;	8.9.2006	30.11.2007
31	78	OJA/189/2007 in COMA/ 560 of 2006 With OJCA/291/2007 Standard Chartered Bank vs. OL of Ambica Mills Ltd. & ors.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Official Liquidator's Report No. 121 of 2006 in Company Petition No. 66 of 1988;	11.8.2006	30.1.2009
32	79	OJA/190/2007 in OJMCA 213 of 2006 With OJCA/292/2007 Standard Chartered Bank vs. OL of	(b) That this Hon'ble Court may be pleased to allow the applicant to substitute its name in place of ICICI Bank Limited in Company Application No. 79 of 1999 in Company Petition	15.9.2006	-

		Arbuda Mills Ltd. & ors.	No. 70 of 1995;		
33	80	OJA/195/2007 in COMA 141 of 2007 Standard Chartered Bank vs. OL of Mayo Hospitals Ltd. & ors.	(a) That this Hon'ble Court may be pleased to permit the applicant to be substitute its name in place of ICICI Bank Limited in Company Application No. 72 of 2007 in Company Petition No. 152 of 1995;		

3. The case of the appellants as pleaded before the learned Company Judge is set out as under:

3.1 ICICI Bank Limited had entered into a Deed of Assignment with the applicants on 31.03.2006, pursuant to which, ICICI Bank Limited assigned all its rights, title, interests and benefit in respect of the debt due from APS Star Industries LTD (hereinafter referred to as the 'Company') along with the underlying securities in favour of the applicants who had agreed to take over the claim against the company. Pursuant to the said Deed, ICICI Bank Limited confirmed that the applicants shall be entitled to initiate/adopt appropriate legal action and/or continue to pursue any existing legal action in its own name against the defendants for recovery of the dues under the said facilities.

3.2 It is the case of the applicants that apropos the assignment agreement, the applicants had become lender and all the rights of ICICI Bank Limited in relation to the loan and

the underlying security interests vested in the applicants and therefore the applicants vide Board Resolution authorized concerned personnel to represent the applicants in any Court of Law, Consumer Court, Tribunal or any other judicial and quasi judicial authority in connection with the legal proceedings initiated by or against the applicants.

3.3 However, it is the case of the applicants that as per the Banking Regulation Act read with the guidelines of Reserve Bank of India, such sale and purchase of the debts, including the rights in the immovable properties being secured creditors, can be sold by the loaner and purchased by the assignee Bank/Financial Institution. As the proceedings for winding up, including for provisional and final were pending before this Court at various stages, including the stage for disposal of the properties of the company in liquidation, the applicants approached this Court to be substituted in place of the original alleged secured creditors. It is also the case of the applicants that in certain cases where the suits/applications are filed for recovery before the Debts Recovery Tribunal ('DRT' for short) based on the deed of assignment, substitution is permitted and, therefore, as per the applicants, they are entitled to be substituted, in place of the secured creditors.

4. We have heard Mr. Mihir Thakore, Mr. Mihir Joshi and Mr. Saurabh Soparkar, Senior Advocates assisted by Mr. Sandeep Singhi & Ms. Niti Sheth, learned advocates for the appellants. Mr. Joshi has taken this Court to the observations made by the Apex Court in the case of **ICICI Bank Limited** (supra) and the relevant paragraphs thereof are reproduced

hereunder:

“27. Issues:

(i) Whether the Gujarat High Court was right in holding that assignment of debts by banks inter se is not an activity permissible under the BR Act, 1949 and consequently all executed contracts of assignment of debts were illegal?

(ii) Whether the High Court was right in holding that the assignee bank (s) was not entitled to substitution in place of the original lender (assignor) in proceedings relating to companies in liquidation pending in the Company Court?

29. For the purpose of deciding Issue No. (i), we are also required to quote relevant portion of RBI Guidelines dated 13th July, 2005, which reads as under:

"Guidelines on purchase/ sale of Non Performing Financial Assets

Scope

1. These guidelines would be applicable to banks, FIs and NBFCs purchasing/ selling non performing financial assets, from/ to other banks/FIs/NBFCs (excluding securitisation companies/ reconstruction companies).

2. A financial asset, including assets under multiple/consortium banking arrangements, would be eligible for purchase/sale in terms of these guidelines if it is a non-performing asset/non performing investment in the books of the selling bank.

3. The reference to 'bank' in the guidelines would include financial institutions and NBFCs."

The above analysis of the various provisions of the 1949 Act shows that RBI is empowered to

regulate the business of the banking companies. That, RBI is empowered to control management of banking companies in certain situations. It is empowered to lay down conditions on which the banking companies will operate. It is empowered to regulate paid-up capital, reserve fund, cash fund and above all to lay down policies in the matter of advances to be made by the banking companies, allocation of resources etc. While laying down such policies under the said Act, RBI can lay down parameters enabling banking companies to expand its business. For example, RBI's permission is required to be obtained if a banking company seeks to deal in "derivatives". It is a business which will not fall in clauses (a) to (o) of Section 6(1)(a) and yet RBI can lay down guidelines and directions enabling banking companies to deal in derivatives like futures and options.

37. The point we are trying to make is that apart from the principal business of accepting deposits and lending the said 1949 Act leaves ample scope for the banking companies to venture into new businesses subject to such businesses being subject to the control of the Regulator, viz. RBI. In other words, the 1949 Act allows banking companies to undertake activities and businesses as long as they do not attract prohibitions and restrictions like those contained in Sections 8 and 9. In this connection we need to emphasize that Section 6(1)(n) enables a banking company to do all things as are incidental or conducive to promotion or advancement of the business of the company. Section 6(1) enables banking companies to carry on different types of businesses. Under Section 6(1), these different types of businesses are in addition to business of banking, viz., core banking. The importance of the words "in addition to" in Section 6(1) is that even if different businesses under clauses (a) to (o) are shut down, the company would still be a banking company as long as it is in

the core banking of accepting deposits and lending so that its main income is from the spread or what is called as "interest income". Thus, we may broadly categorise the functions of the banking company into two parts, viz., core banking of accepting deposits and lending and miscellaneous functions and services. Section 6 of the BR Act, 1949 provides for the form of business in which banking companies may engage. Thus, RBI is empowered to enact a policy which would enable banking companies to engage in activities in addition to core banking and in the process it defines as to what constitutes "banking business".

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

39. The test to be applied is - whether trading in NPAs has the characteristics of a bona fide banking business. That test is satisfied in this case. The guidelines issued by RBI dated 13.7.2005 itself authorizes banks to deal inter se in NPAs. These guidelines have been issued by the Regulator in

exercise of the powers conferred by Sections 21 and 35A of the Act. They have a statutory force of law. They have allowed banks to engage in trading in NPAs with the purpose of cleaning the balance sheets so that they could raise the capital adequacy ratio. All this comes within the ambit of Section 21 which enables RBI to frame the policy in relation to Advances to be followed by the banking companies and which empowers RBI to give directions to banking companies under Section 21(2). These guidelines and directions following them have a statutory force.

40. When a delegate is empowered by the Parliament to enact a Policy and to issue directions which have a statutory force and when the delegatee (RBI) issues such guidelines (Policy) having statutory force, such guidelines have got to be read as supplement to the provisions of the BR Act, 1949. The "banking policy" is enunciated by RBI. Such policy cannot be said to be ultra vires the Act. The idea behind empowering RBI to determine the Policy in relation to Advances is to enable banking companies to expand their business of banking and in that sense such guidelines also define - as to what constitutes banking business.

Trading in NPA - a misnomer

41. At the outset one needs to know what is NPA? When a borrower who is under liability to pay to secured creditors, makes default in repayment of secured debt or any installment thereof, the account of borrower is classified as Non-Performing Asset (NPA). Such NPAs cannot be used for any productive purpose. Continuous growth in NPAs threatens the repayment capacity of the banks. They have an adverse impact on the financial strength of the banks which in the present era of globalization are required to conform to International Standards. Thus, NPA means an asset or account receivable of a borrower, which has been classified by banks or financial institutions in terms of RBI Guidelines as sub-standard, doubtful

etc. These guidelines are issued to improve quality of assets of the banks. The 2005 guidelines of RBI are not to eliminate NPAs but to restructure.

46. As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor bank has never purchased the debt(s). It has advanced loans against security as part of its banking business. The account of a client in the books of the bank becomes Non Performing Asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to recover anything from the borrower(s). **The moment ICICI Bank Ltd. transfers the debt with underlying security, the borrower(s) ceases to be the borrower(s) of the ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee). "**

Emphasis Supplied

4.1 In light of the above observations made by the Apex Court, Mr. Mihir Joshi, learned Senior Counsel submitted that the issue regarding substitution has already been concluded by the Apex Court. Mr. Ashok Shah, learned Senior Counsel has tried to contest this contention by submitting that the issue of substitution is not concluded by the Apex Court. We cannot accept this submission of Mr.

Shah. A bare reading of the observations of the Apex Court in para 46 as extracted hereinabove makes it explicitly clear that the moment ICICI Bank Ltd. transfers the debt with underlying security, the borrower(s) ceases to be the borrower(s) of the bank and becomes the borrower(s) of Kotak Mahindra Bank Ltd (assignee). Thus it is explicitly clear that Kotak Mahindra Bank has become entitled to recover the amount from the borrowers and therefore their prayer for substitution cannot be rejected.

4.2 Mr. Joshi has also drawn the attention of this Court to the observations made by the learned Company Judge in para 41 of the impugned order which reads as under:

“41. Before parting with, it deserves to be recorded that the observations made by this Court are prima facie and shall not be read as conclusive if the legality and validity of the deed of assignment is challenged before the appropriate forum or if the rights are asserted or the defence is raised as permissible in law, by the respective parties before the appropriate forum, which is to finally adjudicate the rights. Such observations would also apply in the event any proceedings are initiated under the provisions of the Stamp Act or the Bombay Stamp Act, as the case may be, for non-payment of the requisite stamp duty. Suffice it to say that all rights and contentions before the appropriate forum of the parties concerned shall not get concluded by the observations made by this Court and shall be treated as concluded only for substitution in the present proceedings.”

5. Mr. Ashok L Shah, learned Senior Advocate appearing with Mr. Bhagyodaya Mishra, Mr. Pavan S. Godiawala, Mr. Indravadan Parmar, Mr. Yogesh Dev, Mr. Rajesh Mankad,

learned advocates for the respondents submitted that if the matters are remanded to the learned Company Judge it may be left open to the parties and all concerned to agitate all questions/issues before any appropriate forum or authority and this order allowing substitution of the respective assignees in place of the respective assignor banks in the respective company applications would not in any way affect or conclude the following amongst other issues:

- (i) Whether the respective deeds of assignment are duly registered under the Indian Registration Act, 1908? If not, all consequences of not getting the deeds of assignment duly registered would follow.
- (ii) Whether the respective deeds of assignment are duly stamped under the applicable provisions of law? If not, necessary consequences of a document not being duly stamped would follow.
- (iii) Whether where the assignee is not a securitization company or reconstruction company, the assignee would be entitled to initiate action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002?
- (iv) Whether when a company is in liquidation, on assignment of NPA by a secured creditor, the assignee claiming before the official liquidator on the basis of the full claim of the assignor would violate provisions of Section 529A of the Companies Act, 1956 and therefore if such assignment is bad in law?

6. Having heard learned Senior Advocates for the parties and having gone through the entire records of the case, we are of the opinion that the issue of substitution has already

been considered and concluded by the Apex Court as observed in the foregoing paragraphs. Therefore, so far as the other issues which are kept open by the Apex Court and for which the matters are remanded to this Court, considering the interests of both the sides, we remand the matter to the learned Company Judge and deem it fit to keep the matter open at large before the learned Company Judge permitting the parties to raise contentions after completing pleadings. The issues other than substitution shall be allowed to be raised before the learned Company Judge. The learned Company Judge shall decide the issues afresh keeping in mind the pleadings and recent law developed on the subject. It is made clear that the issues, if at all raised by either side shall be decided by the learned Company Judge along with final hearing of the Company Petition. Order accordingly.

7. In the premises aforesaid, appeals are partly allowed. We retain the observations made by the learned Company Judge in para 41 of the order dated 05-06-09/07/2007 and the remaining observations shall not be applicable hereinafter and the same are quashed and set aside. It shall be open to either side to raise contentions permissible under law in Company Petitions subject to the rights and contentions to be raised by other side. Civil Applications stand disposed accordingly.

(K.S.JHAVERI, J.)

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(A.G.URAIZEE,J)