Before Ajay Kumar Mittal, Gurmeet Singh Sandhawalia, JJ.

M/S A-ONE MEGA MART P. LIMITED AND OTHERS—Petitioners

versus

HDFC BANK AND OTHERS—*Respondents*

CWP No. 2250 OF 2012

14th September, 2012

Constitution of India, 1950 - Arts. 226 & 227 - Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Ss. 13 (2), 13 (4), 13 (13) & 34 - Maintainability of writ petition against private bank - Petitioner engaged in business of trading of hosiery items etc. - On account of default proceedings initiated by Bank under S. 13(2) and 13(4) of SARFAESI Act - One Time Settlement Scheme approved by bank - Petitioner failing to comply with OTS - Application for extension declined - Challenge thereto - Whether a writ petition is maintainable against private bank - Held, ordinarily no writ would lie against private bank - But where the scheduled bank which is governed by provisions of Banking Regulation Act, 1949, takes recourse to provisions of SARFAESI Act 2002, it shall be amenable to writ jurisdiction.

Held, that 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. Imanual 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.

(Para 17)

Further held, that another factor which cannot be ignored is that under Section 17 of the SARFAESI Act, an appeal lies to the Debt Recovery Tribunal against the action of the Bank and against any order passed thereunder, an appeal is maintainable under Section 18 of the said Act to Debt Recovery Appellate Tribunal (DRAT). An order passed by DRAT is amenable to writ jurisdiction of the High Court. Section 34 of SARFAESI Act also has significance in deciding the issue relating to writ jurisdiction of this Court. This facet lends different dimension to the controversy raised herein. Section 34 bars the jurisdiction of civil courts in matters relating to actions where provisions of SARFAESI Act have been invoked. Constitution guarantees equality and strikes against any arbitrary action of an authority. It cannot be said that wherever any authority acts in a discriminatory or unreasonable manner, the aggrieved party would be without any remedy either by way of civil suit or by invoking writ jurisdiction of the High Court. In such circumstances, it cannot be held that an action by the Scheduled Bank to which the provisions of SARFAESI Act are applicable and have been invoked by it, it shall be immune from the extraordinary writ jurisdiction of this Court.

(Para 26)

Further held that 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.

(Para 28)

Amol Rattan Sidhu, Sr. Advocate with Rohit Suri, Advocate, *for the petitioners.*

Radhika Suri, Advocate for HDFC Bank.

AJAY KUMAR MITTAL, J.

(1) In this petition filed under Articles 226/227 of the Constitution of India, challenge is to the orders dated 27.5.2011 and 24.8.2011, Annexures P.6 and P.9 respectively, whereby application of the petitioners for selling the mortgaged property under Section 13 (13) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, "the SARFAESI Act") has been declined.

(2) Briefly, the facts necessary for adjudication of the controversy as narrated in the petition may be noticed. The petitionercompany is engaged in the business of trading of hosiery items, readymade garments and related items. On account of default and inability of the petitioner-company to pay back the dues of the respondent-Bank, proceedings under under sections 13(2) and 13(4) of the the SARFAESI Act were initiated by the Bank proposing to sell mortgaged properties and hypothecated goods. The petitioner company proposed to sell off the mortgaged properties in order to fetch the best price of the same and make payment to the Bank. For this purpose, the petitioner-company approached the Bank for settlement of loan facility under One Time Settlement scheme(OTS). Copy of the proposal dated 25.3.2010 submitted by the petitionercompany is at Annexure P.1 with the petition. The said proposal was finally approved by the bank vide letter dated 22.1.2011. The Bank granted permission to the petitioner-company for selling the alleged mortgaged properties for a total sale consideration of Rs.250 lacs. The petitioner-company thereafter entered into an agreement for sale of the property. It deposited Rs.50 lacs in terms of the settlement but was unable to pay the remaining amount of Rs.200 lacs by 22.3.2011. The petitioner-company sought extension of time from the Bank. In the meantime, father of petitioner Nos. 2 and 3 expired and due to family circumstances, the balance amount could not be arranged in time. Vide letter dated 24.8.2011, Annexure P.9, the Bank withdrew the one time settlement scheme granted in favour of the petitioners. Hence this petition.

(3) Learned counsel for the petitioners submitted that there was no remedy available to the petitioners against the impugned order passed under section 13(13) of the SARFAESI Act as Section 34 bars jurisdiction of civil court and in such a situation, writ was the only remedy. It was submitted that the period which was allowed by the respondent-Bank for discharging the liability for releasing the property could not be adhered to due to certain circumstances beyond the control of the petitioners. Elaborating the argument, it was urged that the father of petitioner Nos. 2 and 3 who was the Managing Director of the Company had expired on 17.6.2011 and therefore, the petitioner-Company was not able to follow the time schedule. It was next contended that there was statutory obligation which was cast on the Bank to have accepted the application of the petitioner-Company. Once there was no malafide and no alternative remedy of redressal being available, the petitioner-Company is before this Court. Addressing on merits, it was contended that reasonableness and fairness of the action of the Bank was under challenge in this writ petition as the Bank was too harsh in rejecting the application of the petitioners for sale of the mortgaged property for discharge of outstanding liability. There were sufficient grounds existed for condoning the delay and accepting the amount. It was also pointed out that the petitioners had prepared the demand drafts on 26.7.2011 for the balance amount of Rs. 2 crores which was to be paid in terms of the original settlement by the Bank. Besides the aforesaid, learned counsel for the petitioners had shown the willingness of the petitioners in paying additional amount of Rs.50,00,000/- in addition to Rs. 2 crores already deposited in the High Court as submitted by learned counsel for the petitioners on 25.7.2012. It was highlighted that in this situation, the bonafides of the petitioner-company were clear. Learned counsel for the petitioners relied upon following judgments in support of his submissions:-

(i) **Sat Kartar Ice and general Mills *versus* Punjab Financial Corporation (1).**

(ii) **State Bank of India *versus* Vijay Kumar (2).**

(iii) **Smt.Periyakkal and others *versus* Smt.Dakshyani (3).**

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(1) 2008(1) ISJ (Banking) 248 (P&H)
(2) (2007) 11 SCC 369
(3) (1983) 2 SCC 127

(iv) **M/s Sardar Associates and others *versus* Punjab and Sind Bank and others (4).**

(v) **United Bank of India *versus* Satyawati Tondon and others (5).**

(vi) **Federal Bank Limited *versus* Sagar Thomas and others (6).**

(vii) **Punjab and Sind Bank *versus* Debts Recovery Appellate Tribunal and others (7).**

(viii) **Mardia Chemicals Limited *versus* Union of India (8).**

(ix) **ICICI Bank *versus* Shanti Devi Sharma and others (9).**

(4) Learned counsel for the respondents raised a preliminary objection in view of the judgment in ***Federal Bank Limited's*** case (supra) to contend that the writ petition against private Bank was not maintainable. Another preliminary objection was raised with regard to delay and laches and prayer for dismissal of the writ petition was made on that ground. Refuting the contentions of the learned counsel for the petitioners, it was submitted by learned counsel for the respondents that the petitioners did not avail statutory remedy of filing objections under section 13(3A) of the Act against notice issued under Section 13(2) of the SARFAESI Act on 6.6.2009 and, thus, the same stood waived. Further remedy of appeal under Section 17 of the SARFAESI Act was maintainable against notice issued under Section 13(4) of SARFAESI Act.

(5) On merits, it was submitted by learned counsel for the respondents that the permission which was originally granted was conditional permission which was to be operative and effective only on deposit of the entire sale consideration by 22.3.2011 which was subsequently extended vide letter dated 18.4.2011. The petitioners having failed to honour the same, now under the garb of writ jurisdiction cannot claim any relief. It was also

(4) (2009) 8 SCC 257
(5) (2010)8 SCC 110
(6) (2003) 10 SCC 733
(7) 2008(1) PLR 203 (P&H)
(8) (2004) 4 SCC 311
(9) (2008) 7 SCC 532

submitted that the petitioners had a right to redeem the property under section 13(8) of the Act by discharging the entire amount which was payable to the bank. She relied upon judgments of the Hon'ble Supreme Court in ***Federal Bank Limited's*** case (supra) and ***Satyawati Tandon's*** case (supra) and Madras High Court in ***Tamil Nadu Industrial Investment*** Corporation Limited v. Chennai Millenium Business Solutions Pvt. ***Limited and another,*** AIR 2005 Madras 232 in support of her submissions. Learned counsel submitted that no statutory right had been violated and therefore, no mandamus could be issued.

(6) We have heard learned counsel for the parties and perused the record.

(7) The questions required to be answered may be categorized as under:-

(a) Whether the present writ petition is competent against the respondent No.1-Bank? ;

(b) Whether the writ petition suffers from delay and latches and deserve to be dismissed on that ground alone?;

(c) Whether the petitioners have acted bonafide and are entitled to relief as claimed in the writ petition?

(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.

(11) Section 21 of the 1949 Act authorises the Reserve Bank to control advances by banking companies. Section 21 thereof reads as under:

> "21. Power of Reserve Bank to control advances by banking companies -(1) Where the Reserve Bank is satisfied that it is necessary or expedient in the public interest or in the interests of depositors or banking policy so to do, it may determine the policy in relation to advances to be followed by banking companies generally or by any banking company in particular, and when the policy has been so determined, all banking companies or the banking company concerned, as the case may be, shall be bound to follow the policy as so determined.
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> (2) Without prejudice to the generality of the power vested in the Reserve Bank under subsection (1) the Reserve Bank may give directions to banking companies, either generally or to any banking company or group of banking companies in particular, as to-
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> (a) the purposes for which advances may or may not be made,
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> (b) the margins to be maintained in respect of secured advances,
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> (c) the maximum amount of advances or other financial accommodation which, having regard to the paid-up capital, reserves and deposits of a banking company and other relevant considerations, may be made by that banking company to any one company, firm, association of persons or individual,
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> (d) the maximum amount up to which, having regard to the considerations referred to in clause (c),guarantees may be given by a banking company on behalf of any one company, firm,association of persons or individual, and

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

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

(12) A bare perusal of the aforementioned provision would clearly show that the Reserve Bank of India is entitled to formulate the policies which the banking companies are bound to follow. Sub-section (3) of Section 21 of the 1949 Act clearly mandates that every banking company shall be bound to comply with the directions given to it in terms thereof. Section 35A of the 1949 Act, which was inserted by the Banking Companies (Amendment) Act, 1956, empowers the Reserve Bank to issue directions inter alia in the interest of banking policy.

(13) Section 36 of the 1949 Act also provides for further powers and functions of the Reserve Bank of India, clause (d) of Sub-section (1) whereof reads as under:

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

(a) *** *** ***

(b) *** *** ***

(c) *** *** ***

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

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

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

(iii) require the Board of directors of the banking company or any committee or any other body constituted by it to give in writing to any officer specified by the Reserve Bank in this behalf at his usual address all notices of, and other communications relating to, any meeting of the Board, committee or other body constituted by it;

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

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

(14) The Parliament inserted Section 36A in the Act by the Banking Companies (Amendment) Act, 1959 in terms whereof some of the provisions of the 1949 Act were not to be applied to certain banking companies.

(15) We may now examine and analyse the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, 'the DRT Act') Act. It shows that primary object thereof is to facilitate creation of special machinery for speedy recovery of the dues of banks and financial institutions. The DRT Act provides for establishment of the Tribunals and the Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks or financial institutions and specifies the modes of recovery of the amount determined

by the Tribunal or the Appellate Tribunal. It also bars the jurisdiction of all courts except the Supreme Court and the High Courts in relation to the matters specified in Section 17. The Tribunals and the Appellate Tribunals have also been freed from the detailed procedure contained in the Code of Civil Procedure. In other words, the DRT Act has not only brought into existence special procedural mechanism for speedy recovery of the dues of banks and financial institutions, but also made provision for ensuring that defaulting borrowers are not able to invoke the jurisdiction of Civil Courts for frustrating the proceedings initiated by the banks and other financial institutions.

(16) In the year 2002, Parliament enacted the SARFAESI Act. The scheme of the SARFAESI Act after analysing various provisions of the Statute, has been culled out succinctly by the Hon'ble Apex Court in **United Bank of India *versus* Satyavati Tandon (10),** in the following terms:-

> "3. Section 13 of the SARFAESI Act contains detailed mechanism for enforcement of security interest. Sub-section (1) thereof lays down that notwithstanding anything contained in Sections 69 or 69-A of the Transfer of Property Act, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. Subsection (2) of Section 13 enumerates first of many steps needed to be taken by the secured creditor for enforcement of security interest. This sub-section provides that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of Section 13(4). Subsection (3) of Section 13 lays down that notice issued under Section 13(2) shall contain details of the amount payable by the borrower as also the details of the secured assets intended

(10) AIR 2010 SC 3413

to be enforced by the bank or financial institution. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13(2) and challenge the classification of his account as non-performing asset as also the quantum of amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for nonacceptance are required to be communicated within one week. Sub-section (4) of Section 13 specifies various modes which can be adopted by the secured creditor for recovery of secured debt. The secured creditor can take possession of the secured assets of the borrower and transfer the same by way of lease, assignment or sale for realising the secured assets. This is subject to the condition that the right to transfer by way of lease, etc. shall be exercised only where substantial part of the business of the borrower is held as secured debt. If the management of whole or part of the business is severable, then the secured creditor can take over management only of such business of the borrower which is relatable to security. The secured creditor can appoint any person to manage the secured asset, the possession of which has been taken over. The secured creditor can also, by notice in writing, call upon a person who has acquired any of the secured assets from the borrower to pay the money, which may be sufficient to discharge the liability of the borrower. Sub-section (7) of Section 13 lays down that where any action has been taken against a borrower under sub-section (4), all costs, charges and expenses properly incurred by the secured creditor or any expenses incidental thereto can be recovered from the borrower. The money which is received by the secured creditor is required to be held by him in trust and applied, in the first instance, for such costs, charges and expenses and then in discharge of dues of the secured creditor. Residue of the money is payable to the person entitled thereto according to his rights and interest. Sub-section (8) of Section 13 imposes a restriction on the sale or transfer of the secured asset if the amount due to the secured creditor together with costs, charges and expenses

incurred by him are tendered at any time before the time fixed for such sale or transfer. Sub-section (9) of Section 13 deals with the situation in which more than one secured creditor has stakes in the secured assets and lays down that in the case of financing a financial asset by more than one secured creditor or joint financing of a financial asset by secured creditors, no individual secured creditor shall be entitled to exercise any or all of the rights under sub-section (4) unless all of them agree for such a course. There are five unnumbered provisos to Section 13(9) which deal with pari passu charge of the workers of a company in liquidation. The first of these provisos lays down that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956. The second proviso deals with the case of a company being wound up on or after the commencement of this Act. If the secured creditor of such company opts to realise its security instead of relinquishing the same and proving its debt under Section 529(1) of the Companies Act, then it can retain sale proceeds after depositing the workmen's dues with the liquidator in accordance with Section 529-A. The third proviso requires the liquidator to inform the secured creditor about the dues payable to the workmen in terms of Section 529-A. If the amount payable to the workmen is not certain, then the liquidator has to intimate the estimated amount to the secured creditor. The fourth proviso lays down that in case the secured creditor deposits the estimated amount of the workmen's dues, then such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited with the liquidator. In terms of the fifth proviso, the secured creditor is required to give an undertaking to the liquidator to pay the balance of the workmen's dues, if any. Sub-section (10) of Section 13 lays down that where dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application before the Tribunal under Section 17 for recovery of balance amount from the borrower.

Sub-section (11) states that without prejudice to the rights conferred on the secured creditor under or by this section, it shall be entitled to proceed against the guarantors or sell the pledged assets without resorting to the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets. Sub-section (12) of Section 13 lays down that rights available to the secured creditor under the Act may be exercised by one or more of its officers authorised in this behalf. Sub-section (13) lays down that after receipt of notice under sub-section (2), the borrower shall not transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice without prior written consent of the secured creditor. In terms of Section 14, the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor.

4. Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application under Section 17(1). Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties,

comes to the conclusion that the measures taken by the secured creditor are not in consonance with subsection (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously. Section 18 provides for an appeal to the Appellate Tribunal.

5. Section 34 lays down that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI Act is substantially similar to Section 34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

(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 *versus* Shri C.V. Imanual and others (11),** 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 *versus* V.R.Rudani and others (12),** 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

(11) AIR 1969 SC 1306
(12) AIR 1989 SC 1607

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** ***versus*** **VST Industries Workers' Union (13),** 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."

(13) (2001) 1 SCC 298

(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 *versus* V. Sadasivan and others (14),** 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:
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> "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

(14) (2005) 6 SCC 657

> 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** ***versus*** **The Christian Medical College, Ludhiana (15),** 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 directipns 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 duly.

(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

(15) (1997) 2 PLR 320

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 *versus* The Union of India and others (16),** 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,

(16) AIR 1992 Bombay 179

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 thesestatutory duties and obligations, a writ would lie. As observed by the Supreme Court in the case of Praga Tools Corpn. v. C. V. Imanual, -

".....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** *versus* **Union of India (17),** 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

(17) 2004(114) DLT 323

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.

xxxx xxxx xxxx xxxx"

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."

(26) Another factor which cannot be ignored is that under Section 17 of the SARFAESI Act, an appeal lies to the Debt Recovery Tribunal against the action of the Bank and against any order passed thereunder, an appeal is maintainable under Section 18 of the said Act to Debt Recovery Appellate Tribunal (DRAT). An order passed by DRAT is amenable to writ jurisdiction of the High Court. Section 34 of SARFAESI Act also has significance in deciding the issue relating to writ jurisdiction of this Court. This facet lends different dimension to the controversy raised herein. Section 34 bars the jurisdiction of civil courts in matters relating to actions where provisions of SARFAESI Act have been invoked. Constitution guarantees

equality and strikes against any arbitrary action of an authority. It cannot be said that wherever any authority acts in a discriminatory or unreasonable manner, the aggrieved party would be without any remedy either by way of civil suit or by invoking writ jurisdiction of the High Court. In such circumstances, it cannot be held that an action by the Scheduled Bank to which the provisions of SARFAESI Act are applicable and have been invoked by it, it shall be immune from the extraordinary writ jurisdiction of this Court.

(27) Now adverting to the cases on which reliance had been placed by learned counsel for the respondent-Bank, the question in the ***Federal Bank's*** case (supra) was relating to employer-employee dispute for which the employee had sought to approach writ Court for exercise of extraordinary jurisdiction under Article 226/227 of the Constitution of India. It was in those circumstances, it was held that writ petition under Article 226 was not maintainable. However, **Satyawati Tandon** and ***Tamil Nadu Industrial Investment Corporation Limited***'s cases (supra) being different on facts do not advance the case of the respondents.

(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.

(29) Now taking up the issues arising at Nos.(b) and (c), they can be adjudicated together. The petitioners had submitted a proposal for OTS to the respondent Bank which was accepted whereby petitioners were required to liquidate the outstanding liability by 22.3.2011 which period was extended vide letter dated 18.4.2011. The petitioners had deposited Rs.50,00,000/- and the balance amount of ' 2 crores was to be deposited to complete the requirements of OTS accepted by the Bank. The petitioners due to certain personal and practical difficulties could not honour the commitment and had sought further extension which, however, was declined. On 17.6.2011, father of petitioners No.2 and 3 after illness

for over a month expired and thereafter the petitioners again approached the respondent Bank to pay the balance outstanding amount of '2 crores. The bank refused to accept the same. The petitioners in order to show their bonafides had presented drafts for Rs. 2 crores on 26.7.2011 to the Bank and had also produced four demand drafts duly revalidated in this Court on 10.2.2012 which were deposited with the Registrar (Judicial) of this Court. Further on 25.7.2012, learned counsel for the petitioners had stated that besides the aforesaid amount of Rs. 2 crores, the petitioners were prepared to pay additional amount of '50 lakhs. This intention clearly depicts the bonafides of the petitioners. The narration of events noticed hereinbefore shows that it was due to certain unfortunate exigencies, the petitioners could not honour the terms of the OTS. In such circumstances, the action of the respondent-Bank in rejecting the OTS is harsh and unjust. It may also be noticed that the petitioners have no other remedy available against the rejection of extension of time for OTS proposal. This Court in **Sat Kartar Ice and General Mills *versus* Punjab Financial Cororation (18),** had condoned the delay in depositing the amount of OTS and directed the Bank to abide by the OTS. Similarly in **State Bank of India *versus* Vijay Kumar (19),** again, the delay in depositing the amount which was condoned by the High Court was upheld by the Apex Court. Accordingly, in the present facts and circumstances after condoning the delay in depositing the amount, while allowing the writ petition, it is directed that in case, the petitioners deposit another sum of ' 50 lakhs in terms of the statement made by their counsel on 25.7.2012 within two months of receipt of a certified copy of this order, the OTS shall be implemented. It is further directed that the drafts deposited in pursuance to the order of this Court dated 10.2.2012 shall be returned to the petitioners, who after getting them revalidated, shall deposit the same with the bank within the aforesaid period for getting the OTS implemented.

(30) In view of the above, the writ petition stands disposed of.

A. Jain

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(18) 2008(1) ISJ Banking 248

(19) AIR 2007 SC 1689

2434/HC ILR—Govt. Press, U.T., Chd.