IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 13163 of 2008

With

SPECIAL CIVIL APPLICATION No. 14570 of 2008

With

SPECIAL CIVIL APPLICATION No. 5288 of 2009

With

SPECIAL CIVIL APPLICATION No. 12457 of 2009

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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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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SUNDARAM FINANCE LIMITED - Petitioner(s)

Versus

THE ASSISTANT REGISTRAR - Respondent(s)

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Appearance :
MR SANJAY R GUPTA for Petitioner(s) : 1,
MR PRAKASH JANI, GOVERNMENT PLEADER for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 13/01/2010

ORAL JUDGMENT

1. As common questions arise for consideration in all the petitions, they are being considered by common judgement.

2. In all the petitions, the challenge by the petitioners is the initiation of the action of the respondent authorities under Bombay Money Lenders Act, 1946 (hereinafter referred to as Money Lenders Act/ML Act). Basis of all the petitions are that the petitioners are non-banking finance companies (NBFCs) registered under the Indian Companies Act and they are being regulated and governed by the provisions of Reserve Bank of India Act, 1934 (with the amendment and more particularly Chapter-III B) (hereinafter referred to as RBI Act). They are under the control and supervision of Reserve Bank of India for the purpose of issuance of instructions and guidelines, therefore, they are not governed by the provisions of ML Act which is a State Act. As the concerned Registrar under ML Act has issued notice calling upon the petitioners to produce the accounts and documents for verification as to whether the provisions of ML Act are being complied with or not, failing which the fine and the other consequence may arise by initiation of the action under the ML Act, all the petitioners have approached to this Court by the present petitions for challenging the legality and validity of the action of issuing notice by the concerned Registrar under the ML Act.

3. It is an undisputed position that neither the petitioners are registered under ML Act as money lenders nor have obtained any licence under ML Act. It may be recorded that ML Act is a State Act enacted by the State legislature for the then State of Bombay and has been adopted in Gujarat State for its enforcement and is in operation in Gujarat State. Whereas RBI Act is a Central Act enacted by the Parliament.

4. In order to examine the controversy, reference to certain provisions of RBI Act would be relevant and more particularly Chapter 3B of the RBI Act which has been inserted by Act No.55 of 1963. The objects and reasons for insertion of Chapter-III B would assume importance in order to better understand the controversy. The same reads as under:

> ***The existing enactments relating to banks do not provide for any control on companies or institutions, which although they are not treated as banks, accept deposits from the general public to carry on other business which is allied to banking. For ensuring more effective supervision and management of the monetary and credit system by the Reserve Bank, it is desirable that the Reserve Bank should be enabled to regulate the conditions on which deposits may be accepted by this non-banking companies or institutions. The Reserve Bank should also be empowered to give any financial institution or institutions directions in respect of matters, in which the Reserve Bank, as the Central Banking institution of the country, may be interfered from the point of view of control over the credit policy. The Reserve Bank's powers in relation to commercial banks should also be enhanced and extended in certain directions, so as to provide for stricter supervision of the operations and working of such banks.***

5. The aforesaid makes it clear that the intention of the Parliament to insert the provisions of Chapter-3 III B inter alia is to control and regulate the conditions for acceptance of the deposit and to control the credit policy of non-banking finance companies and the financial institutions (hereinafter referred to as NBFC).

6. At this stage, it would be profitable to advert the observations made by the Apex Court in the case of ***Reserve Bank of India Vs. Peerless Co. reported at 1987(1) SCC 424***. the Apex Court has made the following observations regarding the interpretation of the statute:

> ***Interpretation must depend on the text and the context. The are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are import. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may taken colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses, we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the court construed the expression 'Prize Chit' in Srinivasa and we find no reason to depart from the court's construction.***

7. Reference to certain provisions of the said Chapter in RBI Act would also be relevant.

Section 45-I(a) defines business of a non-banking financial institution means carrying on of the business of a financial institution referred to in th clause (c) and include business of a non-banking financial company referred to in clause (f).

Clause 45-I(c) provides for the definition of financial institution which means any non-banking institution which carries on as its business or part of its business any of the activities of; whether by way of loans or advances or otherwise and others. But it does not include the institution which carries on its principal business of agricultural operations or industrial activity.

Section 45-IA requires registration of such non-banking financial institutions.

Section 45-IB provides for maintenance of the percentage of assets, etc.

Section 45-IC provides for reserve fund.

Section 45-J provides for regulation of prospectus etc. and the pertinent aspect is that Section 45JA has been inserted in this Chapter by Amending Act No.23 of 1987 which reads as follows -

> ***(1) If the Bank is satisfied that, in the public interest or to regulate the financial system of the country to its advantage or to prevent the affairs of any non-banking financial company being conducted in a manner detrimental to the interest of the depositors or in a manner prejudicial to the interest of the non-banking financial company, it is necessary or expedient so to do, it may determine the policy and given directions to all or any of the non-banking financial companies relating to income recognition, accounting standards, making of proper provisions for band and doubtful debts capital adequacy based on risk weights for assets and credit conversion factors for off balance-sheet items and also relating to deployment of funds by a non-banking financial company or a class of non-banking financial companies generally, as the case may be, and such non-banking financial companies shall be bound to follow the policy so determined and the directions so issued.***

It may also be recorded that the object and reason behind Act No.23 of 1987, whereby the aforesaid provisions of Section 45-JA was inserted in the RBI Act, inter alia provides for regulating the acceptance of the deposit by such non-banking financial companies and ensure the repayment of such deposits.

Section 45-K provides for power of RBI to collect the information

from non-banking financial companies.

Section 45-L provides for the power with the RBI to call for the information from financial institutions and to give directions in order to regulate the credit system of the country to its advantage.

Section 45-M of the Act provides for the duty of non-banking financial institutions to furnish information.

Section 45-MA provides for powers and duties of auditors.

Section 45-MB provides for power of the RBI to prohibit acceptance of deposits.

Section 45-MC provides for power of RBI to file winding up petition.

Section 45-N provides for inspection.

Section 45-NA provides for prohibition of solicitation of deposits by unauthorized persons.

Section 45-NB provides for disclosure of information.

Section 45-NC provides for powers with the RBI to grant exemption.

Section 45-Q provides for overriding effect which is relevant and which reads as under:

> ***45-Q. Chapter HB to override other laws- the provisions of this Chapter 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***

The provisions of this Chapter shall have the overriding effect and shall stand over any law inconsistent therewith for the time being in force or any instrument having effect by virtue of law.

8. The aforesaid provisions of Chapter-III B of RBI Act goes to show that the Parliament by insertion of the said Chapter has intended to authorise the regulation of the activities of business through RBI as per the Banking Regulation Act and such regulation of Banking business activities of non-banking financial institutions includes the acceptance of the deposit and also the deployment of its funds for private advance and investment of such funds.

9. The Bombay Money Lenders Act enacted in the year 1946 by the State Legislature was enacted with the purpose to regulate and control the transaction of money lending in the State. Reference to certain provisions of the Money Lenders Act would also be relevant.

Section 2(9) of the ML Act provides for definition of the loan which reads as under:

> ***loan means an advance at interest whereof money or in kind, but does not include -***
>
> ***1. a deposit of money or other property in a Government Post Office Bank or in any other bank or in a company or with a co-operative society;***
> ***2. a loan to, or by, or a deposit with any society or association registered under the Societies Registration Act, 1860 (XXI of 1860) or any other enactment relating to a public, religious or charitable object;***
> ***3. a loan advanced by Government or by any local authority authorised by Government;***
>
> ***[(cc) a loan advanced to a Government servant from a fund, established for the welfare or assistance of Government servants, and which is sanctioned by the State Government;]***
>
> ***4. a loan advanced by a co-operative society;***
>
> ***(d1) an advance made to a subscriber to, or a depositor in, a Provident Fund from the amount standing in his credit in the fund in accordance with the rules of the fund;***
>
> ***(d2) a loan to or by an insurance company as defined in the Insurance Act, 1938. (VI of 1939)];***
>
> ***5. a loan to, or by bank;***
> ***6. an advance made on the basis of a negotiable instrument as defined in***

Negotiable Instruments Act, 1881 (XXVI of 1881), other than a promissory note;

[(g) except for the purposes of sections 23 and 25, -

i. a loan to a trader;
ii. a loan to a money lender who holds a valid licence; or
iii. a loan, by a landlord to his tenant for financing of crops or seasonal finance, of not ore than Rs.50 per acre of land held by the tenant;
iv. a loan advanced to an agricultural labourer by his employer;]

Section 2(10) provides for the definition of Money Lender which reads as under:

(10) money lender' means -

i. an individual, or

ii. ***an undivided Hindu Family; or***

iii. ***[xxx]***

[(iiia) a company, or]

iv. ***an un-incorporated body of individuals, who or which-***

(a) carries on the business of money-lending in the [State]; or

(b) has his or its principal place of such business in the [State];

The aforesaid Section 2(10) of the ML Act does provide for inclusion of a Company and the word Company is defined as per the Section 2(4) which defines the company means as defined in the Indian Companies

Act or formed under the Act of UK or Royal Chapter of Letters Patent or by an Act of Legislature of a British Possession.

Section 3 provides for appointment of Registrar and Section 4 provides for maintenance of the Register of money lenders. Section 5 provides for bar of money lending business in the area except under licence and except in accordance with the terms of the licence. Section 6 provides for application for licence and Section 7 provides for grant of licence. There are powers and control for the supervision with the Registrar for cancellation of th licence etc. Section 21 of the ML Act provides for non-obstacle clause in suit, if there is any breach of the provisions of sections 18 or 19. the same reads as under:

> ***21. Procedure of Court in suit regarding loans- Notwithstanding anything contained in any law for the time being in force, in any suit to which the Act applies-***

1. ***a Court shall, before deciding the claim on merits, frame and decide the issue whether the money-lender has complied with the provisions of sections 18 and 19;***

2. ***If the Court finds that the provisions of section 18 or 19 have not been complied with by the money-lender, it may, if the plaintiffs claim is established, in who or in part, disallow the whole or any portion of the interest found due, as may seem reasonable to it in the circumstances of the case and may disallow costs.***

Section 25 of the Act provides the enabling power with the State Government to limit the rate of interest, which reads as under:

> ***25. Limitation on rates of interest. (1) The (State) Government may from time to time by notification in the Official Gazette fix the maximum rates of interest for any local area or class of business of money-lending in respect of secured and unsecured loans:***
>
> ***2.Notwithstanding anything contained in any law for the time being in force, no agreement between a money-lender and a debtor for payment of interest at rates exceeding the maximum rates fixed by the [State] Government under sub-section (1) shall be valid and no Court shall in any suit to which the Act applies award interest exceeding the said rates.***
>
> ***[(3) [If any money-lender or a person advancing a loan specified in sub-clause (g) of clause (9) of section 2 makes an oral or written demand or charges or receives] from a debtor interest at rate exceeding the maximum rate fixed by the [State] Government under sub-section (1) he shall, for the purposes of section 34, be deemed to have contravened the provisions of this Act.]***

10. Two aspects deserves to be noted; one is that the ML Act is essentially with the purpose of regulating transaction of money lending and it enables the State Government to control the rate of interest in the field of money lending. The second aspect is that at the time when the ML Act was enacted by the State Legislature, or the amendment made from time to time which is upto 1963 by Gujarat Act No.44 of 1963, there was no provision made under RBI Act for regulation of the banking business of non-banking financial companies since

Chapter-III B has been inserted on the statute book with effect from 16.11.1963 and the further pertinent aspect is that Section 45Q was inserted on 01.02.1964 in RBI Act. Section 45JA, as referred to hereinabove, has come into force w.e.f. 09.01.1997.

11. The next aspect to be considered is the applicability of ML Act to a non-banking financial institution or non-banking financial companies. As observed earlier, Central Act (RBI Act) provides to regulating of the banking business by non-banking financial institutions through Reserve Bank of India, whereas, the State Act (ML Act) provides for regulating the transaction of money lending by the money lenders. The business of non-banking financial companies as defined in Explanation II of Section 45-I provides as under:

> ***Any credit given by a seller to a buyer on the sale of any property (whether movable or immovable) shall not be deemed to be deposit for the purposes of this clause***
>
> ***[(c) financial institution means any non-banking institution which carries on as its business or part of its business any of the following activities, namely -***
>
> ***(i) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own***

12. The aforesaid shows that the business of NBFC which is sought to be controlled and regulated by Chapter-III B of RBI Act includes the financing whether by way of loan or advances or otherwise. Further, Section 45-J of the said Act enables the RBI to determine the policy and

issue directions to such NBFC which includes the matter relating to deployment of funds by NBFC. The conjoint reading would go to show that the business of financing by such NBFC is regulated by the provisions of Chapter-III B of the RBI Act. There are enabling power with the RBI to issue such instructions and directions and they are binding to NBFC. It can hardly be disputed that the charging of rate of interest for the loans or advances is not an integral component of such business. The regulation of such business of giving loan or advances can be equated with the money lending. Therefore, the situation confronted with is that the State Act as existed prior to the insertion of Section 45JA did provide for regulation of the business of money lending by the State Act. Whereas by subsequent legislation enacted by the Parliament, such business of money lending by NBFC is sought to be regulated through RBI. The aforesaid is coupled with the circumstance that Section 45Q of RBI Act enacted by the Parliament provides for overriding effect, if there is inconsistency to any other law for the time being in force or any instrument having having effect by virtue of any other such law.

13. At this stage, reference to the certain observations made in the decision of this Court in the case of ***Sarvoday Charitable Trust Vs. Gujarat University & Anr. reported in 2008(2) GLR 1760*** would be relevant on the aspects of interpretation of statutes and reconciliation of the law made by the Parliament and the law made by the State legislature. This Court at para 12 had inter alia observed as under -

Therefore, if the interpretation of Mr.Shelat is accepted as

> ***that of Section 39 that it is only the University has the right to open a Post Graduation Centre, then in that case, such would result into curtailing the operation of the laws made in the Parliament as against the State Legislature by virtue of Section 39 of the Act. It is by now well settled, as per the principles for interpretation of the statutes, that attempt on the part of the Court first will be to reconcile the different statutory provisions so as to allow them to operate independently and if such is not possible, the Court may read down the provisions so as to leave room for operating the legislature having overriding effecting and if there is a direct conflict, either the provisions may be declared inoperative or may be ultimately struck down as ultra vires. It is not in dispute that the subject of M.Ed., is of higher education covered by Entry No.66 and consequently in the field of Parliament to make laws for regulating the education. Therefore, the State Legislature even if is on the statute book has to make room for operation of the laws made by the Parliament when covered by the subject of Parliament.***

14. The examination of the situation in light of the aforesaid goes to show that Parliament has not made the law for regulating the business of money lending activity in the country by all persons including NBFCs. But, it has made law for regulating the activities of loans and advances by specific class of persons, viz. NBFCs. Whereas, the State law provides for controlling and regulating the business of money lending for all persons which includes the Companies registered under the the Indian Companies Act. The minute examination of the definition of the word Company under the ML Act refers to only the Companies defined under the Indian Companies Act, 1913, or the Companies formed in pursuance of the Act of UK or by Royal Charter of Letters Patent, or by an Act of Legislature of British Possession. It does not refer to the Companies registered under the

Indian Companies Act, 1956. If the said provisions of ML Act is liberally interpreted keeping in view the principles of purposive interpretation, it would include the Companies registered under the Indian Companies Act, 1956, like the petitioners herein. If the literal interpretation is considered, ML Act may not apply to the petitioning companies which are registered under the Indian Companies Act, 1956 but the liberal interpretation would show that ML Act may be made applicable to subsequent companies registered under the Indian Companies Act, 1956. It may be that in absence of any specific law made by the Parliament, the provisions of State legislature of ML Act may be made applicable for such Companies. However, once the Parliament having enacted the law for regulating the activities of loans and advances through RBI of such Companies which are covered in the definition of NBFC or which are termed as NBFC under ChapterIII B of the Act, if the application of ML Act to such NBFCs are allowed to continue, there would be overlapping of the State legislature over the laws made by the Parliament to that extent. As observed earlier, when the State legislature enacted ML Act, for the Companies like NBFCs in the present case, activities were not being regulated by any laws of the Parliament. It is only after the insertion of the Chapter-IIIB, more particularly after 1997 by insertion of Section 45JA, the regulation is made and business is controlled in the in the field of credit by such NBFCs through RBI. As observed earlier, the said provisions of ChapterIIIB applies with non-obstacle clause as provided under Section 45Q of RBI Act. Therefore, if provisions of Chapter III-B of RBI Act is allowed to operate qua NBFCs so far as relating to money lending with the application of ML Act for money lending by such NBFCs, not only the anomalous situation may arise, but there would also be conflict of both the laws qua applicability of the Companies which are NBFCs. However,

Chapter-III B of the RBI Act applies to only Companies which are NBFCs, whereas, ML Act applies to all Companies. Therefore, in order to reconcile the situation, the provisions of ML Act and more particularly Section 4 providing for the definition of the Companies deserves to be read down to the extent that the Companies which are NBFCs and covered and regulated by the provisions of Chapter-III B of the RBI Act, would not be covered in the definition of Companies under ML Act. The aforesaid appears to be just and proper in order to reconcile both the statutes allowing them to operate instead further examining the constitutional validity of the ML Act and more particularly the definition clause as provided under Section 2(4) in light of the specific law made by the Parliament by insertion of Chapter-III B under RBI Act.

15. Even otherwise also, as observed earlier, the State legislature has to make room for enforceability of the laws made by the Parliament. It is not the case of the State that the subject of money lending is exclusively under the State List and the Parliament has no competence to enact the law for regulating the business of the Companies like NBFCs. Therefore, under these circumstances, if the laws made by the Parliament is to operate over the earlier laws made by the State legislature, it would be reasonable to hold that the Companies which are covered under Chapter-III B of RBI Act, would not be falling under the definition of the word Company under Section 2(4) of the ML Act.
16. It may be incidentally recorded that RBI in the said letter dated 26.07.2005 to the Principal Secretary (Finance) of the State Kerala, copy whereof is produced at Annexure-H in SCA No. 13163/08 has stated for avoiding duality of regulation and regulatory or legislative overlapping for NBFCs

and for exempting he NBFCs from the applicability of the Kerala Money Lenders Act. Paragraphs 3, 4, and 5 reads as under:

> ***3.The registration is being granted to NBFCs on assessment and evaluation of various factors laid down in the RBI Act. The Bank had issued detailed directions to the NBFCs on the acceptance of public deposits and compliance with the Prudential Norms relating to income recognition asset classification, provisioning, etc. the Bank is closely supervising the NBFCs allowed to accept public deposits through a comprehensive mechanism comprising on-site examination on CAMELS pattern, off-site surveillance, a sensitive market intelligence system and initiating necessary supervisory action wherever necessary. The statutory auditors of NBFCs have also been made responsible for direct reporting to the Bank on the contravention of the RBI Act/Directions by the NBFCs noticed by them during the course of their audit. These measures broadly aim at protecting the interests of the depositors as also ensuring the soundness of the financial system.***
>
> ***4. Therefore, in order to avoid duality of regulation and any regulatory legislative overlapping it is considered necessary that NBFCs registered with Reserve bank may be exempted from the provisions of Kerala Money Lenders Act operating in the State. In this regard, we had earlier written to all the Government of States and Union Territories vide our letter D.O. DNBS (PD) No.396/6.30/2001-2002 dated October 30, 2001 (copy enclosed). Subsequently, we had also requested you in the matter vide letter DNBS (PD) No.150/6.30/2002-2003 dated August 21, 2002 and further vide DO. DNBS (PD) No.720/06.30/2002-2003 dated April 3, 2003 (copies enclosed). However, it is observed that Kerala Money Lenders Act continues to be applicable to the registered NBFCs, as well.***
>
> ***5. May I, therefore, request you to kindly look into the***

matter and consider exempting the NBFCs registered with the Reserve Bank of India from the Kerala Money Lenders Act in order to avoid duality/overlap of regulation.

The aforesaid shows that the as per the RBI, on account of the enforcement or applicability of Kerala Money Lenders Act in the State of Kerala, there is duality and overlapping of Regulations of the functioning and business of NBFCs which deserves to be avoided.

17. The learned counsel for the petitioner had relied upon the decision of this Court (Coram: P.B. Majmudar, J.) in the case of ***Sundaram Finance Ltd. Vs. the State of Gujarat reported at 2006(2) GLH 362*** for contending that this Court in the said decision did rule that if the license is not obtained under the ML Act by NBFC, it is not an offence.

18. Whereas, the learned GP relied upon the another decision of this Court (Coram: M.R. Shah, J.) in the case of Bagmar Finance Ltd. Vs. State of Gujarat decided on 16.12.2008 observing that giving loan/finance to a person to purchase rickshaw can be said to be within the meaning of the definition of law attracting Section 5 of the ML Act for which the license is required and in the said decision, this Court distinguished the earlier Judgement in the case of Sundaram Finance Ltd. Vs. State of Kerala and Anr. on the ground that taking into consideration the definition of the word loan given to the trader, it was found that licence was not required.

19. The pertinent two aspects deserve to be recorded; one is that in both the cases, the question arose for commission of the offence and quashing of the complaint. In both the decisions, this court proceeded for examining the definition of the word trader or the word loan for further examining the requirement of the license. In none of the decision, this Court had an occasion to examine the operation of the law made by the Parliament by subsequent legislation over the laws made by the State of ML Act nor had an occasion to examine the definition of the word Company under the ML Act so as to make room for operation of the law made by the Parliament of Chapter III-B under the RBI Act for regulating the business of the companies which are NBFCs. In none of the case this Court had an occasion to examine as to whether the provisions of ML Act can be applied to the Company having character of NBFC and covered by Chapter III-B of RBI Act nor the Court had an occasion to examine as to whether there is overlapping of the laws made by the Parliament vis-□is the laws made by the State Legislature. Further, the pertinent aspect is that in none of the case the attention of the Court was drawn to the provisions of Section 45Q of RBI Act having non obstacle clause with an overriding effect over any other law for the time being in force or any other instruments having effect by any such law. In any case, this Court in none of the decision had an occasion to examine the question as to whether the competent authority under the ML Act had power or competence to initiate the proceedings by issuing notice to the NBFC or not. Therefore, when the issue is not considered and/or not decided in light of the enforceability of the laws made by the Parliament over the State Legislation, it can hardly be accepted that the issues, which arise for consideration in the present case are covered in either way by the aforesaid decision of this Court.

20. Mr.Jani learned Government Pleader appearing for the State authorities did rely upon the decision of ***Kerala High Court in the case of Line Hire-Purchase and Leasing Co.(Pvt.) Ltd. and Premier Kuries and Loans (Pvt. Ltd. Vs. State of Kerala & Ors. reported at (2001) 103 Company Cases 941 (Kerala)*** and contended that as per the view taken by the Kerala High Court the provisions of Kerala Money Lenders Act are applicable to the companies covered by the provisions of Chapter III-B of RBI Act.

21. Firstly, when the aforesaid decision was rendered by the Kerala High Court on 10.03.1995 (though reported in 2001), Section 45JA authorizing the RBI to determine the policy and issue directions was not on the statute book which has come into effect from 09.01.1997 by Act No.23/97. As observed earlier Section 45JA controls the field of enabling power with the RBI to issue directions to accept deposits and deployment of fund by NBFCs. Further, the matter has not been examined by the High Court of Kerala in the said decisions for making room by the State Legislature to operate the laws made by the Parliament and in respect to a specific field covered by loans and advances to be made by NBFCs in its business. Further, in decision of Kerala High Court the matter was examined in light of the definition of the word person under the General Clauses Act, whereas under ML Act there is specific definition of the word Company. In view of these peculiar circumstances, with respect, I cannot concur with the ultimate conclusion held by the High Court Of Kerala that the provisions of ML Act would apply to the companies which are NBFCs.

22. Mr.Jani learned Government Pleader for the State Government heavily contented that, as on today, RBI has not issued any instruction to control the chargeability

of rate of interest in the transaction of loan by NBFCs, whereas the State under ML Act, for all moneylenders has prescribed the rate of interest. If this Court, holds that the provisions of ML Act would not apply to the companies like NBFC, they would be at the liberty to charge exorbitant rate of interest from the loanees and may result into permitting exploitation of the loanees. It was therefore submitted that keeping in view the object behind the ML Act this Court may hold that the control under the ML Act would apply also to the loans given by NBFCs.

23. It is true that the essential purpose of ML Act is to regulate the transaction of money lending and certain provisions of the ML Act do provide for protection against exploitation by the moneylenders. At the same time Chapter III-B and more particularly Section 45JA of the RBI Act enables the RBI to issue such directions as may be required for controlling and regulating the credit policy in the country which includes for deployment of fund by NBFC for loans and advances. It is by now well accepted that status of RBI is like that of a bankers bank and as an expert for management of the monetary and credit system in the country. The communication produced by the petitioner in SCA No.12457/09 at Annexure C provides for the instructions issued by RBI of Fair Practices Code for NBFCs. Further, the copy of the letter dated 26.07.2005 produced at Annexure-H in the compilation of SCA No.13163/08 shows that RBI has addressed letter to the Principal Secretary (Finance) of the State of Kerala to examine the avoidance of dual Regulation and Legislative overlapping for NBFCs, possibly because of the aforesaid decision of the Kerala High Court in the case of Link Hire-Purchase and Leasing Co. (Pvt.) Ltd. (supra) taking the view that the provisions of Kerala Money Lending Act can apply to the NBFCs.

24. The aforesaid goes to show that the RBI has issued instructions for charging a

fair rate of interest. If the State Government is of the view that because of no specific rate of interest provided by RBI in the instructions for chargeability of the rate of interest to the loans and advances by NBFCs and the resultant situation is of permitting exploitation, it would be for the State Government to draw the attention of the competent authority of RBI in this regard with the material in support thereof and when RBI is clothed with the power under Section 45 JA, it will be for the State to request the RBI to issue specific directions for a particular rate of interest or otherwise. No final opinion deserves to be expressed by this Court more particularly because it is for the RBI to examine all the relevant aspects and to issue appropriate directions or instructions, if required to NBFCs keeping in view the object of supervision over the credit policy and monetary fund of such NBFCs.

25. In any case, the provisions of the Constitution is supreme over all sentiment, may be of the State Government or the Central Government. If the Scheme of the Constitution provides for making room for operation of laws made by the Parliament for a particular class of Companies over the State legislature, its effect cannot be diluted nor can be dissected on such contention as sought to be canvassed. Therefore, leaving the State Government to draw the attention of RBI for making appropriate representation for such purpose, and expecting the RBI to play proactive role as per the provisions of Section 45JA of RBI Act, no further view deserves to be expressed in this regard and the matter is left there with the only observation that on such contentions the applicability of ML Act to the Companies like NBFC cannot be maintained.

26. Mr. Jani, learned GP for the State authorities had also contended that the matter is at the stage of show-cause notice for initiation of the process under ML Act and the petitioners can appear before the authorities under the ML Act by

showing cause including for non-applicability of the provisions of ML Act to them. Therefore, keeping in view the said aspects, this Court may decline the entertainment of the petition under Articles 226 and 227 of the Constitution.

27. It is by now well settled that if the initiation of the action is wholly without jurisdiction, it would be a case for entertainment of the petition under Article 226/227 of the Constitution and the bar of self imposed restriction would apply only in cases where the initiation of action is not without jurisdiction or is not in purported exercise of power under the relevant statute. The observations and discussions as made hereinabove, goes to show that when the provisions of ML Act qua the Companies like NBFC is not applicable, the initiation of the action of issuing notice by concerned Registrar under the ML Act can be said to be wholly without jurisdiction. Therefore, it appears to the Court that the self imposed restriction in exercise of the power under Article 226/227 in the cases of existence of alternative remedy under the statute should operate as a bar in entertainment of the present petitions. Further, in any case, the concerned Registrar under the ML Act is the creature of the statute of the ML Act and enjoys the power within the purview of the Act. He would not be in a position to examine the wider question of enforceability of the laws made by the Parliament vis-□is the laws already in existence made by the State legislature nor will have any competence or jurisdiction to read down the definition of the word Company under the ML Act so as to exclude NBFC. Therefore, under these circumstances, when the action is found to be wholly without jurisdiction of this Court, in view to the reading down of the definition of the word Company under the ML Act, neither the bar of self imposed restriction by this Court to the jurisdiction under Article 226/227 of the Constitution should be allowed to operate nor any useful purpose would be served, more particularly when the concerned Registrar under the ML Act will have no power or competence to decide various questions which are required to be considered and as considered by this Court as stated

hereinabove. Hence, the contention raised by the learned Government Pleader cannot be accepted.

28. In view of the aforesaid observations and discussions, the impugned notices for initiation of the action under the ML Act against all the petitioner Companies cannot be sustained and deserves to be quashed and set aside. Hence, they are quashed and set aside.

29. The petitions are allowed accordingly. Rule made absolute. No order as to costs.

(JAYANT PATEL, J.)

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