RESERVED
A.F.R.

WRIT - C No. 18170 of 2018

Independent Power Producers Association of India
Vs.
Union of India & 5 Ors.

WITH

WRIT - C No. 23181 of 2018

Association of Power Producers & 2 Ors.
Vs.
Union of India & 5 Ors.

WITH

WRIT - C No. 23183 of 2018

Prayagraj Power Generation Company Limited
Vs.
Union of India & 4 Ors.

Appearance:

For the petitioners : Mr. Abhishek Manu Singhvi, Mr. Sajan Poovayya and Mr. Navin Sinha, learned Senior Advocates, assisted by Mr. Ashish Mishra, Ms. Kalpna Sinha, Mr. R.P. Kushwaha, Mr. Visson Mukherjee, Ms. Catherine Ayallore, Mr. Milanka Chaudhery, Ms. Ashli Cherian & Ms. Ameya Misra, learned Advocates.

For the respondents : Mr. Tushar Mehta, learned ASG, Mr. Shashi Prakash Singh, learned ASG, assisted by Mr. Sanjay Kumar Om, learned Advocate, for the Union of India.

Mr. Ravi Kadam, Mr. Rakesh Dwivedi and Mr. Anurag Khanna, learned Senior Advocates, assisted by Mr. Amit Saxena, Mr. Vivek Shetty, Mr. Johan Chakshi, Ms. Sansriti Pathak, Mr. Eklayva Dwivedi, Mr. Raghav Dwivedi, Mr. Saurabh Singh and Ms. Roshni Shukla, learned Advocates, for the Reserve Bank of India.

Hon'ble Dilip B. Bhosale, Chief Justice
Hon'ble Yashwant Varma, J.

(Per Dilip B Bhosale, CJ)

1. The first writ petition under Article 226 of the Constitution of India, has been instituted by Independent Power Producers Association of India, for the following reliefs:

> "**A**. Issue an appropriate writ, order or direction for declaring the provisions of Section 35AA and Section 35AB of the Banking Regulation Act, 1949, as ultra vires to the Constitution of India;
>
> **B**. Issue a Writ of Certiorari or any other Writ, Order or Direction of like nature quashing the Order S.O. 1435(E) dated 05.05.2017 issued under Section 35AA of the Banking Regulation Act, 1949, being without the authority of law;
>
> **C**. Issue a Writ of Certiorari or any other Writ, Order or Direction of like nature quashing the Circular having no. DBR No. BP.BC.101/21.04.048/2017-18 dated 12.02.2018."

2. The second writ petition has been filed by Association of Power Producers (Writ-C No. 23181 of 2018) and the third writ petition (Writ-C No. 23183 of 2018) by Prayagraj Power Generation Company Limited. The prayers made in these two writ petitions are similar, as made in Writ – C No. 18170 of 2018, and even interim relief prayed for is also similar.

3. We have heard Dr. Abhishek Manu Singhvi, Mr. Navin Sinha, Mr. Sajan Poovayya, learned Senior Advocates for the petitioners, Mr. Tushar Mehta, learned ASG for the Union of India, Mr. Ravi Kadam and Mr. Rakesh Dwivedi, learned Senior Counsel for the Reserve Bank of India (for short "RBI") at considerable length for grant of interim stay of the implementation of the impugned circular dated 12.02.2018 (for short "the circular") issued by respondent no.2 – RBI.

4. After the matter was closed for orders, we had detailed discussion in

chambers. My learned brother expressed his desire to write a separate order. We both, however, were inclined to reject the preliminary objection as to maintainability of the writ petitions filed by the Associations. My esteemed brother agreed to deal with the same, hence I refrain from dealing with the same in this order. I, therefore, simply observe that the preliminary objection is rejected.

5. Respondent no.2 – RBI through its Secretary, issued the circular in exercise of the powers under Section 35A, 35AA (read with S.O. 1435 (E) dated May 5, 2017 issued by the Government of India) and Section 35AB of the Banking Regulation Act, 1949 (for short "BR Act"), and Section 45 (L) of the Reserve Bank of India Act, 1934 (for short 'RBI Act'), mandatorily directing the banking company/companies to initiate insolvency resolution process of stressed assets under the provisions of the Insolvency and Bankruptcy Code, 2016 (for short 'IBC'). The RBI has issued various instructions aimed at resolution of "stressed assets" in the economy, including introduction of certain specific schemes at different points of time. In view of the enactment of the IBC, it has been decided to substitute the existing guidelines with a harmonized and simplified generic framework for resolution of "stressed assets". It would be advantageous to reproduce relevant portions of the circular. While paragraph 4 of the circular provides for "Implementation of Resolution of Plan", paragraphs 5 to 7 provide for "Implementation Conditions for RP", and paragraphs 8 and 9 provide for "Timeline for Large Accounts to be Referred under IBC", which are relevant for our purpose, read thus:

"**Implementation of Resolution Plan**

4. **All lenders must put in place Board-approved policies for resolution of stressed assets under this framework, including the timelines for resolution. As soon as there is a default in the borrower entity's account with any lender, all lenders – singly or jointly – shall initiate steps to cure the default. The resolution play (RP) may involve any actions/plans/reorganization including, but not limited to, regularisation of the account by payment of all over dues by the borrower entity, sale of the exposures to other entities/investors, change in ownership, or restructuring**[1]. **The RP shall be clearly documented by all the lenders** (even if there is no change in any terms and conditions).

Implementation Conditions for RP

5. A RP in respect of borrower entities to whom the lenders continue to have credit exposure, **shall be deemed to be implemented only if the following conditions are met**:

a. the borrower entity is no longer in default with any of the lenders:

b. if the resolution involves restructuring; then

i. all related documentation, including execution of necessary agreements between lenders and borrower/creation of security charge/perfection of securities are completed by all lenders; and

ii. the new capital structure and/or changes in the terms of conditions of the existing loans get duly reflected in the books of all the lenders and the borrower.

6. Additionally, RPs involving restructuring/change in ownership **in respect of 'large' accounts (i.e. accounts where the aggregate exposure of lenders is Rs 1 billion and above), shall require independent credit evaluation (ICE) of the residual debt**[2] **by credit rating agencies (CRAs) specifically authorised by the Reserve Bank for this purpose**. While accounts with aggregate exposure of Rs 5 billion and above shall require two such ICEs, others shall require one ICE. Only such RPs which receive a credit opinion of RP4[3] or better for the residual debt from one or two CRAs, as the case may be, shall be considered for implementation. Further, ICEs shall be subject to the following:

(a) **The CRAs shall be directly engaged by the lenders and the payment of fee for such assignments shall be made by the lenders**.

(b) If lenders obtain ICE from more than the required number of CRAs, all such ICE opinions shall be RP4 or better for the RP to be considered for implementation.

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1 Restructuring is an act in which a lender, for economic or legal reasons relating to the borrower's financial difficulty (An illustrative non-exhaustive list of indicators of financial difficulty are given in the Appendix to Anex-I), grants concessions to the borrower. Restructuring would normally involve modification of terms of the advances/securities, which may include among others, alteration of repayment period/repayable amount/the amount of instalments/rate of interest; roll over of credit facilities; sanction of additional credit facility; enhancement of existing credit limits; and, compromise settlements where time for payment of settlement amount exceeds three months.

2 The residual debt of the borrower entity, in this context, means the aggregate debt (fund based as well as non-fund based) envisaged to be held by all the lenders as per the proposed RP.

3 **Annex – 2** provides list of RP symbols that can be provided by CRAs as ICE and their meanings.

> 7. **The above requriement of ICE shall be applicable to restructuring of all large accounts implemented from the date of this circular, even if the restructuring is carried out before the 'reference date' stipulated in paragraph 8 below.**
>
> **Timelines for Large Accounts to be Referred under IBC**
>
> 8. **In respect of accounts with aggregate exposure of the lenders at Rs. 20 billion and above, on or after March 1, 2018 ('reference date'), including accounts where resolution may have been initiated under any of the existing schemes as well as accounts classified as restructured standard assets which are currently in respective specified periods (as per the previous guidelines), RP shall be implemented as per the following timelines**:
>
> **i) If in default as on the reference date, then 180 days from the reference date**.
>
> **ii) If in default after the reference date, then 180 days from the date of first such default**.
>
> 9. **If a RP in respect of such large accounts is not implemented as per the timelines specified in paragraph 8, lenders shall file insolvency application, singly or jointly, under the Insolvency and Bankruptcy Code 2016 (IBC)[4] within 15 days from the expiry of the said timeline**[5]."
>
> (emphasis supplied)

5.1 Thus, it appears, the circular provides a resolution plan for a debtor which involves "restructuring" to be approved by "all the lenders"; the resolution plan to be completed within 180 days from 01.03.2018, and if the resolution plan is not approved by 27.08.2018, the lender shall have no option but to initiate process under IBC.

5.2 Clause 18 of the circular is also relevant which provides for 'withdrawal of extant instructions'. Under this clause, *the extant instructions on resolution of stressed assets such as Framework for Revitalising Distressed Assets; Corporate Debt Restructuring Scheme; Flexible Structuring of Existing Long Term Project Loans; Strategic Debt Restructuring Scheme (SDR); Change in Ownership outside SDR, and*

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4 Applicable in respect of entities notified under IBC.

5 The prescribed timelines are the upper limits. Lenders are free to file insolvency petitions under the IBC against borrowers even before the expiry of the timelines, or even without attempting a RP outside IBC.

Scheme for Sustainable Structuring of Stressed Assets stand withdrawn with immediate effect. Irrespective of the stage arrived at in the restructuring schemes and the accounts where any of the schemes have been invoked but not yet implemented, is governed by the revised framework. It accordingly provides that the "Joint Lenders Forum" as an institutional mechanism for resolution of stressed accounts also stands discontinued. All accounts under the circular, including such accounts where any of the schemes have been invoked but not yet implemented, shall be governed by the revised framework.

6. The Electricity Act, 2003 (for short "Electricity Act") was brought in force on 10.06.2003, inter-alia, to attract/promote the entry of the corporate sector in the field of power generation. It lays down the regulatory framework for the electricity sector, including tariff, procurement, supply, payment etc. Pursuant to Section 3 of the Electricity Act, respondent no.1 – Union of India, notified the National Electricity Policy dated 12.02.2005 which highlighted the delicensing of generation as well as the need to increase participation of the private sector in order to alleviate the issue of scarcity of capital. On 06.01.2006, the Central Government notified the Tariff Policy which, inter-alia, sought to attract adequate investment in the power sector by providing an appropriate return on investment. This attracted several companies to come forward and invest in the power sector including the petitioners. I do not propose to narrate further details in respect thereof as they may not be necessary at this stage.

7. During last five years, according to the petitioners, due to several negative externalities impacting them like structural flaws in the regulatory

mechanism as implemented; fuel supply crisis in thermal sector; evacuation system constraints; populist decisions taken contrary to the letter and spirit of Section 61 of the Electricity Act, eroded the semblance of financial creditworthiness in the power sector. According to the petitioners, out of Indian banks' gross NPAs or bad loans of around Rs. 11,00,000 crore, power sector has around 2,50,000 crores NPAs on account of non-availability of coal, lack of PPAs, wrongful under-recovery and disallowance of legitimate cost changes for variety of reasons.

8. In this backdrop, the circular has been issued on 12.02.2018 and it was brought into force from 01.03.2018 (the reference date).

9. Respondent no. 3 – Ministry of Power, having recognized that power sector has been facing several financial issues on account of factors leading to a situation wherein the power sector, in particular the thermal, has contributed to an increase of NPAs, the Standing Committee of the Parliament on Energy (2017-18), had a briefing on “stressed/non-performing assets in electricity sector, pertaining to the Ministry of Power, by their representatives on 23rd October 2017. The Committee thereafter held series of meetings on the subject in November and December 2017 with the Ministry of Power, Ministry of Finance, Ministry of Coal, Ministry of Railways, RBI, Lending Banks and Developers/Promoters of the concerned power projects. The Committee accordingly submitted its comprehensive 37th report on the Stressed/Non Performing Assets in the electricity sector to Parliament on 09.03.2018. It is clear from the report that it was submitted after involving all stakeholders including RBI, the power generating companies, banks and financial institutions. The relevant observations made

by the Standing Committee, read thus:

“*Introduction*

*1. **The Committee note that delicensing of power generation has been done to attract the entry of private sector into the power generation. This was done as the country was facing huge deficit in energy and peak power**. The capacity addition targets required substantial capital addition per year with limited capacity addition expected from the public sector units (both Central and States). **Private participation became essential for achieving the fast growth of power generation keeping pace with the demand of the country. During the 11th Plan period, private generating companies contributed in electricity generation in a substantial manner by outdoing both Central and State sectors put together**. In the capacity addition targets of the Government Private sector have also contributed during the 12th Plan period as well. **Their contribution to the sector has led the country to a power surplus situation from the power deficient one. Hence it is incumbent upon the Government to ensure the proper facilitation of capacity generation stuck due to several factors and forcing them to become NPA. The Committee, therefore, recommend that an appropriate task force be formed/constituted to specifically look into the problems of the IPPs with a view to bring them out of NPAs/Stressed Asset mire so that the power generation in the country is given a fillip and the vision of power for all 24x7 is achieved sooner than later**.*

Stressed Assets in Power Sector

…

*5 … **The Committee are of the considered view that providing finances, though vital, to the project is only one of the several factors essential for the commissioning of the project. As of now, commissioned plants worth of thousands of MWs are under severe financial stress and are currently under SMA-1/2 stage or on the brink of becoming NPA. This is due to fuel shortage, sub-optimal loading, untied capacities, absence of FSA and lack of PPA, etc**. These projects were commissioned on the basis of national need/ demand of electricity, availability of all other essentials required in this regard. **However, due to unforeseen circumstances, these plants are suffering from cash flows, credit rating, interest servicing etc. Hence, simply applying the RBI guidelines mechanically by the banks, financial institutions, joint lender forums will push these plants further into trouble without any hope of recovery**. **The Government of India proposed new credit rating system for fundamentally strong projects which face temporary cash flow mismatch. The emphasis was on various inbuilt credit enhancement structures. The Committee understand that banks have not adopted these guidelines for assessing the credit risk of infrastructure companies.** The new norms provided the risk weight corresponding to each rating levels which the banks have to use for their capital adequacy. **The Committee are of the opinion that banks and other financial institutions should analyse and adopt these guidelines in the proper spirit to provide some succor to the stress**.*

…

*7. **The Committee note that there are 34 power plants which have been categorized as "stressed". The different categories of stressed power plants are (i) plants having PPA and requiring coal; (ii) plants having neither coal linkage nor PPA; (iii) plants having coal block but the issue of coal block is sub-judice; and (iv) the plants stressed on account of reasons other than coal linkage/block issues. The Committee has been informed that upon cancellation of 204 coal blocks by Supreme Court in September 2014, coal mines (Special Provision Act, 2015) was notified on 30th March, 2015. Under the provisions of the said Act, 84 coal mines have so far been successfully allocated. Of these coal mines, 58 coal mines have been allocated to power sector while rest have gone to other areas**. The Committee has also been informed that with a view to ensure that there is no disruption in the power generation arrangements for coal block allottees, it was decided that coal may be supplied to such plants through a separate MoU route till 31.03.2016 as many of the plants were already commissioned or to be commissioned in 2015-16 and had long-term PPAs. The position was reviewed on expiry of the term, i.e., 31.03.2016 and it was decided that these plants may take the coal being made available through the process of special forward e-auction of coal for power sector. In order to ensure that there is no disruption in coal availability to these plants, the term of MoU with these plants which expired on 31.03.2016, was extended till 30.06.2016 so as to facilitate smooth transaction to the special forward e-auction system of CIL. **The Committee note that despite serious attempts made by the Government to make available coal to the power sector, the desired results are not achieved and the sector is starving for fuel**. Despite separate MoU route, special forward e-auction, extension of the term of MoU, there is no improvement in the ground situation. **This has seriously hampered not only the growth of the sector, but has also become one of the major contributory factor for pushing the assets into NPA**. This is a very serious situation and requires urgent remedial measures. **The Committee, therefore, recommend that instead of indulging into futile attempts of different kinds exhibiting hollow exercises only, all efforts should be made to display that there is no mismatch between words, action and the result.***

Shakti Scheme

*8. There are genuine apprehensions regarding availability and allocation of coal among the power producers. During the recent study visit, the Committee itself found that the availability of coal in one of the NTPC plants is very critical and this is the situation in several other plants of the NTPC as well. This affectively rebuts the claim of the Coal India that there is no shortage of coal in the country. The Committee expect that CIL would focus on the seriousness of the issues instead of making tall claims without any basis. **The delay in the implementation of the scheme of SHAKTI should not have happened as it has disastrous entailing effects**. The Committee, therefore, recommend that CIL should make every effort to make available the required quantity of coal to every developer in*

a time-bound manner. Such timeframe for provision of coal to developers be also notified for public information.

<u>Inter-Ministerial group on NPAs</u>

9. ……… The responsibility dwells upon the Ministry of Power to ensure that promotional and regulatory activities are done in an expected manner. They cannot be absolved from their role and responsibility on the ground of the generation being delicensed. ***The Committee, therefore, recommend that Ministry of Power and its associate bodies should become pro-active in understanding and redressing the woes of the sector and expect the inter-Ministerial group of the Ministry will come out with the specific remedies to the different maladies plaguing the sector and distracting its growth****. It is expected that the views/ suggestions of the IMG will be realistic, sector friendly and spur the growth of the electricity sector.*

<u>Regulatory Issues</u>

10. The Committee note that Ministry of Power has made attempts to facilitate the resolution of issues concerning stress in power sector. Several meeting have taken place from July, 2015 onwards with lenders and others but nothing concrete has come out so far. ***The Committee feel that in addition to financial matters, stress in the sector is also caused by various operational/commercial/regulatory issues. Regulatory matters keep on pending for years without any decision. Even the decisions of the regulatory bodies regarding change in law are not honoured by Discoms and various regulators interpret change in law differently leading to the confusion in the sector****. Any situation arising out of the change in law should be uniform all across and if possible be kept out of the purview of the regulators. The Committee are aware that this is a Concurrent Subject and generation is a delicensed activity, but within these limitations some uniform mechanism will have to be explored and established to make the sector stable.* ***The Committee, therefore, recommend that appropriate steps should be taken to ensure that there should be consistency and uniformity with regard to orders emanating from the status of change in law****. Provisions should also be made for certain percentage of payments of regulatory dues to be paid by Discoms in case the orders of regulators are being taken to APTEL/higher judiciary for their consideration and decision.*
…

<u>Role of RBI</u>

12. … The Committee, therefore, recommend that the ***revival schemes of the RBI or the Government should be realistic and not symbolic. Every effort should be made to see that projects with huge investment do not become NPA for want of marginal financial infusion or adjustment in the way of making working capital available for passing on the interest variable to the***

stressed asset.

<u>*Strategic Debt Restructuring*</u>

13. ***The Committee note that the major reasons for stress in most of the thermal power projects have been attributed to (i) non-availability of Fuel (a) Cancellation of coal block, (b) projects set up without linkage, (ii) lack of enough PPA by states, (iii) inability of the promoter to infuse the equity and working capital, (iv) contractual/tariff related disputes, (v) issues related to banks/financial institutions (FIs), (vi) delay in project implementations leading to cost overrun and (vii) aggressive bidding by developers in PPA. Once the project is categorized as NPA, remedial measures of different efficacy follow. One of the remedies available is Strategic Debt Restructuring Scheme***. …"

(emphasis supplied)

9.1 From a bare perusal of the 37th report and the backdrop against which the subject "Stressed/Non Performing Assets in Electricity Sector" was referred to the Standing Committee and, as submitted by counsel for the Union of India and the petitioners, it is clear that the circular was not within the knowledge of or brought to the notice of the Committee when it submitted its report to the Parliament on 07.03.2018. The Standing Committee had a briefing between October and December 2017 and on the basis thereof, the 37th report was prepared and submitted to the Parliament. It is also clear from the report that it does not deal with any other sector except the power sector.

10. It is at this stage and against the background facts mentioned in the earlier paragraphs, the instant writ petitions have been instituted by power generating companies. The first petition (Writ – C No. 18170 of 2018, on 31.05.2018) was placed before this Court on 31.05.2018, when the following order was passed:

"Heard Mr. Sajan Poovayya, Senior Advocate with Mr. Ashish Mishra, learned counsel for the petitioners and Mr. Sanjay Kumar Om, learned counsel for respondents 1 and 3 to 6.

Issue notice to respondent no.2, returnable on 10.7.2018. In addition to Court notice, the petitioners to serve notice to respondent no.2 by registered post with AD/Speed Post/Courier and to file proof of service.

As requested by counsel for the respondent nos. 1 and 3 to 7, the question of maintainability of the writ petition, is kept open to be argued on the next date. It is open to the respondents to file short reply - affidavit at this stage, if they so desire and are advised.

After hearing both the sides, counsel for the parties have agreed for the order that we propose to pass today. Hence the following order:

We request the Secretary, Ministry of Finance, Union of India, to hold a meeting in the month of June, 2018 of respondents 2 to 5 through their Secretaries and a representative of the petitioners' association to consider their grievance and see whether any solution to the problem is possible, in the light of observations made by the Thirty-Seventh Report of Standing Committee on Energy presented to Lok Sabha on 7.3.2018 with regard to stressed/non-performing assets in electricity sector. Though, we could not go through the report, our attention was specifically drawn to some observations in Part-II of the report, which reads thus:

"The Committee are of the considered view that providing finances, though vital, to the project is only one of the several factors essential for the commissioning of the project. As of now, commissioned plants worth of thousands of Mws are under severe financial stress and are currently under SMA-1/2 stage or on the brink of becoming NPA. This is due to fuel shortage, sub-optimal loading, untied capacities, absence of FSA and lack of PPA, etc. These projects were commissioned on the basis of national need/ demand of electricity, availability of all other essentials required in this regard. However, due to unforeseen circumstances, these plants are suffering from cash flows, credit rating, interest servicing etc. Hence, simply applying the RBI guidelines mechanically by the banks, financial institutions, joint lender forums will push these plants further into trouble without any hope of recovery."

It is needless to mention that the petitioners representatives shall supply a copy of this order and of the writ petition with annexures to all the respondents within one week from today. We only observe that action may be avoided on the basis of the impugned circular dated 12.2.2018 issued by respondent no.2-Reserve Bank of India addressed to all Scheduled Commercial Banks and All-India Financial Institutions, against members of the petitioners association, subject to condition that the member(s) is/are not willful defaulter(s) till the meeting is conducted by the Secretary, Ministry of Finance, Union of India. We also observe that the Secretary, Ministry of Finance shall communicate the date and time of the meeting to all concerned, including the President of the petitioners' association, well in advance.

S.O. to 10.7.2018."

(emphasis supplied)

10.1 Thereafter, the Committee constituted by this Court submitted its report on stress in the power sector. I do not propose to make reference to the report in detail. At this stage, suffice it to reproduce the stand of the Ministry of Power and recommendations made by the Committee, which read thus:

> "The Ministry inter-alia made the following points during the meeting held on 21.06.2018:
>
> The electricity Act has provided a conducive environment to promote private sector participation and competition in the sector. Coal based capacity dominates among all sources of generation and its share in the country is 58.89%. The sector wise regional grids have been integrated into a single national grid thereby providing power from one corner of the country to another, through inter regional AC and HVDC links.
>
> During the last decade power generation growth (CAGR) was 6.1% from 2004-14 and 6.8% from 2014-17. However lower growth in power demand has led to declining trend in PLF at an all India level.
>
> **Major reasons for stress**
>
> - **Coal supply issues-owing to cancellation of 204 coal mines by Hon'ble Supreme Court in 2014**.
> - **Demand related issues – Lower than anticipated growth in power demand and surplus supplies has caused under utiliztion**
> - **Delayed Payments by Discoms – Delay in realization of receivables from discoms impairs ability of developers to service debt in a timely fashion**
> - **Inability of promoter to infuse equity**
> - **Aggressive tariffs quoted by bidders in PPAs– unsustainable tariff have been quoted Regulatory and contractual disputes – Delays in approval of additional tariff under change in law**
> - **Legal issues related to auctioned coal mines – Aggressive bidding under the re bid coal mines**
> - **Banks/FIs related issues**
>   - **Delay in disbursement/non agreement amongst FIs/non compliance to decision taken in JLF**
>   - **working capital – Delays in approval of working capital**
>   - **Other operational issues such as land acquisition, inadequate transmission system etc.**
>
> **Recommendation 1 – To set up a High Level Committee**
>
> To deal with the cross sector concerns raised by various stakeholders and consider suggestions made by them, during

presentations & submissions (as shown in Figure), **an appropriate High Level Empowered Committee (HLEC) be constituted by the Ministry of Power. This would be in line with the recommendations given by the Hon'ble Parliamentary Standing Committee on Energy in it's 37th report**.

The HLEC may in a time bound manner specifically look into the cross cutting issues being faced by the thermal power sector in general and IPPs in particular.

Recommendation 2 – Additional time for commissioned assets

An additional 180 days, beyond the timelines prescribed under RBI's circular dated 12th February 2018 may be allowed to commissioned thermal power projects which have been commissioned by 12th February 2018 and have not been admitted or referred to NCLT so far. This would provide an opportunity for the HLEC to address sectoral constraints and provide a window for such assets to optimize their operations. Banks would carry out more intensive monitoring of the account and its cash flows to mitigate any further possibilities of slippages, during this period."

(emphasis supplied)

11. In pursuance of the recommendations made by the Committee, the Government of India, Ministry of Power, vide Office Memorandum dated 29.07.2018, constituted a *High Level Empowered Committee* to address the issue of Stressed Thermal Power Projects in the country, headed by the Cabinet Secretary. The other Members of the Committee are Chairman, Railway Board; Secretary, Department of Economic Affairs; Secretary, Department of Financial Services; Secretary, Ministry of Power; Secretary, Ministry of Coal; CMD, State Bank of India; CMD, Power Finance Corporation; CMD, Rural Electrification Corporation; CMD, Punjab National Bank and CMD, ICICI Bank. The Terms of Reference made to the Committee, read thus:

"a. **To assess the nature of stressed assets with a view to resolving the crisis and maximizing the efficiency of investment**.

b. **Changes required to be made in the fuel linkage/allocation policy/other modes to facilitate supply of fuel to the stressed power plants**.

c. **To facilitate sale of power by these stressed power plants**.

d. **Suggest changes** required in regulatory

framework/administrative measures **to facilitate faster disposal of tariff** petitions/disputes and ensure interim payments during the pendency of the disputes before APTEL and other courts.

e. **Ensure timely payments by the DISCOMS, suggest payment security mechanism for IPPs**.

f. **Changes required in the provisioning norms/Insolvency and Bankruptcy Code (IBC) to facilitate restructuring of the stressed assets including the changes required in Asset Restructuring Company (ARC) Regulations**.

g. Any other measures proposed for revival of stressed assets so as to avoid such investments becoming NPA."

(emphasis supplied)

12. The Prime Minister's Office, perhaps having regard to the nature of reference and to achieve the vision of power for all 24x7, decided, with the approval of the Prime Minister, to constitute a High Level Empowered Committee headed by the Cabinet Secretary. The Ministry of Power, accordingly, issued a Press Release announcing constitution of the High Level Empowered Committee to address the issue of Stressed Thermal Power Projects. At this stage itself, I observe that a representative of the RBI ought to be a part of the Committee. I hope and trust that either PMO or Ministry of Power shall appoint an RBI representative also on the Committee.

13. It would not be out of place for us to mention that after Mr. Singhvi, learned Senior Counsel for the petitioners closed his arguments on interim relief, learned Senior Counsel for the RBI, Mr. Anurag Khanna, at that stage, submitted that the RBI proposes to make an application for transfer of these petitions to the Supreme Court, to be heard with other petitions pending there, challenging the very same circular, and prayed for short adjournment to advance arguments in reply. The RBI, accordingly, I am informed, made an application for transfer. The Supreme Court, however, adjourned the

hearing of the application and, despite insistence, did not grant stay of hearing of these petitions on interim relief.

14. In the meanwhile, the Standing Committee on Energy submitted its 40th report to the Parliament on 07.08.2018. This report is on 'Impact of RBIs Revised Framework for Resolution of Stressed Assets on NPAs in electricity Sector' pertaining to Ministry of Power. It appears that the Committee had a series of discussions on the subject between 11 April and 5 July 2018 with the representatives of the Ministry of Power, Ministry of Finance, Ministry of Coal, Reserve Bank of India, lending banks and developers/promoters of the stressed power projects. This report makes specific reference to the 37th report, referred to above (of the Standing Committee) on 'Stressed/Non Performing Assets in Electricity Sector'. The 40th Standing Committee report on Energy is divided into two parts. The first part mostly consists of facts and figures with reference to the depositions of experts in the field, whereas the second part consists of recommendations of the Committee.

14.1 From the 40th report, it is clear that the Committee was apprised about the circular which discontinued all previous schemes for resolution of stressed assets and substituted the same with a generic framework for resolution. It also took note of the fact that the circular stipulates that default of even a single day in payment of interest/principal would trigger formulation of resolution plan. The framework, it also noticed, provided a deadline of 180 days for implementation of a resolution plan and if it is not implemented, then lenders have to file insolvency application under the IBC within 15 days. The Committee made a specific query as to whether the new guidelines on NPAs will spur the filing of insolvency proceedings with the

National Company Law Tribunal (for short 'NCLT'). The Ministry of Finance informed that as per the RBI's new guidelines (circular), a stressed account of above Rs. 2,000 crore has to be referred to NCLT under IBC if the default continues beyond 180 days.

14.2 It is worth mentioning, at this stage, the difficulties faced by lenders with respect to the strict timeline of 180 days, as provided for in the circular, explained in the words of CMD, Rural Electrification Corporation, as quoted in the 40th report of the Standing Committee on Energy:

> "**Exactly in 180 days to find an optimal solution and resolve is almost impossible**. We have submitted a timeline to the Ministry that minimum, if no roadblocks come in between, 231 days are required because you have to prepare bidding document, technical and financial operation, then you have to invite bids and evaluate, document it and create security also. **All these aspects within 180 days is almost impossible. Ultimately solution is the NCLT only. It means every project will ultimately land up in NCLT where pipeline would be chocked. There are limited number of judges. It will not be so easy**."
>
> (emphasis supplied)

> "**unfortunately 100 per cent consensus to be reached is difficult because in some projects we are having as many as 27 banks**."
>
> (emphasis supplied)

14.3 Explaining why the electricity sector should be treated differently with respect to resolution of the stressed assets, the CMD, during his presentation before the Committee, stated as under:

> "**Power Sector is in a transition which is well known and we are really moving in from a low demand, low supply situation to a moderately high demand context. This is the transition period that needs to be managed. The RBI framework or the other issues that we have been talking about addresses only the financial issues. Of course, as a financial institution that is our major concern but it does not address a whole range of issues that are external to the financing matters**.
>
> We have to take into consideration two major important contexts. **One is the need for a national energy security in the context of managing the transition in the power sector**. (Second,) **these stressed**

> **assets are national assets at the end of the day and need to be preserved, protected and conserved**."
>
> (emphasis supplied)

14.4 The CMD, Power Finance Corporation gave an example of sub-optimal bid outcome and stated as under:

> "**The Chhattisgarh Project** is a running project under operation. It is a good project. Yet there is 70 per cent hair-cut. Against the debt of Rs. 8300 crore, we have received the offer of Rs. 2500 crore only."

14.5 Then he stated that "IBC generally focuses on Capital Structure Resolution only and the sectoral challenges cannot be addressed through IBC and thus the resolution may not be forthcoming as the power assets have challenges extraneous to the capital structure like : shortage/non availability coal, delayed power procurement by Discoms, regulatory issues, long working capital cycle with Discoms and level playing field not offered."

14.6 Elaborating about the need for a separate framework for resolution of stressed assets in electricity sector, Independent Power Producers deposed as under:

> "**RBI circular has not taken cognizance of the (ground realities of the Electricity Sector) and it is heavily framed in such a way that steel and all other industries have been put together and it tried to address every sector together. But electricity is a very highly regulated sector.** So, comparing this sector with other sectors and putting the same framework may not work. So, what we feel is that **there should be a separate framework as far as the power sector is concerned**."
>
> (emphasis supplied)

14.7 Regarding Sub-Optimal Bid Outcome, the Independent Power Producers also stated that:

> "**Abhijit Group had a power plant in Jharkhand**. It was bid out. It got a bid of Rs. 35 lakh per MW whereas a new plant would need five crore rupees. **So, there are no bidders in the system**. Forcing to sell under the circular or NCLT will end up having a big sacrifice of public money without having any benefit to the economy or the

Electricity sector because the new promoter will have the same problem. **Meenakshi Energy got restructured in such a manner and again, it is in stress because if the existing promoters cannot solve the systemic issues, how the new promoter will solve them**."

(emphasis supplied)

14.8 Similarly, a representative of **SBI**, the largest Banking Company in India, also deposed before the Committee as under:

"**As of now our deadline is 27th August not only for getting the bids, but even this restructuring has to be reflected in the books of the banks as well as in the books of the company. Now, this deadline is approaching so fast. The bidding process takes time, and then there are negotiations involved in it. If in the case of power project 12 months' time is given, then this can work smoothly and also very efficiently. Hence, we want an extended time for these**."

(emphasis supplied)

14.9 Highlighting the need for synchronization between the RBI's Guidelines and the resolution of the systemic issues of the Electricity Sector, **the Chairman, SBI deposed that**:

"**From the timeline point of view, even though the RBI circular has the complete framework but its implementation might not give enough results**. The reason is, still we have problems with the coal supplies, PPAs – because many plants do not have PPAs, they have only partial PPAs. **We have large regulatory recoverables. Unless these three are resolved, any amount of changes we do to the RBI framework would not pull the sector up**. My request is, synchronize the implementation of those with the RBI circular."

(emphasis supplied)

14.10 Similarly, while highlighting the problems in formulating a framework for resolution of stressed assets in electricity sector, **the Secretary, Department of Financial Services**, deposed as under:

"**The possibility of the similar demands (of exemption from RBI's Guidelines) from similarly placed sectors cannot be ruled out. It could be shipping, cement, and more particularly MSMEs. MSMEs are at a much worse situation at this stage than these projects and for a much lesser fault of theirs**. This demand can come from all those sectors. So, should we have a separate sector-specific

NPA resolution regime or an overarching regime?"

(emphasis supplied)

15. It is not in dispute that the power sector is completely regulated by government instrumentalities. The quantum, price and quality of coal is controlled by CIL, evacuation of coal from mines pithead to plant is by Indian Railways, transmission of power generated is by Power Grid Corporation, take-off and payment of power by Discoms (State Government owned utilities). The power generating companies have no control on various elements and, therefore, as submitted by the petitioners, they are facing an undeserved extinction and erosion of capital due to expropriatory/uneconomic tariffs, arbitrary actions, delays and a mechanical application of the impugned RBI circular. It was further submitted that other sectors such as Sugar, Cement, Shipping, Steel, Textile, etc are not completely regulated by the government instrumentalities though, in some cases, these sectors also depend on supply of fuel like coal. That was the reason, according to the petitioners, why case of the power sector was considered separately/independently by the Standing Committee. At this stage, I avoid making any reference to the recommendations made by the Committee in 40th report since the RBI raised a serious dispute in respect thereof.

16. It is against this backdrop, we have heard learned counsel for the parties.

16.1 Mr. Abhishek Manu Singhvi, learned Senior Counsel for the petitioners, after drawing our attention to the materials referred to in the forgoing paragraphs, submitted that the circular is arbitrary and violates

Article 14 of the Constitution of India. It equates a heavily regulated sector like electricity, where the Central and State Regulatory Commissions regulate tariff, procurement, payments etc. with unregulated sectors like steel, cement, manufacturing etc and thereby treats unequals equally. It was submitted that there is a need for a separate framework which recognises and addresses the externalities faced by the power sector, as has been acknowledged not only by the Standing Committee but also by the Committee constituted by orders of this Court. He submitted, the circular fails to provide for an alignment of its mechanism with the regulatory regime and statutory scheme and policy in the power sector with the crippling distortion. He submitted that if the circular is implemented as it is and/or the time for its implementation is not extended for another 180 days, as recommended by the Committee, it would be disastrous and the entire power sector will get affected thereby impacting on the need of power/electricity in the rural areas of the country. The impugned circular, he submitted, is contrary to the legislative policy of the Electricity Act and public policy and ought to be quashed and set aside. He submitted that there was no need of issuing the circular and issuing mandatory directions to the banks/financial institutions regulated by it since such a power is always vested in them. He then submitted that the resolution plans which the petitioner company and its lenders are working on will not get concluded before the cut-off date, i.e. 27.08.2018, under any circumstances, and, therefore, time deserves to be extended by 180 days. He submitted that, having regard to the fact that the High Level Empowered Committee headed by the Cabinet Secretary is expected, as submitted on behalf of the

Government of India, to submit its report within a period of 2 months, hence, at least till then, the circular deserves to be stayed or be not implemented. He submitted that it is quite possible that on the basis of the report, the Central Government may, in exercise of its powers under Section 7(1) of the RBI Act, issue appropriate directions after consultation with the Governor of RBI to the banks in public interest. He, therefore, submitted that till the High Level Empowered Committee submits its report, the circular may be stayed insofar as power sector is concerned.

16.2 Mr. Poovayya, learned Senior Counsel, after inviting our attention to the impugned circular, submitted that in terms of paragraph 9 of the circular, if a resolution plan is not implemented within 180 days (i.e. 27.8.2018), with the consent of 100% lenders/creditors, it is mandatory for the lenders to refer the matter under IBC. In terms of paragraph 6 of the circular, he submitted, it mandates that the resolution plans involving restructuring as well as change in ownership pursuant to a resolution plan, in respect of 'large accounts' will require independent credit evaluation by credit rating agencies specifically authorized by RBI. He submitted that though the circular was issued on 12 February 2018, the list of credit rating agencies was approved by RBI and issued the notification, naming those agencies, after 100 days, i.e. on 21 May 2018. Hence, no resolution process could commence or carry out effectively for want of credit evaluation by approved credit rating agencies and, on this ground alone, he submitted, the petitioner deserves an interim relief, as prayed. He then referred to the recommendation made by the Committee constituted by this Court and submitted that till a report of the High Level Empowered Committed is submitted, the impugned circular

may not be implemented.

16.3 Mr. Poovayya, further submitted that the impugned circular violates Article 14 of the Constitution since there is lack of classification, it treats unequals equally, has no nexus with the objective sought to be achieved – resolution of stressed assets and adopts a 'one pill for all ills' approach. The circular, it was submitted, treats regulated and unregulated sectors in the same manner failing to consider sectoral issues and ground realities, affecting different sectors. Power sector, he submitted, is heavily regulated and dependent on Government dispensation, such as tariff is regulated and determined by Central and State Electricity Regulatory Commissions, all claims and compensation, including increase in taxes and duties, have to be approved before Generating Companies can recover them as part of tariff, inputs required for generation – coal, gas etc. are allocated exclusively by the Government of India and distributed by Government Companies, like Coal India, GAIL etc. and the purchasers, i.e. the distribution licensees are limited and are mostly governed and owned by State Agencies. Power sector, it was submitted, is unlike an unregulated sector, like Steel, where increase in taxes etc. can be passed on immediately to the consumer. Similarly, raw material can be procured privately and there is freedom to sell to anyone e.g. GST approval order took nearly 9 months for power companies, whereas unregulated sectors were able to recover GST immediately. He submitted that the RBI circular has no nexus with resolution of stressed assets. Problems plaguing the power sector are systemic. Insolvency proceedings or forced change of management will not address the issue of stressed assets unless issues relating to fuel supply,

PPAs and timely payment of dues is addressed. He submitted that RBI ought to have adopted an individualized approach to the resolution of stressed assets taking into consideration the facts of each case. RBI could have issued different sector-wise circulars in exercise of its powers under Section 35-AA of BR Act and issuance of circular under Section 35-AB, treating all sectors equal, was wrong and illegal. After inviting our attention to the provisions contained in Section 35-AA and 35-AB, he submitted that the circular is contrary to these provisions.

16.4 Mr. Navin Sinha, learned Senior Counsel adopted the submissions made by Mr. Singhvi and Mr. Poovayya, learned Senior Counsel for the petitioners.

16.5 Mr. Kadam, learned Senior Counsel for RBI invited our attention to some relevant facts and figures to contend that the banking sector of India is facing a huge crisis. He pointed out that the gross NPA as on 31.03.2017 was 7,28,768 crores which is equivalent to approximately 5 percent of India's GDP. As on 31.03.2018, the gross NPA was 9,62,621 crores and on 30.09.2018, the gross NPA would be 7,90,649 crores. Out of these NPAs, 87.50 percent are of public sector banks. He submitted that without a continuous flow of credit from banks, the entire economy and growth of the country will come to a grinding halt. He therefore submitted, to tackle the outstanding NPAs, Parliament on 01.12.2016 enacted the IBC with two primary objectives – (i) maximization of value of assets; and (ii) a time bound resolution of stressed assets.

16.6 He then took us through several provisions of IBC and submitted that commencement of IBC proceedings would not result in closure of defaulting

companies. As a matter of fact, he submitted, under the IBC, the Resolution Professional (for short "RP") is required to keep the corporate debtor running as a going concern as provided for under Section 20 (1) of IBC. Except the fact that the Board of Directors stand suspended, the corporate debtor continues to have the benefit of all its employees and personnel and they are bound to cooperate and if they do not, a remedy by way of an application to the NCLT is provided under Section 19 (2) of IBC. Thus, for admission of a petition for insolvency resolution, except for the suspension of the erstwhile Directors, there is no change in the running of its business.

16.7 Mr. Kadam, then submitted that the RP is also mandated to look for resolution applicants in place of the former management. For this, the RP has to, inter-alia, issue an Expression of Interest under Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons) inviting resolution applicants within 75 days from the date of admission of the applications, to take over the business of the corporate debtor. Section 14 gives a protective cover to the corporate sector by a moratorium being imposed on any suit or other recovery proceedings against it. It is also provided with continuity of essential services as contemplated by Section 14(2) of IBC. In order to meet the objects of IBC, i.e. (i) maximisation of value of assets; and (ii) a time bound resolution of stressed assets, a period of 270 days is provided under Section 12 thereof, for arriving at a resolution of insolvency. Section 30 (1) of IBC provides that the RP has to invite resolution applications. Under Section 30 (2), the RP has to ensure that such applications do not fall foul of the provisions of Section 30 (2), Section 29A and the Regulations. Under Section 30 (3), all resolution plans which qualify

under Section 30(2) of IBC, are bound to be placed before the Committee of Creditors (for short "CoC"). Section 30 (4), he submitted, contains the most important provision of IBC. It leaves it to the commercial wisdom of the CoC to determine which resolution plan is to be passed. Under Section 31, the resolution plan approved by CoC is required to be placed before NCLT and on its approval, the resolution plan comes into effect.

16.8 Despite the provisions referred to by him, it was submitted that the crisis in the banking sector continued and, hence, on 04.05.2017, the Government initially issued an Ordinance amending the BR Act and inserted Sections 35AA and Section 35AB of the Amending Act, 2017. He then submitted that by an order dated 05.05.2017, the Government authorised the RBI to issue directions to any banking companies to initiate insolvency resolution process in respect of a default under IBC. Accordingly, he invited our attention to the directions issued by RBI on 13.06.2017 which, he submitted, directed to take action against all accounts whose indebtedness to banks exceeded Rs. 5,000 crores; were NPA for more than one year; and whose NPA exceeded 60 percent of the total borrowing. Thereafter, as a part of a phased process, a second direction was issued by RBI on 28.08.2017, inter-alia, advising banks to initiate insolvency proceedings against certain companies as listed therein. These companies were those where more than 60 percent of the total outstanding has been NPA since 30.06.2017. Thereafter, the impugned circular has been issued by the RBI with revised framework for resolution of stressed assets whereby the RBI put in place a harmonized and simplified framework for resolution of large stressed assets. Hence, the process which commenced on 13.06.2017, he submitted,

logically progressed to the circular. He submitted that all directions issued by RBI in exercise of its powers under Section 35AA and Section 35AB disclose a conscious application of mind towards resolving the NPA situation by identifying largest defaults i.e. defaulters with more than 60 percent NPA and culminating in the impugned direction for initially proceeding against accounts exceeding Rs. 2,000 crores and thereafter proceedings against accounts above Rs. 100 crores and leaving the remaining cases to be decided in a further phased manner. In this backdrop, he submitted that having regard to the objective behind Reserve Bank of India exercising its powers by issuing different circulars including impugned circular, it is in the larger interest of the economic health of the country.

17. At the very outset, I would like to consider the question whether and to what extent this Court can look into or refer to or place reliance upon the Standing Committee reports. In this connection, it would be necessary to have a close look at the judgment of a Constitution Bench of the Supreme Court in **Kalpana Mehta & Ors. Vs. Union of India & Ors., 2018 SCC OnLine SC 512.** In this case, the Supreme Court considered the questions referred by the 2-Judge Bench, (i) *whether in a litigation filed before this Court (Supreme Court) either under Article 32 or Article 32 or Article 136 of the Constitution of India, the Court can refer to and place reliance upon the report of the Parliamentary Standing Committee*; and (ii) *whether such a report can be looked at for the purpose of reference and, if so, can there be restrictions for the purpose of reference regard being had to the concept of parliamentary privilege and the delicate balance between the constitutional institutions that Articles 105, 121 and 122 of the Constitution conceive*.

While dealing with these questions, the Supreme Court in paragraphs 79 and 80, observed thus:

> "**79.** A close look at the functioning of these committees discloses the fact that the committee system is designed to enlighten Members of Parliament (MPs) on the whole range of governmental action including defence, external affairs, industry and commerce, agriculture, health and finance. They offer opportunities to the members of the Parliament to realize and comprehend the dynamics of democracy. **The members of Parliament receive information about parliamentary workings as well as perspective on India's strengths and weaknesses through the detailed studies undertaken by standing committees. Indian parliamentary committees are a huge basin of information which are made available to the Members of Parliament in order to educate themselves and contribute ideas to strengthen the parliamentary system and improve governance.** The committee system is designed to enhance the capabilities of Members of Parliament to shoulder greater responsibilities and broaden their horizons.
>
> **80**. As has been stated in the referral judgment with regard to the Parliamentary Committee, we may usefully refer to the Rules of Procedure and Conduct of Business in Lok Sabha (for short 'the Rules'). Rule 2 of the Rules defines "Parliamentary Committee". It reads as follows:-
>
> 2. (1) … "Parliamentary Committee" means a Committee which is appointed or elected by the House or nominated by the Speaker and which works under the direction of the Speaker and presents its report to the House or to the Speaker and the Secretariat for which is provided by the Lok Sabha Secretariat."

(emphasis supplied)

17.1 A reference was also made to Rule 270 of the Rules of Procedure and Conduct of Business in Lok Sabha (for short 'the Rules'). Paragraph 83 thereof reads thus:

> "**83.** Rule 270 of the Rules, which deals with the functions of the Parliamentary Committee meant for Committees of the Rajya Sabha, is relevant. It reads as follows:-
>
> "**270. Functions**.— Each of the Standing Committees shall have the following functions, namely—
>
> (a) **to consider the Demands for Grants of the related Ministries/Departments and report thereon.** The report shall not suggest anything of the nature of cut motions;
>
> (b) to examine Bills, pertaining to the related Ministries/Departments, referred to the Committee by the Chairman or the Speaker, as the case may be, and report

> thereon;
>
> (c) **to consider the annual reports of the Ministries/Departments and report thereon; and**
>
> (d) **to consider national basic long-term policy documents presented to the Houses, if referred to the Committee by the Chairman or the Speaker, as the case may be, and report thereon:**
>
> Provided that the Standing Committees shall not consider matters of day-to-day administration of the related Ministries/Departments."
>
> (emphasis supplied)

17.2 Rule 274 (3) of the Rules, provides that the report of the Committee together with the minutes of the dissent, if any, is to be presented to the House. Rule 277 stipulates that the report is to have persuasive value. The Supreme Court in paragraph 125 of the judgment, observed that *it is quite vivid on what occasions and situations the Parliamentary Standing Committee reports or other reports of other Parliamentary Committees can be taken note of by the Court and for what purpose. Relying on the same for the purpose of interpreting the meaning of the statutory provision where it is ambiguous and unclear or, for that matter, to appreciate the background of the enacted law is quite different from referring to it for the purpose of arriving at a factual finding. That may invite a contest, a challenge, a dispute and, if a contest arises, the Court, in such circumstances, will be called upon to rule on the same*. The Supreme Court proceeded to make the following observations in paragraph 132, to which our attention was specifically invited by learned Senior Counsel for the RBI, which reads thus:

> "**132.** In the case at hand, the controversy does not end there inasmuch as the petitioners have placed reliance upon the contents of the parliamentary standing committee report and the respondents submit that they are forced to controvert the same. Be it clearly stated, the petitioners intend to rely on the contents of the report and invite a contest. **In such a situation, the Court would be duty bound to afford the respondents an opportunity of being heard in consonance with the principles of natural justice. This, in turn,**

> **would give rise to a very peculiar situation as the respondents would invariably be left with the option either to: (i) accept, without contest, the opinion expressed in the parliamentary standing committee report and the facts stated therein; or (ii) contest the correctness of the opinion of the parliamentary standing committee report and the facts stated therein**. In the former scenario, the respondents at the very least would be put in an inequitable and disadvantageous position. It is in the latter scenario that the Court would be called upon to adjudicate the contentious facts stated in the report. Ergo, **whenever a contest to a factual finding in a PSC Report is likely and probable, the Court should refrain from doing so. It is one thing to say that the report being a public document is admissible in evidence, but it is quite different to allow a challenge**."
>
> (emphasis supplied)

17.3 From the relevant observations in paragraph 125 and paragraph 132, it is clear that reliance can be placed upon the the contents of the Parliamentary Standing Committee report, subject to the right of the respondents to contest or controvert the same. In such a situation, the Courts would be duty bound to afford the respondents an opportunity of being heard in consonance with the principles of natural justice. The Supreme Court has made a categoric observation that whenever a contest to a factual finding in a Parliamentary Standing Committee report is likely and probable, the Court should refrain from doing so.

17.4 After considering these Rules and other relevant materials placed before the Bench, the Hon'ble Chief Justice of India for himself and A.M. Khanwilkar, J. has drawn the following conclusions in paragraph 146:

> "**146**. In view of the aforesaid analysis, we answer the referred questions in the following manner:-
>
> (i) **Parliamentary Standing Committee report can be taken aid of for the purpose of interpretation of a statutory provision wherever it is so necessary and also it can be taken note of as existence of a historical fact**.
>
> (ii) **Judicial notice can be taken of the Parliamentary Standing Committee report under Section 57(4) of the Evidence Act and it is admissible under Section 74 of the said Act**.
>
> (iii) **In a litigation filed either under Article 32 or Article**

136 of the Constitution of India, this Court can take on record the report of the Parliamentary Standing Committee. However, the report cannot be impinged or challenged in a court of law.

(iv) **Where the fact is contentious, the petitioner can always collect the facts from many a source and produce such facts by way of affidavits, and the Court can render its verdict by way of independent adjudication.**

(v) **The Parliamentary Standing Committee report being in the public domain can invite fair comments and criticism from the citizens as in such a situation**, the citizens do not really comment upon any member of the Parliament to invite the hazard of violation of parliamentary privilege."

(emphasis supplied)

17.5 In the concurring judgment written by Dr. D.Y. Chandrachud, J, in paragraphs 124 and 125 observed thus:

"**124.** Committees of Parliament attached to ministries/departments of the government perform the function of holding government accountable to implement its policies and its duties under legislation. The performance of governmental agencies may form the subject matter of such a report. In other cases, the deficiencies of the legislative framework in remedying social wrongs may be the subject of an evaluation by a parliamentary committee. The work of a parliamentary committee may traverse the area of social welfare either in terms of the extent to which existing legislation is being effectively implemented or in highlighting the lacunae in its framework. **There is no reason in principle why the wide jurisdiction of the High Courts under Article 226 or of this Court under Article 32 should be exercised in a manner oblivious to the enormous work which is carried out by parliamentary committees in the field**. **The work of the committee is to secure alacrity on the part of the government in alleviating deprivations of social justice and in securing efficient and accountable governance. When courts enter upon issues of public interest and adjudicate upon them, they do not discharge a function which is adversarial.** The constitutional function of adjudication in matters of public interest is in step with the role of parliamentary committees which is to secure accountability, transparency and responsiveness in government. **In such areas, the doctrine of separation does not militate against the court relying upon the report of a parliamentary committee. The court does not adjudge the validity of the report nor for that matter does it embark upon a scrutiny into its correctness. There is a functional complementarity between the purpose of the investigation by the parliamentary committee and the adjudication by the court. To deprive the court of the valuable insight of a parliamentary committee would amount to excluding an important source of information from the purview of the court**. To do so on the supposed hypothesis that it would amount to a breach of parliamentary privilege would be to miss the wood for the trees. Once the report of the

parliamentary committee has been published it lies in the public domain. Once Parliament has placed it in the public domain, there is an irony about the executive relying on parliamentary privilege. There is no reason or justification to exclude it from the purview of the material to which the court seeks recourse to understand the problem with which it is required to deal. **The court must look at the report with a robust common sense, conscious of the fact that it is not called upon to determine the validity of the report which constitutes advice tendered to Parliament. The extent to which the court would rely upon a report must necessarily vary from case to case and no absolute rule can be laid down in that regard**.

125. There may, however, be contentious matters in the report of a parliamentary committee in regard to which the court will read with circumspection. For instance, the report of the committee may contain a finding of misdemeanor involving either officials of the government or private individuals bearing on a violation of law. If the issue before the court for adjudication is whether there has in fact been a breach of duty or a violation of law by a public official or a private interest, the court would have to deal with it independently and arrive at its own conclusions based on the material before it. **Obviously in such a case the finding by a Parliamentary Committee cannot constitute substantive evidence before the court. The parliamentary committee is not called upon to decide a lis or dispute involving contesting parties and when an occasion to do so arises before the court, it has to make its determination based on the material which is admissible before it.** An individual whose conduct has been commented upon in the report of a parliamentary committee cannot be held guilty of a violation on the basis of that finding. In *Jyoti Harshad Mehta v The Custodian*[6], this Court held that a report of the Janakiraman committee could not have been used as evidence by the Special Court. The court held:

> "57. **It is an accepted fact that the reports of the Janakiraman Committee, the Joint Parliamentary Committee and the Inter-Disciplinary Group (IDG) are admissible only for the purpose of tracing the legal history of the Act alone.** The contents of the report should not have been used by the learned Judge of the Special Court as evidence."

(emphasis supplied)

17.6 Dr. D.Y. Chandrachud, J., in the concluding paragraph observed that, *as a matter of principle, there is no reason why reliance upon the report of a Parliamentary Standing Committee cannot be placed in proceedings under Article 32 or Article 136 of the Constitution*. If the observation made by Dr. D.Y. Chandrachud, J., in paragraph 124, as quoted above, are read with the conclusion, would also mean that reliance on such report can be placed in

6 14 CWN 945

proceedings under Article 226 of the Constitution of India.

17.7 Then, Ashok Bhushan, J., while recording a separate opinion in **Kalpana Mehta**, in paragraph 152, observed that *the apprehension of the respondents that their case shall be prejudiced if this Court accepts the Parliamentary Committee report in evidence, in our opinion is misplaced. By acceptance of a Parliamentary Committee report in evidence does not mean that facts stated in the report stand proved*. Ashok Bhushan, J., in short stated that any observation in the report or inference of the Committee cannot be held to be binding between the parties and they are at liberty to lead evidence independently to prove their stand in a court of law. This is obviously subject to a dispute being raised by respondents in respect of the facts reflected in the report.

18. Insofar as the present case is concerned, that question of contest does not arise since the facts as reflected in the 37th and 40th reports are not in dispute, insofar as the power sector is concerned, such as reference to the major reasons for stress in most of the thermal power projects attributable to non-availability of fuel, cancellation of coal blocks, projects set up without linkage, lack of enough PPA by States, inability of promoters to infuse equity and working capital, contractual/tariff related disputes, issues related to banks/financial institutions, delay in project implementations leading to cost overrun, and aggressive bidding by developers in PPA. Further, the quantum, price and quality of coal is controlled by CIL; evacuation of coal from mines pithead to plant is by Indian Railways; transmission of power generated is by Power Grid Corporation; take-off and payment of power by Discoms (State Government owned utilities) and that is how it is completely

regulated by government instrumentalities. Similarly, categorization of the different categories of stressed power plants, such as plants having PPA and requiring coal, plants having coal block but the issue of coal block is sub-judice, plants having neither coal linkage nor PPA, and the plants stressed on account of reasons other than coal linkage/block issues, is also not in dispute.

19. Thus, it is clear, the Court can take judicial notice of the Parliamentary Standing Committee report under Section 57(4) of the Evidence Act and it is admissible under Section 74 of the said Act. The Court can take such a report on record or note of as existence of a historical fact. Such report can also be taken aid of for the purpose of interpretation of a statutory provision wherever it is so necessary. *The wide jurisdiction of the High Court under Article 226 like the jurisdiction of the Supreme Court under Article 32 should not be exercised in a manner oblivious to the enormous work which is carried out by Parliamentary Committees in the field*. When courts enter upon issues of public interest and adjudicate upon them, as observed by the Supreme Court, they do not discharge a function which is adversarial. *The doctrine of separation does not militate against the court relying upon the report of a Parliamentary Committee*. The court does not adjudge the validity of the report nor for that matter does it embark upon a scrutiny into its correctness. *There is a functional complementarity between the purpose of the investigation by the Parliamentary Committee and the adjudication by the court. To deprive the Court of the valuable insight of a Parliamentary Committee would amount to excluding an important source of information from the purview of the Court as observed*

by the Supreme Court. The Court must look at the report with a robust common sense, conscious of the fact that it is not called upon to determine the validity of the report which constitutes advice tendered to the Parliament. The extent to which the court would rely upon a report must necessarily vary from case to case and no absolute rule can be laid down in that regard.

20. I am conscious of the fact that such reports are only an advice tendered to the Parliament and that it has persuasive value. However, a judicial notice of the reports can be taken by courts and it can be looked into or taken note of or referred to or placed reliance upon, to the extent indicated in **Kalpana Mehta** (supra). The Court can look into the facts, as reflected in the report, while examining the case, in particular the facts, which are not in dispute. The RBI, has not raised any dispute with regard to the facts, insofar as the power sector is concerned, reflected in the reports. The RBI has raised a dispute regarding the recommendations made and opinion expressed by the Committee. I, therefore, make it clear that I am only looking into the facts and figures referred to in the reports.

21. The two reports which have come on record (37th and 40th reports), are quite exhaustive. The reports, as observed earlier, definitely disclose lot of relevant facts/information, which have a bearing upon the present case. Further, it is pertinent to note that on the basis of the report made by the Committee constituted by this Court, the Government of India, Ministry of Power, with the approval of the Prime Minister, has constituted a High Level Empowered Committee to address the issue of stressed thermal power projects in the country, headed by the highest bureaucrat, namely the

Cabinet Secretary. The order recommending constitution of the Committee also formulated the Terms of Reference which cover all aspects/issues covering power sector, including to consider whether changes required in the provisioning norms/IBC to facilitate restructuring of the stressed assets and the changes required in ARC regulations. Thus, the object of the reference is also relatable to the powers of RBI to issue direction/guidelines under Section 35AA or 35AB of BR Act. This clearly indicates that efforts are being made at the highest level to resolve the sectoral (power) issues. Such efforts, admittedly, are not made in respect of any other sector insofar as the impugned circular is concerned.

22. I would now like to have a look at the provisions of the Banking Regulation (Amending) Act, 2017 (for short "the Amending Act, 2017") which empowered the RBI to issue directions to any banking company to initiate insolvency resolution process in respect of a default under the provisions of IBC. The preamble to the Ordinance, issued on 04.05.2017, read thus:

> "**WHEREAS the stressed assets in the banking system have reached unacceptably high levels and urgent measures are required for their resolution**;
>
> AND WHEREAS the Insolvency and Bankruptcy Code, 2016 has been enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders;
>
> **AND WHEREAS the provisions of Insolvency and Bankruptcy Code, 2016 can be effectively used for the resolution of stressed assets by empowering the banking regulator to issue directions in SPECIFIC CASES**;
>
> AND WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;"

(emphasis supplied)

22.1 Section 35AA and Section 35AB, inserted in the BR Act, by way of Amending Act, 2017, read thus:

> "35AA. **The Central Government may by order authorise the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016**.
>
> *Explanation.* – For the purposes of this section, "default" has the same meaning assigned to it in clause (12) of section 3 of the Insolvency and Bankruptcy Code, 2016.
>
> 35AB. (1) Without prejudice to the provisions of section 35A, **the Reserve Bank may, from time to time, issue directions to the banking companies for resolution of stressed assets**.
>
> (2) The Reserve Bank may specify one or more authorities or committees with such members as the Reserve Bank may appoint or approve for appointment to advise banking companies on resolution of stressed assets."

22.2 The Ordinance was ultimately replaced by the Amending Act, 2017, and it received assent of the President on 25.08.2017. The Statement of Objects and Reasons of the Amending Act, 2017 states that stressed assets in the banking system, or non-performing assets have reached unacceptably high levels and hence, urgent measures are required for their speedy resolution to improve the financial health of banking companies for proper economic growth of the country. Therefore, it was considered necessary to make provisions in the BR Act, authorising the RBI to issue directions to any banking company or banking companies to effectively use the provisions of the Insolvency and Bankruptcy Code, 2016 for timely resolution of stressed assets. Thus, it is clear that urgent measures are required for their speedy resolution to improve the financial health of banking companies for proper economic growth of the country, and for that purpose the provisions of IBC can be effectively used for resolution of stressed assets by empowering the banking regulator to issue direction in

specific cases. Indisputably, the object in introducing IBC is laudable and in the present scenario it needs to be implemented scrupulously in improving the economic growth of the country.

22.3 Section 35A was inserted in the BR Act, with effect from 14.01.1957. This provision also empowers the RBI to give directions where it is satisfied in the public interest or in the interest of banking policy or to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of depositors or in a manner prejudicial to the interests of the banking company or to secure the proper management of any banking company generally, it is necessary to issue directions to banking companies generally or to any banking company in particular, it may, from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions. Thus, even before introduction of Sections 35AA and 35AB, the RBI had powers under Section 35A to give directions as aforementioned. Sections 35AA and 35AB have been introduced after the IBC was enacted and brought into force. In view of the provisions contained in Section 35A, it is not in dispute that even under that provision, the RBI could have issued directions similar to the directions issued under the circular without reference to IBC. In other words, it was possible to issue directions to secure the proper management of any banking company and to prevent its affairs being conducted in a manner detrimental to the interests of depositors or in a manner prejudicial to the interests of the banking company. But this power was not exercised by RBI, insofar as the power sector is concerned, till the circular was issued.

22.4 A plain reading of Section 35AA shows that to issue directions as contemplated thereunder, a basic requirement is that the Central Government, by order, requires and authorises RBI to initiate insolvency resolution process in respect of a default, under the provisions of the IBC. In other words, to initiate insolvency resolution process in respect of a default, on the directions of RBI to any banking company or banking companies, authorisation by the Central Government is a basic requirement. Insofar as Section 35AB is concerned, for issuing direction under this provision, authorisation as contemplated by Section 35AA is not a pre-condition and direction under this provision can be issued to the banking company or banking companies for resolution of “stressed assets”. This provision does not make reference to the requirements of authorisation by the Central Government to the RBI to issue directions and to initiate proceedings under IBC. Section 35AB only speaks of directions to the banking company or banking companies for resolution of “stressed assets”. The expression “stressed assets” has not been used or defined in IBC, in particular Part II of Chapter II thereof. This provision opens with the expression 'without prejudice to the provisions of Section 35A of BR Act' which is general in nature and under which the RBI is obliged to give directions to banking companies as stipulated therein. The expression “without prejudice to the provisions of Section 35A” as one finds in Section 35AB would only indicate that the general power conferred on the RBI under this provision is in addition to the powers of RBI to issue directions under Section 35A of the BR Act.

22.5 Mr. Poovayya, learned Senior Counsel for the petitioners, in view of

the language employed in these two provisions, vehemently submitted that under Section 35AB, the RBI has no powers to issue directions to the banking company or banking companies for resolution of stressed assets under the provisions of IBC. If that was the intention of the legislature, he submitted, the provisions of Section 35AB would have made it so clear, as in Section 35AA. As against this, Mr. Dwivedi, learned Senior Counsel appearing for the RBI, invited our attention to the Statement of Object and Reasons (SOR) dated 14.07.2018, to contend that intention can be gathered on the basis thereof. He submitted that SOR specifically provides for authorising the RBI to issue directions to any banking company or banking companies to effectively use the provisions of IBC for timely resolution of "stressed assets". He submitted, in view of the SOR, even under the provisions of Section 35AB the RBI can give direction to any banking company or banking companies for resolution of stressed assets under the provisions of IBC.

22.6 To appreciate and to understand the submissions advanced by learned Senior Counsel for the parties and also the intention of legislature, it would be advantageous to reproduce the SOR dated 14.07.2018 to the Amending Act, 2017, which reads thus:

> "Stressed assets in the banking system, or non-performing assets have reached unacceptably high levels and hence, urgent measures are required for their speedy resolution to improve the financial health of banking companies for proper economic growth of the country. Therefore, **it was considered necessary to make provisions in the Banking Regulation Act, 1949 for authorising the Reserve Bank of India to issue directions to any banking company or banking companies to effectively use the provisions of the Insolvency and Bankruptcy Code, 2016 for timely resolution of stressed assets**.
>
> 2. It was accordingly decided to make amendments to the Banking Regulation Act, 1949. Since Parliament was not in session and

immediate action was required to be taken, the Banking Regulation (Amendment) Ordinance, 2017 was promulgated by the President on the 4th May, 2017.

3. The Banking Regulation (Amendment) Bill, 2017 which seeks to replace the Banking Regulation (Amendment) Ordinance, 2017, provides for the following, namely:—

(a) to confer power upon the Central Government for authorising the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016;

(b) **to confer power upon the Reserve Bank to issue directions to banking companies for resolution of stressed assets and also allow the Reserve Bank to specify one or more authorities or committees to advise banking companies on resolution of stressed assets; and**

(c) to amend section 51 of the Act so as to make therein the reference of proposed new sections 35AA and 35AB.

4. The Bill seeks to replace the said Ordinance."

(emphasis supplied)

22.7 The Amending Act, 2017, which seeks to replace the Ordinance, thus, confers power upon the Central Government for authorising the RBI to issue directions to any banking company or banking companies "to initiate insolvency resolution process in respect of a default", under the provisions of IBC, and to confer power upon the RBI to issue directions to banking companies for resolution of stressed assets and to allow the RBI to specify one or more authorities or committees to advise banking companies on resolution of stressed assets. Thus, prima facie, it appears that even SOR makes a similar distinction as noticed by us between Section 35AA and 35AB. In view of the language of the SOR read with the provisions contained in Sections 35AA and 35AB in particular the difference in the language used in these two provisions, it appears that under Section 35AB it may not be open to the RBI to issue directions to any banking company or banking companies for resolution of "stressed assets" under the provisions

of IBC. Had the legislature an intention to confer powers against all corporate debtors, the provisions of Section 35AB would have made it so clear. In other words, Section 35AB would have certainly provided for authorisation, as provided for under Section 35AA for the use of IBC process of insolvency resolution. One clearly finds that in Section 35AB the authorisation by the Central Government and action under IBC are missing. A plain reading of Section 35AB with SOR, in particular clause (b) of Para 3 of the SOR, one finds that directions under Section 35AB are general in nature and not to initiate action under IBC. The powers of RBI to issue any such direction, is under Section 35AA, under which banking company or banking companies can be directed to initiate insolvency process in respect of a default, under the provisions of IBC in specific/individual cases, including specific sector. The argument based on Sections 35AA and 35AB go to the root which require further hearing. It would not be proper to record any categoric finding at this stage and it would be proper to give further opportunity to both the sides to make their submissions on this question.

22.8 The RBI Act was enacted and brought in force on 6 March 1934. Under this Act, the RBI has been constituted to regulate the issue of bank notes and the keeping of reserves with a view to securing monetary stability in India and generally to operate the currency any credit system of the country to its advantage. The RBI is obliged to take a macro look at the financial condition and fiscal position of the country as a whole. It is a regulator to secure the monetary stability and is a bankers' bank. The submissions made on behalf of RBI about its role under the provisions of RBI Act and BR Act cannot be disputed or brushed aside, and I find force in

the same. Sub-section (1) of Section 7 of the RBI Act provides that the Central Government may, from time to time, give such directions to the RBI as it may, after consultation with the Governor of the Bank, consider necessary in the public interest. I am avoiding to make reference to other sub-sections, since the arguments of learned counsel for the parties centered around Section 7(1) only. Under this provision, the Central Government, it was submitted on behalf of the RBI, could have issued directions, in consultation with the Governor of RBI insofar as power sector is concerned, in the light of the reports of the Standing Committee. It is not in dispute that the reports of Standing Committee are, so far, not accepted by the Parliament and in view thereof, it may not be possible for the Central Government to issue directions as contemplated by Section 7 of the RBI Act. But, that would not preclude the Central Government to initiate consultative process for giving appropriate directions under Section 7(1), if they so desire, at any stage even before the High Level Empowered Committee submits its report.

23. Next, let me have a close look at few relevant provisions of IBC not only to understand the object in introducing the same but also to appreciate the submissions advanced by learned counsel for the parties in the light thereof. Chapter II of Part II of the IBC deals with corporate insolvency resolution process. The provisions therein provide for a complete mechanism right from the stage of initiation of corporate insolvency resolution process till approval of a resolution plan. A financial creditor, as defined by Section 5(7) of the IBC, can initiate the process by making an application for insolvency resolution. The Adjudicating Authority, namely

National Company Law Tribunal constituted under Section 408 of the Companies Act, 2013, as defined under sub-section (1) of Section 5 of the IBC, is empowered, within 14 days of the receipt of the application, ascertain the existence of default and, after being satisfied, admit such an application and then follow the procedure as contemplated under the provisions of Chapter II. Time limit for completion of insolvency resolution process is provided for under Section 12. It would be advantageous to reproduce the said provision, which reads thus:

> "**12. Time-limit for completion of insolvency resolution process. –** (1) Subject to sub-section (2), **the corporate insolvency resolution process shall be completed within a period of one hundred and eighty days** from the date of admission of the application to initiate such process.
>
> (2) The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent of the voting shares.
>
> (3) On receipt of an application under sub-section (2), **if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days**:
>
> Provided that **any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once**."
>
> (emphasis supplied)

23.1 Then, Sections 13 and 14 deal with declaration of moratorium and public announcement. Section 15 provides the procedure for public announcement of corporate insolvency resolution process. Section 16 deals with appointment and tenure of interim resolution professional. Section 17 deals with management of affairs of corporate debtor by interim resolution professional. Section 18 provides for duties of interim resolution

professional. Section 20 speaks about management of operations of the corporate debtor as a going concern. Sub-section (1) thereof states that the interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. Section 21 speaks about Committee of Creditors. Section 22 provides for appointment of resolution professional in the place of the interim resolution profession by the creditors. Section 23 provides for the resolution professional to conduct the corporate insolvency resolution process. Section 25 deals with the duties of the resolution profession. Section 30 provides for submission of resolution plan. Section 31 provides for approval of a resolution plan and Section 32 provides for an appeal from an order approving the resolution plan on the grounds laid down in sub-section (3) of Section 61 of the IBC.

23.2 Chapter III of Part II deals with liquidation process. It starts with initiation of liquidation under Section 33 of the IBC and ends with dissolution of a corporate debtor under Section 54 thereof. Section 53 in this Chapter provides for distribution of assets.

23.3 From the scheme of the provisions contained in these two Chapters, it appears to us that once corporate insolvency resolution process is initiated, it either ends with approval of a Resolution Plan or ends with dissolution of the corporate debtor. The time limit provided under Section 12 (1) is 180 days and it could be extended by another 90 days, i.e. beyond 180 days, if instructed to do so by the resolution passed at a meeting of the committee of creditors by a vote of 66 percent of voting shares. Once the process starts it can not be interrupted. Thus, on receipt of an application under sub-section

(2) for extension of the period of corporate insolvency resolution process beyond 180 days, if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within 180 days, it may, by order, extend the duration of such process beyond 180 days for such further period as it thinks fit, but not exceeding 90 days and such extension cannot be granted more than once, as provided in the proviso to sub-section (3) thereof. In other words, once the process begins it cannot be interrupted. It must get resolved within 180 days plus 90 days i.e. 270 days. That process in the present case as mandated would start any time within 15 days from 27.08.2018 as provided for in para 9 of the circular.

24. In the light of these provisions, I would like to have a fresh look at the circular. The circular issued in exercise of the powers under these provisions, prescribes a timeline, namely if the borrower is in default as on the reference date (i.e. 01.03.2018), then 180 days therefrom, and where the default is after the reference date, 180 days from the date of first default. The footnote states that the prescribed timelines are the upper limits. It further states that lenders are free to file insolvency petitions under the IBC against borrowers even before the expiry of timelines or even without attempting a Resolution Plan outside IBC. The reading of the circular with the footnote makes it clear that lenders, irrespective of the direction issued by the RBI vide the circular, are free to file insolvency petitions under Section 7 of IBC against borrowers even before expiry of the timeline prescribed under the circular. The circular, however, mandatorily directs the banking company to file insolvency petitions on expiry of 180 days under IBC irrespective of the

fact whether any resolution plan is being worked out. Clause 18 of the circular, specifically provides that the extant instructions on resolution of stressed assets stand withdrawn with immediate effect. The circular makes it mandatory to the lenders to initiate insolvency process under IBC even if, in a given case and for some valid reasons, they do not wish to do so.

24.1 Thus, the circular provides that if the process of resolution of insolvency resolution is not completed within 180 days, commencing from 1 March 2018, with 100 percent consensus amongst creditors, the creditors have no option but to initiate insolvency resolution process immediately, and in which case, as contemplated by clause 18 of the circular, all resolution processes would stand withdrawn. It was argued on behalf of petitioners-Associations that in case of their Members, insolvency resolution processes have been initiated and are in progress and those would not be concluded within 180 days i.e. before 27.08.2018 and they would require further time. As observed earlier, the Central Government is in favour of granting them some more time so as to save the power sector in the larger interest. Mr. Tushar Mehta, learned ASG, submitted that it is desirable, while considering the “sector (power) specific issues” that a timline prescribed under the circular be made effective after 180 days from 27.08.2018 and subsequent steps be taken by the parties based upon the reports of the High Level Empowered Committee presided over by the Cabinet Secretary. He submitted, the time can be extended at this stage and not once process under IBC is set in motion.

25. From the efforts that are being made by the Central Government starting with the report of the 37th Standing Committee and till the

constitution of the High Level Empowered Committee with the approval of the Prime Minister insofar as the power sector is concerned, cannot be completely overlooked and judicial note of these developments is required to be taken at this stage and, if that is not done, perhaps, as submitted by the petitioners, that may cause irreparable loss to the power sector. Further, it was submitted that if some reasonable time is granted to the power sector to work on RPs and to the Central Government to take appropriate decision on the basis of report of High Level Empowered Committee in exercise of the powers under Section 7 of the RBI Act, no irreparable loss would be caused to the economy of the country.

26. The two major important circumstances, insofar as the power sector is concerned, are the need for national energy security in the context of managing the transition in the power sector and these stressed assets are national assets at the end of the day and need to be preserved, protected and conserved. If the power generating companies are willful defaulters or even otherwise, it is and was always open to the lenders to take appropriate steps/action under IBC, for which directions of RBI in the form of a circular under Sections 35AA and 35AB were not necessary. In other words, it was submitted that the RBI circular addresses only financial issues and not sectoral issues and, prima facie, treats unequals equally. Merely because similar demands from other sectors, such as cement, shipping etc., are likely to come forward, cannot be the ground to overlook sectoral issues reflected in the Parliamentary Committees reports – insofar as power plants are concerned. A representative of SBI also deposed before the Committee that the time-line needs to be extended further.

27. As observed earlier, the major reasons for stress in most of the thermal power projects have been attributed to non-availability of fuel, cancellation of coal blocks, projects set up without linkage, lack of enough PPA, inability of the promoter to infuse the equity and working capital, contractual/tariff related disputes, issues related to banks/financial institutions, delay in project implementation leading to cost overruns and aggressive bidding by developers in PPA. The RBI could not dispute that the reasons for stress in most of the thermal power projects are a reality and they are completely regulated by the Government/Government instrumentalities and that these power projects do not have any independence in respect thereof. The RBI, however, contended that there are other sectors such as sugar, which are also regulated by Government instrumentalities.

28. I am, prima facie, of the view that there should be unanimity amongst the different arms of the Government on such crucial issues like timeline for resolution and they should be flexible enough to address the problems in the proper perspective and resolve it in a positive manner. Whether RBI, apart from financial issues can also take into consideration or deal with operational/commercial/regulatory issues is the question, as has been raised, can be considered at later stage. The revival scheme should be realistic and not only based on the provisions of law. Every effort should be made to see that the “power projects” with huge investments do not become NPA for want of marginal financial infusion or adjustment in the way of making working capital available for passing on the interest variable to the stressed asset, so that the power generation in the country is given a fillip and the vision of “power for all” is achieved sooner than later. Alongwith the

economic health of the country, which is the direct concern of the RBI, progress and growth of the country including providing power/electricity to every village in the country, is the concern of the Government and, therefore, there should be unanimity amongst the different arms of the Government on such crucial issues.

29. In this backdrop, at this stage I would like to consider the submission of Mr. Dwivedi, learned Senior Counsel for the RBI, that even a day's extension after 27.08.2018 would be detrimental to the economic health of the country apart from the fact that it would be contrary to the scheme of the IBC and the circular issued in exercise of the powers under Section 35AB of BR Act.

29.1 The RBI in their affidavit dated 20.08.2018, in paragraphs 2, 3 and 4 has stated thus:

> "2. That it is submitted that as on March 2010, the gross advances made by public sector banks was Rs. 32,64,989 crores and the total gross NPAs was Rs. 81,805 crores, being approximately 2.51% of the total gross advances. This figure of NPA's has increased substantially as on March 2018, where the total gross advances was Rs. 83,99,196/- crores and the total gross NPAs was Rs. 9,62,621 crores, being 11.46% of the total gross advances. A copy of the tabular chart setting out the details of the increase in the gross advances and NPAs in the economy (in aggregate) for the period commencing from March, 2010 to March, 2018 is annexed hereto and marked as **Annexure -"1".**
>
> 3. That it is submitted that as on March 2015, the gross advances made by public sector banks to electricity generation companies was Rs. 4,08,256 crores and the total gross NPAs was Rs. 10,804 crores, being approximately 2.6% of the total gross advances. The figure of NPA's has increased substantially as on March 2018, where the total gross advances was Rs. 4,64,969 crores and the total gross NPAs was Rs. 1,04,337 crores, being 22.4% of the total gross advances. A copy of the tabular chart setting out the details of the increase in the gross advances and NPAs in the economy in respect of the electricity generation companies for the period commencing from March 2015 to March 2018 is annexed hereto and marked as **Annexure-"2".**
>
> 4.That it is submitted that the aforesaid increase in the gross advances and NPAs (including that of the electricity generation companies) in the banking sector, has drastically affected the

> profitability of the banks. As on March 2010, the profit (after tax) of banks was Rs. 52,638 crores which has significantly reduced to a loss of Rs. 24,820 crores as on March 2018. A copy of the tabular chart setting out the details of the decline in the profitability of all banks and decline of credit growth of the public sector banks for the period commencing from March, 2010 to March, 2018 is annexed hereto and marked as **Annexure -"3"."**

29.2 From the contents of these paragraphs, it is clear that as in March 2010, the gross advances made by public sector banks were Rs. 32,64,989 crores and the total gross NPAs was Rs. 81,805 crores, being approximately 2.51% of the total gross advances. The figure of NPA was then increased in March 2018 to Rs. 83,99,196 crores and the total gross NPAs was increased to Rs. 9,62,621 crores, being 11.46 percent of the total gross advances. Insofar as power sector is concerned, it is clear that in March 2015, the gross advances made by public sector banks was Rs. 4,08,256 crores and the total gross NPAs was Rs. 10,804 crores, being approximately 2.6% of the total gross advances. These figures, in March 2018, reached to Rs. 4,64,969 crores and Rs. 1,04,337 crores, being 22.4% of the total gross advances. This undoubtedly shows that the power sector is under stress, in particular from 2015 onwards. I have already noticed the reasons which are also highlighted in the Standing Committee reports, which are not in dispute, why the electricity generation companies are under stress since 2014-15. Thereafter the IBC was enacted and brought into force on 28 May 2016 to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximisation of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment

of government dues and to establish an Insolvency and Bankruptcy Board of India, and for matters connected therewith or incidental thereto.

29.3 Section 7 of IBC provides for initiation of corporate insolvency resolution process by a financial creditor. Under this provision, a financial creditor either by itself or jointly with other financial creditors may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. Further, it provides the procedure, to which I have already made brief reference contained in Chapter II of Part II of IBC, which provides a mechanism for insolvency resolution process. However, no steps are taken against the members of the Associations till today under IBC.

29.4 Section 12 of IBC, as seen earlier, provides a timeline (180 days) for completion of insolvency resolution process. Under this provision, at a meeting of the committee of creditors by a vote of 66 percent of the voting shares, the time can further be extended by 90 days. Section 27 provides the procedure for replacement of a resolution professional by the committee of creditors. Sub-section (2) thereof provides that the committee of creditors may, at a meeting, by a vote of 66 percent of voting shares, resolve to replace the resolution professional appointed under Section 22 with another resolution profession. Even for appointment under Section 22, the committee of creditors may, in the first meeting, by a majority vote of not less than 66 percent of the voting share of financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution profession by another resolution professional. Sub-section (8) of Section 21 also provides that all decisions

of the committee of creditors shall be taken by a vote of not less than 66 percent of voting share of the financial creditors. Section 28, which deals with approval of committee of creditors for certain actions, in its sub-section (3), provides that no action under sub-section (1) shall be approved by the committee of creditors unless approved by a vote of 66 percent of the voting shares. Section 30 deals with submission of a resolution plan. Sub-section (4) thereof clearly provides that the committee of creditors may approve a resolution plan by a vote of not less than 66 percent of voting share of the financial creditors, after considering its feasibility and viability, and such other requirements as may be specified by the Board. Thus, from all these provisions, it appears to us that every decision/approval in respect of a resolution plan at every stage is required to be taken by a vote of not less than 66 percent of voting share of the financial creditors.

29.5 As against this, the circular, impugned in these petitions, provides that a resolution plan shall be clearly approved/documented by all lenders, i.e. 100 percent lenders. The CMD, Rural Electrification Corporation, deposed that exactly in 180 days to find an optimal solution and resolve is almost impossible and that too with “100 percent consensus” is almost impossible. In view of the directions given by the circular, even a person having 0.1 percent share can stall the resolution process. The Chairman of SBI deposed that even though the RBI circular has the complete framework but its implementation might not give enough result. The circular provides 100 percent consensus/consent of the lenders for implementation of resolution plan. It was, therefore, submitted that the circular though provides for working on resolution plan, it would, ultimately, push the debtor to face IBC

procedure. In other words, the condition that 100 percent consensus is required to be reached in the circular, has made RPs unworkable outside IBC. As submitted by counsel for the petitioners, till today not a single corporate debtor could get RP approved outside IBC. The RBI could not satisfactorily explain this anomaly.

29.6 Section 35A was inserted in BR Act by Act 95 of 1956 and was brought into force from 14.01.1957. It is not clear whether any directions insofar as stressed assets are concerned, have ever been issued since 2010, in particular 2015. Then, the provisions contained in Sections 35AA and 35AB were introduced by Amending Act, 2017 with effect from 4 May 2017. Even thereafter, till the circular was issued no steps against the stressed assets have been taken. In this backdrop, paragraph 6 of the circular needs to be seen carefully. It provides for implementation condition for a Resolution Plan. Such Resolution Plans involving restructuring/change in ownership in respect of large accounts shall require independent credit evaluation (ICE) of the residual debt by credit rating agencies (CRAs) specifically authorised by the RBI for this purpose. Though the circular was issued on 12.02.2018, the RBI issued a notification authorising CRAs on 21 May 2018, i.e. almost after 100 days from the date of the circular. It was specifically argued by Mr. Poovayya that for the lack of CRA notification, insolvency resolution process could not even begin and all debtors lost 100 days time out of 180 days. No satisfactory explanation is forthcoming though it was submitted on behalf of RBI that issuance of such a notification is a formality and merely because the notification had not been issued for 100 days, would not affect implementation of RPs. The fact, however, remains that for no good and

acceptable reason there was 100 days delay in issuance of CRA notification.

30. Mr. Dwivedi, learned Senior Counsel for RBI submitted that RBI is not expected to be sector specific and its decision can only have a nexus and connection with banks and banking activities, borrowing, lending, recovery of loans etc. which they are supposed to regulate. It is also true that the circular gives effect to the economic policy contained in Sections 35AA and 35AB of the BR Act and is the culmination of a phased and systematic process by which twin objectives of the IBC, namely (i) maximization of value of assets; and (ii) a time bound resolution of stressed assets, are being achieved in a rational manner. It was submitted on behalf of the RBI that in cases where accounts have already been classified as NPA, it gives the corporate debtor yet another opportunity of 180 days to permit resolution outside IBC. The action under the circular, as submitted, is rational and completely meets the statutory object of making the most substantial recoveries in the shortest possible time. The power sector, in any case, cannot be given different treatment since it is not consistent with the object and purpose of IBC. He further submitted that the RBI, being a banking regulator, is bound to treat all defaults equally and without discrimination and can only classify them on basis that are relevant and have nexus with the objectives of the IBC. It was further submitted, stress in a particular be it power, steel, textiles, sugar, telecom etc. has no nexus with the object and purpose of the IBC. This can, therefore, never be a reason for distinguishing between corporate debtors who are in default. The directions, by the impugned circular, it was submitted, are sector agnostic. On the contrary, it was further submitted that a classification by sectors would result in mini-

classification which, in turn, would violate the mandate of Article 14. The statutory mandate of the IBC is to take action even in the default in payment. Neither the IBC nor the BR Act provide for an arbitrary judgment on genuine and non-genuine defaults. In other words, all defaults are treated alike by the law.

31. I once again make it clear that the object of IBC read with Sections 35AA and 35AB of BR Act is laudable. The powers of the RBI under the provisions of these enactments cannot be disputed. As a matter of fact, having regard to the economic health, in the light of different scams happened in the country during last few years, the RBI should and can exercise powers under Section 35AA and 35AB. The powers of the RBI cannot be either curtailed or interfered with in any manner. The matters of economic policy should be best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover, in the context of the changed economic scenario, the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramification and can put the clock back for a number of years and the process of rationalisation of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislation, this Court, should interfere only in those cases where the view reflected in the legislation is not possible to be taken at all. **(See Bhavesh D. Parish & Ors. Vs. Union of India & Anr., (2000) 5 SCC 471)**. Once insolvency resolution process begins, it cannot be arrested by courts. The question whether the courts can exercise its powers under Article 226 of the Constitution to

extend the period by few days/weeks/months, where RBI in exercise of its powers under Section 35AA or 35AB, directs commencement of the process from a particular date, as in the present case, from 27.08.2018, to some future date, if the case is made out for such relief, needs to be answered at an appropriate stage.

32. I now would like to consider Mr. Kadam's submission based on the three circulars dated 13.06.2017, 28.08.2017 and 12.2.2018. I have perused the first circular dated 13.06.2017 very carefully. It appears therefrom that an Internal Advisory Committee (IAC) was constituted, which held its meeting on 12.06.2017 and agreed to focus on large stressed accounts at that stage and accordingly took up for consideration the accounts which were classified partly or wholly as non-performing from amongst the top 500 exposures in the banking system. The IAC also arrived at an objective, non-discretionary criterion for referring accounts for resolution under IBC. In particular, the IAC recommended for IBC reference in respect of all accounts with fund and non-fund based outstanding amount greater than Rs. 5,000/- crore, with 60 percent or more classified as non-performing as of 31.03.2016. The IAC noted that under the recommended criterion, only 12 accounts totaling about 25 percent of the current gross NPAs of the banking system would qualify for immediate reference under IBC. Thus, in view of the recommendations made by the Advisory Committee, a reference under IBC was made only in respect of 12 accounts out of the top 500 exposures in the banking system. Similarly, the circular dated 28.08.2017, in the form of explanation, also shows that the RBI acted on the recommendations of IAC constituted pursuant to the Banking Regulation (Amendment) Ordinance,

2017 and based on its recommendations, 12 accounts were identified for immediate reference under the IBC. As regards other NPA accounts, the IAC had recommended that banks may be required to finalise a resolution plan within six months, failing which these may be directed for reference under IBC. The IAC had met twice to deliberate on the specific contours of the approach to be followed in respect of such NPA accounts. Based on the IAC recommendations, it was decided that of the above accounts, those which are materially NPA as on 30.06.2017, i.e., where more than 60 percent of the total outstanding was classified as NPA on CRILC, would be given time till 13 December 2017 for resolution under IBC. It is, thus, clear that there is a difference between action under the earlier circulars and the impugned circular. In this backdrop, it was submitted that RBI before issuing the impugned circular did not constitute IAC, which, if had they done so, could have advised to take sectoral issues into consideration, in particular the power sector before issuing the circular. No satisfactory explanation is forthcoming from RBI as to why IAC was not constituted before the impugned circular was issued.

33. Mr. Poovayya, learned Senior Counsel appearing for the petitioner – Associations, after drawing our attention to the 37th and 40th reports of the Standing Committee, as also the decision of the Ministry of Power to constitute a High Level Empowered Committee, approved by the Prime Minister, vehemently submitted that there is every possibility that the Central Government, on the basis of the reports of the Standing Committee and a report of the High Level Empowered Committee may issue appropriate directions, after consultation with the Governor of the RBI,

under Section 7 of the RBI Act. On the other hand, Mr. Rakesh Dwivedi, learned Senior Counsel appearing for the RBI, submitted that the question of Central Government issuing any directions at this stage does not arise. It was possible for the Central Government to issue such directions immediately after the 37th report or at least when the High Level Empowered Committee was constituted. He submitted, in any case, as of today, the Central Government has not issued any such directions and in view thereof, it is not necessary to either grant interim stay of the circular as prayed for in the instant writ petitions or to grant any extension for implementation of the circular.

34. It is true that sub-section (1) of Section 7 of the RBI Act empowers the Central Government to issue directions from time to time to the RBI as it may, after consultation with the Governor, consider necessary in the public interest. The Central Government, however, is not expected to issue any directions, as contemplated under Section 7(1), indiscriminately or randomly. Such directions are possible when there exists sufficient material in support. I prima facie find that there exists material which deserves to be taken into consideration. The question, whether a breathing time deserves to be granted in the larger public interest and to achieve vision of power to all, needs to be answered by the Central Government. Learned ASG submitted that extension of 180 days may be granted. His submission was on the strength of reports of Standing Committee and the decision to constitute a High Level Empowered Committee with the approval of the Prime Minister. In this backdrop, it is necessary that the Central Government, without any delay, should consider whether it would like to issue any such directions.

35. In view of the power shortage in the country, private participation became essential for achieving fast growth of power generation keeping pace with the demands of the country. The Electricity Act, 2003, undoubtedly, attracted the entry of the corporate sector into power generation. Private participation in the power sector and their contribution, undoubtedly, improved the power generation condition in the country. However, due to unforeseen circumstances, the power plants, during last three-four years, are suffering from cash flaws, credit rating, interest servicing etc. As of now, commissioned plants worth thousands of MWs are under severe financial stress and are currently under SMA-1/2 stage or are becoming/have become NPAs. It appears from the report of the Standing Committee that 34 Power Plants have been categorized as 'stressed'. The different categories of stressed power plants are (i) plants having PPA and requiring coal; (ii) plants having neither coal linkage nor PPA; (iii) plants having coal block but the issue of coal block is sub-judice; and (iv) the plants stressed on account of reasons other than coal linkage/block issues. It has also come on record that upon cancellation of 204 coal blocks by the Supreme Court in September 2014, coal mines were notified in March, 2015 under the Special Provisions Act, 2015. Thus attempts are being made to make available coal to the power sector, but the desired results are not yet achieved and the power sector is starving for fuel.

36. It is not in dispute that the major reasons for stress in most of the Thermal Power Projects have been attributed to (i) non-availability of fuel (a) cancellation of coal blocks, (b) projects set up without linkage; (ii) lack of enough PPA by States; (iii) inability of the promoter to infuse the equity

and working capital; (iv) contractual/tariff related disputes; (v) issues related to banks/financial institutions; (vi) delay in project implementations leading to cost overrun; and (vii) aggressive bidding by developers in PPA. It is, thus, clear that in addition to financial matters, stress in the power sector is also caused by various operational/commercial/regulatory issues.

37. The facts, as reflected in the reports of the Standing Committee, are not in dispute though it was vehemently submitted that the reports cannot be relied upon for curtailing the powers of RBI under the provisions of IBC read with the relevant provisions of the other enactments such as BR Act and RBI Act. The Standing Committee, in its 40th report, considered various operational/commercial/regulatory issues insofar as the power sector is concerned, in the light of the impugned circular. It appears from the depositions of experts, like CMD, Rural Electrification Corporation, Chairman, SBI, Secretary, Department of Financial Services, etc. that 180 days, as provided for in the impugned circular commencing from 1 March 2018, are not sufficient to find an optimal solution and to resolve the issues within 180 days and that too, with 100% consensus to be reached amongst the lenders/creditors, particularly, where the number of lenders/creditors is large. It also appears that the power sector is in a transition, which is well known and moving from a low demand, low supply situation to a moderately high demand context and this being the transition period, needs to be managed. This has to be done in the light of the need for National Energy Security in the context of managing the transition in the power sector on the basis of the examples, quoted by the experts before the Standing Committee in cases of Chhattisgarh Project, Abhijit Group and Meenakshi

Energy. It appears that the deadline provided under the circular to reach 100% consensus is not only difficult but perhaps, impossible. The representative of SBI, therefore, stated that the deadline is not only for getting bids but even the restructuring has to be reflected in the books of the Banks as well as in the books of the Companies, and since it is approaching so fast, the bidding process which normally takes time and then involves negotiations, the period of 180 days is short.

38. The question whether RBI, which is within its power to issue a circular in exercise of powers under Sections 35AA and 35AB of Amending Act, 2017, and while giving any directions is expected to take into account sectoral issues, may be on the advise of Internal Advisory Committee (IAC) requires to be addressed at the stage of final hearing of the petitions. At the same time, the reality of electricity sector cannot be completely overlooked as is noticed by the Standing Committees. A High Level Empowered Committee has been constituted to address the whole range of vital issues of the electricity sector, keeping in view the financial issues also. The RBI's circular, undoubtedly, address only financial issues. The Government, on the other hand, seems to be concerned for revival of 'stressed' power plants and, in view thereof, in the light of factual data reflected in the reports of Standing Committees, the Central Government, should step in and decide whether it would like to exercise its powers under Section 7 of the RBI Act in the larger interest of the power sector and to see that the vision of power to all 24 x 7 is achieved.

39. In my opinion, the RBI will have to address the following questions at the stage of further hearing of the petitions : whether the circular can

mandatorily direct to reach “100 percent consensus” amongst the financial creditors to find an optimal solution or for resolution of stressed assets?; whether there was inordinate delay of 100 days (out of 180 days provided for resolution plan outside IBC) in issuing CRA notification as provided for in paragraph 6 of the circular?; whether the RBI committed any error of procedure in not referring the matter to Internal Advisory Committee (IAC), as was done when two earlier circulars were issued, before issuing the circular?; whether there was a delay on the part of RBI in exercising its powers under Section 35A or under Section 35AA of BR Act though NPAs started emerging in 2010, in particular 2015 – so far as power sector is concerned? and, if yes, why can't it wait for some time more as prayed for by the petitioners and the Government?; whether RBI can issue directions under Section 35AB to the banking company or banking companies for resolution of stressed assets under IBC?; whether the circular treats unequals equally?; and whether while exercising powers under Section 35AA and 35AB, the RBI was expected to take sectoral issues into consideration, may be after seeking advise of IAC?

40. As stated in the foregoing paragraphs, so far sincere efforts seems to have been made at all levels, including all ministries to save the power sector. It would, therefore, be appropriate for the Central Government to step in, in exercise of the powers under Section 7 of RBI Act, and after consultation with the Governor of RBI, to take an appropriate decision or issue directions, as it deems fit and proper in the larger public interest.

41. It would not be necessary at this stage to deal with any individual case, particularly in view of the admitted position that the circular is under

Section 35AB and not in any specific case as contemplated by Section 35AA of IBC. In other words, the circular is not issued in specific case(s) including any particular/specific sector, as contemplated under Section 35AA, but it is under Section 35AB.

42. In this backdrop, I am inclined to direct the High Level Empowered Committee to submit its report within two months from the date of its constitution. The Ministry of Power shall invite a senior officer of the RBI, after consultation with the Governor of RBI, as a member of the High Level Empowered Committee forthwith. In the meantime, I observe that the Central Government should consider whether it would like to issue directions under Section 7 of the RBI Act on the basis of the report and other material, including reports of the Standing Committee within 15 days from today in the light of the observations made in this order. In view thereof, it is not desirable to grant any interim relief at this stage. This shall not preclude the petitioner-Associations or its members from applying for urgent relief, if the circumstances so demand, placing the request and factual details in respect of such an action. This order shall not curtail the rights/powers of the financial creditors under Section 7 of IBC or even of the RBI in issuing directions in specific case(s) under Section 35AA of BR Act to initiate corporate insolvency resolution process under Chapter II of Part II of IBC, in any given case, including the petitioners or members of the petitioners' Association.

(Per Yashwant Varma, J.)

A. INTRODUCTION

43. While we are agreed that the petitioners are not entitled to any interim

relief, I propose to assign and record my own independent reasons on the basis of which alone I have arrived at this conclusion. I have found the petitioners not entitled to the grant of any interlocutory relief since in my considered opinion the grant of interlocutory relief in terms as prayed at this stage, where parties are yet to be heard in greater detail on contentious issues, the reliability of material on the basis of which an informed adjudication may be undertaken, of necessary parties not being before Court, would have a cascading and deleterious effect on the regime which the Reserve Bank of India[7] seeks to usher in. I also necessarily bear in mind the rubicon which must be recognised to exist when Courts are called upon to evaluate and rule on economic or fiscal measures framed by an expert body of stature attached to a central banking organisation namely the RBI. This the Court notes, not because it does not recognise its powers to interfere with a directive issued by the RBI in exercise of its powers of judicial review, but essentially and as would be evident from what follows, parties are yet to be heard on the seminal questions which this batch of writ petitions raise as also because the petitioners have failed to lay down a factual foundation entitling them to the grant of interim relief at this stage. At the tenuous juncture at which proceedings presently rest, the probable adverse impact that may flow from the grant of interim relief far outweighs the individual and yet to be substantiated claims of the petitioners.

44. Reverting firstly to the undisputed facts, these three petitions question the Directive dated 12 February 2018 issued by the RBI laying down a detailed procedure for restructuring of stressed assets. While a challenge is

7 RBI

also laid to Sections 35AA and 35AB of the **Banking Regulation Act, 1949**[8], no party has addressed submissions in this respect. One therefore has to proceed on the basis that the power of the R.B.I. to issue the impugned directions is neither doubted nor seriously challenged at this stage. The core issue which is raised is with respect to the prescription of a 180-day period for implementation of a **Resolution Plan**[9] and the prayer that this period be extended by the Court in the interim. This prayer is addressed primarily in light of the recommendations made by a Committee constituted pursuant to the interim order passed by the Court on 31 May 2018 in **Writ Petition No. 18170 of 2018** as well as the observations and recommendations contained in the 37th and 40th Reports of the Standing Committee on Energy presented to the Lok Sabha. It is also submitted that all coercive action be stayed till such time as the High Level Empowered Committee formed by the Union Government takes a decision in the matter.

45. Writ Petition No. 23183 of 2018 has been instituted by the petitioner, Prayagraj Power Generation, which has established a Thermal Power Project at Bara, District Allahabad. **Writ Petition No. 18170 of 2018** has been instituted by the Independent Power Producers Association of India[10] which is described to be a non-profit independent association constituted to study and frame recommendations with respect to issues critical to the development of the power sector in India. Of its 20 members, according to the list as appended at Page 127A of the paper book, members at Serial Nos. 4 and 7 are stated to have interests present in the State of U.P. **Writ Petition**

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8 1949 Act
9 RP
10 IPPA

No. 23181 of 2018 has been presented by the Association of Power Producers[11] and is joined by G.M.R., Chhattisgarh Energy Limited and G.M.R. Rajahmundry both situate at Bangalore. The first petitioner in this writ petition is described to be a registered society having 29 members who are leading private power producers of India owning power plants in the country. From its list of members placed at Annexure-4 to the writ petition, we are informed that its members at Serial Nos. 13, 14, 15 and 21 have interests within the State of U.P. While an issue with respect to the maintainability of the writ petitions preferred by **IPPA** and **APP** has been raised, no objection is taken by the respondents with respect to the maintainability of the writ petition preferred by Prayagraj Power Generation. The question of maintainability is raised both in respect of the competence of IPPA and APP to institute and maintain a writ petition on behalf of their members collectively as well as on the ground of territorial jurisdiction.

46. Before however proceeding to notice and consider the rival submissions advanced before us, it would be relevant to note that arguments in detail spread over various dates were addressed primarily on the petition preferred by Prayagraj Power Generation and parties restricted their submissions to the issue of grant of interim relief. While detailed submissions spread over various dates were advanced with respect to the merits of the claim, all parties clarified that the submissions were being advanced only to enable this Court to consider the issue of grant of interim relief only. We have also been informed of a Transfer Petition preferred by the RBI before the Supreme Court and which is fixed for hearing on 28 August 2018 along with

11 APP

other petitions/matters assailing the impugned directive. However no interim stay of the present proceedings operates in respect of these proceedings and therefore learned counsels for respective parties have urged us to proceed to consider and rule on the issue of interlocutory relief. Having noticed the backdrop in which the present hearing on these three writ petitions was conducted I proceed to briefly notice the undisputed facts.

B. THE FACTUAL MATRIX

47. On 4 May 2017, the Union Government promulgated the **Banking Regulation (Amendment) Ordinance, 2017**[12]. By virtue of this Ordinance, Sections 35AA and 35AB were introduced in the Banking Regulation Act, 1949[13]. Section 35AA empowers the Union Government to authorise the RBI to issue directions to any banking company/companies to initiate an insolvency resolution process in respect of a default under the provisions of the **Insolvency and Bankruptcy Code, 2016**[14]. Section 35AB confers powers on the RBI to issue directions to banking companies in general for resolution of stressed assets. Pursuant to the introduction of these two provisions in the 1949 Act, the Union Government by an order dated 5 May 2017 specifically authorised RBI to issue directions as contemplated under Section 35AA. Before proceeding further it would be pertinent to extract the Preamble of the Ordinance which reads thus: -

> "WHEREAS the stressed assets in the banking system have reached unacceptably high levels and urgent measures are required for their resolution;
>
> AND WHEREAS the Insolvency and Bankruptcy Code, 2016 has been enacted to consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons,

12 2017 Ordinance
13 1949 Act
14 IBC

partnership firms ad individuals in a time bound manner for maximisation of value of assets to promote entrepreneurship, availability of credit and balance the interest of all the stakeholders;

AND WHEREAS the provisions of Insolvency and Bankruptcy Code, 2016 can be effectively used for the resolution of stressed assets by empowering the banking regulator to issue directions in specific cases;" (emphasis supplied)

48. The Ordinance was ultimately replaced by the **Banking Regulation (Amendment) Act, 2017**[15] which was deemed to have come into force on 4 May 2017, the date when the initial Ordinance was promulgated. The SOR of the 2017 Act which would also have a bearing on the issue at hand is extracted hereunder for convenience: -

"**STATEMENT OF OBJECTS AND REASONS**

Stressed assets in the banking system, or non-performing assets have reached unacceptably high levels and hence, urgent measures are required for their speedy resolution to improve the financial health of banking companies for proper economic growth of the country. Therefore, it was considered necessary to make provisions in the Banking Regulation Act, 1949 for authorising the Reserve Bank of India to issue directions to any banking company or banking companies to effectively use the provisions of the Insolvency and Bankruptcy Code, 2016 for timely resolution of stressed assets.

2. It was accordingly decided to make amendments to the Banking Regulation Act, 1949. Since Parliament was not in session and immediate action was required to be taken, the Banking Regulation (Amendment) Ordinance, 2017 was promulgated by the President on the 4th May, 2017.

3. The Banking Regulation (Amendment) Bill, 2017 which seeks to replace the Banking Regulation (Amendment) Ordinance, 2017, provides for the following, namely:—

(a) to confer power upon the Central Government for authorising the Reserve Bank to issue directions to any banking company or banking companies to initiate insolvency resolution process in respect of a default, under the provisions of the Insolvency and Bankruptcy Code, 2016;

(b) to confer power upon the Reserve Bank to issue directions to banking
companies for resolution of stressed assets and also allow the Reserve Bank to specify one or more authorities or committees to

15 2017 Act

> advise banking companies on resolution of stressed assets; and
>
> (c) to amend section 51 of the Act so as to make therein the reference of proposed new sections 35AA and 35AB.
>
> 4. The Bill seeks to replace the said Ordinance."

49. The Standing Committee on Energy presented its 37th Report to the Lok Sabha on 7 March 2018. This report while dealing with myriad issues affecting the power sector of the country, also considered the position of stressed/non performing assets in the sector. The Standing Committee essentially dwelt upon the peculiar problems faced by the sector in the country and framed various recommendations for the consideration of Parliament. The Standing Committee essentially formed the opinion that there was an inherent need to balance the interests of the nascent private power sector as against the modes of recovery as formulated by the RBI and opined that the N.P.A. and stressed assets Guidelines as framed by the RBI would not merit a mechanical application since the same would push the power sector into further jeopardy and diminish all hopes of recovery. Undisputedly, no concrete measures have either been formulated or passed by Parliament on the basis of the 37th Report till date.

50. On 13 June 2017, RBI issued a directive dealing with the subject of the necessity of Financial Institutions [FI's] identifying stressed assets and the imperative need to initiate processes for resolution thereof under the IBC. It accordingly constituted an Internal Advisory Committee[16] to identify the category of stressed assets that would require further scrutiny including initiation of steps under IBC in the first instance. The IAC at the outset identified the top 500 accounts which had been classified as partly or wholly

16 IAC

non-performing. The IAC further recommended that all such accounts having outstanding greater than Rs. 5,000 crores with 60% or more classified as NPA as on 31 March 2016 for initiation of action under the IBC. Based upon the initial criteria so formulated, 12 accounts were identified for immediate reference under IBC. RBI further provided that in respect of NPAs, which did not qualify the above criteria, their lenders should finalise a RP within six months. It further mandated that where a viable resolution is not arrived at within six months, banks would be required to initiate insolvency proceedings under the IBC. This Circular was followed by another directive of the RBI dated 28 August 2017. By means of this direction, RBI identified accounts where either the SBI was the lead bank or where the SBI was a member of the Joint Lenders Forum[17]. It accordingly directed SBI and other lenders that may have been part of the consortium of banks to complete the resolution process and implement a RP by 13 December 2017 failing which the JLF was directed to initiate insolvency proceedings before 31 December 2017. A careful reading of the two communications of the RBI dated 13 June 2017 and 28 August 2017 *prima facie* evidences a tiered and phased approach adopted by RBI to deal with stressed assets based upon their outstanding and their impact on the banking sector as a whole. These two directives were ultimately replaced by the impugned Directions dated 12 February 2018. The impugned Directions which are described as guidelines issued in exercise of powers conferred under Section 35A, 35AA, 35AB of the 1949 Act read with Section 45L of the **Reserve Bank of India Act, 1934**[18] are a replacement of all existing

17 JLF
18 1934 Act

instructions relating to the resolution of stressed assets and the institutional mechanisms created at different stages by the RBI.

51. Paragraph 4 commands all lenders to put in place Board approved policies for resolution of stressed assets including timelines for resolution. It further mandates that as soon as there is a default in any lender's account, all lenders, singly or jointly, shall initiate steps to cure the same. It essentially emphasises the requirement of exploring and evaluating a R.P. immediately upon default having occurred. The challenge in the instant batch of writ petitions has turned primarily around the provisions of Paragraphs 5, 8, 9 and 18 and consequently the same are being extracted herein below: -

> "C. Implementation Conditions for RP
>
> 5. A RP in respect of borrower entities to whom the lenders continue to have credit exposure, shall be deemed to be 'implemented' only if the following conditions are met:
>
> a. the borrower entity is no longer in default with any of the lenders;
>
> b. if the resolution involves restructuring; then
>
> i. all related documentation, including execution of necessary agreements between lenders and borrower/ creation of security charge/perfection of securities are completed by all lenders; and
>
> ii. the new capital structure and/or changes in the terms of conditions of the existing loans get duly reflected in the books of all the lenders and the borrower.
>
> D. Timelines for Large Accounts to be referred under IBC
>
> 8. In respect of accounts with aggregate exposure of the lenders at Rs. 20 billion and above, on or after March 1, 2018 ('reference date'), including accounts where resolution may have been initiated under any of the existing schemes as well as accounts classified as restructured standard assets which are currently in respective specified periods (as per the previous guidelines), RP shall be implemented as per the following timelines:
>
> i) If in default as on the reference date, then 180 days from the reference date.
>
> ii) If in default after the reference date, then 180 days from the date of first such default.

> 9. If a RP in respect of such large accounts is not implemented as per the timelines specified in paragraph 8, lenders shall file insolvency application, singly or jointly, under the Insolvency and Bankruptcy Code 2016 (IBC) within 15 days from the expiry of the said timeline.
>
> V. Withdrawal of extant instructions
>
> 18. The extant instructions on resolution of stressed assets such as Framework for Revitalising Distressed Assets, Corporate Debt Restructuring Scheme, Flexible Structuring of Existing Long Term Project Loans, Strategic Debt Restructuring Scheme (SDR), Change in Ownership outside SDR, and Scheme for Sustainable Structuring of Stressed Assets (S4A) stand withdrawn with immediate effect. Accordingly, the Joint Lenders' Forum (JLF) as an institutional mechanism for resolution of stressed accounts also stands discontinued. All accounts, including such accounts where any of the schemes have been invoked but not yet implemented, shall be governed by the revised framework."

52. This Circular was challenged firstly in the petition preferred by IPPA on which a detailed order was passed on 31 May 2018 by a Division Bench of the Court. The Division Bench noticing the observations appearing in the 37th Report of the Standing Committee on Energy, as an interim measure requested the Secretary in the Ministry of Finance of the Union Government to hold a meeting of the respondents 2 to 5 in the said writ petition through their Secretaries and the representatives of the IPPA to consider their grievances and to explore whether any solution to the problem was possible. It further provided that action on the basis of the impugned directive may be avoided against members of the IPPA who are not willful defaulters till the meeting is convened and held.

53. Pursuant to the directions issued by the Court a meeting was in fact held and the report dated 17 July 2018 has been placed and made a part of these proceedings. The said Committee firstly recommended the setting up a High Level Empowered Committee[19] to deal with the sectoral concerns raised by various stakeholders in a time bound manner. It also recommended

19 HLEC

that an additional 180 days beyond the timeline prescribed under the impugned directions may be allowed to commissioned Thermal Power Projects to enable the HLEC to address and look into the sectoral constraints faced by the power sector. RBI which was also invited to participate in the deliberations submitted its comments which stand appended to the report of the Committee. It basically took the position that the ground reality of the high level of stressed assets cannot be ignored and that there was an emergent need for early and expeditious resolution. It further opined that the 180-day window for resolution which operates outside the IBC gives a powerful incentive to the lenders to undertake expeditious restructuring. RBI further noted that in its experience it had found that although the 34 identified stressed assets had been restructured in the past, despite adequate time having been provided they continued to remain either N.P.A. or under further stress. It accordingly opined that a lesson must be taken from the past in order to make the restructuring more meaningful and for the application of a more stringent criterion. RBI also took the position that it could not make any exception for any particular sector since this may lead to not only a host of demands of exceptions from other categories of stressed borrowers, it may also lead to legal challenges. RBI further rejected the suggestion of banks to initiate a resolution process only 90 days after default since it was of the opinion that a prolonged default was itself one of the contributors to the deterioration in the quality of the stressed assets.

54. Reverting to the provisions of the impugned directive, paragraph 5 provides that a RP shall be deemed to be implemented on the following

conditions being met:

a) The borrower entity being no longer in default with any of the lenders;

b) If the RP involve restructuring, all related documentation and agreements between lenders and borrowers, creation of security etc. are completed by all lenders; and,

c) The new capital structure and/or restructured terms of the existing loans are duly reflected in the books of both the lenders as well as the borrower.

55. Paragraph 8 lays down the timelines for implementation of the RP. It applies to all accounts where the aggregate exposure of lenders stands at Rs. 20 billion or above on or after 1 March 2018. In respect of this category of exposures, it provides that the RP shall be implemented within 180 days from the reference date, if in default on that date and in case of default after the reference date then 180 days from the date of first such default. The reference date being 1 March 2018.

56. Paragraph 9 then provides that if a RP is not implemented as per the time frame specified in paragraph 8, lenders shall file an insolvency application either singly or jointly under the IBC within 15 days from the expiry of the timeline. Footnote 8 to paragraph 9 significantly provides that the prescribed timelines are the upper limits and that lenders are free to file insolvency petitions even before the expiry of the timeline or even without attempting a RP outside IBC as provided for in the impugned directive. Paragraph 18 essentially repeals all existing instructions and schemes formulated by the RBI for resolution of stressed assets. It not only

discontinues all institutional mechanisms for resolution, it also provides that all accounts where any of the prior existing schemes have been invoked but not yet implemented, shall be governed by the revised framework as embodied in the impugned directive. It is these provisions of the Directions which are assailed by the petitioners.

57. In order to complete the narration of facts, I also note that pursuant to the recommendations framed by the Committee which came to be convened pursuant to the interim directions issued by this Court, the Union Government has constituted the HLEC in terms of the Office Memorandum dated 29 July 2018 issued by the Ministry of Power. The HLEC chaired by the Cabinet Secretary comprises of 10 other members from different ministries, banking institutions as also the Power Finance Corporation and the Rural Electrification Corporation. RBI is conspicuously absent from the HLEC. During the pendency of these writ petitions, the Standing Committee On Energy has also submitted its 40th Report to the Lok Sabha on 7 August 2018. This report too is relied upon by the petitioners to buttress their challenge to the impugned directive. However, since these reports are dealt with in extenso in the opinion of the Honble Chief Justice, I do not deem it necessary to extract their contents herein.

C. MAINTAINABILITY OF THE PETITIONS BY IPPA and APP

58. Sri Rakesh Dwivedi, learned Senior Advocate appearing for RBI firstly raised the issue of maintainability of the writ petitions and submitted that both IPPA as well as APP were clearly not authorised to maintain the writ petitions voicing the alleged grievances of their members. He referred to the absence of a provision in the Articles of Association prescribing a condition

that in case they were to initiate litigation on behalf of their members, they would be bound by the decisions rendered therein. He also submitted that in the petition filed by APP the resolution also did not empower or authorise it to initiate the present proceedings and all that was held out in the resolution brought on record was that its members would also join in the proceedings. More fundamentally, Sri Dwivedi submitted that in respect of a majority of the members of the two associations, the plans for restructuring had already been rejected and therefore no cause as such existed for this Court entertaining writ petitions at their behest.

59. A further submission which was urged was with regard to lack of territorial jurisdiction and it was contended that the majority of the members of IPP and APP had no interests situate in the State of U.P. so as to warrant this Court entertaining a writ petition at their instance.

60. Sri Dwivedi in support of his submissions relied upon the following decisions namely, (A) **Nawal Kishore Sharma v. Union of India**[20]; (B) **Umesh Chand Vinod Kumar Vs. Krishi Utpadan Mandi Samiti**[21]; (C) **Aloo Phal Subzi Arhati Association Vs. State of U.P.**[22] and (D) **Goa Judicial Officers Association Vs. State of Goa**[23]

61. Further elaborating on the issue of maintainability Sri Dwivedi submitted that Lanco Anpara having a unit in the State of U.P. was not shown to be a member of APP. It was further submitted that Reliance Power, a member of APP had no stressed assets. Insofar as Jaiprakash Power is

20 (2014) 9 SCC 329 Pr.9 to 16
21 AIR 1984 All 46 (Pr. 23)
22 2002 ALJ 2587
23 1997 (4) Bom CR 372 (Pr 49 & 52)

concerned, it was contended that banks had already decided to invoke the provisions of the IBC. The second aspect arising from the objection with regard to maintainability as formulated by Sri Dwivedi was with respect to the existence of only three plants of members of the petitioners being situate in U.P. while their corporate offices being outside the State. In the submission of Sri Dwivedi the absence of corporate head offices within the State of U.P. clearly pointed to a lack of territorial jurisdiction vesting in this Court to entertain the writ petition since the issue of financing contracts was directly connected with the corporate or registered offices of companies and not their plants.

62. The two Full Bench decisions of this Court in **Umesh Chand Vinod Kumar** and **Aloo Phul Sabzi,** which clearly bind this Court have in unequivocal terms recognised the right of an association to maintain a writ petition where the relief is claimed for the benefit of all its members collectively and is not really designed to canvass the interest of a particular member or seek relief in respect thereof. In the present case both IPPA and APP assert that the impugned directive shall adversely impact not a particular member but collectively operate against all its members. It is therefore not really a petition seeking relief in respect of a particular member. The challenge appears to be on the ground that the directive shall adversely affect the power sector as a whole and its members collectively. The test formulated by the Full Bench was ***"Where the rules or regulations of the association specifically authorise it to take legal proceedings on behalf of its members, so that any order passed by the court in such***

proceedings will be binding on the members." This test, in the facts of this case, is clearly met.

63. The relevant Bye laws/Articles of both IPPA and APP undisputedly empower the associations to initiate litigation in courts. In light of the express provision made in this respect any decision rendered on their writ petitions would clearly bind all its members. On an overall consideration of the nature of the challenge raised, it is evident that the same is a collective action instituted by IPPA and APP raising issues concerning all their members and is not an espousal of an individual grievance. I, therefore in view of the binding opinion entered by the Full Benches of this Court find myself unable to accept the dictum laid down in **Goa Judicial Officers Association** by the Bombay High Court. The decision in **Mahinder Kumar Gupta Vs. Union of India**[24] can have no application since in that particular case the issue was whether an association could maintain a writ petition under Article 32 of the Constitution for enforcement of a fundamental right. Sri Dwivedi in his usual fairness did concede that the position would be entirely different if the petitioners were to assail the impugned directive on the anvil of Article 14 of the Constitution. In any case, as noticed hereinbefore the question of validity of sections 35AA and 35AB has not been urged at this stage.

64. The second limb of the objection with respect to maintainability was this Court lacking territorial jurisdiction. This Court notes that IPPA and APP have clearly averred that some of their members have interests in the State of U.P. in the shape of coal-based plants established here. Details of

24 (1995) 1 SCC 85

plants existing in the State of U.P. have been noticed under the heading "Introduction". In response to this assertion, it has been averred by the RBI that full address and other particulars have not been disclosed. However during the course of oral submissions although it was not disputed that some plants did exist, it was contended that the majority of the members of IPPA and APP were situate outside the State. According to Sri Dwivedi only a few individual members of the two associations had manufacturing facilities with the State of U.P. and therefore the Court should throw out the petitions of IPPA and APP on this score alone.

65. While dealing with the issue of maintainability, this Court cannot rest its decision on the numerical strength of members of an association. It has to primarily consider whether cause of action, wholly or in part, has arisen within its territorial jurisdiction. Even if a singular plant is found to exist within the State of U.P. and is likely to be impacted by the impugned action, the same would constitute a material fact for adjudging the question of maintainability. While during the course of oral submissions Sri Dwivedi did address some additional facets of this objection relating to the number of members whose plans already stood rejected, those whose cases already stood referred under IBC, no such foundation or disclosure appears to have been laid or made in the affidavits filed by RBI in these proceedings. I therefore do not propose to take cognizance of this facet of the objection. Similarly it was urged that the petitions should have been preferred only where the registered or corporate offices of the members of IPPA and APP were situate since according to Sri Dwivedi the contracts between lenders

and banks are entered into by and at the registered or corporate offices. I note that the challenge in the present proceedings does not emanate or stand confined to the contractual arrangements between parties. It essentially relates to the alleged detrimental effect that the impugned directions would have on the businesses of the members of IPPA and APP. In view of all of the above, I would overrule the objection with respect to the maintainability of the petitions moved by IPPA and APP.

D. THE SUBMISSIONS OF THE PETITIONERS

66. Submissions on behalf of the petitioners were advanced by Sri A.M. Singhvi, Sri Sajjan Powaiyya and Sri Navin Sinha learned senior counsels. The petitioners primarily contend that RBI has proceeded to paint all stressed assets with one brush completely ignoring the sectoral concerns of the power industry as noticed in the 37th and 40th Standing Committee reports. It was submitted that the *"sector agnostic"* approach as adopted by the RBI is clearly violative of Article 14 of the Constitution. Much stress was laid upon the recommendations made by the Standing Committee in its 37th and 40th reports, which clearly recognised the problems of the power sector and which, according to the petitioners, required a separate and individualistic approach being adopted in respect of that sector. It was also contended that the impugned Circular since couched in mandatory terms clearly robs Banks and FI's of the discretion vested in them under the IBC. It was contended that a plain reading of the Directions clearly established that the Banks and FI's had no option but to initiate insolvency proceedings immediately on the expiry of the 180 day window. It was further submitted that the Circular caused grave and irreparable prejudice to the petitioners

since all existing plans of restructuring including those which may be in the process of being implemented stood completely rescinded and wiped out. The petitioners also laid great emphasis on the recommendations framed by the Committee constituted pursuant to the interim directions passed by this Court and the reports of the Standing Committees referred to above as well as the stand of the Union Government itself on the matter to buttress their prayer for the extension of the 180 day period. It was submitted that these reports constituted material evidence that could be relied upon by the Court. It was contended that in light of the recommendations contained in these reports, the petitioners were entitled to the grant of interim relief and all coercive action stayed till the matter is resolved by the HLEC.

67. The prayer for the extension of the 180-day period was also addressed in light of the provisions of section 12(4) of the IBC, which confers discretion on the Resolution Professional to seek extension of this period by a further 90 days. The petitioners contend that the moment proceedings under the IBC are initiated, certain irreversible and irretrievable steps stand initiated causing grave and irreparable harm to the petitioners. Referring to the measures which stand triggered immediately upon a petition being admitted under Section 7 of the IBC, it was submitted that the petitioners would clearly stand denuded of all rights and that their entire business would come to a grinding halt. It was also contended that the admission of the petition would clearly have a deleterious effect on the day to day functioning of the corporate debtor and also result in the suspension and rescission of all contracts including Power Purchase Agreements. Reference was also made

to the provisions of Section 29A which denudes the existing promoters or management from the right to submit a plan for resolution. In substance the submission was that since the admission of the petition under the IBC would trigger steps which are permanent and irrevocable, the ends of justice would merit all coercive actions being deferred till such time as the proceedings before the HLEC stand concluded. This line of submission was also addressed in light of the stated stand of the Union Government as embodied in the report of the Committee constituted under the orders of the Court, the oral submissions advanced by Shri Tushar Mehta, the learned ASG and in light of what is noticed hereinafter. In light of the submissions advanced by and on behalf of the Union Government by the learned ASG, the petitioners contended that the stand of the RBI refusing to budge from the prescribed time line was clearly arbitrary and warranted the intervention of this Court.

E. SUBMISSIONS OF THE UNION

68. The learned ASG submitted that the IBC was a valid piece of legislation and that the Union Government fully supports the amendments introduced in the 1949 Act. It was his submission that while recognising the concerns of the RBI with respect to the entertaining of sectoral representations, since the matter had been referred to the HLEC, action under IBC may be deferred. Sri Mehta, the learned ASG, has essentially submitted that no irreparable harm or prejudice would stand caused in case the Court were to restrain the initiation of any coercive steps or proceedings under the IBC till such time as the HLEC studies the entire matter and formulates its recommendations/policy.

69. On being specifically queried whether the Union Government was

contemplating issuance of directions in this respect by virtue of powers conferred upon it by Section 7 of the 1934 Act, the learned ASG gave no positive answer and remained ambivalent. The learned ASG also did not explain the absence of RBI from the HLEC nor could he justify the evident absence of the impugned directive being subject matter of the Terms of Reference. However the learned ASG did state that the Union would have no issue in inviting RBI to participate in the deliberations and placing their views. It was his categorical submission that in the fitness of things, RBI should be included in the process of deliberations that may take place before the HLEC.

F. SUBMISSIONS OF RBI

70. Shri Ravi Kadam, learned Senior Counsel, who advanced submissions on behalf of the RBI, submitted that the measures adopted by the RBI cannot be judged without appreciating the backdrop in which they came to be issued. Apprising us of the status of the banking sector of the country, he referred to the Gross NPA position of scheduled banks which, according to him, stood thus:

Sr. No.	Date	Gross NPA
1.	31.03.2017	Rs. 7,28,768 crores(equivalent to approx. 5% of India's GDP)
2.	30.09.2018	Rs. 7,90,649 crores
3.	31.03.2018	Rs. 9,62,621 crores

71. It was his submission that the measures adopted by the RBI must be viewed and tested in the background of the state of the banking sector of the country which was facing a huge crisis. He highlighted the fact that Gross

NPA's had only increased manifold despite the issuance of numerous directives by the RBI and the creation of various institutional resolution mechanisms. His submission was that the glaring fact that the gross NPAs, as on 31 March 2017 were equivalent to approximately 5% of the country's GDP, clearly justified the processes and steps initiated by RBI. According to Shri Kadam, in the absence of a continuous flow of credit from Banks, the economy and growth of the nation as a whole would be seriously impacted. RBI would contend that it was in the backdrop of the above factual position as prevailing that necessity was found justifying the imposition of a strict time frame for formulation and implementation of a RP and on its failure for initiation of insolvency resolution under the IBC.

72. It was also submitted that the initiation of proceedings under the IBC does not result in a closure of the corporate debtor. Reference was made to the provisions of Section 20 of the IBC to submit that a RP is required to keep the corporate debtor running as a *"going concern"*. On the strength of the provisions of Section 19, it was further submitted that in spite of the fact that the Board of Directors stand suspended, the corporate debtor continues to retain all employees and personnel with it. It was thus submitted that it would be wholly incorrect to contend that the business of the corporate debtor comes to a grinding halt on the mere admission of a petition under the IBC. It was then submitted that under Section 12, an adequate window of 270 days is provided for the adoption of a RP in respect of a corporate debtor. It was also submitted that in terms of section 14 (2), all essential services to the corporate debtor are continued. In view of the said provision,

it was submitted that the contention advanced on behalf of the petitioners that all contracts including Power Purchase Agreements would stand suspended or annulled, is untenable.

73. Shri Kadamb then explained the actions taken by the RBI commencing from the directions issued on 13 June 2017 explaining that the RBI had proceeded to unroll a process for insolvency resolution in a phased manner. The submission, in essence, was that the steps formulated and unrolled were not a knee jerk reaction but a well considered plan framed by RBI to address the issue of resolution of stressed assets. The Directions, in the submission of Shri Kadamb, put in place a harmonised and simplified framework to tackle stressed assets.

74. Dealing with the contentions and the direction dated 12 February 2018 being not in conformity with the Article 14, Shri Kadamb submitted that RBI is primordially concerned with the management and affairs of banks, banking activity, borrowing, lending and recovery of loans. It was his submission that the huge outstanding debts of Banks was an issue which had and was likely to have a titanic impact on the economy of the country and the larger public interest. According to Shri Kadamb, the framing of sector specific directions by RBI would itself be discriminatory since public debt and issues arising therefrom must be addressed on a uniform plane. It was contended that since RBI was a banking regulator, it is bound to treat all defaulters equally and can classify them only on basis and criteria, which is relevant and has nexus with the objectives of the IBC. According to Shri Kadamb, stress in a particular sector has no nexus with the object and

purpose of the IBC. Great stress was also laid upon the statutory mandate of the IBC to take immediate action in the event of default. Default or defaulters, according to Shri Kadamb, are liable to be treated alike under the law and action under IBC cannot be circumscribed or made to depend upon whether default is willful or genuine.

75. It was also submitted that the impugned directions were in essence, a policy measure framed by RBI, which is the primary regulatory and expert body on the subject. According to Shri Kadamb, interference by the Court with such a policy measure would only be warranted where it be found that the measure is so outrageous as to be in defiance of logic or moral standards or is manifestly unjust or designed to reach an unlawful end. Shri Kadamb in support of his submissions has also placed reliance upon the decisions of the Supreme Court in **Innoventive Industries Ltd.**[25] and a yet more recent decision rendered by the Supreme Court in **Chitra Sharma & Ors. Vs. Union of India & Ors**.[26] I shall deal with the two decisions referred to above in the subsequent parts of this order.

76. Shri Kadamb has then detailed the financial position and condition of Prayagraj Power Generation to submit that it was clearly not entitled to the grant of any interim relief. From the summary of arguments placed on record, I note that Prayagraj Power Generation was classified as NPA as far back as on 2 November 2016. The Sustainable Structuring of Stressed Assets Scheme[27] was invoked against it on 29 May 2017. The shares pledged by this particular company with its lenders, which constituted

25 2018 1 SCC 407
26 Writ Petition (Civil) No. 744 of 2017 decided on 9 August 2018
27 S4A

89.47% of its total share capital were invoked on 18 December 2017 and we are informed that the lenders propose to sell the equity owned by them to an identified investor. We were also informed that the total outstanding debt of this particular company as on 31 March 2018 amounted to approximately Rs.9997 crores. The Court was also apprised of a plan submitted by this petitioner for restructuring of its debts on 16 March 2018. Shri Kadamb also highlighted that there has been a deliberate suppression of a material fact by this petitioner since it has failed to disclose that the S4A had been invoked in its case unsuccessfully and that its proposal for restructuring had been rejected by its lenders on 7 May 2018. In light of the above, it was submitted that the petition was clearly a *"dressed up attempt"* by the entrenched management to continue its control over the corporate debtor even though the promoters today hold only 10.53% of its equity.

77. The attention of the Court was also drawn to the provisions of Section 12 A of the IBC to submit that even if an application was admitted under Section 7, in the event of a RP being approved by the Committee of Creditors, it would always be open for the withdrawal of insolvency proceedings on the application of 90% of the creditors holding a voting share equivalent to the said percentage in the Committee of Creditors.

78. Resuming arguments on behalf of RBI, Sri Rakesh Dwivedi, learned Senior Counsel, on merits explaining the scheme of Sections 35AA and 35AB, submitted that Section 35AA empowers the RBI upon being authorised by the Union Government to take action in specific cases of default. Section 35 AB on the other hand, according to Sri Dwivedi, was a

conferment of power in general terms empowering RBI to issue various directives relating to the resolution of stressed assets. The conferment of these powers, according to Sri Dwivedi, was primarily to enable and clothe the RBI with the requisite powers to deal with the issue of stressed assets in light of the statutory regime introduced and put in place upon promulgation of the IBC.

79. Sri Dwivedi has sought to impress upon the Court the state of the banking and financial sector of the country by highlighting the following facts:

(a) While the total gross NPAs constituted 2.51% of the total gross advances made by public sector banks as on March 2010, this percentage has increased substantially and as on March 2018, the total gross NPAs rose to 11.46% of the total gross advances.

(b) The total gross NPA percentage of electricity generating companies increased from 2.6% of the total gross advances as on March 2015 to 22.4% as on March 2018.

(c) The profitability of banks which stood at Rs. 52,638 crores as on March 2010 stood completely eroded and as on March 2018 banks faced a loss of Rs.24,820 crores.

(d) The total capital infusion in public sector banks by the Union Government from 2008-09 till 2018-19 stood at Rs.2,73,000 crores.

(e) The significant increase in infusion of budgeted capital in public sector

banks was highlighted with the aid of the chart appended as Annexure-4 to the Supplementary Affidavit.

80. Sri Dwivedi in essence submitted that RBI was constrained to initiate action and issue the impugned directive bearing in mind the above financial condition of the public sector banks. He submitted that the credit growth of public sector banks which stood at 19.72% in March 2010 stood reduced to 5.94% in March 2018. He sought to impress upon us the massive infusion capital by the Union Government in the banking sector which was necessitated in order to enable public sector banks to maintain the minimum level of regulatory capital. In the submission of Sri Dwivedi the Court cannot possibly turn a blind eye to these undisputed facts in the backdrop of which the impugned directive came to be issued.

81. Rebutting the submission advanced on behalf of the petitioners with respect to the stand of the Union and the recommendations of the Standing Committees, Sri Dwivedi's submissions were as follows. According to him the promulgation of IBC, the introduction of Sections 35AA and 35AB initially by way of the 2017 Ordinance, its replacement by the 2017 Amendment and the specific authorisation of the Union Government under section 35AA were themselves indicative of the principled decision of the Union Government to empower RBI to take emergent steps for the resolution of stressed assets. Sri Dwivedi referred to the amended Preamble of the 1934 Act to highlight the stated will of Parliament to clothe RBI with the requisite powers and authority to frame monetary policy in order to meet the challenges of an increasingly complex global economy as also to lay

down a broad monetary policy framework to maintain price stability bearing in mind the objective of growth of the nation. Sri Dwivedi further laid stress upon the provisions of Section 7 of the 1934 Act to contend that this provision lays down a statutory mechanism for resolution of any differences of opinion between the Union Government and RBI. In the submission of Sri Dwivedi, Section 7 embodies and puts in place a forum for resolution of all questions and is in one sense the repository mechanism for dealing with issues which constitute a "conflict zone". In the submission of Sri Dwivedi the very fact that the Union Government has not invoked the powers conferred by Section 7 clearly establishes that there is no conflict and that at least the powers exercised by RBI are not found fault with.

82. Sri Dwivedi then turning to the recommendations made by the committee constituted pursuant to the interim order of the Court as well as the Standing Committees submitted that they were merely in the nature of advice. It was submitted that the reports of the committees had not been utilized for the issuance of any statutory directions or suggested amendments to the existing statutory regime. Sri Dwivedi also highlighted the inherent peril attached to the Court adopting the recommendations of these committees if ultimately the Union Government decided not to accept those reports. It was contended that no occasion arises for this Court to mandate a change or modulation in the policy framed by the RBI or to substitute its own prima facie view in respect thereof even before the Union Government were to act upon or accept the recommendations contained in these reports. The submission of Sri Dwivedi in essence was that the Courts while dealing

with such complex fiscal issues must adopt a *"hands off"* approach and leave it for respective governmental authorities and statutory functionaries to initiate the consultative process contemplated under Section 7 of the 1934 Act.

83. Turning to the impugned directive, Sri Dwivedi submitted that the same could clearly not be considered as being violative of Article 14 of the Constitution. Far from being prejudicial, Sri Dwivedi submitted that the same creates a breathing space for the management of the corporate debtor and its creditors to resolve all issues. The directive, according to the learned senior counsel, was in one sense a window created by the RBI to enable a speedy resolution of stressed assets.

84. Sri Dwivedi further countered the argument of a prejudicial impact of the impugned directive by submitting that the circular could not possibly be read as undoing all processes of restructuring which may have either been set in motion or completed under the institutional mechanisms as existing prior to 12 February 2018. Referring to Clause 18 of the impugned directive, Sri Dwivedi submitted that all that stood altered consequent to the promulgation of the directive was that steps for restructuring initiated or adopted earlier would be governed by the revised framework. Elaborating his submissions in respect of the impugned directive Sri Dwivedi submitted that the discretion of banks to invoke IBC had neither been fettered not taken away. All that was sought to be introduced by the impugned directive, according to the learned senior counsel, was to highlight and underline the inherent need for banks and FI's to initiate a RP with expediency. Explaining

the Footnote to Paragraph 8 Sri Dwivedi submitted that the same was neither intended nor liable to be read as a provision compelling banks and FIs to initiate a RP without waiting for the 180 day period. According to the learned Senior Counsel, the concerned Footnote was placed as a matter of abundant caution to leave the respective banks free to deal with cases of chronic debtors and defaulters whose cases may have already been found to be unviable.

85. Sri Dwivedi has then reiterated the submissions advanced by Sri Kadamb earlier relating to IBC to contend that action under the Code cannot be read as being prejudicial to the interests of the corporate debtor which is to be continued as a *"going concern"*. It was also highlighted that in the absence of any challenge to the scheme and the provisions of IBC it cannot possibly be contended that it causes prejudice or irreperable loss. The contention of the petitioners that the processes initiated upon its invocation would result in a closure of operations or the death of the corporate debtor was also countered with the aid of the relevant provisions of the IBC which have been noticed while detailing the submissions of Sri Kadam. Taking us through the scheme and relevant provisions of the IBC it was contended that the very essence of the Code is to formulate a RP for the stressed asset and if found viable to ensure its resurrection.

86. Sri Dwivedi has further underlined the fact that the RBI by the very nature of its position as a central bank of the country is unlike any other regulator. He drew our attention to the provisions of the 1934 and 1949 Acts to highlight the vast panoply of powers conferred on and vested in the RBI

to enable it to discharge its myriad functions as the primary monetary regulator of the nation. Sri Dwivedi stressed that the decisions taken by such a body should not ordinarily be interfered with unless they are found to be palpably arbitrary as also bearing in mind the principles of judicial restraint which must be exercised in respect of economic and fiscal policies.

87. Turning then to the prayer of the petitioners for the grant of interim relief, it was submitted that the grant of injunction in any form would seriously impact the measures formulated by RBI and have a cascading detrimental effect on the processes initiated under the impugned directive. It was further submitted that both IPPA as well as APP had abjectly failed to disclose any material facts in respect of their particular members, on the basis of which, the prayer for interim relief could possibly be considered. According to Shri Dwivedi, there could possibly be no blanket order of restraint, unless requisite facts are disclosed before this Court. Turning then to the individual facts of Prayagraj, Shri Dwivedi reiterated that this particular petitioner had remained a NPA right from 2016. Even today, it was pointed out that no specific revival proposal had been submitted, on the basis of which, it could be prima facie held that this petitioner was entitled to interim protection.

88. Drawing our attention to the last proposal submitted by Prayagraj, it was pointed out that the same also only envisaged the petitioner obtaining further loans from a new creditor in order to liquidate its outstanding dues partly. It was also brought to our attention that the proposed credit facility offered to the petitioner was itself subject to the condition that the new creditor would

be granted an overriding charge over its assets, thus, diminishing the position of its existing lenders. It was then submitted that the proposed sale of shares would also not get short circuited in light of the express provisions of the IBC. Elaborating on this aspect, Shri Dwivedi referring to the provisions of Section 14 of the IBC, submitted that the moratorium which would come into operation upon a petition being admitted would clearly not apply since the security interest created by this petitioner had already been enforced and foreclosed. Shri Dwivedi submitted that upon the enforcement of the security interest, the management clearly stood divested of ownership and title over approximately 90% of its share capital. Our attention was also drawn to the provisions made in Section 28, in terms of which, according to Shri Dwivedi, the sale of shares even under the existing proposal would not stand annulled and would be subject only to the Resolution Professional obtaining the prior approval of the Committee of Creditors. Since, according to Shri Dwivedi, this process of negotiation of the proposed sale of shares would not stand evaporated merely on proceedings under IBC being initiated, there arose no occasion for this Court to grant any interim relief. Shri Dwivedi then rested his case on Section 12A to submit that in any view of the matter, it would always be open to the financial creditors to withdraw from the IBC, in case, the proposal was accepted.

89. Addressing the submission advanced with respect to the notifications of CRA's, Shri Dwivedi contended that a careful reading of paragraph 6 of the impugned directive would establish that the independent credit evaluation is not a pre-condition for the submission of a RP. It was contended that the

independent credit evaluation of residual debt is connected with implementation and is not a condition for its initial acceptance. The credit evaluation, according to Shri Dwivedi, comes into play only at a stage where the financial creditors proceed to consider the viability of the RP. In view of above, it was submitted that the contention that the period of 180 days should commence only from 21 May 2018, would not commend acceptance. In the end, Shri Dwivedi submitted that the jurisdiction of the Court had been ill-advisedly invoked since no factual foundation had been laid and that in any view of the matter, the petitioners did not stand prejudiced.

90. Turning then to the formation of the HLEC, Shri Dwivedi referred to its Terms of Reference (TOR) to contend that the impugned directive did not form subject matter of consideration at all. In light of this it was submitted that the prayer for the implementation of the directive being deferred clearly did not merit consideration.

91. Although the present order in light of the submissions of parties is only dealing with the entitlement of the petitioners to the grant of interlocutory relief, bearing in mind the fact that elaborate submissions have been advanced, I proceed to deal with the same and record my *prima facie* opinion in respect thereof hereinafter.

92. The submissions of the petitioners primarily rest on two pillars:-

(a) The 37th and 40th reports of the Standing Committee and

(b) The irreversible prejudice and loss that shall be caused in case proceedings are initiated under the IBC.

G. THE STANDING COMMITTEE REPORTS

93. Insofar as reliance placed on the recommendations and findings contained in the report submitted by the Standing Committee are concerned, the petitioners seek to draw sustenance from the recent decision rendered by the Constitution Bench of the Supreme Court in **Kalpana Mehta Vs. Union of India**[28]. On the strength of this decision, it is submitted that the reports of the Standing Committees of Parliament can be taken note of by the Court and in light of the findings recorded therein this Court must invoke its extraordinary jurisdiction and issue interim directions which would be in tune with the recommendations embodied in those reports. This submission *prima facie* would not commend acceptance for the following reasons.

94. The Constitution Bench in **Kalpna Mehta** has lucidly explained the purposes for which the report of a Standing Committee may be relied upon. These have been identified to be to understand the backdrop in which legislation has come to be passed, for interpreting the meaning of a statutory provision where it is ambiguous or unclear or for that matter to appreciate the mischief, which Parliament sought to address. The issue however, in the present case is slightly distinct since what the petitioners contend essentially is for this Court to issue a prerogative writ based upon what is recorded in the reports of the Standing Committee. In my considered opinion, while reliance upon the report of a Parliamentary Committee for the purposes noticed above is one thing, the exercise of power by a constitutional Court based solely upon the recommendations contained in such reports would be a wholly different matter.

95. As is evident from a reading of Rule 277 of the **Rules of Procedure**

28 (2018) 7 SCC 1

and Conduct of Business in the Lok Sabha, a report of a Standing Committee is only enjoined to have persuasive value and is entitled to be treated as considered advise given by the Committee. This Court also cannot loose sight of the fact that the stand of the RBI has been consistently opposed to the acceptance of the recommendations as framed by the Standing Committee. The advice tendered by the Standing Committee is yet to be accepted by Parliament and undisputedly no statutory measure or provision has been made or adopted to give effect to the same. The two reports relied upon by the petitioners have also not moved the Union Government itself to issue any directives or to initiate the consultative process as envisaged under Section 7 of the 1934 Act. As I noted while recording the submissions of the learned ASG, the Union Government remained unequivocal and ambivalent on whether it was even considering the exercise of these statutory powers. However, since the stated stand of the Union before us has been in favour of extension of the 180 day period, perhaps the Union must therefore be called upon to render serious thought on this aspect.

96. I also cannot loose sight of the stated stand of the Ministry of Finance which was noted in the following terms by the **Standing Committee in its 40th Report**:-

> "....various special resolution schemes introduced by RBI were used by lenders more to address asset classification concerns rather than to effectively resolve stressed assets. An internal review of SDR and S4A schemes, which provided asset classification benefits to banks, revealed that their adoption rate among eligible borrowers was less than 20% and in case of SDR, the success rate was close to zero where implemented, indicating that the schemes were not really used for resolution of stressed assets.
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RBI has stated that default is a lagging indicator of financial stress in a borrower's account. The framework provides for 180 days after the lagging indicator to cure the stress, in the case of borrowers with aggregate exposure of Rs. 2,000 crore and above, failing which insolvency resolution process under IBC will be triggered, which provides for another 270 days for resolution. Lenders need to be proactive in monitoring their borrowers and be able to identify financial stress using a combination of leading indicators and renegotiation points in the form of loan covenants, rather than wait for a borrower to default. Such early identification of stress and loan modifications in response would provide sufficient time for lenders to put in place the required resolution plan"

97. Similarly it noticed the response of the Rural Electrification

Corporation and RBI in the following terms: -

REC RESPONSE

"JLF was an inefficient tool for resolution of stressed assets due to various inter-creditor issues,

- Lenders' efforts were driven by minimization of provisioning rather than focussing on recovery/ asset resolution,
- Weak regulatory response to change in costs aggravated cashflow stress.

RBI RESPONSE

"one day default does not result in reference to NCLT at all. We have mentioned the 90 days definition for NPA classification as it is. What we have said is that one day default should set in motion a process to deal with the problem. From that day, within 180 days, the problem should be solved. If the problem is solved within 180 days, the case does not go to NCLT."

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International research has shown that higher and quicker build up of provisions helps in faster resolution of stressed assets. The stressed assets include throughout the sector, throughout the economy. The infusion of capital by the Government of India has been timed well to enable the banks to manage the transition while not breaching any regulatory capital limits. It is a requirement when we are in the international capital market. We have to follow the rules that the rest of the world follows. We cannot be having separate rules for the banking system which is integrated with the rest of the world. If you include the budgeted amount for this year over the last four years, the capital infusion into our banks will be Rs.2,15,000 crore, if my calculation is correct. The Reserve Bank also committed to facilitate a smoother transition as much as prudentially possible. In particular banks were given additional time to make provisions for cases referred under IBC on the RBI direction which would include the power assets. It must be stressed that as a result of the above measures, none of our public sector banks barring one is in breach of the regulatory capital requirement of nine per cent of capital adequacy ratio as on March 31, 2018 in spite of recognizing much higher level of NPAs.

> These NPAs were always there. We are now recognizing them. Further, it is expected that the banks will have sufficient avenues to raise additional capital so as not to face any capital constraints. As I just mentioned, the Government has budged Rs.65,000 crore for additional capital infusion in 2018-19 alone which can be front-loaded. Further, post re-capitalization, the scope for PSBs to raise additional market borrowings continue.These measures are expected to assist the PSBs in complying with the regulatory capital requirements and in case of healthier PSBs to also have growth capital. Since substantial parts of stressed assets have been recognized and reasonably provisioned, any further accretion to capital is expected to help any further asset quality stress in the short run and hopefully and eventually support credit growth in the medium to long term while preserving the financial health of our public sector banks. Overall, therefore, we are of the view that the banking system in general including the PSBs is getting stronger with the regulatory and transparency measures undertaken by the RBI and other regulators. The legislative changes brought about through the enactment of IBC and the amendments that have taken place as recently as last week and the financial support to the public-sector banks by the Central Government goads well for the sector."

98. The response of the Ministry of Finance before the Standing Committee when contrasted with the submission of the learned ASG advanced before us leads me to decipher and notice a subtle shift and change in position. While before the Standing Committee it was urged that the existing measures had proved to be ineffective and lenders needed to be proactive, the learned ASG submitted that the Union was in favour of extension of time even though it was in agreement with the basic and underlying intent of the impugned directive as well as the powers vesting in the RBI to deal with the subject of resolution of stressed asset. In fact the directive appears to be aimed at infusing a sense of urgency to initiate a resolution process since in the experience of RBI, the earlier schemes were not effective and result oriented.

99. Reverting to **Kalpana Mehta** this Court notes that the Constitution Bench further also dealt with the question of what would be the persuasive or binding character of Parliamentary Reports when a factual finding

recorded therein is challenged or disputed. In my respectful view, **Kalpana Mehta** cannot be read as having laid down a proposition that even in a circumstance where there is a challenge to the recommendations contained in a report of the Standing Committee, the same would be liable to be *ipso facto* applied and accepted. This is evident from the extracts of the decisions of the Constitution Bench which are referred to hereinafter.

100. The Hon'ble Chief Justice of India who was joined by A.M. Khanwilkar, J. dealt with this aspect in the following manner:

> "**95.** Rule 274(3) is extremely significant, for it provides that the report of the Committee together with the minutes of the dissent, if any, is to be presented to the House. Rule 277 stipulates that the report is to have persuasive value. In this context, Rule 277 is worth quoting:-
>
> > 277. Reports to have persuasive value.— The report of a Standing Committee shall have persuasive value and shall be treated as considered advice given by the Committee.
>
> The aforesaid rule makes it quite vivid that the report of the Committee is treated as an advice given by the Committee and it is meant for the Parliament.
>
> **135.** Further, it is quite vivid on what occasions and situations the Parliamentary Standing Committee Reports or the reports of other Parliamentary Committees can be taken note of by the Court and for what purpose. Relying on the same for the purpose of interpreting the meaning of the statutory provision where it is ambiguous and unclear or, for that matter, to appreciate the background of the enacted law is quite different from referring to it for the purpose of arriving at a factual finding. That may invite a contest, a challenge, a dispute and, if a contest arises, the Court, in such circumstances, will be called upon to rule on the same."

> **143.** In the case at hand, the controversy does not end there inasmuch as the petitioners have placed reliance upon the contents of the parliamentary standing committee report and the respondents submit that they are forced to controvert the same. Be it clearly stated, the petitioners intend to rely on the contents of the report and invite a contest. In such a situation, the Court would be duty bound to afford the respondents an opportunity of being heard in consonance with the principles of natural justice. This, in turn, would give rise to a very peculiar situation as the respondents would invariably be left with the option either to: (i) accept, without contest, the opinion expressed in the parliamentary standing committee report and the facts stated therein; or (ii) contest the correctness of the opinion of the

parliamentary standing committee report and the facts stated therein. In the former scenario, the respondents at the very least would be put in an inequitable and disadvantageous position. It is in the latter scenario that the Court would be called upon to adjudicate the contentious facts stated in the report. Ergo, whenever a contest to a factual finding in a PSC Report is likely and probable, the Court should refrain from doing so. It is one thing to say that the report being a public document is admissible in evidence, but it is quite different to allow a challenge.

144. It is worthy to note here that there is an intrinsic difference between parliamentary proceedings which are in the nature of statement of a Minister or of a Mover of a bill made in the Parliament for highlighting the purpose of an enactment or, for that matter, a parliamentary committee report that had come into existence prior to the enactment of a law and a contestable/conflicting matter of "fact" stated in the Parliamentary Committee report. It is the parliamentary proceedings falling within the former category of which Courts are enjoined under Section 57, sub-section (4) to take judicial notice of, whereas, for the latter category of parliamentary proceedings, the truthfulness of the contestable matter of fact stated during such proceedings has to be proved in the manner known to law."

101. Similarly D.Y. Chandrachud, J. in his opinion observed thus:

"**265.** There may, however, be contentious matters in the report of a Parliamentary Committee in regard to which the court will tread with circumspection. For instance, the report of the committee may contain a finding of misdemeanor involving either officials of the government or private individuals bearing on a violation of law. If the issue before the court for adjudication is whether there has in fact been a breach of duty or a violation of law by a public official or a private interest, the court would have to deal with it independently and arrive at its own conclusions based on the material before it. Obviously in such a case the finding by a Parliamentary Committee cannot constitute substantive evidence before the court. The parliamentary committee is not called upon to decide a lis or dispute involving contesting parties and when an occasion to do so arises before the court, it has to make its determination based on the material which is admissible before it. An individual whose conduct has been commented upon in the report of a parliamentary committee cannot be held guilty of a violation on the basis of that finding. In Jyoti Harshad Mehta v The Custodian, (2009) 10 SCC 564, this Court held that a report of the Janakiraman committee could not have been used as evidence by the Special Court. The court held:

> "57. It is an accepted fact that the reports of the Janakiraman Committee, the Joint Parliamentary Committee and the Inter-Disciplinary Group (IDG) are admissible only for the purpose of tracing the legal history of the Act alone. The contents of the report should not have been used by the learned Judge of the Special Court as evidence."

102. Ashok Bhushan J. while dealing with the issues which would arise

where the report of a Parliamentary Committee is questioned or impeached observed thus:

> "**393.** We are of the view that the law as broadly expressed in paragraph 58 of the above case cannot be accepted. All references to Parliamentary proceedings and materials do not amount to breach of privilege to invite contempt of Parliament. When a party relies on any fact stated in the report as the matter of noticing an event or history no exception can be taken 91 on reliance on such report. However, no party can be allowed to "question" or "impeach" report of Parliamentary Committee. The Parliamentary privilege that it shall not be impeached or questioned outside the Parliament shall equally apply both to a party who files claim in the court and other who objects to it. Both parties cannot impeach or question the report. In so far as the question of unfair disadvantage is concerned, both the parties are fee to establish their claim or objection by leading evidence in the court and by bringing materials to prove their point. The court has the right to decide the 'lis' on the basis of the material and evidence brought by the parties. Any observation in the report or inference of the Committee cannot be held to be binding between the parties or prohibit either of the parties to lead evidence to prove their stand in court of law. Unfair disadvantage stands removed in the above manner."
>
> **411**. In the above judgment, this Court has referred to Parliamentary Standing Committee Report in paragraphs 14 and 16. In paragraph 21 it was held that opinion of the Parliamentary Standing Committee would not be sacrosanct. In paragraph 21 following observation was made:
>
> "21….The view of the Parliamentary 107 Standing Committee with regard to the expediency of the Search/Selection Committee taking decisions when vacancy/vacancies exists/exist is merely an opinion which the executive, in the first instance, has to consider and, thereafter, the legislature has to approve. The said opinion of the Parliamentary Standing Committee would therefore not be sacrosanct. The same, in any case, does not have any material bearing on the validity of the existing provisions of the Act."
>
> **448**. The apprehension of the respondents that their case shall be prejudiced if this Court accepts the Parliamentary Committee report in evidence, in our opinion is misplaced. By acceptance of a Parliamentary Committee report in evidence does not mean that facts stated in the Report stand proved. When issues, facts come before a Court of law for adjudication, the Court is to decide the issues on the basis of evidence and materials brought before it and in which adjudication Parliamentary Committee Report may only be one of the materials, what weight has to be given to one or other evidence is the adjudicatory function of the Court which may differ from case to case. The Parliamentary Committee reports cannot be treated as conclusive or binding of what has been concluded in the Report. When adjudication of any claim fastening any civil or criminal liability on an individual is up in a Court of law, it is open for a party to rely on all evidences and materials which is in its power and Court has to decide the issues on consideration of entire material brought before it. When the Parliamentary Committee report is not adjudication of any civil or criminal liability of the private 133 respondents, their fear that acceptance of report shall prejudice their case is unfounded. We are, thus, of the opinion that by accepting Parliamentary Committee report on the record in this case and considering the Report by this Court, the respondents' right to dispel conclusions and findings in the Report are not taken away and they are free to prove their case in

accordance with law."

103. From the above, it is clear that the proposition as broadly framed and advanced on behalf of the petitioners namely, the Standing Committee reports being conclusive evidence of facts and entitled to be relied upon for the purposes of issuance of directions even if there be a contest in respect of the correctness of the recommendations or findings recorded therein cannot be accepted. As held in **Kalpana Mehta** once there is a contest, it is for the Courts to evaluate and consider what would be the true facts. **Kalpana Mehta,** in the respectful opinion of this Court, cannot be read as holding that once a particular recommendation or finding comes to be recorded in the report of a Standing Committee, it must be accepted and acted upon *per se* and of its own. While it is true that the Standing Committee on Energy has gone into the issues faced by the power sector in general and has also commented upon the merits of the directions issued by the RBI, these findings or recommendations alone cannot be read as overriding the view taken and adopted by the RBI.

H. IBC AND THE ARGUMENT OF IRREVERSIBLE PREJUDICE

104. I then turn to the submissions addressed on behalf of the petitioners with regard to a *fait accompli* occurring immediately upon proceedings being initiated under the IBC. In order to appreciate this submission this Court must bear in mind the fact that IBC represents, as has been described by the Supreme Court itself, a *"paradigm shift"* in respect of treatment and restructuring of stressed assets. As is evident from a reading of the SOR of IBC, the legislation itself was framed since Parliament found that the existing framework for insolvency and bankruptcy was inadequate,

ineffective and resulted in undue delays in resolution. It was in that backdrop that the Parliament felt the need to introduce new legislation which would establish an effective legal framework for timely resolution of insolvency and bankruptcy. In a significant decision rendered by the Supreme Court in **Innoventive** at a stage when the IBC had just recently been promulgated, the report submitted by the Bankruptcy Law Reforms Committee [Reforms Committee] as well as the statement of the Finance Minister made while piloting IBC in Parliament were taken note of. The Finance Minister while placing the proposed legislation for consideration of Parliament clearly stated that the proposed legislation (IBC) would essentially change the principle of the debtor being in possession over the assets and transferring the same to the creditor. The Reforms Committee noticed the contract between equity and debt underlying the existence of a limited liability company. It went on to observe that while the equity owners must be granted complete control as long as debt obligations are met, when a default takes place control must stand transferred to the creditors and then equity owners can have no say. It noticed the position in India of promoters continuing to stay in control of the company even after the default. Dealing with the same it went on to hold that in case of a defaulting firm appropriate disposition in respect thereof is a business decision which only the creditor should be permitted to make. The relevant extracts of the Reforms Committee report read thus:-

> "The Committee believes that there is only one correct forum for evaluating such possibilities, and making a decision: a creditors committee, where all financial creditors have votes in proportion to the magnitude of debt that they hold. In the past, laws in India have brought arms of the government (legislature, executive or judiciary)

> into this question. This has been strictly avoided by the Committee. The appropriate disposition of a defaulting firm is a business decision, and only the creditors should make it.
>
> X X X X X
>
> Control of a company is not divine right. When a firm defaults on its debt, control of the company should shift to the creditors. In the absence of swift and decisive mechanisms for achieving this, management teams and shareholders retain control after default. Bankruptcy law must address this."

105. After noticing the backdrop in which the IBC came to be promulgated, the Supreme Court in **Innoventive** observed:-

> "33. Under Section 30, any person who is interested in putting the corporate body back on its feet may submit a resolution plan to the resolution professional, which is prepared on the basis of an information memorandum. This plan must provide for payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the plan, and implementation and supervision of the plan. It is only when such plan is approved by a vote of not less than 75% of the voting share of the financial creditors and the adjudicating authority is satisfied that the plan, as approved, meets the statutory requirements mentioned in Section 30, that it ultimately approves such plan, which is then binding on the corporate debtor as well as its employees, members, creditors, guarantors and other stakeholders. Importantly, and this is a major departure from previous legislation on the subject, the moment the adjudicating authority approves the resolution plan, the moratorium order passed by the authority Under Section 14 shall cease to have effect. The scheme of the Code, therefore, is to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency, to continue the business of the corporate body as a going concern until a resolution plan is drawn up, in which event the management is handed over under the plan so that the corporate body is able to pay back its debts and get back on its feet. All this is to be done within a period of 6 months with a maximum extension of another 90 days or else the chopper comes down and the liquidation process begins."

106. The Court must bear in mind that there is no challenge to the provisions or the underlying scheme of the IBC. It clearly enjoins a banking or a financial institution to initiate the resolution process upon a default having occurred. As has been rightly pointed out by Sri Kadam, the learned Senior Counsel, all that happens upon the admission of a petition under Section 7 and a moratorium having come into operation is the removal and suspension of the management and the Board of Directors. The corporate

debtor continues to exist and is also run as a going concern albeit by a Resolution Professional. The employees and officers of the corporate debtor are also retained. Even the contractual arrangements between the corporate debtor and others do not stand annulled. The corporate debtor ceases to exist only when it is found that resolution is not possible and proceedings for its liquidation are initiated. The core scheme of the IBC appears to be timely identification of default, implementation of a resolution plan with expedition, suspension and removal of the existing management, their replacement by a Resolution Professional and the Committee of Creditors thus enabling the adoption of timely measures so that the quality of the stressed asset does not deteriorate. The submission therefore that the initiation of the proceedings under the IBC amounts to a death knell for the corporate debtor is clearly misconceived. In fact the submission of prejudice flies in the face of the basic ethos underlying IBC itself. It is the statutory code which mandates the removal of existing management and the takeover of the corporate debtor by the Resolution Professional. This statutory mandate is designed to be set in motion the moment there is a default. The foundational mandate of IBC is the expeditious take over of the corporate debtor on default and to implement a RP. That a default has occurred is not disputed before us. The conceptual and tectonic shift in the statutory regime cannot be reversed or halted.

107. Insofar as the impact of existing restructuring proposals or initiatives triggered prior to 12 February 2018, as rightly pointed out by Sri Dwivedi, these measures do not stand “evaporated” but are merely to be continued

and processed in accordance with the impugned directive. This the Court notes notwithstanding that in the IPPA and APP proceedings there is no disclosure whatsoever of any existing restructuring proposal being jeopardized. The independent factual position of Prayagraj Power Generation shall be dealt with independently in the subsequent parts of this order.

108. The Court also notes that from an ex facie reading of the impugned directive it is evident that the period of 180 days provided therein is in addition to the total period of 270 days prescribed under the IBC.

I. THE ARTICLE 14 ARGUMENT

109. On a consideration of the rival submissions advanced on this aspect, I prima facie find merit in the contention advanced on behalf of RBI. The RBI in its position as the central bank of the country is primordially concerned with issues such as the formulation of monetary policy, public debt, the condition of banks and FI's and the health of the finances of the country. It is essentially charged with the formulation of *"banking policy"* designed in the interest of the banking system, monetary stability and sound economic growth. The Court also bears in mind the significant amendments made to the SOR of the 1934 Act as amended in 2016 which reads thus:-

> **"RESERVE BANK OF INDIA ACT, 1934**
> [Act No. 2 of 1934 amended upto Act No. 28 of 2016]
> **PREAMBLE**
> An Act to constitute a Reserve Bank of India.
>
> Whereas it is expedient to constitute a Reserve Bank for India to regulate the issue of Bank notes and the keeping of reserves with a view to securing monetary stability in [India] and generally <u>to operate the currency and credit system of the country to its advantage</u>;
>
> <u>AND WHEREAS it is essential to have a modern monetary policy framework to meet the challenge of an increasingly complex economy;</u>

> AND WHEREAS the primary objective of the monetary policy is to maintain price stability while keeping in mind the objective of growth;
>
> AND WHEREAS the monetary policy framework in India shall be operated by the Reserve Bank of India;**”**

110. RBI is obliged to frame monetary policy having due regard to the interest of depositors as well as the efficient use of deposits and resources, the complexities of the modern interconnected global economy and the needs of fundamental growth of the nation as a whole. In substance RBI is obliged to take a macro look at the financial condition and fiscal position of the nation as a whole. It is really not concerned with the formation of ameliorative or protective measures for a particular industry/sector. When it proceeds to formulate monetary policy, it does so primarily bearing in mind the state of the financial institutions of the country, the position of debt and other germane issues touching upon monetary stability and the efficient deployment and utilization of credit. Ultimately whether a modulation of the terms of the impugned directive is merited is a subject that should be left for the consideration and expertise of RBI. In any view of the matter, the Court notes the provisions of section 7 of the 1934 Act which embodies the consultative mechanism to be initiated in case the appropriate authorities do feel the need for amendment or modulation of the policy measure. This exercise must be left to be initiated and undertaken by the respective authorities. However, if the two organs are at variance, the Union should consider whether the circumstances warrant the initiation of the consultative process.

111. The submission of Sri Kadam that there could be a challenge raised

against the RBI itself in case it were to frame policies on a sectoral basis also merits consideration. On the whole, the submissions advanced on behalf of RBI in response to the argument of a violation of Article 14 cannot be brushed aside lightly at this stage.

J. JUDICIAL DEFERENCE

112. While dealing with the challenge to the impugned directions, this Court necessarily recognises the position of preeminence that RBI enjoys by virtue of being the central bank of the country. RBI is the primary body which is charged with the framing of banking policy for the nation. When such an expert body proceeds to frame directions by exercising the statutory powers entrusted to it, the Court must necessarily examine the extent to which it can possibly or should interfere and tinker with such a policy on merits while exercising its jurisdiction of judicial review under Article 226 of the Constitution. It cannot possibly be disputed that the framing of monetary measures, creation of fiscal policy or management of debt is a highly sensitive and complex exercise. It is in that context that the principles of *"judicial self restraint"* and *"judicial deference"* have been formulated. It also raises the important issue of *"institutional competence"*. The parameters of judicial review which must apply in such a situation have been duly noticed in **Chitra Sharma** based upon a long line of precedents starting from **R.K. Garg Vs. Union of India**[29]. Dealing with the scope of judicial review and more particularly with regard to the directions framed by the RBI, the Supreme Court made the following pertinent observations in **Peerless General Finance and Investment Co. Ltd. Vs. RBI**[30]**:**

29 (1981) 4 SCC 675
30 (1992) 2 SCC 343

> "74. It is well settled that the court is not a Tribunal from the crudities and inequities of complicated experimental economic legislation. The discretion in evolving an economic measures, rests with the policy makers and not with the judiciary.....
> The Act assigns the power to the RBI to regulate monitory system and the experimentation of the economic legislation, can best be left to the executive unless it is found to be unrealistic or manifestly arbitrary. Even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibilities from those on whom a democratic society ultimately rests......."

113. Again in **Bhavesh D. Parish Vs. Union of India**[31], dealing with the validity of Section 45 S of the 1934 Act and the powers of the RBI, the Supreme Court observed:

> **"**26. ……….But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with. The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all.**"**

114. Having noticed the parameters of judicial review which must necessary be borne in mind, I am of the considered opinion that at this stage and on a *prima facie* evaluation, the impugned directions cannot be said to be so patently arbitrary or in defiance of logic so as to be tampered with presently and at the interim stage.

K. WHETHER THE PETITIONERS HAVE MADE A CASE FOR INTERIM RELIEF

115. Ultimately, the grant of interim relief in all cases must necessarily be considered on the strength of individual facts placed before a Court of law. It is incumbent upon the petitioners to establish the existence of a strong

31 (2000) 5 SCC 471

prima facie case, balance of convenience and irreparable loss. The position in Prayagraj Power Generation has been amply demonstrated by the respondents. This petitioner has been a NPA right from 2016. Its case for restructuring was duly considered under the S4A and ultimately found unviable. Its second plan of restructuring submitted in March 2018 has already been turned down by the creditors in their meeting held on 7 May 2018. Almost 90% of its shareholding which stood pledged with its lenders has already been invoked. Its outstanding dues and recoverable owed to the lenders as on 31 March 2018 stands at Rs. 9997 Crores. If the RBI therefore, takes the position that the resolution process in respect of this corporate debtor cannot be delayed beyond the time frame stipulated by it and must be addressed with expedition, I find no fault in the same. After all moneys due and recoverable from the petitioner is public debt. I also bear in mind that this petitioner has even before us not referred to any restructuring proposal which could be said to be pending. Its last proposal was itself based on the said petitioner taking on further debt. One of the pre conditions to this proposal was for the existing lenders ceding their charge over its assets and making it subservient to that of the new creditor. This proposal has already been turned down by the lenders. The lenders who have now stepped into the position of shareholders seek to recover their dues by sale of their equity for which an investor has already been identified. On the individual facts as have been placed before us and which are not disputed, it is evident that no relief in the interim is liable to be granted to the said petitioner.

116. Insofar as the members of IPPA and APP are concerned, it is pertinent

to note that the writ petitions neither carry nor disclose the financial status or outstanding of any individual member. None of the lender banks have been arrayed as party respondents in these three writ petitions. The Court has therefore had no occasion to consider the views of the lenders in respect of the prayer for interim relief as claimed. The petitions of IPPA and APP also carry no details of any individual restructuring plans, which may be jeopardized. Our attention has also not been invited to any coercive measure that may have been adopted or taken by any of the lender Banks. The challenge to the impugned direction is in one sense addressed and canvassed in the abstract. We have also not been apprised of the financial position of any of the members of IPPA and APP so as to evaluate the merits of their claim for grant of interim relief. The absence of disclosure with regard to the financial status of the individual members or the views of the lenders themselves being placed before this Court is a circumstance, which weighs heavily against them when considering the issue of grant of interim relief.

117. The oral submission which was addressed for the consideration of the Court was that in many cases restructuring plans were in the process of being implemented or formulated and that the impugned directive would result in these measures being effaced completely. This Court is constrained to note that at least in the IPPA and APP petitions, no details whatsoever of any such restructuring processes having been set in motion in respect of their members have been disclosed.

118. Insofar as the case of Prayagraj Power Generation is concerned Sri Navin Sinha learned senior counsel has additionally referred to the

acceptance of a proposal by a corporate entity to purchase the equity held by the lenders. It was submitted that although all the lenders have accepted this proposal in principle, it has been clearly noted that formalities to be completed with the identified purchaser would require at least three months. According to this petitioner even this proposal shall be set at naught in light of the directives of the RBI.

119. However as rightly submitted by Sri Dwivedi, this proposal shall neither stand shelved nor shall it stand effaced even if proceedings were initiated against this petitioner under IBC. Firstly, since the equity and the security interest created thereon already stands invoked, the moratorium shall have no effect and would not act as a fetter upon further negotiations between the intending investor and the lenders. Secondly, in light of the express provisions of section 28 of IBC, the sale of equity is made subject only to a prior approval by the Committee Of Creditors. Even otherwise, this Court notes that since all the lenders have already agreed to the proposal in principle, even if one lender were to initiate proceedings under the IBC so as to short circuit this process, the same would not take away the right of the majority of lenders equivalent to 90% in the Committee of Creditors to apply for withdrawal from IBC in accordance with section 12 A.

120. The Court is constrained to reiterate here that none of the lenders of Prayagraj were present before the Court. Ultimately the Court has been left to consider the challenge at the hands of the management which retains a mere 10% of the share capital of the corporate debtor. It is this aspect which has perhaps led the RBI to allege that it is a dressed up attempt by the

entrenched management to retain control.

121. This Court therefore is constrained to record that while IPPA and APP have miserably failed to lay a factual foundation warranting the grant of interim relief to their members, Prayagraj Power Generation in light of its peculiar facts is not entitled to the grant of interim relief. Notwithstanding the above, it is always open to IPPA or APP to approach this Court for grant of urgent interim relief if need so arise and provided a factual foundation is laid in place.

122. I also deem it apposite to briefly deal with the submission of deferral of all action till the matter is decided by the HLEC. While dealing with the constitution of the HLEC, I had an occasion to note that RBI is not co-opted in the HLEC. In what backdrop the impugned directive is likely to be considered, if at all, in the absence of the author itself being part of the HLEC was left unknown and uncertain. However the learned ASG in the course of his oral submissions stated that the Union would invite RBI to participate in proceedings before the HLEC thus enabling it to place its views before it including the merits of the impugned directive issued by it. In light of the statement of the learned ASG, it would appear to be expedient in the interest of justice to accept the stand of the Union and permit participation of the RBI before the HLEC.

123. I must however record a note of caution here. The participation of RBI before the HLEC is noticed solely on account of the statement and submission of the learned ASG. However while not standing in the way of the stated stand of the Union in this regard, the Court does not intend to hold

that RBI shall be bound by the report/recommendations or the majority view that may come to be forged before the HLEC.

L. THE ARGUMENT OF DISCRETION OF BANKS UNDER IBC

124. It was vehemently contended on behalf of the petitioners that section 7 confers a discretion in the financial creditors to choose whether to initiate proceedings under IBC. According to the petitioners, this discretion stands taken away by virtue of the impugned directive. This submission has been denied by the RBI on whose behalf it has been contended that the directive still leaves it open to the financial creditor to decide when to invoke IBC. According to RBI, this directive only mandates the formulation of Board approved policies to ensure that a RP is initiated and considered upon default.

125. Having considered the rival submissions, I am *prima facie* of the opinion that the contention is not tenable. Firstly RBI stands expressly conferred with the authority to issue directions to a banking company/companies on the subject of resolution of stressed assets. Resolution of stressed assets can take place both within and outside the contours of IBC. In fact the impugned directive undisputedly deals with corporate debt resolution outside IBC. As I read the directions, it appears that the same have been essentially framed to underline, reiterate and emphasise the emergent need to deal with stressed assets and to initiate a RP with expedition. It primarily appears to emphasise a speedy resolution of a stressed asset. Banks cannot be accepted to state that while a default has occurred, a resolution process shall not be initiated. More fundamentally, to

hold that individual banks would have the discretion not to invoke IBC notwithstanding a direction of the RBI would be to ignore the amplitude of the powers conferred upon the central bank by virtue of sections 21, 35A and 35AB of the 1949 Act.

M. THE SEMINAL ISSUES

126. While this Court has refused the prayer for interim relief, these three petitions do give rise to certain significant questions. A fundamental issue which arises in the facts of the present case is the alleged and perceived conflict between the views expressed by the Union Government and the stand taken by the RBI. I have already noticed the submissions advanced by the learned ASG as contrasted with the submissions of the Ministry of Finance before the Standing Committee. There has also been no positive stand taken by the Union with regard to its intent, if at all, to initiate the process of dialogue under section 7 of the 1934 Act. This would clearly merit this Court exploring the contours and width of the independent statutory powers conferred on two collaborative organs of the State. The answer to this complex question would clearly merit further and in depth consideration of the provisions of the 1949 and 1934 Acts, the roles of the Union Government/RBI, the weight to be attached to competing views as well as the recognition of a space for conflict resolution and of a consensus being arrived at.

127. While the Court recognises the position of preeminence which the RBI enjoys, it also cannot ignore the following pertinent observations made by the Supreme Court in **Joseph Kuruvilla Vellukunnel Vs. Reserve Bank**

of India [32]**:-**

> "31. ……..Further, we do not think that the possibility that the procedure under Sections and (3)(b)(iii) may be invoked in some cases and the procedure of the Companies Act in others, makes any difference, because the different procedures will be invoked to suit different situations, and it cannot be said that the Reserve Bank would act arbitrarily from case to case. The Reserve Bank, apart from it being a reasonable body, is answerable to the Central Government, and the public opinion is certainly strong and vocal enough for it to heed. If the Reserve Bank were to act mala fide, the Central Government and in the last resort, the Courts, will be there to intervene. In our judgment, the provisions of Sections and (3)(b)(iii) cannot be said to be a breach of Art. 14 of the Constitution."

In the end the Court is faced with the competing views of two organs of the State. It is for them to arrive at a harmonious conclusion and evolve a consensual position. It is perhaps for this very purpose that section 7 appears to have been placed on the statute book. The Union rather than being non committal and leaving it to the Court to resolve such differences must no longer remain ambivalent or inert. It must consider and decide whether the consultative process should be initiated. In any case it cannot be permitted to strike a discordant note before this Court and yet remain undecided on whether to initiate the process envisaged under section 7.

128. Reverting to the impugned directive, the Court notes that in terms of paragraph 5 and more particularly clause (b) (i) thereof, it appears that the RBI construes a RP to be implemented only if a restructuring plan enjoys the approval of all lenders. The Court notices this aspect since in terms of the provisions of the IBC a RP shall stand approved if it enjoys the approval of 66% of the lenders in the Committee of Creditors. Paragraph 5 may lead to a situation where a lender even in a minuscule percentage may stall the implementation of a RP. This Court also takes note of the fact that originally

32 AIR 1962 SC 1371

sub section (3) of Section 28 required the approval of 75% of the creditors. This percentage as prescribed therein was amended and presently stands reduced to 66%. RBI must therefore be called upon to explain the logic and the necessity of the restructuring plan enjoying the approval of the entire consortium of lenders.

129. The third aspect of significance which *prima facie* arises flows from paragraph 6. Paragraph 6 provides that all RP's involving restructuring/change would require an independent credit evaluation of the residual debt by Credit Rating Agencies (CRA's) specifically authorised by the RBI for this purpose. The CRA's are to be directly engaged by the lenders who are thereafter enjoined to submit a credit opinion as envisaged therein. It further provides that only such RP's which receive a credit opinion of RP4 or better from one or two CRAs shall be considered for implementation. Undisputedly the CRAs were notified for the first time by the RBI only on 21 May 2018. The 180 days period however is mandated to be computed from the reference date of 1 March 2018. The contention of the petitioners therefore was that the period of 180 days could not be permitted to commence prior to 21 May 2018. On the other hand, RBI contends that the credit rating report is only an aid to the formation of opinion by the lender whether to accept or reject the final RP and not a pre condition. This contention has been vehemently opposed by the petitioners. The Court can always deal with the merits of this submission at the time of final hearing. However even here in the absence of any material in evidence of an imminent threat, the Court is not persuaded to extend the period of 180 days

in the interim or to restrain an individual lender from initiating steps under the IBC. Ultimately what has weighed while arriving at this conclusion is the absence of lenders before the Court, their individual views not being known and the serious issue of the health of the financial sector of the country and its overall impact on public debt. Measures adopted to address such complex economical issues must at present, be left to the wisdom of experts.

130. The Court has also been referred to the recent decision rendered by the Supreme Court in **Chitra Sharma and Others Vs. Union of India and others**[33]**.** In that case, even though the Supreme Court had initially stayed proceedings before the NCLT bearing in mind the interest of thousands of individual allottees and home buyers, it ultimately took the view that the law governing the subject namely, IBC, must prevail and the disputes settled under the umbrella of the applicable statutory code. The following observations as made in **Chitra Sharma** clearly apply to the facts of the present case:-

> "JAL was one such entity. No viable resolution plan could be found as a result of which it is also required to be referred for CIRP. RBI has carried out this exercise as a matter of economic policy in its capacity as the prime banking institution in the country, entrusted with a supervisory role, and the power to issue binding directions. The position of the RBI as an expert regulatory body particularly in matters of economic and financial policy has been reiterated in several decisions of this Court: [R.K. Garg v. Union of India (1981) 4 SCC 675, Peerless General Finance and Investment Co. Ltd. v. RBI (1992) 2 SCC 343, TN Generation and Distribution Corporation Ltd. v. CSEPDI-Trishe Consortium (2017) 4 SCC 318.
> 41. JAL was classified under the SMA - II category (demands overdue for more than 60 days) by banks as early as on 3 October 2014 and as an NPA since 31 March 2015. We agree with the submission of the RBI that any further delay in resolution would adversely impact a viable resolution being found for JAL and JIL. The facts which have emerged before the Court from the application filed by the RBI clearly indicate the financial distress of JAL and JIL. The apprehensions of the home-buyers in regard to their financial

33 Writ Petition (Civil) No. 744 of 2017 decided on 9.8.2018

> incapacity is borne out by RBI, as a responsible institution has urged before the Court. The IBC has been enacted in the form of a comprehensive bankruptcy law and with a specific legislative intent. With the amendment brought about by the Ordinance promulgated in June 2018, the interests of the home buyers have been sought to be safeguarded. Accordingly, we accede to the request made on behalf of the RBI to allow it to follow the recommendations of the IAC to initiate a CIRP against JAL under the IBC."

131. Significantly though the Supreme Court observed that the initial period of 180 days was liable to be computed from the date of its judgment, however, this direction was framed by the Supreme Court by invoking its powers conferred by Article 142 of the Constitution. Undisputedly no such parallel power either stands conferred or vested in the High Court.

N. CONCLUSIONS

132. In the ultimate analysis, I have been unable to persuade myself to find the petitioners entitled to the grant of interim relief bearing in mind factors such as the state of the banking sector, rising status of NPA's, declining profitability of public sector banks, steady erosion of profits, majority of banks not even meeting the minimum capital requirements, the huge infusion of funds by the Union Government to shore up the banking system as a whole, the experience of RBI of existing schemes not being sufficiently strong to deal with resolution of stressed assets with expediency, all of which appear to have acted as the backdrop in which the impugned directive came to be issued. The amendments to the 1934 and 1949 Acts, the express authorization in favour of the RBI by the Union Government, viewed cumulatively, indicate the intent to sufficiently empower RBI to deal with the subject of stressed assets. In such situations, the Court must necessarily be circumspect and tread with caution keeping the principles of *"judicial deference"* and *"institutional competence"* in mind. Ultimately the question

of weighing competing economic factors, choice of fiscal measures liable to be adopted must not be interfered with lightly unless established to be palpably arbitrary. The petitioners have failed to meet this benchmark at the present. The petitioners have woefully failed to lay in place a factual foundation, provide requisite details of irreparable prejudice warranting the grant of interim relief. In view of the contest on the ultimate recommendations framed by the Standing Committee as well as the Committee constituted pursuant to the interim order of this Court, they on their own would not sufficiently empower the Court to issue interim directions. This additionally because they remain in the nature of "considered advise" yet to be accepted, adopted or acted upon. I have already noticed the presently unclear position of the Union, which prevaricated on the issue of either the necessity of initiating the consultative process and whether it was even considering invoking its powers under section 7 of the 1934 Act. However as observed hereinbefore, the Union cannot remain irresolute and undecided. If it stand convinced that the impugned directive merits modulation, then it must consider taking recourse to the statutory mechanism placed and initiate the process of consultation. Its position of ambivalence cannot be permitted to perpetuate. Such issues should be resolved between the two governmental organs and should require no intervention of the Court.

133. RBI is essentially a monetary and fiscal regulator. It does not appear to be specifically charged with the function of framing sectoral resurrection measures or to fix incipient or seething problems faced by a particular

industry. It would appear that it is essentially obliged to take a macro look at the financial sector and the fiscal condition of the country as a whole. If it be the stand of the Union that a particular industry merits independent consideration in light of its own peculiar facts, then it is for it to convey and advise the RBI accordingly leaving it open to the central bank to evaluate and consider whether any modulation is merited and justified.

134. I, therefore, come to conclude that the petitioners have failed to establish a case for the grant of interim relief at this stage. I would therefore refuse the prayer for interim relief in terms as prayed. This however is not intended to preclude IPPA or APP from applying for urgent interim directions if need so arises and provided the requisite factual details in respect of such an action are brought on record. Equally important is the presence of the lenders before the Court so that their views on the subject may also be elicited and known with regard to the viability of any existing restructuring plans or schemes in respect of the petitioners or their members. The larger questions as noticed above and which arise herein may be considered when these writ petitions are posted for hearing next.

135. Order : We are of the opinion that interim relief, at this stage, need not be granted. IPPA or APP are at liberty to apply for urgent interim relief if need so arises, placing the requisite factual details on record. The Central Government shall consider initiation of the consultative process contemplated under Section 7 of RBI Act, and conclude the same within 15 days from today. The High Level Empowered Committee shall submit its report within two months from the date of its constitution. The Ministry of

Power shall invite a senior representative of the RBI, after consultation with the Governor of RBI, as a member of the High Level Empowered Committee forthwith. This order shall not curtail the rights/powers of a financial creditor under Section 7 of the IBC or even of the RBI in issuing directions in specific case(s) under Section 35AA of BR Act to initiate corporate insolvency resolution process under Chapter II of Part II of IBC, in any given case, including the petitioners or members of the petitioners' Association.

August 27, 2018
AHA/LA

(Dilip B Bhosale, CJ)

(Yashwant Varma, J)