

Bombay High Court State Bank Of India And 9 Ors vs State Of Maharashtra
And 9 Ors on 22 March, 2016 Bench: S.C. Dharmadhikari WP308.14.doc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 308 OF 2014

1. State Bank of India, a body corporate]
incorporated under the provisions of the]
State Bank of India Act, 1955 and having]
its office at State Bank Bhavan, Madame]

Cama Road, Nariman Point, Mumbai-21.]

2. Bank of India, body corporate constituted]
by the Banking Companies (Acquisition]
& Transfer of Undertakings), 1970 (5 of]

1970), having its office at 70-80, M.G.Road]
Fort, Mumbai 400001. ig]

3. ICICI Bank Limited, a company within the]
meaning of the Companies Act, 2013,]

having its office at ICICI Bak Towers]
Bank-Kurla Complex, Mumbai-400 051.]

4. Bank of Baroda, body corporate constituted]
by the Banking Companies (Acquisition &]

Transfer of Undertakings 1970 (5 of 1970)]
having its office at Ground floor, Walchand]

Hirachand Marg, Ballard Pier, Mumbai-1.]

5. Capital First Limited, a company within]
the meaning of Companies Act, 2013,]

having its office at Indiabulls Finance]
th
Centre, Tower II, 15 Floor, Senapati]
Bapat Marg, Elphinstone Road, Mumbai-13]

6. Mr. Harshendu U. Kaka, aged years,]

Indian inhabitant, residing at Ashish, 2nd]
Floor, N.S. Road-12, Vithal Nagar Society]
Juhu Scheme, Mumbai - 400 049.]

SRP 1/167

::: Uploaded on - 23/03/2016

::: Download

7. Mr. Krishnakumar Dave, aged 62 years,]
Indian inhabitant, residing at A-73,]
Silverline Apartments, 51, TPS Road,]

1

1

1

1

1

1

1

1

1

1

1

1

1

1. State of Maharashtra, through the]
 Secretary, Department of Revenue and]
 Forest, Mantralaya, Madame Cama Road,]

Nariman Point, Mumbai - 400 032.]
 AND
 Through the Secretary, Department of]
 Mantralaya, Madame Cama Road,]
 Nariman Point, Mumbai - 400 032.]

2. Inspector General of Registration &]
 Controller of Stamps, Maharashtra State,]
 Ground floor, Opp. Vidhan Bhavan,]
 Council Hall, New Administrative Building]

SRP 2/167

::: Uploaded on - 23/03/2016

::: Download

Pune - 411 001.]

3. Office of the Inspector General of]

Registration & Controller of Stamps,]
 Maharashtra State, Ground floor, Opp.]
 Vidhan Bhavan, Council Hall, New]

- Administrative Building, Pune - 411 001]
4. Indian Banks' Association, an association]
of banks having its office at World Trade]
- Complex, Centre 1, 6th Floor, Cuffe Parade]
Mumbai 400 005.]
5. Citibank, a national banking association]
- duly constituted under the laws of the]
United States of America and a banking]
company within the meaning of Banking]
- Regulation Act, 1949, and having its office]
at First International Financial Centre]
(FIFC), 54 & 55, G Block, Bandra-Kurla]
- Complex, Bandra (East), Mumbai-400051]
6. Dena Bank, a body corporate constituted]
by the Banking Companies (Acquisition &]
- Transfer of Undertakings) Act, 1970]
(5 of 1970) and having its office at C-10,]
- G-Block, Bandra-Kurla Complex,]
Bandra (East), Mumbai - 400 051.]
7. Fullerton India Credit Company Limited, a]

Company within the meaning of Companies
Act, 2013, having its office at Floor No.6,]
B-Wing, Supreme IT Park, Supreme City,]
Behind Castle Lake, Powai, Mumbai-76]

8. Magma Housing Finance(a Public Company]

with Unlimited Liability), a company]
registered under the Companies Act, 1956]
and having its office at 8, Sant Nagar,]
East of Kailash, New Delhi 110065 and]
branch office at 301, Bhajanlal Complex]

SRP 3/167

::: Uploaded on - 23/03/2016

::: Download

Seth Bhajanlal Marg, Daulat Nagar,]
Near Jain Mandir, Borivali East,]
Mumbai - 400 066]

9. HDFC Bank,a company incorporated under]
Companies Act, 1956 and licensed as a]

bank under the Banking Regulation Act,]
1949, having its registered office at HDFC]
Bank House, Senapati Bapat Marg,]
Lower Parel, Mumbai - 400 013.]

10. Union of India, Through the Secretary,
Ministry of Finance, Department of
Economic Affairs, Room No. 34-C,

]
]
]

New Delhi - 110001.

] .

Mr. Virag Tulzapurkar, senior counsel with Ms. Sowmya
Srikrishna, Mr. Girish Dave, Ms. Mona Bhide and Mr. Biswadeep
i/b M/s. Dave Girish & Co. for the Petitioner.

Mr. S.G. Aney, Advocate General with Ms. Geeta Shastri, Addl.
Govt. Pleader and Ms. Shruti D. Trivedi and Mrs. Pooja
Khandeparkar for the Respondent Nos.1 to 3.

Mr. S.U. Kamdar, senior counsel i/b Mrs. R.V. Thakkar for the

Respondent No.4.

Mr. Pravin Samdani, senior counsel with Ms. Bindi Dave, Mr.
Pradeep Bakhru and Mr. Neel D'Souza i/b M/s. Wadia Ghandy &

Co. for the Respondent Nos.5, 7, 8 & 9.

Mr. Parag Vyas for the Respondent No.10 (UOI).

CORAM : S.C. DHARMADHIKARI &

G.S. PATEL, JJ.

RESERVED ON: 19TH JANUARY, 2016 PRONOUNCED ON: 22ND MARCH, 2016 SRP 4/167 WP308.14.doc JUDGMENT : [Per S.C. Dhar-madhikari, J.] 1. This Writ Petition under Article 226 of the Constitution of India seeks the following declarations and reliefs : (a) that the Hon'ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order and/or direction and declare that the Maharashtra Tax Laws (Levy and Amendment) Act, 2013 insofar as it enacts the Stamp Act Amendment (Exhibit A) is ultra vires and void on account of being violative of Article 14 of the Constitution and being beyond the legislative competence and power of the State Legislature and also for being vague, arbitrary and irrational and be pleased to quash the same. (b) that this Hon'ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order and/or direction SRP 5/167 WP308.14.doc to declare that the Maharashtra Act No. X of 2012 insofar as it enacts Registration Act Amendments (Exhibit B) is ultra vires and void on account of not only being repugnant to sub-section (f) of Section 58 of the Transfer of Property Act but also being vague, arbitrary and irrational and be pleased to quash the same. (c) that this Hon'ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order and/or direction to quash and set aside the Circular dated August 8, 2013 (Exhibit C) issued by Respondent No.2 on account of the same being ultra vires, void and invalid and be pleased to quash the same. (d) for a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order and/or direction from this Hon'ble Court directing the Respondents as well as their officers, servants and agents to refrain/abstain from taking any steps in SRP 6/167 WP308.14.doc furtherance or implementation or enforcement of the Maharashtra Tax Laws (Levy and Amendment) Act, 2013 insofar as it enacts the Stamp Act Amendment (Exhibit A). (e) for a writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order and/or direction from this Hon'ble Court directing the Respondents as well as their officers, servants and agents to refrain/abstain from taking any steps in furtherance or implementation or enforcement of the Maharashtra Act No. X of 2012 insofar as it enacts the Registration Act Amendment (Exhibit B). 2. The petitioners have approached the Court in certain peculiar circumstances according to them for they are ten banks and financial institutions and one of the respondents, other than the statutory authorities, is the Indian Banks' Association claiming to be an Association of Banks having office at Mumbai. 3. The petitioner Nos. 5 and 6 claim to be the SRP 7/167 WP308.14.doc shareholders of Yes Bank Limited and State Bank of India and ICICI Bank. 4. The Stamp Act Amendment came into force on 1st May, 2013, vide the Notification bearing No. VAT 1515/C.R.57/ Taxation-1 dated 25th April, 2013. 5. The Registration Act Amendments came into force on 1st April, 2013

vide the Notification bearing No.RGN-2012/ C.R.20/M-I dated 7th March, 2013. 6. The respondent No.2 addressed a circular dated 8 th August, 2013, to all the banks and financial institutions notifying them about the Stamp Act Amendment and the Registration Act Amendments. Paragraph 2.1 goes even beyond the amendments in stating that if the intimation is not filed, the mortgage cannot be enforced and is thus being contrary to the Registration Act Amendment and is thus ex-facie without any authority in law and unlawful inasmuch as it is clearly in violation of the Registration Act Amendment. SRP 8/167

7. Section 30 of the Stamp Act provides as to who shall be responsible to bear stamp duty, in the absence of any agreement to the contrary, in case of instruments described in Clauses (a) to (g) therein.
8. The business and activities of all banks and financial institutions is regulated by the Reserve Bank of India (RBI) and accordingly the RBI is the sole regulator of the banking business and activities of banks in India. Further, sub-section (2) of section 6 of the Banking Regulation Act specifically provides that a banking company shall not carry on any activities other than those stipulated in sub-section (1) of section 6 of the Banking Regulation Act.
9. To the utter shock and surprise of the petitioners, the respondent No.2 issued the Circular notifying the petitioners of the Stamp Act Amendment which makes all the banks and financial institutions liable for payment of proper stamp duty on instruments specified under section 30(a) to (g) of the Stamp Act, creating a right in favour of such banks and financial institutions. SRP 9/167
10. In view of the aforesaid arbitrary and unreasonable enactment, not only will all the banks and financial institutions be liable to make payment of proper stamp duty on instruments executed on or after 1st May, 2013, but in terms of sub-section (2) of the impugned section 30A, also verify that too by 30 th September, 2013, whether adequate stamp duty has been paid on all instruments executed prior to the aforesaid date and are still effective. Furthermore banks and financial institutions are now obligated to determine whether proper stamp duty has been paid and in the event of deficit stamp duty, impound such instruments by 30th September, 2013 and send them to the Collector for recovery.
11. Moreover the unreasonable objective of respondent No.1 is evident from the fact that if the banks and financial institutions fail to impound such instruments, the banks and financial institutions will be liable to pay a penalty equal to the stamp duty payable on the instrument.

12. Without prejudice to the contentions as regards the SRP 10/167 WP308.14.doc constitutional validity of the Stamp Act Amendments, the petitioners state that it is ex facie unreasonable, irrational and arbitrary for respondent Nos.1, 2 and 3 to expect all banks and financial institutions to undertake the aforesaid cumbersome, time consuming and voluminous exercise at every stage and every year, especially given that the representatives of the banks cannot be expected to be aware of or know the appropriate stamp duty payable on any instrument executed on a particular date in the past, which could be as early as the year 1959 when the Stamp Act came into force. Further, the petitioners state that it is ex facie unreasonable, irrational and arbitrary for respondent Nos.1, 2 and 3 to require all banks and financial institutions to ascertain whether proper stamp duty has been paid on all instruments executed prior to the coming into force of the Stamp Act Amendment (i.e. May 1, 2013) by 30 th September, 2013, and to impound all such instruments. To resolve this issue, each branch of a bank or financial institution will now have to depute / hire a number of employees to identify amongst the umpteen transactions executed by the branch, the documents still effective and thereupon engage lawyers and solicitors to opine on the stamp duty implication on those documents. Clearly such SRP 11/167 WP308.14.doc exercise would be extremely expensive and impractical for the banks and financial institutions.
13. Respondent No.1 amended the Stamp Act, by inserting section 10D which imposes obligation on all banks and financial institution through whose system or who are related to the functioning of the system in order to ensure that proper stamp duty is paid. Secondly, it makes the proper officer nominated by the department, or body etc. which shall include banks and non-banking financial undertaking, liable to ensure that proper stamp duty is paid.
14. Without prejudice to the contention as regards the constitutional validity of the Stamp Act Amendments, the petitioners state that it is ex facie unreasonable, irrational and arbitrary for respondents Nos.1, 2 and 3 to expect that banks and financial institutions and their officers should undertake the aforesaid cumbersome, time consuming and voluminous exercise at every stage and every year, especially given that the representatives of the banks cannot be expected to be aware of or know the appropriate stamp duty payable on any instrument. In SRP 12/167 WP308.14.doc any event there is also no guidance awarded for such officer to check or cross verify his/her interpretation of relevant section of the Maharashtra Stamp Act. That apart the arbitrariness and irrationality of the said section is evident in view of the fact that the same does not provide for any consequence or mechanism in the event the adjudication by such officer of duty payable is incorrect or improper.
15. The petitioners further state that the effect of section 10D is that the

officer so nominated assumes the role of an adjudicating authority as if such officer was himself empowered to decide what stamp duty would be applicable to the document produced before him. He has the power to interpret and decide the amount of applicable stamp duty and such the officer would then be able to bind the stamp authorities with his decision irrespective of whether or not it is accurate or erroneous.

16. The petitioner further states that since only a few banks so authorised would be empowered to carry out the activity of stamping documents under G.R.A.S. It is likely that the nominated officer who may not be conversant with legal SRP 13/167 WP308.14.doc interpretation of a document would become liable if the documents are under stamped. The documents may pertain not only to the bank for which he is employed, but also belong to other banks / persona who may send their documents for franking to the banks authorised for stamping. Section 10D as enacted is unclear on whether the concerned officer is required to check the name of the document or read through and understand the document or be merely authorized to stamp as per the request form. This is not clearly mentioned in Section 10D. It would be unjust if the nominated officer is made liable to penalty for acts of other banks if he is required to merely follow the instructions for stamping.
17. The Registration Act amendments have come into force from 1st April, 2013. Furthermore, the petitioners have received information that the Registration Authority has been, upon receiving the intimation of mortgage being created simplicitor, by way of deposit of title deeds, as prescribed by section 89B amendment, pressurizing the mortgagors into executing, stamping and registering a document evidencing such creation of mortgage by way of deposit of title deeds. In this SRP 14/167 WP308.14.doc regard the petitioners refer to and rely upon the affidavit. Exhibit-D to the petition which explains how indirectly SRAs force parties to execute agreements. It is submitted that in actual practice, para 2.1 of the circular virtually forces parties to execute, stamp and register the agreements even though neither section 58 of the Transfer of Property Act nor section 89B amendment requires the parties to do so. Therefore, even though the section 17 amendment inter alia provides for compulsory registration only in case where an agreement evidencing mortgage by way of deposit of title deeds is executed, the Registration Authority is now, upon being intimated of a mortgage being created by way of deposit of title deeds, causing, under duress, every such transaction of mortgage by deposit of title deeds to be executed through a written agreement, which entitles them to mandatorily require the agreement to be stamped and registered. In view of the above, it is submitted that the section 89B amendments that are, in any event, void and unconstitutional on account of being repugnant to sub-section (f) of section 58 of the Transfer of Property Act, are being abused and misused by the Registration Authority. Accordingly, it is submitted that the

section 89B amendments ought to be declared SRP 15/167 WP308.14.doc ultra vires and invalid on this ground as well.

18. It is pertinent to note that while section 89B amendment only stipulates that if the notice of intimation is not filed within 30 days of creation of a mortgage by way of deposit of title deeds, any further transaction undertaken by the mortgagor, where the mortgaged property is the subject matter, shall be void. On the other hand, the circular goes beyond the scope of section 89B amendment and stipulates that the failure by the mortgagor to file the notice of intimation within 30 days of creation of the mortgage, the mortgage cannot be enforced. The circular thus travels beyond the scope of what the legislature has intended to legislate by the section 89B amendment.
19. It is based on the above material that the provisions in the two different enactments are challenged and the aforequoted reliefs are claimed. Annexure-A to the writ petition is an extract of the amendment to the Maharashtra Stamp Act, 1958, incorporating section 30A in the Act. Then, Annexure B onwards is an extract of the relevant provisions of the Registration Act, 1908. It is then stated that the office of the Inspector General of SRP 16/167 WP308.14.doc Registration and Controller of Stamps, Maharashtra State, Pune, on 8th August, 2013, issued under the signature of the Inspector General of Registration and Controller of Stamps that in the interest of banks, financial institutions and general public, certain amendments have been brought into the two statutes and they came into effect on 1st April, 2013 and 1st May, 2013, respectively. The communication emphasizes how the amended provisions of the Registration Act makes it compulsory to register agreement relating to deposit of title deeds. In case no agreement is signed and mortgage is created by simple deposit of title deeds, a notice of intimation informing the creation of mortgage has to be filed in the office of the Sub-Registrar. Hence, if the document is not registered and the information is not filed, the mortgage cannot be enforced.
20. To make it convenient, the Department has provided facility of e-filing of notice of mortgages, e-registration module is being developed and will be rolled out soon. Then, the amended provisions of the Maharashtra Stamp Act are highlighted and all the banks and financial institutions are informed that they should issue necessary instructions to the concerned SRP 17/167 WP308.14.doc departments to implement the provisions in public interest and the interest of the institution as well. The various annexures to this communication have been despatched according to the petitioners and to that effect reliance is placed on the averments in the writ petition in paragraph 2.1.
21. Then, there is an extract which is annexed from the provisions which are also inserted in the Maharashtra Stamp Act, namely, section 10-D and

what is indicated is that it would be incumbent upon the petitioners as also others affected to ensure that proper stamp duty has been paid on the documents of which registration is not compulsory to the State Government through Government Receipt Accounting System in respect of such instruments as may be specified in the Notification passing through their system or related to their functioning. Our attention has been invited to the sub-sections of section 10-D and even this provision is under challenge.

22. After the petition was filed and copies thereof were served, an affidavit-in-reply has been filed on behalf of the State in which these amendments are justified. SRP 18/167

23. In paragraph 2 to 7 and 17 of the affidavit, this is what is stated : 23(a) At the outset, the petition is misconceived, does not disclose any cause of action against the Respondent Nos.1 to 3. I say that by this petition, the petitioners are challenging the validity of section 30A of the Maharashtra Stamp Act, 2013, which is annexed as Exhibit A at page 38 to the petition on the ground that it is violative of Article 14 of the Constitution of India since it is discriminatory in nature as it differentiates only bank and financial institutions from other commercial institutions for imposition of obligation and penalties in term of Maharashtra Stamp Act Amendment to pay proper stamp duty on the documents mentioned in section 30A of commencement of Maharashtra Tax Laws (Levy and Amendment) Act, 2013, if any, to collect it from other party and further to verify the adequacy of stamp duty paid on the instrument executed by or in favour of the financial institution prior to commencement of Maharashtra Tax Laws (Levy and Amendment) Act 2013 and upon identifying the said instrument with deficit stamp duty to impound the same SRP 19/167 WP308.14.doc without specifying ground of making such classification. The petitioner has also further challenged the validity of section 17(1)(g) to (h) and section 89B of Registration Act, 1908, which is annexed as Exhibit-B at page 39 to the petition inserted by Maharashtra Act No.X of 2012 and also the Circular dated 8 th August, 2013, issued by respondent No.2 which is annexed as Exhibit-C at page 40 to the petition on the ground that it is in direct conflict with section 58(f) of the Transfer of Property Act and also beyond the legislative competence of the respondent No.1 to enact the stamp duty amendment. 23(b) I say that with a view to give effect to the proposal in the Budget speech for the year 2012-13 and further in order to streamline the procedural aspect of the administration of Maharashtra Stamp Act, 1958, the State Government has enacted Maharashtra Tax Law (Levy and Amendment) Act, 2013 (Maharashtra Act VIII of 2013) whereby amending the Maharashtra Stamp Act, 1958 and inserting section 30A. This amendment to Maharashtra Stamp Act, 1958 was carried out by Notification dated 25th April, 2013 which came into effect

from 1st May, 2013. Hereto annexed and marked EXHIBIT-1 and 1A are SRP 20/167 WP308.14.doc copies of Bill No.XI of 2013 regarding the Maharashtra Tax Law (Levy and Amendment) Act, 2013 containing the Statement of Objects and Reasons and also the Maharashtra Act No.VII of 2013. I say that the said amendments to Maharashtra Stamp Act is done in exercise of power conferred by entry 63 of List II and entry 44 of list III of Seventh Schedule of the Constitution of India. 23(c) I say that under the amended section 30A of the Maharashtra Stamp Act, the responsibility to bear the proper stamp duty is on the banks and financial institutions in respect of those documents by which a right is created in their favour without affecting any right to collect it from the other party. Under the amended section 30A of the Maharashtra Stamp Act, further duty is cast on the banks and financial institutions to impound on or before 30th September, 2013 such instrument which are executed prior to the commencement of the date of Maharashtra Tax Law (Levy and Amendment) Act 2013 (Maharashtra Act VIII of 2013) in which proper stamp duty is not paid and to forward it to the Collector for recovery and on failure to do so, the concerned banks and financial institutions SRP 21/167 WP308.14.doc shall be liable to pay penalty equivalent to stamp duty payable on instrument. The said amendment has come into force with effect from 1st May, 2013. I say that obligation on financial institutions and banks to impound document under amended Section 30A(2) of the Maharashtra Stamp Act is incidental to levy of stamp duty. The aforesaid obligation under section 30A(2) of Maharashtra Stamp Act is in respect of outstanding loan or alive loan which is still being administered by the bank and financial institution. 23(d) I say that under section 34 of the Maharashtra Stamp Act, 1958, instruments which are not stamped are not admissible in evidence in Court of law. Hence, the instrument created by or in favour of financial institutions creates right in their favour and if not properly stamped will not be enforceable in court of law. Therefore, to protect the interest of the financial institution and bank and further to see that proper stamp duty is paid, the obligation is cast on the financial institution to pay the stamp duty with liberty to collect the same from the borrowers. 23(e) I say that under Entry 63 of List-II of the Seventh Schedule to the Constitution of India, the State Government has SRP 22/167 WP308.14.doc power to enact the rates of stamp duty in respect of the documents other than those specified in List-I with regard to the rates of stamp duty. I say that under Entry-44 of List III of Seventh Schedule of Constitution of India, the State Government has concurrent power in respect of stamp duty other than duties or fees executed by means of judicial stamps. I deny that the State Government has no power to amend the Maharashtra Stamp Act in respect of documents executed by the financial institutions and banks for the purpose of payment and recovery of stamp duty and impounding instrument with deficit stamp duty as alleged or at all. 23(f) I deny that the said amendment in any way violates Article 14 of the Constitution of India as alleged or at all. It is denied that it is

violative of Article 14 of the Constitution of India as it imposes on the banks and financial institutions, a liability to pay proper stamp duty on the documents mentioned in section 30A of Maharashtra Stamp Act, 1958, those executed on and after the date of commencement of Maharashtra Tax Laws (Levy and Amendment) Act, 2013, creating any right in favour of financial institutions without affecting their right, if any, to SRP 23/167 WP308.14.doc collect it from other party and also impose an obligation upon the financial institutions including banks to levy the adequacy of stamp duty paid on the instrument executed in favour of institutions prior to commencement of Maharashtra Tax Laws (Levy and Amendment) Act, 2013. I deny that the said amendment is discriminatory as alleged or at all. I say that financial institutions and banks are class by themselves and the said duty is cast on financial institutions and banks also to protect their interest and also in the interest of public and also for the purpose of recovery of revenue. I deny that there is no reasonable ground for making the said clarification as alleged or at all. I say that there is nexus with the object sought to be achieved. I deny that it interferes with the banking activities which are regulated by Banking Regulation Act, 1949. I deny that State Government has no power to lay down aforesaid amendment in Maharashtra Stamp Act, 1958, in respect of the document executed by financial institutions for purpose of payment and recovery of stamp duty and impounding of documents not properly stamped. I say that the penalty laid down in section 30A(3) of Maharashtra Stamp Act is incidental to enforcement of stamp duty. I say that unreasonableness is not SRP 24/167 WP308.14.doc the same as hardship as alleged or at all. I say that it must be unreasonable in law and not in fact. I say that the stamp duty is a tax and hardship is not relevant in interpreting fiscal statutes are well known principles. In the field of taxation the legislature enjoys greater latitude for classification. 23(g) I say that the obligation impounded by the Amendment to the Maharashtra Stamp Act by inserting section 30(A) has only laid down the responsibility of payment of stamp duty in respect of those documents and transactions to which the financial institution is a party. I say that the object of the Maharashtra Stamp Act is to collect proper stamp duty on the instrument or conveyance and the said Act is a fiscal measure enacted to secure revenue for the State and therefore, to enforce fiscal measure, the State for certain classes of instruments executed by certain classes of persons, has laid the obligation on the said class of persons for recovering the proper stamp duty in respect of documents and transactions to which they are parties and on failure has imposed penalty.

24. Thus, the affidavit seeks to justify the amendments by SRP 25/167 WP308.14.doc urging that they are in the interest of the public, to avoid fraud on innocent people, to avoid multiplicity of litigation and to bring about transparency by having the instrument registered. The amendments cannot be said to be beyond the competence of the State legislature. They also cannot be said to be usurping the powers of any

Court. Therefore, each of these amendments would enable the collection of stamp duty on instruments and registration of documents smoothly.

25. We have an application by the applicant / intervenor - HDFC Bank who seeks to intervene in the proceedings and equally by the Central Bank of India. Since both of them have been impleaded as party-respondents together with the Association of Banks, we have heard them as well in support of the challenge.
26. Section 6 of the Banking Regulation Act falling under Part II under the heading “Business of Banking Companies” in sub-section (1) states that in addition to the business of banking, a banking company may engage in any one or more of the forms of business set out in clause (a) to (o) of that sub-section and by SRP 26/167 WP308.14.doc section (2) it is mandated that no banking company shall engage in any form of business other than those referred to in sub- section (1).
27. It is common ground that the word “banking” is defined in section 5(b) to mean the accepting for the purpose of lending or investment of deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise. The Banking Regulation Act, 1949, is an Act to consolidate and amend the law relating to banking.
28. A perusal of the Act and particularly, sections 5 and 6 leave us in no manner of doubt that by section 30-A of the Maharashtra Stamp Act, 1958, the banks and financial institutions are not called upon anything which interferes with the mandate of the Banking Regulation Act, 1949. The VII th Schedule of the Constitution of India contains the Lists, namely, Union List, State List and Concurrent List. Union List is termed as List-I. Therein, falls the subject of banking (See Entry No.45). We do not see how by the obligation under the Banking Stamp Act, 1958, which is extremely limited and restricted and equally SRP 27/167 WP308.14.doc in public interest can it be said that the State legislature has over- reached or has taken over taken over or interfered with the field occupied by the Banking Regulation Act, 1949.
29. As already held, the competence of the State to enact the Maharashtra Stamp Act, 1958, is not disputed. The power in that regard is to be found in Entry No.63 of List II, namely, the State List of the very schedule to the Constitution of India. That deals with rates of stamp duty in respect of documents other than those specified in the provisions of List-I. With regard to rates of stamp duty.
30. In such circumstances, it is not possible to agree with Mr. Tulzapurkar that the impugned amended provision in the Maharashtra Stamp Act, 1958, should be struck down on the ground that the purports to take over or occupied the field occupied by the Banking Regulation Act, 1949.

31. The lead arguments were canvassed by Mr. Virag V. Tulzapurkar, learned senior counsel and he would submit that this provision is ultra vires Article 14 and 19(1)(g) of the SRP 28/167 WP308.14.doc Constitution of India. Mr. Tulzapurkar would submit that Maharashtra Stamp Act and its predecessor law, namely, Bombay Stamp Act, 1958 seeks to levy stamp duty on an instrument. The stamp duty is not on the transaction. Insofar as such levy is concerned and elaborating the challenge, Mr. Tulzapurkar relied upon the definitions in the Stamp Act. He firstly invited our attention to the definition of the term 'Banker' appearing in section 2 clause (b). He would submit that if this is an association, a company or a person who accepts for the purpose of lending or investment, deposits of money from the public, repayable on demand or otherwise, then, it has been during the course of its business of lending or investment, a party to several instruments. These instruments and which are chargeable to stamp duty in terms of section 2 clause (d) as the term is defined, according to Mr. Tulzapurkar, would then have to be duly stamped. For that purpose, Mr. Tulzapurkar relied upon the definitions of the term 'Collector' appearing in section 2(f). The definition of the word 'Deputy Inspector General of Registration and Deputy Controller of Stamps'. Then, he relied upon the definition of the term 'duly stamped' as appearing in section 2(h). He also invited our attention to the definition of the SRP 29/167 WP308.14.doc words 'executed' and 'execution' which are defined in section 2(i) to mean with reference to instruments, "signed" or "signature". With the explanation now that is introduced therein even an electronic record as per section 11 of the Information Technology Act, 2000, particularly attribution to electronic record would fall within this definition. The definition of the term 'immovable property' is to be found in section 2(ja) and then comes the definition which is relied upon by Mr. Tulzapurkar of the word 'instrument' appearing in section 2(l). That reads as under : "2. Definitions : (a)

.....

(1) "instrument" includes every document by

which any right or liability is, or purports to be created, transferred, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt; Explanation.- The term "document" also includes any electronic record as defined in clause (t) of sub- section (1) of section 2 of the Information Technology Act, 2000."

32. Mr. Tulzapurkar then relied upon the definition of the term 'market value' in section 2(na), 'mortgage deed' appearing in section 2(p), the word 'Schedule' as defined in section 2(s) and SRP 30/167 WP308.14.doc submits that by section 3 of the Act, the instruments chargeable with duty are

set out. Chapter II, according to Mr. Tulzapurkar, has the broad heading Stamp Duties and under that sub-heading '(A) Of the Liability of Instruments to Duty' appears in section 3. Mr. Tulzapurkar submits that how an instrument would be charged with duty, namely, the nature thereof, how if a single transaction is embodied and contained in several instruments is a matter dealt with by section 4 and instruments relating to several distinct matters are dealt with by section 5. If Mr. Tulzapurkar then invites our attention to the sections in this Chapter and would urge that the sub-headings of this would indicate as to how liability of instruments to duty of stamp and the mode of using them, of the time of stamping instruments, on valuations for duty are matters exclusively dealt with by the authorities under the Stamp Act. Mr. Tulzapurkar submits that by section 30 by whom the duties are payable are set out and after extensive reference to that Mr. Tulzapurkar would submit that insofar as any instrument described in the Articles of Schedule I and specified in clause A of section 30, the duty is payable particularly in the case of the instrument described by Article No.59(b) by the person drawing or making such SRP 31/167 WP308.14.doc instrument. Mr. Tulzapurkar would submit that the obligation and liability to pay duty in the case of transfer of any interest secured by a bond or mortgage debt or policy of insurance is by the drawer or maker of such instrument. In such circumstances then to call upon the financial institution to pay duty by introduction and insertion of section 30A and that too in relation to such instruments as are executed before the date of Maharashtra Tax Laws (Levy and Amendment) Act, 2013, would denote that this is a complete arbitrary and high handed provision. Mr. Tulzapurkar would submit that it is no solace that the financial institution concerned without affecting its right to collect the duty from the other party will have to be discharge the obligation in terms of sub-section (1) of section 30A. In these circumstances, Mr. Tulzapurkar submits that even if this is a provision in an enactment levying stamp duty, it can be struck down provided it is ultra vires Part III of the Constitution of India.

33. In the written points of arguments which were tendered, Mr. Tulzapurkar submitted as follows :

(a) **The Stamp Act Amendment is violative of Article 14 of**

SRP 32/167

the Constitution since it is discriminatory in nature and imposes obligations only upon banks and financial institutions to verify the adequacy of the stamp duty paid on instruments/ documents executed by or in favour of the banks and financial institutions and upon identifying such instruments with deficit stamp

duty, to impound the same, without specifying any grounds for making such classification. There should be a nexus on the basis of which the State Legislature makes any sort of classification amongst classes of commercial entities. Banks and financial institutions are not the only entities who are parties or the beneficiaries of the commercial contracts or agreements. There are various government authorities such as customs, excise, Director General of Foreign Trade and private parties such as real estate companies, insurance companies, share brokers, mutual fund companies, telecom and power sectors etc., who are either a party to or a beneficiary of a commercial contract or agreement, however on such other commercial entities no similar obligation has not been imposed. Therefore, in view of the discriminatory nature of the Stamp Act Amendment, the Stamp Act Amendment clearly violates Article 14 of the Constitution in as much as it differentiates and isolates only banks and financial institutions SRP 33/167 WP308.14.doc from other commercial entities for imposition of obligations and penalties in terms of the Stamp Act Amendment. There is no legally justifiable reason or ground as to why only banks, financial institutions and housing finance companies should be required to undertake the heavy responsibility of verifying payment of proper stamp duty and no other entities have any such obligation, with respect to future transactions and more so in case of past transactions and only with respect to those instruments which are falling in clauses (a) to (g) of Section 30 of the Stamp Act and not those which fall outside Section 30 of the Stamp Act and also the Stamp Act Amendments do not apply to those private parties or persons even though they execute the same type of instruments in their normal course of activities. (b) Further, it was held by the Supreme Court of India that “discretionary power may not necessarily be a discriminatory power but where a statute confers a power on an authority to decide matters of moment without laying down any guidelines or principles or norms, the power has to be struck down as being violative of Article 14 of the Constitution”. Therefore in terms of the direction of the Supreme Court, an SRP 34/167 WP308.14.doc enactment ought to be struck down as being violative of Article 14 of the Constitution if it does not lay down any guidelines or principles or norms while conferring any right upon an authority. However, in the present case, the State Legislature goes a step further and imposes obligations on private entities without justifying or laying down any principles or guidelines for imposition of such unreasonable obligations. Accordingly, it is clear that without laying down any guidelines/ reasons/ principles/ norms, the enactment of the Stamp Act Amendment, which imposes obligations and penalties only upon banks and financial institutions, is categorically violative of Article 14 of the Constitution. (c) “Banking’ is categorically a Union List Entry (Entry 45) in the Seventh Schedule to the Constitution and accordingly only the Parliament is empowered to make enactments pertaining to inter alia business, duties, rights, liabilities, obligations of the banks including activities which are permissible for banks to carry on. As per Article 246(1) of the Constitution, the Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I of Schedule VII to the SRP 35/167 WP308.14.doc Constitution. Since the power to legislate in respect of any matter relating to

banking, including to regulate the activities relating to banking, being the exclusive domain of the Parliament under Entry 45 of List I of the Seventh Schedule to the Constitution, any regulation or obligation or duty may be imposed only by the Parliament. No other entity or authority or Government, whether State Government or any Municipality or local authority has the jurisdiction or legal competence to impose any obligations or duties on banks especially since sub-section (2) of Section 6 of the Banking Regulation Act specifically provides that a banking company shall not carry on any activities other than those stipulated in sub-section (1) of Section 6 of the Banking Regulation Act. In view thereof, the Stamp Act Amendment enacted by the State Legislature is beyond the legislative competence and power of the State Legislature and hence ultra vires the Constitution. To ensure the payment of Stamp Duty is not a part of the banking business and the function of ensuring the payment of proper stamp duty cannot be and is not the activities of business or function which can be imposed on banks in as much as, by doing so, the banks will be forced to discharge functions contrary to Section 6 of the Banking Regulation Act. SRP 36/167

(d) Further, without prejudice to the aforesaid, assuming

for the sake of argument that even if the State Legislature is competent to enact the said Stamp Act Amendment, the Stamp Act Amendment ought to be declared void and invalid on account of its inherent arbitrariness, vagueness and ambiguity. Section 30A of the Stamp Act as enacted imposes a liability on the banks and financial institutions to verify if the stamp duty paid on the instrument/documents executed before May 1, 2013 and effective, is proper and adequate. The Stamp Act Amendment does not prescribe any time limit within which the document executed has to be verified; rather it just classifies verification of all documents/instruments, which are effective. However, the Section 30A of the Stamp Act does not lay any grounds to determine what constitutes a document being “effective”. Accordingly, it is not clear whether being “effective” would mean that even though a deed of mortgage was entered into as early as 1960s but if the deed of reconveyance is not executed and the mortgaged property is not reconveyed, the transaction will be considered as effective and therefore such documents would have to be verified by the banks and financial institutions to ascertain SRP 37/167 WP308.14.doc as to what the proper stamp duty as then applicable was paid. Further, in a number of cases, the loans granted by banks and financial institutions towards working capital facilities as well as term facilities have drawn out repayment schedules extending to many years, therefore it is not clear whether the banks and financial institutions are

to verify the documents as to the payment of proper stamp duty, executed even at the time the Bombay Stamp Act, 1958 came into force i.e February 19, 1959. Further, it is pertinent note that there are over 9000 branches of commercial banks all over the State of Maharashtra including rural and semi-urban areas and expecting over 9000 branches of all the banks to ensure such statutory compliance of the said Stamp Act Amendment, is not only arbitrary, unreasonable and irrational but also impossible in these circumstances. It is pertinent to note that as on date, there are approximately 13,00,00,000 (Thirteen Crore) loans extended by banks in Maharashtra, which are outstanding as on May 1, 2013. In that case, each branch manager of a bank, in terms of the Stamp Act Amendment, is required to verify each and every document executed by that branch with respect to stamp duty paid thereon on the particular date on which such document was executed. It SRP 38/167 WP308.14.doc is clearly that undertaking such a task is not possible for the branch manager since the documents could be executed as early as 1959 or in the 1970s or 1980s and expecting the branch manager to be aware of the stamp duty payable on each of the documents as of the relevant date is arbitrary, irrational and absurd. (e) Unreasonable obligations imposed by the Stamp Act Amendment imposing on the banks and financial institutions to undertake the cumbersome, time consuming and voluminous exercise of ascertaining whether proper stamp duty has been paid on all instruments executed prior to the coming into force of the Stamp Act Amendment (i.e. May 1, 2013) by September 30, 2013 and to impound all such instruments clearly would be an extremely expensive and impractical exercise for the banks and financial institutions. Such a harsh imposition would not only increase the unnecessary expense of the banks and financial institutions but also hamper the current on-going business of the banks, as they would have to dedicate a large part of their resources, manpower and time to perform such a cumbersome activity and time consuming exercise. Therefore, it is evident that SRP 39/167 WP308.14.doc such a retrospective liability is too severe and unreasonable and such imposition would cripple the business of the banks as the banks would now have to dedicate its resources and time primarily for verifying the requisite stamp duty payable on every instrument executed by the banks right from 1959 till date. The Supreme Court has taken the view that “in order to establish arbitrariness or unreasonableness, it does not become necessary to show that the business of the assessee would be completely crippled and have to close down in consequence of withdrawal of the relief with retrospective effect. It was asserted by the Apex court that the assessee would be seriously prejudiced in case of removal of the relief due to him with retrospective effect, for no fault of his own, and this would be unjustifiable and therefore arbitrary and thus held to be violative of Art. 19(1)(g)” . Accordingly, the Petitioner No. 5 , being is a shareholder of YES Bank Ltd. and Petitioner No.6, being a shareholder of Petitioner No. 2 and Petitioner No. 4 urges that such unreasonable obligations imposed by way of the Stamp Act Amendment clearly restricts and hinders the business of banking activities of the banks and accordingly are violative of Article 19(1)(g) of the Constitution. SRP 40/167

(f) Furthermore, as per Section 33 of the Stamp Act, only

parties authorized to receive evidence and person in charge of public offices are authorized to impound documents. Therefore the Stamp Act makes it clear that only persons in charge of public offices are authorized to impound documents and the State Legislature cannot delegate the duty of impounding documents to private institutions, when only persons in charge of public offices are entitled to do so. Therefore, the Stamp Act Amendment suffers from the vice of excessive delegation as there are no guidelines in the Stamp Act for such drastic delegation of powers on private entities. Therefore, for this reason alone, the Stamp Act Amendment must be declared void and unenforceable. (g) It is pertinent to note that under Section 33 of the Stamp Act, inter alia the designated persons authorized by law or the Respondent No.1 can, at their discretion, impound the documents/instruments, if it appears to them that such instruments/documents are not duly stamped. The original framework of the Act does not impose any penal consequences on the person authorised to receive evidence or the public officer if SRP 41/167 WP308.14.doc he fails to assess that a particular instrument was adequately stamped thereby failing to impound the same. However, in terms of the Stamp Act Amendment banks and financial institutions are foisted with the duty to ensure payment of correct stamp duty with the onerous obligation that failure to ensure would result in the liability being fastened on the banks and financial institutions. Further, unlike sub-section (1) of Section 30A of the Maharashtra Stamp Act, where the State Legislature atleast gave a right to the bank to recover the amount of stamp duty paid by the bank from the borrower/obligor, sub-section (2) of the Stamp Act Amendment does not even give any such right to recover the penalty so imposed upon banks for failure to impound the documents, from the borrowers/obligors even if a corresponding right is available to the banks under the agreements/documents in question. Accordingly, it is abundantly clear that the banks and financial institutions are heavily prejudiced because of the unreasonableness, arbitrariness and harshness inflicted by the Stamp Act Amendment. (h) It is urged that levy of tax, collection of tax levied and verification whether the payment of tax by the tax-payers is SRP 42/167 WP308.14.doc adequate and in accordance with law are the functions of the authorities of the Government which levies the tax and such functions cannot be delegated to the tax payer himself, in this case the banks and financial institutions. In the present case, in terms of the Stamp Act Amendment, the obligation to verify adequacy of stamp duty paid on a document executed in favour of any bank or financial institution and impound the document if duty paid is not adequate, is cast on the party to the contract namely, the bank or a financial institution. Exercise of such statutory powers by the bank or financial institution will adversely affect the other party to the

document and hence such powers need to be entrusted to an independent public authority as contemplated under the scheme of the Stamp Act, and not to an interested party in whose favour the document is executed. In the matter of deciding whether a particular document is adequately stamped a bank officer may impound a document by way of abundant caution or not impound a document to avoid detriment to itself. Entrustment of powers of impounding documents to a party in whose favour the document is executed is violative of principles of natural justice. SRP 43/167

(i) The banks and financial institutions

jurisdiction or authority to determine whether proper stamp duty has been paid on a particular instrument especially when the branch manager would have no means to know what the applicable stamp duty on document/instruments on the date of their execution was. The State Legislature has not deliberated upon what happens, when, in the process of verifying the stamp duty applicable on a document/ instrument, the bank or financial instrument determines the stamp duty of a particular amount and then such a bank or financial institution is made responsible for payment of penalty when it makes a wrong decision? Further, an important question which arises for consideration is that; if the statutory power has been entrusted to a statutory authority to determine the proper stamp duty on a document, it will be required to satisfy itself by following the due procedure to determine the proper stamp duty on a document. Can it do it unilaterally, without issuing a show cause notice to the other party? In the present case, if a bank or a financial institution, determines the amount of stamp duty payable on any instrument without giving opportunity to its borrowers to decide as to what is the amount of correct stamp duty, the decision of the bank may SRP 44/167 WP308.14.doc be open to challenge by the borrower since the Stamp Act Amendment does not authorize the banks to overrule the borrowers' objections. Therefore, it is abundantly clear that the State Legislature has not considered all aspects thoroughly before hastily enacting the law thereby imposing the obligations upon only banks and financial institutions and housing finance companies to determine the proper stamp duty payable on the documents/instruments and to find out the deficiency in payment of stamp duty and thereafter to impound such documents/instruments. In these circumstances, it is ex facie unreasonable, arbitrary and irrational for the Stamp Act Amendments to require the banks and financial institutions to impound all documents on which they consider insufficient stamp duty to have been paid, failing which the banks and financial institutions would be liable to a penalty equal to the stamp duty payable on such instrument, without a right to recover it from the borrower/obligor, as may otherwise be provided for in the agreement/ document. (j) The State Legislature has not considered the probability that since some of the documents/instruments are SRP 45/167 WP308.14.doc pertaining

to transactions conducted in the past years and therefore, in all probability the borrowers may not even be available or traceable. Moreover, the Stamp Act Amendment is unclear on what happens when a borrower of a bank, brings a document executed in another state to the State of Maharashtra and defaults in paying the differential amount of stamp duty, if any, within the prescribed time period. Now, since such document will fall under the ambit of the Stamp Act Amendment, it would be unreasonable and arbitrary to impose an obligation upon the banks to know the appropriate stamp duty payable on such an instrument, let alone impound such documents since the bank, in all probability, would not even be aware of such default committed by the borrower. In that event, for imposing the penalty on banks for a default not occasioned by act of the bank, the Stamp Act Amendment is unreasonable, illegal and arbitrary and is a transparent attempt by Respondent No. 1 to transfer its obligations on the banks and financial institutions. (k) Also, the Stamp Act Amendment introduces an element of the need to exercise discretion by the officers of the bank, who are entrusted with such obligations. Some officers SRP 46/167 WP308.14.doc may take a view that the document is not adequately stamped by way of abundant caution to safeguard the interest of the bank. On the other hand, a view may be taken by another officer of the bank, that the document is adequately stamped. The function of taking a decision as to the adequacy of stamp and impounding a document needs to be entrusted to an independent public authority and not a party to the contract, in whose favour the stamped document is executed. In any event there are no guidelines or instructions as to how the discretions which are statutory in nature to decide the proper stamp duty are exercised and in the absence of which, it always would happen that the decision of officer would contradict that of the other and there would be no unanimity on the stamp duty payable on the concerned instrument in absence of proper guidelines. Thus this decision may be challenged on the ground of arbitrariness, discriminatory and such other allegations and would result in endless litigations against the banks. Further, an instrument in respect of which stamp duty is to be paid maybe liable to subjective interpretations of officers, even if guidelines are provided. Therefore, imposition of such liabilities upon banks and financial institutions is unreasonable in the first instance. SRP 47/167

(1) The Stamp Act Amendment is vague and unclear as to

whether the penalty imposed upon the banks and financial institutions under sub-section (2) of the Stamp Act Amendment is over and above and in addition to the penalty provisions already in place under the Stamp Act? It appears that the intention of the Respondent No.1 is to enrich itself by prescribing a

penalizing provision under Section 30A (2) when there are provisions already in place under the Stamp Act to which also adequately protects the interest of revenue of the State. Therefore, the Stamp Act Amendment enacted gives unbridled power to the State to impose further penalties over banks and financial institutions, irrespective of the fact that the banks and financial institutions may not be at fault. The Supreme Court has observed that “an instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence and it cannot be acted upon by that person or by any public officer. This is the penalty which is imposed by law on the person who may seek to claim any benefit under an instrument if it is not duly stamped. Once detected the authority competent to impound the document can recover not only duty SRP 48/167 WP308.14.doc but also penalty, which provision protects the interest of revenue. In the event there being a criminal intention or fraud, the persons responsible may be liable to be prosecuted. The availability of these provisions, in our opinion adequately protects the interest of revenue.” It is further held by the Supreme Court that “Possessing a document not duly stamped is not by itself any offence. Under the garb of the power conferred by Section 73 the person authorized may go on rampage searching house after house i.e residences of the persons or the places used for the custody of the documents. The possibility of any wild exercise of such power may be remote but then on the framing of Section 73, the provision impugned herein, the possibility cannot be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate with the purpose sought to be achieved and, therefore a reasonable nexus between stringency of the provision and the purpose sought to be achieved ceases to exist.” (m) The Maharashtra Stamp Act, 2013 is a fiscal

SRP 49/167

legislation. It is a well settled principle that remedial statutes and statutes which have come to be enacted on demand of the permanent public policy generally receive a liberal interpretation but fiscal statutes cannot be classed as such, operating as they do to impose burdens upon the public and need, therefore, to be construed strictly. There is a need for balancing the harshness which would be inflicted on the subjects by implementation of the Stamp Act Amendment as against the advantage which would result in the form of revenue to the State, the latter may not be able to compensate the discontent and heavy work load, deployment of human resources time and heavy financial liability, which would be occasioned amongst the banks and financial institutions. It is pertinent to note that a revenue generating legislation cannot be enacted by the State so as to burden the banks and financial institutions unreasonably and impose such harsh penalty thereby being detrimental to their business as a whole. The State cannot arbitrarily impose any liabilities and penalties on banks

and financial institutions with heavy financial and other costs and obligation that would though generate revenue for the State but will cripple the on-going business activities of the banks and financial institutions. SRP 50/167

(n) Without Prejudice to all that is stated above, a bare perusal

of the Circular and the Stamp Act Amendment annexed to it evidences that there are certain contradictory provisions in the Circular and Section 30A which renders the Stamp Act Amendment uncertain and ambiguous. While, on one hand the Circular provides that 'in case of documents executed before May 1, 2013 and are effective, it should be verified whether proper stamp duty has been paid or not. If it has not been paid, it should be ensured that proper stamp duty (which includes penalty, if any) is paid by September 30, 2013 by the partly liable to pay it. Else the documents have to be impounded and forwarded to the Collector of Stamps before September 30, 2013. Failure to do this would result in penalty (equal to Stamp Duty Payable) being levied on Banks/ FIs.', on the other hand, Section 30A provides that 'In respect of any such instrument executed before the date of commencement of the Maharashtra Tax Laws (Levy and Amendment) Act, 2013, and are effective and where proper stamp duty is not paid, then the financial institution shall impound such instrument on or before the 30th September, 2013 and forward the same to the Collector for recovery.' Section 30A SRP 51/167 WP308.14.doc further provides that 'Where the financial institution fails to impound such instrument as provided in sub-section (2), then the concerned financial institution shall be liable to pay a penalty equal to the stamp duty payable on such instrument.' As seen above, while the Circular clarifies that if adequate stamp duty is not paid on an instrument/document executed before May 1, 2013, it should be ensured that such proper stamp duty including penalty, if any shall be paid by September 30, 2013 and in the event such stamp duty is not paid, the instrument will have to be impounded and forwarded to the Collector of Stamps before September 30, 2013. However, the Stamp Act Amendment i.e Section 30A provides that if proper stamp duty is not paid on documents/instruments executed before May 1, 2013 and are effective, then banks and financial institutions shall consequently impound such instruments/documents on or before September 30, 2013 and forward the same to the Collector for recovery. Therefore while the Stamp Act Amendment stipulates impounding of documents immediately upon the banks verifying that proper stamp duty was not paid on such documents, the Circular provides, in the SRP 52/167 WP308.14.doc event proper stamp duty is not paid, payment of adequate stamp duty and penalty should be made first and only upon failure of such payment, the documents should be impounded. Therefore, a conjoint

reading of the Circular and the Stamp Act Amendment creates a contradictory position and is demonstrative of the vagueness, uncertainty, arbitrariness and unreasonableness of the Stamp Act Amendment, which warrants the Stamp Act Amendment and the Circular being declared ultra vires, void and invalid. (o) The Stamp Act defines the expression “banker”, whereas Section 30A refers to a “bank” or a non-banking finance company or a housing finance company or other financial institutions. The definition of the expression “banker” is taken from the Indian Stamp Act of 1899 and the definition is not in conformity with the various categories of banks who are at present operating in the business of banking. There are public sector banks, private sector banks, foreign banks, co-operative banks, regional rural banks, other development financial institutions like SIDBI, Exim Bank, National Housing Bank, Reserve Bank of India, International Finance Corporation, and it SRP 53/167 WP308.14.doc is not clear whether all such institutions are expected to comply with the Stamp Act Amendment enacted to the Stamp Act. 34. Thus, the sum and substance of Mr. Tulzapurkar arguments are that section 30A by sub-section (1) and which opens with a non obstante clause, merely because any writing in favour of any financial institution is created by the instrument referred to in clauses (a) to (g) of section 30, the liability contrary to the mandate of that section and ordinarily understood of paying stamp duty is foisted and thrust upon the bank and financial institution. If that is not discharged then the bank may face several consequences, including penalties. Secondly, any instrument of the nature specified in sub-section (1) but effective before the commencement of the Maharashtra Tax Laws (Levy and Amendment) Act, 2013, and the proper stamp duty is not paid, the same would have to be impounded. Apart from the enormity and impracticality, the obligation and duty is so unreasonable that for the performing the same, the banks / financial institutions would have to undertake an adjudication. In that regard, he relied upon the words and phrases “in favour of or by any financial institutions such as bank SRP 54/167 WP308.14.doc etc.” appearing in sub-section (1) of section 30A which creates any right in favour of any such financial institution and the words and phrases appearing in sub-section (2) of section 30A “effective and where proper stamp duty is not paid”. Mr. Tulzapurkar would submit that failure to carry out the duty under sub-section (2) of impounding the instrument would automatically attract penalty and there is nothing that the bank could state in defence or in answer. This is thus a drastic power and which would completely paralyze the banking transactions. 35. Mr. Tulzapurkar summing up said that the above does not fall in the business of banking and as contemplated by the Banking Regulation Act, 1949, to the extent that the bank would be required to discharge functions and perform duties outside the ambit and scope of this Act, the amendment to the Stamp Act overreaches the parliamentary statute by trying to introduce something not covered by the area and field therein. That is how it goes beyond the powers of the State. Rather, the State has transgressed its powers and over-reached the Banking Regulation Act, 1949, to the above extent. SRP 55/167

36. Mr. Tulzapurkar was also critical of the amendment, namely, section 10A and he would submit that even Nationalized banks are now obliged to collect stamp duties and would be required to make an endorsement on the instrument. If the duty is payable to the State Government and how they are to be paid is indicated by section 10, then one fails to understand as to why the legislature thought it fit to bring in an amendment by section 10A that would further increase the burden. Not only does that increase the burden, but the impact of the same is felt by section 10D and it is that provision which is essentially challenged as being *ex facie* unreasonable, irrational and arbitrary. The banks cannot be expected to be aware of or know the stamp duty payable on any instrument. If it has to ensure that a proper stamp duty is paid, then, this is a power sought to be conferred, but without any guidelines. This provision clearly falls foul of the Stamp Act and the Banking Regulation Act, apart from being violative of Article 14 of the Constitution of India and it isolates only banks and financial institutions controlled or substantially financed by the State Government or any class of them. Secondly, by obliging the Nationalized banks to collect duties and remit them would not just create a collection centre, but require SRP 56/167 WP308.14.doc the banks to perform a host of other functions and duties not contemplated by the Stamp Act, 1958.
37. It is clear that when sub-section (3) of sub-section 30- A provides for imposition of penalty that is understood to be a civil liability. In the case of Director of Enforcement vs. MCTM Corporation Pvt. Ltd. AIR 1996, SC, 1100 , the Supreme Court holds that breach of civil obligation also attracts penalty and when the law so enacts it is not understood to be a penalty in the sense of criminal law. Imposition of penalty for the breach of civil obligation laid down under the Act does not impose any "sentence" for the commission of any offence. The explanation "penalty" is a word of wide significance. Some times it means recovery of an amount as a penal measure even in civil proceedings.
38. Further elaborating this concept in a latter decision in the case of Prati-bha Processors & Ors. vs. Union of India & Ors., AIR 1997 SC 138, the Hon'ble Supreme Court explains it thus : "fiscal statutes with import of the words "tax", "interest", "penalty" etc. are well known. They are different concepts. A SRP 57/167 WP308.14.doc penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of a particular statute" (see paragraph 13). Hence, it is not possible to agree with the learned senior counsel appearing for the petitioners that imposition of penalty would follow simply for inability to impound the instrument as mandated by sub-section (2) of section 30-A. We are clear in our mind that if there is a failure to impound then alone the penalty follows. When the law provides for imposition of penalty and the concept is as understood above, then, there is no basis for the apprehension

that the banks and financial institutions would not be able to contest the imposition or levy of penalty on any permissible ground, much less as above. Therefore, in a given case, the banks and financial institutions point out that they genuinely and bona fide were unable to impound the instrument. Everything, therefore, depends upon the circumstances in each case. In that regard we cannot lay down a general rule. However, we can only say and declare that the provision is not unconstitutional for providing a penalty on account of failure to impound the instrument. More so, when we have explained as above that the impounding does not require performing of any adjudicatory or quasi judicial function, but SRP 58/167 WP308.14.doc merely take a charge or custody and possession of the instrument.

39. Then, Mr. Tulzapurkar turns to the next challenge of the petitioners and namely to section 89-B of the Registration Act, 1908. In that regard he submits that the Registration Act is an Act to consolidate the enactments relating to the registration of documents. Mr. Tulzapurkar invites our attention to Part III of the Act and submits that section 17 falling therein sets out the documents of which registration is compulsory whereas documents of which registration is optional are dealt with by section 18. Mr. Tulzapurkar then invites our attention to the provisions contained in Part XV styled as Miscellaneous and submits that section 89 therein refers to copies of certain orders, certificates and instruments to be sent to registering officers and filed.
40. Mr. Tulzapurkar submits that the Registration (Maharashtra Amendment) Act, 2010 (Mah. X of 2012) seeks to add in sub-section (1) of section 17 as clauses (e), (f), (g) and (h) an agreement relating to the deposit of title deeds, where such SRP 59/167 WP308.14.doc deposit has been made by way of security for the repayment of a loan or an existing or future debt, a sales certificate issued by any competent officer or authority under any recovery act, irrevocable Power of Attorney relating to transfer of immovable property in any way, executed on or after the commencement of the Registration (Maharashtra Amendment) Act, 2010 (Mah. X of 2012) with effect from 1st April, 2013. If these are the documents of which registration is made compulsory, then, they cannot be out of public domain. There is nothing secretive or clandestine about them.
41. Yet, what one finds by introduction of section 89-B and particularly sub-section (2) thereof is that non filing of a notice of intimation, of having mortgaged an immovable property by way of a deposit of title deeds, to the registering officer within the local limits of whose jurisdiction the whole or any part of the property is situate, as required by sub-section (1) of section 89-B, would make a subsequent transaction in relation to or affecting the immovable property which is the subject matter of the mortgage with a third party, void. That and limiting the rights of the third party in relation to such transaction is beyond the SRP 60/167 WP308.14.doc power of the

State and by enacting such measures the State has taken away the rights of the subsequent mortgagee. By taking them away or limiting or restricting them the State is purporting to over-reach section 58 of the Transfer of Property Act, 1882. That Act does not make any such transaction illegal or void. If that is not provided in the substantive law, then, by insertion of a provision in an enactment like the Registration Act, 1908, the State Government cannot dilute or whittle down the rights conferred by general law. That is how section 89-B would operate and to the extent indicated above, the same be declared as null, void and of no legal effect.

42. Mr. Tulzapurkar submits that by the above restriction and placed on a third party, the mandate of Article 19(1)(g) and 300A of the Constitution of India is violated. Mr. Tulzapurkar relied upon the newly introduced clauses (f), (g) and (h) in sub-section (1) of section 17 and submitted that the irrevocable Power of Attorney relating to transfer of immovable property in any way executed prior to 1st April, 2013, does not require registration. It is valid. Now, it having been included in sub-section (1) would impact several transactions. That is also ultra SRP 61/167 WP308.14.doc vires Article 19(1)(g), 300 and Article 20 of the Constitution of India.
43. Mr. Tulzapurkar also highlighted the grounds in the petition, particularly that the Stamp Act amendments as well as the Registration Act amendments are colourable legislations, the real purpose and object of which is completely distinct from the stated one. He has also challenged the validity of the Circular at page 40 and submitted that all these are purportedly enacted or issued to safeguard the interest of the banks or financial institutions. However, in view of what is urged hereinabove, such amendments only hamper and restrict the smooth operation and the on-going business activity of the banks and financial institutions.
44. Mr. Tulzapurkar's arguments are adopted by Mr. Samdani, learned senior advocate appearing for respondent Nos. 5, 7, 8 and 9 in Writ Petition No. 304 of 2014. Additionally, Mr. Samdani outlined the difference between power to adjudicate and power to impound which powers are to be found in the sections under distinct Chapters of the Maharashtra Stamp Act, 1958. SRP 62/167

Mr. Samdani would submit that sub-section (2) of section 30A employs the word 'effective'. In a way, that means valid and binding. Therefore, the banks would be required to impound the instrument within the meaning of this sub-section if it is effective and that would entail a process by which it will have to adjudicate. That power to impound without adjudication cannot be exercised and the bank must necessarily undertake this exercise. Therefore, there cannot be a delegation or outsourcing of an adjudicatory

function or power. Once there is a power in the financial institution to seize or take possession of an instrument then conferment of such a power and failure to exercise it resulting in penalty would denote as to how the amendments to the Stamp Act are completely unconstitutional or unworkable.

45. Mr. Kamdar, learned senior counsel appearing for the Indian Banks Association, while adopting the arguments submitted that classification of documents broadly made has been added to by an additional classification or sub-classification in terms of section 30A of the Maharashtra Stamp Act, 1958. He would submit that non recovery of stamp duty is not peculiar to the instruments in favour of banks and only including the banks SRP 63/167 WP308.14.doc within the ambit and scope of sub-sections (1) and (2) of section 30A would indicate that the classification is wholly arbitrary, discriminatory and unsustainable. There is absolutely no nexus with the object sought to be achieved.
46. All the senior counsel appearing for the petitioners have relied on the following decisions and in order of their arguments they are as under :-
Decisions relied upon by Mr. V.V. Tulzapurkar, learned senior counsel:
 - (1) State of M.P. vs. Rakesh Kohli & Anr., AIR 2012 SCC 2351.
 - (2) Mardia Chemicals Ltd. vs. Union of India & Ors., AIR 2004 SC 2371.
 - (3) Dr. Subramanian Swamy vs. Director, Central Bureau of Investigation & Anr. AIR 2014 SC 2140.
 - (4) State of West Bengal vs. Anwar Ali Sarkar, 1952 S.C.R. 284: AIR 1952 SC 75 : 1952 Cri L J 210. Decisions relied upon by Mr. Pravin K. Samdani, learned senior counsel: SRP 64/167

- (1) *Shreya Singhal vs. Union of India*, (2015) 5 SCC, 1.

Decisions relied upon by Mr. S.U. Kamdar, learned senior counsel: (1) D.S. Nakara & Ors. vs. Union of India, (1983) 1 SCC 305. 47. Having noted the arguments of the senior counsel appearing for the petitioners, we must now refer to the contrary submissions of the learned Advocate General. 48. His submissions can be summarized as under : 49. Section 30A read and understood in the setting and backdrop, particularly the Chapter in which it appears would demonstrate that it is not ultra vires the parent Act or the mandate of Articles 14, 19(1)(g) and 300 of the Constitution of India. Mr. Aney would submit that the learned senior counsel have not read the amendments in their proper perspective. The amendment by way of section 30A is brought about to facilitate collection of revenue. The Legislature has ample discretion, very wide powers

and enough latitude insofar as imposition of duties and taxes and their recovery. The mandate of Article 14 of the SRP 65/167 WP308.14.doc Constitution of India is to be applied somewhat differently while considering the constitutional validity of a taxing statute. The Legislature need not tax everything to tax something. The Legislature need not include everything that is conceivable and possible in the taxing provision. The incidence and imposition of tax could be sustained and the rigours that are ordinarily applied would have to be relaxed in the case of a taxing statute. Once there is a wide discretion and latitude in the Legislature, then, it would be apparent that the financial institutions such as banks, non-banking financial company, housing finance company or alike deal with large number of instruments. These instruments are in favour of or executed by such entities. It came to the notice of the State that in relation to such instruments and which are of the nature referred to in clause (a) to (g) of section 30, the proper stamp duty has not been collected. Therefore, section 30A was inserted by Maharashtra Act No.8 of 2013 with effect from 1 st May, 2013. The Statement of Objects and Reasons to this amendment would indicate as to how there was a revenue loss. The State could not afford to loose revenue in the form of stamp duty on these instruments. The sweep of the banking transactions having increased manifold, large scale urbanization SRP 66/167 WP308.14.doc having taken place, banks deal in number of ways with its constituents, customers, clients and others, the services provided by the banking sector ever expanding that the instruments attracting stamp duty have increased. These instruments and for their sheer volume can be treated as a class apart. They can be brought by the Legislature under the umbrella of a provision like section 30A. Such provisions are in the nature of an exception. Such provisions do not impose any obligation or duty on the financial institutions in the nature of adjudication or taking a decision on the amount of duty payable, the instruments on which they are payable etc. The learned senior counsel have not read sub-section (1) in its entirety and which indicates that the liability to pay proper stamp duty shall be on such financial institutions concerned in whose favour or who has executed any instrument after the commencement of the Amendment Act and which instrument creates any right in favour of any such financial institution, then, the liability to pay proper stamp duty shall be on such financial institution concerned. This is notwithstanding anything contained in section 30. The bank will only perform a ministerial act. The instruments which attract stamp duty are already specified in section 3 of the Maharashtra SRP 67/167 WP308.14.doc Stamp Act which is entitled as 'Instruments chargeable to duty'. Now, the instrument is mentioned in Schedule I, if not having been previously executed by any person and is executed in the State on or after the date of commencement of the Maharashtra Stamp Act and every instrument mentioned in Schedule I which not having been previously executed by any person is executed out of the State on or after the said date but relate to any person situate or any matter or thing done or to be done in the State of Maharashtra and is received in the State, then, the stamp duty indicated in Schedule I shall be chargeable. The amount is also indicated in Schedule I. That is the proper duty. Once the Legislature employs these very words

in section 30A, then, it is a misnomer to read any adjudicatory function or any quasi judicial act required to be performed. The proper stamp duty is already indicated. Since duty is payable by the persons indicated in section 30, but the liability would fall on the bank / financial institution but reserving its right to collect it from the other party, this facilitates the revenue collection. 50. To enable the banks and financial institutions to collect the stamp duty in cases of instruments executed before SRP 68/167 WP308.14.doc the date of commencement of the Amendment Act and in the event such instruments are effective, but where proper stamp duty is not paid, then the financial institution shall impound such instrument on or before the date specified in sub-section (2) and forward the same to the Collector for recovery. Once again, this is a power to facilitate collection of duty and through the bank. The bank has to impound the instrument on which proper stamp duty is not paid and forward it to the Collector for recovery. The Collector would proceed in terms of his powers under Chapter III or the further Chapters and recover the duty in accordance with law. There is absolutely no force in the contentions that the bank would be discharging any quasi judicial functions or exercising adjudicatory power or there is any outsourcing of the said adjudicatory powers in their favour. The impounding is only when on effective instruments, the proper stamp duty is not paid. The payment of stamp duty is evident and proof thereof is to be found on the face of the instrument itself. If the payment is made, then it is impressed with stamps. If it is not so impressed, then, only a look at the instrument would reveal the amount of duty with which it is chargeable and in terms of section 3 read with Schedule I to the Maharashtra Stamp Act, 1958. As simple as a SRP 69/167 WP308.14.doc task as this would enable the bank to impound the instrument. If there is any failure to impound such instrument as is provided in sub-section (2) only then the concerned financial institution is liable to pay penalty equal to the stamp duty payable on such instrument. It is not in every case that such a imposition would follow. Once a provision as sub-section (3) is understood in this perspective, then, it is apparent that there is no force in the petition. 51. Mr. Aney has invited our attention to sections 37, 39, 46 and 53(1A) of the Maharashtra Stamp Act and the Chapter heading under which they fall. Mr. Aney submits that the machinery provisions are under sections 37, 39 and 46. Neither section 30A sub-section (1) nor sub-section (2) or sub-section (3) thereof can be termed as arbitrary once one looks at the scheme of the Act and particularly section 53(1A) thereof. 52. Mr. Aney then submitted as under : (a) Section 30A cannot be read in isolation. It is a part of Chapter II which concerns Stamp Duties. This Chapter is divided in several parts viz. (A) Of the Liability of the Instruments to SRP 70/167 WP308.14.doc Duty, (B) Of Stamps and the mode of using them (which includes amended Section 10D), (C) Of the time of stamping instruments, (D) Of valuations for stamp duty, (E) Duty by whom payable (which includes Section 30A). (b) Chapter III relates to adjudication of stamps. Chapter IV deals with instruments not duly stamped [including Section 37(2) and Section 39]. (c) Section 30 specifies a list of instruments and makes it clear as to who is liable to pay the duty. Therefore, the liability to pay duty qua each instrument must be understood

the Collector. There are instruments which “are effective”. It would be well within the knowledge of the financial institution as to which instruments that create rights in their favour are effective. It is indeed impossible to envisage a situation that the bank would be unaware of instruments that create rights in their favour. (j) As to the second objection viz. that in any case the financial institution would be required to adjudicate upon what is the proper stamp duty to be paid, it is submitted that the language of Section 3 itself clarifies that the proper stamp duty is the duty of the amount indicated in Schedule I. Therefore, save and except the requirement of referring to the contents of Schedule I and making necessary calculation, the financial institution has to perform no further function to understand what SRP 74/167 WP308.14.doc is meant by proper stamp duty. At best, this function can be described as a ministerial act on the part of the financial institution and cannot be stretched to mean that it is an adjudicatory activity. (k) Adjudication is a specific power given in Chapter III. Its provisions empower the Collector to perform necessary functions relating to adjudication as to the proper stamp. The term “liability to pay proper stamp duty” used in Section 30A(1) and the term “adjudication as to proper stamps” used in Section 31 need not be confused. The first relates to a calculation required to be made with reference to Schedule I, whereas the latter is in essence a quasi-judicial function permitting receiving of evidence and any further enquiry that may be needed to determine whether the instrument is chargeable. It is not the intendment of the amendment to confer any adjudicatory power much less impose a duty to adjudicate on the financial institutions. (l) The Petitioners’ submission that the failure of the financial institution not to impound and forward an instrument SRP 75/167 WP308.14.doc within the period specified in Section 30A(2) which attracts penalty may be answered thus. In a given case, assuming the instrument is impounded after the date specified it would still be dealt with in terms of Section 37(2) which covers cases of instruments that have been impounded by financial institutions. The action to be taken is provided for by Section 39. It is for the Collector to deal with the collection of Stamp Duty. (m) Section 42 refers to taking of proceedings concerning payment of penalty not being a bar for prosecution. Section 43 refers to recovering the penalty by the person paying it from the persons who were bound to pay it in the first place. Section 46 concerns with recovery of penalty as arrears of land revenue. The scheme is therefore one which contemplates a legal process and would necessarily provide basic safeguards against penal action that may, in rare circumstances be imposed on a financial institution which may have bona fide reasons for not impounding the documents within the period specified in Section 30A(2). (n) Further provisions of Chapter VI and in particular Sections 53 and 53A thereof give powers of revision against the SRP 76/167 WP308.14.doc Collector’s Order to the Chief Controlling Revenue Authorities. Hence, the penal provisions are not without recourse. (o) Merely because a law operates to hardship of a class of persons does not render it unlawful. (p) The intent sub-clause (2) of Section 89B is not to divest rights or titles, although that may be one of the effects. The intent of the legislature in bringing about the amendment was to amend the Registration Act. As the subject matter of Registration falls in

Entry 6 of List III - Concurrent List, the State has legislative competence. The aspect of touching rights to property, as envisaged by Section 89B(2), is at best incidental entrenchment. (q) As both Registration Act and Transfer of Property Act are relatable to Entry 6 of List III - Concurrent List, there is no absence of legislative competence in the State to enact the amendments. However, since the Transfer of Property Act, which is a Central Act, already occupies the field, the amended Section 89B would have to be understood as making an incidental SRP 77/167 WP308.14.doc encroachment on the said Central Legislation. Such entrenchment is permissible in Law. 53. The learned Advocate General has submitted that section 89-B(2) is not to make transactions impossible or difficult for bankers. The menace of uncontrolled or repetitive mortgages are dealt with and there is distinction because it is only a written agreement of mortgage which is compulsorily registrable. What is dealt with by Schedule I of Article VI of the Maharashtra Stamp Act and the compulsorily registrable instruments provided in the Registration Act is not to be confused with an intimation which would be required to be forwarded about the act of deposit of title deeds with an intent to create an equitable mortgage. It is that intimation which must be given and the failure to give it entails the consequences provided by sub-section (2) of section 89-B. The intent is never to nullify the transactions as is apprehended. These amendments have been brought in bearing in mind the recommendations of the Law Commission of India contained in its 178th Report. 54. Thus, the learned Advocate General was supportive of SRP 78/167 WP308.14.doc the amendments and invited our attention to the scheme of both the Maharashtra Stamp Act, 1958 and the Registration Act, 1908. Alternatively and without prejudice he would submit that in the event this Court is of the view that sub-section (3) of section 30A which provides for penalty is harsh and that imposition may be excessive, this Court may read down the provision to the effect that imposition of penalty is not automatic. It would be imposed upon the satisfaction of any deliberate or intentional act and, in any event, it would not be imposed before a minimal hearing or opportunity to the affected party. It is also possible to seek the assistance from the Inspector General of Stamps and his intervention can be sought so that in terms of his supervisory and controlling powers, he can absolve the aggrieved party from penalty. Further, all factors and which are relevant and material while imposing penalties would have to be considered. According to him, all this is adequate protection and there is no need to strike down the provision and similarly with regard to section 89-B(2) that is inserted with some object and namely to control the menace of multiple transactions and mortgages. He would submit that it is surprising that the banks are challenging such a provision because it is for their protection. SRP 79/167

Though there is an equitable mortgage created in their favour, the mortgagor without intimating the registration office proceeds to mortgage that very immovable property or security by seeking financial assistance from other banks and

financial institutions. To secure that facility, the same property is mortgaged. This would create difficulty for the banks and financial institutions, namely, the first mortgagee's if not impossibility to recover the moneys from the borrowers and mortgagors. It is in these circumstances that the Maharashtra State stepped in and to implement the recommendations of the Law Commission of India. The Power of Attorney transactions in immovable property exposed the public at large to such transactions as were doubtful from the threshold. Once the hurdles and obstacles or suspicious, doubtful transactions lacking in bona fides are sought to be controlled, then, such a provision need not be challenged by banks at least. If there is any subsequent mortgage or if any bank is aggrieved, it may request the Court to intervene. In any event, Mr. Aney would submit that it is for this Court to give the provision a meaning by which it is functional and workable. Beyond that the State does not expect anything, much less intends to take away any existing legally enforceable rights in SRP 80/167 WP308.14.doc favour of any bank or anybody. 55. Mr. Aney has made all the above submissions without giving up his preliminary objection to the maintainability of the petition in the form in which it is presented and filed. Mr. Aney would submit that barring some individuals all the petitioners before this Court are corporate entities / companies / banks / financial institutions. They are artificial persons. No such entity enjoys any fundamental freedom, much less under Article 19(1) (g) of the Constitution of India. That is assured and guaranteed to citizens. A corporate entity cannot be said to be a citizen and, therefore, it is bereft of any such right and freedom. In such circumstances the petition ought to be dismissed even now on this ground. Assuming without admitting that banks and financial institutions have approached this Court relying on the mandate of Article 14 of the Constitution of India, even then they have never been discriminated against and nothing that the law does not envisage or provide for is called upon to be performed or discharged by them. Their banking business is unaffected and untouched. None interferes with the same, much less the State Government. It is their banking business which has resulted in SRP 81/167 WP308.14.doc multiple instruments being executed or brought in the State. It is such instruments which are openly and brazenly put in the market without any stamp duty being paid and impressed upon them. It is the transaction evidenced by these instruments which, therefore, does not come to the knowledge of the public for want of payment of stamp duty or for want of registration. Eventually, therefore, the banks would be at the receiving end and there is no discrimination, much less it is arbitrary or unreasonable or unfair in calling upon the banks to pay the stamp duty when all their rights are intact so also their remedies. Mr. Aney would submit that the petition deserves to be dismissed. 56. Mr. Aney, learned Advocate General, relies on the following judgments : (1) R.K. Garg vs. Union of India (1981) 4 SCC 675. (2) M/s. Murthy Match Works vs. The Asstt. Collector (1974) 4 SCC 428. (3) State of Gujarat vs. Akhil Gujarat Pravasi, (2004) 5 SCC 155. (4) Gujarat Ambuja Cement vs. Union of India (2005) 4 SCC 214. SRP 82/167

- (5) Heena Kausar Vs. Competent Authority, (2008) 14 SCC 724.
- (6) Sri Srinivasa Theatre & Ors. vs. Govt. of Tamil Nadu, AIR 1992 SCC 999.
- (7) State of A.P. vs. McDowell & Co. & Ors. (1996) 3 SCC 709.
- (8) Kerala High Court & Restaurant Association vs. State of Kerala, (1990) 2 SCC 502.
- (9) Express Hotels Pvt. Ltd. vs. State of Gujarat & Anr., (1989) 3 SCC 677.
- (10) Girnar Traders vs. State of Maharashtra (2011) 3 SCC, 1.
- (11) State Trading Corporation of India Ltd. vs. CTO & Ors. AIR 1963 SC1811.
- (12) British Indian Steam Navigation Co. Ltd. vs. Jasjit Singh & Ors. AIR 1964 SC 1451.
- (13) State of Gujarat vs. Shri Ambica Mills Ltd. (1974) 4 SCC 656.
- (14) State of Rajasthan & Anr. vs. Shamshe Singh 1985 (Supp) SCC 416.
- (15) State Government Houseless Harijan Employees Association vs. State of Karnataka & Ors., (2001) 1 SCC610. SRP 83/167

57. Mr. Tulzapurkar in a brief rejoinder sought to repel the arguments of Mr. Aney firstly on the ground of maintainability by submitting that the challenge in the petition is not only based on the mandate of Article 19(1)(g) of the Constitution of India, but that of Article 14 and 300A thereof. Further, the Act even if upheld, the Circular which is challenged goes much beyond the same and hence can be impugned and questioned. The petition, therefore, is maintainable. Secondly, the notice of intimation need not be stamped but non giving of the notice resulting in the drastic consequences under sub-section (2) of section 89-B and destroying the second mortgage or subsequent transaction completely that such a provision cannot find place in the Registration Act, 1908, or in the scheme thereof. Having travelled much beyond that, it deserves to be struck down.
58. With regard to the amendments to the Maharashtra Stamp Act, Mr. Tulzapurkar reiterates his submissions made in the opening and additionally contends that if the statement of objects and reasons is perused it would be evident that banks and financial institutions are singled out. It is not that the revenue SRP 84/167 WP308.14.doc remains outstanding only because of these entities or persons. How the object and purpose of collection of revenue and facilitating the same would be achieved by incorporation and insertion of section 30A of the Maharashtra Stamp Act, 1958, is not clarified at all. It is, therefore, evident that people similarly situated have not been treated similarly. The individuals, mutual funds, insurance companies are left out though they can safely be brought in the purview of the broad term “corporates”. Hence the banks have a legitimate right to complain.
59. Mr. Tulzapurkar reiterated the argument on legislative competence and brought to our notice Schedule VII List I Entry 45 of the Constitution of India. He also brought to our notice section 6(2) of the Banking Regulation Act once again to submit that requiring a bank to undertake a function alien to this provision in the Banking Regulation Act would mean that the Stamp Act goes much beyond its object and purpose and encroaches or interferes with the field reserved under the Banking Regulation Act. In such circumstances and when there is no answer to this, we should not sustain section 30A of the Maharashtra Stamp Act. Lastly, Mr. Tulzapurkar would submit SRP 85/167 WP308.14.doc that section 30A(2) must be struck down because it stipulates a date. By that date the impounding must be done. Else the consequences would follow. This portion is an integral part of the sub-section and can not be separated or segregated from it. Therefore, the provision will have to be read as it is and so read, the obligation is either immediate or incapable of being complied with thereafter and attracting a penalty. Thus, after that date the liability entirely will be that of the bank and it is not possible to recover the amounts.

ig Hence, reading down of both sub- sections (2)and (3) is not going to save them from the vice of unconstitutionality and illegality and hence the section as a whole deserves to be struck down.

60. It is on the above material that we have to consider as to whether the provisions brought in the two enactments are unconstitutional, invalid and ultra vires as claimed.
61. First we would consider the submissions of both sides with regard to the legality and validity of section 30A of the Maharashtra Stamp Act,1958. SRP 86/167
62. This provision is falling in the Maharashtra Stamp Act, 1958. That is an Act to consolidate and amend the law relating to stamps and stamp duties in the State of Bombay.
63. The section opens the Chapter titled “Preliminary” and contains apart from the short title, extent and commencement, some vital definitions. Section 2 opens with the words “In this Act, unless there is anything repugnant to the subject or context-”. Therefore, as is ordinarily understood, the definition would be applied provided there is nothing repugnant in the subject or context. The term ‘Banker’ is defined in section 2 clause (b) as under : “2. Definitions
(a)
(b) “banker” means an association, a company or a person who accepts, for the purpose of lending or investment, deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise;”
64. A bare perusal thereof would indicate as to how any person, association or a company accepting for the purpose of lending or investment deposits of money from the public and repayable on demand or otherwise and withdrawable by cheque, SRP 87/167 WP308.14.doc draft, order or otherwise is a banker. Though the word is defined like this, section 30A employs the phraseology in the marginal note “financial institution” and in subsection (1) that expression is understood as a Bank, Non-Banking Finance Company, Housing Finance Company or alike. Hence, we cannot construe section 30A with the aid of the definition of the term ‘banker’ for financial institutions are performing diverse functions and discharging various obligations, including acceptance for the purpose of lending and investment, deposit of money from the public. However, their activities and functions are not restricted to this at all.

65. Then the crucial term or word which is defined is “chargeable”. That appears in section 2 clause (d) and reads as under : “2. Definitions

(a)

(b) “chargeable” means, as applied to an instrument, executed or first executed after the commencement of this Act, chargeable under this Act, and as applied to any other instruments, chargeable under the law in force in the State when such instrument was executed or, where several persons executed the instrument at different times, first executed;" SRP 88/167

66. A perusal of this definition would reveal as to how it is defined in its application to an instrument on which stamp duty is chargeable or executed or first executed after the commencement of this Act.

67. Then, the definition of the term “Collector” is section 2 clause (f) is material. That is reproduced herein below : “2. Definitions

(a)

(b) “Collector” means the Chief Officer in charge of the revenue administration of a district and includes any officer whom the State Government may, by notification in the Official Gazette, appoint in this behalf; and on whom any or all of the powers of the Collector under this Act are conferred by the same notification or any other like notification."

68. A perusal of this definition would reveal that the Collector means the Chief Officer in charge of the revenue administration of a district and on whom any or all of the powers of the Collector under this Act are conferred by the same notification or any other notification. The word “Conveyance” is defined in section 2(g) but this definition need not detain us further. The other important definitions are of the Deputy SRP 89/167 WP308.14.doc Inspector General and Deputy Collector of Stamps appearing in section 2(ga), “duty stamped” appearing in section 2(h), “executed” and “execution” in section 2(i), “impressed stamp” appearing in section 2(k) and “instrument” appearing in section 2(l). These four definitions are reproduced simply to understand the objections of the petitioners that they would have to perform some adjudicatory functions or decide upon proper stamp duty. “2. Definitions

(a) (ga) “Deputy Inspector General of Registration and Deputy Collector of Stamps” means the officer or officers so designated by the State Government and includes any other officer whom the State Government may, by notification in the Official Gazette, appoint in this behalf;

III of the Stamp Act. The petitioners or for that matter anybody in section 30-A is not expected to take over the above noted functions. 70. Before we reproduce section 3 of the Maharashtra Stamp Act, we would only refer to one or two more definitions one of which is that of mortgage deed. That appears in section 2(p). It reads as under : “2. Definitions (a) (p)” mortgage deed" includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers or creates to, or in favour of, another, a right over or in respect of specified property;" SRP 92/167

71. The Act does not attempt to define mortgage but a mortgage deed and, therefore, that word must be understood and interpreted with the aid of the Transfer of Property Act, 1882. The term “Power of Attorney” is defined in section 2 sub-clause

- (r) and that definition is again an inclusive one. That is empowering a specified person to act for and in the name of the person executing it. After all this, we come to section 3 and section 3 reads thus : “3. Instrument chargeable with duty Subject to the provisions of this Act and the exemptions contained in Schedule 1, the following instruments shall be chargeable with duty of the amount indicated in Schedule 1 as the proper duty therefor respectively, that is to say-
- (s) every instrument mentioned in Schedule 1, which not having been previously executed by any person, is executed in the State on or after the date of commencement of this Act;
- (t) every instrument mentioned in Schedule 1, which not having been previously executed by any person is executed out of the State on or after the said date, relates to any property situate, or to any matter or thing done or to be done in this State and is received in this State; Provided that a copy or extract, whether certified to be a true copy or not and whether a facsimile image or otherwise of the original instrument on which stamp duty is chargeable under the provisions of this section, shall be chargeable with full stamp duty SRP 93/167 WP308.14.doc indicated in the Schedule 1 if the proper duty payable on such original instrument is not paid. Provided further that no duty shall be chargeable in respect of-
- (1) any instrument executed by or on behalf of, or in favour of , the Government in cases, where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument or where the Government has undertaken to bear the expenses towards the payment of the duty.
- (2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part,

interest, share or property of or in any ship or vessel registered under the Bombay Coasting Vessels Act, 1838, or Merchant Shipping Act, 1958."

72. From a reading of section 3, it is apparent that it falls under sub-heading (A) "Of the Liability of Instruments to Duty" under Chapter II. Secondly, section 3 opens with the words: 'Subject to the provisions of the Maharashtra Stamp Act and exemptions contained in Schedule 1, the instruments of the description in that section shall be chargeable with duty of the amount indicated in Schedule 1 as the proper duty therefor respectively.'
73. Hence, no adjudicatory or quasi judicial exercise is SRP 94/167 WP308.14.doc contemplated by section 30A when it obliges the bank to pay the stamp duty. Its liability to pay proper stamp duty on the instrument specified in sub-section (1) of section 30A must be understood in terms of section 3. Therefore, if there is an instrument to which section 3 is subject and if there is any exemption as far as that form payment of stamp duty, all that the bank or the financial institution is required to look at is the instrument and if the instrument is not impressed in terms of the above and duly stamped, then, the proper stamp duty would be computed and calculated by referring to Schedule 1. If that is deficient or not paid then the liability would be of the financial institution.
74. Section 4 of the Act provides for chargeability of duty on several instruments used in a single transaction of (development agreement) sale (lease) mortgage or settlement. Section 5 which falls in the same Chapter II deals with instruments relating to several distinct matters and section 6 deals with instruments coming with several descriptions in Schedule 1. Section 7 provides for payment of higher duty in respect of certain instruments and section 8 deals with the bonds SRP 95/167 WP308.14.doc or securities other than debentures issued on loans. The power to reduce, limit or compound duties is conferred by section 9 and it is conferred on the State Government.
75. Sub-heading (B) of this Chapter is titled as "(B) Of Stamps and the mode of using them". In that appears section 10 which deals with how to pay duty. Section 10A provides for duties to be paid in cash, by demand draft or by pay order by Government controlled bodies, insurance companies and banks. Section 10B obliges stock exchange etc. to deduct stamp duty from trading member's account. Section 10C deals with duties to be paid in cash or by demand draft or by pay order by Notary. Section 10D which is then questioned and challenged in this petition reads as under : " 10D. Certain departments, organisations, institutions etc., to ensure payment of stamp duty (1) Notwithstanding anything contained in this Act, the State Government may, by notification in the Official Gazette, direct that any State Government Department, institution or local self-Government, semi Government organization, banking or non- banking financial institution or the body owned, controlled or substantially financed by the State Government or any class of them, shall ensure that the proper duty is paid to the State Government through Government Receipt Accounting

System SRP 96/167 WP308.14.doc (G.R.A.S.) in respect of such instruments, as may be specified in the notification passing through their system or related to their functioning of which registration is not compulsory.

- (2) The Chief Controlling Revenue Authority shall authorise a person nominated by such Department or body, etc.. as mentioned in sub-section (1) as a proper officer for defacing the challan and making the endorsement on such instruments.
- (3) It shall be the duty of the proper officer so authorised under sub-section (2) to make an endorsement on the instruments after defacing the challan, as follows :- “Stamp duty of Rs. _____ paid in *cash / by demand draft / by pay order / e-Challan vide Receipt / Challan No. _____ / GRN No. _____ CIN _____ dated the _____*. *Seal of the Office Signature of the Officer* Strike out whatever is not applicable.]”

76. It is apparent that by sub-section (1) of section 10 which opens with the words “Except as otherwise expressly provided in this Act”, all duties with which any instruments are chargeable shall be paid, and such payments shall be indicated on such instrument, by means of stamps according to the provisions contained in the chapter or when no such provision is applicable, as the State Government may by Rules direct. The Rules made under sub-section (1) may regulate among other, matters falling in sub-clauses (a) and (b) of sub-section (2) of section 10. We find SRP 97/167 WP308.14.doc that several amendments have been made by introduction of sub-sections after sub-section (2) of section 10 and by sub-section (3) one finds that by notification in the Official Gazette, the Chief Controlling Revenue authority is specifying the mode of payment on instruments chargeable with stamp duty. The modes are set out in sub-section (3) of section 10 which also has been substituted by Maharashtra Act No.X of 2003. Surprisingly, none of the petitioners challenged this and yet pick up one section, namely, section 10D and impugn it. If the stamp duty can be paid by means of a franking machine, by means of cash, by demand draft, by pay order or by e-payment and the procedure to regulate the use of that payment through Government Receipt Accounting System (Virtual Treasury) for payment of duty shall be such as the Chief Controlling Revenue Authority may by an order determine. Therefore, there is no obligation on the banks and financial institutions to pay stamp duty but that stamp duty which has to be paid on an instrument and payable by a person set out in section 30 can be paid by the above modes and one of which is demand draft or pay order.

77. Section 10A has been inserted by the same Act so as SRP 98/167 WP308.14.doc to enable the State Government to issue a notification directing the bodies owned or controlled by the State or Central Government, Insurance Companies, Nationalized Banks, that the duty may be paid by their Head Office, Regional Office or Zonal Office by way of

cash or by demand draft or by pay order in the manner further specified therein and eventually to carry an endorsement as set out in section 10A. Therefore, this provision has been inserted only to facilitate the bodies owned and controlled by the State or Central Government, Insurance Companies and Nationalized Banks to pay duty either through their Head Office, Regional Office or Zonal Office by way of cash or by way of the mode specified in section 10A. This could certainly, therefore, not be challenged and similarly the banks are not concerned with the obligation of the Stock Exchange etc. as set out in section 10B and duty to be paid in cash or by demand draft or by pay order by notary. These sections, namely, sections 10A and 10C are opening with the words " Notwithstanding anything contained in section 10" and section 10B opens with the words "Notwithstanding anything contained in this Act". Section 10D which is then relevant, has already been reproduced by us above. SRP 99/167

78. We do not think from a reading of these provisions that they are in any way onerous, arbitrary or excessive, much less violative of the mandate of Articles 14 and 300A of the Constitution of India. It does not oblige the bank to carry on any function or perform any duty de hors the Banking Regulation Act, 1949 for it only enables the State Government to issue notification in the Official Gazette directing that any State Government department, Institution of Local self-Government, Semi-Government Organizations, Bank or Non-banking Financial Institution or the body owned and controlled or substantially financed by the State Government or any class of them to ensure that the proper duty is paid to the State Government through G.R.A.S. in respect of such instrument as may be specified in the notification passing through their system or related to their functioning of which registration is not compulsory. A limited number of instruments passing through the system all related to their functioning of which registration is not compulsory that these entities have to ensure that the proper duty is paid to the State Government through the G.R.A.S. That is a mode in which the stamp duty can be paid and as is clear from section 10(3). This system comes into force and operation after the Chief SRP 100/167 WP308.14.doc Controlling Revenue Authority issues a notification in the Official Gazette and in terms of sub-section (3) of section 10. The Government Receipt Accounting System regulates the use of e- payment and the procedure to regulate this payment through this accounting system has to be determined by the Chief Controlling Revenue Authority. The banks in the present case have to ensure that there is compliance with the Government notification issued in terms of section 10D(1). That is a limited duty, namely, to ensure that proper duty is paid to the State Government through this G.R.A.S. only in respect of instruments as may be specified in the notification passing through the system

or related to their function of which registration is not compulsory. We do not see how any responsibility or duty which contravenes the mandate of section 6 of the Banking Regulation Act, 1949, would have to be performed and discharged. It is only ensuring proper duty being paid to the State Government through a system which is to be availed of only after the regulatory regime is put in force by the Chief Controlling Revenue Authority. We do not find, therefore, any substance in this challenge of the petitioners. We do not think that Mr. Tulzapurkar is right in complaining that the banks would have to undertake any function or work which is not falling SRP 101/167 WP308.14.doc within the banking business and function. We do not see any over-reaching by the State legislature, much less directing taking over of or performing any function as such. To ensure payment of proper stamp duty to the State Government in relation to such instruments as are specified and noted above would not, therefore, be said to be unconstitutional, ultra vires and illegal.

79. Then we come to the further sections of Chapter II, namely section 11 and which are pertaining to use of adhesive stamps; section 12 - cancellation of adhesive stamps and by section 13, what we find is that instruments stamped with impressed stamps have to be written in such manner that the writing may appear on the face and if required on the reverse of such sheet so that it cannot be used for or applied to any other instrument. This, to our mind, completely falsifies the complaint by the banks and financial institutions that they would have to determine the proper rate of duty. By sections 14 and 14A it is apparent that only one instrument to be on same stamp and alterations in instruments also have to be charged in the manner set out in section 14A. Section 15 shows that instruments written contrary to sections 13, 14 or 14A would be termed as SRP 102/167 WP308.14.doc not duly stamped and then comes section 16, which reads as under : " 16. Denoting Duty Where the duty with which an instrument is chargeable, or its exemption from duty, depends in any manner upon the duty actually paid in respect of another instrument, the payment of such last mentioned duty shall, if application is made in writing to the Collector for the purpose, and on production of both the instruments, be denoted upon such first mentioned instrument by endorsement under the hand of the Collector in such other manner (if any) as the State Government may, by rules, prescribe."
80. Hence everything is denoted upon the instrument and in cases covered by section 16 first mentioned instrument by endorsement under the hand of the Collector in such manner, if any, as the State Government may, by rules, prescribe. The instrument thus, on the face of it, would denote whether duty is paid. That can be ascertained by having a look at the instrument. It is that instrument which would, therefore, invite further consequences in law.
81. The time of stamping instruments is another sub- heading of Chapter II

and under which sections 17, 18 and 19 appear. That deals with instruments executed in the State, SRP 103/167 WP308.14.doc executed out of State and payment of duty on certain instruments or copies thereof liable to increased duty in Maharashtra State.

82. Valuation for duty is dealt with by sub-heading “(D) - Of Valuation for Duty” of the same Chapter II in which sections 20 to 29 appear, all of which and read together and harmoniously with the other provisions of the Act would indicate that there is no adjudicatory function which will have to be performed by the banks or financial institutions.
83. Then comes sections 30 and 30A, both of which read as under : “30. Duties by whom payable. In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne;-
- (a) in the case of any instrument described in any of the following articles of Schedule I, namely- No.2 (Administration Bond); No.6 (Agreement relating to Deposit of Title-deeds, Pawn or Pledge),

No.12	(Bond),
No. 14	(Bottomry Bond),
No. 28	(Customs Bond),
No. 33	(Further Charge),
No. 35	(Indemnity Bond)
No. 40	(Mortgage Deed),

SRP 104/167

No. 52	(Release),
No. 53	(Respondentia Bond),
No. 54	(Security Bond or Mortgage Deed),

No. 55	(Settlement)
No.59(a)	Transfer of debentures, being marketable securities whether the

debenture is liable to duty or not,
except debentures provided for by
section 8 of the Indian Stamp Act,
1899.

No. 59(b) Transfer of any interest secured by a bond or mortgage deed or policy insurance), by the person drawing or making such instrument; (b) in the case of a conveyance (including by a conveyance of mortgaged property) by the grantee; in the case of a lease or agreement to lease by the lessee or intended lessee; (c) in the case of a counter part of a lease by the lessor; (d) in the case of an instrument of exchange by the parties in equal shares; (e) in the case of an instrument of exchange by the parties in equal shares; (f) in the case of an instrument of partition by the parties thereto in proportion to their respective shares in the whole property partitioned, or, when the partition is made in execution of an order passed by a Revenue Authority or Civil Court or Arbitrator, in such proportion, as such Authority, Court or arbitrator directs; (f-a) in case of instruments of works contract as provided in Article 63 of SCHEDULE I, by the person receiving the contract. (g) in any other case, by the person executing the instrument. SRP 105/167

30A. Duties payable by financial institution

(1) Notwithstanding anything contained in

section 30, where any instrument referred to in clauses (a) to (g) of section 30, is executed on or after the date of commencement of the Maharashtra Tax Laws (Levy and Amendment) Act, 2013, in favour of or by any financial institution, the liability to pay proper stamp duty shall be on such financial institution concerned without affecting their right, if any, to collect it from the other party. (2) In respect of any such instrument executed before the date of commencement of the Maharashtra Tax Laws (Levy and Amendment) Act, 2013, and are effective and where proper stamp duty is not paid, then the financial institution shall impound such instrument on or before the 30th September 2013 and forward the same to the Collector for recovery. (3) Where the financial institution fails to impound such instrument as provided in sub-section (2), then the concerned financial institution shall be liable to pay a penalty equal to the stamp duty payable on such instrument." 84. Section 30 is dealing with duty by whom payable. As set out in section 30, in the absence of an agreement to the contrary the expenses of providing the proper stamp shall be borne in cases of these instruments and which are set out in clause (a) by the person drawing or making such instrument, in the case of a conveyance including conveyance of mortgaged property, by the grantee in the case of a lease or agreement to lease by the lessee or intended lessee. Hence, the duties are SRP 106/167 WP308.14.doc

payable by these persons and on instruments falling in the categories enumerated above. However, notwithstanding anything contained in section 30 any instrument referred to in the above clauses of section 30 is executed on or after the commencement of the Maharashtra Tax Laws (Levy and Amendment) Act, 2013, in favour of or by any financial institution which creates any right in favour of any such financial institution then the liability to pay proper stamp duty shall be on the financial institution concerned without affecting its rights, if any, to collect it from the other party. 85. We do not see how this is an impediment on the right to carry on banking business or any trade, occupation and profession within the meaning of sub-clause (g) of clause (1) of Article 19 of the Constitution of India. It is only after the Amendment Act that this liability comes on to the bank / financial institution. Further, it is restricted to the instruments of the above nature, namely, in favour of or by any financial institution such as bank etc. and which create any right in favour of such financial institution. No difficulty, much less of any insurmountable nature can be experienced when in only limited SRP 107/167 WP308.14.doc number of instruments the liability to pay the stamp duty is on the bank / financial institution, but without affecting its corresponding right to recover it. Therefore, we see no reason to strike down this sub-section. It is in relation to limited instruments that the liability to pay stamp duty is of the banks / financial institutions and for good reasons. That is because the banks and financial institutions post urbanisation, industrialisation, liberalisation and privatisation era are handling and dealing in ig varied transactions evidenced by such instruments. Now, banking activity has undergone a radical change by passage of time. In the modern era banks and financial institutions are undertaking multiple assignments for their clients, customers and constituents and others located nationally and internationally. A large number of dealings and transactions so also services rendered by banks and financial institutions resulting in large number of instruments being executed in favour of or by any financial institution create a right in favour of such institutions. Therefore, to smoothen the process of collection of stamp duty and not to delay it, the State has decided to fix the liability to pay proper stamp duty on such financial institutions and the provision has taken care not to affect any SRP 108/167 WP308.14.doc right in such institutions to collect it from the other party. In their written arguments, the petitioners themselves highlight that there are 9000 (nine thousand) branches of Commercial Banks all over the State. As on 1 st May, 2013, the outstanding loan transactions are in the range of thirteen crore. Given this state of affairs one can only imagine the number of instruments. In this backdrop, we do not see how this provision can be termed as arbitrary, unreasonable and unfair given the sheer volume of banking and financial transactions and execution of multiple instruments. In such circumstances, we do not think that the legislature has, in facilitating collection and recovery of stamp duty, placed a burden on the banks which is impossible to discharge. It is neither onerous nor excessive as well. Once the nature of the liability is understood, then, we do not see any substance in the arguments and to the contrary. More so, when the instruments in relation to which the liability is to be discharged are set out. The liability is instrument specific, namely, that

which is executed in favour of or by any financial institution, which creates any right in its favour. Such instruments are identifiable. The rights of the financial institutions to rely upon and enforce these instruments and the SRP 109/167 WP308.14.doc transactions and deals evidenced thereby are not affected at all. Once the duty is paid the instrument can be tendered and relied on in legal proceedings. The hurdle or obstacle to admissibility on this ground is removed. Thus, the banks / financial institutions are in a way benefited by this statutory arrangement. 86. Mr. Tulzapurkar laid heavy emphasis on the ground that it is unreasonable and irrational having no nexus with the object sought to be achieved. He has complained that there are no materials produced or placed before this Court and the statement of objects and reasons is completely silent on this aspect. We do not think that the statement of objects and reasons is silent for there is a clear indication therein that to facilitate and rather accelerate collection of revenue, namely, stamp duty that this provision is enacted. It subserves larger public interest and works for public good. Lest everybody forgets, taxes are not imposed only to collect revenue but, to reduce inequality. In the case of *Sri Srinivasa Theatre & Ors. vs. Government of Tamil Nadu & Ors.* AIR 1992 SC 999, the Hon'ble Supreme Court had to consider a challenge which was somewhat identical. Before us, there is no challenge to the machinery provisions in a taxing SRP 110/167 WP308.14.doc statute. The challenge is only to the mode of collection and recovery. Once far more latitude and freedom is available to the State in these matters, then, we do not see any substance in the challenge. The Supreme Court held thus : "9. Article 14 of the Constitution enjoin upon the State not to deny to any person 'Equality before law' or 'the equal protection of laws' within the territory of India. The two expressions do not mean the same thing even if there may be much in common. Section 1 of the XIV Amendment to U.S. Constitution uses only the latter expression whereas the Irish Constitution (1937) and the West German Constitution (1949) use the expression "equal before law" alone. Both these expressions are used together in the Universal Declaration of Human Rights, 1948, Article 7 whereof says "All are equal before the law and are entitled without any discrimination to equal protection of the law." While ascertaining the meaning and content of these expression, however, we need not be constrained by the interpretation placed upon them in those countries though their relevance is undoubtedly great. It has to be found and determined having regard to the context and scheme of our Constitution. It appears to us that the word "law" in the former expression is used in a generic sense-a philosophical sense-whereas the word "law" in the latter expression denotes specific laws in force. 10. Equality before law is a dynamic concept having many facets. One facet-the most commonly acknowledged-is that there shall be no privileged person or class and that none shall be above law. A facet which is of immediate relevance herein is the obligation upon the State to bring about, through the machinery of law, a more equal society envisaged by the preamble and part IV of our Constitution. For equality before law can be predicated meaningfully only in an equal society i.e., in a society contemplated by Article 38 of the Constitution, which reads; SRP 111/167

"38. State to secure a social order for the

promotion of welfare of the people. (1) The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social, economic and political, shall inform all the institutions of the national life. (2) The State shall, in particular strive to minimise the inequalities in income, and endeavour to eliminate inequalities, in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations." 11. The instrument of taxation is not merely a means to raise revenue in India; it is, and ought to be, a means to reduce inequalities. You don't tax a poor man. You tax the rich and the richer one gets, proportionately greater burden he has to bear. Indeed, a few years ago, the Income Tax Act taxed 94p out of every rupee earned by an individual over and above Rupees one Lakh. The Estate Duty Act, no doubt since repealed, Wealth Tax Act and Gift Tax Act are all measures in the same direction. It is for the reason that while applying the doctrine of classification-developed mainly with reference to and under the concept of "equal protection of laws"-Parliament is allowed more freedom of choice in the matter of taxation vis-a-vis other laws. If this be the situation in the case of direct taxes, it should be more so in the case of indirect taxes, since in the case of such taxes the real incidence is upon some other than upon the person who actually makes it over to the State, though, it is true, he cannot avoid the liability on the ground that he has not passed it on. In the matter of taxation it is, thus, not a question of power but one of constraints of policy-the interests of economy, of trade, profession and industry, the justness of the burden, its 'acceptability' and other similar considerations. We do not mean to say that taxation laws are immune from attack based upon Article 14. It is only that parliament and legislatures are accorded a greater freedom and latitude in SRP 112/167 WP308.14.doc choosing the persons upon whom and the situation and stages at which it can levy tax. We are not unaware that this greater latitude has been recognised in USA and UK even without resorting to the concepts of 'equality before law' or "the equal protection of laws" -as something that is inherent in the very power of taxation and it has been accepted in this country as well. (See in this connection the decision of Subba Rao, C.J., (as he then was) in *Gorantia Butchavaa Chowdary & Ors. v. The State of A.P. & Ors.*, 1958 A.P. 294, where the several US and English decisions have been carefully analysed and explained). In the context of our Constitution, however, there is an added obligation upon the State to employ the power of taxation-nay, all its powers-to achieve the goal adumbrated in Article 38. 12. The decisions of this court on the above aspect are legion, starting from *Moopil Nair v. State of Kerala*, [1961] 3 SCR 77. One of the latest decisions is in *Spences Hotel Pvt. Ltd. v. State of West Bengal*, [1991] 2 S.C.C. 154 wherein almost all the earlier decisions of this court on this aspect have been referred to and discussed. To bring out the principle, it would be sufficient if we refer to two of them namely *S.K. Datta, I.T.O v. Lawrence Singh Ingty*, [1968]

2 S.C.R. 165 and *Elle Hotel and Investments Ltd. v. Union of India*, [1991] 2 S.C.R. 166. In the former case, this court observed:- “It is not in dispute that taxation laws must also pass the test of Art. 14. That has been laid down by this Court in *Moopil Nair v. State of Kerala*, [1961] 3 S.C.R. 77. But as observed by this Court in *East India Tobacco Co. v. State of Andhra Pradesh*, [1963] 1 S.C.R. 4040, in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others; it is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, SRP 113/167 WP308.14.doc that it would be violative of Article 14. It is well settled that a State does not have to tax everything in order to tax something. It is allowed to pick and choose district, objects, persons, methods and even rates for taxation if it does so reasonably.” 13. Similarly, it was observed in the other case by one of us (*Venkatachaliah, J.*): “It is now well settled that a very wide latitude is available to the legislature in the matter of classification of objects, persons and things for purposes of taxation. It must need to be so, having regard to the complexities involved in the formulation of a taxation policy. Taxation is not now a mere source of raising money to defray expenses of government. It is a recognised fiscal tool to achieve fiscal and social objectives. The differential of classification presupposes and proceeds on the premise that it distinguishes and keeps apart as a distinct class hotels with higher economic class hotels with higher economic status reflected in one of the indicia of such economic superiority. The presumption of constitutionality has not been dislodged by the petitioners by demonstrating how even hotels, not brought into the class, have also equal or higher chargeable receipts and how the assumption of economic superiority of hotels to which the Act is applied is erroneous or irrelevant.” 14. We shall now proceed to examine the contentions before us in the light of the above

principles, but before
appropriate to remind
dictum :

we do that
ourselves of

we t
the f

“...in the ultimate analysis, we are not really to concern our selves with the hollowness or the self- condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain the legislation. The deponents of the affidavits filed into court may speak for the parties on whose behalf they swear to the statement. They do SRP 114/167 WP308.14.doc not speak for the Parliament. No one may speak for the Parliament and Parliament is never before the Court. After Parliament has said what it intends to say, only the Court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court’s is the only authentic voice which may echo (interpret) the Parliament. This the Court will do with reference to

the language of the statute and other permissible aids. The executive Government may place before the court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of Parliamentary intention by the executive government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament. Validity of Legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the court may ultimately find and more especially by what may be gathered from what the legislature has itself said. We have mentioned the facts as found by us and we do not think that there has been any infringement of the right guarantee by Article 14." (Sanjeev Coke Manufacturing Company v. Bharat Cooking Coal Ltd. & Anr., [1983] 1 S.C.R. 1000 at 1029). 15. We shall first examine whether it was not competent for the Tamil Nadu Legislature to declare that the theatres situated within the five kilometer radius (belt) of the municipal corporation areas and the areas of special grade municipalities shall be subjected to the same method of taxation as the theatres situated within the said area ? It is true that the Act adopts the local areas declared under the Tamil Nadu Municipal Corporation Act, Tamil Nadu Municipalities Act and Tamil Nadu Gram Panchayats Act as the basis or prescribing the rate of taxation. But it must be remembered that it was not obligatory upon the legislature to do so. It could have adopted SRP 115/167 WP308.14.doc any other basis. It is only for the sake of convenience that the existing local areas, convenient existing units of reference, were adopted. It is not a question of power but one of the convenience. There was nothing precluding the legislature to have declared in the very first instance (i.e. at the time of 1978 Amendment Act) that the admission system was to continue in force now only in the corporation areas but also in five kilometer radius (belt) abutting each of those areas. The only question then would have been, as not it is, whether such a course brings about an unreasonable classification or whether it amounts to treating unequals on a uniform basis." 87. These principles which we have reproduced above from the judgment of the Hon'ble Supreme Court in Srinivasa (supra) and those referred therein are from times immemorial. Once it is not obligatory upon the legislature to choose only one mode of collection and recovery and there is a wide choice in that behalf, then, any other basis or choice can be adopted. It could be a question not of power but one of convenience. It is in these circumstances that collection by one more mode has been resorted to. If that is how it has been done, then, we cannot approach the challenge differently. 88. To ensure that stamp duty is collected expeditiously, the State may devise a scheme and pick and choose persons or SRP 116/167 WP308.14.doc instruments by applying broad principles. Given the latitude and freedom the State can within the statutory framework enact measures so that the stamp duty liability will have to be discharged initially by the beneficiary of the transaction and deal. That is done in the present case without exhausting or impacting legal

rights and remedies of the person who has to bear it at the threshold. He can shift the burden and recover the amount of duty paid from the person who must bear it in law. That person is in no way absolved and absolutely. Hence, the classification vide section 30-A has a clear nexus with the object sought to be achieved, namely, easy and uncomplicated method of collecting and recovering the stamp duty. That method is devised without adversely affecting the banks' / financial institution's interests and rights. Some rights hitherto not conferred of taking charge or possession of the instruments on which stamp duty is unpaid and outstanding so as to facilitate the recovery and collection are now conferred vide section 30-A(2). There is nothing arbitrary, discriminatory in singling out the banks and financial institutions as commercial entities for enabling speedy recovery of Government revenue or tax. The target is not the entities but the instruments of a particular category or class. The power to do all SRP 117/167 WP308.14.doc the above in matter of collection of tax is not questioned nor challenged. Neither is the competence of the State in enacting or amending the Stamp Act, a State law. All the arrangements overlook the underlying thread passing through section 30-A. There is no burden imposed and of such magnitude which would enable us to hold that any fundamental freedom guaranteed by the Constitution is taken away. That is neither taken away nor adversely affected by making the banks / financial institutions responsible and in equal measure with the State to recover the tax. The assistance sought from them subserves the larger public interest and public good. There is no restriction on the banking and financial business by enacting the above referred measures. So considered, the challenge must fail. 89. We repeatedly questioned the learned counsel as to how there is any prejudice, much less serious and for the banks and financial institutions as a whole or such loss which has compelled them to raise the challenge. Beyond submitting that the banks would have to first decide and determine what is proper stamp duty and secondly in determining whether the instrument creates any right in favour of the financial institution SRP 118/167 WP308.14.doc it would necessitate scrutinizing the underlying transaction, there are no grounds assigned. 90. We would analyze these reasons and assigned so strenuously by the senior counsel. We have already indicated and with sufficient reasoning of our own that the banks do not have to determine and decide the proper stamp duty. That is already decided and determined by the statute. It cannot be left to anybody's whims and fancies what is the quantum of tax or duty. The charging section is absolutely clear when it says that certain instruments are chargeable to stamp duty, their description and the rate of duty with which they are charged are both set out in a comprehensive schedule and there is sufficient guide in the enactment itself as to how the calculation and computation has to be made and done. If the Legislature has spoken so very clearly, then, we do not see how the petitioners can complain. Apart therefrom, the liability to pay stamp duty on certain instruments and of the nature specified in sub-section (1) does not mean that the stamp duty as determined by the statute cannot be questioned at all. In what circumstances that can be questioned, by whom and how that question or issue has to be SRP 119/167 WP308.14.doc determined is enumerated in the statute itself under a separate

chapter, namely, Adjudication of Stamps. For all these reasons, we do not see any substance in the complaint of the petitioners. There is considerable merit in the submissions of the learned Advocate General on this point. An Act of computing and calculating the duty with the aid of a statutory framework which is never questioned ought not present any difficulty to the bank. The task is neither onerous nor impossible to perform as complained much less as projected. 91. There is no fishing out, tracing from archives, locating from unknown sources, the old unstamped instruments. The record of the transactions, the outstanding monetary liability as determined from books of account etc. furnish a safe guide to work out the amount of duty. 92. We do not see any substance in the other complaint as well. The second ground that the bank would have to necessarily visit and scrutinize the underlying transaction in all cases is also without merit. The Act has clearly set out that the instrument ought to be in favour of or by any financial institution SRP 120/167 WP308.14.doc such as bank etc. and creating any right in favour of any such institution. For ascertaining that, the instrument will speak for itself. Even otherwise, the definition of the term instrument appearing in section 2(1) of the Maharashtra Stamp Act includes every document by which right of liability is created or purported to be created. Therefore, the definition is a sufficient guide and so long as any document is a instrument chargeable to stamp duty in terms of the schedule, then, nothing else is required to be looked into. Its nomenclature would guide the banks / financial institutions and thereafter the clauses or sub-clauses of the written instrument would denote the complete transaction. The instruments are already specified in the statute vide clauses (a) to (g) in section 30. There is no need to interpret the writing or its clauses. A broad identity such as agreement acknowledging the debt mortgaging the property to secure it or securing it by other modes is enough to understand the legislative prescription. Once one of the instrument could be an agreement relating to deposit of title-deeds, deed of hypothecation, pawn or pledge, a writing to bind oneself such as indemnity bond, further charge, mortgage, transfer of debentures being marketable securities, transfer of any interest secured by a bond or mortgage, SRP 121/167 WP308.14.doc conveyance, lease etc., then, we do not see how any detailed analysis, much less an adjudication is called for. The banks and financial institutions are sufficiently familiar with such instruments and the obligations created thereby. There is nothing to shock or surprise them for they handle and deal with such instruments day in day out. They pass through them as well. It is, therefore, no ground to urge that the bank would have to determine whether the instrument creates any right in its favour or not. The bank or person proceeded against in terms of section 30-A can, in a given case, seek the opinion of the Collector as to the duty, if any, with which or the Article of Schedule I under which it is chargeable and pay a fixed fee and leave it to the Collector to determine the duty, if any, with which or the Article of Schedule I under which in his judgment the instrument is chargeable. This is what is adjudication as to proper stamps and contemplated by sub-section (1) of section 31. To enable the Collector to do so, there are sufficient guidelines and inbuilt checks and safeguards in section 31 itself. Therefore, it is not as if where any instrument referred to in clauses (a)

to (g) of section 30 is executed and after the commencement of the Amendment Act in favour of or by any financial institution such as bank etc. SRP 122/167 WP308.14.doc which creates any right in favour of any such financial institution, then, the liability to pay stamp duty and which is on the financial institution is so absolute and unregulated that no protection at all is available within the statute or otherwise. Firstly, the bank's right to collect the stamp duty from any other party is untouched. Secondly, as indicated above, one of the parties to the instrument can approach the Collector and seek an adjudication as to proper stamp duty. Hence, the challenge to sub-section (1) of section 30A has no basis and must fail. 93. We then come to sub-section (2) of section 30-A and that relates to or is regarding any such instrument which means an instrument within the meaning of sub-section (1) of section 30A, but executed before the date of commencement of the Amendment Act, 2013. There, if the instrument is effective and where proper stamp duty is not paid, then, there is no liability on the financial institution to pay, but there is an obligation to impound such instrument and forward the same to the Collector for recovery of stamp duty. This is a power, but not a liability. The past instruments and which are effective but stamp duty on which remained unpaid then the proper stamp duty has to be SRP 123/167 WP308.14.doc recovered. That is not going to be recovered by the bank and financial institution and no obligation is cast as regards the same. Rather, it is a power to impound such instrument and forward the same to the Collector for recovery. Even this is challenged on the ground that banks / financial institutions would have to determine whether the instrument is effective and what is the proper stamp duty which is not paid. This is termed as a requirement of undertaking of an adjudication or exercising quasi judicial power. ig We are unable to see any force in such contentions either. The plain dictionary meaning of the term "effective" is operative, existing in fact though not formerly acted as such. Therefore, it is not an adjudication which is required to be undertaken nor is any outsourcing of the adjudicatory function done by the State. The State has not delegated any such power nor has divested itself of it. The impounding has to be done by the banks / financial institutions of an instrument which is in operation and existing in fact. If that instrument is not cancelled, then, it has to be impounded and forwarded to the Collector for recovery. It is clear that such a power to impound has already been conferred in terms of section 33 upon every person having by law or consent of parties authority to receive SRP 124/167 WP308.14.doc evidence and every person in charge of public office except an officer of police before whom any instrument chargeable in his opinion with duty is produced or comes in the performance of his functions. If it appears to him that such instrument is not duly stamped he can impound the same and section 33(1) uses the phraseology "irrespective of whether the instrument is or is not valid in law". For that purpose by sub-section (2) of section 33, a specific power to examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with the stamp of the value or description required by law for the time being in force in the State when such instrument was executed or first executed is conferred. In the present case, this power is not conferred by sub-section

(2) for the Legislature is aware that the banks/ financial institutions are not in receipt of the instrument in the manner set out in sub-section (1) of section 33 but such instruments are effective and of the nature specified in sub-section (1) of section 30A are not duly stamped. Meaning thereby, proper stamp duty is not paid thereon for a considerable period of time. If a more drastic power is conferred in terms of sub-section (1) of section 33 on the person performing the SRP 125/167 WP308.14.doc functions as set out therein and he need not record any satisfaction whether the instrument is valid in law or not, then, we do not see how the recipient of a lesser power and without any corresponding obligation in terms of sub-section (2) of section 30A can complain. The bank has not to perform any adjudicatory or quasi judicial function. If the instrument is impounded on the footing that it is one specified by sub-section (1) and secondly it is effective and on the face of it there is proof of stamp duty being paid, then, everything else rests with the Collector to whom it is forwarded for recovery. One who is aggrieved by any such act of the bank has enough protection and remedies available to him within the statute. The bank need not worry about the legality and validity of its act. However, before the impounding of the instrument or because of the fact that the instrument is fairly old there was a delay in impounding or some such reason which is genuine and bona fide the bank is unable to perform the function or exercise the power conferred on it, then, it can, depending upon other facts and circumstances, urge that no penalty be levied in terms of sub-section (3) of section 30A for there is no failure to impound the instrument. The complaint that the penalty follows automatically is the one which requires to be dealt with and that SRP 126/167 WP308.14.doc is equally without any merit. The moment sub-section (3) talks of penalty and liability to pay a penalty, then all the principles which go into imposition of a penalty would be applicable. In this case, the penalty is a civil liability. It would be imposed for some deliberate and intentional act. The word 'failure' itself has been construed and interpreted judicially as explained in Law Lexicon by P. Ramanatha Aiyar, 3rd Edn. Reprint 2007 (Book 2). The meaning of this term as judicially understood is set out thus : "Failure means 'a falling short', 'deficiency' or 'lack'." It has also referred to a judgment of Allahabad High Court in the case of Ram Kishore vs. Bimla Devi, AIR 1957, All. 658. 94. Even in common parlance and going by the dictionary meaning it means the omission of expected or required action. Therefore, if that cannot be attributed then the penalty may not be necessarily imposed. Everything ultimately depends upon the facts and circumstances of each case and merely because the failure to impound attracts penalty ipso facto does not render the substantive provision or the penalty provision unconstitutional. Even in a taxing statute, one finds such provisions and in plenty. It is argued that the imposition of penalty is for failure to perform SRP 127/167 WP308.14.doc any quasi judicial or adjudicatory function. That is not so as held above. It is a failure to impound the instrument and to forward it to the Collector for recovery and collection of revenue. If that is an obligation and function to be performed by others also and such a provision was already enacted in the very statute, then, all the more we do not see any force in the contentions of Mr. Tulzapurkar which are supported

by the other senior counsel. The impounding being for ultimate recovery and collection of stamp duty which is admittedly payable, then, what the banks and financial institutions are doing once again is to facilitate the Revenue or the State in collecting and recovering the duty. If that is to aid and assist the State and, therefore, a power is conferred towards that end, then all the more we cannot declare sub-section (2) of section 30A as unconstitutional. We see much substance in the contentions of the State and the learned Advocate General in that behalf. 95. The word 'impound' and the power in that behalf is also judicially settled. The word impound, according to the Law Lexicon by P. Ramanatha Aiyar, 3rd Edn., Reprint 2007 (Book 2) means 'to keep in the custody of law'. It has also referred to a SRP 128/167 WP308.14.doc judgment of the Kerala High Court in the case of Varghese vs. State of Kerala AIR 1989 Ker. 248 that the word as defined in the Oxford Dictionary meaning of which has been applied means to take legal or formal possession of the instrument. In the present case, the word is understood in the sense that once the condition as above is satisfied the banks / financial institutions are obliged to take the instrument in their custody or possession. The recovery will be by the authority competent to do so by the Maharashtra Stamp Act, 1958. The bank is not concerned with the further steps at all. 96. We do not see, therefore, any substance in the complaint or the ground raised that this act and which is specified in sub-section (2) of section 30A would necessitate carrying out the same exercise as is contemplated by Chapter IV titled Instruments not duly stamped. As held above therein appear sections 33, 33A and 34. 97. The impounded instruments have to be dealt with in terms of section 37. In the case before us the banks or financial institutions have merely to look at the instrument and if it is SRP 129/167 WP308.14.doc effective and where proper stamp duty is not paid then the financial institution shall impound such instrument and forward the same to the Collector for recovery. Its failure to impound such instrument as provided in sub-section (2) results in the imposition of penalty. 98. It is not as if the bank is required to take some elaborate and detailed action on par with the other provisions in the Stamp Act. All that the bank is required to do is to impound the instrument so long as it is effective. The bank can ascertain from the instrument itself whether proper stamp duty is not paid and if that is so, it shall impound it. We have already outlined the difference between examination and impounding of an instrument which is an exercise contemplated by section 37 wherein the concerned officer or person has to record an opinion that the instrument is not duly stamped and that is irrespective whether the instrument is or is not valid in law. In the case before us under sub-section (2) not every old or ancient instrument, as is complained, would have to be impounded. Such instruments may not be effective for they have worked themselves out by passage of time. The transaction recorded in SRP 130/167 WP308.14.doc the same may itself be not subsisting or is over long back. Then, such instruments may not impact anything as could be termed as creating any right in favour of any bank / financial institution. If such instrument is not impounded, then, in a given case and depending on other facts and circumstances, the bank / financial institution may be able to place before the authorities, their version that no penalty

is required to be paid as it is a bona fide act on its part. Even if the penalty is imposed and still with such version being placed the parties like the petitioners are not remediless. They can bring to the notice of a competent authority under the Act or the competent court that imposition of the penalty was not called for and is unwarranted. Hence, on mere apprehension that all old or ancient instruments would have to be searched and dug out, taken up seriatim and with regard to every such instrument an impounding order or exercise will have to be carried out is without any basis. That bogie cannot be raised for not performing what is preeminently a public duty. 99. It is somewhat strangely urged that banks and financial institutions are picked up and singled out for performing such a duty or discharging an obligation whereas SRP 131/167 WP308.14.doc there may be others who have failed to ensure payment of proper stamp duty but nothing has been done against them either statutorily or otherwise. We do not see how any argument of this nature can be the foundation of a complaint of inequality or violation of the mandate of Article 14 of the Constitution of India or the State treating the petitioners and other banks and financial institutions differently without any legal basis. If other wrongdoers or others who are equally responsible and obliged to perform a duty are not brought in the net of the statute or purview of a statutory provision by itself and without anything more cannot be discrimination or inequality within the meaning of Article 14. It would mean all those who have failed to perform and discharge a public function or public duty are a class as a whole and somebody being picked up from them means negation or violation of the mandate of equality enshrined by Article 14 of the Constitution of India. It has been repeated on several occasions by the Hon'ble Supreme Court that Article 14 which speaks of the right to equality and equal protection of laws or in other words equality before law and equal protection of laws is a positive concept. It is not a negative one. Hence, it cannot be founded on a plea that one wrongdoer or a defaulter goes scot free SRP 132/167 WP308.14.doc or benefits by any inaction all others must be treated in the same way. By that process nobody can be penalised ever. It also mandates if one wrong or one injury is committed that cannot be perpetuated for all times to come. Thus the argument that these amendments have no nexus with the object sought to be achieved deserves to be rejected for its foundation is totally faulty and unsound. The object sought to be achieved is apparent and clear, namely, augmentation of revenue and collection thereof expeditiously. If the Legislature as a matter of broader policy thinks and views the large volume of documents and instruments dealt with by the banks and treats them as a class, then, that classification cannot be interfered with, leave alone nullified on the specious ground and as urged by Mr. Tulzapurkar. It is not necessary for the Legislature to demarcate or specify and with details as to how many instruments passing through the banks and financial institutions or favouring them or creating a right which is subsisting in their favour are to be dealt with differently. If on a broad policy, the State justifies selecting the instruments pertaining to banks and those creating rights in their favour then we do not see any negation or violation of the mandate of Article 14. First of all we see no discrimination but a different SRP 133/167 WP308.14.doc treatment

in some cases. Secondly, we do not see that banks and financial institutions are targetted but only those instruments are taken into consideration and account which are executed in favour of or by any financial institution which creates any right in favour of the bank and financial institution etc. Therefore, at best it is taking these limited instruments as the basis and for the amendment and which for the reasons indicated hereinabove has a clear nexus with the object sought to be achieved. In the affidavit-in-reply it is indicated with sufficient details as to how the State thought it fit to enact a provision like section 30A in relation to these instruments. The affidavit-in-reply of the State from paragraph 7 onwards sets out the reasons and then states that the provision has been enacted so as to protect the interests of the banks and financial institutions. If the instruments of the class above are not stamped, then a question would arise about their admissibility in evidence in a court of law. Therefore, if the bank itself takes the requisite steps and care then its interest would be protected. If in a wider sense such provisions also enable protection of public money, then, we do not see why Nationalized banks all the more have come forward to challenge them. In such circumstances, the entire foundation of SRP 134/167 WP308.14.doc the argument being legally untenable, the same must be rejected. The senior counsel ought to be aware of the principles emerging from the three Judge Bench judgment of the Hon'ble Supreme Court of India in the case of Hindustan Steel Ltd. vs. Dilip Construction Company, reported in AIR 1969 SC 1238. The Hon'ble Supreme Court held thus : "4. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence, and it cannot be acted upon by that person or by any public officer. Section 35 provides that the admissibility of an instrument once admitted in evidence shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Relying upon the difference in the phraseology between Section 35 and 36 it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because Section 35 operates as a bar to the admission in evidence of the instrument not duly stamped as well as to its being acted upon, and the Legislature has by S. 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument. The argument ignores the true import of Section 36. By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 36 does not prohibit a challenge against an instrument that it shall not be acted upon because it is not duly stamped, but on that account there is no bar against an instrument not duly stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt, if any, is removed by the terms of Section 42(2) which enact, in terms SRP 135/167 WP308.14.doc unmistakable, that every instrument endorsed by the Collector under Section 42(1) shall be admissible in evidence and may be acted upon as if it had been duly stamped. 5. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of

instruments : it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the Scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon Section 40 provides the procedure for instruments 'being impounded, sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped, and sub-section (2) of Section 42 enacts the consequences resulting from such certification.” 100. Then comes the amendment to the Registration Act and section 89-B, which has been introduced in the Registration Act by the Maharashtra legislature and particularly sub-section (2) thereof having been assailed, we reproduce the same hereinbelow: “89-B Notice to be sent to registering officers by mortgagor in case of mortgage by depositing title deeds and provisions for compensation in favour of subsequent transferee. - (1) Every person who has mortgaged immovable property by way of a mortgage by depositing title deeds under clause (f) of section 58 of the Transfer SRP 136/167 WP308.14.doc of Property Act, 1882 (IV of 1882) shall, within thirty days from the date of the mortgage, file a notice of intimation of his having so mortgaged the property, giving details of his name and address, name and address of the mortgagee, date of mortgage, amount received under the mortgage, rate of interest payable, list of documents deposited, and description of the immovable property in the manner required by section 21, to the registering officer within the local limits of whose jurisdiction the whole or any part of the property is situate, and the said officer shall file the same in his Book No. 1: Provided that, if the property so mortgaged falls within the jurisdiction of more than one registering officer, the procedure specified in this sub-section shall be followed in respect of the property within the jurisdiction of each of such officers. (2) If, the person who has mortgaged the property as aforesaid fails to file a notice within thirty days as stated in sub-section (1) before the registering officer or officers, as the case may be, and enters into any transaction in relation to or affecting the immovable property which is the subject matter of the mortgage, with a third party; such a transaction shall be void and the third party shall be entitled to refund of any amount paid by him together with interest at twelve per cent from the date of payment and also to compensation for any damages suffered by him, from the transferor. (3) The amount recoverable by such transferee as specified in sub-section (2) shall be a charge on the interest of the mortgagor, in the mortgaged property: Provided that, nothing in this section shall apply to the instruments of agreement relating to mortgage by deposit of title deeds which are duly registered as per the provisions of this Act.” 101. The reasons for such amendment are essentially SRP 137/167 WP308.14.doc contained in the 178th Report of the Law Commission of India. The extract thereof is annexed as Annexure 9 to the affidavit-in- reply. The reasons are then elaborated in paragraphs 26 to 30. These read as under : “26. I say that the most important thing is to understand that the purpose of Registration Act which protects not only the

claimant's 'Right in Persona' and 'Right in Rem', but also to protect the right of other individuals in the society. Registration of an instrument, for example, a sale deed, gives the purchaser a certain right over the property. This right is against the seller, that is, as the seller renounces/transfers his rights over the property, he/she cannot deal with that property anymore. It also creates a right in rem, that is, the purchaser's right to that property is against all individuals, all the world. Everyone in the society is legally notified that the purchaser has got the rights over the particular property and public in general have to deal with the purchaser only; neither with the seller nor with any other person in the world. I say that equally important is the other side of the same coin of 'right in rem', that is, right of the other individuals in the society, right of the world, to know the status of the property. They have a right to know as to who holds what rights over the particular property. This will prevent them from being defrauded by people who have no connection with the property. I say that this intention behind the law of Registration can be gleaned from the object of the one of the earliest legislations on the subject, i.e., Regulation XXXVI of 1793, which was passed by the Governor-General in Council on 1st May 1793. Its object was "to give security to the titles and rights of persons purchasing real property or receiving such property in gift, or advancing money on the mortgage of it, or taking it on lease or other limited assignment; to prevent individuals being defrauded by buying, or receiving in gift, or lending money on mortgage, or taking on lease any such property that may have been so previously disposed of or pledged; to afford persons the means of obviating as far as may be practicable, litigation respecting the authenticity SRP 138/167 WP308.14.doc of their wills, or any written authority they may grant to their wives to adopt sons after their death; and that individuals may be able to provide against any injury to their rights or property, by the loss or destruction of deeds relating to transactions of the nature of those above specified." 27. I therefore say that it is important to register anything affecting immovable property under the Registration Act. If a deed is executed, but not registered, society at large would deal with the earlier person as if he/she is the holder of rights. This will shake the foundations on which the property rights exist. The tremors could pass on to financial markets; Innocent third parties might end up purchasing properties which have already been mortgaged. The seriousness of the problem has increased manifold in the recent years due to rapid urbanization. 28. I say that in a rural setting, people know the real right-holders of the property and the charges created therein. An urbanized environment relies mostly on documents. In that scenario, hiding certain rights over a particular property, whether intentionally or unintentionally, by not registering related documents on time, will sound death-knell to the stability of property system as well as financial system. Emerging materialism in the society and rapidly increasing real estate rates have compounded the problem further. 29. I say that keeping this in view, with the intention protecting the interests of banks and Financial institutions as well as society at large, Law Commission had recommended compulsory intimation of equitable mortgage to the Sub-Registrar office. A few states including Madhya Pradesh and Tamil Nadu have implemented these provisions already. 30. I say

that going a step ahead and for the first time in the country, Government of Maharashtra has introduced e-filing for this purpose. Using this, the persons mortgaging their property can file the notice SRP 139/167 WP308.14.doc of intimation from the bank itself or from their office/home. Banks can ensure that this information is filed so that their interest is protected." 102. A perusal of these paragraphs leave us in no manner of doubt that the legislative policy and its wisdom is something we cannot go into or decide. If an agreement records an equitable mortgage then that document now requires compulsory registration. That part of the amendment is not assailed. The document is styled as an agreement relating to deposit of title- deeds where such deposit has been made by way of security for repayment of a loan or an existing or future debt. That now requires compulsory registration in terms of section 17(1)(f) of the Registration Act, 1908, as amended in the State of Maharashtra. Even a sale certificate issued by a competent officer or authority under any recovery act, irrevocable Power of Attorney relating to transfer of immovable property in any way, executed on or after the commencement of the amended Act (Maharashtra Amendment) Act, 2010 (Mah.X of 2012) requires compulsory registration. That is not challenged admittedly. Section 89-A is also not challenged which is dealing with copies of court decrees, attachment orders etc. to be sent to the registering SRP 140/167 WP308.14.doc officers and filed therein. Section 89-B speaks of an act of any person who has mortgaged immovable property by way of deposit of title deeds under clause (f) of section 58 of the Transfer of Property Act, 1882, shall, within thirty days from the date of the mortgage, file a notice of intimation of his having so mortgaged the property and thereby giving details as are set out in sub- section (1) of section 89-B. These details have to be given in the manner required by section 21 to the registering officer within the local limits of whose jurisdiction the whole or any part of the property is situate. The obligation of the officer is then to file the same in Book No.1. If the jurisdiction of more than one registering officer is involved for the mortgaged property falls also within that part or area, then, the same procedure will have to be followed in respect of the property within the jurisdiction of each such officers. 103. By sub-section (2), the failure to file a notice before the registering officer or officers may not invite other consequences, with which we are not concerned. It is only in case where the mortgagor who has mortgaged the property but has not filed a notice within the stipulated period entering into any SRP 141/167 WP308.14.doc transaction relating to or affecting the immovable property which is the subject matter of a mortgage with a third party that invites the consequences and the restriction on the rights of the third party. 104. What we find is that this failure invites these consequences because it is not just a subsequent mortgage which would invite the consequences, but any transaction in relation to or affecting the immovable property which is the subject matter of mortgage and with a third party which would invite them. 105. Mr. Tulzapurkar's arguments overlook these wide words and their amplitude. He would urge that there could be a sale of the property by the mortgagor subject to the mortgage or there could be a lesser right or interest created, namely, a lease or there could be a simple act of putting the third party in possession. He

would submit that these are transactions relating to or affecting the immovable property in that sense. We are of the view that these words would have to be construed by looking at the entire transaction or deal and on a case to case basis. A transaction may not necessarily be in relation to the immovable SRP 142/167 WP308.14.doc property which is the subject matter of mortgage or it may refer to the mortgage but it may be specified that this does not relate to the immovable property which is subject matter of the mortgage for it is carved out and shown separately and distinctly. Merely because a document refers or relates to the immovable property would not mean that the subject matter of the mortgage is necessarily affected. Similarly, the third party may have been made aware of all the consequences by referring to the mortgage. It may be possible to then urge that such transaction is not void. Similarly, the words in relation to and affecting the immovable property are separated by the expression “or”. It could be argued and in an individual and given case that the conditions set out in sub-section (2) are not satisfied or not attracted at all. Even the substantive law namely the Transfer of Property Act, 1882 must be looked at before any conclusion is reached or drawn. We do not see how Mr. Tulzapurkar’s extreme argument would shut out such contentions. We do not read the words and expressions “such a transaction shall be void” in an isolated manner. These would have to be read with the preceding words and expressions for it is well settled that not only a section, but parts of the section, a sub-section would have to be read together and not SRP 143/167 WP308.14.doc looked at in isolation or torn from the context. Therefore, applying these principles of interpretation and if one looks at the provision and read every part of it together and harmoniously not only with other sub-sections of the same section but the entire statute itself then it is possible to make a consistent whole of the enactment. It is only that transaction which is void or such transaction which is void which is of the nature referred to by the preceding words. Therefore, to raise a general and vague contention that all second mortgages or subsequent mortgages would be necessarily void and press the same for acceptance will not be proper. 106. The Registration Act, as we have noted above, consolidates the enactments relating to registration of documents. The statement of objects and reasons to the Amendment Act No.48 of 2001 refers to Conference of Chief Ministers and Finance Ministers of States and the conclusions arrived at therein, inter alia, the registration of the Power of Attorney which is in the nature of a contract to sell immovable property be made compulsory and consequential amendments be made in the Registration Act, 1908, the Transfer of Property Act, SRP 144/167 WP308.14.doc 1882 and the Indian Stamps Act, 1899. After this we have noticed as to how the States gave effect to these recommendations in consonance with the conclusion at the Conference and in Part III which is titled as “Of Registrable Documents” added clauses (f), (g) and (h) in sub-section (1) of section 17. Therefore, an agreement relating to the deposit of title deeds where such deposit has been made by way of security for the repayment of a loan or an existing or future deed is compulsorily registrable. 107. Then comes section 18 which speaks of documents of which registration is optional. Therein clause (cc) was inserted by Act 33 of 1940. Therefore, instruments transferring or assigning

any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than hundred rupees, to or in immovable property, their registration is optional. However, when the sum is above hundred rupees then the document is compulsorily registrable. Then comes section 19 which takes care of the documents in SRP 145/167 WP308.14.doc language not understood by the registering officer. Section 21 reads as under : “21. Description of property and maps or plans.—(1) No non-testamentary document relating to immovable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same. (2) Houses in towns shall be described as situate on the north or other side of the street or road (which should be specified) to which they front, and by their existing and former occupancies, and by their numbers if the houses in such street or road are numbered. (3) Other houses and lands shall be described by their name, if any, and as being the territorial division in which they are situate, and by their superficial contents, the roads and other properties on to which they abut, and their existing occupancies, and also, whenever it is practicable, by reference to a Government map or survey. (4) No non-testamentary document containing a map or plan of any property comprised therein shall be accepted for registration unless it is accompanied by a true copy of the map or plan, or, in case such property is situate in several districts, by such number of true copies of the map or plan as are equal to the number of such districts.” 108 A bare perusal of sub-sections (1) to (4) of this section would reveal as to how there should be description of property by maps or plans and no non-testamentary document relating to immovable property shall be accepted for registration unless it SRP 146/167 WP308.14.doc contains a description of such property sufficient to identify the same. Then, the requirement set out in the sub-sections of this provision are to be complied with. Section 22 deals with description of houses and land by reference to Government maps or surveys. 109 These provisions would, therefore, indicate that adequate care has been taken to register the documents and while registering them every aspect of the same, namely, interlineations, blanks, erasures or alterations and description of property and maps or plans are placed on record. Once the document is registered and the above information is provided, then, it would alert everybody else and sufficiently. After Part IV come Part V and Part VI and which would enable us to hold that to facilitate registration, the law has made several enabling provisions. These confer powers of varied nature on the officers in charge of implementing and enforcing the Act. A perusal of Part V and Part VI, including compulsory affixing of photographs, would enable this Court to further conclude that in the Registration Act, apart from section 89-B in relation to compulsory registrable documents, there are sufficient SRP 147/167 WP308.14.doc safeguards. In relation to those documents as well and upon such enquiries and satisfaction of officers, Part X has been inserted in the Act which deals with the effects of registration and non-registration. Therein appear sections 47 to 49 and which deal with time from which registered document operates, registered documents relating to property

when it takes effect against oral agreements and section 49 sets out the effect of non registration of documents required to be registered. Sections 48 and 49 read as under : “48. Registered documents relating to property when to take effect against oral agreements.—All non-testamentary documents duly registered under this Act, and relating to any property, whether movable or immovable, shall take effect against any order agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession and the same constitutes a valid transfer under any law for the time being in force: Provided that a mortgage by deposit of title-deeds as defined in section 58 of the Transfer of Property Act, 1882 (4 of 1882), shall take effect against any mortgage-deed subsequently executed and registered which relates to the same property. 49. Effect of non-registration of documents required to be registered. —No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall— (a) affect any immovable property comprised therein, or SRP 148/167 WP308.14.doc (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.” 110 A perusal of these two provisions would indicate that all non testamentary documents duly registered under the Registration Act and relating to any property, whether movable or immovable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession and the same constitutes a valid transfer under any law for the time being in force. The proviso to section 48 is very important and that enacts that a mortgage by deposit of title deeds as defined in section 58 of The Transfer of Property Act, 1882, shall take effect against the mortgage deed subsequently executed and registered which relates to the same property. Section 49 states that no document required by section SRP 149/167 WP308.14.doc 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall affect any immovable property comprised therein or confer any power to adopt or be received as evidence of any transaction affecting such property or conferring such power unless it has been registered. However, the proviso to section 49 must be noted and that relates to an unregistered document affecting immovable property and required by the Registration Act, 1908, or the Transfer of Property Act, 1882, to be registered but not registered may still be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1963, or as evidence of any collateral transaction not required to be effected by a registered instrument. Hence, “affecting the immovable property” and “relating to the immovable property” are the words employed by the Legislature, namely, the Parliament in sections 48, 49 and equally by section 50 which reads as under : “50. Certain registered documents relating to land to

take effect against unregistered documents:- (1) Every document of the kinds mentioned in clauses (a), (b), (c) and (d) of section 17, sub-section (1) and clauses (a) and (b) of section 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not SRP 150/167 WP308.14.doc being a decree or order, whether such unregistered document be of the same nature as the registered document or not. (2) Nothing in subsection (1) applies to leases exempted under the proviso to sub-section (1) of section 17 or to any document mentioned in subsection (2) of the same section or to any registered document which had not priority under the law in force at the commencement of this Act. Explanation:- In cases where Act No. XVI of 1864 or the Indian Registration Act, 1866 (XX of 1866b), was in force in the place and at the time in and at which such unregistered document was executed" unregistered " means not registered according to such Act, and, where the document is executed after the first day of July 1871, not registered under the Indian Registration Act, 1871. (8 of 1871), or the Indian Registration Act, 1877 (3 of 1877), or this Act." 111 A bare perusal of section 50 would also reveal that certain registered documents relating to land to take effect against unregistered documents but that document should not be a decree or order. Obviously decree or order would be a decree or order of a court. Therefore, when the State of Maharashtra introduced section 89-A we must not lose sight of the distinction which we have noted above. Section 89-A states that the copies of the court decrees, attachment orders etc. to be sent to registering officers and filed in registers. Then, section 89-B talks of notice to be sent to registering officers by mortgagor in case of SRP 151/167 WP308.14.doc a mortgage by deposit of title deeds and provisions for compensation in favour of subsequent transferee. If documents which are compulsorily registrable are not registered and yet the rigour of section 49 is relaxed by the provision itself and prior provision section 48, then, we do not see how mere non filing of a notice of intimation in respect of a mortgage by deposit of title- deeds but not evidenced by any writing would necessarily and inevitably bring about the consequences as enumerated in sub- section (2). If the rigour of the conditions which are more stricter is capable of being relaxed, then, the difference between the effect of non-registration of a document compulsorily registrable and the effect of non-filing of a notice of intimation of a mortgage effected by depositing title deeds would have to be considered. The latter one of filing of notice of intimation within the meaning of section 89-B(1) not being complied with, the consequences cannot be so drastic as are highlighted before us by Mr. Tulzapurkar and others. We cannot agree with them that the words and expression in sub-section (2) of section 89-B " such a transaction shall be void" would mean giving a go-by to all the rights and liabilities arising out of mortgages of immovable property and charges as enumerated in Chapter IV of the SRP 152/167 WP308.14.doc Transfer of Property Act, 1882. Clause (f) of section 58 which was added by Act 20 of 1929 in the Transfer of Property Act, 1882, refers to a mortgage by deposit of title deeds and concerns a person in any of the towns, namely, the towns of Calcutta, Madras and Bombay and any other town which the State Government concerned by notification in the official gazette specify. Such a person delivering

to a creditor or his agents documents of title of immovable property with intent to create a security thereon, that act or transaction is called as mortgage by deposit of title deeds. Then, follow several provisions in that Act itself, namely, Transfer of Property Act, 1882, commencing from section 58 and ending with section 98, which sets out rights and liabilities of mortgagor, rights and liabilities of mortgagee, priority, marshalling and contribution, deposit in court, suits for foreclosure and sale or redemption. Section 96 is one of the sections therein and which clarifies that the provisions hereinabove obtained which apply to a simple mortgage so far as may be applicable to mortgage by deposit of title-deeds. To urge that all this would come to an end and would have no effect in the light of sub-section (2) of section 89-B would not be proper. It is apparent that if the rights and liabilities of the mortgagor do not SRP 153/167 WP308.14.doc limit, much less prohibit a sale of the mortgaged property or creation of any right in respect thereof may be of a limited nature, then, to read sub-section (2) of section 89-B of the Registration Act, 1908 as an over-riding provision would be erroneous in law. It is not, therefore, possible to accept the argument that sub-section (2) of section 89-B to the extent above is ultra vires the mandate of Article 14 and 300A of the Constitution of India so also the Transfer of Property Act, 1882. We are of the opinion that this provision would have to be read with the other sections and provisions of the Registration Act and harmoniously. It would also have to be read together with the Transfer of Property Act and to the extent it permits a mortgagor to deal with the mortgaged property or enter into any transaction in relation to or affecting the immovable property which is the subject matter of the mortgage with a third party. Once the substantive law, namely, the Transfer of Property Act, 1882, does not contain any limiting or restricting provision, then, by relying on the phraseology of sub-section (2) of section 89-B above we cannot strike it down. 112 We must, in this behalf, not lose sight of the principles

SRP 154/167

of statutory interpretation and an interpretation must be placed mindful of the consequences. If the consequences have to be regarded, then, a construction that results in hardship, serious inconvenience, injustice, absurdity or anomaly or which leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate has to be rejected and preference should be given to that construction which avoids such results. In Principles of Statutory Interpretation by Justice G.P. Singh, this principle has been enunciated and by referring to several judgments of the Hon'ble Supreme Court of India and the Courts abroad. 113 It may be that this principle has certain limitations. However, to highlight them if the grammatical construction leads to some absurdity or some repugnance or inconsistency with the rest of the instrument, it may be departed from so as to avoid that absurdity and inconsistency. This principle has been further amplified and elaborated in the case of Tirath Singh

vs. Bachinttar Singh reported in AIR 1955, SC 830. 114 The other principle is with regard to the presumption

SRP 155/167

that a statute is intended to be just and reasonable. The law does not compel the doing of impossibilities. Similarly, if the acts which are referred to in the enactment are of a third person, then, any lapses or deliberate attempts to avoid the compliance with law should not visit somebody who has absolutely no control with extreme or drastic consequences. In other words, when the natural construction leads to some general hardship or injustice and some other construction is reasonably open, then, the natural construction may be departed from. On this principle, the learned author refers to several statutes and states that “It is often found that laws enacted for the general advantage do result in individual hardship; for example laws of limitation, registration, attestation although enacted for the public benefit may work injustice in particular case but that is hardly any reason to depart from the normal rule to relieve the supposed hardship or injustice in such cases”. True it is that the courts do not have a power to recast the Act or any part of it. It must be possible to spell the meaning contended for use of the words actually used, then, the exercise of placing an alternate construction is perfectly permissible. The decided cases also refer to the rule of harmonious construction and it is well settled SRP 156/167 WP308.14.doc that a statute must be read as a whole and one provision of the Act should be construed with reference to the other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is a duty of the courts to avoid a head-on clash. It should not be lightly assumed that the Parliament had given with one hand what it took away from the other. Hence the provisions of one section of the statute cannot be used to defeat those of another, unless it is impossible to effect reconciliation between them. All these principles and which are enunciated in this work from pages 131 to 145 with the aid of decided cases can safely be applied. 115 Thus a construction unmindful of or in disregard to the consequences is not permissible. 116 The last principle and which we have often applied, namely, of strict construction or construction of mandatory and directory provisions. As far as the latter principle is concerned, the same learned author has in that very work outlined that SRP 157/167 WP308.14.doc principle in the following words : “If by holding a provision mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory and equally they would not be construed and interpreted so as to visit such persons with drastic consequences.” Moreso, when non- compliance of mandatory requirements results in nullification of the act and when performance as the requirement is impossible it is then excused.

The principle that is evolved is to be found in the decision reported in AIR 1997 SC 1879 Biharilal vs. Bhuri Devi . That principle is enunciated as under : “....
 This view obviated the inconvenience and injustice to innocent persons which the Federal Court felt in J.K. Gas Plant Manufacturing Co. Ltd. v. The King Emperor (1947)FCR 141 at 156, 157) and at the same time protects Government. We feel that some reasonable meaning must be attached to Article 299 (1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded. On the other hand, an officer entering into a contract on behalf of Government can always safeguard himself by having recourse to the proper form. In between is a large class of contracts, probably by far the greatest in numbers, which though authorised, are for one reason or other not in proper proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no SRP 158/167 WP308.14.doc doubt Government will always accept the responsibility. If not, ins interests are safeguarded as we think the Constitution intended that they should be.” 117 It is for this reason that we are unable to subscribe to the contentions of Mr. Tulzapurkar and strike down the above sub-section to the extent prayed by the petitioners. Rather, we would prefer the construction and interpretation of the provision as enunciated above. If this provision is read together with other sections of the Registration Act, 1908, and subject to the Transfer of Property Act, 1882, then the consequences as apprehended by Mr. Tulzapurkar can be avoided. We would prefer that and not agree with the extreme contention. In any event, the words “shall be void” have been interpreted as not operating by their own force. Its mere use is not determinative of the legal impact. In AIR 1996 SC 906 (State of Kerala vs. M.S.Nambiar) interpreting these words in the context of section 83 of Kerala Land Reforms Act, the Hon’ble Court held as under : “5.
 ... Will the observations made in C.R.P. 3440 of 1977 to the effect”that the S.<. proceedings without intimation by the Board under Section 85(7) of the Kerala Land Reforms Act Act render such proceedings void“, effect the legality or validity of the proceedings which culminated in C.R.P. 3440 of 1977 ? SRP 159/167

6. It is not necessary for us to go into the merits of the case. We are of the view that the order passed inter parties in C.R.P. 3440 of 1977 dated 2.11.1977, has become final, and it concludes the matter. The observations made in the proceedings. at the instance of the 1st respondent regarding the validity of the order of the Board, in C.R.P. 3696 of 1977. will not, in any way, effect the legality and validity of the proceedings declining to implead respondents No. 3 and 4 or the order passed in Revision therefrom- C.R.P. 3440 of 1977. It is true that the proceedings dated

28.6.1977 was observed to be void in law in C.R.P. 3696 of 1977, filed by the first respondent. In our opinion, even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact be effective inter parties until it is successfully avoided or challenged in higher forum. Mere use of the word "void" is not determinative of its legal impact. The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise and in this case, the only complaint about the initiation of the suo moto proceedings by Board was, that it was not initiated on intimation by the State Land Board about the non-filing of the statement as required by Section 85(7) of the Kerala Land Reforms Act. In our opinion, this is not a case where the infirmity is fundamental. It is unnecessary to consider the matter further.

7. In Halsbury's Laws of England, 4th edition, (Reissue) Volume 1(1) in paragraph 26, page 31, it is stated, thus:- "If an act or decision, or an order or other instrument is invalid, it should, in principle, be null and void for all purposes: and it has been said that there are no degrees of nullity. Even though such an act is wrong and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is preserved." In the Judicial Review of Administrative Action, De Smith. Woolf and Jowell, 1995 edition. at pages 259- 260 the law is stated, thus:- "The erosion of the distinction between jurisdictional errors and non-jurisdictional errors has, as we have seen, correspondingly eroded the distinction between void and voidable decisions. The courts have become increasingly impatient with the distinction, to the extent that the situation today can be summarised as follows:

- (1) All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent Jurisdiction." Similarly, Wade and Forsyth in Administrative Law, Seventh edition- 1994, have stated the law thus at pages 341-342:- "...every unlawful administrative act, however invalid, is merely voidable. But this is no more than the truism that in most situations the only way to resist unlawful action is by recourse to the law. In a well-known passage Lord Radcliffe said: An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders. This must be equally true even where the brand of invalidity is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in

the House of Lords and Privy Council without distinction between patent and latent defects.” SRP 161/167

The above statement of the law supports our view that the order of the Board dated 28.6.1977, declining to implead respondents No. 3 and 4 (which stood confirmed in Revision) concludes the matter against respondents No. 3 and 4.

8. In this context, the Constitution Bench decision of this Court in Janardhan Reddy & others vs. State of Hyderabad and others, (A.I.R. 1951 SC
- 217) is of great relevance. In that case, the Court found that there is no specific order of the civil administrator making over the case covered by charge-sheet No. 14 dated 20.7.1949 [charge sheet No. 14 (2)] to the Tribunal. Therefore, the Court held that prima facie there was room to hold that case No.
17. which was affected by the charge sheet No. 14 (2) was never properly made over to the Tribunal and the trial of the accused in that case was, therefore, without jurisdiction. But the matter was carried in appeal before the High Court of Hyderabad and the convictions and sentences were confirmed. It was urged before the Supreme Court that notwithstanding the decision rendered by the High Court in appeal since the decision of the Tribunal was without jurisdiction, the detention was invalid. In repelling this plea, Fazl Ali, J. observed at page 225, thus:- “Evidently, the appellate Ct. in a case which properly comes before it on appeal, is fully competent to decide whether the trial was with or without jurisdiction, & it has jurisdiction to decide the matter rightly as well as wrongly. If it affirms the conviction and thereby decides wrongly that the trial Ct. had the jurisdiction to try and convict it cannot be said to have acted without jurisdiction and its order cannot be treated as a nullity.” “It is well settled that if a Ct. acts without jurisdiction, its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction, i.e., an appeal would lie to the Ct. to which it would lie if its order was SRP 162/167 WP308.14.doc with jurisdiction.” In a succinct exposition of this principle, a reference can usefully be made to the judgment of the Mysore High Court reported in AIR 1957-, Mysore, 72 Abdul Khader vs. State of Mysore : “63. It is true that both in the case of an Act repealed and an Act declared void, they seized to be operative and the law is annulled. There is however, I feel, with very great respect to the learned judges, a great deal of deference between an Act which is void and an Act repealed. An opponent, whether he is dead, unconscious

or a sleep is in effect equally harmless. Though there is no difference in effect, there may be substantial difference in what bring about the effect. A void sale need not be set aside. A sale that required to be and is set aside is as ineffective as a void sale. There is nothing in what is void and a void Act need no repeal. Whether the word "void" is treated to the Latin form "Viduus" meaning bereft as some do or to the Latin form "Vacare" meaning to be empty, the word connotes emptiness, a vacuum or a nullity. Repealing denotes withdrawing something which is in existence (re., back, apeler, appeler to call-Chambers Twentieth Century Dictionary). To me it looks that to say that a law is inoperative is to say something less than to say that an Act is repealed. Any way, the two ideas are different. The word 'void' may not have its full force and effect when it is used in an enactment for the benefit of particular persons and understood as 'voidable' at the election of those persons but "when it relates to persons not capable of protecting themselves or when it as some object of public policy which requires the strict construction, the word receive its full force and effect," SRP 163/167

as observed by Maxwell's Interpretation of Statute (p. 189, eighth Edn.). In this case the word is not used in respect of particular persons. It is used to lay down a general policy applicable to every citizen. The word void has to be understood to have its full meaning as when it is used with the word null to indicate nullity." 118 Thus, the word conveys different ideas dependent upon the context. As a result of the above discussion we find that both sections of the Maharashtra Stamp Act, 1958, and the Registration Act, 1908, read and understood so also interpreted in the above manner need not be struck down. 119 While arriving at the above conclusion, we have taken the aid and assistance of the very principles which have been pressed into service by Mr. Tulzapurkar. We need not advert to each and every judgment relied upon by counsel. We have referred to the very principles and which are enunciated in the case of State of Madhya Pradesh vs. Rakesh Kohli & Anr. (supra) about constitutional validity of taxing statutes. 120 We are not in agreement with Mr. Tulzapurkar that the provisions of the Stamp Act and particularly, section 30A SRP 164/167 WP308.14.doc need to be struck down on the anvil that they violate the mandate of Articles 14, 19(1)(g) and 300A of the Constitution of India. We do not think that section 30A is in any way on par with section 73 of the Andhra Act which was under consideration in the case of District Registrar and Collector, Hyderabad vs. Canara Bank AIR 2005 SC 186. 121 Nonetheless, none of the principles that we have referred above would run counter to the paragraphs in this judgment and heavily relied upon by Mr. Tulzapurkar. When the banks and financial institutions are not required to perform the functions of the nature enunciated in this judgment, then, we need not refer to it any further. 122 We also need not refer

to the judgment which has been cited before us by Mr. Samdani, namely, Shreya Singhal vs. Union of India, (2015) 5 SCC, 1. The paragraphs of this judgment which Mr. Samdani relies upon should be seen in the context of the essential challenge before the Court. 123 The judgment cited by Mr. Kamdar (2015) 5 SCC, 1,

SRP 165/167

D.S. Nakara & Ors. vs. Union of India (supra) has equally no application for that is on the principle of equality and to be precise that unequals cannot be treated equally which would be an infraction of the guarantee of equality enshrined in the Constitution. 124 In the view that we have taken, we need not refer to all the judgments which have been cited by the learned Advocate General. 125 As a result of the above detailed discussion, we find no merit in the Writ Petition. It is dismissed. There shall be no order as to costs. 126 After the judgment was pronounced, Mr. Samdani and Mr. Kamdar, learned counsel appearing for the respective parties pray that there is an interim order and operating in this petition since 2013. The effect of that is that the obligation to comply with sub-section (2) of section 30-A of the Bombay Stamp Act, 1958 is postponed. SRP 166/167

127

Since the respondents have not taken steps in

pursuance of the further provision, namely, sub-section (3), the request is that time be granted to comply with the statutory obligation which, as it is, stands postponed. 128 This request is opposed by Ms. Shastri appearing for the respondent Nos.1 to 3. 129 Having heard learned counsel on this point we are of the view that the compliance with the statutory obligation may be made by the petitioner and the respective banks / financial institutions by 1st July, 2016. The time will not be extended thereafter. However, this is without prejudice to the rights and contentions of both sides, including that of the petitioners to challenge this judgment in a higher Court. G.S. PATEL, J. S.C. DHARMADHIKARI, J.

SRP 167/167