Pandurang Ganpati Chaugule vs Vishwasrao Patil Murgud Sahakari Bank ... on 5 May, 2020

Equivalent citations: AIRONLINE 2020 SC 527

Author: Arun Mishra

Bench: Aniruddha Bose, M.R. Shah, Vineet Saran, Indira Banerjee, Arun Mishra

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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO. 5674 OF 2009

PANDURANG GANPATI CHAUGULE … APPELLANT

VERSUS

VISHWASRAO PATIL MURGUD SAHAKARI
BANK LIMITED … RESPONDENT

WITH

CIVIL APPEAL NO. 5684 OF 2009
CIVIL APPEAL NO. 5682 OF 2009
CIVIL APPEAL NO. 5681 OF 2009
CIVIL APPEAL NO. 10871 OF 2010
CIVIL APPEAL NO. 5675 OF 2009
CIVIL APPEAL NO. 2384 OF 2020
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 25930 OF 2009)

CIVIL APPEAL NO. 4391 OF 2010
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(@ SPECIAL LEAVE PETITION (CIVIL) NO. 24309 OF 2010)
CIVIL APPEAL NO. 7410 OF 2010
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(@ SPECIAL LEAVE PETITION (CIVIL) NO. 29859 OF 2010)
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(@ SPECIAL LEAVE PETITION (CIVIL) NOS. 7295-7298 OF 2011)

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JUDGMENT

Arun Mishra, J.

1. The matters have been referred in view of conflicting decisions in Greater Bombay Coop. Bank Ltd. v. United Yarn Tex (P) Ltd. and Ors. 1, Delhi Cloth & General Mills Co. Ltd. v. Union of India and Ors. 2, T. Velayudhan Achari and Anr. v. Union of India and Ors. 3, and Union of India and Anr. v. Delhi High Court Bar Association and Ors. 4. The question relates to the scope of the legislative field covered by Entry 45 of List I viz. 'Banking' and Entry 32 of List II of the Seventh Schedule of the Constitution of India, consequentially power of the Parliament to legislate. The moot question is the applicability of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the SARFAESI Act') to the co□operative banks.

1. The Parliament's competence to amend Section 2(c) of the SARFAESI Act by adding sub□clause '(iva) □a multi□State co□operative 1 (2007) 6 SCC 236 2 (1983) 4 SCC 166 3 (1993) 2 SCC 582 4 (2002) 4 SCC 275 bank' has also been questioned. The issue arises whether the definition of 'banking company' contained in Section 5(c) of the Banking Regulation Act, 1949 (for short, 'the BR Act, 1949') covers co□operative banks registered under the State law and also multi□State co□ operative societies under the Multi□State Co□operative Societies Act, 2002 (for short, 'the MSCS Act'). Consequently, (i) whether co□operative banks at State and multi□State level are co□operative banks within the purview of the SARFAESI Act ? and (ii) whether provisions of the SARFAESI Act apply to the co□operative banks registered under the MSCS Act ?

2. Section 56(c)(i)(cci) is contained in Part V of the BR Act, 1949, and was brought into force on 1.3.1966. It defines 'co□operative bank' to mean a 'state co□operative bank,' a 'central co□operative bank,' and a 'primary co□operative bank.' By the notification issued in 2003, the co□operative bank was brought within the class of banks entitled to seek recourse to the provisions of the SARFAESI Act. Section 2(1)(c) (iva) was inserted into the SARFAESI Act, w.e.f. 15.1.2013. Before that, the co□ operative bank and the multi□State co□operative bank took recourse to the SARFAESI Act under the notification issued in 2003.

3. Writ petitions were filed questioning vires of the notification dated 28.1.2003 issued under Section 2(1)(c)(v) of the SARFAESI Act and the insertion of Section 2(1)(c)(iva) to the SARFAESI Act in 2013. The backdrop history of litigation indicates that in Narendra Kantilal Shah v. Joint Registrar, Co□operative Societies5, a Full Bench of the Bombay High Court opined that term 'banking company' also means co□operative bank within the meaning of Section 2(d) of the RDB Act, 1993. Hence, with effect from the date of constitution of Debts Recovery Tribunal under RDB Act, 1993, the courts and authorities under the Maharashtra Co□operative Societies Act, 1960, as also the MSCS Act would cease to have jurisdiction to entertain the applications submitted by the co□operative banks for recovery of their dues. The decision in Narendra Kantilal Shah (supra) was set aside by this Court in Greater Bombay Coop. Bank Ltd. (supra). This Court opined that the co□ operative banks established under the Maharashtra Co□operative Societies Act, 1960 and Andhra Pradesh Co□operative Societies Act, 1964, transacting the business of banking do not fall within the meaning of 'banking company' as defined in Section 5(c) of the BR Act, 1949. Therefore, the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, now renamed as The Recovery of Debts and Bankruptcy Act, 1993 (for short, 'the RDB Act, 1993'), by invoking the doctrine of incorporation do not apply to the recovery of dues by co□operative banks from their members. The field of co□operative societies cannot be said to have been covered by the Central legislation by reference to Entry 45 of List I of the Seventh 5 AIR 2004 Bom 166 Schedule of the Constitution of India. Co□operative banks constituted under the Co□operative Societies Acts enacted by the respective States would be covered by 'co□operative societies' by Entry 32 of List II of the Seventh Schedule of the Constitution of India. In the year 2004, the Banking Regulation (Amendment) and Miscellaneous Provisions Act, 2004, was passed by the Union of India, amending various provisions contained in the BR Act, 1949 retrospectively, w.e.f. 1.3.1966. On the same anvil, the question posed is whether provisions can be applied to recovery provisions carved out in the SARFAESI Act.

4. Writ Petition No.2672 of 2007 was filed by Khaja Industries, challenging the invocation of the SARFAESI Act by Jalgaon Peoples Co□operative Bank. The Bombay High Court dismissed the same. The recourse to the proceedings under the SARFAESI Act was upheld. In Rama Steel v. Union of India6, the decision in Khaja Industries was followed. Against the decision of Bombay High Court, appeals have been filed.

5. On 13.8.2008, Pandurang Ganpati Chougule – appellant, questioned the action of Vishwasrao Patil Murgud Sahakari Bank Limited under the SARFAESI Act before the Civil Judge in Spl. Civil Suit No.226 of 2007. Deciding the preliminary issue, the Trial Court held that it did not have the jurisdiction to decide the suit. The first 6 (2007) 6 Mah. L.J. 387 appeal preferred was dismissed. Against that, the appeal has been preferred before this Court. A separate writ petition under Article 32 of the Constitution of India has also been filed, questioning the invocation of the SARFAESI Act by issuing notices under Section 13 by co□operative banks. During the pendency of the matters, the Central Government brought into force the Enforcement of Security Deposit and Debts Law (Amendment) Act, 2012 (Act 1 of 2013), amending the definition of Section 2(1)(c) of the SARFAESI Act; the amendment has also been questioned in the writ petition filed in this Court.

6. In Administrator, Shri Dhakari Group Co□operative Cotton Seal & Ors. v. Union of India, (Special Civil Application No.930 of 2001), the Gujarat High Court struck down the notification dated 28.1.2003, relying upon Greater Bombay Coop. Bank Ltd. (supra), same has also been questioned in the appeal. Later on, Gujarat High Court in Neel Oil Industries v. Union of India 7, rejected the challenge to the Constitutional validity of clause (iva) 'multi□State co□operative bank' inserted by way of Amendment Act, 2013.

7. On 30.7.2015, the matter was referred to a larger Bench. After that, on 26.2.2016, a three□Judge Bench referred the matter to a larger Bench, due to conflicting decisions mentioned earlier of the 7 AIR 2015 Gujarat 171 three□Judge Bench of this Court.

ARGUMENTS:

8. Shri Devansh A. Mohta, learned counsel appearing on behalf of the appellants, raised the following arguments:

> (a) The scope of banking under Entry 45 of List I is to be interpreted in light of the definition of expression 'banking' in terms of Section 5(b) of the BR Act, 1949. He has referred to Rustom Cavasjee Cooper v.

Union of India8 in which this Court held that 'banking' under Entry 45 did not include 'banker' or 'bank.' Banking is an activity. Entry pertains to the activity of banking alone. Section 5(b) read with Section 6(1) of the BR Act, 1949, recognizes two kinds of activities that a bank may undertake: (1) the banking business, i.e., 'core banking business'; and (2) any other business as provided in Section 6(1). He has also referred to the decision in Mahaluxmi Bank Ltd. v. Registrar of Companies, West Bengal9 in which the court considered the meaning of 'banking,' and held that the essence of banking was the relationship brought into existence, i.e., the core of banking.

(a) As to the scope of Entry 45 List I, he has further referred to the decision in ICICI Bank Limited v. Official Liquidator of APS Star Industries Limited and Ors.10, wherein it was emphasised that even if a 8 (1970) 1 SCC 248 9 AIR 1961 Calcutta 666 10 (2010) 10 SCC 1 company was doing different businesses in addition to clause (a) to (o) of Section 6(1), it would remain a banking company as long as it was performing the core banking functions under Section 5(b). The core banking function is the sine qua non for being regulated by the BR Act, 1949. Therefore, 'banking' in Entry 45 of List I is essentially meant to be confined to 'core banking business'. At the time when the Constitution of India was promulgated, a well□defined and well□established meaning of the expression 'banking' prevailed in the form of the definition of 'banking' under Section 5(b) of the BR Act, 1949. The same expression was borrowed by the Framers of the Constitution of India, and same meaning was to be given to the expression 'banking' in the Entry as defined in the BR Act, 1949 as observed by this Court in The State of Madras v. Gannon Dunkerley & Co., (Madras) Ltd.11 and Diamond Sugar Mills Ltd. and Anr. v. State of Uttar Pradesh and Anr.12.

(b) There is a difference between 'entity' and 'activity'. Section 6(1) and 6(2) of the BR Act, 1949, enable only a banking entity to perform certain additional business/functions. The performance of

additional business/functions does not confer any status of a banking company upon such an entity. He also referred to Sections 32 and 33 of the State Bank of India Act, 1955 (for short, 'the SBI Act'). Section 32 11 AIR 1958 SC 560 12 AIR 1961 SC 652 recognises that the State Bank of India can carry 'agency business' on behalf of Reserve Bank of India, that is not a banking business performed by the State Bank of India as apparent from the perusal of Section 33, which categorically enables the State Bank of India to carry on banking business under Section 5(b) and other forms of business under Section 6(1) of the BR Act, 1949. Thus, it was submitted that every activity performed by a bank is not a banking activity.

(c) That Entry 43 of List I of the Seventh Schedule of the Constitution of India confers upon the Parliament the competence to pass law pertaining to 'incorporation, regulation and winding up' of a trading corporation, more particularly a banking corporation. However, 'co□operative societies' are expressly excluded from the purview of the Parliament's competence being a State subject under Entry 32 of List II. He argued that the legislative history of the BR Act, 1949, made a difference between 'entity' and 'activity.' The expression 'banking' was defined in Chapter X□A of the Companies Act (VII of 1913). Sections 277F to 277N were inserted vide Amendment Act No.22 of 1936. After that, the BR Act, 1949, was enforced, providing a comprehensive definition of 'banking' to bring within its scope all institutions which receive deposits repayable on demand or otherwise for lending or investment. At that time, the relevant entries of the Government of India Act, 1935, which dealt with the subject of banking as well as trading corporation, were in List I (Federal Legislative List). Entry 38 and Entry 33 were in relation to 'banking' and 'corporation' respectively. In the Constitution of India, Entry 38 and Entry 33 have been substituted. Entry 38 is substituted as Entry 45 of List I and Entry 33 has been bifurcated into Entry 43, and 44 of List I. Until 1965 before the amendment was inserted in the BR Act, 1949, it dealt with 'banking companies.' The word 'companies' was omitted in the year 1965. The function of the State Bank of India was governed by a separate statute such as the State Bank of India Act, 1955. In the year 1965, the Central Government passed the Banking Laws [Application of Cooperative Societies Act, 1965 (Act No.23 of 1965)]. He has referred to the Statement of Objects and Reasons, which brings out that the BR Act, 1949, was only to regulate the banking business relatable to Entry 45 and not to regulate the co□operative societies.

(d) Section 2(10) of the Maharashtra Co□operative Societies Act, 1960, is related to the management and business of co□operative societies. Under Section 91 of the Maharashtra Act, any dispute touching the constitution, management or business is required to be referred to a co□operative court.

(e) Similarly, Section 3(f) of the MSCS Act defines 'co□operative bank' to mean a multi□State co□ operative society, which undertakes the banking business. Under Section 84(2) of the MSCS Act, a dispute can be raised. The power of Parliament is confined to specific provisions of the BR Act, 1949 (a legislation referable to Entry 45 of List I), and the Reserve Bank of India Act (a legislation referable to Entry 38 of List I). The Parliament lacks legislative competence to regulate any other business, function, or facets of co□operative societies. It could have extended the provisions of said Act only. The Parliament cannot regulate these co□operative societies like a company performing banking functions or a banking corporation.

(f) The object of the SARFAESI Act is to regulate securitisation and reconstruction of financial assets and enforcement of security interests. The business of securitisation is not a banking business. Under Section 2(1)(l) of the SARFAESI Act, a 'financial asset' means debt or receivable and includes inter alia any financial asset. Section 2(1)(ha) defines 'debt' to mean the same as defined in clause (g) of Section 2 of the RDB Act, 1993. Financial assistance to members is another form of business that is not a banking business. Therefore, an attempt to regulate the assets of a co□operative bank by bringing them within the purview of the SARFAESI Act is contrary to the original intent of the extending provisions of the BR Act, 1949 and that would amount to exercising control over the entities which are beyond the purview of competence of Parliament.

(g) The Parliament lacks legislative competence to regulate financial assets related to the non□ banking activity of a co□operative society as they are expressly excluded from the purview of Entry 43 of List I. The regulation cannot be based upon an interpretation of only Entry 45 without any regard to Entry 43. The legislative action would be inconsistent with the limitation inherent in the federal scheme of distribution of legislative powers between the Union and the State. It would amount to regulation of co□operative society which subject matter is covered under Entry 32 of List II and also confer upon them a status of a banking corporation or a banking company. It would render an entity falling under Entry 32 of List II subject to the control of the Parliament, which would be contrary not only to the text but also to the constitutional intendment as opined in I.T.C. Ltd. v. Agriculture Produce Market Committee and Ors.13

(h) Notification No.105(E) dated 28.1.2003 is ultra vires as the Parliament has included only two classes of entities, i.e., banking company and banking corporation within its purview. The definition of 'bank' under Section 2(1)(c)(v) means 'such other bank which the Central Government may by notification, specify for this Act.' The power of the Central Government is confined to the entity of the kind referred under Clauses (i) to (iv) and not beyond that, i.e., a banking company or a banking corporation only and not co□operative societies/banks. The co□operative bank is neither a banking company 13 (2002) 9 SCC 232 nor a banking corporation; thus, it falls outside the purview of Section 2(1)(c)(v) of the SARFAESI Act. The notification is ultra vires and violative of not only the parent statute but also the Constitution of India. For this purpose, learned counsel relied upon Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat and Ors.14. Recovery of debts due is essential for the bank, i.e., entity and not for the banking business, i.e., activity. In Greater Bombay Coop. Bank Ltd. (supra), the argument based upon the banking business of the co□operative bank to be covered by Entry 45, was rejected. Therefore, recovery of dues was held to be outside the purview of Entry 45 of List I. The Central legislation seeking to regulate banks can only bring within its purview entities falling in Entry 43, i.e., banking corporation and banking companies. Thus, the Parliament is not competent to enact a law concerning the subject matter of Entry 32 of List II.

(i) The amendment incorporated is a colourable exercise. The notification dated 28.1.2003 is ultra vires in view of the decisions in K.C. Gajapati Narayan Deo and Ors. v. State of Orissa 15 and State of Tamil Nadu and Ors. v. K. Shyam Sunder and Ors 16. Once entities are excluded by Entry 43, the Union of India cannot control it by an indirect method. The Multi□State Co□operative Bank is a primary co□operative bank that is, in turn, a co□operative society. In Apex 14 (2008) 5 SCC 33 15 AIR 1953 SC 375 16 (2011) 8 SCC 737 Cooperative Bank of Urban Bank of Maharashtra & Goa Ltd. v.

Maharashtra State Cooperative Bank Ltd. and Ors. 17, it was observed that co□operative societies are in the purview of the State List.

(j) The MSCS Act is relatable to Entry 44. This Court is not required to pronounce upon the validity of the said Act. The source of legislative authority to regulate such banks would be Entry 43. The purpose of Act No.23 of 1965 was to regulate the banking business of certain co□operative societies. They do not cease to be co□operative societies as held in Virendra Pal Singh and Ors. v. District Assistant Registrar, Cooperative Societies, Etah, and Anr. 18. There is a difference in the Entries 43, 44 and 32 as held in S.S. Dhanoa v. Municipal Corporation, Delhi and Ors.19, Daman Singh and Ors. v. State of Punjab and Ors.20, and Dalco Engineering Private Limited v. Satish Prabhakar Padhye and Ors.21. The decision in Greater Bombay Coop. Bank Ltd. (supra) laid down the law correctly.

(k) There has to be harmonious construction of the Entries in List I and List II. Any argument of alarm relating to an adverse effect on the banking sector would be of no consequence or relevance to the question of construction of the constitutional entry as held in I.T.C. 17 (2003) 11 SCC 66 18 (1980) 4 SCC 109 19 (1981) 3 SCC 431 20 (1985) 2 SCC 670 21 (2010) 4 SCC 378 Ltd. (supra).

9. Shri Vijay Kumar, learned counsel appearing on behalf of petitioners, submitted that Parliament is not competent to enact laws concerning co□operative societies/banks. Banking business for a co□ operative society is merely an incidental/ancillary business. A co□operative society doing business remains a co□operative society and is covered under Entry 32 of List II. He has placed reliance on Iqbal Naseer Usmani v. Central Bank of India and Ors. 22. There is complete mechanism provided under the State Co□operative Societies Acts and MSCS Act; thus, the amendment to the SARFAESI Act and the notification deserve to be struck down.

10. Shri Vishwas Shah, learned counsel appearing on behalf of appellants, has argued that it is not necessary to question the 1965 Amendment made to the BR Act, 1949. The validity of the notification and the provisions of the SARFAESI Act have to be tested on their own. The co□ operative banks differ from other banks. Entities are basically co□operative societies, and it incidentally trenches on banking. The dominant legislation on the subject is State legislation under Entry 32. The co□operative banks are different from banking companies to the extent that they advance loans to their members only. The banking companies/corporations deal with the public. The 22 (2006) 2 SCC 241 co□operative banks do not carry the business as defined in the BR Act, 1949. The Doctrine of Pith and Substance has to be applied, co□operative society engaged in banking does not cease to be a co□operative society. In Entry 45 of List I, 'banking' does not include co□operative banks. He relied upon Gannon Dunkerley & Co. (Madras) Ltd. (supra) and I.T.C. Ltd. (supra).

11. Shri Satpal Singh, learned counsel, has re□emphasised that amendment made by inserting the definition of 'multi□State co□operative bank' is colourable legislation and deserves to be struck down. The Co□operative Acts are comprehensive. The meaning of the expression 'bank' could not have been enlarged.

12. Per contra, Shri Shekhar Naphade, learned senior counsel, appearing on behalf of Cosmos Bank, raised the following arguments:

> (a) Section 2(1)(c) of the SARFAESI Act defines 'bank' to mean 'banking company' as defined in Section 5(c) of the BR Act, 1949.

Thus, the definition of 'bank' contained in Section 5(c) of the BR Act, 1949 stands incorporated in Section 2(d) of the SARFAESI Act, that came into existence on 21.6.2002; hence, it is necessary to examine Section 5(c) of the BR Act, 1949, as it stood on 21.6.2002. It is covered by way of incorporation, w.e.f. 1.3.1966. Section 56(a) became part of Statute since 1.3.1966, the reference to a 'banking company' or a 'company' shall be construed as a reference to a co□operative bank. Section 56(a) becomes part of Section 5(c) of the BR Act, 1949, and stands incorporated in Section 5(c) of the BR Act, 1949. Thus, a reference to the banking company has to be read as a reference to the co□ operative bank.

(a) Section 56(a) becomes part of Section 5(c) of the BR Act, 1949. Although Section 56(a) is located in a separate place, its impact on Section 5(c) results in a co□operative bank both on State level as well as multi□State level becoming part of a banking company. Therefore, the SARFAESI Act covers in its purview co□operative banks and multi□State co□operative banks.

(b) The insertion of a ‘multi□State co□operative bank’ in Section 2(1)

(c)(iva) is ex majori cautela as multi□State co□operative bank comes under the ambit of ‘banking company’ mentioned in Section 2(1)(c) and as defined in Section 2(d) of the SARFAESI Act. In Daman Singh (supra), this Court held that expression 'corporation' occurring under Article 31A(1)(3) of the Constitution of India is required to be given a broad interpretation and takes within its compass a registered co□operative society.

(c) He relied on The Majoor Sahakari Bank Ltd. v. N.N. Majmudar and Anr.23 in which the Bombay High Court observed that co□operative society doing business of banking is a company. The question 23 AIR 1957 Bom 36 mentioned above arose as the Government of Bombay issued a notification and directed that all the provisions of the Bombay Industrial Disputes Act shall apply to the business of banking companies registered under any of the enactments relating to the companies for the time being in force.

(d) Article 246 distributes legislative powers between the Union and the State regarding three lists in the Seventh Schedule. Under Article 246(1), the Parliament has exclusive power to make laws in respect of 97 matters enumerated in List I notwithstanding anything contained in clauses (2) and (3). As per Article 246(3), the State legislature has legislative powers to make laws with respect to 66 matters enumerated in List II. The exclusive power of the State legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to Article 246(1), i.e., the exclusive power of the Parliament to legislate concerning matters enumerated in List I. As a consequence if there is a conflict in an Entry in List I and an Entry in List II, which is not capable of reconciliation, the power of Parliament to legislate concerning matters enumerated in List I must

supersede pro tanto the power of the State legislature. Both the Parliament and the State legislatures have concurrent power of legislation for 47 matters enumerated in List III.

(e) Reliance has been placed on Virendra Pal Singh (supra), in which the Court examined the powers of the State legislature relating to the service conditions of employees. The Court held that the State legislature was competent to legislate concerning employees of the bank. This Court did not deal with the banking business of the co□operative societies. He argued that regulating the non□banking affairs of society and regulating the banking business of society are two different things. Entry 32 of List II deals with regulation of non□banking affairs of the co□operative society, on the other hand, Entry 45 of List I deals with banking; hence, any legislation dealing with regulation of banking will be traceable to Entry 45 of List I and only the Parliament will be competent to legislate. The SARFAESI Act does not deal with incorporation, regulation, and winding up of the corporation, company, or co□operative societies. It does not regulate the working of a corporation, company, or co□operative society. It only provides for the recovery of dues of banks, including co□operative banks, the procedure for recovery, the authority competent to recover the loan, and the judicial forum to deal with disputes arising out of recovery. Thus, the Act does not touch upon Entry 32 of List II. The decision in Greater Bombay Coop. Bank Ltd. (supra) requires reconsideration and clarification. There is no in□depth consideration of its provisions and, more particularly, Section 56 of the BR Act, 1949.

(f) The ratio of the judgment is material. The obiter relates to the finding of court on an issue that arises in the matter but is not required to be decided for the final decision of the case. Thus, the finding of an issue is considered as an obiter. In contrast to ratio and obiter, the opinion of the court on an issue that does not arise is a casual or passing observation. The question in Greater Bombay Coop. Bank Ltd. (supra) was whether the court and authorities constituted under the State Co□operative Societies Act and the MSCS Act continue to have jurisdiction to consider applications/disputes submitted before them by State level and multi□State co□operative banks for recovery of debts due to them. The question was of the applicability of the RDB Act, 1993 to debts due to co□operative banks constituted under the MCS Act, 1960, the MSCS Act, and the APCS Act, 1964. The question whether the State legislature was competent to legislate law concerning co□operative societies transacting business of banking in the light of Entry 32 of List II of the Seventh Schedule, did not arise in the matter; hence, any observation made by this Court, concerning the said issue, cannot be considered as the ratio of the judgment in Greater Bombay Coop. Bank Ltd. (supra).

(g) He relied upon the decision of a Division Bench of the Bombay High Court in The Shamrao Vithal Co□operative Bank Ltd., Mumbai, and Anr. v. M/s. Star Glass Works, Mumbai and Ors. 24 in which meaning of incorporation by reference was considered. The same has 24 AIR 2003 Bom 205 to be taken to a logical end. The Parliament has provided an additional remedy to co□operative banks to recover their dues by recourse to the Co□operative Societies Act. The Court did not consider the said aspect in Greater Bombay Coop. Bank Ltd. (supra). The distinction between co□operative banks serving the members and the corporate bank doing commercial transactions would make no difference. The activity remains banking merely by the fact that co□operative banks are co□operative societies doing banking business; it does not make the banking activity carried out by

them incidental one. It remains their activity. It was observed that the definition of 'banking company' in Section 5(c) had not been altered by Act No.23 of 1965. The incorporation, by reference, has the effect of changing the definition of 'banking company.' Even if in the RDB Act, 1993, the co□ operative bank is not included right from the beginning, nothing came in the way of Parliament to enact a law that provides for an additional remedy to co□operative banks.

13. Shri Jaideep Gupta, learned senior counsel appearing on behalf of the Reserve Bank of India, raised the following arguments:

> (a) The matter is covered by Entry 45 of List I of the Seventh Schedule of the Constitution of India. For the very reason, the Parliament has the right to legislate in respect of the banking business as defined in Section 5(b) of the BR Act, 1949.
>
> (a) Banking operations would inter alia include accepting of loans and deposits, the grant of loans and recovery of debts due to the bank.

There can be little doubt that the Parliament can enact a law about the conduct of the business by a bank. Recovery of dues is an essential function of a banking institution. Entry 45 of List I would mean legislation regarding all aspects of banking, including ancillary or subsidiary matters relating to that. The SARFAESI Act falls within the ambit of Entry 45 of List I.

(b) The Parliament can enact a law in respect of matters contained in Entry 45 of List I, even if the bank in question is a co□operative society. Entry 45 of List I makes no difference whether an entity carrying business of banking is a company or statutory corporation or a co□operative society.

(c) The 1965 amendment to the BR Act, 1949, brought within its ken co□operative banks, is not under challenge and has never been successfully questioned. The Parliament has the power to legislate concerning matters referred to in the SARFAESI Act under Entry 45 of List I, even if the entity which carries out the activity of banking, is a co□operative society. It is permissible for the Parliament to include multi□State co□operative banks within the definition of 'bank.' Similarly, the Government could have notified co□operative banks under the purview of Section 2(1)(c)(v) of the SARFAESI Act, more so, in view of the definition in clause (cci) of Section 56 of the BR Act, 1949.

(d) The argument of the appellant that Section 2(1)(c) of the SARFAESI Act refers to an entity and not the activity, therefore, it cannot be justified under Entry 45 of List I, is misconceived. Section 2(1)(c) is only a definition provision. The subject matter of legislation is securitisation, reconstruction of financial assets and enforcement of security interest of banks or financial institutions. The subject matter of legislation is not based on the entity.

(e) The SARFAESI Act is not a legislation relating to incorporation, regulation, and winding up of the co□operative societies or multi□State co□operative society engaged in banking. The same is traceable to Entry 45 of List I, i.e., the activity of banking.

(f) The Statement of Objects and Reasons of the SARFAESI Act indicates that it relates to the business of banking and matters incidental to it. It confers the power upon the bank and financial institutions to take possession of security and sell them to overcome the slow pacing of recovery of default loans and mounting levels of non-performing assets of banks and financial institutions. It was based on the recommendation of the Narasimham Committee I and II and the Andhyarujina Committee formed by the Central Government to examine the banking sector reforms. The legislation in question, thus, relates to the business of banking.

(g) The argument of the appellant that 'such other banks' cannot include co-operative banks, is also without basis, and the Parliament has the power to legislate. Certain observations made in Greater Bombay Coop. Bank Ltd. (supra) are incorrect and required to be overruled. The questions which arose in the said case were different.

14. Shri Vijay Hansaria, learned senior counsel appearing on behalf of Maharashtra State Co-operative Bank, reiterated the aforesaid arguments and additionally urged that the Maharashtra State Co-operative Bank has 41 branches in the State of Maharashtra. As on 31.3.2015, it had deposits of Rs.9,992 crores and has granted loans and advances to the extent of Rs.12,006 crores and has working capital to the extent of Rs.20,947 crores. There are total 2115 members including 1818 co-operative institutions, 296 individuals and individual societies and 1 State Government and the number of total shares held by them is 45,67,280 (35,66,104 are held by co-operative institutions, 1176 are held by individuals and individual societies, and 10,00,000 are held by the State Government). The MSC Bank advances various terms loans and working capital loans to co-operative processing units like Sugar Factories, Private Sugar Mills, Spinning Mills, Oil Mills, Marketing Co-operatives, Educational Institutions, and other co-operative Industrial Units. It is the apex institution of all District Central Co-operative Banks, Urban Co-operative Banks, and Primary Agricultural Co-operative Societies. It has a network of co-operative banks and the agricultural co-operative societies in the State of Maharashtra on 31.3.2015 as under:

> Total number of District Central Co-operative Banks 31 Number of branches of District Central Co-operative 3,734 Banks Number of Primary Agriculture Credit Societies 21,124 Number of members of Primary Agriculture Credit 1,14,54,704 Societies He further pointed out that out of 31 District Co-operative Banks, 30 primarily cater to the financial needs of the agriculture sector. MSC Bank provides re-finance facilities to the District Central Co-operative Bank, and it also takes care of the financial needs of the non-farming sector by providing re-finance facilities to the District Co-operative Banks under the NABARD's general re-finance to enable them to help rural artisans and small-scale industries. It has also introduced the crop loan system in the State in association with District Co-operative Banks. Thus, the notification issued and the amendment are appropriate, more so, in light of the amendment incorporated in 1965. The matter is covered under Entry 45 of List I of the Seventh Schedule.
>
> 15. On behalf of the Indian Banks Association, Shri P.V. Yogeswaran learned counsel, supported the arguments raised on behalf of the Banks. He further argued that the

enactment of the SARFAESI Act is within the legislative competence of the Parliament. It does not deprive borrowers' right to challenge the action under Section 13 of the SARFAESI Act as well as under the Maharashtra Co□operative Societies Act and is not violative of Article 14. It only provided an additional remedy. This Court upheld the validity of Sections 13 and 17 of the SARFAESI Act. The Parliament can legislate concerning co□operative banks within the purview of Entry 45 of List I.

16. Shri Vinay Navre, learned senior counsel appearing on behalf of Co□operative Banks, vehemently argued that:

(a) The expression 'incorporation, regulation and winding up' in Entries 43 and 44 of List I and Entry 32 of List II refers only to organisational aspects of the corporations. It does not have any bearing on the business/transactional aspects. He has relied upon decisions in Hindustan Lever and Anr. v. State of Maharashtra and Anr.25, Kerala State Electricity Board v. Indian Aluminium Co. Ltd. 26 and Sita Ram Sharma and Ors. v. State of Rajasthan and Ors. 27. The framers of the Constitution deliberately did not define many terms used in the Lists in the Seventh Schedule. Wherever it was required, they defined such terms. Some of the subjects enumerated in Lists of the Seventh Schedule are defined in Article 366 of the Constitution, for instance, Agricultural Income (List I, Entry 82), Corporation Tax (List I, Entry 85), Debt (List II, Entry 42), Pension (List I, Entry 71) and 25 (2004) 9 SCC 438 26 (1976) 1 SCC 466 27 (1974) 2 SCC 301 (List II, Entry 42). The framers of the Constitution avoided defining the term 'banking' in Article 366. The intention was not to restrict its meaning. For certain Entries, the framers of the Constitution specified the meaning, such as in Entry 71 of List I and Entries 5, 8, 13, 17, 18 of List II.

(a) There was a purpose for the framers not to define as an Entry has to be given meaning as per changes in society, science, and technology. When the American Constitution was framed more than 200 years before the Indian Constitution, space science and technology were unknown to the human. The Entry 'defence' in the Union List was interpreted to include even space science and technology. He argued that the internet was unknown in 1950. Today Entry 31 of List I of the VII Schedule of the Constitution of India can include the internet. The courts interpreted an Entry taking into account the changing perspectives of the time, retaining the substance.

(b) The term 'banking' as understood in 1950 was too narrow, and after 70 years, the banking industry has undergone significant changes. Today it includes portfolio management, underwriting of shares, and investment banking. There are grey areas like credit card companies, i.e., VISA or American Express. The definition in the BR Act, 1949, cannot be used to restrict the scope of the term 'banking' in Entry 45 of List I.

(c) If the argument of the appellants that co□operative banks are not covered by Entry 45 of List I is accepted, the consequences will be disastrous. Entire Part V of the BR Act, 1949, would become unconstitutional. The Parliament can amend Section 84 of the MSCS Act, and it could enact the SARFAESI Act. Similarly, power can be provided to recover dues under the SARFAESI Act also. The

argument raised on behalf of appellants as to 'occupied field' cannot be accepted as the question of 'occupied field' is germane concerning the Concurrent List as held in State of A.P. and Ors. v. Mcdowell & Co. and Ors.28. The recovery of dues is an essential function of a bank. The argument to the contrary cannot be accepted. The purpose of the SARFAESI Act is the enforcement of security interests. The consequence thereof is a recovery, which is an incidental one.

(d) The SARFAESI Act is for enforcement of security, and it is referable to Entry 6 of List III also, more so, because of the provisions contained in Sections 69 and 69A of the Transfer of Property Act, 1882. Section 13 or other provisions of the SARFAESI Act do not interfere with the legislative field occupied by Entry 32 of List II. The Maharashtra Co□operative Societies Act, 1960, provides two remedies to the co□operative banks for recovery of their dues. Section 91 is akin 28 (1996) 3 SCC 709 to a civil suit, and Section 101 provides a summary procedure for issuance of a revenue recovery certificate. The SARFAESI Act does not take away the remedies of the co□operative banks under Section 91 or 101 of the said Act; it provides additional remedy under Section 13 to co□operative banks to recover the dues and enforce security interest. It is a classic case of co□ operative/collaborative federalism.

17. Shri Abhijet Sengupta, learned counsel appearing on behalf of Jana Seva Sahakari Bank Ltd., urged that petition under Article 32 of the Constitution cannot be said to be maintainable, given the decisions in Dewan Bahadur Seth Gopal Das Mohta v. Union of India and Ors.29, and Khyerbari Tea Co. Ltd. and Ors. v. State of Assam 30. Entry 45 of List I and Entry 32 of List II are to be read harmoniously.

18. Following questions arise for consideration:

> (1) Whether 'co□operative banks', which are co□operative societies also, are governed by Entry 45 of List I or by Entry 32 of List II of the Seventh Schedule of the Constitution of India, and to what extent?
>
> (2) Whether ‘banking company’ as defined in Section 5(c) of the BR Act, 1949 covers co□operative banks registered under the State Co□operative Laws and also multi□ State co□operative 29 (1955) 1 SCR 773 30 (1964) 5 SCR 975 societies?

(3)(a) Whether co□operative banks both at the State level and multi□State level are 'banks' for applicability of the SARFAESI Act?

(3)(b) Whether provisions of Section 2(c) (iva) of the SARFAESI Act on account of inclusion of multi□State co□operative banks and notification dated 28.1.2003 notifying cooperative banks in the State are ultra vires?

IN REFERENCE QUESTION NO.1:

19. In order to appreciate the rival submissions, we have to consider Entries 43, 44 and 45 of List I and Entry 32 of List II of the Seventh Schedule of the Constitution of India. The Entries are

reproduced hereunder:

> "43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co□operative societies.
>
> 44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.
>
> 45. Banking.
>
> ***
>
> 32. Incorporation, regulation and winding up of corporation, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co□operative societies."

20. In the BR Act, 1949, 'banking' has been defined under Section 5(b) thus:

> "5. Interpretation. — In this Act, unless there is anything repugnant in the subject or context,—
>
> (b) "banking" means 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;"

21. Under Section 5(c) of the BR Act, 1949, the term 'banking company' has been defined thus:

> "5. Interpretation.— In this Act, unless there is anything repugnant in the subject or context,—
>
> (c) "banking company" means any company which transacts the business of banking in India;

Explanation.— Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause;"

22. Section 6 in Part II of the BR Act, 1949 deals with forms of business in which banking companies may engage, is extracted hereunder:

> "6. Forms of business in which banking companies may engage.— (1) In addition to the business of banking, a banking company may engage in any one or more of the

following forms of business, namely:—

(a) the borrowing, raising, or taking up of money;

the lending or advancing of money either upon or without security; the drawing, making, accepting; discounting, buying, selling collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, traveller's cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposits or for safe custody or otherwise; the providing of safe deposit vaults: the collecting and transmitting of money and securities;

(b) acting as agents for any Government or local authority or any other person or persons; the carrying on of agency business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of customers, but excluding the business of a managing agent or secretary and treasurer of a company;

(c) contracting for public and private loans and negotiating and issuing the same;

(d) the effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, of State, municipal or other loans or of shares, stock, debentures, or debenture stock of any company, corporation or association and the lending of money for the purpose of any such issue;

(e) carrying on and transacting every kind of guarantee and indemnity business;

(f) managing, selling and realising and property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;

(g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;

(h) undertaking and executing trusts;

(i) undertaking the administration of estates as executor, trustee or otherwise;

(j) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex□employees of the

company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance;

subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object;

(k) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;

(l) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;

(m) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this sub□section;

(n) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;

(o) any other form of business which the Central Government may, by notification in the Official Gazette, specify as a form of business in which it is lawful for a banking company to engage.

(2) No banking company shall engage in any form of business other than those referred to in sub□ section (1).”

23. Initially, the provisions of the BR Act, 1949, applied only to banking companies. The provisions of the BR Act, 1949, were extended to co□operative banks by Act No.23 of 1965, w.e.f. 1.3.1966. Earlier Section 56 was repealed by Act No.36 of 1957, w.e.f. 17.9.1957. Bill No.85 of 1964 was introduced in Parliament on 17.12.1964 to amend the Reserve Bank of India Act, 1934 and the Banking Companies Act, 1949 to regulate the banking business of certain co□operative societies and for matters connected in addition to that.

24. Before we come to the amendments made, it is necessary to consider the Statement of Objects and Reasons. It was considered necessary to extend provisions of the BR Act, 1949 to State co□ operative banks, the central co□operative banks, and, more importantly, to primary non□agriculture credit societies, which were relatable to banking. The Statement of Objects and Reasons is extracted hereunder:

> “STATEMENT OF OBJECTS OF REASONS The provisions of the Banking Companies Act, 1949 are not now applicable to or in relation to co□operative banks. The deposits and working funds of co□operative banks are now so large that the extension of the more important provisions of the Banking Companies Act, 1949 (and of certain other allied provisions of the Reserve Bank of India, Act, 1934) to these banks will be in the public interest.

The Bill seeks accordingly to extend to the State co□operative banks, the central co□operative banks and the more important primary non□agricultural co□operative banks certain provisions of the existing Central laws which are relatable to “banking”.

2. The notes on clauses explain in detail the various provisions of the Bill.” (emphasis supplied) The President's recommendation under Article 117 of the Constitution contained in appended Notes on clauses is also significant. The State or apex co□operative banks, all central co□operative banks, and primary non□agricultural credit societies, which have paid□up capital and reserves of a nominal value of Rs.1 lakh or more, were to be deemed to be co□operative banks. Consequential change in the qualifications of directors was proposed to be made. Clause 6 provided to keep reserve at 3 per cent for apex co□operative banks. It was proposed to control co□operative banks effectively under the provisions of the Reserve Bank of India Act and Banking Companies Act. It would not be necessary to make separate provisions concerning them, as such the Banking Companies Act was to be renamed as Banking Regulation Act, and it would not be confined any longer to companies incorporated under the Companies Act carrying on the business of banking.

25. What is of utmost significance is that extensive amendments and omissions of several provisions of the BR Act, 1949 became necessary concerning matters covered under Entry 32 of List II; as such various amendments were separately reflected in a separate chapter, amendments were incorporated under various provisions of the Act in Parts IIA, III and IIIA. The provisions relatable directly or indirectly to incorporation, management and winding up of co□operative banks were proposed to be omitted as these Parts or provisions were not in pith and substance within the scope of any entry in the Central or Concurrent List of subjects in the Seventh Schedule of the Constitution of India. Following is the relevant extract of the Notes appended to President's recommendation under Article 117 of the Constitution of India:

> “According to the scheme of control as it is envisaged in the Reserve Bank of India Act and in the Banking Companies Act, (a) all the State or apex co□operative banks, (b) all central co□operative banks and (c) such of the primary non□agricultural credit societies, including in particular urban co□operative banks, as have paid□up capital and reserves of a nominal value of Rs. 1 lakh or more, will be deemed to be co□ operative banks. The definition of the expression "co□operative bank" will exclude (a) all primary agricultural credit societies, whatever the nominal value of their paid□up capital may be, (b) primary non□agricultural credit societies with paid□up capital and reserves of a nominal value of less than rupees one lakh, even though they may be accepting deposits from non□members and (c) all other co□operative societies which do not obtain, or may hereafter cease to obtain, deposits from non□members.
>
> Clauses 8 and 9 provide for the modification of the definition of (a) financial institutions and (b) non□banking insitutions for the purposes of Chapter IIIB of the Reserve Bank of India Act. It is proposed that
>
> (a) all co□operative banks, (b) all agricultural credit societies and (c) all primary non□agricultural credit societies which are not co□operative banks should be

> excluded from the scope of the statutory provisions relating to the Reserve Bank's control over the loan investment or other allied policies of financial and non□banking institutions. Co□operative banks will be effectively controlled in accordance with other provisions which are being made for this purpose in the Reserve Bank of India Act and the Banking Companies Act and it will not, therefore, be necessary to make any separate provision in regard to them. Agricultural credit societies have been excluded generally from the scope of the various provisions of the present Bill.

The working funds and turnover of primary non□agricultural credit societies which are not co□ operative banks are relatively insignificant, with the result that the trouble or expense involved in controlling their loans or advances or investment policies may not be worthwhile.

Clauses 10 and 11.— Chapter III provides for the amendments necessary to Banking Companies Act. Clauses 10 and 11 seek to alter the description of this Act and to make certain consequential changes in the long title and the preamble. The Act, it is proposed, should be known in future as the Banking Regulation Act, 1949. This will be appropriate, as its application will not be confined any longer to companies incorporated under the Companies Act and carrying on the business of banking.

Parts IIA, III and IlIA and such of the provisions in the other Parts of the Act as are relatable either directly or indirectly to the incorporation, management and winding up of co□operative banks are proposed to be omitted, as these Parts or provisions are not in pith and substance within the scope of any entry in the Central or Concurrent List of subjects in the Seventh Schedule to the Constitution." (emphasis supplied) The provisions of Bankers' Books Evidence Act, 1891 were also proposed to be suitably modified to apply to the co□operative banks thus:

> "The provisions of the Bankers' Books Evidence Act, 1891 and the Banking Companies (Legal Practitioners' Clients' Accounts) Act, 1949 are proposed to be modified suitably, so that the special procedure as to evidence or the protection in respect of certain accounts may be extended to or be available in future in relation to co□operative banks [clause (zk)].
>
> The Third Schedule as proposed to be amended provides for the prescribed Forms in which the ba1ance□sheets and profit and loss accounts of co□operative banks will have to be maintained. The Forms may, if necessary, be modified in future in the light of further experience and in accordance with the procedure which is already prescribed in the Act for this purpose." The co□operative banks were also required to submit the balance sheet and profit and loss account to the Reserve Bank of India.

26. Various amendments were carried out in the Reserve Bank of India Act to make it applicable to the co□operative banks. The 'central co□operative bank' was defined by substituting clause (bi) to Section 2 of the Reserve Bank of India Act, 1934. Similarly, 'co□operative bank', 'co□operative credit society' and 'co□operative society' were defined by substituting Section 2(bii), Section 2(biii) and Section 2(biv) respectively. The relevant definitions as inserted in the Reserve Bank of India Act, 1934 are extracted hereunder:

> "(bi) "central co□operative bank" means the principal co□operative society in a district in a State, the primary object of which is the financing of other co□operative societies in that district:
>
> Provided that in addition to such principal society in a district or where there is no such principal society in a district, the State Government may declare any one or more co□operative societies carrying on the business of financing other co□operative societies in that district to be a central co□operative bank or banks within the meaning of this definition;
>
> (bii) "co□operative bank" means a State co□operative bank, a central co□operative bank and a primary co□operative bank;
>
> (biii) "co□operative credit society" means a co□operative society, the primary object of which is to provide financial accommodation to its members and includes a co□ operative land mortgage bank:
>
> (biv) "co□operative society" means a society registered, or deemed to be registered, under the Co□operative Societies Act, 1912 or any other law relating to co□operative societies for the time being in force in any State;" The 'primary co□operative bank' has been defined in Section 2(ciii), and 'primary credit society' has been defined in Section 2(civ).

The definitions are extracted hereunder:

> "(ciii) "primary co□operative bank" means a co□operative society, other than a primary agricultural credit society,— (1) the primary object or principal business of which is the transaction of banking business; (2) the paid□up share capital and reserves of which are not less than one lakh of rupees; and (3) the bye□laws of which do not permit admission of any other co□operative society as a member;
>
> (civ) "primary credit society" means a co□operative society, other than a primary agricultural credit society,— (1) the primary object or principal business of which is the transaction of banking business; (2) the paid□up share capital and reserves of which are less than one lakh of rupees; and (3) the bye□laws of which do not permit admission of any other co□operative society as a member;

Explanation.— If any dispute arises to the primary object or principal business of any co□operative society referred to in this clause or clause (cii) or clause (ciii), a determination thereof by the Bank shall be final.';" Other corresponding changes were brought in the provisions to apply the Reserve Bank of India Act to co□operative banks.

(a) Various amendments have been carried out in the Banking Companies Act, 1949, it was renamed as the BR Act, 1949. The 'primary agricultural credit society' was excluded from the purview of the

Reserve Bank of India Act and the BR Act, 1949. Co□operative land mortgage banks and any other co□operative society except in the manner and to the extent specified in Part V were also excluded. Section 3 of the BR Act, 1949 was substituted as under:

> "3. Nothing in this Act shall apply to□
>
> (a) a primary agricultural credit society;
>
> (b) a co□operative land mortgage bank; and
>
> (c) any other co□operative society, except in the manner and to the extent specified in Part V."
>
> (b) As it became necessary to apply certain provisions of the BR Act, 1949 to the co□ operative banks in the modified form without inserting the amendments/omissions in the various provisions, as that would have made the understanding of provisions a little complicated.

Entire amendments made which applied to or about the co□operative societies concerning co□ operative banks were specified in Section 56, Chapter V, though they had the effect of amending the main provisions of the Act wherever they occurred.

(c) It was provided by Section 56(a) of the BR Act, 1949 that throughout the Act, unless the context otherwise requires, references to a banking company or the company or such company shall be construed as references to a co□operative bank. Section 56(a)(i) and

(ii) is extracted hereunder:

> "56. The provisions of this Act, as in force for the time being, shall apply to, or in relation to, co□operative societies as they apply to, or in relation to banking companies subject to the following modifications, namely:—
>
> (a) Throughout this Act, unless the context otherwise requires,—
>
> (i) references to a "banking company" or, "the company" or "such company" shall be construed as references to a co□operative bank,
>
> (ii) references to "commencement of this Act" shall be construed as references to commencement of the Banking Laws (Application to Co□operative Societies) Act, 1964" By virtue of Section 56(b) in Section 2, the words and figures 'the Companies Act, 1956' were omitted. After clause (cc) in Section 5 definition of 'central co□ operative banks' in clause (ccc) was added as under:

> "(ccc) "central co□operative bank", "co□operative bank", "co□operative society", "director", "primary agricultural credit society", "primary co□operative bank", "primary credit society" and "State co□operative bank" shall have the meanings respectively assigned to them in the Reserve Bank of India Act, 1934."
>
> (d) Section 5A was modified concerning the co□operative banks.

Section 5A provided that the provisions of Part V shall prevail and override bye□laws of a co□ operative society or any agreement executed by it, whether the same be registered, executed or passed, before or after the commencement of the Banking Laws (Application to Co□operative Societies) Act, 1964. Section 5A is extracted hereunder:

> "5A. (1) The provisions of this Part shall have effect, notwithstanding anything to the contrary contained in the bye□laws of a co□operative society, or in any agreement executed by it, or in any resolution passed by it in general meeting, or by its Board of directors or other body entrusted with the management of its affairs, whether the same be registered, executed or passed, as the case may be, before or after the commencement of the Banking Laws (Application to Co□operative Societies) Act, 1964.
>
> (2) Any provision contained in the bye□laws, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of this Part, become or be void, as the case may be.";"
>
> (e) By virtue of provisions contained in Section 56(e) in Part V of the BR Act, 1949 so far as it extends to co□operative society/banks, the modification has been made in Section 6(1)(b) to the extent 'but excluding the business of a managing agent or secretary and treasurer of the company' shall be omitted. In clause (d) after the word 'company,' the words 'or co□operative society' shall be inserted.
>
> (f) In Section 6(1) in clause (d), the words 'co□operative society' were inserted after the word 'company.' For co□operative society to be named as a co□operative bank, the following section was substituted:
>
> "7. (1) No co□operative society other than a co□operative bank shall use as part of its name any of the words "bank", "banker" or "banking" and no co□operative society shall carry on the business of banking in India unless it uses as part of its name at least one of such words.
>
> (2) Nothing in this section shall apply to□
>
> (a) a primary credit society, or

(b) a co□operative society formed for the protection of the mutual interests of co□ operative banks or co□operative land mortgage banks.;" (emphasis supplied)

(g) Section 11 was substituted in application to co□operative banks.

The relevant portion of Section 11(1) is extracted hereunder:

"11. (1) Notwithstanding any law relating to co□operative societies for the time being in force, no co□operative bank shall commence or carry on the business of banking in India unless the aggregate value of its paid□up capital and reserves is not less than one lakh of rupees:"

(h) Section 18 was substituted, which provided for maintaining cash reserve. Every co□operative bank not being a State co□operative bank included in the Second Schedule to the Reserve Bank of India Act, 1934, shall maintain in India by way of cash reserve of 3 per cent of the amount. The relevant portion of Section 18 is extracted hereunder:

"18. Every co□operative bank, not being a State co□operative bank · for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934, shall maintain in India, by way of cash reserve with itself or in current account opened with the Reserve Bank or the State Bank of India or the State co□operative bank of the State concerned or with any other bank notified by the Central Government in this behalf or, in the case of a primary co□operative bank, with the central co□ operative bank of the district concerned or partly in cash with itself and partly in such account or accounts, a sum equivalent to at least three per cent of the total of its time and demand liabilities in India and shall submit to the Reserve Bank before the 15th day of every month a return showing the amount so held on Friday of each week of the preceding month with particulars of its time and demand liabilities in India on each such Friday, or, if any such Friday is a public holiday under the Negotiable Instruments Act, 1881, at the close of business on the preceding working day."

(i) Section 19 was substituted concerning the application to the co□operative societies. The relevant portion of Section 19 is as under:

"19. No co□operative bank shall hold shares in any other co□operative society except to such extent and subject to such conditions as the Reserve Bank may specify in that behalf: ..." The restriction was imposed under Section 19 on holding shares in other co□operative societies except as provided by the Reserve Bank of India.

(j) Section 22 of the BR Act, 1949, as amended in its application with respect to the co□operative banks, provides that no co□operative society shall carry on banking business in India unless it is a primary credit society or a co□operative bank and holds a licence issued in that behalf by the Reserve Bank. Thus, it was necessary that

only primary credit society could involve in the banking business in India and to hold a licence from the Reserve Bank of India. The provisions of sub-Sections (1) and (2) of Section 22 were also substituted in their application to the co-operative bank as under:

"(o) in section 22,—

(i) for sub-sections (1) and (2), the following sub-sections shall be substituted, namely:-"(1) Save as hereinafter provided, no co-operative society shall carry on banking business in India unless—

(a) it is a primary co-operative society, or

(b) it is a co-operative bank and holds a licence issued in that behalf by the Reserve Bank, subject to such conditions, if any, as the Reserve Bank may deem fit to impose:

Provided that nothing in this sub-section shall apply to a co-operative society, not being a primary credit society or a co-operative bank carrying on banking business at the commencement of the Banking Laws (Application to Co-operative Societies) Act, 1964, for a period of one year from such commencement.

(2) Every co-operative society carrying on business as a co-operative bank at the commencement of the Banking Laws (Application to Cooperative Societies) Act, 1964, shall before the expiry of three months from such commencement, every primary credit society which becomes a primary co-operative bank after such commencement shall before the expiry of three months from the date on which it so becomes a primary co-operative bank and every co-operative society other than a primary credit society shall before commencing banking business in India, apply in writing to the Reserve Bank for a licence under this section:

Provided that nothing in clause (b) of sub-section (1) shall be deemed to prohibit a co-operative society carrying on business as a co-operative bank at the commencement of the Banking Laws (Application to Co-operative Societies) Act, 1964, and a primary credit society which becomes a primary co-operative bank after such commencement, from carrying on banking business until it is granted a licence in pursuance of this section or is by notice in writing informed by the Reserve Bank that a licence cannot be granted to it.;" (emphasis supplied)

(k) The embargo has also been created by sub-Section (1) of Section 23, to open a new place of business insofar as it applies to the co-operative banks thus:

"(1) Without obtaining the prior permission of the Reserve Bank, no co-operative bank shall open a new place of business or change otherwise than within the same city, town or village, the location of an existing place of business:" It has been made

necessary by substituting Sections 29 and 30 for every co-operative bank to submit accounts and balance sheets to the Reserve Bank of India. Reserve Bank of India has also been given power under Section 35 to inspect primary co-operative banks. In Section 35A(1)(c), after the words 'banking company', the words 'banking business of any co-operative bank' has been substituted.

Forms have also been prescribed for submitting balance sheet, property, and assets, and profit and loss account.

Thus, it is apparent that deep and pervasive control by the Reserve Bank of India is provided on primary credit society, which is involved in banking. As per the provisions of the BR Act, 1949, no business can be done by any co-operative society without obtaining a licence from the Reserve Bank of India. The very existence of the co-operative banks is dependent and is governed by the Reserve Bank of India Act as well as the BR Act, 1949. The aforesaid legislations are under Entry 38 and Entry 45, respectively, of List I of the Constitution of India.

27. Before proceeding further, it is necessary to consider the provisions contained in the SARFAESI Act. The SARFAESI Act has been enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith and incidental to that. It was considered that banks do not have the power to take possession of the property and sell them. The legal system related to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. The relevant portion of the Statement of Objects and Reasons of the SARFAESI Act is extracted hereunder:

> "STATEMENT OF OBJECTS AND REASONS The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial

Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

2. It is now proposed to replace the Ordinance by a Bill, which, inter alia, contains provisions of the Ordinance to provide for—

(g) defining 'security interest' as any type of security including mortgage and charge on immovable properties given for due repayment of any financial assistance given by any bank or financial institution;

(h) empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower's account as non-performing asset in accordance with the directions given or guidelines issued by the Reserve Bank of India from time to time;"

28. Under Section 13 of the SARFAESI Act, it is open to the Bank to enforce the security interest without intervention of the court or tribunal in accordance with the provisions of the Act, and the appeal to Debts Recovery Tribunal is provided. The Appellate Tribunal has been defined to mean Debts Recovery Appellate Tribunal, and the right to appeal/application against the action has been provided in Section 17 to the Debts Recovery Tribunal. Thus, Debts Recovery Tribunal is constituted under the RDB Act, 1993.

29. What is of significance is the definitions of 'bank' and 'banking' which have been provided in the SARFAESI Act in Section 2(1)(c) and 2(1)(d) respectively thus:

"2. Definitions.—(1) In this Act, unless the context otherwise requires,—

(c) "bank" means—

(i) a banking company; or

(ii) a corresponding new bank; or

(iii) the State Bank of India; or

(iv) a subsidiary bank; or (iva) a multi-State co-operative bank; or

(v) such other bank which the Central Government may, by notification, specify for the purposes of this Act;

***

(d) "banking company" shall have the meaning assigned to it in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);"

30. In exercise of power conferred under Section 2(1)(c)(v) of the SARFAESI Act, a notification was issued by the Ministry of Finance and Company Affairs on 28.1.2003 specifying co-operative banks as defined in clause (cci) of Section 5 of the BR Act, 1949 for the purpose of the SARFAESI Act. Following notification was issued:

"S.O.105 (E).— In exercise of the powers conferred under item (v) of clause (c) of Sub-section (1) of Section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), the Central Government hereby specifies "Co-operative Bank" as defined in clause (cci) of Section 5 of the Banking Regulation Act 1949 (10 of 1949) as 'bank' for the purpose of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002)."

31. In Section 2(1)(c) of the SARFAESI Act, further amendments have been made by incorporating a 'multi-State co-operative bank,' w.e.f. 15.1.2013 by way of Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 (No.1 of 2013). Other provisions of the SARFAESI Act were also amended. A similar amendment was made to the RDB Act, 1993, in Section 2(d) by inserting clause (vi) 'a multi-State co-operative bank.' Section 2(d) is extracted hereunder:

"2. Definitions.—In this Act, unless the context otherwise requires,—

(d) "bank" means—

(i) a banking company;

(ii) a corresponding new bank;

(iii) State Bank of India;

(iv) a subsidiary bank; or

(v) a Regional Rural Bank;

(vi) a multi-State co-operative bank;"

32. We have to examine the legislative competence of the Parliament with respect to co□operative banks within the State as the MSCS Act, 2002 is enacted in exercise of power under Entry 44 List I of the Seventh Schedule of the Constitution of India. The legislative competence of Parliament regarding the MSCS Act, 2002 is not in issue.

MEANING OF 'BANKING'

33. The main issue is as to the meaning of 'banking' used in Entry 45 of List I of the Seventh Schedule of the Constitution of India. It is necessary to understand the meaning of 'bank' and 'banking.' Before the Constitution was promulgated, banking was dealt with by the erstwhile Banking Companies Act, 1949. Upon its extension to co□operative banks run by co□operative societies, it was renamed as the BR Act, 1949. Before we consider the definition of 'banking' under the BR Act, 1949, it is necessary to understand the meaning of 'bank' and 'banking.' The bank ordinarily means any establishment which carries the business of banking. The expression 'bank' has been defined in several enactments. In Concise Oxford English Dictionary, 'bank' has been defined thus:

> "bank • n. 1 a financial establishment that uses money deposited by customers for investment, pays it out when required, makes loan at interest, and exchanges currency." In Concise Oxford English Dictionary, the word 'banking' has been defined thus:
>
> "banking • n. the business conducted or services offered by a bank." In Black's Law Dictionary, Ninth Edition 'banking' means the business carried on by or with a bank. 'Bank' is defined thus:
>
> "bank. (15c) 1. A financial establishment for the deposit, loan, exchange, or issue of money and for the transmission of funds; esp., a member of the Federal Reserve System. • Under securities law, a bank includes any financial institution, whether or not incorporated, doing business under federal or state law, if a substantial portion of the institution's business consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks and if the institution is supervised and examined by a state or federal banking authority; or a receiver, conservator, or other liquidating agent of any of the above institutions. 15USCA § 78c(a)(6). [Cases: Banks and Banking 2, 232, 289, 359.].
>
> 2. The office in which such an establishment conducts transactions." Banks can be of different kinds such as Co□operative Bank, Collecting Bank, Commercial Bank, Correspondent Bank, Custodian Bank, Depository Bank, Drawee Bank, Federal Home Loan Bank, Federal Land Bank, Intermediary Bank, Investment Bank, Mutual Savings Bank, Nationalised Banks, Negotiable Bank, Non□Member Bank, Payor Bank, Savings and Loan Bank, Saving Bank.

The expression 'bank' has been defined in various enactments relating to it.

34. The 'Reserve Bank' has been defined in Section 5(l) to mean Reserve Bank of India constituted under Section 3 of the Reserve Bank of India Act, 1934 (2 of 1934). Section 5(ha) defines the 'National Bank' to mean the National Bank for Agriculture and Rural Development established under Section 3 of the National Bank for Agriculture and Rural Development Act, 1981. The 'State Bank of India' is defined in Section 5(nc) to mean the State Bank of India constituted under Section 3 of the State Bank of India Act, 1955 (23 of 1955).

35. The term ‘banking’ used in Entry 45 List I, came up for consideration in Rustom Cavasjee Cooper (supra), in which 11□Judge Bench of this Court considered the question of ‘banking’ and observed:

> “27. The argument raised by Mr Setalvad, intervening on behalf of the State of Maharashtra and the State of Jammu and Kashmir, that the Parliament is competent to enact Act 22 of 1969, because the subject□matter of the Act is “with respect to” regulation of trading corporations and matters subsidiary and incidental thereto, and on that account is covered in its entirety by Entries 43 and 44 of List I of the Seventh Schedule, cannot be upheld. Entry 43 deals with incorporation, regulation and winding up of trading corporations including banking companies. Law regulating the business of a corporation is not a law with respect to regulation of a corporation. In List I entries expressly relating to trade and commerce are Entries 41 and 42. Again several entries in List I relate to activities commercial in character. Entry 45 “Banking”; Entry 46 “Bills of exchange, cheques, promissory notes and other like instruments”; Entry 47 “Insurance”; Entry 48 “Stock Exchanges and future markets”; Entry 49 “Patents, inventions and designs”. There are several entries relating to activities commercial as well as non□commercial in List II — Entry 21 “Fisheries”; Entry 24 “Industries X X X” ; Entry 25 “Gas and Gas works”; Entry 26 “Trade and commerce”; Entry 30 “Money□lending and money□lenders”; Entry 31 “Inns and Inn□keeping”; Entry 33 “Theatres and dramatic performances, cinemas etc.”. We are unable to accede to the argument that the State Legislatures are competent to legislate in respect of the subject□matter of those entries only when the commercial activities are carried on by individuals and not when they are carried on by corporations.
>
> 31. The expression “banking” is not defined in any Indian statute except in the Banking Regulation Act, 1949. It may be recalled that by Section 5(b) of that Act “banking” means “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 or otherwise”. The definition did not include other commercial activities which a banking institution may engage in.
>
> 32. In support of his contention Mr Palkhivala relied upon the observation of Lord Porter in Commonwealth of Australia v. Bank of New South Wales, LR (1950) AC 235 that banking consists of the creation and transfer of credit, the making of loans, purchase and disposal of investments and other kindred transactions; and upon the

statement in Halsbury's Laws of England, 3rd Edn., Vol. 2, Article 270 at pp. 150 and 151 that:

"A 'banker' is an individual partnership or corporation, whose sole or predominating business is banking, that is the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid by a customer." and in the footnote (g) at p. 151 that:

"Numerous other functions are undertaken at the present day by banks such as the payment of domiciled bills, custody of valuables, discounting bills, executor and trustee business, or acting in relation to stock exchange transactions, and banks have functions under certain financial legislation, X X X ." These functions are not strictly banking business.

33. The Attorney□General said that the expression "banking" in Entry 45, List I means all forms of business which since the introduction of western methods of banking in India, banking institutions have been carrying on in addition to banking as defined in Section 5(b) of the Banking Regulation Act, and on that account all forms of business described in Section 6(1) of the Banking Regulation Act in clauses (a) to (n) are, if carried on in addition to the "hard□core of banking" banking and the Parliament is competent to legislate in respect of that business under Entry 45, List I. In support of his contention that apart from the business of accepting money from the public for lending or investment, and withdrawable by cheque, draft or otherwise, banking includes many allied business activities which banking institutions were engaged in, the Attorney□General invited our attention to clause 21 of the Charter of the Bank of Bengal (Act 6 of 1839); Section 27 of Act 4 of 1862; to Sections

36 and 37 of the Presidency Banks Act 11 of 1876; to Section 91(15) of the British North America Act; to Paget's Law of Banking, 7th Edn., at p. 5; to the Standard Form of Memorandum of Association of a Banking Company in Palmer's Company Precedents Form 138; and to the Statement of Objects and Reasons in support of the Bill which was enacted as the Indian Companies (Amendment) Act, 1936.

34. The Charter of the Bank of Bengal, the Presidency Banks Act 4 of 1862, Ch. X□A of the Indian Companies Act, 1913, as incorporated by the Indian Companies (Amendment) Act, 1936, merely described the business which a banking institution could carry on. It was not intended thereby to include those activities within the expression "banking". The Acts enacted after the Banking Regulation Act, 1949, also support that inference. Under Section 33 of the State Bank of India Act, 1955, the State Bank is entitled to carry on diverse business activities beside banking. Similarly the Banks subsidiary to the State Bank were by Section 36 of Act 38 of 1959 to act as agents of the State Bank, and also to carry on and transact business of banking as defined in Section 5(b) of the Banking Regulation Act, 1949, and were also competent to engage in such one or more other forms of business specified in Section 6(1) of that Act. These provisions do not aid in construing the Entry "Banking" in Entry 45, List I.

35. In modern times in India as elsewhere, to attract business, banking establishments render, and compete in rendering, a variety of miscellaneous services for their constituents. If the test for determining what "banking" means in the constitutional entry is any commercial activity which bankers at a given time engage in, great obscurity will be introduced in the content of that expression. The coverage of constitutional entry in a Federal Constitution which carves out a field of legislation must depend upon a more satisfactory basis.

36. The legislative entry in List I of the Seventh Schedule is "Banking" and not "Banker" or "Banks". To include within the connotation of the expression "Banking" in Entry 45, List I, power to legislate in respect of all commercial activities which a banker by the custom of bankers or authority of law engages in, would result in re□writing the Constitution. Investment of power to legislate on a designated topic covers all matters incidental to the topic. A legislative entry being expressed in a broad designation indicating the contour of plenary power must receive a meaning conducive to the widest amplitude, subject however to limitations inherent in the federal scheme which distributes legislative power between the Union and the constituent units. The field of "banking" cannot be extended to include trading activities which not being incidental to banking encroach upon the substance of the entry "trade and commerce" in List II.

148. Counsel for the petitioner contended that the word "banking" would have the same meaning as the definition of "banking" occurring in Section 5(b) of the Banking Regulation Act of 1949 hereinafter referred to for the sake of brevity as the 1949 Act. This contention was amplified to exclude four types of business from the banking business and therefore the Act of 1969 was said to be not within the legislative competence of Banking under Entry 45 in List I. These four types of business are: (1) the receiving of scrips or other valuables on deposit or for safe custody and providing of safe deposit vaults, (2) agency business, (3) business of guarantee, giving of indemnity and underwriting and (4) business of acting as executors and trustees. "Banking" was defined for the first time in the 1949 Act as meaning the acceptance for the purpose of lending or investments of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft or otherwise. In England there is no statutory definition of banking but the Courts have evolved a meaning and principle as to what the legitimate business of a bank is.

152. Keeping valuables for safe custody, the providing of safe deposit vaults occur in clause (a) of Section 6(1) along with various types of business like borrowing, raising or taking up of money, or lending or advancing of money. It will appear from clause (n) of Section 6(1) of the 1949 Act that in addition to the forms of business mentioned in clauses (a) to (m) a banking company may engage in "doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company". The words "other things" appearing in clause (n) after enumeration of the various types of business in clauses (a) to (m) point to one inescapable conclusion that the businesses mentioned in clauses (a) to (m) are all incidental or conducive to the promotion or advancement of the business of the company. Therefore these businesses are not only legitimate businesses of the banks but these also come within the normal business activities of commercial banks of repute. Entry 45 in List I of the 7th Schedule of the Constitution, namely, "banking" will therefore have the wide meaning to include all legitimate businesses of a banking company referred to in Section 5(b) as well as in Section 6(1) of the 1949 Act. The contention on behalf of the

petitioner that the four disputed businesses are not banking businesses is not supportable either on logic or on principle when businesses mentioned in the sub□clauses of Section 6(1) of the 1949 Act are recognised to be legitimate business activities of a banking company by statute and practice and usage fully supports that view.

158. It was suggested by counsel for the petitioner that by banking business is meant only the hard core of banking as defined in Section 5(b) of the 1949 Act. It is unthinkable that the business of banks is only confined to that aspect and not to the various forms of business mentioned in Section 6(1) of the 1949 Act. Receiving valuables on deposit or for safe custody and providing for safe custody vaults which are contemplated in clause (a) of Section 6(1) of the 1949 Act cannot be dissociated from other forms of unchallenged business of a bank mentioned in that clause because any such severance would be illogical particularly when deposit for safe custody and safe deposit vaults are mentioned in the long catalouge of businesses in clause (a). The agency business which is mentioned in clause (b) of Section 6(1) is one of the recognised forms of business of commercial banks with regard to mercantile transactions and payment or collection of price. Agency is after all a comprehensive word to describe the relationship of appointment of the bank as the constituent's representative. The forms of agency transactions may be varied. It may be acting as collecting agent or disbursing agent or as depository of parties. The categories of agency can be multiplied in terms of transactions. That is why the business of agency mentioned in clause (b) is first in the general form of acting as an agent for any Government or local authority, secondly carrying on of agency business of any description including the clearing and forwarding of goods and thirdly acting as attorney on behalf of the customers. The business of guarantee is in the modern commercial word practically indissolubly connected with a bank and forms a part of the business of the bank. It is almost common place for Courts to insist on bank guarantee in regard to furnishing of security. There may be so many instances of guarantee. As to the business of trusteeship and executorship it may be said that this is the wish of the settler who happens to be a constituent of the bank appointing the bank as executor or trustee because of the utmost faith and confidence that the constituent has in the solvency and stability of the bank and also to preserve the continuity of the trustee or the executor irrespective of any change by reason of death or any other incapacity. It is needless to state that these four disputed forms of business all spring out of the relation between the bank on the one hand and the customer on the other and the bank earns commission on these transactions or charges fees for the services rendered. Although trust accounts may be kept in a separate account all moneys arising out of the trust money go to the general pool of the bank and the bank utilises the money and very often trust moneys may be kept in fixed deposit with the trustee bank and expenses on account of the trust are met out of the general funds of the trustee bank. Payments to beneficiaries are made by crediting the beneficiaries accounts in the trustee bank and if they are not constituents other modes of payment through other banks are adopted. The position of the banks as executor is similar to that of a trustee. Whatever moneys the bank may spend are recouped by the bank out of the accounts of the trust estate.

160. There are various provisions in the 1949 Act to indicate that a banking company cannot carry on business of a managing agent or Secretary and treasurer of a company and that it cannot acquire, construct, maintain, alter any building or works other than those necessary or convenient for the purpose of the company. A banking company cannot acquire or undertake the whole or any portion

of any business unless such business is of one of those enumerated in Section 6(1) of the 1949 Act. A bank cannot deal in buying or selling or bartering of goods except in connection with certain purposes related to some of the businesses enumerated in the aforesaid Section 6(1). These provisions also establish that businesses mentioned in Section 6 of the 1949 Act are incidental and conducive to banking business. A bank cannot employ any person whose remuneration is in the form of a commission or a share in the profits of the banking company or whose remuneration is in the opinion of the Reserve Bank excessive. One of the most important provisions is Section 35 of the 1949 Act, which states that the Reserve Bank at any time may and on being directed so to do by the Central Government cause an inspection to be made by one or more of its officers of the books of account and to report to the Central Government on any inspection and the Central Government thereafter if it is of opinion after considering the report that the affairs of the banking company are being conducted to the detriment of the interests of its depositors, may prohibit the banking company from receiving fresh deposits or direct the Reserve Bank to apply under Section 38 for the winding up of the banking company. Another important provision in the 1949 Act, is found in Section 27 which provides for monthly returns in the prescribed form and manner showing assets and liabilities. The power of the Reserve Bank under Sections 27 and 35 of the 1949 Act relates to the affairs of the banking company which comprehend the various forms of business of the bank mentioned in Section 6 of the 1949 Act. Then again Section 29 of the 1949 Act contemplates accounts relating to accounts of all business transacted by the bank. Section 35□A of the 1949 Act confers power on the Reserve Bank to give directions with regard to the affairs of a bank. These provisions indicate beyond any measure of doubt that all forms of business mentioned in Section 6(1) of the 1949 Act are lawful, legitimate businesses of a bank as these have grown along with increase of trade and commerce. The word “banking” has never had any static meaning and the only meaning will be the common understanding of men and the established practice in relation to banking. That is why all these disputed forms of business come within the legitimate business of a bank.” (emphasis supplied) The submission raised by the petitioner that banking business meant only the hardcore of banking, was not accepted. It was held that the word 'banking' has never had any static meaning, and the only meaning will be the common understanding of men and the established practice about banking. Various forms of business come within the legitimate business of a bank.

36. It was argued on behalf of appellants that the BR Act, 1949 recognises two categories of finance activity which a bank may undertake such as (1) the banking business under Section 5(b), i.e., core banking business; and (2) any other business as provided in Section 6(1). For the purpose, reliance has been placed on Rustom Cavasjee Cooper (supra). The decision of the High Court of Calcutta in Mahaluxmi Bank Ltd. (supra), is pressed into service, wherein it was held:

> “5. After this an application was made to this Court for sanction of the special resolution effecting the said alterations. The Court directed certain advertisements to issue and also directed service of the usual notices as required by Sec.17 of the Companies Act, 1956. The Registrar of Joint Stock Companies filed an affidavit□in□ opposition and at the hearing opposed the application but no creditor or share□ holder of the company opposed the application. P. B. Mukharji, J., before whom the application was heard, gave effect to the contentions raised by the Registrar and

dismissed the application. In dismissing the application the learned Judge made inter alia the following observations in his judgment:

"At the outset it must be said that it is a curious application. If the object is "to lend money to such person or persons or firms and at such terms as may seem expedient," then it may amount to some kind of a banking in disguise. It is quite true that under the Banking Companies Act, banking' is defined to mean the acceptance, "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." With a little clever manipulation, the petitioner might go on doing the banking business under the proposed amendment although by allowing such amendment it will put on the garb of a non□banking company."

It has been argued that these observations of the learned Judge are due to a misconception of the true nature and character of a banking business. Reliance is placed by the learned counsel for the appellant company on the definition of the word 'banking' as given in Sec.5 (1)(b) of the Banking Companies Act, 1949, which is as follows:

"'Banking' means 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."

Now this definition makes it clear that receiving money on deposit from customers and honouring their cheques is the essential characteristic of banking. The money deposited by the customers can be utilised by the banker for lending it or for investing it but the bank also undertakes the obligation to repay the deposit on demand or otherwise and the mode by which the withdrawal of the deposit can be effected is by the issue of cheques, drafts, orders or otherwise, that is, by like methods.

6. In Hart's Law of Banking, a banker or bank is defined as one who, in the ordinary course of his business, receives money which he pays by honouring the cheques of persons from or on whose account he receives it. Sir John Paget in his book On Banking has pointed out that "no person or body corporate or otherwise can be a banker who does not (1) take deposit accounts, (2) take current accounts, (3) issue and pay cheques, and (4) collect cheques crossed and uncrossed for his customers." Sheldon in his book on the Practice and Law of Banking, seventh edition at page 183, formulates the following definition of a banker.

"A person cannot claim to be carrying on the business of banking unless he receives money or instruments representing money on current account, honours cheques drawn thereon, and collects the proceeds of cheques which his customers place into his hands for collection." In the case of Re Bottomgate Industrial Co□operative Society, (1891) 65 LT 712 at p. 714, Smith, J. defines the business of bankers thus:

"The principal part of the business of a banker is receiving money on deposit, allowing the same to be drawn against as and when the depositor desires, and paying

interest on the amounts standing on deposit."

7. Then Sec.6 (1) of the Banking Companies Act, 1949, provides that in addition to the business of banking, a banking company may engage in any one or more of the different kinds of business specified in the various sub□clauses of sub□sec. (1) of Sec. 6. This indicates that the main or real business of a banking company is as stated in Sec. 5 (1)(b) of the Act but banking companies usually carry on and are permitted to carry on other kinds of business which are auxiliary or incidental to the main business. Sub□section (2) of Sec. 6 Iays down that no banking company shall engage in any form of business other than those referred to in sub□section (1). So the banking company is expressly prohibited from carrying on any kind of incidental or allied business other than those enumerated in sub□clauses (a) to (o) of sub□section (1) of Sec. 6 of the Act. Thus it is abundantly clear that the essence of banking is the relationship which is brought into existence at the time of the deposit; that is the core of banking. It is true that the business of banking covers every possible phase or combination of deposit, custody, investment, loan, exchange, issue and transmission of money, creation and transfer of credit and other kindred activities but if the essential characteristic of banking, namely, the power to receive deposits from the public which are repayable in the manner indicated in Sec. 5 (1) (b) of the Banking Companies Act is absent and merely the power of granting loans is retained and exercised that, in my view, does not make the company a banking company. Lending of money may be one phase of a banking business but it is not the main phase or the distinguishing phase. In the case of Bank of Commerce Ltd. v. Kunja Behari Kar, 1944 FCR 370: (AIR 1945 FC

2) it was argued before the Federal Court that Bengal Money Lenders' Act, 1940, was a legislation which fell within the item of banking in entries Nos. 33 and 38 of List 1 of Schedule VII of the Government of India Act, 1935 inasmuch as lending money to customers or advancing money on promissory notes is a principal part of the banking business and the case of Tennant v. Union Bank of Canada, 1894 AC 31 was referred to, but the Federal Court did not accept the contention. It was pointed out that money lending by a bank qua bank might make such money lending part of a banking business but not otherwise (per Spens, C. J. at page

389)."

37. The decision in ICICI Bank Ltd. (supra) has been relied upon in which the Court emphasised that even if different businesses under clause (a) to (o) of section 6(1) are shut down, the company would still be a banking company as long as it is performing the core banking functions under Section 5(b). The Court observed:

> "37. The point we are trying to make is that apart from the principal business of accepting deposits and lending the said 1949 Act leaves ample scope for the banking companies to venture into new businesses subject to such businesses being subject to the control of the regulator viz. RBI. In other words, the 1949 Act allows banking companies to undertake activities and businesses as long as they do not attract prohibitions and restrictions like those contained in Sections 8 and 9. In this connection we need to emphasise that Section 6(1)

> (n) enables a banking company to do all things as are incidental or conducive to promotion or advancement of the business of the company.

Section 6(1) enables banking companies to carry on different types of businesses. Under Section 6(1), these different types of businesses are in addition to business of banking viz. core banking. The importance of the words "in addition to" in Section 6(1) is that even if different businesses under clauses (a) to (o) are shut down, the company would still be a banking company as long as it is in the core banking of accepting deposits and lending so that its main income is from the spread or what is called as "interest income". Thus, we may broadly categorise the functions of the banking company into two parts viz. core banking of accepting deposits and lending and miscellaneous functions and services. Section 6 of the BR Act, 1949 provides for the form of business in which banking companies may engage. Thus, RBI is empowered to enact a policy which would enable banking companies to engage in activities in addition to core banking and in the process it defines as to what constitutes "banking business"."

38. Learned counsel urged that performing core banking function is the sine qua non for being regulated by the BR Act, 1949. The BR Act, 1949 applies to a primary credit society which has been brought within its purview, leaving out primary agricultural credit society and a co□operative land mortgage bank. The business of banking cannot be carried out in India as per Section 22 of the BR Act, 1949 as applicable to the co□operative banks/societies, unless it is a primary credit society, and it is a co□operative bank and holds a licence issued by the Reserve Bank of India. It is not in dispute that all co□operative banks run by cooperative societies hold the licence, and all co□operative banks are doing the business within the purview of the BR Act, 1949. We are unable to accept the submission that banking under Entry 45 of List I does not cover 'co□operative banks'. The activity of the co□operative bank is covered under Section 5(1)(b). A similar submission was not accepted in Rustom Cavasjee Cooper (supra). No doubt about it that every commercial activity cannot be brought within the scope of 'banking' in Entry 45 of List I. 'Banking' itself has a wide meaning, and the activity of co□operative banks is definitely, beyond an iota of doubt, covered by Entry 45 of List I.

39. It was argued on behalf of appellants that banking's legal term 'nomen juris' is defined under Section 5(b) of the BR Act, 1949. When the Constitution was being drafted, the definition of 'banking' in the said Act prevailed. The makers of the Constitution adopted the same expression. Thus, intent bore the precise and definite meaning it had in law and, therefore, must be construed having regard to its known legal import. For this purpose, reference has been made to the observations made by this Court in Gannon Dunkerley & Co., (Madras) Ltd. (supra), in which it was held:

> "(36) The principle of these decisions is that when, after the enactment of a legislation, new facts and situations arise which could not have been in its contemplation, the statutory provisions could properly be applied to them if the words thereof are in a broad sense capable of containing them. In that situation, "it is not," as observed by Lord Wright in 1936 AC 578 (H), "that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of

that meaning". The question then would be not what the framers understood by those words, but whether those words are broad enough to include the new facts. Clearly, this principle has no application to the present case. Sales tax was not a subject which came into vogue after the Government of India Act, 1935. It was known to the framers of that statute and they made express provision for it under Entry

48. Then it becomes merely a question of interpreting the words, and on the principle, already stated, that words having known legal import should be construed in the sense which they had at the time of the enactment, the expression "sale of goods" must be construed in the sense which it has in the Sale of Goods Act.

(37) A contention was also urged on behalf of the respondents that even assuming that the expression "sale of goods" in Entry 48 could be construed as having the wider sense sought to be given to it by the appellant and that the provisions of the Madras General Sales Tax Act imposing a tax on construction contracts could be sustained as within that entry in that sense, the impugned provisions would still be bad under S. 107 of the Government of India Act, and the decision in Dukhineswar Sarkar v. Commercial Tax Officer, (S) AIR 1957 Cal 283 (Z19) was relied on in support of this contention. Section 107, so far as is material, runs as follows:

S. 107 — (1) "If any provision of a Provincial law is repugnant to any provision of a Dominion law which the Dominion Legislature is competent to enact or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Dominion law, whether passed before or after the Provincial law, or, as the case may be, the existing law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor□General has received the assent of the Governor□General, the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter." Now, the argument is that the definition of "sale" given in the Madras General Sales Tax Act is in conflict with that given in the Sale of Goods Act, 1930, that the sale of goods is a matter falling within Entry 10 of the Concurrent List, and that, in consequence, as the Madras General Sales Tax (Amendment) Act, 1947, (Mad. 25 of 1947) under which the impugned provisions had been enacted, had not been reserved for the assent of the Governor□ General as provided in S. 107 (2). Its provisions are bad to the extent that they are repugnant to the definition of "sale" in the Sale of Goods Act, 1930. The short answer to this contention is that the Madras General Sales Tax Act is a law relating not to sale of goods but to tax on sale of goods, and that it is not one of the matters enumerated in the Concurrent List or over which the Dominion legislature is

competent to enact a law, but is a matter within the exclusive competence of the Province under Entry 48 in List II. The only question that can arise with reference to such a law is whether it is within the purview of that Entry. If it is, no question of repugnancy under S. 107 can arise. The decision in (S) AIR 1957 Cal 283 (Z19) on this point cannot be accepted as sound." In Diamond Sugar Mills Ltd. (supra), it was held:

"(10) In considering the meaning of the words "local area" in entry 52 we have, on the one hand to bear in mind the salutary rule that words conferring the right of legislation should be interpreted liberally and the powers conferred should be given the widest amplitude; on the other hand we have to guard ourselves against extending the meaning of the words beyond their reasonable connotation, in an anxiety to preserve the power of the legislature. In Re the Central Provinces & Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, 1939 FCR 18 at p. 37: (AIR 1939 FC 1 at p. 4) Sir Maurice Gwyer, C.J., observed:

"I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of correcting any supposed errors." Again, in Navinchandra Mafatlal v. Commissioner of Income Tax, Bombay City, 1955 1 SCR 829: ((S) AIR 1955 SC 58) Das, J. (as he then was) delivering the judgment of this Court observed: — "..... The cardinal rule of interpretation however, is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude." (25) It is true that when words and phrases previously interpreted by the courts are used by the Legislature in a later enactment replacing the previous statute, there is a presumption that the Legislature intended to convey by their use the same meaning which the courts had already given to them. This presumption can however only be used as an aid to the interpretation of the later statute and should not be considered to be conclusive. As Mr Justice Frankfurter observed in Federal Communication Commissioner v. Columbia Broadcasting System of California, (1940) 311 U.S. 132 when considering this doctrine, the persuasion that lies behind the doctrine is merely one factor in the total effort to give fair meaning to language. The presumption will be strong where the words of the previous statute have received a settled meaning by a series of decisions in the different courts of the country; and particularly strong when such interpretation has been made or affirmed by the highest court in the land. We think it reasonable to say however that the presumption will naturally be much weaker when the interpretation was given in one solitary case and was not tested in appeal. After giving careful consideration to the view taken by the learned Judge of the Allahabad High Court in ILR (1942) All 302: (AIR 1942 All 156) (supra) about the meaning of the words "local area" & proper weight to the rule of interpretation mentioned above, we are of opinion that the Constitution makers did not use the words "local area" in the meaning which the

> learned Judge attached to it. We are of opinion that the proper meaning to be attached to the words “local area” in Entry 52 of the Constitution, (when the area is a part of the State imposing the law) is an area administered by a local body like a municipality, a district board, a local board, a union board, a Panchayat or the like. The premises of a factory is therefore not a “local area”.

40. In our opinion, the framers of the Constitution cannot be said to have confined the meaning of 'banking' to a particular definition, as given in the BR Act, 1949. The word 'banking' has been incorporated in Entry 45 of List I. The decision in Rustom Cavasjee Cooper (supra) vividly leaves no room for doubt that banking done by the co□operative bank is covered within the ambit of Entry 45 of List I. The decision in Gannon Dunkerley & Co., (Madras) Ltd. (supra) stands neutralised by introduction of Article 366(29A) of the Constitution of India and the meaning of the said term has been redefined. Entries have to be given full effect in pith and substance considering forms of business of co□operative banks performing the activities of banking under a licence. The same is covered within the purview of Entry 45 of List I.

41. On the strength of Sections 32 and 33 of the State Bank of India Act, 1955, learned counsel on behalf of appellants argued that Section 32 recognises that State Bank of India can carry on 'agency business' on behalf of Reserve Bank of India. Section 33 enables the State Bank of India to carry on banking business under Section 5(b) and other forms of business under Section 6(1) of the BR Act, 1949. The argument is of no avail. The State Bank of India Act, 1955, is independent and is not co□ related with the co□operative banks, and the State Bank of India has been established as a corporation under the Act. Thus, the provision is of no help to take home the submission espoused on behalf of appellants to take them out of the purview of Entry 45 of List I.

42. Learned Counsel on behalf of appellants argued that there is a difference between entity and activity. On a plain reading of Section 6(1) of the BR Act, 1949, it becomes evident that there is a distinction between the business of banking and entity that performs the banking functions. Section 6(1) and 6(2) enable only an entity to perform certain additional business functions. It does not confer any such status upon such an entity.

43. In our opinion, Section 6 deals with the forms of business in which banking companies may engage. There cannot be any form of activity/business of banking without there being an entity. Section 6 is not a provision of the conferral of the status of the banking company. The definitions of 'banking' and 'banking company' are contained in Section 5(b) and 5(c) of the BR Act, 1949 respectively, and when reading with Section 56(a), it means co□operative banks also. The co□ operative bank falls within the definition of Section 5(c), and its activity is of banking, and in addition to the business of banking, a co□operative bank may engage in any of the business as enumerated in Section 6.

EFFECT OF ENTRIES 43 AND 45 OF LIST I AND ENTRY 32 OF LIST II OF THE SEVENTH SCHEDULE OF THE CONSTITUTION OF INDIA

44. Entry 43 of List I of the Seventh Schedule of the Constitution of India has been pressed into service on behalf of appellants. It confers upon the Parliament the competence to pass the law pertaining to 'incorporation, regulation and winding up' of the trading corporation, more particularly, a banking corporation. However, co□operative societies are expressly excluded from the purview of the Parliament's competence. No doubt about it that in Entry 43 of List I 'incorporation, regulation and winding up' of the co□operative societies have been kept out of the purview of the Union List by specifically excluding the co□operative societies, otherwise, they would have been included for 'incorporation, regulation and winding up' in Entry 43 of List I. The terms "incorporation, regulation and winding up of co□operative societies" were reserved as State subjects under Entry 32 of List II, it was so omitted from List 43 of List I. But the exclusion from Entry 43 of List I taking out 'incorporation, regulation and winding up' of co□operative societies out of the purview of the Parliament, does not advance the cause of the co□operative banks. As a corollary to the aforesaid submission, it was also urged that the banking company was defined and governed by Sections 277F to Section 277N under Chapter X□A of the Companies Act (VII of 1913). It was inserted vide Amendment Act No.22 of 1936. On 10.3.1949, the Banking Companies Act, 1949, was enforced. The primary objective of the Banking Companies Act, 1949, was to provide a comprehensive definition of 'banking' to bring within its scope all the institutions which receive deposits repayable on demand or otherwise for lending or investment. At the relevant time, the Government of India Act, 1935, which dealt with the subject of 'banking' as well as 'trading corporation,' was in List I (Federal Legislative List), thus:

> “Entry 38 in relation to "banking": "Banking," that is to say, the conduct of banking business by corporations other than corporations owned and controlled by a federated state and carrying on business only within that State.
>
> Entry 33 in relation to corporation: "Corporations,"
>
> that is to say, the incorporation, regulation, and winding□up of trading corporations, including banking, insurance, and financial corporations, but not including corporations owned or controlled by a Federated State and carrying on business only within that State or co□operative societies, and of corporations, whether trading or not, with objects not confined to one unit (but not including Universities)."

Entry 38 of the Government of India Act was re□enacted as 'banking' in Entry 45 of List I, while Entry 33 was bifurcated in Entries 43 and 44. Learned Counsel further argued that up to 1965, the primary entity which was regulated by the Parliament was a company that found a place in Entry 43. Thus, both in its function, i.e., banking and as an entity, fell in List I (banking under Entry 45 and company under Entry 43). Therefore, it was within the control of the Parliament. Up to 1965, Banking Companies Act, 1949, only dealt with a juristic entity called banking companies. Then from the Preamble, the word "company" was omitted. The banking corporation was governed by the State Bank of India Act, 1955. Thus, the question of regulating the banking business of an entity outside the purview of List I never arose. In 1965, the Government enacted Banking Laws (Application to Co□operative Societies Act, 1965 (Act No.23 of 1965) and extended the provisions of Banking Companies Act, 1949, and Reserve Bank of India Act to co□operative banks. Thus, learned counsel

urged that the Statement of Objects and Reasons of the said Amendment Act was only to regulate relatable Entry 45 and not to regulate the co-operative societies. The provisions relatable either directly or indirectly to 'incorporation, management and winding up' of co-operative banks were omitted as they were not covered under Entry 45 of List I.

45. Shri Devansh A. Mohta, learned counsel, further argued that Section 2(10) of the Maharashtra Co-operative Societies Act, 1960 has defined 'co-operative bank' thus:

> "Section 2 -Definitions In this Act, unless the context otherwise requires, — (10) "co-operative bank" means a society which is doing the business of banking as defined in clause
>
> (b) of sub-section (1) of section 5 of the Banking Companies Act, 1949 and includes any society which is functioning or is to function as a Co-operative Agriculture and Rural Multipurpose Development Bank under Chapter XI;" Under Section 91 of the Maharashtra Act, any dispute relating to constitution, management or business is required to be referred to a co-operative court. Similarly, Section 2(f) of the Multi-State Co-operative Society Act defines 'co-operative bank' to mean multi-State co-operative society, which undertakes the banking business. Under Section 84(2), a claim for any debt or demand due shall be deemed to be a dispute touching the constitution, management, or business of a multi-State co-operative society. The Parliament has extended specific provisions of the BR Act, 1949, and the Reserve Bank of India Act, 1934, which legislations are relatable to Entry 45 of List I and Entry 38 of List I, respectively. The Parliament lacks legislative competence to regulate any other business, function, or facet of co-operative societies. It could not have provided a recovery procedure as that is within the domain of the State legislature. We cannot accept the aforesaid submission raised by the learned Counsel.

46. In Delhi High Court Bar Association (supra), this Court in the context of the RDB Act, 1993 held that Parliament has the legislative competence to enact the Act. 'Banking' in Entry 45 of List I would comprehend legislation in respect of matters ancillary or subsidiary to it. The Parliament can enact a law regarding the conduct of the banking business, which includes recovery of banks' dues, and for that purpose, set up the adjudicatory body like the Banking Tribunal is permissible. Thus, the establishment of Debts Recovery Tribunal under the RDB Act, 1993, was upheld. The Court opined:

> "14. The Delhi High Court and the Guwahati High Court have held that the source of the power of Parliament to enact a law relating to the establishment of the Debts Recovery Tribunal is Entry 11-A of List III which pertains to "administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Courts". In our opinion, Entry 45 of List I would cover the types of legislation now enacted. Entry 45 of List I relates to "banking". Banking operations would, inter alia, include accepting of loans and deposits, granting of loans and recovery of the debts due to the bank. There can be little doubt that under Entry 45 of List I, it is Parliament alone which can enact a law with regard to the conduct of business by the

> banks. Recovery of dues is an essential function of any banking institution. In exercise of its legislative power relating to banking, Parliament can provide the mechanism by which monies due to the banks and financial institutions can be recovered. The Tribunals have been set up in regard to the debts due to the banks. The special machinery of a Tribunal which has been constituted as per the preamble of the Act, "for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto" would squarely fall within the ambit of Entry 45 of List I. As none of the items in the lists are to be read in a narrow or restricted sense, the term "banking" in Entry 45 would mean legislation regarding all aspects of banking including ancillary or subsidiary matters relating to banking. Setting up of an adjudicatory body like the Banking Tribunal relating to transactions in which banks and financial institutions are concerned would clearly fall under Entry 45 of List I giving Parliament specific power to legislate in relation thereto."

47. In view of the aforesaid discussion, we are of the opinion that recovery of dues would be an essential function of any banking institution and the Parliament can enact a law under Entry 45 of List I as the activity of banking done by co□operative banks is within the purview of Entry 45 of List I. Obviously, it is open to the Parliament to provide the remedy for recovery under Section 13 of the SARFAESI Act. Co□operative bank's entire operation and activity of banking are governed by a law enacted under Entry 45 of List I, i.e., the BR Act, 1949, and the RBI Act under Entry 38 of List I.

48. In UCO Bank and Anr. v. Dipak Debbarma and Ors. 31, the question arose under the SARFAESI Act vis□a□vis the provisions of Section 187 of Tripura Land Revenue and Land Reforms Act, 1960 as under the Tripura Act there was a legislative embargo on the sale of mortgaged properties by the bank to any person who is not a member of a Scheduled Tribe. The auction purchasers in the case were not members of the Scheduled Tribe. This Court observed that provisions of the SARFAESI Act enable the bank to take possession of any property where a security interest has been created in its favour and sell such property to any person to realise dues. This Court observed that the Parliament enacted the law traceable to Entry 45 dealing exclusively with activities relating to the sale of secured assets, which being Central legislation would prevail, thus:

> "15. In the present case the conflict between the Central and the State Act is on account of an apparent overstepping by the provisions of the State Act dealing with land reform into an area of banking covered by the Central Act. The test, therefore, would be to find out as to which is the dominant legislation having regard the area of encroachment.
>
> 18. The 2002 Act is relatable to the entry of banking which is included in List I of the Seventh Schedule.

Sale of mortgaged property by a bank is an inseparable and integral part of the business of banking. The object of the State Act, as already noted, is an attempt to consolidate the land revenue law in the State and also to provide measures of agrarian reforms. The field of encroachment made by the

State Legislature is in the area of banking. So long there did not exist any parallel Central Act dealing with sale of secured assets and referable to 31 (2017) 2 SCC 585 Entry 45 of List I, the State Act, including Section 187, operated validly. However, the moment Parliament stepped in by enacting such a law traceable to Entry 45 and dealing exclusively with activities relating to sale of secured assets, the State law, to the extent that it is inconsistent with the 2002 Act, must give way. The dominant legislation being the Parliamentary legislation, the provisions of the Tripura Act, 1960, pro tanto, (Section 187) would be invalid. It is the provisions of the 2002 Act, which do not contain any embargo on the category of persons to whom mortgaged property can be sold by the bank for realisation of its dues that will prevail over the provisions contained in Section 187 of the Tripura Act, 1960."

49. In State Bank of India v. Santosh Gupta and Anr. 32, the question arose concerning the rights of banks to enforce security interests outside the court's process by acting under Section 13 of the SARFAESI Act and its applicability to the State of Jammu and Kashmir. The recovery of debts and adjudicatory mechanisms provided in the SARFAESI Act, therefore, it comes within the purview of subject 'banking' in Entry 45 of List I of the Seventh Schedule. The Presidential order under Article 370 empowered the Parliament to legislate on the Seventh Schedule List I Entry 45 read with Entry 95 in respect of the State of Jammu and Kashmir. The SARFAESI Act can be validly applied to the State of Jammu and Kashmir even if Section 140 of the Transfer of Property Act of J&K, 1920, conflicts with the SARFAESI Act. Thus, the transfer of property by way of sale or assignment is only one of the several ways for recovery of debts and, 32 (2017) 2 SCC 538 thus, the SARFAESI Act as a whole cannot be said to be in pith and substance an Act relatable to the subject of transfer of property. The sale and mortgage of property for recovering loans/debts is also an integral part of 'banking'. The setting up of an adjudicatory body like the banking tribunal would also fall under Entry 45 of List I of the Seventh Schedule. Thus, State law can operate if there is no Central law regarding the same. The State law cannot encroach upon the Central law by operation of the principle of repugnancy if there is a Central law. The Parliament is qualified with exclusive power to make law concerning banking. It is not possible to dissect the provisions of the SARFAESI Act and attach them to different entries under different lists. In pith and substance, the SARFAESI Act does not deal with the transfer of property in Entry 6 of List III of the Seventh Schedule but deals with the recovery of debt owing to banks and financial institutions. It was observed:

> "30. When it came to SARFAESI itself, this Court has held in Central Bank of India v. State of Kerala, (2009) 4 SCC 94: (SCC p. 116, para 36) "36. Undisputedly, the DRT Act and the Securitisation Act have been enacted by Parliament under Schedule VII List I Entry 45 whereas the Bombay and Kerala Acts have been enacted by the State Legislatures concerned under Schedule VII List II Entry 54. To put it differently, two sets of legislations have been enacted with reference to entries in different lists in the Seventh Schedule. Therefore, Article 254 cannot be invoked per se for striking down State legislations on the ground that the same are in conflict with the Central legislations. That apart, as will be seen hereafter, there is no ostensible overlapping between two sets of legislations.

Therefore, even if the observations contained in Kesoram Industries case, (2004) 10 SSC 201, are treated as law declared under Article 141 of the Constitution, the State legislations cannot be struck down on the ground that the same are in conflict with Central legislations."

34. A judgment of the Privy Council in Attorney General for Canada v. Attorney General for the Province of Quebec, 1947 AC 33 (PC) also throws some light on what is the correct meaning to be given to the expression "banking". A Quebec Statute deemed as vacant property, without an owner, (which will now belong to His Majesty) all deposits or credits in credit institutions and other establishments which received funds or securities on deposit where for 30 years or more such deposits or credits are not the subject of any operation or claim by the persons entitled thereto. In an appeal from the Court of King's Bench of the Province of Quebec, the Bank of Montreal argued that the State Act was beyond the powers of the Quebec Legislature as "banking" was one of the subjects allotted exclusively to Parliament of Canada. Lord Porter, in an illuminating judgment, posed the question and answered it thus: (AC p. 44) "Is then, the repayment of deposits to depositors or their successors□in□title under the law as existing a part of the business of banking or necessarily incidental thereto, or is it primarily concerned with property and civil rights or incidental to those subjects? Their Lordships cannot but think that the receipt of deposits and the repayment of the sums deposited to the depositors or their successors as defined above is an essential part of the business of banking." In this view of the matter, the Privy Council further held: (AC p. 46) "... In their view, a Provincial Legislature enters on the field of banking when it interferes with the right of depositors to receive payment of their deposits, as in their view it would if it confiscated loans made by a bank to its customers. Both are in a sense matters of property and civil rights, but in essence they are included within the category of banking."

37. Applying the doctrine of pith and substance to SARFAESI, it is clear that in pith and substance the entire Act is referable to Entry 45 List I read with Entry 95 List I in that it deals with recovery of debts due to banks and financial institutions, inter alia through facilitating securitisation and reconstruction of financial assets of banks and financial institutions, and sets up a machinery in order to enforce the provisions of the Act. In pith and substance, SARFAESI does not deal with "transfer of property". In fact, insofar as banks and financial institutions are concerned, it deals with recovery of debts owing to such banks and financial institutions and certain measures which can be taken outside of the court process to enforce such recovery. Under Section 13(4) of SARFAESI, apart from recourse to taking possession of secured assets of the borrower and assigning or selling them in order to realise their debts, the banks can also take over the management of the business of the borrower, and/or appoint any person as manager to manage secured assets, the possession of which has been taken over by the secured creditor. Banks as secured creditors may also require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom money is due or payable to the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt. It is thus clear that the transfer of property, by way of sale or assignment, is only one of several measures of recovery of a secured debt owing to a bank and this being the case, it is clear that SARFAESI, as a whole, cannot possibly be said to be in pith and substance, an Act relatable to the subject□matter "transfer of property".

50. In Delhi Cloth & General Mills Co. Ltd. (supra), the question came up for consideration concerning legislation whether it falls within one entry or the other. However, some portion of the subject-matter of the legislation incidentally trenched upon and might enter a field under another list; then, it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It was observed:

> "33. Mr O.P. Malhotra raised a contention as to the legislative competence of the Parliament to enact Section 58-A and the Deposits Rules enacted in exercise of the power conferred by Section 58-A read with Section 642 of the Companies Act, 1956. This is only to be mentioned to be rejected. Mr Malhotra urged that when a company invites and accepts deposits, there comes into existence a lender-borrower relationship between the depositor and the company, and therefore the legislation dealing with the subject squarely falls under Entry 30 of the State List, 'money lending and moneylenders'. If this submission were to carry conviction, every depositor in the bank would be a moneylender and the transaction would be one of moneylending. Is the banking industry to be covered under Entry 30? On the other hand, Entry 45 in Union List is a specific Entry 'Banking' and therefore any legislation relating to banking would be referable to Entry 45 in the Union List. Entry 43 in the Union List is:
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> "Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including cooperative societies". Entry 44 refers to "incorporation, regulation, and winding up of corporation whether trading or not when business is not confined to one State but not including universities". Obviously the power to legislate about the companies is referable to Entry 44 when the objects of the company are not confined to one State and irrespective of the fact whether it is trading or not. When a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions (see A.S. Krishna v. State of Madras, 1957 SCR 399, 410). To resolve the controversy if it becomes necessary to ascertain to which entry in the three Lists, the legislation is referable, the court has evolved the doctrine of pith and substance. If in pith and substance, the legislation falls within one entry or the other but some portion of the subject-matter of the legislation incidentally trenches upon and might enter a field under another List, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence (see Ishwari Khaetan Sugar Mills (P) Ltd. v. State of U.P., (1980) 3 SCR 331, 343, Union of India V.H.S. Dhillon, (1972) 2 SCR 33, Kerala State Electricity Board v. Indian Aluminium Company, (1976) 1 SCR 552 and State of Karnataka v. Ranganatha Reddy, (1978) 1 SCR 641). Applying this doctrine of pith and substance, Section 58-A which is incorporated in the Companies Act is referable to Entries 43 and 44 in the Union List and the enactment viewed as a whole cannot be said to be legislation on moneylenders and moneylending or being referable to Entry 30 in the State List.

Undoubtedly, therefore Parliament had the legislative competence to enact Section 58□A."

51. Reliance has also been placed on the decision of a Constitution Bench in I.T.C. Ltd. (supra). The question involved in the said case was to the applicability and validity of Bihar Agricultural Produce Markets Act, 1960 and the Karnataka Agricultural Produce Marketing (Regulation) Act, 1966, to the extent these State legislations deal with the sale of tobacco in market areas with particular reference to the levy thereupon of market fee after enactment of Tobacco Board Act, 1975 □parliamentary legislation. The scope of Entry 52 in the Union List of the Seventh Schedule of the Constitution of India with particular reference to the meaning of the expression 'Industries' as also in Entry 24 in the State List of the Seventh Schedule of the Constitution came up for consideration. The Court relied on the decision of Constitution Bench in Belsund Sugar Co. Ltd. v. State of Bihar33, in which it was held that merely because the industry is controlled by a declaration under Section 2 of the IDR Act enacted by Entry 52 of the Union List, the State Legislature would not be denied of its power to regulate the products of such industry by the exercise of its legislative power under the State List. The Court ultimately held that State Legislation and the Tobacco Board Act, 1975 to the extent they relate to the sale of tobacco in market areas, cannot co□exist. The State legislatures were competent to pass legislation concerning such goods. In I.T.C. Ltd. (supra), it was observed:

"87. Further, in Belsund Sugar Co., (1999) 9 SCC 620, the Constitution Bench cited with approval the decision in SIEL case, (1998) 7 SCC 26 and reiterated that merely because the industry is controlled by a declaration under Section 2 of the IDR Act enacted by Entry 52 of the Union List, the State Legislature would not be denied of its power to regulate the products of such an industry by exercise of its legislative power under the State List. It would be useful to extract para 119 of Belsund Sugar Co. case, (1999) 9 SCC 620, as under: (SCC pp. 670□71) "119. However, so far as the IDR Act is concerned, it is enacted under Entry 52 of the First Schedule which deals with industries in general. Simultaneously in the State List itself there is Entry 24 which deals with industries subject to the provisions of Entries 7 and 52 of List I. Consequently, the products of such controlled industries would necessarily not be governed by the sweep of the general legislation pertaining to such industries as per Entry 52 of the Union List. The aforesaid Constitution Bench judgment was not concerned with any State legislation enacted under Entry 24. On the contrary, it dealt with legislation of the Union Parliament under Entry 54 of the Union List read with Entry 23 of the State 33 (1999) 9 SCC 620 List. The scheme of the aforesaid legislative entries is entirely different from the scheme of Entry 52 of List I read with Entry 24 of List II with which we are concerned. On a conjoint reading of the aforesaid two entries, therefore, the ratio of the decision of the Constitution Bench in the aforesaid case cannot be effectively pressed into service by Shri Ranjit Kumar for supporting his contention. In this contention, we may usefully refer to a decision of this Court in SIEL Ltd., (1998) 7 SCC 26, where one of us, Sujata V. Manohar, J. was a Member. It has rightly distinguished the ratio of the Constitution Bench decision in the case of Hingir Rampur Coal Co.

Ltd., AIR 1961 SC 459 and taken the view that merely because an industry is controlled by a declaration under Section 2 of the IDR Act enacted by Entry 52 of the Union List, the State Legislature would not be denied of its powers to regulate the products of such an industry by exercise of its legislative powers under Entry 24 of the State List. In that case the question was whether the U.P. Sheera Niyantran Adhiniyam, 1964 could be said to be repugnant to the Molasses (Control) Order issued by the Central Government under Section 18□G of the IDR Act imposing restrictions on the sale of molasses and fixing the maximum price of molasses. Answering the question in the negative, it was held that the term 'industry' in Entry 24 would not take within its ambit trade and commerce or production, supply and distribution of goods which are within the province of Entries 26 and 27 of List II.

Similarly, Entry 52 in List I which deals with industry also would not cover trade and commerce in, or production, supply and distribution of, the products of those industries which fall under Entry 52 of List I. For the industries falling in Entry 52 of List I, these subjects are carved out and expressly put in Entry 33 of List III. It was also held that since the Molasses (Control) Order of 1961 passed by the Central Government in exercise of powers conferred by Section 18□G was not extended at any point of time to the State of U.P. or the State of Bihar, the question of repugnancy between the Molasses Control Order, 1961 and the U.P. Sheera Niyantran Adhiniyam, 1964 does not arise. Consequently, it must be held that in the absence of a statutory order promulgated under Section 18□G of the IDR Act, it cannot be said that the field for regulation of sale and purchase of products of the flour industry like atta, maida, suji, bran, etc. would remain outside the domain of the State Legislature."

93. That the legislative power of Parliament in certain areas is paramount under the Constitution is not in dispute. What is in dispute is the limits of those areas as judicially defined. Broadly speaking, parliamentary paramountcy is provided for under Articles 246 and 254 of the Constitution. The first three clauses of Article 246 of the Constitution relate to the demarcation of legislative powers between Parliament and the State Legislatures. Under clause (1), notwithstanding anything contained in clauses (2) and (3), Parliament has been given the exclusive power to make laws with respect to any of the matters enumerated in List I or the Union List in the Seventh Schedule. Clause (2) empowers Parliament, and the State Legislatures subject to the power of Parliament under clause (1), to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule described in the Constitution as the "Concurrent List" notwithstanding anything contained in clause (3). Under clause (3) the State Legislatures have been given exclusive powers to make laws in respect of matters enumerated in List II in the Seventh Schedule described as the "State List" but subject to clauses (1) and (2). The three lists while enumerating in detail the legislative subjects carefully distribute the areas of legislative authority between Parliament (List I) and the State (List II). The supremacy of Parliament has been provided for by the non obstante clause in Article 246(1) and the words "subject to" in Articles 246(2) and (3). Therefore, under Article 246(1) if any of the entries in the three lists overlap, the entry in List I will prevail (M.P.V. Sundararamier & Co. v. State of A.P., AIR 1958 SC 468). Additionally some of the entries in the State List have been made expressly subject to the power of Parliament to legislate either under List I or under List III. Entries in the lists of the Seventh Schedule have been liberally interpreted, nevertheless courts have been wary of upsetting this balance by a process of interpretation so as to deprive any entry of its content

and reduce it to "useless lumber" (Calcutta Gas Co. (Proprietary) Ltd. v. State of W.B., AIR 1962 SC 1044). The use of the word "exclusive" in clause (3) denotes that within the legislative fields contained in List II, the State Legislatures exercise authority as plenary and ample as Parliament.

"276. The fact that under the scheme of our Constitution, greater power is conferred upon the Centre vis□a□vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers.

More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States."

126. To sum up: the word "industry" for the purposes of Entry 52 of List I has been firmly confined by Tika Ramji, AIR 1956 SC 676 to the process of manufacture or production only.

Subsequent decisions including those of other Constitution Benches have reaffirmed that Tika Ramji case, AIR 1956 SC 676 authoritatively defined the word "industry" — to mean the process of manufacture or production and that it does not include the raw materials used in the industry or the distribution of the products of the industry. Given the constitutional framework, and the weight of judicial authority it is not possible to accept an argument canvassing a wider meaning of the word "industry". Whatever the word may mean in any other context, it must be understood in the constitutional context as meaning "manufacture or production".

130. It was held that: (AIR pp. 94□95, para 10) "Market no doubt ordinarily means a place where business is being transacted. That was probably all that it meant at a time when trade was not developed and when transactions took place at specified places. But with the development of commerce, bargains came to be concluded more often than not through correspondence and the connotation of the word 'market' underwent a corresponding expansion. In modern parlance the word 'market' has come to mean business as well as the place where business is carried on."

163. As noticed earlier the majority view in ITC case, 1985 Supp SCC 476 has been upheld in the judgment of Brother Pattanaik, on slightly different reasoning and the decisions of this Court in M.A. Tulloch, AIR 1964 SC 1284 and Baijnath Kadio, (1969) 3 SCC 838 dealing with legislation on mining and relied upon in the majority judgment of ITC case, 1985 Supp SCC 476 have been found to be not relevant for the decision. It is true, while legislating on any subject covered under an entry of any list, there can always be a possibility of entrenching upon or touching the field of legislation of another entry of the same list or another list for matters which may be incidental or ancillary thereto. In such eventuality, inter alia, a broad and liberal interpretation of an entry in the list may certainly be required. An absolute or watertight compartmentalization of heads of subject for legislation may not be possible but at the same time entrenching into the field of another entry cannot mean its total sweeping off even though it may be in the exclusive list of heads of subjects for legislation by the other legislature. As in the present case the relevant heads of subject in List II, other than Entry 24, cannot be made to practically disappear from List II and assumed to have crossed over in totality to List I by virtue of declaration of the tobacco industry under Entry 52 of List I, in the guise of touching or entrenching upon the subjects of List II."

52. In Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal and Ors.34, a Constitution Bench of this Court considered the meaning of 'industry' in Entry 52 of List I and Entries 24 and 25 of List II and observed that having regard to the principles, while giving the most extensive scope to both the entries, the interpretation which harmonizes has to be adopted. It was held:

> "9. With this background let us construe the aforesaid entries. There are three possible 34 AIR 1962 SC 1044 constructions, namely, (1) Entry 24 of List II, which provides for industries generally, covers the industrial aspect of gas and gas□works leaving Entry 25 to provide for other aspects of gas and gas□works; (2) Entry 24 provides generally for industries, and Entry 25 carves out of it the specific industry of gas and gas□works, with the result that the industry of gas and gas□works is excluded from Entry 24; and (3) the industry of gas and gas□works falls under both the entries, that is, there is a real overlapping of the said entries. Having regard to the aforesaid principle, while giving the widest scope to both the entries, we shall adopt the interpretation which reconciles and harmonizes them."

53. In Central Bank of India v. State of Kerala and Ors. 35, the question came up for consideration concerning Entry 45 of List I and Entry 54 of List II. The question arose whether Section 38□C of the Bombay Sales Tax Act, 1959 and Section 26□B of the Kerala General Sales Tax Act, 1963 and similar provisions contained in other State legislation by which a first charge was created on the property of the dealer or such other person, who was liable to pay sales tax, were inconsistent with the provisions contained in the RDB Act, 1993 and the SARFAESI Act and whether central legislations would have primacy over the state legislations. It was observed:

> "92. An analysis of the abovenoted provisions makes it clear that the primary object of the DRT Act was to facilitate creation of special machinery for speedy recovery of the dues of banks and financial institutions. This is the reason why the DRT Act not only provides for establishment of the Tribunals and the Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks or financial institutions and specifies the modes of recovery of the amount 35 (2009) 4 SCC 94 determined by the Tribunal or the Appellate Tribunal but also bars the jurisdiction of all courts except the Supreme Court and the High Courts in relation to the matters specified in Section 17. The Tribunals and the Appellate Tribunals have also been freed from the shackles of procedure contained in the Code of Civil Procedure. To put it differently, the DRT Act has not only brought into existence special procedural mechanism for speedy recovery of the dues of banks and financial institutions, but also made provision for ensuring that defaulting borrowers are not able to invoke the jurisdiction of civil courts for frustrating the proceedings initiated by the banks and financial institutions.
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> 93. The enactment of the Securitisation Act can be treated as one of the most radical legislative measures taken by the Government for ensuring that dues of secured creditors including banks, financial institutions are recovered from the defaulting borrowers without any obstruction. For the first time, the secured creditors have

been empowered to take measures for recovery of their dues without the intervention of the courts or tribunals.

110. The DRT Act facilitated establishment of two-tier system of tribunals. The tribunals established at the first level have been vested with the jurisdiction, powers and authority to summarily adjudicate the claims of banks and financial institutions in the matter of recovery of their dues without being bogged down by the technicalities of the Code of Civil Procedure. The Securitisation Act drastically changed the scenario inasmuch as it enabled banks, financial institutions and other secured creditors to recover their dues without intervention of the courts or tribunals. The Securitisation Act also made provision for registration and regulation of securitisation/reconstruction companies, securitisation of financial assets of banks and financial institutions and other related provisions.

116. The non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law.

In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or the Securitisation Act, the provisions contained in those Acts cannot override other legislations. Section 38-C of the Bombay Act and Section 26-B of the Kerala Act also contain non obstante clauses and give statutory recognition to the priority of the State's charge over other debts, which was recognised by Indian High Courts even before 1950. In other words, these sections and similar provisions contained in other State legislations not only create first charge on the property of the dealer or any other person liable to pay sales tax, etc. but also give them overriding effect over other laws." This Court found no conflict in the provisions of the Central Act and that of the State.

54. Learned counsel on behalf of appellants relying on the decisions in S.S. Dhanoa, Daman Singh, and Dalco Engineering Private Limited (supra), argued that the Parliament was conscious of the distinction between a corporation falling under Entries 43 and 44 of List I and a co-operative society falling under Entry 32 of List II. In S.S. Dhanoa (supra), this Court considered the distinction between corporation created by law and a body or society created by an act of individual in accordance with provisions of the statute and observed:

"8. A corporation is an artificial being created by law having a legal entity entirely separate and distinct from the individuals who compose it with the capacity of continuous existence and succession, notwithstanding changes in its membership. In addition, it possesses the capacity as such legal entity of taking, holding and conveying property, entering into contracts, suing and being sued, and exercising such other powers and privileges as may be conferred on it by the law of its creation just as a natural person may. The following definition of corporation was given by Chief Justice Marshall in the celebrated Dartmouth College case, 4 Wheat 518, 636: 4 L Ed 629 (1819):

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being." The term 'corporation' is, therefore, wide enough to include private corporations. But, in the context of clause Twelfth of Section 21 of the Indian Penal Code, the expression 'corporation' must be given a narrow legal connotation.

9. Corporation, in its widest sense, may mean any association of individuals entitled to act as an individual. But that certainly is not the sense in which it is used here. Corporation established by or under an Act of Legislature can only mean a body corporate which owes its existence, and not merely its corporate status, to the Act. For example, a Municipality, a Zilla Parishad or a Gram Panchayat owes its existence and status to an Act of Legislature. On the other hand, an association of persons constituting themselves into a company under the Companies Act or a society under the Societies Registration Act owes its existence not to the Act of Legislature but to acts of parties though, it may owe its status as a body corporate to an Act of Legislature." In Daman Singh (supra), a Constitution Bench of this Court considered Entry 43 of List I and Entry 32 of List II of the Seventh Schedule of the Constitution of India and observed:

"5. What is a corporation? In Halsbury's Laws of England, Fourth Edition, Volume 9, Paragraph 1201, it is said, A corporation may be defined as a body of persons (in the case of a corporation aggregate) or an office (in the case of a corporation sole) which is recognised by the law as having a personality which is distinct from the separate personalities of the members of the body or the personality of the individual holder for the time being of the office in question.

A corporation aggregate has been defined in paragraph 1204 as, [A] collection of individuals united into one body under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and of exercising a variety of political rights,

> more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation or at any subsequent period of its existence.
>
> This Court in Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v. State of Delhi, 1962 Supp 1 SCR 156 was required to answer the question whether the Board of trustees which was originally registered under the Societies Registration Act, 1860 and a new Board of trustees which was incorporated by an Act of the legislature called the Tibbia College Act, 1952 by which the old Board was dissolved and a new Board constituted were corporations. The Court held that the old Board was not but the new Board was. Posing the question what is a corporation, the Court answered it with the statements contained in Halsbury's Laws of England already extracted by us and added, A corporation aggregate has therefore only one capacity, namely, its corporate capacity. A corporation aggregate may be a trading corporation or a non□ trading corporation. The usual examples of a trading corporation are (1) charter companies, (2) companies incorporated by special Acts of Parliament, (3) companies registered under the Companies Act, etc. Non□trading corporations are illustrated by (1) municipal corporations, (2) district boards, (3) benevolent institutions, (4) universities etc. An essential element in the legal conception of a corporation is that its identity is continuous, that is, that the original member or members and his or their successors are one. In law the individual corporators, or members, of which it is composed are something wholly different from the corporation itself; for a corporation is a legal persona just as much as an individual. Thus, it has been held that a name is essential to a corporation; that a corporation aggregate can, as a general rule, only act or express its will by deed under its common seal; that at the present day in England a corporation is created by one or other of two methods, namely, by Royal Charter of incorporation from the Crown or by the authority of Parliament that is to say, by or by virtue of statute.

There is authority of long standing for saying that the essence of a corporation consists in (1) lawful authority of incorporation, (2) the persons to be incorporated, (3) a name by which the persons are incorporated, (4) a place, and (5) words sufficient in law to show incorporation. No particular words are necessary for the creation of a corporation; any expression showing an intention to incorporate will be sufficient.

The Court then noticed the various provisions of the Societies Registration Act, 1860 which according to them contained no sufficient words to indicate an intention to incorporate but on the contrary contained provisions showing that there was an absence of such intention. Therefore, they observed, "We have, therefore, come to the conclusion that the provisions aforesaid do not establish the main essential characteristic of a corporation aggregate, namely, that of an intention to incorporate the society". Considering next the question whether the new Board was a corporation, the Court had no difficulty in answering the question with reference to sub□section (2) of Section 3 which stated that the Board shall be a body corporate having perpetual succession and common seal and shall by the said name sue and be sued. The Court observed, "Sub□section (2) of Section 3 says

in express terms that the new Board constituted under the impugned Act is given a corporate status; in other words, the new Board is a corporation in the full sense of the term".

6. We have already extracted Section 30 of the Punjab Act which confers on every registered cooperative society the status of a body corporate having perpetual succession and a common seal, with power to hold property, enter into contracts, institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it is constituted. There cannot, therefore, be the slightest doubt that a cooperative society is a corporation as commonly understood. Does the scheme of the Constitution make any difference? We apprehend not.

7. ... According to Mr Ramamurthi the express exclusion of cooperative societies in Entry 43 of List I and the express inclusion of cooperative societies in Entry 32 of List II separately and apart from but along with corporations other than those specified in List I and universities, clearly indicated that the constitutional scheme was designed to treat cooperative societies as institutions distinct from corporations. On the other hand one would think that the very mention of cooperative societies both in Entry 43 of List I and Entry 32 of List II along with other corporations gave an indication that the Constitution makers were of the view that cooperative societies were of the same genus as other corporations and all were corporations. In fact the very express exclusion of cooperative societies from Entry 43 of List I is indicative of the view that but for such exclusion, cooperative societies would be comprehended within the meaning of expression "corporations"." In Dalco Engineering Private Limited (supra), the Court followed the decision in S.S. Dhanoa (supra) and opined that there is a difference between a corporation established by law and established under the law. However, the question involved in the instant case is different.

55. In Hindustan Lever (supra), question was considered, whether there was an encroachment on the field of the Parliament reserved under Entry 43 of List I of the Seventh Schedule of the Constitution of India, which empowers the Union Government to make law relating to 'incorporation, regulation and winding up of trading corporations including banks, insurance, and finance corporations'. It was held that the levy of stamp duty and prescribing rate of stamp duty on such documents is a different aspect. The Bombay Stamp Act does not provide for 'incorporation, regulation and winding up of corporations'. The Court held:

> "42. It was next contended that provisions of Section 2(g)(iv) read with Section 34 of the Bombay Stamp Act which provide that an instrument not duly stamped would be inadmissible in evidence are repugnant to Section 394 of the Companies Act and that the State legislation cannot prevail over the provisions of the Companies Act. It was also contended that in the guise of stamp duty the State Legislature is in reality imposing a tax on the amalgamation of companies and has therefore encroached on the field of Parliament under Entry 43 List I of the Constitution. We do not find any substance in this submission as well. Stamp duty is levied on the instrument and the measure is the valuation of the property transferred. There is no question of encroachment on the field of Parliament under Entry 43 List I of the Constitution which empowers the Union to make laws re: incorporation, regulation and winding up of trading corporations including banks, insurance and finance corporations but

not including cooperative societies.

The follow-up legislation under Entry 43 List I is totally different from the levy of stamp duty and of prescribing rate of stamp duty on such documents. The Bombay Stamp Act does not provide for any legislation with regard to incorporation, regulation and winding up of corporations. It only levies the stamp duty and prescribes the rate of stamp duty in respect of documents by compromise or arrangement."

56. In Kerala State Electricity Board (supra), a Constitution Bench, while considering the Doctrine of Pith and Substance and dominant purpose, opined:

> "5. In view of the provisions of Article 254, the power of Parliament to legislate in regard to matters in List III, which are dealt with by clause (2), is supreme the Parliament has exclusive power to legislate with respect to matters in List 1. The State Legislature has exclusive power to legislate with respect to matters in List II. But this is subject to the provisions of clause (1) [leaving out for the moment the reference to clause (2)]. The power of Parliament to legislate with respect to matters included in List I is supreme notwithstanding anything contained in clause (3) [again leaving out of consideration the provisions of clause (2)]. No what is the meaning of the words "notwithstanding" in clause (1) and "subject to" in clause (3)? They mean that where an entry is in general terms in List II and part of that entry is in specific, terms in List I, the entry in List I takes effect notwithstanding the entry in List II. This is also on the principle that the "special" excludes the "general" and the general entry in List II is subject to the special entry in List
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> 1. For instance, though house accommodation and rent control might fall within either the State list or the concurrent list, Entry 3 in List I of Seventh Schedule carves out the subject of rent control and house accommodation in Cantonments from the general subject of house accommodation and rent control (see Indu Bhusan v. Sundari Devi, (1970) 1 SCR 443). Furthermore, the word "notwithstanding" in clause (1) also means that if it is not possible to reconcile the two entries the entry in List I will prevail. But before that happens attempt should be made to decide in which list a particular legislation falls. For deciding under which entry a particular legislation falls the theory of "pith and substance" has been evolved by the courts. If in pith and substance a legislation falls within one list or the other but some portion of the subject-matter of that legislation incidentally trenches upon and might come to fall under another list, the Act as a whole would be valid notwithstanding such incidental trenching. These principles have been laid down in a number of decisions.
>
> 16. It would be obvious that one part of the Act does deal with the constitution of the Board, the incorporation of the Board and the regulation of its activities. But the main purpose of the Act is for rationalising the production and supply of electricity. The regulation contemplated in Entries 43 and 44 is not regulation of the business of production, distribution and supply of electricity of the corporation. As the 1910 and

> 1948 Acts together form a complete code, with respect to Entry 38 in List 111 the Board is only an instrument fashioned for carrying out this object. The provision regarding the incorporation and regulation of the Electricity Board should be taken to be only incidental to the provision regarding production, supply and distribution of electricity.
>
> 18. In Ramtanu Housing Society v. Maharashtra, (1970) 1 SCC 248, this Court had dealt with the Maharashtra Industrial Development Act, 1961 and the question whether the Maharashtra Development Corporation formed under the Act was a trading corporation. In holding that the legislation fell under Entry 24 of the State list and not under Entry 43 of the Union list this Court observed: [SCC pp. 324, 325, 326, 327□328, paras 3, 4, 8, 11 & 15] The Act is one to make a special provision for securing the orderly establishment in industrial areas and industrial estates of industries in the State of Maharashtra, and to assist generally in the organisation thereof, and for that purpose to establish an Industrial Development Corporation, and for purposes connected with the matters aforesaid.

The corporation is established for the purpose of securing and assisting the rapid and orderly establishment and organisation of industries in industrial areas and industrial estates in the State of Maharashtra.

Broadly stated the functions and powers of the corporation are to develop industrial areas and industrial estates by providing amenities of road, supply of water or electricity, street lighting, drainage ... or otherwise transfer any property held by the corporation on such conditions as may be deemed proper by the corporation ....

The principal functions of the corporation in regard to the establishment, growth and development of industries in the State are first to establish and manage industrial estates at selected places and secondly to develop industrial areas selected by the State Government. When industrial areas are selected the necessity of acquisition of land in those areas is apparent. The Act, therefore, contemplates that the State Government may acquire land by publishing a notice specifying the particular purpose for which such land is required .... Where the land has been acquired for the corporation or any local authority, the State Government shall, after it has taken possession of the land, transfer the land to the corporation or that local authority ....

* * * * It is in the background of the purposes of the Act and powers and functions of the corporation that the real and true character of the legislation will be determined .... Industries come within Entry 24 of the State list. The establishment, growth and development of industries in the State of Maharashtra does not fall within Entry 7 and Entry 52 of the Union list. Establishment, growth and development of industries in the State is within the State list of industries .... Acquisition or requisition of land falls under Entry 42 of the concurrent list. In order to achieve growth of industries it is necessary not only to acquire land but also to implement the purposes of the Act. The corporation is therefore established for carrying out the purposes of the Act, The pith and substance of the Act is establishment, growth and organisation of industries, acquisition of land in that behalf

and carrying out the purposes of the Act by setting up the corporation as one of the limbs or agencies of the Government. The powers and functions of the corporation show in no uncertain terms that these are all in aid of the principal and predominant purpose of establishment, growth and establishment of industries. The corporation is established for that purpose .... We, therefore, hold that the Act is a valid piece of legislation.

19. In the present case the incorporation of the State Electricity Boards is merely for the rationalisation of the production and supply of electricity, for taking measures conducive to electrical development and for all matters incidental thereto. The incorporation of the Electricity Boards being incidental to the rationalisation of the production and supply of electricity and for being conducive to electrical development, the 1948 Act in pith and substance should be deemed to be one falling under Entry 38 of List III. Furthermore, Electricity Boards are not trading corporations. They are public service corporations. They have to function without any profit motive. Their duty is to promote coordinated development of the generation, supply and distribution of electricity in the most efficient and economical manner with particular reference to such development in areas not for the time being served or adequately served by any licensee (Section 18). The only injunction is that as far as practicable they shall not carry on their operations at a loss (Section 59). They get subventions from the State Governments (Section

63). In the discharge of their functions they are guided by directions on questions of policy given by State Governments (Section 78□A). There are no shareholders and there is no distribution of profits. This is another reason why the 1948 Act cannot be said to fall under Entry 43 of List I.

20. The question, therefore, is whether the impugned legislation falls under Entry 38 of List III or Entries 26 and 27 of List II and if the former, whether it is repugnant to the existing law on the subject, that is, the 1910 and 1948 Acts and if that were so, whether that repugnancy has been cured by Presidential assent?

21. Even assuming that part of the 1948 Act is legislation with respect to incorporation and regulation of a trading corporation, falling under Entry 43 of List I of Schedule VII, the rest of it will fall under Entry 38 of List III. That part of the Act relating to the regulation of the activities regarding production and distribution of electricity would, as we have shown, fall under the entry "Electricity". The Kerala Act has nothing to do with the incorporation and regulation of the Electricity Board and, therefore, it can only relate to Entry 38 of List III, if at all." It was held that repugnancy could only arise if both the legislations of Parliament and State fell within List III.

57. In Sita Ram Sharma and Ors. (supra) the question concerning Entry 43 of List I and Entries 35 and 42 of List III was considered. It was held:

> "9. The main argument is that the subject□matter of Section 4 falls within Item 43 of List I of the Seventh Schedule to the Constitution. So the State Legislature could not enact Section 4. The rival contention of Dr L.M. Singhvi, Advocate□General of Rajasthan, is that the subject□matter of Section 4 in its true nature and character falls within Items 35 and 42 of List III of the Seventh Schedule to the Constitution.

> 10. Item 43 of List I reads: “Incorporation, regulation and winding up of trading corporation, including banking, insurance and financial corporation but not including cooperative societies.” Item 35 of List III reads: “Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.” Item 42 of List III reads: “Acquisition and requisitioning of property.”
>
> 15. It is not disputed by the appellant that the subject-matter of Chapter IV-A falls within Items 35 and 42 of List III. It would accordingly follow that Section 68-A the definition clause, also is a law with respect to those very items. Section 4 of the Ordinance declares that any scheme prepared and published under Section 68-C by the General Manager of State Transport Undertaking shall be deemed to have been prepared or published by the State Transport Undertaking. It also provides that the scheme shall not be questioned in any court or before any authority merely on the ground that the same has been prepared or published by the General Manager. It may be observed that Section 4 makes no amendment in the Road Transport Corporation Act. It does not directly affect the power of the Road Transport Corporation under Section 19(2)(c) of the said Act. It has attempted to insert a new Section 68-CC in Chapter IV-A of the Motor Vehicles Act. By this new section it has validated the scheme prepared and published by the General Manager of a State Transport Undertaking as defined in Section 68-C.
>
> 16. We have little doubt in our mind that the subject-matter of Section 4 clearly falls within Items 35 and 42 of List III and not within Item 43 of List I. The subject-matter is the conferment of power of acquisition of a road transport undertaking by the General Manager of the State Transport Undertaking. It has direct concern with acquisition.

It has no concern with incorporation, regulation and winding up of trading corporations. The constitutionality of the law is to be determined by its real subject-matter and not by the incidental effect which it may have on any topic of legislation in List I. (See Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., 1947 FCR 28: AIR 1947 PC 60: 74 IA and Kannan Devan Hills Produce Company Ltd. v. State of Kerala, (1973) 1 SCR 356).” (emphasis supplied) It is apparent that 'incorporation, regulation and winding up' of the co-operative societies are covered under Entry 32 of List II of the Seventh Schedule of the Constitution of India, whereas 'banking' is covered by Entry 45 of List I. Thus, aspect of 'incorporation, regulation and winding up' would be covered under Entry 32 of List II. However, banking activity of such co-operative societies/banks shall be governed by Entry 45 of List I. The said banks are governed and regulated by legislation related to Entry 45 of List I, the BR Act, 1949 as well as the Reserve Bank of India Act under Entry 38 of List I. In the matter of licencing and doing business, a deep and pervasive control is carved out under the provisions of the BR Act, 1949 and banking activity done by any entity, primary credit societies, is a bank and is required to submit the accounts to the Reserve Bank of India, and there is complete control under the aforesaid Act. For activity of banking, these banks are governed by the legislation under Entry 45 of List I. Thus, recovery being an essential part of the banking, no conflict has been created by providing additional procedures under Section 13 of the SARFAESI Act. It is open to the bank to adopt a

procedure which it may so choose. When banking in pith and substance is covered under Entry 45 of List I, even incidental trenching upon the field reserved for State under Entry 32 List II is permissible.

58. There can be various aspects of an activity. The co□operative societies may be formed under the provisions of the State Co□operative Acts. The State law provides for 'incorporation, regulation and winding up' under Entry 32 of List II, a membership registration, and other matters can be governed by Entry 32 of List II, and, at the same time, the aspects relating to the banking, licensing, accounts, etc. can be covered under Entry 45 List I.

59. In State of W.B. v. Kesoram Industries Ltd. and Ors. 36, a Constitution Bench considered the aspects' theory and considered the field of taxation under Lists I and II and opined that there might be overlapping in fact, but there would be no overlapping in law. Simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. It was held that Entries 52, 53, and 54 are not heads of taxation. The field of taxation is covered by Entries 49 and 50 of List 36 (2004) 10 SCC 201 II. It was held that the same transaction might involve two or more taxable events in its different aspects. Merely because the aspects overlap, such overlapping does not detract from the distinctiveness of the aspects. There was no question of conflict solely on account of two aspects of the same transaction being utilized by two legislatures for two levies. The Court held:

> “141. As held in Goodricke Group Ltd., 1995 Supp (1) SCC 707 which we have held as correctly decided, this Court has noted the principle of law well established by several decisions that the measure of tax is not determinative of its essential character. The same transaction may involve two or more taxable events in its different aspects. Merely because the aspects overlap, such overlapping does not detract from the distinctiveness of the aspects.

In our opinion, there is no question of conflict solely on account of two aspects of the same transaction being utilised by two legislatures for two levies both of which may be taxes or fees or one of which may be a tax and the other a fee falling within two fields of legislation respectively available to the two.” The legislation and entries are to be considered in pith and substance is the settled principles of law, and incidental trenching is permissible. Thus, we are of the opinion that section 2(c)(iv)(a) of the SARFAESI Act and the notification dated 28.2.2003 cannot be said to be ultra vires. They are within the ken of Entry 45 List I of the Seventh Schedule to the Constitution of India.

EFFECT OF CONSTITUTIONAL PROVISIONS

60. Our aforesaid conclusion finds support by the Constitutional provisions inserted by way of the Constitution (Ninety Seventh Amendment) Act, 2011. Article 43B has been added concerning the management of co□operative societies. Article 43B is extracted hereunder:

> “43B. Promotion of co□operative societies.— The State shall endeavour to promote voluntary formation, autonomous functioning, democratic control and professional

management of co□operative societies."

61. Article 243ZI provides that the legislature of a State may, by law, make provisions with respect to 'incorporation, regulation and winding up' of co□operative societies. Article 243ZI is extracted hereunder:

> "243ZI. Incorporation of co□operative societies. — Subject to the provisions of this Part, the Legislature of a State may, by law, make provisions with respect to the incorporation, regulation and winding up of co□operative societies based on the principles of voluntary formation, democratic member□control, member□economic participation and autonomous functioning."

62. The Ninety Seventh Amendment also incorporated Article 243ZL dealing with supersession and suspension of the board and interim management. Article 243ZL is extracted hereunder:

> "243ZL.—Supersession and suspension of board and interim management.— (1) Notwithstanding anything contained in any law for the time being in force, no board shall be superseded or kept under suspension for a period exceeding six months:
>
> Provided that the board may be superseded or kept under suspension in case—
>
> (i) of its persistent default; or
>
> (ii) of negligence in the performance of its duties; or
>
> (iii) the board has committed any act prejudicial to the interests of the co□operative society or its members; or
>
> (iv) there is stalemate in the constitution or functions of the board; or
>
> (v) the authority or body as provided by the Legislature of a State, by law, under clause (2) of article 243ZK, has failed to conduct elections in accordance with the provisions of the State Act:
>
> Provided further that the board of any such co□operative society shall not be superseded or kept under suspension where there is no Government shareholding or loan or financial assistance or any guarantee by the Government:
>
> Provided also that in case of a co□operative society carrying on the business of banking, the provisions of the Banking Regulation Act, 1949 shall also apply:
>
> Provided also that in case of a co□operative society, other than a multi□State co□ operative society, carrying on the business of banking, the provisions of this clause shall have the effect as if for the words "six months", the words "one year" had been

substituted.

(2) In case of supersession of a board, the administrator appointed to manage the affairs of such co-operative society shall arrange for conduct of elections within the period specified in clause (1) and handover the management to be elected board.

(3) The Legislature of a State may, by law, make provisions for the conditions of service of the administrator." (emphasis supplied) The third proviso to Article 243ZL(1) clarifies that in case of a co-operative society carrying on the business of banking, the provisions of the BR Act, 1949 shall also apply besides the State Act. The fourth proviso to clause (1) of Article 243ZL also contains an exception with respect to multi-State co-operative society carrying on the business of banking, the provisions of this clause shall have the effect as if for the words 'six months', had been substituted by words 'one year.' Thus, the constitutional provision itself makes a distinction between a co-operative bank and other co-operative societies and applied law enacted under Entry 45 of List I of the Seventh Schedule. It set at rest any controversy concerning the applicability of the BR Act, 1949 to banks run by co-operative societies. It also makes it clear that such banks are governed by Entry 45 of List I of the Seventh Schedule.

63. A three-Judge Bench decision in Greater Bombay Coop. Bank Ltd. (supra) is heavily relied upon by the appellants, and due to conflict noted by a three-Judge Bench, the matter has been referred. In Greater Bombay Coop. Bank Ltd. (supra) the question arose whether co-operative banks constituted under the Co-operative Societies Act would have the right to recover the amount from debtors under the Co-operative Societies Act, or they could proceed under the RDB Act, 1993, and whether pending proceedings were to be transferred to the Debt Relief Tribunal. In other words, whether the tribunals and the authorities constituted under the Maharashtra Co-operative Societies Act, 1960 and the Multi-State Co-operative Societies Act, 2002, continue to have jurisdiction to entertain applications/disputes submitted before them by the co-operative banks incorporated under the 1960 Act and 2002 Act for recovery of debts after the establishment of a Debts Recovery Tribunal under the RDB Act, 1993. The High Court opined that after the establishment of Debts Recovery Tribunal under the 1993 Act, the courts and authorities under the 1960 Act as well as the 2002 Act would cease to have jurisdiction to entertain the applications submitted by the co-operative banks for recovery of their dues. However, at the same time, the High Court upheld the competence of the State legislature to enact the Maharashtra Co-operative Societies Act, 1960.

64. In another matter, namely A.P. State Coop. Bank v. Samudra Shrimp (P) Ltd., the High Court of Andhra Pradesh, struck down Sections 61 and 71 of the APCS Act, 1964 on the ground of constitutional incompetence. It was held that subject matter was excluded from the State legislative field in Entry 32 of List II of the Seventh Schedule, and the recovery of monies fell within the core and substantive area of banking in Entry 45 of List I of the Seventh Schedule of the Constitution. A co-operative bank, as defined in Section 56(cci) of the BR Act, 1949, is a bank and a banking company within the meaning of Section 2 (d) & (e) of the RDB Act, 1993. The Debts Recovery Tribunal constituted under the Act of 1993 had exclusive jurisdiction.

65. In Greater Bombay Coop. Bank Ltd. (supra) as to the scope of Entries 43, 44 and 45 of List I and Entry 32 of List II of the Seventh Schedule of the Constitution of India, it was observed:

> "88. Entry 43 of List I speaks of banking, insurance and financial corporations, etc. but expressly excludes cooperative societies from its ambit. The constitutional intendment seems to be that the cooperative movement was to be left to the States to promote and legislate upon and the banking activities of cooperative societies were also not to be touched unless Parliament considered it imperative. The BR Act deals with the regulation of the banking business. There is no provision whatsoever relating to proceedings for recovery by any bank of its dues. Recovery was initially governed by the Code of Civil Procedure by way of civil suits and after the RDB Act came into force, the recovery of the dues of the banks and financial institutions was by filing applications to the Tribunal. The Tribunal has been established with the sole object to provide speedy remedy for recovery of debts of the banks and financial institutions since there has been considerable difficulties experienced therefor from normal remedy of civil court.
>
> 89. In R.C. Cooper v. Union of India, (1970) 1 SCC 248, this Court observed that power to legislate for setting up corporations to carry on banking and other business and to acquire, hold and dispose of property and to provide for administration of the corporations is conferred upon Parliament by Entries 43, 44 and 45 of the Constitution. Therefore, the express exclusion of cooperative societies in Entry 43 of List I and the express inclusion of cooperative societies in Entry 32 of List II separately and apart from but along with corporations other than those specified in List I and universities, clearly indicated that the constitutional scheme was designed to treat cooperative societies as institutions distinct from corporations. Cooperative societies, incorporation, regulation and winding up are State subjects in the ambit of Entry 32 of List II of the Seventh Schedule to the Constitution of India.

Cooperatives form a specie of genus "corporation" and as such cooperative societies with objects not confined to one State are read in with the Union List as provided in Entry 44 of List I of the Seventh Schedule of the Constitution; the MSCS Act, 2002 governs such multi-State cooperatives. Hence, the cooperative banks performing functions for the public with a limited commercial function as opposed to corporate banks cannot be covered by Entry 45 of List I dealing with "banking". The subject of cooperative societies is not included in the Union List rather it is covered under Entry 32 of List II of the Seventh Schedule appended to the Constitution." The Court distinguished the decision in Delhi High Court Bar Association (supra) thus:

> "95. Union of India v. Delhi High Court Bar Assn., (2002) 4 SCC 275, relied upon on behalf of the respondents in support of the judgments and orders of the High Court of Bombay and the High Court of Andhra Pradesh, does not consider the issue of cooperative banks' adjudication and recovery provisions under Entry 32 of List II. The Court was only considering Entry 45, List I vis-a-vis Entry II-A, List III "administration of justice". As such, the decision of this case is of no assistance or of

help to the proposition of law involved in the present cases."

66. In Greater Bombay Coop. Bank Ltd. (supra), the Court relied upon the decisions in Sant Sadhu Singh v. State of Punjab37, and Nagpur District Central Cooperative Bank Ltd. v. Divisional Joint Registrar, Cooperative Societies38. In Sant Sadhu Singh (supra), the amendment made to the Punjab Co□operative Societies Act, 1961, which curtailed the rights and powers of the shareholders in managing the co□operative society, was under challenge. Thus, the question involved was related to the management aspect of the bank governed by the Co□operative Societies Act for which State had the exclusive legislative competence under Entry 32 of List II. Whereas in Nagpur District Central Cooperative Bank Ltd. (supra), the question arose 37 AIR 1970 P&H 528 38 AIR 1971 Bom 365 whether Registrar had the power under Section 78 of the Maharashtra Co□operative Societies Act to issue show cause notice to any committee of the society or any member of such committee including the Directors in respect of any default or negligence in the performance of the duties imposed on it or him by the Act or the rule or the bye□laws and power of the Registrar to remove the Committee or the members thereof if any such action is called for. The argument was rejected that the co□operative societies indulged in the banking business, hence, the State did not have the legislative competence under Entry 32 of List II, and only the Parliament had the legislative competence under Entry 45 of List I. The question involved as to management was clearly covered under Entry 32 of List II. It was with respect to incorporation, management, and winding up of a society. Thus, both the abovementioned decisions could not be said to be applicable with regard to the aspect of banking and were wrongly relied upon while forming an opinion in Greater Bombay Coop. Bank Ltd. (supra).

67. At the same time, we are unable to accept the argument raised on behalf of the respondents. The SARFAESI Act is relatable to Entry 6 of List III considering the provisions contained in Sections 69 and 69A of the Transfer of Property Act, 1882. We are of the opinion that it relates to Entry 45 of List I of the Seventh Schedule of the Constitution of India.

68. Learned Counsel for the appellants has also placed reliance on Virendra Pal Singh (supra), in which the provisions relating to the recruitment, emoluments, terms, and conditions of service, including disciplinary control of employees working in the co□operative societies involved in the banking were considered. Thus, the question of management/regulation of the co□operative societies was involved. The aspect of the banking business of the co□operative banks was not involved. A question was raised as to the legislative competence of the State to enact. In that context, the Court held that, in pith and substance, the U.P. Co□operative Societies Act dealt with incorporation, management and winding up and that if it incidentally trenches upon banking, would not take the legislation beyond the competence of the State Legislature. For the proper financing and effective functioning of co□operative societies, there must also be co□operative societies that do banking business to facilitate the working of other co□operative societies merely because they do banking business, they do not cease to be co□operative societies. It was opined:

> "10. We do not think it necessary to refer to the abundance of authority on the question as to how to determine whether a legislation falls under an entry in one list or another entry in another list. Long ago in Prafulla Kumar Mukherjee v. Bank of

Commerce Ltd., 74 IA 23, the Privy Council was confronted with the question whether the Bengal Money-Lenders Act fell within Entry 27 in List II of the Seventh Schedule to the Government of India Act, 1935, which was "money-lending", in respect of which the provincial legislature was competent to legislate, or whether it fell within Entries 28 and 38 in List I which were "promissory notes" and "banking" which were within the competence of the Central Legislature. The argument was that the Bengal Money-Lenders Act was beyond the competence of the provincial legislature insofar as it dealt with promissory notes and the business of banking. The Privy Council upheld the vires of the whole of the Act because it dealt, in pith and substance, with money-lending. They observed:

Subjects must still overlap, and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial legislation could never effectively be dealt with. Examining the provisions of the U.P. Cooperative Societies Act in the light of the observations of the Privy Council we do not have the slightest doubt that in pith and substance the Act deals with "cooperative societies". That it trenches upon banking incidentally does not take it beyond the competence of the State Legislature. It is obvious that for the proper financing and effective functioning of cooperative societies there must also be cooperative societies which do banking business to facilitate the working of other cooperative societies. Merely because they do banking business such cooperative societies do not cease to be cooperative societies, when otherwise they are registered under the Cooperative Societies Act and are subject to the duties, liabilities and control of the provisions of the Cooperative Societies Act. We do not think that the question deserves any more consideration and, we, therefore, hold that the U.P. Cooperative Societies Act was within the competence of the State Legislature. This was also the view taken in Nagpur District Central Cooperative Bank Ltd. v. Divisional Joint Registrar, Cooperative Societies, AIR 1971 Bom 365 and Sant Sadhu Singh v. State of Punjab, AIR 1970 P & H 528." In the aforesaid decision, it was held that under the U.P. Co-operative Societies Act, the State was competent under Entry 32 of List II to deal with incorporation, regulation and winding up of co-operative banks. However, the main aspect of the activity of the co-operative bank relating to banking was covered by the BR Act, 1949, and the Reserve Bank of India Act, which legislations are related to Entries 45 and 38 of List I of the Seventh Schedule. The aspects of 'incorporation, regulation and winding up' are covered under Entry 32 of List II of the Seventh Schedule. In our opinion, the activity of banking by such bankers is covered by Entry 45 of List I considering the Doctrine of Pith and Substance, and also considering the incidental encroachment on the field reserved for State is permissible.

69. The concept of regulating non-banking affairs of society and regulating the banking business of society are two different aspects and are covered under different Entries, i.e., Entry 32 of List II and

Entry 45 of List I, respectively. The law dealing with regulation of banking is traceable to Entry 45 of List I and only the Parliament is competent to legislate. The Parliament has enacted the SARFAESI Act. It does not intend to regulate the incorporation, regulation, or winding up of a corporation, company, or co□operative bank/co□operative society. It provides for recovery of dues to banks, including co□operative banks, which is an essential part of banking activity. The Act in no way trenches on the field reserved under Entry 32 of List II and is a piece of legislation traceable to Entry 45 of List I. The decision in Virendra Pal Singh (supra) has been rendered regarding service regulations. It does not apply to the instant case concerning the regulation of 'banking' covered under Entry 45 of List I. The Court did not deal with the aspect of the regulation of banking in the said decision as it was not required to be decided. Thus, the ratio of the decision operates in a different field. Moreover, the U.P. Co□operative Services Act was saved on the ground of incidental trenching on the subject of another list, i.e., Entry 45 List I, which is permissible. IN REFERENCE QUESTION NO.2:

70. The next question is of the effect of Section 56(a) on the definition of 'banking company' as defined in Section 5(1)(b) of the BR Act, 1949. It is necessary to consider the definition of 'banking' as contained in the SARFAESI Act. The term 'bank' has been defined in Section 2(1)(c) to mean 'banking company', a corresponding new bank, a subsidiary bank or a multi□State co□operative bank or such other bank which the Central Government may by notification specify for the Act. The term 'banking company' under Section 2(d) shall have the meaning assigned to it in Section 5(c) of the BR Act, 1949. Thus, the definition of 'banking company' stands incorporated in Section 2(1)

(d) of the SARFAESI Act, which came into force on 21.6.2002. Section 56(a) was incorporated in the BR Act, 1949 by Act No.23 of 1965, w.e.f. 1.3.1966. On that date, Section 56(a) became part of the statute. Section 5(c) of the BR Act, 1949 defines 'banking company' means any company which transacts the business of banking. By virtue of Section 56(a), a reference to a 'banking company' or 'the company' or 'such company' shall be construed as references to a co□operative bank for the application of the Act to the co□operative banks. Section 5(c) was not amended, and other provisions were also not amended where they were placed. However, amendments were incorporated by a different Chapter V by way of various provisions incorporated in Section 56 as it was necessary to retain certain provisions in the existing form as they applied to other banks and companies considering that the amendments and certain modifications which were necessary and were extensively required. The provisions in amended form in their application to the co□operative banks were separately provided. When the BR Act, 1949 was applied to the co□operative bank, all the provisions under the Act concerning 'incorporation, regulation and winding up' were omitted insofar as the Act of 1949 is applied to co□operative banks, though they continue to exist in the Act for other entities but not concerning co□operative banks. It was mentioned in the advice given to the President under Article 117 that these matters were specifically not covered under Entry 45 of List I of the Seventh Schedule and formed the subject□matter of Entry 32 of List II. Thus, when we apply the provisions of the Act of 1949 to a co□operative bank, the definition of 'banking company' has to be read to include a co□operative bank. Section 56(a) becomes part of Section 5(c), although it is located in a separate place. As only Part V of the Act applies to the co□operative banks, Section 56(a) amends the definition of the 'banking company,' and it becomes an integral part of Section 5(c), as the full effect is required to be given.

71. The aspect of incorporation by reference of earlier Act into later has been dealt with in the 'Principles of Statutory Interpretation', 12 th Edition 2010 by Justice G.P. Singh at pages 318□320 thus:

> "Incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later.39 When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been "bodily transposed into it".40 The effect of incorporation is admirably stated by LORD ESHER, M.R.: "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it."41 The result is to constitute the later Act along with the incorporated 39 Mary Roy v. State of Kerala, (1986) 2 SCC 209, p. 216 : AIR 1986 SC 1011;

Nagpur Improvement Trust v. Amrik Singh, AIR 2002 SC 3499, p. 3512 : (2002) 7 SCC 657.

40 Ramsarup v. Munshi, AIR 1963 SC 553, p. 558 : 1963 (3) SCR 858 ; Nagpur Improvement Trust v. Amrik Singh, AIR 2002 SC 3499, p. 3512 : (2002) 7 SCC 657. 41 Re, Wood's Estate, Ex parte, Works and Buildings Commrs., (1886) 31 Ch D 607, p. 615; Ram Kripal Bhagat v. State of Bihar, AIR 1970 SC 951, p. 957 : (1969) 3 SCC 471; Bolani Ores Ltd. v. State of Orissa, AIR 1975 SC 17, p. 29 : 1975 (2) SCR 138 : (1974) 2 SCC 777 ; Mahindra and Mahindra Ltd. v. Union of India, AIR 1979 SC 798, pp. 810, 811 : (1979) 2 SCC 529 ; Onkarlal Nandlal v. State of Rajasthan, (1985) 4 SCC 404, p. 415 : AIR 1986 SC 2146; Surana Steels Pvt. Ltd. v. Dy. Commissioner of Income□tax, AIR 1999 SC 1455, p. 1459 : (1999) 4 SCC 306 (p. 233 of 7th edition of this book is approvingly quoted).

provisions of the earlier Act, an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act. 42 As observed by BRETT, J.: "Where a statute is incorporated, by reference, into a second statute, the repeal of the first statute by a third does not affect the second."43 To the same effect is the statement by SIR GEORGE LOWNDES: "It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function, effectually without the addition.44 Ordinarily if an Act is incorporated in a later Act, the intention is to incorporate the earlier Act, with all the amendments made in it up to the date of incorporation.45 The rule that the repeal or amendment of the Act which is incorporated by reference in a later Act is not applicable for purposes of the later Act is subject to qualifications and exceptions.46 A distinction is in this context drawn between incorporation and mere reference of an earlier Act into a later Act.47 Further, a 42 Narottamdas v. State of M.P., AIR 1964 SC 1667, p. 1670 : (1964) 7 SCR 820; Bolani Ores Ltd. v. State of Orissa, supra; Mahindra and Mahindra Ltd. v. Union of India, supra; Nagpur Improvement Trust v. Amrik Singh, supra ; Sneh Enterprises v. Commr. of Customs, (2006) 7 SCC 714 (para 13) : (2006) 8 JT 587 : (2006) 7 SLT 615 (passage from 10th edition of this book is approvingly quoted). 43 Clarke v. Bradlaugh, (1881) 8

QBD 63, p. 69; referred to in Ramsarup v. Munshi, AIR 1963 SC 553, p. 558 : (1963) 3 SCR 858; Collector of Customs, Madras v. Nathelal Sampathu Chetty, AIR 1962 SC 316, p. 334 : (1962) 3 SCR 786. See further Jethanand Betab v. State of Delhi, AIR 1960 SC 89, pp. 91, 92 : (1960) 1 SCR 755; Bolani Ores Ltd. v. State of Orissa, supra; Mahindra and Mahindra Ltd. v. Union of India, supra; Nagpur Improvement Trust v. Amrik Singh, supra . 44 Secretary of State v. Hindustan Co□operative Insurance Society Ltd., AIR 1931 PC 149, p. 152. Referred to in Chairman of the Municipal Commrs. of Howrah v. Shalimar Wood Products (Private) Ltd., AIR 1962 SC 1691, p. 1694 : 1963 (1) SCR 47; Bolani Ores Ltd. v. State of Orissa, AIR 1975 SC 17, p. 29 : 1974 (2) SCC 777 ; Mahindra and Mahindra Ltd. v. Union of India, AIR 1979 SC 798, pp. 810, 811 :

(1979) 2 SCC 529.

45 State of Maharashtra v. Madhavrao Damodar Patil, AIR 1968 SC 1395, p. 1400 :

1968 (3) SCR 712.

46 See text and notes 9□41, pp. 324□332.

47 See text and notes 14□21, pp. 326□328.

distinction is also drawn when what is referred to is not an earlier Act or any provision from it but law on a subject in general.48 There is, however, no controversy on the point that when any Act or rules are adopted in any later Act or rules, such adoption normally whether by incorporation or mere reference takes in all the amendments in the earlier Act or rules till the date of adoption.49" The present one is a case of incorporation by reference in the same Act by a subsequent amendment in the application to co□operative banks. When we apply the provisions of Section 5(c) to the co□ operative banks, we have to read the co□operative banks as part and parcel of said definition as mandated statutorily. In case a company is not taken as a reference to the co□operative societies/banks in Section 5(c), several problems as to the interpretation of Section 56 would arise. It would have become necessary to amend all the provisions wherever words 'banking company' occur in the BR Act, 1949 in the application to co□operative banks.

72. With respect to legislative device of incorporation by reference in Mary Roy, etc. v. State of Kerala and Ors.50, the Court held:

> "7. ... The legislative device of incorporation by reference is a well□known device where the legislature instead of repeating the provisions of a particular statute in another statute incorporates 48 See text and notes 10□3, pp. 325, 326.
>
> 49 Rajasthan State Road Transport Corporation Jaipur v. Poonam Pahwa, AIR 1997 SC 2951, p. 2957 : 1997 (6) SCC 100. Also see text and note 80, supra.
>
> [For convenience, citations have been renumbered.] 50 AIR 1986 SC 1011: (1986) 2 SCC 209 such provisions in the latter statute by reference to the earlier statute. It is a

legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of an earlier statute in a later statute. But when the legislature intends to adopt this legislative device the language used by it is entirely distinct and different from the one employed in S.29 sub□sec.(2) of the Indian Succession Act, 1925. The opening part of S.29 sub□sec. (2) is intended to be a qualificatory or excepting provision and not a provision for incorporation by reference. We have no hesitation in rejecting this contention urged on behalf of the respondents."

73. In U.P. Avas Evam Vikas Parishad v. Jainul Islam and Anr. 51, it was observed:

"The determination if a legislation was by way of incorporation or reference is more a matter of construction by the Courts keeping in view the language employed by the Act, the purpose of referring or incorporating provision of an existing Act and the effect of it on the day□to□day working. Reason for it is the Courts prime duty to assume that any law made by the Legislature is enacted to serve public interest."

74. In Portsmouth Corporation v. Smith52, it was opined:

"Where a single section of an Act of Parliament is introduced into another Act, I think, it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act." Lord Blackburn further observed thus:

"I do not mean that if there was in the original Act a section not incorporated, which came by way of a proviso or exception on that which is incorporated, that should be referred to, but all others, including the interpretation clause, if there be one, may be 51 AIR 1998 SC 1028 52 (1885) 10 AC 364 referred to. It is dangerous mode of draftsmanship to incorporate a section from a former Act, for unless the draftsman has a much clearer recollection of the whole of the former Act than can always be excepted, there is great risk that something may be expressed which was not intended.""

75. In Surana Steels Pvt. Ltd. v. Dy. Commissioner of Income Tax and Ors.53, it was held that provision is bodily listed and stands incorporated and plain rule of interpretation to be applied:

"12. Once we have ascertained the object behind the legislation and held that the provisions of Section 205 quoted hereinabove stand bodily lifted and incorporated into the body of Section 115J of the Income Tax Act, all that we have to do is to read the provisions plainly and apply rules of interpretation if any ambiguity survives. Section 205(1) first proviso Clause (b), of the Companies Act brings out the unabsorbed portion of the amount of depreciation already provided for computing the loss for the year.

The words "the amount provided for depreciation"

> and "arrived at in both cases after providing for depreciation" make it abundantly clear that in this clause "loss" refers to the amount of loss arrived at after taking into account the amount of depreciation provided in the profit and loss account." (emphasis supplied)

76. In Secretary of State v. Hindustan Cooperative Insurance Society Ltd.54, the Privy Council held:

> ".....In this country it is accepted that where a statute is incorporated by reference into a second statute, the repeal of the first statute does not affect the second: see the cases collected in "Craies on Statute Law". This doctrine finds expression in a common form section which regularly appears in the Amending and Repealing Acts which are passed 53 (1999)4 SCC 306 54 AIR 1931 PC 149 from time to time in India. The section runs.

"The repeal by this Act of any enactment shall not affect any Act in which such enactment has been applied, incorporated or referred to;" The independent existence of the two Acts is therefore recognized, despite the death of the parent Act, its offspring survives in the incorporating Act. Though no such saving clause appears in the General Clauses Act, their lordships think that the principle involved is as applicable in India as it is in this country.

It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function effectually without the addition."

77. In Ram Sarup and Ors. v. Munshi and Ors.55, it was opined:

> "(11) The problem here raised is dependent upon the construction which the several provisions which we have set out earlier would bear after the repeal of the Punjab Alienation of Land Act, 1900. One thing is clear and that is that the authority which enacted the repeal of the Punjab Alienation of Land Act did not consider that Punjab Act 1 of 1913 had itself to be repealed. We shall now consider the effect of the repeal of the Punjab Alienation of Land Act with reference to each of the provisions:— (1) Definition of 'agricultural land' under S. 3(1):
>
> Where the provisions of an Act are incorporated by reference in a later Act the repeal of the earlier Act has, in general, no effect upon the construction or effect of the Act in which its provisions have been incorporated. The effect of incorporation is stated by Brett, L.J. in Clarke v Bradlugh, (1881) 8 QBD 63:
>
> "Where a statute is incorporated, by reference, into a second statute the repeal of the 55 AIR 1963 SC 553 first statute by a third does not affect the second." In the

circumstances, therefore, the repeal of the Punjab Alienation of Land Act of 1900 has no effect on the continued operation of the Pre□emption Act and the expression 'agricultural land' in the later Act has to be read as if the definition in the Alienation of Land Act had been bodily transposed into it. Section 2 of the Punjab Alienation of Land Act, 1900, as amended by Act 1 of 1907 defined 'land' as follows:

"The expression 'land' means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes..... ....." It is not in dispute that the land concerned in the claim for pre□ emption made in the appeal satisfies this definition."

78. It is apparent that in order to avoid verbatim reproduction of the earlier provisions, which did not apply to a co□operative bank, a device was carved out in Section 56(a) to read 'company' as 'banking company' or 'the company' or 'such company' as references to a co□operative bank. If the definition in Section 5(c) and interpretation clause are not read as incorporated and having been amended, the interpretation clause and the entire amendment of Part V will become unworkable. It was not practical to amend the entire Act of 1949 as it dealt with 'incorporation, regulation and winding up' of other entities relatable to List I, as such the provisions were required to be retained, and such matters concerning co□operative societies/banks, relatable subject□matter under Entry 32 of List I of the Seventh Schedule of the Constitution of India, were to be excluded. As various provisions were to be omitted in their application to the co□operative societies and other provisions were to apply in a modified form, the amendments were made in the provisions in their application to the co□operative banks by providing a separate Chapter. Thus, it was not considered necessary nor would have been appropriate to amend the definition of Section 5(c) where it existed, in fact it was so amended in Section 56(a). Entire Chapter V was enacted concerning the application of the Act to the co□operative banks and has to be given full effect. Merely because the procedure for recovery of dues is provided in the Co□operative Societies Act, could not have come in the way of interpretation of that expression 'co□operative bank' which was included in the definition and interpretation clause of Section 5 of the BR Act, 1949. It was open to the Parliament to deal with the subject of 'banking' in Entry 45 of List I and this Court in Greater Bombay Coop. Bank Ltd. (supra) itself opined that the BR Act, 1949 applies to co□operative banks which is the enactment related to Entry 45 of List I and third proviso to Article 243□ZL(1) of the Constitution of India also provides that the BR Act shall also apply. Thus, the Parliament considered it appropriate to provide additional remedy for speedy recovery which is an alternative even if there is an incidental encroachment on the field reserved for the State under Entry 32 of List II, as in pith and substance, the 'banking' is part of Entry 45 of List I and recovery procedure is covered within the ken of Entry 45 of List I. Thus, considering the Doctrine of Pith and Substance and incorporation by amendment made, we are of the considered opinion that co□operative banks are included in the definition of 'bank' and 'banking company' under Section 2(1)(c) and 2(1)(d) of the SARFAESI Act.

79. In Greater Bombay Coop. Bank Ltd. (supra) concerning the BR Act, 1949, it was held:

> "39. Chapter V of the BR Act was inserted by Act 23 of 1965 w.e.f. 1□3□1966. Section 56 of the Act provides that the provisions of this Act, as in force for the time being, shall apply to, or in relation to, banking companies subject to the following modifications, namely:
>
> "56. (a) throughout this Act, unless the context otherwise, requires,—
>
> (i) references to a 'banking company' or 'the company' or 'such company' shall be construed as references to a cooperative bank;
>
> (ii)* * *" The purpose and object of modifications were to regulate the functioning of the cooperative banks in the matter of their business in banking. The provisions of Section 56 itself start with the usual phrase "unless the context otherwise requires" is to make the regulatory machinery provided by the BR Act to apply to cooperative banks also. The object was not to define a cooperative bank to mean a banking company, in terms of Section 5(c) of the BR Act. This is apparent from the fact that instead of amending the original clause (c) of Section 5 separate clause (cci) was added to cover the "cooperative bank" to mean "a State cooperative bank, a Central cooperative bank and a primary cooperative bank". In clause (ccv) "primary cooperative bank" means "a cooperative society, other than a primary agricultural credit society".

The primary object or principal business of the "cooperative bank" should be the transaction of banking business.

40. The modifications given in clause (a) of Section 56 are apparently suitable to make the regulatory machinery provided by the BR Act to apply to cooperative banks also in the process of bringing the cooperative banks under the discipline of Reserve Bank of India and other authorities. A cooperative bank shall be construed as a banking company in terms of Section 56 of the Act. This is because the various provisions for regulating the banking companies were to be made applicable to cooperative banks also. Accordingly, Section 56 brought cooperative banks within the machinery of the BR Act but did not amend or expand the meaning of "banking company" under Section 5(c). On a plain reading of every clause of Section 56 of the BR Act, it becomes clear that what is contained therein is only for the purpose of application of provisions that regulate banking companies to cooperative societies. According to the expression "cooperative societies" used in Section 56 means a "cooperative society", the primary object or principal business of which is the transaction of banking business. In other words, first it is a cooperative society, but carrying on banking business having the specified paid□up share capital. Other definitions also make it clear that the entities are basically cooperative societies."

(a) Concerning the SARFAESI Act, following observations were made:

> "41. Parliament had enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the Securitisation Act")

> which shall be deemed to have come into force on 21□6□2002. In Section 2(d) of the Securitisation Act same meaning is given to the words "banking company" as is assigned to it in clause (e) of Section 5 of the BR Act. Again the definition of "banking company" was lifted from the BR Act but while defining "bank", Parliament gave five meanings to it under Section 2(c) and one of which is "banking company". The Central Government is authorised by Section 2(c)(v) of the Act to specify any other bank for the purpose of the Act. In exercise of this power, the Central Government by notification dated 28□1□2003, has specified "cooperative bank" as defined in Section 5(cci) of the BR Act as a "bank" by lifting the definition of "cooperative bank" and "primary cooperative bank" respectively from Section 56, clauses 5(cci) and (ccv) of Part V. Parliament has thus consistently made the meaning of "banking company" clear beyond doubt to mean "a company engaged in banking, and not a cooperative society engaged in banking" and in Act 23 of 1965, while amending the BR Act, it did not change the definition in Section 5(c) or even in Section 5(d) to include cooperative banks; on the other hand, it added a separate definition of "cooperative bank" in Section 5(cci) and "primary cooperative bank" in Section 5(ccv) of Section 56 of Part V of the BR Act.

Parliament while enacting the Securitisation Act created a residuary power in Section 2(c)(v) to specify any other bank as a bank for the purpose of that Act and in fact did specify "cooperative banks" by notification dated 28□1□2003.

42. The context of the interpretation clause plainly excludes the effect of a reference to banking company being construed as reference to a cooperative bank for three reasons: firstly, Section 5 is an interpretation clause; secondly, substitution of "cooperative bank" for "banking company" in the definition in Section 5(c) would result in an absurdity because then Section 5(c) would read thus: "cooperative bank" means any company, which transacts the business of banking in India; thirdly, Section 56(c) does define "cooperative bank" separately by expressly deleting/inserting clause (cci) in Section 5. Parliament in its wisdom had not altered or modified the definition of "banking company" in Section 5(c) of the BR Act by Act 23 of 1965.

43. As noticed above, "cooperative bank" was separately defined by the newly inserted clause (cci) and "primary cooperative bank" was similarly separately defined by clause (ccv). The meaning of "banking company" must, therefore, necessarily be strictly confined to the words used in Section 5(c) of the BR Act. If the intention of Parliament was to define the "cooperative bank" as "banking company", it would have been the easiest way for Parliament to say that "banking company" shall mean "banking company" as defined in Section 5(c) and shall include "cooperative bank" and "primary cooperative bank" as inserted in clauses (cci) and (ccv) in Section 5 of Act 23 of 1965."

(b) Concerning incorporation by reference to Section 56 (a) of the BR Act, 1949, it was opined:

> "70. The dues of cooperatives and recovery proceedings in connection therewith are covered by specific Acts, such as the MCS Act, 1960 and the APCS Act, 1964, which are comprehensive and self□contained legislations. Similarly, for multi□State

cooperatives there is a specific enactment in the form of the MSCS Act, 2002 comprehensively providing the legal framework in respect to issues pertaining to such cooperatives. Therefore, when there is an admittedly existing legal framework specifically dealing with issues pertaining to cooperatives and especially when the cooperative banks are, in any case, not covered by the provisions of the RDB Act specifically, there is no justification of covering the cooperative banks under the provisions of the RDB Act by invoking the doctrine of incorporation."

(c) Regarding the definition of 'banking company' in the BR Act, 1949, it was observed:

"73. The RDB Act was passed in 1993 when Parliament had before it the provisions of the BR Act as amended by Act 23 of 1965 by addition of some more clauses in Section 56 of the Act. Parliament was fully aware that the provisions of the BR Act apply to cooperative societies as they apply to banking companies. Parliament was also aware that the definition of "banking company" in Section 5(c) had not been altered by Act 23 of 1965 and it was kept intact, and in fact additional definitions were added by Section 56(c). "Cooperative bank" was separately defined by the newly inserted clause (cci) and "primary cooperative bank" was similarly separately defined by clause (ccv). Parliament was simply assigning a meaning to words; it was not incorporating or even referring to the substantive provisions of the BR Act. The meaning of "banking company" must, therefore, necessarily be strictly confined to the words used in Section 5(c) of the BR Act. It would have been the easiest thing for Parliament to say that "banking company" shall mean "banking company" as defined in Section 5(c) and shall include "cooperative bank" as defined in Section 5 (cci) and "primary cooperative bank" as defined in Section 5(ccv). However, Parliament did not do so. There was thus a conscious exclusion and deliberate omission of cooperative banks from the purview of the RDB Act. The reason for excluding cooperative banks seems to be that cooperative banks have comprehensive, self□contained and less expensive remedies available to them under the State Cooperative Societies Acts of the States concerned, while other banks and financial institutions did not have such speedy remedies and they had to file suits in civil courts.

80. As already pointed out, the RDB Act is consistent with the general banks and their creditors/loanees while the MCS Act, 1960, the APCS Act, 1964 and the MSCS Act, 2002 are concerned with the regulation of societies only. The language of the sections in these enactments defining "banking company" is plain, clear and explicit. It does not admit any doubtful interpretation as the intention of the legislature is clear as aforesaid. It is well settled that the language of the statutes is to be properly understood. The usual presumption is that the legislature does not waste its words and it does not commit a mistake. It is presumed to know the law, judicial decisions and general principles of law. The elementary rule of interpretation of the statute is that the words used in the section must be given their plain grammatical meaning. Therefore, we cannot afford to add any words to read something into the section,

which the legislature had not intended.

81. Finally, it could not be said that amendments in Chapter V, Section 56 of the BR Act by Act 23 of 1965 inserting “cooperative bank” in clause (cci) and “primary cooperative bank” in clause (ccv) either expressly or by necessary intendment (sic make the RDB Act) apply to the cooperative banks transacting business of banking.”

(d) The questions were answered thus:

“97. For the reasons stated above and adopting pervasive and meaningful interpretation of the provisions of the relevant statutes and Entries 43,

44 and 45 of List I and Entry 32 of List II of the Seventh Schedule of the Constitution, we answer the reference as under:

“Cooperative banks” established under the Maharashtra Cooperative Societies Act, 1960 (the MCS Act, 1960), the Andhra Pradesh Cooperative Societies Act, 1964 (the APCS Act, 1964), and the Multi□State Cooperative Societies Act, 2002 (the MSCS Act, 2002) transacting the business of banking, do not fall within the meaning of “banking company” as defined in Section 5(c) of the Banking Regulation Act, 1949 (the BR Act). Therefore, the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the RDB Act) by invoking the doctrine of incorporation are not applicable to the recovery of dues by the cooperatives from their members.” No doubt about it that certain observations made in the aforesaid decision support the case set up by the appellants.

80. Before we deal with the decision, in Greater Bombay Coop. Bank Ltd. (supra), it was noted that 'co□operative bank' was defined in Section 56(cci) of the BR Act, 1949; thus, the object was not to define co□operative bank to mean banking company; that is why the original Section 5(c) was not amended. Another ground employed concerning the definition of the 'co□operative bank' was that the modifications made by way of Section 56 were apparently suitable to make the regulatory machinery provided by the BR Act, 1949, to apply to co□operative banks also. It was opined that a co□operative bank to be construed as a banking company in terms of Section 56 of the BR Act, 1949, because various provisions were made applicable to co□operative banks also. At the same time, it was held that Section 56 brought co□operative banks within the machinery of the BR Act, 1949, but it did not amend or expand the meaning of 'banking company' under Section 5(c). It was further observed that the entities doing banking are basically co□operative societies. Regarding the SARFAESI Act, it was observed in paragraph 41 of the decision quoted above that meaning of 'banking company' is a company engaged in banking and not a 'co□operative society' engaged in banking. The Parliament did not alter or modify the meaning of 'banking company' under Section 5(c) of the BR Act, 1949 by Act No.23 of 1965. The meaning of 'banking company' has to be confined to the words used in Section 5(c) of the BR

Act, 1949. It was emphasised that there was already a procedure prescribed for recovery of dues by banks under the Co□operative Societies Act. The RDB Act, 1993, refers to the transfer of 'every suit or other proceeding pending before any court.' The word 'court' in the context of the RDB Act, 1993, signifies 'civil court.' It is clear that the Registrar or an officer designated by him or an arbitrator under Sections 61, 62, 70, and 71 of the Andhra Pradesh Co□operative Societies Act, 1964 and under Section 91 and other provisions of Maharashtra Co□operative Societies Act, 1960 are not 'civil courts.' Thus, it was opined that the RDB Act, 1993 is consistent with the general banks and their creditors/loaners where the Maharashtra Co□operative Societies Act, 1960; the Andhra Pradesh Co□operative Societies Act, 1964 and the MSCS Act are concerned with the regulation of co□operative societies only. Due to the amendments in Chapter V of the BR Act, 1949 inserting 'co□operative bank' in clause (cci) to Section 56 and 'primary co□operative bank' in clause (ccv) to Section 56 it could not be said that RDB Act, 1993 applies to the co□operative banks transacting the business of banking.

81. In Greater Bombay Coop. Bank Ltd. (supra), the provisions of the BR Act, 1949 were simply noted; there was no in□depth consideration of the various provisions and, more particularly of those contained in Section 56 of the Act. The main issue was whether the court had jurisdiction or Debts Recovery Tribunal to recover the amount from the debtor. In that connection, the question of application of RDB Act, 1993 to the co□operative societies constituted under MSCS Act as well as State Co□operative Acts arose and also whether the State legislature was competent to enact legislation concerning co□operative societies incidentally transacting the business of banking in the light of Entry 32 of List II. The findings were recorded on various aspects with which we are unable to agree. The discussion on various issues was not in□depth, could not be said to be binding. We have dealt with the various questions with the help of various decisions of this Court, and we find ourselves unable to agree with the conclusions recorded therein. The co□operative banks are doing the banking business, it could not be said to be an incidental activity but main and only activity. We are unable to subscribe to the view taken in Greater Bombay Coop. Bank Ltd. (supra) as the provisions were not correctly appreciated.

82. The reason is given in Greater Bombay Coop. Bank Ltd. (supra) that comprehensive machinery is provided in the State Act, could not have come in the way of Parliament enacting a law as to recovery within the purview of 'banking' in Entry 45 of List I as the same is its essential part. Even incidental trenching upon other fields cannot invalidate legislation. Equally futile is the argument that the Parliament did not amend Section 5(c) of the BR Act, 1949; in fact, the Parliament did so under Section 56(a) concerning its application to co□operative banks. A large number of provisions added in Chapter V by way of amending Section 56 cannot be ignored and set at naught. The extensive amendments made in Part V of the BR Act, 1949, have to be given full effect. In case co□ operative banks are kept outside the purview of the BR Act, 1949, and other legislation under Entry 45 and RBI Act, no licence can be granted, and they cannot do banking as that is not permissible without compliance of various provisions as provided in the BR Act, 1949. They would have to close

down and stop the business forthwith.

83. The co□operative banks, which are governed by the BR Act, 1949, are involved in banking activities within the meaning of Section 5(b) thereof. They accept money from the public, repayable on demand or otherwise and withdrawal by cheque, draft, order or otherwise. Merely by the fact that lending of money is limited to members, they cannot be said to be out of the purview of banking. They perform commercial functions. A society shall receive deposits and loans from members and other persons. They give loans also, and it is their primary function. Thus, they are covered under 'banking' in Entry 45 of List I. IN REFERENCE QUESTION NOS. 3(a) AND 3(b)

84. Learned Counsel appearing on behalf of appellants argued that securitisation is not a banking business. The SARFAESI Act is to regulate securitisation and reconstruction of financial assets. Emphasis was laid on the financial assets and financial assistance. The definition of 'debt' in Section 2(1)(ha) of the SARFAESI Act is the same as defined in Section 2(g) of the RDB Act, 1993, the 'debt' is defined as any liability which is claimed as due during any business activity undertaken by the bank or the financial institution. In our opinion, the submission ignores and overlooks the purpose of the SARFAESI Act, i.e., enforcement of security interest, and that is precisely sought to be achieved by Section 13 without the intervention of the court. Since the activity of a co□operative bank is banking regulated by the law enacted within the relatable Entry 45 of List I, we find no reason as to why the Parliament lacked the competence to enact the SARFAESI Act and to provide a procedure for the speedy recovery of dues. The SARFAESI Act also covers the activities undertaken by the co□operative banks. The co□operative banks are doing banking business under Section 5(b) of the BR Act, 1949, and the exclusion of the co□operative societies from Entry 43 of List I, does not have any bearing regarding the interpretation of Entry 45 of List I.

85. Even assuming for the time being that definition of 'bank' in Section 5(c) of the BR Act, 1949 did not cover the co□operative banks; the expression 'bank' has been defined in the SARFAESI Act under Section 2(1)(c), and the provisions contained in Section 2(1)(c)(v) authorises the Central Government to specify 'such other bank' for that Act. Thus, the notification issued on 28.1.2003 notifying 'co□operative bank' as the 'bank' is covered by Entry 45 of List I as they are regulated by the BR Act, 1949, and the RBI Act. For the 'banking' activity under Entry 45 of List I, the Parliament had the power to enact such a provision defining 'bank' to authorise and prescribe the recovery procedure for such a bank as provided in Section 13 of the SARFAESI Act; However, we are of the view that co□operative societies/banks stand included by incorporation in Section 5(1)(c) of the BR Act and the notification was issued ex abundanti cautela. By virtue of Section 56(a), co□operative banks, as defined in Section 56(cci) of the BR Act, 1949, are included in Section 5(1)(c). Similarly, multi□State co□operative banks were also covered.

86. The earlier procedure for recovery of dues was differently provided for general banks and the co□operative banks through the Civil Court or Tribunal. In the SARFAESI Act, a procedure has been prescribed under Section 13 without the intervention of the court/tribunal to keep pace with the time. Thus, the malady of inordinate delay with which the order of civil court suffered as well as of the co□operative tribunals or summary procedure under the Co□operative Societies Act, was sought to be redressed. Apart from that, it is permissible for the Parliament to enact the law to provide

recovery procedures for bank dues that have been done by providing speedy recovery of secured interest without intervention of the court/tribunal.

87. In Soma Suresh Kumar v. Government of Andhra Pradesh and Ors.56, it was observed that there were several occasions when the laws enacted by the State as well as by the banking regulation carved out by Central Government acted in their field. This Court considered the Andhra Pradesh Protection of Depositors of Financial Establishments Act, 1999, and the effects of the BR Act, 1949. It was held that ambit 56 (2013) 10 SCC 677 of respective Acts and field covered is required to be considered and it was permissible for the State legislature also to enact the provisions notwithstanding the BR Act, 1949 with respect to the matters which were not covered by the said Act to protect the interest of the investors. It was held that Andhra Pradesh Protection of Depositors of Financial Establishments Act, 1999, did not create any repugnancy to any Central law. It was observed:

> "6. Further, it is also pointed out that the Banking Regulations Act, enacted by the Central Government, to regulate the operation of banking companies or organisations, enables RBI to give licence to banking companies to carry out the functions of the Bank. It was pointed out that it covered different areas which are not common to the area covered by the Andhra Act. Further, it was pointed out that both the Acts have applicability to different aspects of refund to the depositors. The Banking Regulations Act, it is pointed out, was enacted to regulate the functioning of the banking companies, including Vasavi Cooperative Urban Bank Ltd. and that the petitioners have approached this Court challenging the validity of the Act so as to wriggle out of the clutches of law."
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> 88. In K.K. Baskaran v. State Represented by its Secretary, Tamil Nadu, and Ors.57, the question arose concerning T.N. Protection of Interests of Depositors (in Financial establishments) Act, 1997. The said Act provided for a remedy to evils caused by fraudulent activities of financial establishments for which no redressal mechanism was provided in Central enactments. It was held that T.N. Protection of Interests of Depositors (in Financial establishments) Act, 1997, did not

57 (2011) 3 SCC 793 entrench the field occupied by Section 58□A of Companies Act, 1956 as the object of the 1997 Act was completely different. The Doctrine of Pith and Substance and its effect on the overlapping of fields occupied by Central and State Lists was considered. The relevant discussion is extracted hereunder:

> "18. It often happens that a legislation overlaps both List I as well as List II of the Seventh Schedule. In such circumstances, the doctrine of pith and substance is applied. We are of the opinion that in pith and substance the impugned State Act is referable to Entries 1, 30 and 31 of List II of the Seventh Schedule and not Entries 43, 44 and 45 of List I of the Seventh Schedule.

> 19. It is well settled that incidental trenching in exercise of ancillary powers into a forbidden legislative territory is permissible vide the Constitution Bench decision of this Court in State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201 [vide SCC paras 31(4), (5) & (6) and 129(5)]. Sharp and distinct lines of demarcation are not always possible and it is often impossible to prevent a certain amount of overlapping vide ITC Ltd. v. State of Karnataka, 1985 Supp SCC 476 (SCC para 17).

We have to look at the legislation as a whole and there is a presumption that the legislature does not exceed its constitutional limits.

21. The doctrine of pith and substance means that an enactment which substantially falls within the powers expressly conferred by the Constitution upon a legislature which enacted it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature. The Court must consider what constitutes in pith and substance the true subject□matter of the legislation. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature then it must be held to be valid even though it incidentally trenches on matters beyond its legislative competence, vide Union of India v. Shah Goverdhan L. Kabra Teachers' College, (2002) 8 SCC 228 (SCC para 7).

22. For applying the doctrine of pith and substance regard is to be had to the enactment as a whole, its main objects and the scope and effect of its provisions vide Special Reference No. 1 of 2001, In re, (2004) 4 SCC 489 (SCC para 15). For this purpose the language of the entries in the Seventh Schedule should be given the widest scope of which the meaning is fairly capable, vide State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201, [SCC para 31(4)], Union of India v. Shah Goverdhan L. Kabra Teachers' College, (2002) 8 SCC 228 (SCC para 6) and ITC Ltd. v. State of Karnataka, 1985 Supp SCC 476 (SCC para 17)."

89. In M/s. Ujagar Prints and Ors. (II) v. Union of India and Ors. 58, it was laid down that entries in the State legislature should be liberally construed and the Doctrine of Pith and Substance was considered thus:

> "48. Entries to the legislative lists, it must be recalled, are not sources of the legislative power but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression "with respect to" in Article 246 brings in the doctrine of "Pith and Substance" in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised the test is whether the legislation, looked at as a whole, is substantially "with respect to" the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic."

90. In Keshavlal Khemchand and Sons Private Limited and Ors. v. 58 (1989) 3 SCC 488 Union of India and Ors. 59, the object of the SARFAESI Act was explained thus:

"30. The person advancing the money is generally called a creditor and the person receiving the money is generally called a borrower. The most simple form of a loan transaction is a contract by which the borrower agrees to repay the amount borrowed on demand by the creditor with such interest as stipulated under the agreement. Such a loan transaction may be attended by any arrangement of a security like a mortgage or pledge, etc. depending upon the agreement of the parties.

31. The Act provides for a mode of speedy recovery of the monies due from the borrowers to one class of creditors who are banks and financial institutions (creditors). Advances/Loans made by creditors to businessmen and industrialists are generally not repayable on demand but repayable in accordance with a fixed time schedule agreed upon by the parties known as "term loans":

"Term loans.—A loan may be made for a specified period (a term loan). In such a case repayment is due at the end of the specified period and, in the absence of any express provision or implication to the contrary, no further demand for repayment is necessary." — Chitty on Contracts, Vol. II, 30th Edn., p. 913. In other words, such loans are repayable in instalments over a period of time the terms of which are evidenced by a written agreement between the parties. A default in the repayment (in terms of the agreed schedule) generally provides a cause of action for the creditor to initiate legal proceedings for the recovery of the entire amount due and outstanding from the borrower. Normally such term loans are also accompanied by some "security interest" in a "secured asset" of the borrower. Such a recovery is to be made normally by instituting a suit for recovery of the amounts by enforcing the "security interest". The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 created an exclusive forum for a speedy ascertainment of the amounts actually due from the defaulting

59 (2015) 4 SCC 770 borrower and also provided for a mechanism for speedy recovery of the amounts so ascertained from such borrowers.

32. Since such a system was also found to be inadequate for the speedy recovery of the monies due from the borrowers to the creditors, Parliament made the Act under which the process of ascertainment of the amounts due from a borrower by an independent adjudicatory body is dispensed with. The secured creditor is made the sole judge of the amount due and outstanding from a borrower subject to an appeal under Section 17 of the Act. Be that as it may, such an ascertainment of amount due and outstanding is not the only criterion on the basis of which the secured creditor is entitled to initiate proceedings under Section 13(4) of the Act, but the secured creditor is also required to classify the account of the borrower (asset of the creditor) as an NPA. Dehors the Act, when the borrower of a term loan defaults in the repayment, the creditor can initiate legal proceeding straightaway for recovery of the amounts due and outstanding from the borrower. The Act places an additional legal obligation on the creditor to examine and decide whether the account of the borrower has become an NPA before initiating action under the Act."

91. The Bombay High Court in The Majoor Sahakari Bank Ltd. (supra) considered the question whether co□operative society carrying on the banking business, considering its activity, could be termed as industry to which Bombay Industrial Disputes Act would apply. Though co□operative society was doing the business of banking, it was submitted that nonetheless, it was a co□operative society to which the provisions of the Bombay Industrial Disputes Act could not apply. Considering the activity and definition of the 'company' as defined in Halsbury's Laws of England as an association of a number of individuals formed with a common purpose. The High Court opined that in the wide and proper legal sense, the petitioners were a company although they may choose to call themselves a society or even if Co□Operative Societies Act requires that they should call themselves a society. However, in the eye of the law, they are a company when they were doing the business of banking. Though registered as a co□operative society, the provisions of industrial law were held to be applicable. The High Court also observed that there was no special charm or magic in a company registered under the Companies Act or the Co□operative Societies Act as far as the result of registration is concerned. The High Court observed:

> "(4) Now turning to the language of the notification what is urged by Mr. Parpia is that the notification only contemplates the Indian Companies Act and Acts similar to that Act. In our opinion, there is no reason why such a limited interpretation should be put upon the general words used in the notification. If the intention of the State Government was, that the notification should only apply to the companies registered under the Indian Companies Act or Acts corresponding to Indian Companies Act nothing was easier than for the Government to have stated so. If the intention was to exclude the banking companies registered under the Co□operative Societies Act that also could have been set out in the notification itself. Neither counsel has been able to draw our attention to any Indian Legislation under which an association doing banking business can be registered other than the Indian Companies Act and the Co□ operative Societies Act. Therefore, nothing was simpler or easier than for the State Government to have stated "doing business of Banking Companies registered under enactments other than the Co□operative Societies Act". When a Court is called upon to interpret a notification which is capable of more than one meaning it is not amiss to consider the reason and principle underlying the notification. There is no reason or principle why a co□operative society doing banking business should be put on a different footing with regard to industrial law from other companies doing identical business. There is no reason why a co□operative banking society should treat its employees otherwise than as laid down under the industrial law. If we were satisfied that there was some reason or principle which would lead us to put upon this notification the interpretation which Mr. Parpia suggests we might have put such an interpretation on the notification, but all the considerations are in favour of the interpretation suggested by Mr. Rane. There is nothing in the notification which prevents us from giving the interpretation which we have ultimately decided to give to this notification. Therefore, we are of the opinion that the petitioners are doing business of Banking and are registered under an enactment relating to companies, which is the Co□operative Societies Act. The learned Judge was right in taking the view that he had jurisdiction to deal with the matter. The petition fails and is

dismissed with costs."

92. In Jayant Verma and Ors. v. Union of India and Ors. 60, the question arose concerning the applicability of Section 21A of the B.R. Act, 1949. In that context, the provisions of the B.R. Act, 1949, were considered and it was held that enactment to be relatable to Entry 45 of List I and has to be given a wide meaning. It was observed:

> "16. There can be no doubt that the Banking Regulation Act deals with the subject "banking" insofar as it licenses banking companies, as defined, and cooperative banks, and seeks to regulate them. Section 21□A, though by way of amendment, is undoubtedly an integral part of the aforesaid Act relating to the interdict on the reopening of loan transactions between a banking company and its debtor, on the ground that the rate of interest charged is excessive. There can be no doubt that a law relating to indebtedness of a debtor to a banking company and the interdict against a court reopening 60 (2018) 4 SCC 743 any such transaction, on the ground that interest charged by the banking company is excessive, would relate to the business of banking. We must not forget that the entries in the Lists to the Seventh Schedule have to be read in the widest possible manner, and we have seen from the judgments quoted by us above that the expression "banking" contained in List I Entry 45 is to be given a wide meaning. There can be no doubt that the statute as a whole and the aforesaid section does fall within List I Entry 45." (emphasis supplied)

93. In Federation of Hotel & Restaurant Association of India, etc. v. Union of India and Ors.61, the question of overlapping of the law was considered with respect to a subject which might incidentally affect another subject in some way or the other and held that that is not the same thing as the law being on the latter subject. The same transaction may involve two or more taxable events in its different aspects.

94. In Apex Cooperative Bank of Urban Bank of Maharashtra & Goa Ltd. (supra) the question arose concerning licensing of co□operative societies by the Reserve Bank of India to carry on banking business under the provisions of the BR Act, 1949. It was held that co□operative banks, which are not State co□operative banks or Central co□operative banks or primary co□operative banks as defined in Section 56(cci) of B.R. Act, 1949, were not eligible for licensing. The grant of licence by Reserve Bank of India to co□operative banks, which were 61 (1989) 3 SCC 634 not registered under the Multi□State Co□operative Societies Act, 1984, was not justified. The powers of Reserve Bank of India under the Multi□State Co□operative Societies Act were exercisable only for co□operative banks, not to any other co□operative societies not doing business of banking. It was opined:

> "25. Another aspect which must be noticed is that in the Constitution of India, the subject pertaining to co□operative societies is in the State List i.e. Entry 32 of List II of Schedule VII. The Union List has Entry 44 of List I of Schedule VII which deals with corporations. In this case we are not concerned with the validity of a Central legislation and thus do not deal with that aspect. For purpose of the judgment we will take it that a co□operative society with objects not confined to one State would fall

> within the term corporation, and thus a Central legislation may be saved. However, from the constitutional provisions it is clear that matters pertaining to co□operative societies are in the State List. Thus many States have enacted laws relating to co□ operative societies. We have not seen other Acts. However, as this case concerns a society in Maharashtra, the Maharashtra Cooperative Societies Act was shown to us. Significantly, this law does not define a co□operative society. It did not need to, as a society registered under it would be automatically covered.

The need to define a co□operative society arises only in a Central legislation which does not cover all co□operative societies and thus needs to indicate to which society it applies."

95. In Bharat Coop. Bank (Mumbai) Ltd. v. Coop. Bank Employees Union62, the question arose concerning the Industrial Disputes Act, 1947 and the B.R. Act, 1949. There was a reference in Section 2(bb) of Industrial Disputes Act, 1947, to the definition of 'banking company' as defined in Section 5 of the B.R. Act, 1949. It was held 62 (2007) 4 SCC 685 that same was instance of legislation by incorporation and not legislation by reference. It was further opined that amendment to BR Act, 1949 after Section 5 was incorporated in Section 2(bb), would not have any effect on the expression 'banking company'. This Court further held that the I.D. Act was a complete and self□ contained code in itself, and its working was not dependent on the BR Act, 1949.

96. In Reserve Bank of India v. M. Hanumaiah and Ors.63, the question arose of supersession of the Committee of the management of Co□operative Bank. There was a written requisition from the Reserve Bank of India to the Registrar, Co□operative Societies, to supersede the management under Section 30(5) of the Karnataka Co□operative Societies Act, 1959. It was held that principles of natural justice were not applicable, and the Committee of the management had no right of hearing. Thus, there are various instances where the Central legislation has controlled co□operative societies' aspects relating to banking.

97. In State of Gujarat and Anr. v. Shri Ambica Mills Ltd., Ahmedabad, and Anr.64, the definition clause in a provision when it is under inclusion and over□inclusive was considered, thus:

> “54. A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is: what does the 63 (2008) 1 SCC 770 64 (1974) 4 SCC 656 phrase “similarly situated” mean? The answer to the question is that we must look beyond the classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.
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> 55. A classification is under□inclusive when all who are included in the class are tainted with the mischief but there are others also tainted whom the classification does not include. In other words, a classification is bad as under□inclusive when a State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are

> similarly situated. A classification is over-inclusive when it includes not only those who are similarly situated with respect to the purpose but others who are not so situated as well. In other words, this type of classification imposes a burden upon a wider range of individuals than are included in the class of those attended with mischief at which the law aims. Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification."

98. In Girnar Traders (3) v. State of Maharashtra and Ors. 65, the question of incorporation by reference and Doctrine of Pith and Substance were considered thus:

> "87. However, since this aspect was argued by the learned counsel appearing for the parties at great length, we will proceed to discuss the merit or otherwise of this contention without prejudice to the above findings and as an alternative plea. These principles have been applied by the courts for a considerable period now. When there is general reference in the Act in question to some earlier Act but there is no specific mention of the provisions of the former Act, then it is clearly considered as legislation by reference. In the case of legislation by 65 (2011) 3 SCC 1 reference, the amending laws of the former Act would normally become applicable to the later Act;

but, when the provisions of an Act are specifically referred and incorporated in the later statute, then those provisions alone are applicable and the amending provisions of the former Act would not become part of the later Act. This principle is generally called legislation by incorporation. General reference, ordinarily, will imply exclusion of specific reference and this is precisely the fine line of distinction between these two doctrines. Both are referential legislations, one merely by way of reference and the other by incorporation. It, normally, will depend on the language used in the later law and other relevant considerations. While the principle of legislation by incorporation has well-defined exceptions, the law enunciated as of now provides for no exceptions to the principle of legislation by reference. Furthermore, despite strict application of doctrine of incorporation, it may still not operate in certain legislations and such legislation may fall within one of the stated exceptions.

88. In this regard, the judgment of this Court in M.V. Narasimhan, (1975) 2 SCC 377, can be usefully noticed where the Court after analysing various judgments, summed up the exceptions to this rule as follows: (SCC p. 385, para 15) "(a) where the subsequent Act and the previous Act are supplemental to each other;

(b) where the two Acts are in pari materia;

(c) where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and

(d) where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act."

148. Having perused and analysed the various judgments cited at the Bar we are of the considered view that this rule is bound to have exceptions and it cannot be stated as an absolute proposition of law that wherever legislation by reference exists, subsequent amendments to the earlier law shall stand implanted into the later law without analysing the impact of such incorporation on the object and effectuality of the later law. The later law being the principal law, its object, legislative intent and effective implementation shall always be of paramount consideration while determining the compatibility of the amended prior law with the later law as on relevant date.

173. The doctrine of pith and substance can be applied to examine the validity or otherwise of a legislation for want of legislative competence as well as where two legislations are embodied together for achieving the purpose of the principal Act. Keeping in view that we are construing a federal Constitution, distribution of legislative powers between the Centre and the State is of great significance. Serious attempt was made to convince the Court that the doctrine of pith and substance has a very restricted application and it applies only to the cases where the court is called upon to examine the enactment to be ultra vires on account of legislative incompetence.

174. We are unable to persuade ourselves to accept this proposition. The doctrine of pith and substance finds its origin from the principle that it is necessary to examine the true nature and character of the legislation to know whether it falls in a forbidden sphere. This doctrine was first applied in India in Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., (1946□47) 74 IA 23 : AIR 1947 PC 60. The principle has been applied to the cases of alleged repugnancy and we see no reason why its application cannot be extended even to the cases of present kind which ultimately relates to statutory interpretation founded on source of legislation."

99. We find that 'banking' relating to co□operatives can be included within the purview of Entry 45 of List I, and it cannot be said to be over inclusion to cover provisions of recovery by co□operative banks in the SARFAESI Act. It cannot be said to be over□inclusion on the anvil of the principles laid down by this Court.

100. Learned Counsel on behalf of appellants argued that notification dated 28.1.2003 is ultra vires and beyond the purview of the parent statute, i.e., the SARFAESI Act. The amendment is colourable legislation, and it encroaches upon a field outside its scope and is also an indirect method of achieving the result of bringing 'co□operative banks' within the purview of the SARFAESI Act and RDB Act, 1993 and is an attempt to regulate entities expressly excluded by Entry 43 of List I. Reliance has been placed on K.C. Gajapati Narayan Deo (supra), in which it was held:

> "(9) It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power Vide Cooley's Constitutional Limitations, Vol. 1, p.379. A distinction, however, exists

between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetence, and a legislature which enjoys only a limited or a qualified jurisdiction.

If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff, J. in — 'Attorney-General for Ontario v. Reciprocal Insurers', 1924 A C 328 at p. 337 (B):

"Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing." In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority — 'Vide 1924 A C 328 p. 337 (B)'. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design — 'Vide Attorney-General for Alberta v. Attorney-General for Canada', 1939 A C 117 at p. 130 (C). But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers.

It is said by Lefroy in his well-known work on Canadian Constitution that even if the legislature avow on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction, yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered 'ultra vires' See Lefroy on Canadian Constitution page 75." (emphasis supplied) By applying the aforesaid principle, the provision in question/notification cannot be said to be

colourable legislation.

101. In State of Tamil Nadu and Ors. v. K. Shyam Sunder and Ors. 66, the concept of colourable legislation was considered and it was observed that the doctrine of malafides does not involve any question of bonafide or malafide on the part of the legislature, and the Court is concerned with a limited issue of competence of the particular legislature to enact a particular law. The motive of the legislature while enacting a law is inconsequential. It was observed:

> "37. It has consistently been held by this Court that the doctrine of mala fides does not involve any question of bona fide or mala fide on the part of legislature as in such a case, the Court is concerned to a limited issue of competence of the particular legislature to enact a particular law. If the legislature is competent to pass a particular enactment, the motives which impelled it to an act are really irrelevant. On the other hand, if the legislature lacks competence, the question of motive does not arrive at all. Therefore, whether a statute is constitutional or not is, thus, always a question of power of the legislature to enact that statute. Motive of the legislature while enacting a statute is inconsequential: "Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of mala 66 (2011) 8 SCC 737 fides." The legislature, as a body, cannot be accused of having passed a law for an extraneous purpose.

This kind of "transferred malice" is unknown in the field of legislation. (See K.C. Gajapati Narayan Deo v. State of Orissa, AIR 1953 SC 375, STO v. Ajit Mills Ltd., (1977) 4 SCC 98, SCC p. 108, para 16, K. Nagaraj v. State of A.P., (1985) 1 SCC 523, Welfare Assn., A.R.P. v. Ranjit P. Gohil, (2003) 9 SCC 358 and State of Kerala v. Peoples Union for Civil Liberties, (2009) 8 SCC 46)." We find that the SARFAESI Act qualifies the test of legislative competence, as well as the definition, cannot be said to be colourable piece or over□inclusive or beyond the competence of the Parliament.

102. Resultantly, we answer the reference as under:

> (1)(a) The co□operative banks registered under the State legislation and multi□State level co□operative societies registered under the MSCS Act, 2002 with respect to 'banking' are governed by the legislation relatable to Entry 45 of List I of the Seventh Schedule of the Constitution of India.
>
> (b) The co□operative banks run by the co□operative societies registered under the State legislation with respect to the aspects of 'incorporation, regulation and winding up', in particular, with respect to the matters which are outside the purview of Entry 45 of List I of the Seventh Schedule of the Constitution of India, are governed by the said legislation relatable to Entry 32 of List II of the Seventh Schedule of the Constitution of India.
>
> (2) The co□operative banks involved in the activities related to banking are covered within the meaning of 'Banking Company' defined under Section 5(c) read with

Section 56(a) of the Banking Regulation Act, 1949, which is a legislation relatable to Entry 45 of List I. It governs the aspect of 'banking' of co-operative banks run by the co-operative societies. The co-operative banks cannot carry on any activity without compliance of the provisions of the Banking Regulation Act, 1949 and any other legislation applicable to such banks relatable to 'Banking' in Entry 45 of List I and the RBI Act relatable to Entry 38 of List I of the Seventh Schedule of the Constitution of India.

(3)(a) The co-operative banks under the State legislation and multi-State co-operative banks are 'banks' under section 2(1)(c) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The recovery is an essential part of banking; as such, the recovery procedure prescribed under section 13 of the SARFAESI Act, a legislation relatable to Entry 45 List I of the Seventh Schedule to the Constitution of India, is applicable.

(3)(b) The Parliament has legislative competence under Entry 45 of List I of the Seventh Schedule of the Constitution of India to provide additional procedures for recovery under section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 with respect to co-operative banks. The provisions of Section 2(1)(c)(iva), of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, adding "ex abundanti cautela", 'a multi-State co-operative bank' is not ultra vires as well as the notification dated 28.1.2003 issued with respect to the co-operative banks registered under the State legislation.

The civil appeals, writ petitions and the pending applications, if any, are disposed of accordingly. No costs.

.....J. (Arun Mishra) .....J. (Indira Banerjee) .....J. (Vineet Saran) .....J. (M.R. Shah) New Delhi; .....J. May 05, 2020. (Aniruddha Bose)