

W.P No.12586 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.09.2020

C O R A M

The Hon'ble **Mr. A.P.SAHI, THE CHIEF JUSTICE**

and

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY**

Writ Petition No.12586 of 2020 &
W.M.P.Nos.15519 & 15524 of 2020

1. Piyush Bokaria
2. Piyush Bokaria Hindu Undivided Family,
Represented by its Karta, Mr.Piyush Bokaria
1-45, 10th Street, I-Block,
Anna Nagar East, Chennai-600 102.
3. Prashant Bokaria
4. Prashant Bokaria Hindu Undivided Family,
Represented by its Karta Mr.Prashant Bokaria,
No.1-45, 10th Street, I-Block,
Anna Nagar East, Chennai-600 102.
5. Prabin Bokaria
6. Prabin Bokaria Hindu Undivided Family,
Represented by its Karta Mr. Prabin Bokaria,
H No.1-45 New 1-22, I-Block 10th Street,
Anna Nagar East, Chennai-600 102.
7. Umed Singh Bokaria UF,
Represented by its Karta, Mr.Umed Singh Bokaria,
No.1-45, I-Block, 10th Steet,
Anna Nagar East, Chennai-600 102.

... Petitioners

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vs.

1. Reserve Bank of India,
No.16, Rajaji Salai, Fort Glacis,
Chennai-600 001, Tamil Nadu.

2. Administrator of Yes Bank Ltd.,
(Appointed by the Reserve Bank of India)
having his office at 9th Floor,
Nehru Centre, Discovery of India,
Ar.A.B.Road, Worli, Mumbai-400 018.

3. Yes Bank Limited,
having its registered office at 9th Floor,
Nehru Centre, Discovery of India,
Dr.A.B.Road, Worli, Mumbai-400 018.

... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India praying to issue a writ of Declaration to declare the impugned Master Circular – Basel III Capital Regulations issued by First Respondent Reserve Bank of India dated 01.07.2015 bearing RBI/2015-16/58 DBR No.BP.BC.1/21.06.201/2015-16 insofar as it relates to issuance and write off of Additional Tier 1 Capital Bonds, as ultra-vires, without authority of law, unconstitutional, void, invalid in law being violative of Articles 14,19,21, 253 and 300-A of Constitution of India, 1949, and being contrary to, including but not limited to, provisions of The Companies Act, 2013 (r/w 1956), the Indian Contract Act 1872 and the Transfer of Property Act, 1881 and also to consequently declare all proceedings issued by Reserve Bank of India dated 01.07.2015 bearing RBI/2015-16/58 DBR No.BP.BC.1/21.06.201/2015-16 insofar as it relates to issuance and write off of Additional Tier 1 Capital Bonds as null.

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For Petitioners : Mr.Nithyaesh Natraj
For Respondents : Mr.P.Giridharan & Mr.Dominic S. David
for R1
: Mr. Karthik Seshadri for R3

ORDER

SENTHILKUMAR RAMAMOORTHY J.,

THE PREFACE

Capital adequacy has long been considered of paramount importance to the stability of the financial system, both global and Indian, in general, and, in particular, to the financial health of the principal actor in the financial system, banks. The Basel Committee on Banking Standards (the BCBS), which we will discuss at greater length later, has been at the forefront of global efforts in this direction. The Reserve Bank of India (the RBI) is India's representative on the BCBS. The BCBS prepared a report titled Based III: A Global Regulatory Framework for Resilient Banks and Banking Systems (the Basel III Report), which is regarded as the Basel III Capital Regulations, and its members agreed to implement it in their respective domestic jurisdictions in a phased manner. The Basel III Capital Regulations set out the elements of capital for capital adequacy purposes and specify the

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different types of equity, preferred capital or debt instruments that would be reckoned and, in what manner, for such purpose. The RBI initiated action to implement the Basel III capital Regulations in 2012. By Master Circular dated 01.07.2015 (the Master Circular), the circulars issued earlier on the subject were consolidated. The Master Circular is the focal point of the present writ petition wherein it is challenged insofar as it permits banks, under its supervisory control, to issue and write-off a form of regulatory capital, which is referred to as Additional Tier 1 (AT1) Capital Bonds. The Master Circular is challenged on the ground that it violates Articles 14, 19, 21, 253 and 300-A of the Constitution of India. In addition, it is challenged on the ground that it is contrary to the provisions of the Companies Act, 2013 (CA 2013), the Indian Contract Act, 1872 (the Contract Act), the Transfer of Property Act, 1882 (the TP Act) and the Banking Regulation Act, 1949 (the BR Act).

2. The provenance of the Bank of International Settlements (BIS)

and consequently, of the Basel III Capital Regulations is traceable to the aftermath of World War-I. On 17.05.1930, several countries, including India, entered into the Hague Agreement. The Hague Agreement stipulated that

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various functions relating to but not limited to the complete and final settlement of reparations by Germany and other named Axis powers would be transferred to the BIS which was to be established in terms of the aforesaid Hague Agreement. Shortly thereafter, the Reserve Bank of India (the RBI) was constituted under the Reserve Bank of India Act, 1934 (the RBI Act). Under the RBI Act, the Government of India transferred the functions relating to currency management and entrusted the carrying on of banking business, as specified in Section 3 of the RBI Act, to the RBI. Thereafter, the RBI stepped into the shoes of the Government of India as regards the BIS. The BIS constituted various committees for the exercise of its functions. One of these committees is the BCBS. Section 3 of the Basel Committee Charter, which deals with its legal status, is as under:

"The BCBS does not possess any formal supranational authority. Its decisions do not have legal force. Rather, the BCBS relies on its members' commitments, as described in Section 5, to achieve its mandate."

3. Section 5 specifies the responsibilities of BCBS members and these responsibilities include, *inter alia*, working together to achieve the mandate of the BCBS; implementing and applying BCBS standards in their

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domestic jurisdictions within the pre-defined time frame established by the Committee; and to promote the interests of global financial stability and not solely national interests, while participating in BCBS work and decision making. As stated earlier, the RBI is one of the institutional representatives on the BCBS.

THE BASEL III REPORT/BASEL III CAPITAL REGULATIONS

4. In December 2010, BCBS released a report titled Based III: A Global Regulatory Framework for Resilient Banks and Banking Systems (the Basel III Report). Part I of the Report dealt with minimum capital requirements and buffers and set out the components of capital. The standards prescribed in the Basel III Report are referred to as the Basel III Capital Regulations. As per the Basel III Report, the elements of capital that would be taken into consideration for purposes of capital adequacy are set out, and the term used to describe such capital is regulatory capital. They are broadly: Tier 1 (going-concern) capital and Tier 2 (gone-concern) capital. Tier 1 capital, in turn, consists of the sum of Common Equity Tier 1(CET 1) and Additional Tier 1 (AT 1) capital. CET 1 comprises, as its most important elements, the sum of the equity shares issued by a bank, its reserves and

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surplus. AT 1 includes instruments, other than common equity, which meet the criteria for inclusion as AT 1. Paragraph 55 of the Basel III Report sets out the criteria for inclusion in AT 1 capital. There are 14 criteria out of which the important criteria are:

- Subordinated to depositors, general creditors and subordinated debt of the bank.
- Is neither secured nor covered by a guarantee of the issuer or related entity or other arrangement that legally or economically enhances the seniority of the claim vis-a-vis bank creditors.
- Is perpetual, i.e. there is no maturity date and there are no step-ups or other incentives to redeem.
- May be callable at the initiative of the issuer only after a minimum of five years subject to conditions that are specified therein.
- Any prepayment of principal [e.g. through repurchase or redemption] must be with prior supervisory approval and banks should not assume or create market expectations that supervisory approval will be given.
- The instrument cannot contribute to liabilities exceeding assets if such a balance sheet test forms part of national insolvency law.
- Instruments classified as liabilities for accounting purposes must have principal loss absorption through either (i) conversion to common shares at an objective pre-specified trigger point or (ii)

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a write-down mechanism which allocates losses to the instrument at a pre-specified trigger point. The write-down will have the following effects:

- a] Reduce the claim of the instrument in liquidation;
 - b] Reduce the amount re-paid when a call is exercised;
 - c] Partially or fully reduce coupon/dividend payments on the instruments.
- The instrument cannot have any features that hinder recapitalization, such as provisions that require the issuer to compensate investors if a new instrument is issued at a lower price during a specified time frame.

5. In order to implement the Basel III Capital Regulations in fulfillment of obligations under the Basel Committee Charter, the RBI released draft guidelines on 30.12.2011 and called upon banks to offer their comments or suggestions latest by 15.02.2012. Thereafter, on 02.05.2012, final guidelines were issued for the implementation of Basel III Capital Regulations in India. The said guidelines led to the issuance of circulars which were consolidated in the Master Circular.

THE MASTER CIRCULAR

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6. Given that the Basel III Capital Regulations are intended to augment the regulatory capital of banks so as to enhance their financial stability and that of the global financial system, the Master Circular contains measures to achieve this objective by carrying forward and incorporating the elements of CET 1 and AT 1 (collectively Tier 1), and Tier 2 from the Basel III Capital Regulations. Towards fulfilment of the above objective, paragraph 4.1 of the Master Circular stipulates that banks are required to maintain a minimum Pillar 1 of Capital to Risk-weighted Assets Ratio (CRAR) of 9% on an on-going basis. In order to calculate CRAR, the eligible total capital would consist of CET 1 and AT I capital and this would constitute the numerator for calculation of CRAR. The denominator would consist of Credit Risk Risk Weighted Assets (RWA) + Market Risk RWA + Operational Risk RWA.

7. Paragraph 2.1 of the Master Circular sets out the components of capital and specifies that the total regulatory capital will consist of the sum of the following categories:

(1) Tier 1 Capital (going-concern capital) consisting of:

(a) Common Equity Tier 1

(b) AT 1 Capital

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(2) Tier 2 Capital (gone-concern capital)

The footnote with regard to going-concern capital specifies that from a regulatory capital perspective, going-concern capital is the capital which can absorb losses without triggering bankruptcy of the bank. Gone-concern capital is the capital which will absorb losses only in a situation of liquidation of the bank.

8. Paragraph 4.2.4 of the Master Circular deals with AT 1 capital and specifies the elements or types thereof. These elements, *inter alia*, include Perpetual Non-Cumulative Preference Shares (PNCPS), which comply with the regulatory requirements as specified in Annex 3; and debt capital instruments eligible for inclusion in AT 1 capital, which comply with the regulatory requirements as specified in Annex 4. As per Annex 4, one of the mandatory features that a debt capital instrument should have to qualify as AT 1 capital is that it should be perpetual. Therefore, these instruments are called perpetual debt instruments (PDI). The criteria for inclusion of PDI in AT 1 capital are furnished in Annex 4. Annex 16 contains criteria for loss absorption through conversion/write down/write-off of AT 1 instruments on

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breach of the pre-specified trigger and of all non-common equity regulatory capital instruments at the point of non-viability (PONV).

9. Thus, the most important forms of instrument that qualify as AT 1 capital, as per the Master Circular, are PNCPS and PDI. In this case, we are concerned with PDI, which are referred to as AT 1 Capital Bonds. In a nutshell, the most important criteria for inclusion of PDI as AT 1 capital are: (i) subordinate status to deposits or ordinary forms of debt; (ii) perpetual duration, i.e. without a put option; (iii) call option after a minimum of 5 years subject to stipulated conditions, including the prior approval of the RBI; and (iv) loss absorbency at pre-specified trigger points either by conversion to common equity or partial or complete write-down.

YES BANK AT 1 BOND ISSUE AND ITS FINANCIAL CRISIS

10. Yes Bank Limited issued AT 1 bonds on 23.12.2016 for an aggregate sum of Rs.3000 crore and again on 18.10.2017 for a sum of Rs.5415 crore. The Petitioners state that they invested in the AT 1 bonds that were issued on 18.10.2017 through the secondary market. From the documents on record, it appears that each of these trades was carried out on 23.04.2018. The sale appears to have been made by ECL Finance Ltd. to the

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Petitioners, acting individually or on behalf of HUFs, through the Indian Clearing Corporation Ltd. Because the transaction took place on the secondary market, the consideration was higher than the face value of these AT 1 bonds. The deal confirmation records the coupon rate of 9%, the accrued interest, and the next interest date as 18.10.2018. Aditya Birla Money Ltd. was the depository participant (DP) of the Central Depository Services Ltd. (the Depository) as regards these transactions and the Petitioners were the beneficial owners of the AT 1 bonds upon consummation of the respective transaction.

11. The financial position of Yes Bank deteriorated considerably over a period of time and, consequently, the gross and net non-performing assets and the provisions in respect thereof increased dramatically. Hence, a moratorium notice dated 05.03.2020 (the Moratorium Notice) was issued by the Reserve Bank of India. In terms of the Moratorium Notice, the RBI informed the public at large that the RBI had applied to the Central Government for imposing a moratorium under Section 45 of the BR Act and that the Central Government had imposed a moratorium with effect from 05.03.2020. On the same date, by exercising power under Section 36 ACA of

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the BR Act, the RBI, in consultation with the Central Government, superseded the Board of Directors of Yes Bank Ltd. for a period of 30 days and appointed an Administrator to take over the assets and affairs of the Bank. Thereafter, a draft scheme of reconstruction was placed in the public domain on 06.03.2020. This draft scheme of reconstruction contained a specific clause to the following effect:

“The instruments qualifying as Additional Tier 1 capital, issued by the Yes Bank Ltd., under Basel III framework, shall stand written down permanently, in full, with effect from the Appointed date. This is in conformity with the extant regulations issued by Reserve Bank of India based on the Basel framework.

In the final Reconstruction Scheme 2020, which was released on 13.03.2020, the aforesaid clause did not find a place. However, by communication dated 14.03.2020, from the Administrator of Yes Bank Limited to the stock exchanges (BSE and NSE), the stock exchanges were informed as under:

“2. As per the provisions of Master Circular-Basel III Capital Regulations dated July1, 2015 issued by the RBI, (“Basel III Circular”), more specifically, clause 2.15 of Annex 16 of the Basel III Circular.

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“If the relevant authorities decide to reconstitute a bank or amalgamate a bank with any other bank under the Section 45 of BR act, 1949, such a bank will be deemed as non-viable or approaching non-viability and both the pre-specified trigger and the trigger at the point of non-viability for conversion/write-down of AT1 instruments will be activated. Accordingly, the AT1 instruments will be fully converted / written-down permanently before amalgamation/reconstruction in accordance with the rules”.

3. Given that Section 45 of the Banking Regulation Act, 1949 has been invoked by the RBI and the Scheme has been notified, the Bank is deemed to be non-viable or approaching non-viability and accordingly, the triggers for a write-down of certain Basel III additional tier 1 Bonds (“AT 1 Bonds”) issued by the Bank has been triggered. Such AT 1 Bonds would need to be fully written down permanently before any reconstruction of the Bank is undertaken.

4. In light of the above provisions of the Basel III Circular, the Perpetual Subordinated Basel III Compliant Additional Tier I Bonds issued by the Bank for an amount of Rs.3,000 crores on December 23, 2016 and the Perpetual Subordinated

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Basel III Compliant Additional Tier 1 Bonds issued by the Bank for an amount of Rs.5,415 crores on October 18, 2017 have been fully written down and stand extinguished with immediate effect.”

The present litigation was initiated pursuant to the said communication dated 14.03.2020. We are informed that separate but related proceedings are pending at the instance of other investors wherein, *inter alia*, the validity of the communication dated 14.03.2020 is impugned.

12. We heard Mr.Nithyaesh Natraj, the learned counsel for the Petitioners; Mr.P.Giridharan, the learned counsel for the RBI; and Mr. Karthik Seshadri, the learned counsel for Yes Bank.

THE CONTENTIONS

13. The contentions of Mr. Nithyaesh Natraj and Mr.P.Giridharan were heard on 11.9.2020 and 14.09.2020 and these submissions were captured in orders of even date. They made further submissions thereafter on 21.09.2020 and 23.09.2020, when we also heard the submissions of Mr.Karthik Seshadri, and posted the case on 28.09.2020 for pronouncing the order. A petition to re-open for further hearing was filed by the Petitioners

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and, on that basis, we re-opened proceedings and heard the parties again on 28.09.2020 and, once again, posted the case on 30.09.2020 for pronouncing the order.

PETITIONERS' CONTENTIONS

14. The contentions of Mr. Nithyaesh Natraj are as under:

(i) The Master Circular dated 01.07.2015 has been issued without authority or jurisdiction inasmuch as the Basel III Capital Regulations have not been enacted as law as per Article 253 of the Constitution. He dilated upon this contention by pointing out that the Master Circular draws reference to the G-20 Pittsburg summit wherein it was decided to implement the Basel III Capital Regulations. Thus, through the Master Circular, RBI is implementing a treaty under international law, whereas such implementation is unlawful unless preceded by the enactment of law by Parliament in terms of Article 253 of the Constitution. For this proposition, he relied on the following judgments, which are set out along with context and principle:

(a) State of West Bengal v. Kesoram Industries
(2004) 10 SCC 201 (Kesoram Industries), wherein, at paragraph 491, the Supreme Court held that a treaty entered into by India cannot become the law of the land until Parliament

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enacts a law as per Article 253. However, an Indian statute may be interpreted by keeping in mind the relevant international treaty.

(b) **Karan Dileep v. Union of India 2010 SCC Online Bom 23**, wherein, in the context of the contention that the impugned notifications violate India's trade agreements with several countries, at paragraphs 35 and 36, the Bombay High Court considered and summarized the effect of treaties and the implications of Article 253.

(c) **Ashwani Kumar v. Union of India 2019 12 SCALE 125**, wherein, in the context of a petition to direct the enactment of a law to prevent custodial torture, at paragraph 34, the Supreme Court held that international treaties and conventions can be ratified and implemented in India only after the relevant domestic law is amended by enacting enabling legislation.

(d) **Dinesh Gurjar v. Union of India 1999 2 MPLJ 649**, wherein at paragraphs 7-10, in the context of an agreement between India and Bhutan regarding sale of lottery tickets, which had not been enacted by Parliament, the Jabalpur Bench of the Madhya Pradesh High Court held that international treaties and conventions cannot be implemented in India unless Parliament enacts a law for such purpose.

(e) **Attorney General of Canada v. Attorney General of Ontario, AIR 1937 PC 82**, wherein, at paragraphs

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6,7 and 12, the Privy Council held that the performance of obligations under international treaties entail legislative action in the relevant domestic jurisdiction.

(f) **Walker v. Baird(1892)**, wherein the Privy Council held that obligations under a treaty cannot be enforced if it involves invasion of private rights unless there is parliamentary sanction.

(g) **Republic of Italy v. Hambros Bank, 1950 CH 314**, where the Chancery Division held that a financial agreement between the Government of the UK and the Government of Italy is not justiciable or cognizable in the courts of the United Kingdom unless the same forms part of municipal or domestic law.

(h) **In re Berubari Union, 1960 3 SCR 250 (Berubari Union)**, wherein, in the context of an agreement between India and Pakistan on the partition of Berubari Union between them, at paragraphs 17,18,32,35,46 and 49, the Supreme Court negated the contention of the Attorney General and held that the implementation of a treaty can only be effected through Parliamentary legislation and, if it entails an amendment to Part I of the Constitution, Article 368 should be complied with.

(ii) The Master Circular is liable to be struck down because it is *ultra vires* the BR Act and there is clear lack of legislative competence. It is also a manifestly arbitrary and unreasonable exercise of subordinate or

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delegated legislation. In support of these contentions, he relied upon the following judgments, which are set out along with context and principle:

(a) **State of TN v. P. Krishnamurthy (2006) 4 SCC 517 (P.Krishnamurthy)**, wherein, in the context of a challenge to Rule 38A of the Tamil Nadu Minor Mineral Concession Rules, 1959, at paragraphs 15-20, the Supreme Court set out the grounds on which subordinate legislation may be assailed, which, inter alia, includes lack of legislative competence, violation of fundamental rights, violation of provisions of the Constitution, violation of parent statute, violation of any other law, and manifest arbitrariness. The contention is that all the criteria are satisfied in this case.

(b) **Hindustan Construction Company v. Union of India 2019 SCC Online 1520**, wherein, in the context of a challenge to Section 87 of the Arbitration and Conciliation Act, 1996, at paragraphs 56-57 and 75, the Supreme Court held that manifest arbitrariness is a ground to strike down legislation and, in the case at hand, the Master Circular is indeed manifestly arbitrary because it extinguishes liability.

(c) **State of Kerala v. Unni (2007) 2 SCC 265**, wherein the Supreme Court held that subordinate legislation does not enjoy the same degree of protection as an act of Parliament or legislature.

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(d) **Senior Superintendent v. Hissar Hussain (1989) 4 SCC 318**, wherein, at paragraph 4, the Supreme Court held that a statutory provision cannot be amended by executive instructions, and that arbitrariness is a ground to strike down such executive instructions.

(e) **Director General, NHAI v. Aam Aadmi, 2020 SCC Online SC 572**, wherein, at paragraphs 93-96, the Supreme Court held that unreasonableness and arbitrariness are grounds to strike down subordinate legislation.

(f) **J.Jayalalithaa v. State of Karnataka, (2014) 2 SCC 401**, where, at paragraph 27, the Supreme Court held that if a discretionary power is exercised for an unauthorized purpose, it cannot be sustained on the basis of good faith. Accordingly, RBI cannot justify the Master Circular by contending that it furthers public interest.

(g) **Internet and Mobile Association v. RBI 2020 SCC online SC 275 (the Cryptocurrency case)**, wherein, at paragraphs 224-228, the Supreme Court held that a Master Circular may be struck down on the basis of the doctrine of proportionality. Mr. Nithyaesh contended that this judgment cannot be relied upon to sustain the issuance of AT 1 Bonds under the Master Circular inasmuch as it deals with cryptocurrency, which is within the core currency regulation and management function of RBI. For the

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principle that a judgment is only a precedent for what it decides and not what may be inferred therefrom, he relied on paragraph 9 of *Padmasundara Rao v. State of Tamil Nadu* (2002) 3 SCC 533.

(h) **Magabhai Ishwarbhai Patel v. Union of India (1970) 3 SCC 400 (Maganbhai Patel)**, at paragraph 81, wherein the Supreme Court held that an exercise of legislative power whereby a citizen's right to property is infringed should be supported by legislation.

(iii) The BR Act confers power on the RBI as regards the issuance of capital under Section 12. Section 12 does not confer the power to issue the AT 1 Capital Bonds and such power cannot be exercised by taking recourse to Section 35 A of the BR Act. In support of this proposition, the following judgment was relied upon:

Dharani Sugars v. Union of India (2019) 5 SCC 220 (Dharani Sugars), wherein, in the context of a challenge to the constitutional validity of Sections 35AA and 35 AB of the BR Act and the Circular dated 12.02.2018, at paragraphs 26,40-42,62-63 and 72, the Supreme Court held that general powers under a statute should not be exercised when specific powers are conferred in respect of a particular issue by particular sections of that statute. On the facts of the case at hand, Section 12 deals with issuance of capital; and, in that context, Section 35 A,

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which is the general power to issue directions, cannot be relied upon to issue AT 1 Bonds, which are a form of capital.

(iv) RBI has only recommendatory power under Section 45 of the BR Act and it is only the Central Government which has the power to reduce or write-down the interest or liabilities of members, depositors and other creditors in terms of Section 45(5)(f) of the BR Act.

(v) The Master Circular is unconstitutional as it deprives the Petitioners of their property and does so by invidiously discriminating between AT 1 Bonds, which are a form of debt, and other forms of debt. Therefore, there is violation of Article 300 A of the Constitution of India. It also violates Article 14 because the AT 1 bond holders are discriminated against vis-a-vis other bond/debenture holders who are assured repayment of the debt under Section 71 of CA 2013. In support of these propositions, the following judgments, which are set out along with context and principle, were relied upon:

(a) **D.D. Basnett v. Collector (2020) 4 SCC 572**

(D.D. Basnett), wherein, in the context of acquisition of land for the Agriculture Department of the Government of Sikkim, at paragraphs 14-22, the Supreme Court held that the right to property is a constitutional right and that a

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person cannot be deprived of property rights except with the sanction of law.

(b) **Bishan Das v. State of Punjab, AIR 1961 SC 1570 (Bishan Das)**, wherein, in the context of the eviction of persons from Dharamsala land, at paragraphs 12,16 and 17, the Supreme Court held that property rights cannot be divested by executive fiat.

(c) **Lachham Das v. Jagat Ram (2007) 10 SCC 448 (Lachham Das)**, wherein, in the context of the Punjab Pre-emption Act, 1913, the Supreme Court held that a person cannot be deprived of property except in accordance with the provisions of a statute.

(d) **K.T. Plantations v. State of Karnataka, (2011) 9 SCC 1 (K.T.Plantations)**, wherein, in the context of Roerich and Devikarni Estate (Acquisition and Transfer) Act, 1966, at paragraphs 168,180-182, 190-192 and 212-221, the Supreme Court held that deprivation of property should be in accordance with law, fair, equitable and reasonable to pass muster under Article 300 A of the Constitution.

(e) **Mukesh Singh v. Benaras State Bank 2002 SCC online All 330**, at paragraphs 5-10, wherein, the Allahabad High Court held that deprivation of property should be through a non-arbitrary law to pass the test of Article 300 A of the Constitution.

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vi) The Master Circular violates CA 2013 which defines a debenture in Section 2(30) in an inclusive manner so as to include debentures, bonds and other securities evidencing a debt. As per Section 71(8), a company shall pay interest and redeem the debentures and, as per sub-section (10) and (12) thereof, a debenture holder is entitled to approach the National Company Law Tribunal [NCLT] or sue for specific performance, respectively, if a company fails to redeem the debentures on the date of their maturity. In addition, CA 2013 does not recognize the concept of irredeemable debentures whereas the AT 1 bonds are perpetual in character and, therefore, contrary to Section 71 of CA 2013.

In support thereof, the following judgment was relied upon:

Dr. S.K. Kacker v. All India Institute of Medical Sciences (1996) 10 SCC 734, wherein, at paragraph 12, the Supreme Court held that resolutions that are contrary to statutory rules have no legal efficacy.

(vii) In light of the permanent write-off of the AT 1 bonds by communication dated 14.03.2020, the issuance of these AT 1 bonds are without consideration. Therefore, both Section 23 and 25 of the Contract Act are violated. In support of this principle, the following judgments, which are set out along with context and principle, were relied upon:

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(a) **Jiwanlal Acharya v. Rameshwar Lal, AIR 1967 SC 1118 (Jiwanlal Acharya)**, wherein, in the context of the attempt to enforce a promissory note, at paragraph 8, the Supreme Court held that a bond is an instrument that obliges the obligor to pay the obligee the stipulated sum of money. Hence, such a debt cannot be extinguished by the Master Circular. In this connection, the definition of bond under Section 2(f) of the Indian Stamp Act, 1899, was relied upon to emphasize that it is a debt instrument with the inherent obligation on the borrower to repay.

(b) **State Bank of India v. Madhumita Constructions 2002 SCC Online Cal 410**, wherein, at paragraph 15.2, the definition of a debt under Section 2(g) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, was dealt with and it was held that a debt implies an inherent obligation to repay.

(viii) There can be no estoppel against law. Therefore, notwithstanding the terms of the AT 1 Bond issue, the Petitioners are entitled to contend that the permanent write-off is contrary to the Constitution and law. In support of this proposition, the following judgments were relied upon:

(a) **Union Territory, Chandigarh v. Managing Society, Goswami, (1996) 7 SCC 665**, wherein, at paragraph 4, the Supreme Court held that a contract in violation of mandatory provisions of law can be read and

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enforced only in terms of law and an equitable estoppel cannot be set up against law.

(b) **Director of Elementary Education v. Promod Kumar Sahoo (2019) 10 SCC 674**, wherein, at paragraph 11, the Supreme Court reiterated that there can be no estoppel against law.

(c) **Balakrishna S. v. Vithalbai C. (2010) 13 SCC 291**, wherein, at paragraph 10, the Supreme Court held that the terms of a contract can be read and enforced only in accordance with law.

(ix) The Draft Scheme of Reconstruction dated 06.03.2020 was recommended by the RBI to the Central Government. In paragraph 6, this draft scheme contained an express provision for the permanent write-down of the AT 1 capital issued by Yes Bank Limited. However, in the final Scheme of Reconstruction dated 13.03.2020, the clause enabling permanent write-down is conspicuously absent. Therefore, it is clear that the Central Government rejected the request for a permanent write-down of the AT 1 bonds.

THE RESPONDENTS' CONTENTIONS

15. The contentions of Mr.Giridharan, in reply, were as under:

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(i) The RBI is empowered under Section 35 A of the BR Act to issue directions in respect of banking companies and the power to issue the Master Circular dated 01.07.2015 is traceable to Section 35 A.

(ii) In exercise of executive power under Article 53 read with Article 73, the RBI's powers are co-extensive with that of Parliament.

(iii) The RBI Master Circular enables the issuance of both PNCPS and debt capital instruments/PDI for inclusion as AT1 capital.

(iv) In case of debt capital instruments, it is necessary that they comply with the requirements of Annex-4 and Annex-16 of the Master Circular in order to qualify as AT 1 capital. Annex-4 and 16 mandate that the bond should be: subordinate to deposits; not secured or guaranteed; perpetual; investors should not have a put option; and that the instruments should have loss absorption features either through conversion to common shares or a write-down mechanism which allocates losses to the instrument at a pre-specified trigger point.

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(v). After it was constituted under the RBI Act, the RBI stepped into the shoes of the Government of India and thereby became a member of BIS. The BIS was constituted under the Hague Agreement dated 17.05.1930.

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The BCBS was formed as a Committee under the BIS and the RBI is a constituent member of the BCBS.

(vi) Under the Basel Committee Charter, BCBS members agreed to implement and apply BCBS standards in their domestic jurisdiction within the pre-defined time frame established by BCBS. The Basel III original report of 2010 set out the elements of regulatory capital and the criteria for inclusion in AT1 Capital, which are the Basel III Capital Regulations. The RBI released the draft guidelines on 30.12.2011 to implement the Basel III Capital Regulations and consequently circulated the final Guidelines on 02.05.2012, in that regard, which came to be consolidated in the Master Circular. Therefore, the Master Circular is intended to implement the Basel III Capital Regulations by invoking Section 35 A of the BR Act.

(vii) Clause 6 (1) of the Reconstruction Scheme stipulates that, unless expressly provided otherwise, all contracts, bonds, deeds and other instruments shall continue to be effective in the same manner and to the same extent as was the case before the commencement of the Reconstruction Scheme. Therefore, the contractual right to permanently write-down the AT 1 bonds remained in force notwithstanding the deletion of the clause regarding

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permanent write-down of the AT 1 Bonds under the Reconstruction Scheme 2020.

(viii) CA 2013 applies to banking companies only to the extent the provisions are not inconsistent with the provisions of the BR Act, and this is expressly stipulated in Section 1(4)(c) thereof. As regards PDI, the RBI issued the Master Circular under Section 35 A of the BR Act in respect thereof and enabled banking companies to issue PDI with the features and characteristics described in Annex 4 and 16 of the Master Circular. To the extent that Section 2(30) read with Section 71 of CA 2013 is inconsistent therewith, the Master Circular would prevail.

(ix) With regard to the power of the RBI, he referred to **Internet and Mobile Association of India v. Reserve Bank of India 2020 SCC online SC 275 (the Cryptocurrency case)**, and, in particular, to paragraphs 17,167, 207 and 209 thereof, where the Supreme Court considered the membership of the RBI in the BIS, its power under the BR Act, including under Section 35 A, and held at paragraph 167 that the RBI's directives have statutory force and should be read as supplementing the BR Act.

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16. Mr. Karthik Seshadri pointed out that the Board of Directors of Yes Bank was reconstituted after the Reconstruction Scheme came into effect and that he represents the Bank under authorization from the Board. He contended that the Petitioners are market players who voluntarily assumed the risk of investing in instruments which may be permanently written-down upon occurrence of pre-specified triggers. In this case, such contingency undoubtedly arose and the decision to write-down the AT 1 bonds and restructure Yes Bank was taken at the highest level in the interest of the financial system, including, primarily, that of depositors.

QUESTIONS FOR CONSIDERATION

17. We considered the oral and written submissions of the learned counsel for the respective parties and examined the materials on record. Upon consideration of the rival submissions, keeping in mind the relief requested herein, the following questions arise for determination:

- i) Whether the Master Circular was issued without jurisdiction?
- ii) Whether the AT 1 bonds constitute capital or debt instruments?

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- iii) Whether the AT 1 bonds violate CA 2013?
- iv) Whether the Master Circular is liable to be declared *ultra vires*, void and invalid?
- v) Whether the AT 1 bonds violate the Contract Act or any other legislation?

DISCUSSION AND ANALYSIS

THE STATUTORY BASIS OF THE MASTER CIRCULAR

18. With regard to the Master Circular, the contention of Mr.Nithyaesh Natraj was that it was issued without jurisdiction or authority. This contention was raised on two grounds. The first ground is that the Master Circular was issued so as to comply with Basel III Capital Regulations and these regulations have not been enacted by Parliament under 253 of the Constitution. Although Mr.Giridharan initially contended that the Master Circular constitutes the RBI's endeavour to implement international law, he subsequently pointed out that the Basel III Capital Regulations were framed by the BCBS and that the RBI is a member of the BCBS as India's representative on the BIS. We concur with the contention of Mr. Nithyaesh Natraj that a treaty is enforceable under Indian law only after Parliament

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enacts a law to implement such treaty in terms of Article 253. Indeed, this question is no longer *res integra* and it is sufficient to refer to **Berubari Union** and **Kesoram Industries**. Nonetheless, from Clause 3 of the Basel Committee Charter, it is clear that the Charter does not create binding legal obligations on the members. However, the members, including the RBI, agreed to implement and apply the decisions of BCBS in the domestic jurisdiction within the predefined time frame established by BCBS. When the Master Circular is examined carefully to ascertain if it is a measure aimed at implementing a treaty or convention to which India is a party, we find that there is a reference therein to the G20 Pittsburg Summit and the decision by the G20 leaders to strengthen the regulatory system of banks. The Pittsburg Summit took place in September 2009. The Master Circular also draws reference to the BCBS report dated December 2010 entitled Basel III: A global regulatory framework for more resilient banks and banking systems and, significantly, refers to this as the Basel III Capital Regulations. Article 2(1)(a) of the Vienna Convention on the Law of Treaties, 1969 (the Treaties Convention), defines a treaty as under:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether

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embodied in a single instrument or in two or more related instruments and whatever its particular designation;

Although India has not ratified the Treaties Convention, on account of its widespread acceptance, as regards the fundamental concepts and principles contained therein, such as the definition of treaty, it has the status of customary international law. Article 253 of the Constitution of India empowers Parliament to make law to implement a treaty, agreement or convention with other countries or a decision taken at an international conference or association. Thus, if an agreement, treaty or convention had been executed at the Pittsburg Summit or even if a decision governed by international law was taken, there is no denying that the treaty obligations would not be enforceable on the domestic plane until Parliament enacts a law. But we are not dealing with a treaty or convention, which is governed by international law, that was signed at the Pittsburg Summit. Instead, we are dealing with a report prepared by BCBS more than a year later, which functions under a charter that makes it clear that its decisions do not have legal force and effect. Therefore, in light of Clause 3 of the Basel Committee Charter, Article 2(1)(a) of the Treaties Convention and, above all, the fact that

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the BCBS report is not an international treaty or convention, we conclude that the Master Circular is not a measure to implement international law because the Basel III Capital Regulations do not qualify as a treaty or convention. Instead, the Master Circular represents the RBI's endeavour towards implementing the BCBS standards in India, as committed by the RBI, in the BCBS. Thus, the validity of the Master Circular should be tested under Indian law and not with reference to Article 253.

19. As regards the power of RBI, in addition to Section 45, the RBI exercises power under various provisions of the BR Act, including Section 35 A. Section 35A is as under:

"Power of the Reserve Bank to give directions

(1) Where the Reserve Bank is satisfied that-

(a) in the public interest; or

(aa) in the interest of banking policy; or

(b) to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of depositors or in a manner prejudicial to the interests of the banking company; or

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(c) to secure the proper management of any banking company generally, it is necessary to issue directions to banking companies generally or to any banking company in particular; it may, from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.

(2) The Reserve Bank may, on representation made to it or on its own motion, modify or cancel any direction issued under sub-section (1), and in so modifying or cancelling any direction may impose such conditions as it thinks fit, subject to which the modification or cancellation shall have effect."

The scope and import of Section 35 A was considered in several judgments of the Hon'ble Supreme Court and reference may be made to some of them. In **Dharani Sugars**, the Supreme Court considered the scope of Section 35 A in paragraph 39, wherein it was held as under:

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"39.A cursory reading of Section 35-A makes it clear that there is nothing in the aforesaid provision which would indicate that the power of RBI to give directions, when it comes to the Insolvency Code, cannot be so given. The width of the language used in the provision which only uses general words such as "public interest" and "banking policy", etc. makes it clear that if otherwise available, we cannot interdict the use of Section 35-A as a source of power for the impugned RBI circular on the ground that the Insolvency Code, 2016 could not be said to have been in the contemplation of Parliament in 1956, when Section 35-A was enacted. Dr Singhvi's contention must, therefore, fail."

The above conclusion would apply with equal force to the AT 1 instruments that are the subject matter of the Master Circular. The question as to whether the directions under the BR Act are statutory was considered in **ICICI Bank Ltd. v. APS Star Industries Ltd. (2010) 10 SCC 1**, where it was held as follows in paragraph 35:

"35.Section 21 deals with the power of RBI to control advances by banking companies. Section 21 empowers RBI to frame policies in relation to advances to be followed by banking companies. It further says that once such policy is made all banking companies shall be bound to follow them.

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Section 21(1) is once again a general provision empowering RBI to determine policy in relation to advances whereas Section 21(2) empowers RBI to give directions to banking companies as to items mentioned there i.e. in Section 21(2). Under Section 21(3) every banking company is bound to comply with directions given by RBI at the peril of penalty being levied for non-compliance. Section 35-A says that where RBI is satisfied that in the interest of banking policy it is necessary to issue directions to banking companies it may do so from time to time and the banking companies shall be bound to comply with such directions. Thus, in exercise of the powers conferred by Sections 21 and 35-A of the said Act, RBI can issue directions having statutory force of law. Section 36 deals with further powers and functions of RBI. Under Section 39 it is RBI which shall be the Official Liquidator in any proceedings concerning winding up of a banking company."

In paragraph 167 of the **Cryptocurrency** case, the Supreme Court held that these directions are supplemental to the Act by holding as under:

167.Law is well settled that when RBI exercises the powers conferred upon it, both to frame a policy and to issue directions for its enforcement, such directions become supplemental to the Act itself. In *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India*, this court followed the decisions

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in *State of U.P. v. Babu Ram Upadhyaya and D.K.V. Prasada Rao v. Govt. of A.P.* to hold that Rules made under a statute must be treated as if they were contained in the Act and that therefore they must be governed by the same principles as the statute itself. Useful reference can also be made in this regard to the following observations in *ICICI Bank Ltd v. Official Liquidator of APS Star Industries Ltd*:

“40. When a delegate is empowered by Parliament to enact a policy and to issue directions which have a statutory force and when the delegatee (RBI) issues such guidelines (policy) having statutory force, such guidelines have got to be read as supplement to the provisions of the BR Act, 1949. The “banking policy” is enunciated by RBI. Such policy cannot be said to be *ultra vires* the Act.” (emphasis supplied)

Likewise, in **Peerless General Finance and Investment Co. Ltd. v. RBI (1992)2 SCC 343**, it was held, *inter alia*, as follows in paragraph 30:

30. Before examining the scope and effect of the impugned paragraphs (6) and (12) of the directions of 1987, it is also important to note that Reserve Bank of India which is bankers' bank is a creature of statute. It has large contingent of expert advice relating to matters affecting the economy of the entire country and nobody can doubt the bona fides of the Reserve Bank in issuing the impugned directions of 1987. The Reserve Bank plays an

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important role in the economy and financial affairs of India and one of its important functions is to regulate the banking system in the country. It is the duty of the Reserve Bank to safeguard the economy and financial stability of the country...."

Upon perusal of the aforesaid, it is clear that the RBI is empowered to issue directions under Section 35 A to secure the proper management of a banking company and we do not find any reason to read any fetters into this power given the statutory role of the RBI as the regulator of banks in India. The Master Circular is a measure to enhance capital adequacy of banks by raising the CRAR and ensuring that it is maintained at levels consistent with the financial stability of a bank not only at times of normalcy but also when the balance sheet of the bank concerned is under stress. Therefore, it cannot be said that the Master Circular is without jurisdiction.

20. We examined the Master Circular in light of the Basel III Original Report of December 2010. From the Basel III Original Report, it is clear that AT 1 Capital should fulfil specified criteria. As set out above, these criteria include the following features: these instruments should be subordinate to depositors, general creditors and the subordinated debt of the

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bank; neither secured nor covered by a guarantee; perpetual i.e. without a maturity date; without a put option; and callable by the issuer only after a minimum of five years subject to conditions such as the prior approval of the RBI. The instrument should also have principal loss absorption either through conversion to common shares or a write-down mechanism, both of which would be activated at a pre-specified trigger point.

21. The draft guidelines dated 30.12.2011 in relation to issuance of AT 1 instruments were in furtherance of and in conformity with the above criteria. This resulted in the Guidelines dated 02.05.2012 and eventually led to the Master Circular. Under the Master Circular, Indian banks were permitted to issue AT 1 Capital in the form of PNCPS, which satisfy the requirements of Annex 3; and debt capital instruments, which satisfy the requirements of Annex-4 and Annex-16. As stated earlier, Annex-4 and 16 stipulate that debt capital instruments should be perpetual, and therefore the terminology perpetual debt instruments (PDI); they should not have a put option; the call option should not be exercisable before at least five years and even thereafter only with the prior approval of the RBI. The PDI should have principal loss absorption either through conversion to common shares or write down mechanism which allocates losses at a pre-specified trigger point.

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22. Thus, all the conditions specified in the Basel III Report were introduced in the Master Circular and the AT 1 bonds were issued by Yes Bank Limited by incorporating all these conditions in the information memorandum. Although the Petitioners state that they purchased the AT 1 bonds in the secondary market, they cannot claim to be ignorant of the terms and conditions thereof. Significantly, the Petitioners contractually agreed to invest in an instrument which may be permanently written down, if a point of non-viability trigger is reached.

23. In this case, the moratorium was imposed by the Central Government as recommended by the RBI on 05.03.2020. Therefore, there is no doubt that the point of non-viability trigger was reached. Indeed, this is not disputed by the Petitioners. Pursuant thereto, the draft scheme of reconstruction was recommended by the RBI and approved by the Central Government resulting in the Reconstruction Scheme 2020. The final Reconstruction Scheme does not contain the clause dealing with permanent write-down although the said clause was present in the draft scheme of reconstruction. Therefore, the question arises as to whether the permanent

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write-down by communication dated 21.03.2020 is invalid or whether it is justifiable as per the Master Circular, the Information Memorandum and terms of issue of the AT 1 bonds by Yes Bank, and Clause 6 of the Reconstruction Scheme. However, it needs to be borne in mind that the validity of the communication dated 21.03.2020 is not impugned in this proceeding and separate proceedings were initiated in connection therewith. Therefore, we propose to confine our findings to the validity of the Master Circular.

DO AT 1 BONDS CONSTITUTE CAPITAL?

24. Given that we concluded that the RBI is empowered to issue the Master Circular, it remains to be considered as to whether enabling the issuance of AT 1 instruments, including AT 1 bonds, violates the Constitution or any other law. In order to answer this question, it is necessary to first determine the nature and character of AT 1 bonds. For this purpose, the first question to be examined is whether these AT 1 bonds could be considered as a part of the capital of a bank for all purposes. The Master Circular permits the issue of two principal forms of AT 1 capital, namely, PNCPS and PDI. As

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per the Information Memorandum, Yes Bank issued instruments described as unsecured perpetual subordinated Basel III compliant AT 1 bonds, which are PDI and not PNCPS. Indeed, they are referred to as debentures both in the Information Memorandum and the relevant trust deed. In order to qualify as share capital for purposes of CA 2013, there should be an issuance, subscription and paying-up of share capital. This would, in turn, be reflected as share capital in the balance sheet of the issuer company and the relevant return of allotment would be required to be filed. In this case, the AT 1 bonds are reflected as a borrowing, and not share capital, in the balance sheet of Yes Bank and this is in consonance with the Master Circular. If these instruments qualify as share capital, they would also have to fall within the scope of Section 43 of CA 2013 or Section 12 of the BR Act which provide for only two forms of share capital, namely, equity and preference. Moreover, the permanent write-down would have to comply with reduction of share capital requirements under Section 66 of CA 2013. Mr. Giridharan contended that it qualifies as a non-common equity capital instrument, which is another way of saying that it is not part of CET 1 but a part of Tier 1 capital. For reasons aforesaid, in our view, these instruments constitute regulatory capital but not share capital for purposes of CA 2013. Given the conclusion that it is not a

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part of share capital, we are of the view that Section 12 of the BR Act does not apply as regards AT 1 bonds. Consequently, the contention that Section 35 A of the BR Act cannot be relied upon to sustain the Master Circular by relying upon **Dharani Sugars** is untenable. Therefore, we conclude that the PDI do not constitute share capital for purposes of CA 2013.

DO THE AT 1 BONDS CONSTITUTE DEBENTURES PER CA 2013?

25. Having concluded that it is not share capital for purposes of CA 2013, is it a debt instrument? In our opinion, it is clear from the Master Circular that PDI are debt instruments. Indeed, they are required to be reflected as borrowings for accounting purposes. Mr.Giridharan contended that Section 129 of CA 2013 does not apply to banking companies and that banking companies are required to prepare and file financial statements as per Schedule III of the BR Act. However, this does not make any difference because even under Schedule III, AT 1 bonds are required to be classified as borrowings. He further contended that AT 1 bonds may be borrowings but they do not constitute a debt. This contention is required to be examined closely. If AT 1 bonds are classified as borrowings, would they qualify as debentures under CA 2013? The term debenture is defined in Section 2(30)

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of CA 2013 in an inclusive manner so as to cover debentures, bonds and other securities evidencing a debt. Section 71 of CA 2013 mandates that a debenture redemption reserve should be created in respect of debentures. However, it is the admitted position that the requirement of creating a debenture redemption reserve does not apply to banking companies as per the Companies [Share capital and Debentures] Rules 2014, and, in particular, Rule 18(7)(b)(i) which exempts banking companies from the requirement of creating a debenture redemption reserve fund. Nonetheless, Mr. Nithyaesh Natraj contended that it is necessary to repay the debentures as per Section 71(8) of CA 2013 and, in case of default, the debenture holder is entitled to approach the NCLT for repayment in terms of sub-section (10) thereof or to seek specific performance as per sub-section (12) thereof. On the contrary, Mr. Giridharan contended that CA 2013 applies to banking companies only to the extent that the provisions of CA 2013 are not inconsistent with the provisions of the BR Act. Section 1 (4) (c) of CA 2013 is relevant, in this regard, and is as under:

“The provisions of this Act shall apply to--

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(c) banking companies, except in so far as the said provisions are inconsistent with the provisions of the Banking Regulation Act, 1949 (10 of 1949);

Therefore, it should be examined as to whether AT 1 bonds qualify as debentures as per Section 2(30) read with Section 71 of CA 2013.

26. In light of the admitted position that a debenture redemption reserve is not necessary, the other aspect to be considered, in this regard, is the contention that CA 2013 does not provide for issuance of perpetual debentures. Mr. Giridharan contended that perpetual debentures were provided for under Section 120 of CA 1956 and that CA 1956 was in force when the first circular on AT 1 bonds was issued. He also pointed out that CA 2013 applies to banking companies only to the extent that it is not inconsistent with the BR Act. Because the Master Circular was issued in terms of Section 35 A of the BR Act, he contended that in case of inconsistency between the two laws, CA 2013 would not apply. We find that CA 2013 does not deal with or proscribe the issuance of perpetual debentures, in its substantive provisions.

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27. From the Master Circular, it is clear that both PNCPS and debt instruments/PDI may be issued as AT 1 instruments provided they fulfill the criteria specified therein. These features include a perpetual duration, the absence of a put option, the absence of security or guarantee and, most importantly, loss absorption at a pre-specific trigger point. From these features, it is clear that the only reason instruments such as the AT 1 bonds are permitted to be included in Tier I capital is because they are treated like and equated with equity share capital or CET 1 inasmuch as the holders of such AT 1 instruments cannot demand repayment of their investment in the same manner as the CET 1 shareholders cannot demand a buy-back. To put it differently, it is only on account of these features and characteristics that such instruments are permitted to be included as Tier 1 regulatory capital for purposes of enabling a bank to fulfill CRAR requirements. Otherwise, the banks would be required to raise their CET 1 capital to the extent necessary for meeting CRAR requirements. Thus, the above features, and, in particular, loss absorption upon occurrence of a pre-specified trigger event, are the *raison d'etre* of AT 1 bonds. When all the above aspects are reckoned, we find that there is inconsistency between the provisions of the Master Circular,

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which qualify as statutory rules, and the provisions relating to debentures in CA 2013. We previously concluded that the RBI is empowered to issue the Master Circular under Section 35 A of the BR Act, and the status of the RBI as a premier statutory regulator with wide-ranging powers was recognized in the **Cryptocurrency case**. For all the reasons set out above, we conclude that the AT 1 bonds do not constitute a debenture as defined in 2(30) and as dealt with in Section 71 of CA 2013. Consequently, we are inclined to accept the contention of Mr. Giridharan that the Master Circular prevails over CA 2013 and that the AT 1 bonds are not required to satisfy the requirements of CA 2013 to the extent of inconsistency with the Master Circular.

NATURE OF AT 1 BONDS

28. It remains to be considered whether the AT 1 bonds constitute debt and, if so, what are the implications thereof. As stated earlier, we are of the view that it is regulatory capital for purposes of meeting CRAR requirements. However, for all other purposes, it is a borrowing as is evident from the Master Circular itself. Nonetheless, from the various features and characteristics of AT 1 bonds, in our view, it is a particular form of borrowing, wherein the only enforceable debt obligation is the payment of the coupon

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rate provided it is not written-down. To put it differently, the investor does not have the right or even the option to demand repayment of the principal, albeit it may be repaid by the issuer by exercising the call option after not less than 5 years subject to conditions, including the prior approval of the RBI. Another defining characteristic of this form of borrowing is that it can either be converted into equity shares or written-down fully or partially upon occurrence of a point of non-viability trigger.

29. Therefore, the AT 1 bonds are borrowings in which the investor/lender does not have a put option or an actionable right to the repayment of the principal. The indebtedness of the issuer is confined to the liability to discharge coupon/interest rate payment obligations until write-down or conversion. As regards the liability to repay the principal, it is a contingent indebtedness actionable subject to conditions by the borrower but not by the lender. In light of the above discussion, we are of the view that the judgments in **Jeevan Lal Acharya** and **Madhumitha Constructions** with regard to the nature of bonds and the repayment obligation that characterizes such instruments are inapplicable to AT 1 bonds. Hence, we conclude that the AT 1 bonds constitute a *sui generis* borrowing/debt instrument which, *inter*

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alia, may be extinguished upon the occurrence of a pre-specified trigger event or a point of non-viability.

THE CONSTITUTIONAL CHALLENGE

30. Given the nature and characteristics of AT 1 bonds, it should be examined whether the Master Circular that enables the issuance of such instruments violates the Constitution. Several judgments, such as **P. Krishnamurthy, Hindustan Construction Company and Director General, NHAI**, were cited to buttress the contention that a subordinate legislation may be struck down on the grounds of legislative incompetence, violation of fundamental or constitutional rights, violation of parent statute or any other law and manifest arbitrariness. These principles are fundamental and unexceptionable. Therefore, the Master Circular should be tested on these standards. The learned counsel for the Petitioners also relied on judgments, such as **K.T. Plantations, D.D. Basnett, Bishan Das and Lachham Das**, in support of the proposition that the Master Circular violates Article 300 A of the Constitution because it enables the deprivation of property. There can be no quarrel with the proposition laid down in those judgments and it is for that reason that the power of eminent domain can only be exercised in terms of

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and in accordance with law. However, in the case at hand, we are not dealing with expropriation. Instead, the controversy centres on statutory directions under Section 35 A of the BR Act that enable the issuance of AT 1 instruments, which constitute a particular form of property. This form of property, by its terms, permits a permanent write-down upon the occurrence of specified contingencies. In private law, many forms of proprietorship are recognized. By way of illustration, a lease confers interest in property but the lessee can agree, by contract, to the unilateral termination of the lease by the lessor even on "without cause and without fault" basis. Even in the context of sale, as per the TP Act, only absolute restraints on the rights of a purchaser are void. Thus, in our view, the Master Circular is not a subordinate legislation that deals with compulsory acquisition or expropriation. On the contrary, it deals with a form of investment instrument with an inherent inability to demand repayment of the principal. Therefore, we conclude that Article 300 A of the Constitution is not violated.

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31. Dilating further on this theme, we note that the law recognizes many forms of lending and borrowing. For example, the Insolvency and Bankruptcy Code, 2016, classifies lenders into operational and financial

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creditors and their rights in insolvency resolution vary markedly. Even under CA 2013, in case of liquidation, the rights of secured creditors, unsecured creditors and crown debts all stand on a different footing under the waterfall mechanism. We previously concluded that AT 1 bonds constitute a distinct class, which is *sui generis*, and therefore cannot be compared with standard forms of debt. On this issue, it is pertinent to bear in mind that the Master Circular is a form of subordinate economic legislation by an expert statutory body for the purpose of ensuring capital adequacy and, in such context, the case for greater legislative latitude and judicial restraint is compelling as held in several judgments such as **State of Gujarat v. Shri Ambika Mills (1974) 4 SCC 656; R.K. Garg v. Union of India (1981) 4 SCC 675; Government of Andhra Pradesh v. P. Lakshmi Devi (2008) 4 SCC 720; and Swiss Ribbons Pvt. Ltd. v. Union of India (2019) 4 SCC 17**. In order to elucidate the above principle, it is sufficient to set out excerpts from **R.K. Garg** and **Swiss Ribbons**. Paragraph 8 of **R.K. Garg** is set out below:

8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some

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play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in *Morey v. Doud* [351 US 457 : 1 L Ed 2d 1485 (1957)] where Frankfurter, J., said in his inimitable style: “In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.”

The Court must always remember that “legislation is directed to practical problems, that the economic

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mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry”; “that exact wisdom and nice adaption of remedy are not always possible” and that “judgment is largely a prophecy based on meagre and uninterpreted experience”. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture v. Central Roig Refining Company* [94 L Ed 381 : 338 US 604 (1950)] be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing,

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it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.

Paragraphs 51 and 120 of **Swiss Ribbons** exemplify the same approach and are as under:

"51. Most importantly, financial creditors are, from the very beginning, involved with assessing the viability of the corporate debtor. They can, and therefore do, engage in restructuring of the loan as well as reorganisation of the corporate debtor's business when there is financial stress, which are things operational creditors do not and cannot do. Thus, preserving the corporate debtor as a going concern, while ensuring maximum recovery for all creditors being the objective of the Code, financial creditors are clearly different from operational creditors and therefore, there is

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obviously an intelligible differentia between the two which has a direct relation to the objects sought to be achieved by the Code."

"120. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole. Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners."

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Therefore, we conclude that the differential treatment meted out to AT 1 bonds vis-a-vis other forms of debt is a reasonable classification with a strong rational nexus to the object as would be evident from the preceding paragraphs. Thus, Article 14, 19 and 21 of the Constitution are not violated.

DO THE AT 1 BONDS VIOLATE ANY OTHER LAW?

32. As regards the contention that the AT 1 bonds violate Section 25 of the the Contract Act, in our view, this contention cannot be countenanced. The AT 1 bonds are perpetual debt instruments that provide for a coupon rate. Accordingly, the investors in the AT 1 bond are entitled to receive interest periodically throughout the perpetual tenure unless written-down or converted. From the facts on record, it appears that the predecessors-in-title of the Petitioners received interest and the Petitioners may have received interest at least on 18.10.2018. Even if we proceed on the basis that an estoppel does not operate against the Petitioners on account of receiving interest by relying on judgments such as **Director of Elementary Education and Union Territory, Chandigarh**, it cannot be said that these AT 1 bonds do not carry consideration. For this reason, we also reject the contention that it is a gift and that it violates the requirements of a valid gift under the TP Act.

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We are also not inclined to accept the contention that it violates public policy (section 23 of the Contract Act) and it must be borne in mind that these AT 1 bonds play an important role in ensuring that banks satisfy CRAR requirements. Indeed, from a public interest perspective, the higher the CRAR, the greater the safety and the lower the risk as regards depositors of a bank.

33. From the Petitioners' perspective, there is no doubt that they are put to heavy losses on account of the permanent write-down of these AT 1 bonds. However, all investors in AT 1 bonds were informed about the features of these bonds by way of disclosures in the information memorandum. In spite of such disclosure, the Petitioners and other investors chose to run the risk of investing in an instrument with loss absorption features. Mr.Nithyaesh Natraj contended that the shareholders of Yes Bank Ltd. have been permitted to go scot-free inasmuch as the equity share capital is not written down. This contention is not tenable because one of the features of AT 1 Bonds is that they can be written-down before the equity shares bear losses. Clause 2.3 of Annex 16 of the Master Circular specifies as under:

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"The write-down of any CET 1 capital shall not be required before a write-down of any AT 1 capital instrument.(emphasis added)

Besides, as per clause 2.6 of Annex 16 of the Master Circular, the aggregate amount to be written-down/converted for all AT1 instruments on breaching the trigger level must be at least the amount needed to immediately return the bank's CET1 ratio to the trigger level or, if this is not possible, the full principal value of the instruments. Further, the issuer should have full discretion to determine the amount of AT1 instruments to be converted/written down subject to the amount of conversion/write-down not exceeding the amount which would be required to bring the CET1 ratio to 8% of RWAs (minimum CET 1 of 5.5% + capital conservation buffer of 2.5%). As is evident from the foregoing, the whole purpose of instruments such as the AT 1 bonds is to shore-up the CRAR, at normal times, because they qualify as Tier 1 capital and once the point of non-viability trigger is reached, the write-down of these bonds reduces the liability of the issuer as a proportion of the risk adjusted assets, and thereby boosts the CRAR.

CONCLUSION

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34. Therefore, we conclude that the AT 1 bonds do not violate CA 2013, the BR Act, the Contract Act or any other legislation. We further conclude that the RBI is authorized to issue the Master Circular in terms of the BR Act. Given the nature and characteristics of AT 1 bonds, which was disclosed to investors such as the Petitioners, in our view, these AT 1 bonds constitute a distinct class and therefore it is not tenable to contend that Article 14, 19, 21 and 300 A of the Constitution are violated. In the result, the Petitioners fail to make out a case to declare the Master Circular as unconstitutional or otherwise invalid.

EPILOGUE

35. Before parting with the case, without prejudice to the conclusions herein, we find ourselves constrained to make a few observations. The Master Circular permits participation by retail investors but the Yes Bank AT 1 bond issue does not appear to permit such participation. Nonetheless, the Petitioners participated in the secondary market and it appears from the documents on record that the trade was duly completed and the names of the Petitioners seem to be reflected in the records of the depository, CDSL. The present imbroglio, in our view, makes out a case for

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RBI to revisit the Master Circular as regards direct retail participation in instruments that carry such high risk. In addition, in co-ordination with the Securities and Exchange Board of India, measures may be taken to avert retail participation when the terms of issue do not permit the same. While making these observations, we are conscious that ultimately it is for the RBI to take a calibrated decision on carrying out a risk-benefit analysis.

36. For the reasons set out above, the writ petition fails and the same is dismissed. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

(A.P.S.,C.J.) (S.K.R.,J.)
30.09.2020

Speaking Order

Index :Yes

Internet :Yes

kal

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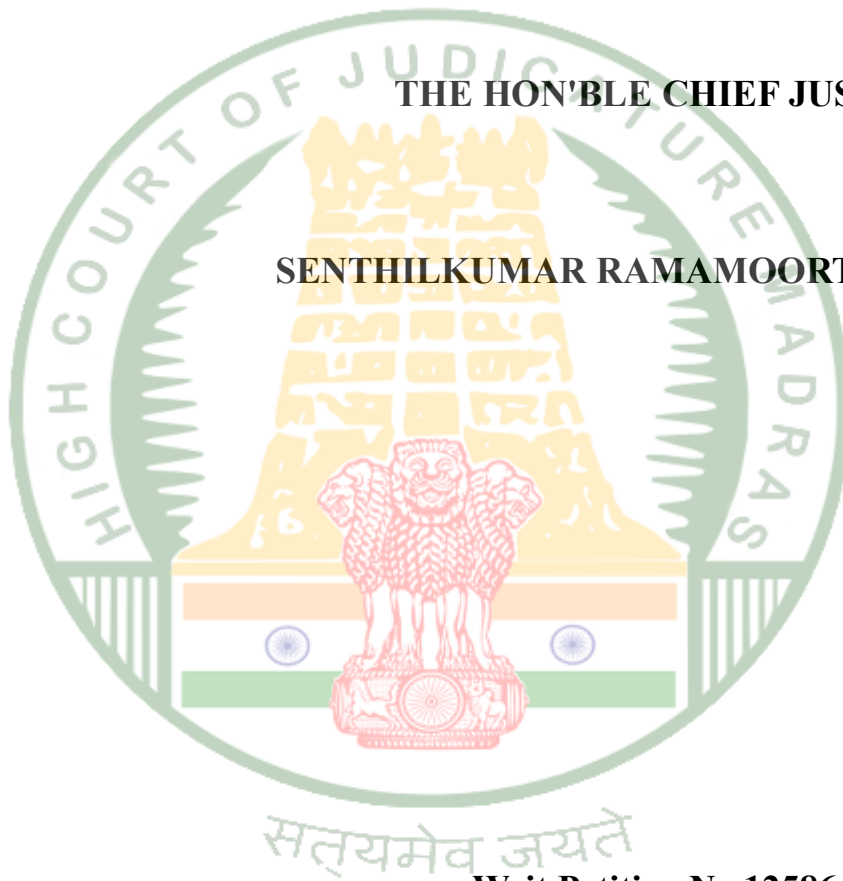
To

1. Reserve Bank of India,
No.16, Rajaji Salai, Fort Glacis,
Chennai-600 001, Tamil Nadu.
2. Administrator of Yes Bank Ltd.,
(Appointed by the Reserve Bank of India)
having his office at 9th Floor,
Nehru Centre, Discovery of India,
Ar.A.B.Road, Worli, Mumbai-400 018.
3. Yes Bank Limited,
having its registered office at 9th Floor,
Nehru Centre, Discovery of India,
Dr.A.B.Road, Worli, Mumbai-400 018.

सत्यमेव जयते

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THE HON'BLE CHIEF JUSTICE

and

SENTHILKUMAR RAMAMOORTHY J.,

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Writ Petition No.12586 of 2020

&

W.M.P.Nos.15519 & 15524 of 2020

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30.09.2020

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THE HON'BLE CHIEF JUSTICE

Having gone through the exhaustive and point-wise analysis made by my esteemed colleague, Brother Justice Senthilkumar, there is no facet of the dispute that has remained untouched and, therefore, I find myself entirely in agreement with the views expressed therein, but since certain additional arguments have been advanced once again by Mr.Nithyaesh Natraj, learned counsel for the petitioners and replied to by Mr.P.Giridharan on behalf of the Reserve Bank of India, I have attempted a supplement to the conclusions drawn by my esteemed Brother.

2. At the outset, it may be recorded that the Offer Letter/Disclosure Document/Information Memorandum issued by

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the Yes Bank, and as supplied to the Court by the learned counsel, in response whereto the petitioners are stated to have made their investments, is in respect of an instrument, which is described in Clause 5.18(2) of the document as follows:

5.18. Issue Details

	Security Name	
1		
2	Type of Instrument	Perpetual Subordinated Unsecured BASEL III compliant Additional Tier I Bonds in the nature of debentures of Rs.10,00,000 each (each a "Bond" or "Debenture").

3. The same clause containing the issue details enlists the Nature of Instrument, as also the Seniority/Order of claim of the said bonds. Clauses 5.18(3) and (4) are extracted herein under:

	Security Name	
3.	Nature of Instrument	Unsecured The bonds are neither secured nor covered by a guarantee of the Bank nor related entity or other arrangements that legally or economically enhances the seniority of the claim vis-a-vis other creditors of the Bank. Bondholders will not be entitled to receive notice of or attend or vote at any meeting of shareholders of issuer or participate in management of issuer.
4.	Seniority/Order of claim of Additional Tier I instruments	The claims of the Bondholders in the Bonds shall: (i) be superior to the claims of investors in equity shares and perpetual non-cumulative preference shares issued by the Bank; (ii) be subordinated to the claims of depositors, general creditors and subordinated debt of the

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	Security Name	
		Bank other than any subordinated debt qualifying as Additional Tier 1 Capital (as defined in the Basel III Guidelines); (iii) neither be secured nor covered by a guarantee of the Issuer or its related entity or other arrangement that legally or economically enhances the seniority of the claim vis -à-vis creditors of the Bank; (iv) be pari passu with claims of holders of such subsequent debentures/bond issuances of the Bank, unless the terms of any subsequent issuance of bonds/debentures by the Bank specifies that the claims of such existing and subsequent bond holders are senior or subordinate to the Bonds issued under this Disclosure Document or unless the RBI specifies otherwise in its guidelines; (v) rank pari passu without preference amongst themselves. Notwithstanding anything to the contrary stipulated herein, the claims of the Bondholders shall be subject to the provisions of "Coupon Discretion", "Loss Absorbency" & "Other Events" mentioned in this Disclosure Document. The Bonds shall not contribute to liabilities exceeding assets of the Bank if such a balance sheet test forms part of a requirement to prove insolvency under any law or otherwise

4. While defining the Objects of the Issue, the Details of Utilization of Funds, the Coupon Rate, Clauses 11, 12 and 13 stipulate as under:

	Security Name	
11	Objects of the Issue	Augmenting Additional Tier 1 Capital and overall capital of the Bank for strengthening its capital adequacy and for enhancing its long-term resources in accordance with RBI Guidelines.
12	Details of Utilization of Funds	The Bank shall utilize the proceeds of the issue for augmenting Additional Tier 1 Capital and overall capital base and for the purpose of its

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	Security Name	
		regular business activities & other associated business objectives.
13	Coupon Rate	9.50% p.a. subject to "Coupon Discretion" and/or "Loss Absorbency" (as the case may be). Please note that if the RBI and Central Government decide to reconstitute the Bank or amalgamate the Bank with any other bank under the Section 45 of Banking Regulation Act, 1949, or upon PONV, debentures may be converted into equity shares or written off in line with extant RBI guidelines. In the event that the Debentures are converted into equity shares, then the holders thereof, shall only be entitled to the same rights as any other common equity share holder of the company, including in relation to dividend payable, and will not be entitled to any coupon thereon. For more information in relation to the circumstances under which the Debentures can be converted into equity, please refer to paragraph 56 herein below.

5. There are other terms and conditions that are enlisted in the said offer letter, the contents whereof are not disputed by either of the parties.

6. There is another important feature which is contained in Clause 55 of Loss Absorbency, followed by Point of Non-Viability in Clause 56. For the present purpose, Clause 56 is extracted herein under:

	Security Name	
56	PONV	Without the need of the consent of Bondholders or Trustee, the Bonds (including all claims,

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	Security Name	
		demands on the Bonds and interest thereon, whether accrued or contingent), at the option of the RBI, can be permanently written down or converted into common equity, upon the occurrence of the trigger event called "Point of Non-Viability Trigger" ("PONV Trigger") The PONV Trigger event is the earlier of: (i) a decision that a permanent write-off without which the Bank would become non-viable, as determined by the Reserve Bank of India; and (ii) the decision to make a public sector injection of capital, or equivalent support, without which the Bank would have become non-viable, as determined by the relevant authority. The amount of non-equity capital to be converted/ written-off will be determined by RBI. The Write-off of any Common Equity Tier 1 capital shall not be required before the write-off of any Non-equity (Additional Tier 1 and Tier 2) regulatory capital instrument. The order of write-off of the Bonds shall be as specified in the order of seniority as per this Information Memorandum and any other regulatory norms as may be stipulated by the RBI from time to time. The Bonds can be converted or written-down multiple times in case the Bank hits the PONV Trigger Level subsequent to the first conversion or write-down. The Bonds which has been written off shall not be written up. Such a decision would invariably imply that the write-off or issuance of any new shares as a result of conversion consequent upon the trigger event must occur prior to any public sector injection of capital so that the capital provided by the public sector is not diluted. The Bondholders shall not have any residual claims on the Bank (including any claims which are senior to ordinary shares of the Bank), following any trigger event. In any case it should be noted that following writing-off or conversion of the instruments and claims and demands as noted above neither the Bank, nor any other person on the Bank's behalf shall be required to compensate or provide any relief, whether absolutely or contingently, to the

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	Security Name	
		Bondholder or any other person claiming for or on behalf of or through such holder and all claims and demands of such persons, whether under law, contract or equity, shall stand permanently and irrevocably extinguished and terminated. Unless otherwise specified in this Information Memorandum, the write-off of any common equity or any other regulatory capital (as understood in terms of the aforesaid circular or any replacement/amendment thereof), whether senior or pari passu or subordinate, and whether a Tier 1 capital or otherwise shall not be required before the write-off of any of the Bonds and there is no right available to the Bondholder hereof or any other person claiming for or on behalf of or through such holder to demand or seek that any other regulatory capital be subject to prior or simultaneous write-off or that the treatment offered to holders of such other regulatory capital be also offered to the Bondholders. For these purposes, the Bank may be considered as non-viable if: The Bank which, owing to its financial and other difficulties, may no longer remain a going concern on its own in the opinion of the RBI unless appropriate measures are taken to revive its operations and thus, enable it to continue as a going concern. The difficulties faced by the Bank should be such that these are likely to result in financial losses and raising the Common Equity Tier 1 capital of the Bank should be considered as the most appropriate way to prevent the Bank from turning non-viable. Such measures would include write-off / conversion of non-equity regulatory capital into common shares in combination with or without other measures as considered appropriate by the Reserve Bank. The Bank facing financial difficulties and approaching a PONV will be deemed to achieve viability if within a reasonable time in the opinion of RBI, it will be able to come out of the present difficulties if appropriate measures are taken to revive it. The measures including augmentation of equity capital through write off of Bonds/conversion/ public sector injection of funds are likely to:

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	Security Name	
		a. Restore depositors'/investors' confidence; b. Improve rating /creditworthiness of the Bank and thereby improve its borrowing capacity and liquidity and reduce cost of funds; and c. Augment the resource base to fund balance sheet growth in the case of fresh injection of funds. The trigger at PONV will be evaluated both at consolidated and solo level and breach at either level will trigger write-off.

7. These clauses are being mentioned only for an illustration to indicate the involvement of the Reserve Bank of India and the steps that can be taken by it.

8. One of the salient features of the offer document is Section 3, which describes risk factors, which indicates the options available to the bank itself for taking steps, the terms whereof are categorized.

9. It is in this background that the petitioners are stated to have acquired these bonds.

10. The nature of the issue is based on the Basel III Capital Regulations, and the Reserve Bank of India had released the draft guidelines way back on 30.12.2011, followed by the circular of the

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same date, and followed by another circular dated 2.5.2012. The Additional Tier I Capital has been described to be an instrument based on global liquidity standards and the details whereof are contained in Basel Committee on Banking Supervision Report issued in December, 2010, published by the Bank for International Settlements.

11. The aforesaid facets are necessary to understand the background in which the challenge has been raised to the impugned Master Circular, which in turn refers to the Basel III Reforms on Capital Regulation. The said Regulations have been made effective from 1.4.2013, but the Master Circular under challenge in the present case is dated 1.7.2015, that consolidates all the instructions in respect of Basel III Capital Regulations. The Circular bereft of the enclosures is extracted herein under:

"RBI/2015-16/58"

DBR.No.BP.BC.1/21.06.201/2015-16

July 1, 2015

*All Scheduled Commercial Banks
(Excluding Local Area Banks
and Regional Rural Banks)*

Madam / Sir,

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Master Circular – Basel III Capital Regulations

Please refer to the Master Circular No.DBOD.BP.BC.6/21.06.201/2014-15 dated July 1, 2014, consolidating therein the prudential guidelines on capital adequacy issued to banks till June 30, 2014.

2. As you are aware, Basel III Capital Regulations are being implemented in India with effect from April 1, 2013 in a phased manner. *This Master Circular consolidates instructions on the above matters issued up to June 30, 2015.*

3. The Basel II guidelines as contained in the Master Circular DBOD.No.BP.BC.4/21.06.001/2015-16 dated July 1, 2015 on 'Prudential Guidelines on Capital Adequacy and Market Discipline-New Capital Adequacy Framework (NCAF)' may, however, be referred to during the Basel III transition period for regulatory adjustments / deductions up to March 31, 2017."

12. The enclosure that is relevant for the purpose of the present controversy is Part A thereof containing the guidelines on Minimum Capital Requirement, followed by other provisions that have been appended thereto, but more particularly Annexure 16, which contains Clause 2.15 and other provisions relating to permanent writing-off.

13. The primary ground of attack to the Master Circular is on the ground that it does not have the sanction of law and its issuance is neither traceable to any power under Section 35A of the

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Banking Regulation Act, 1949, nor any action taken in terms of Section 45 of the 1949 Act.

14. Learned counsel for the petitioners has advanced oral arguments and has also submitted three sets of the summary of arguments dated 11.9.2020, 21.9.2020 and 24.9.2020.

15. The contention which I propose to deal with is that in order to enforce a Convention/International Agreement, the same can be done only by framing a law as envisaged under Article 253 of the Constitution of India. Article 253 is extracted herein under:

"Article 253. Legislation for giving effect to international agreements.—

Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

16. It is urged that the Master Circular is not an outcome of any law in terms of Article 253 of the Constitution of India, in as much as the Basel III Capital Regulations, being an outcome of the Pittsburgh Summit, even if construed to be an international

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agreement, cannot be enforced by a subordinate legislation in the nature of a circular, unless the Parliament enacts a law to that effect. For this, the learned counsel for the petitioners has cited several decisions, but this Court refers to a couple of them: (i) the judgment in the case of **Maganbhai Ishwarbhai Patel etc. v. Union of India and another, (1970) 3 SCC 400**, which in turn refers to the other decisions that have been cited at the bar, and (ii) a Division Bench judgment of the Bombay High Court in the case of **Karan Dileep Nevatia v. Union of India and others, 2010 SCC Online Bom 23**. There cannot be a dispute on that proposition of law, but what appears on the facts of the present case is whether the said Master Circular qualifies as a valid document in terms of Section 35A of the 1949 Act or not.

17. When it comes to such activities relating to banking, the observations made by the Supreme Court in the case of **Internet and Mobile Association of India v. Reserve Bank of India, 2020 SCC Online SC 275** cannot be lost sight of. This issue has been dealt in the report of the said judgment from paragraph 167 onwards. It is apposite to extract paragraphs 167 to 173 herein under:

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"167. Law is well settled that when RBI exercises the powers conferred upon it, both to frame a policy and to issue directions for its enforcement, such directions become supplemental to the Act itself. In *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India*, (1992) 2 SCC 343 this court followed the decisions in *State of U.P. v. Babu Ram Upadhyaya*, AIR 1961 SC 751 and *D.K.V. Prasada Rao v. Govt. of A.P.*, AIR 1984 AP 75, to hold that Rules made under a statute must be treated as if they were contained in the Act and that therefore they must be governed by the same principles as the statute itself. Useful reference can also be made in this regard to the following observations in *ICICI Bank Ltd v. Official Liquidator of APS Star Industries Ltd*, (2010) 10 SCC 1:

'40. When a delegate is empowered by Parliament to enact a policy and to issue directions which have a statutory force and when the delegatee (RBI) issues such guidelines (policy) having statutory force, such guidelines have got to be read as supplement to the provisions of the BR Act, 1949. The "banking policy" is enunciated by RBI. Such policy cannot be said to be ultra vires the Act.'

(emphasis supplied)

168. In his treatise on *Administrative Law*, Durga Das Basu, Ch.4, Page 121, 6th Edition, 2004, states:

'The scope of judicial review is narrowed down when a statute confers discretionary power upon an executive authority to make such rules or regulations or orders 'as appear to him to be necessary' or 'expedient', for carrying out the purposes of the statute or any other specified purpose. In such a case, the check of ultra vires vanishes for all practical purposes inasmuch as the determination of the necessity or expediency is taken out of the hands of the Courts and the only

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ground upon which Courts may interfere is that the authority acted mala fide or never applied his mind to the matter, or applied an irrelevant principle in making a statutory order.'

(emphasis supplied)

169. In *Jayantilal Amrit Lal Shodhan v. F.N. Rana*, AIR 1964 SC 648 the majority pointed out that there can be no assumption that the legislative functions are exclusively performed by the legislature, executive functions by the executive and judicial functions by the judiciary alone. The court indicated that the Constitution has not made an absolute or rigid division of functions between the three agencies of the state and that at times the exercise of legislative or judicial functions are entrusted to the executive. A very important observation made by the Constitution Bench in *Jayantilal (supra)* was as follows:

".....in addition to these quasi-judicial and quasi-legislative functions, the executive has also been empowered by statute to exercise functions which are legislative and judicial in character and in certain instances, powers are exercised which appear to partake at the same moment of legislative, executive and judicial characteristics."

170. In *Shri Sitaram Sugar Co. Ltd. v. Union of India*, (1990) 3 SCC 223 the Constitution bench of this court held that whether an order is characterized as legislative or administrative or quasi-judicial or whether it is a determination of law or fact, the judgment of the expert body entrusted with power is generally treated as final and the judicial function is exhausted when it is found to have "warrant in the record" and a rational basis in law.

171. It must be pointed out that the power of RBI is not merely curative but also preventive. This is acknowledged by

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this court in Ganesh Bank of Kurunwad Ltd. v. Union of India, (2006) 10 SCC 645 where it was held that RBI has a right to take pre-emptive action taking into account the totality of the circumstances.

'It is not that when there is a run on the bank then only RBI must intervene or that it must intervene only when there are a good number of court proceedings against the bank concerned. RBI has to take into account the totality of the circumstances and has to form its opinion accordingly.'

172. *The impugned Circular is intended to prohibit banking companies from entering into certain territories. The Circular is actually addressed to entities regulated by RBI and not to those who do not come within the purview of RBI's net. But the exercise of such a power by RBI, over the entities regulated by it, has caused a collateral damage to some establishments like the petitioners', who do not come within the reach of RBI's net.*

173. *The power of a statutory authority to do something has to be tested normally with reference to the persons/entities qua whom the power is exercised. The question to be addressed in such cases is whether the authority had the power to do that act or issue such a directive, qua the person to whom it is addressed. While persons who suffer a collateral damage can certainly challenge the action, such challenge will be a very weak challenge qua the availability of power."*

18. Thereafter, the Apex Court in paragraphs 200 to 209 of the said report has opined as under:

"VI. Different types of VCs require different treatments

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200. Drawing our attention to a Report by the European Parliament under the caption 'Cryptocurrencies and Blockchain', released in July 2018, it is contended by Shri Ashim Sood, learned Counsel for the petitioners that all virtual currencies are not fully anonymous. While some, such as Dash and Monero are fully anonymous, others such as Bitcoin are pseudo-anonymous. Therefore, it is contended that banning transactions only in fully anonymous VCs could have been a better and less intrusive measure. An identical argument is advanced by Shri Nakul Dewan learned Senior Counsel for the petitioners, with reference to a report of October 2012 of the European Central Bank on "Virtual Currency Schemes". According to the said Report, Virtual Currency schemes can be classified into three types, depending upon their interaction with traditional real money and real economy. They are (i) closed virtual currency schemes basically used in an online game (ii) virtual currency schemes having a unidirectional flow (usually an inflow), with a conversion rate for purchasing the virtual currency which can subsequently be used to buy virtual goods and services, but exceptionally also to buy real goods and services and (iii) virtual currency schemes having a bidirectional flow, where they act like any other convertible currency with two exchange rates (buy and sell) which can subsequently be used to buy virtual goods and services as well as real goods and services.

201. Let us first deal with Shri Nakul Dewan's submission. In the very same October 2012 Report of the European Central Bank, it is accepted that virtual currencies (i) resemble money and (ii) necessarily come with their own dedicated retail payment systems. These two aspects are indicated in the Report to be covered by the term "Virtual Currency Scheme".

....

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VIII. RBI's decisions do not qualify for Judicial deference

206. It is contended by Shri Ashim Sood, learned Counsel for the petitioners that the impugned Circular does not have either the status of a legislation or the status of an executive action, but is only the exercise of a power conferred by statute upon a statutory body corporate. Therefore, it is his contention that the judicial rule of deference as articulated in *R.K. Garg v. Union of India*, (1981) 4 SCC 675, *BALCO Employees' Union (Regd.) v. Union of India*, (2002) 2 SCC 333, and *Swiss Ribbons Pvt. Ltd. v. Union of India*, (2019) 4 SCC 17 will not apply to the decision taken by a statutory body like RBI. If, a legislation relating to economic matters is placed at the highest pedestal, an executive decision with regard to similar matters will be placed only at a lower pedestal and the decision taken by a statutory body may not even be entitled to any such deference or reverence.

207. **But given the scheme of the RBI Act, 1934 and the Banking Regulation Act, 1949, the above argument appears only to belittle the role of RBI. RBI is not just like any other statutory body created by an Act of legislature. It is a creature, created with a mandate to get liberated even from its creator.** This is why it is given a mandate - (i) under the Preamble of the RBI Act 1934, to operate the currency and credit system of the country to its advantage and to operate the monetary policy framework in the country (ii) under Section 3(1), to take over the management of the currency from the central government (iii) under Section 20, to undertake to accept monies for account of the central government, to make payments up to the amount standing to the credit of its account and to carry out its exchange, remittance and other banking operations, including the management of the public debt of the Union (iv) under Section 21(1), to have all the money, remittance, exchange and banking transactions in India of the central government

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*entrusted with it (v) under Section 22(1), to have the sole right to issue bank notes in India and (vi) under Section 38, to get rupees into circulation only through it, to the exclusion of the central government. **Therefore, RBI cannot be equated to any other statutory body that merely serves its master. It is specifically empowered to do certain things to the exclusion of even the central government. Therefore, to place its decisions at a pedestal lower than that of even an executive decision, would do violence to the scheme of the Act.***

208. On the primary question of switching over to judicial "silent mode" or "hands off mode", qua economic legislation, it is not necessary to catalogue all the decisions of this court such as *State of Gujarat v. Shri Ambica Mills Ltd.*, (1974) 4 SCC 656, *G.K. Krishnan v. Tamil Nadu*, (1975) 1 SCC 375, *R. K. Garg v. Union of India (supra)*, *State of M.P. v. Nandlal Jaiswal*, (1986) 4 SCC 566, *P.M. Ashwathanarayana Setty v. State of Karnataka*, 1989 Supp (1) SCC 696, *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India (supra)*, *T.Velayudhan v. Union of India*, (1993) 2 SCC 582, *Delhi Science Forum v. Union of India*, (1996) 2 SCC 405, *Bhaves D. Parish v. Union of India*, (2000) 5 SCC 471, *Ugar Sugar Works Ltd. v. Delhi Administration*, (2001) 3 SCC 635, *BALCO Employees' Union (Regd.) v. Union of India (supra)*, *Govt. of Andhra Pradesh v. P. Laxmi Devi*, (2008) 4 SCC 720, *Villianur Iyarkkai Padukappu Maiyam v. Union of India*, (2009) 7 SCC 561, *D.G. of Foreign Trade v. Kanak Exports*, (2016) 2 SCC 226, *State of J&K v. Trikuta Roller Flour Mills Pvt. Ltd.*, (2018) 11 SCC 260, and *Pioneer Urban Land and Infrastructure Ltd. v. Union of India*, (2019) 8 SCC 416, **as the entire history of the doctrine of deference from Lochner Era has been summarized by this court in Swiss Ribbons Pvt. Ltd. v. Union of India (supra).** In fact, even the learned Counsel for the petitioners is ad idem

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with the learned Senior Counsel for RBI that economic regulations require due judicial deference. The actual argument of the learned Counsel for the petitioners is that such deference may differ in degree from being very weak in respect of the decision of a statutory authority, to being very strong in respect of a legislative enactment.

209. But as we have pointed out above, RBI is not just any other statutory authority. It is not like a stream which cannot be greater than the source. The RBI Act, 1934 is a pre-constitutional legislation, which survived the Constitution by virtue of Article 372(1) of the Constitution. The difference between other statutory creatures and RBI is that what the statutory creatures can do, could as well be done by the executive. The power conferred upon the delegate in other statutes can be tinkered with, amended or even withdrawn. But the power conferred upon RBI under Section 3(1) of the RBI Act, 1934 to take over the management of the currency from the central government, cannot be taken away. The sole right to issue bank notes in India, conferred by Section 22(1) cannot also be taken away and conferred upon any other bank or authority. RBI by virtue of its authority, is a member of the Bank of International Settlements, which position cannot be taken over by the central government and conferred upon any other authority. Therefore, to say that it is just like any other statutory authority whose decisions cannot invite due deference, is to do violence to the scheme of the Act. In fact, all countries have central banks/authorities, which, technically have independence from the government of the country. To ensure such independence, a fixed tenure is granted to the Board of Governors, so that they are not bogged down by political expediencies. In the United States of America, the Chairman of the Federal Reserve is the second most powerful person next only

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*to the President. Though the President appoints the seven-member Board of Governors of the Federal Reserve, in consultation with the Senate, each of them is appointed for a fixed tenure of fourteen years. Only one among those seven is appointed as Chairman for a period of four years. As a result of the fixed tenure of 14 years, all the members of Board of Governors survive in office more than three governments. Even the European Central Bank headquartered in Frankfurt has a President, Vice-President and four members, appointed for a period of eight years in consultation with the European Parliament. World-wide, central authorities/banks are ensured an independence, but unfortunately Section 8(4) of the RBI Act, 1934 gives a tenure not exceeding five years, as the central government may fix at the time of appointment. Though the shorter tenure and the choice given to the central government to fix the tenure, to some extent, undermines the ability of the incumbents of office to be absolutely independent, the statutory scheme nevertheless provides for independence to the institution as such. **Therefore, we do not accept the argument that a policy decision taken by RBI does not warrant any deference.***

19. The aforesaid observations of the Apex Court, therefore, impels the Court to adopt the said reasoning, as the combined effect of adoption of the Basel III Regulations by the Reserve Bank of India in banking activities is prevalent since 2011, and it was categorically mentioned in the document of offer, against which the petitioners made investments. The petitioners, therefore, by their conduct have acquiesced to the said obligations without

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demur, and, as a matter of fact, the said contract has been acted upon, as the petitioners from their own documents appear to have received interest for one year. The intention of the petitioners, bereft of the subsequent action taken by the Central Government, and the Bank being now run under a Scheme, cannot have any impact so as to dilute or dissolve the rights and obligations that have been created under a document, which is now sought to be questioned when intimation of writing off has been given to the petitioners by the bank. This Court does not have to opine on the consequential action, as it is under challenge in a separate writ petition, but a challenge to the Master Circular on constitutional grounds may not be possible, as due deference has to be observed in the light of the Apex Court pronouncement referred to above.

20. The argument of the learned counsel for the petitioners is that there cannot be any estoppel against statute, and if there is no law made by the Parliament to backup the issuance of the Master Circular, then, in that event, the Master Circular cannot survive, as it cannot take away legal rights of the petitioners, which otherwise can be sustained in law.

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21. In the opinion of the Court, the Master Circular has a binding effect, as admittedly the petitioners are investors after the Circular had come into effect and they have with open eyes undertaken risks of making financial investments through instruments, the composition whereof is self-explanatory and would operate with binding force on the petitioners.

22. The nature of the instrument did provide an opportunity of profitable venture, but at the same time, the terms and conditions of the risks involved substantially economize the rights of the investors in AI Tier Bonds. The potential nature of the instrument had its inherent risks. It was a composite package that simultaneously offered a substantial rate of interest, but at the same time a status of uncertainty of the principal capital in the event of non-viability. The instrument of offer itself contains clear recitals that the Reserve Bank of India would have the authority to write-off. This is evident from the extracts that have been quoted above. Thus, to raise the argument to the level of the Reserve Bank of India not being possessed of legal authority stands curtailed by the recitals contained in the offer of instrument itself that were accepted by the petitioners without demur.

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23. The flip side of the coin is that if the argument on behalf of the petitioners about the legal incapacity of the Reserve Bank of India to issue the Master Circular is accepted, then the entire investment through the offer of instrument would be without authority of law and, therefore, this argument would amount to something like dismembering the same branch of a tree on which one is sitting. The entire edifice of the transaction from its very inception will fall through. The submissions, therefore, would lead to an inevitable result, if the said argument is accepted, to a point that would even destroy any future claims, including the rights which the petitioners may or may not have in a challenge raised to the intimation of writing off by the bank, which is subject matter of a different set of proceedings.

24. It is well said by Horace that "**Riches either serve or govern the possessor**". It is not that the petitioners have been caught by surprise, but the transaction is an entire outcome of their own acquiescence in order to achieve higher prospects.

25. The petitioners have urged that a judgment should not

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be relied on without discussing as to how the factual situation fits in, for which reference has been made to the Constitution Bench judgment in the case of ***Padma Sundara Rao (Dead) and others v. State of Tamil Nadu and others, (2002) 3 SCC 533***. There is no dispute with the said proposition, but the judgment in the case of ***Internet and Mobile Association of India*** (supra), in paragraphs extracted herein above, explains the level of deference of judicial review in such matters. The said judgment, therefore, cannot be said to have laid down a ratio that is alien to the issue involved on the facts of the present case.

26. It has then been submitted that a treaty entered into by India cannot become law of land and cannot be implemented unless Parliament passes a law as required under Article 253 of the Constitution of India. Paragraphs 490 to 492 and 494 of the judgment of the Apex Court in the case of ***State of West Bengal v. Kesoram Industries Ltd., (2004) 10 SCC 201***, has been relied on. It has already been indicated above that there cannot be a dispute with the aforesaid proposition, but applying the said law on the facts of the present case, in view of what has been said

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above and in the judgment of my esteemed colleague, does not arise at all.

27. A challenge has been raised on the ground that subordinate legislation can be questioned on several grounds, including manifest arbitrariness and unreasonableness, apart from being invalid on account of being unsupported in law.

28. In the instant case, the petitioners having accepted the terms and conditions of issue cannot turnaround and say that the conditions are unreasonable. What they now say is that the Master Circular suffers from manifest arbitrariness and unreasonableness. This Court does not see as to how in a matter of investment, can the investor raise an issue of the absence of authority of law, when the bank itself while issuing the instrument of offer had made it clear that the power was available with the Reserve Bank of India to write-off the capital under the instrument, and the investments were made on such conditions existing. To this, the argument of the learned counsel for the petitioners is that the investments are property and, therefore, writing-off the investment will violate Article 300A of the Constitution of India.

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29. I entirely agree with my Brother on this issue that this is not an act of expropriation of property so as to attract Article 300A of the Constitution of India. The principal amount invested itself is capable of losing its value on its own even if the Master Circular is not applied. Thus, the challenge to the Master Circular on constitutional grounds is a challenge in vain, and this Court, therefore, finds it necessary to defer all judicial review on such grounds in the light of the principles laid down by the Apex Court in the case of **Internet and Mobile Association of India** (supra).

30. The validity of the Master Circular, therefore, in the background above cannot be said to be violating the fundamental rights of the petitioners. The action taken by the Reserve Bank of India on the strength of the circular dated 1.7.2015 cannot be crucified on any constitutional ground, so as to pulverize the Master Circular and thereby nullifying the impact of a prompt action that has been taken in larger public interest by the Reserve Bank of India. An action based on public policy for the good of public purpose on universally accepted principles should not be jettisoned at the instance of those who had not objected to the terms and

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conditions of the offer instrument and had rather proceeded to reap the dividends therefrom. This Court was desirous on first impressions to be persuaded by the arguments led on behalf of the petitioners, but on closer scrutiny, this Court finds it to be against the conclusions drawn herein above, which this Court considers a better judgment.

31. None of the rights of the petitioners under Part III of the Constitution of India are impinged either violating their right to trade in business or their right to equality. They, as investors in AI Tier Bonds, form a different class by themselves, who cannot be allowed to approbate and reprobate by finding fault with the Master Circular, may be they can question the correctness of the consequential action on grounds which are not subject matter of the present writ petition.

32. The nature of A1 Tier Bonds did make an offer which made the petitioners mentally rich, but that was subject to a financial adventurous journey that was subject to risks and hazards that were attached with the nature of the transaction itself. Their desire to be possessed of speculative wealth was circumscribed and

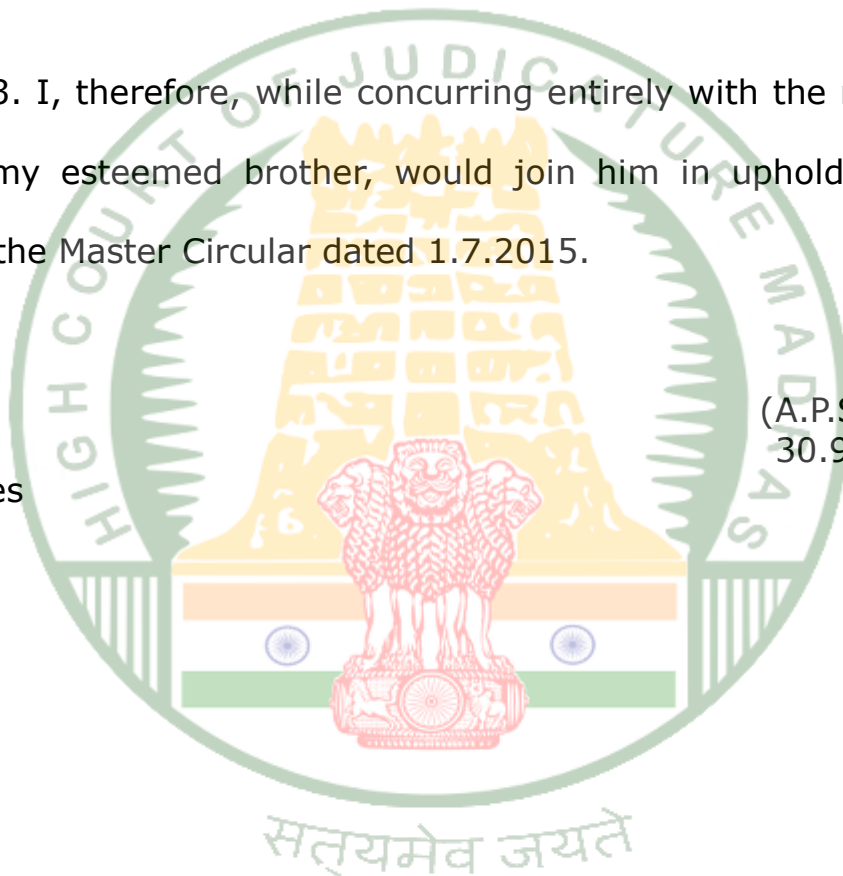
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hedged by lawful limitations that were not unknown to them or to commercial transactions of this nature. Any tinkering with the impugned circular on a liberal note may be not only against the present cause, but may have adverse impacts otherwise.

33. I, therefore, while concurring entirely with the reasons given by my esteemed brother, would join him in upholding the validity of the Master Circular dated 1.7.2015.

(A.P.S., CJ.)
30.9.2020

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sasi

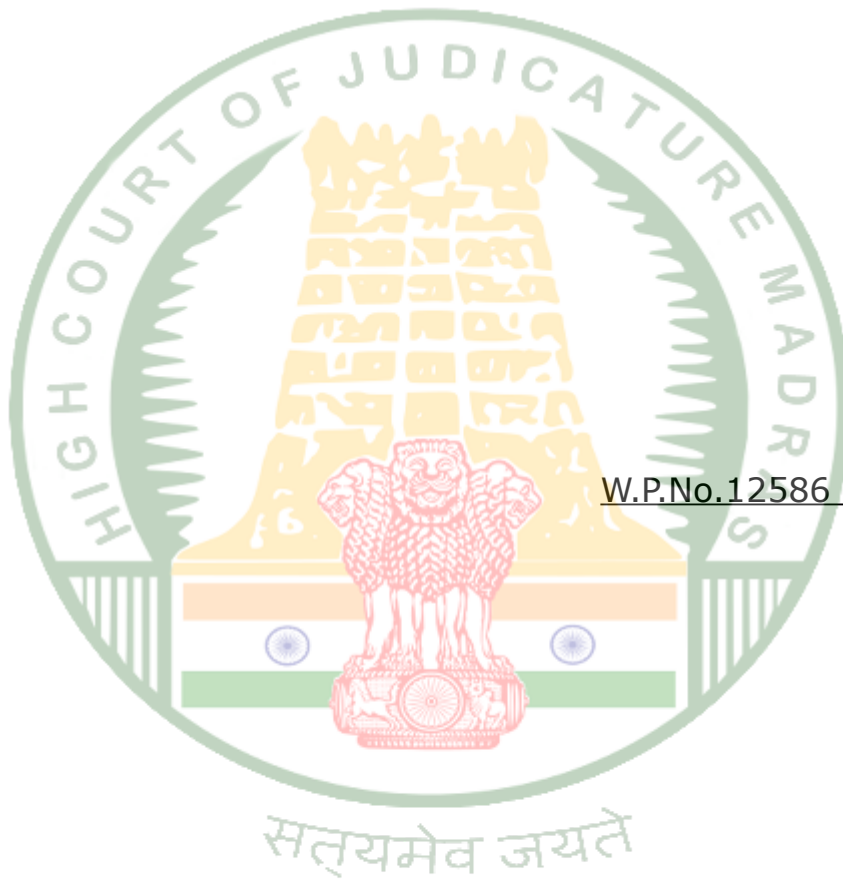


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THE HON'BLE CHIEF JUSTICE
AND
SENTHILKUMAR RAMAMOORTHY,J.

(sasi)



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