**Ghanta Infrastructures Ltd., a Company Incorporated Under the Provisions of Companies Act Being Represented by Its Director M. Raghuveer Vs. Asset Reconstruction Company (India) Ltd., (Arcil), a Company Incorporated Under the Companies Act, 1956 Represented by Its Chairman and Managing Director, Mr. S. Khasnobis and 5 ors.**

**Ghanta Infrastructures Ltd., a Company Incorporated Under the Provisions of Companies Act Being Represented by Its Director M. Raghuveer Vs. Asset Reconstruction Company (India) Ltd., (Arcil), a Company Incorporated Under the Companies Act, 1956 Represented by Its Chairman and Managing Director, Mr. S. Khasnobis and 5 ors.**

**SooperKanoon Citation** : sooperkanoon.com/423449

**Court** : Andhra Pradesh

**Decided On :** Jan-23-2008

**Reported in** : 2008(2)ALT611

**Judge** : P.S. Narayana, J.

**Acts** : Banking Regulation Act, 1941 - Sections 22 and 22(3); Assam Control Order, 1961; Bombay Tenancy Act, 1939; Company Court Rules, 1959 - Rule 79; Constitution of India - Articles 12, 14, 19(1), 32, 226 and 300A; Code of Criminal Procedure (CrPC) , 1973 - Sections 313; Enforcement of Security Interest and Recovery of the Debts Laws (Amendment) Act, 2004; Evidence Act, 1872 - Sections 78(2) and 81; Companies Act, 1956 - Sections 4A, 81, 91, 100, 190, 224 to 233, 235 to 351, 391-394, 433, 617, 619 and 643; Companies Act, 1913 - Sections 153; Indian Contract Act, 1872 - Sections 172; Industrial Courts Act, 1919; Industries (Development and Regulation Act, 1951; International Finance Corporation (Status, Immunities and Privileges) Act, 1958; Madras Agriculturalists' Relief Act; Recovery of

**Appeal No.** : W.P. No. 8223 of 2007

**Appellant** : Ghanta Infrastructures Ltd., a Company Incorporated Under the Provisions of Companies Act Being Repr

**Respondent** : Asset Reconstruction Company (India) Ltd., (Arcil), a Company Incorporated Under the Companies Act,

**Advocate for Def.** : S.R. Ashok, Adv. for 1st Respondent, ;Ranjeet Kumar, Adv. for 2nd Respondent, ;S. Ravi, Adv. for 3rd Respondent, ;C.V. Mohan Reddy, Advocate General for 5th Respondent and ;E. Manohar, Adv. for 6th Re

**Advocate for Pet/Ap.** : Uday Lalit, Adv.

**Disposition** : Petition dismissed

**Judgement** :

ORDER

**P.S. Narayana, J.**

1. This Court issued rule nisi on 19-4-2007.

2. Counter affidavits, additional affidavits and reply affidavits were filed and written arguments also were submitted in addition to the submissions made by the respective Counsel in open Court. Certain subsequent events also were brought to the notice of the Court and apart from the material papers initially placed, additional material papers as well had been placed before this Court.

3. M/s. Ghanta Infrastructure Limited, a Company incorporated under the provisions of the Companies Act, represented by its Director Sri M. Raghuveer, filed the present Writ Petition for a Writ of Mandamus declaring the proceedings ARG-II/PJ/FY07/04568 dated 12-12-2006 and the consequential proceedings ARG 1/PJ/FY07/04730 dated 22-12-2006 of the 1st respondent as illegal, arbitrary and violative of Article 14 of the Constitution of India and consequently to direct the 1st respondent to accept the bid of the petitioner in respect of the business and assets of the 3rd respondent and to pass such other suitable orders.

4. The 1st respondent is Asset Reconstruction Company (India) Ltd., (in short hereinafter referred to as 'ACRIL'). The 2nd respondent is Mr. S. Khasnobis and 3rd respondent is Spectrum Power Generation Limited. The 4th respondent is Dr. A.V. Mohan Rao, 5th respondent is Pinnacle Overseas Assets Ltd., represented by its Managing Director. 6th respondent is Lehman Brothers Commercial Corporation Asia Limited, Hong Kong.

5. The stand taken by the respondents 1 and 2 virtually is the same. The 3rd respondent also had taken similar stand just akin to the stand taken by respondents 1 and 2. The 4th respondent is not contesting the matter. Respondents 5 and 6, though represented by different Counsel, in substance, the stand taken by them appears to be the same. No doubt it is contended on behalf of the 6th respondent that the 6th respondent in fact is an unnecessary party.

6. Sri Uday Lalit, the learned senior Counsel representing the writ petitioner while making elaborate submissions had taken this Court through the affidavits, counter affidavits, reply affidavit and also the relevant material papers placed before this Court. The learned Counsel also had taken this Court through different provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter in short referred to as 'Act' for the purpose of convenience). While making elaborate submissions, the learned senior Counsel would maintain that the stand taken by the respondents that the Writ Petition is not maintainable on the ground that the 1st respondent is neither an authority nor a State within the meaning of Article 12 of the Constitution of India, cannot be a sustainable ground since if the functions, obligations and the powers of the 1st respondent, if carefully examined, these being powers flowing out of the statutory provisions conferred by different provisions of the statute, this lis would fall within the realm of Public Law and hence the writ petitioner is entitled to invoke Article 226 of the Constitution of India. The learned senior Counsel also would maintain that the 1st respondent is bound to follow the provisions of the Act and also the guidelines of the Reserve Bank of India. The learned senior Counsel while further elaborating his submissions had specifically pointed out to Sections 9 and 13 of the Act and also placed strong reliance on several decisions to substantiate his stand that the Writ Petition is maintainable. The learned Counsel also pointed out to the relevant definitions, viz., Section 2(a), 2(b), 2(c) and 2(d) and also Sections 3 and 5 of the Act. The learned Counsel also made elaborate submissions relating to source test, functional test and off-set test and would maintain that a Private Authority discharging Public functions, also is amenable to writ jurisdiction and the best test would be the 'functional test'. Incidentally, the learned senior Counsel laid emphasis on the 'off set test' as well. These may be cases of the lenders and borrowers and contractual obligations, but there is departure from normal Law. The learned senior Counsel also explained the object of the reconstruction companies and the statutory mechanisms and also explained how this entity should not have been brought into existence at all, but for the statute. The Counsel also laid stress on the aspect that it may not be the character of the body which may be relevant but the character of the duties, functions and obligations of a particular entity which may have to be carefully examined. The learned senior Counsel laid all emphasis on the public interest and the depositors interest involved in such matters. The learned Counsel also explained how the decision of the Five Judge Bench approving a particular view to be preferred in preference to the Judgments of the Benches of lesser strength. The learned senior Counsel also distinguished the decisions on which reliance was placed by the Counsel representing the

respondents. While further proceeding with his submissions, the learned Counsel also would maintain that Reserve Bank of India had not issued any guidelines for sale of the business of the borrowers under Section 9(b) of the Act and under Clause 7(2) of the Securitisation Companies and Reconstruction of Companies (Reserve Bank) Guidelines and Directions 2003, only the Reserve Bank of India issues such guidelines, the measures under Section 9(b) of the Act not to be taken and hence in the absence of the same, any proceeding or any action taken by the 1st respondent to be held to be illegal and even in the light of the same, the learned Counsel would maintain that the Writ Petition is perfectly maintainable. The learned senior Counsel also explained the unreported decision of the Mumbai High Court in W.P. No. 417/2005. While touching the other merits of the matter, the learned senior Counsel repeatedly laid emphasis that on a comparative basis, the offer made by the writ petitioner is a better offer at any stretch of imagination and pointed out several arithmetic calculations and made an attempt to demonstrate before this Court that on a comparison of the offers of the writ petitioner and the respondents 5 and 6 as well, which offer can be said to be a better offer. In all fairness, the learned senior Counsel would maintain that in the realm of contractual field, when a writ Court is called upon to decide the relative merits and demerits relating to the offers, the power of judicial review is no doubt very limited, but however the learned senior Counsel would stress upon that what is being called in question is the decision making process and no general proposition as such can be laid down that in relation to contractual field what ever may be the illegalities pointed out, a Writ Petition is not maintainable. The learned senior Counsel pointed out that accepting the 5th respondent as a successful bidder despite the fact that the 5th respondent was not a bidder at all initially is an incurable illegality. The learned senior Counsel also pointed out to the relevant portions of the proceedings and how the 1st respondent in a way was anxious to help the respondents 5 and 6. The learned senior Counsel also laid emphasis on the aspect that the bid of the respondents 5 and 6 is a conditional one and the same is contrary to the terms and conditions. There is no final bid offer or bid submitted either by the 5th respondent or the 6th respondent. The Wednesbury's principle had been elaborated and several decisions governing the field also had been cited. The learned senior Counsel in a meticulous way had taken this Court through the relevant proceedings, the relevant dates and also how with a view to help the 5th respondent, there had been delay in communication. The Invitation for Expression of Interest (hereinafter in short referred to as 'I.E.I.') and the treatment given to the petitioner in this regard, is unjust and unfair. The contents of the initial offer and the revised offer and the news item in Economic Times also had been pointed out. The learned senior Counsel also made an attempt to demonstrate how the 1st respondent acted beyond the terms of the invitation and would maintain that when the basic tenet of the initial offer is not conditional, the approval of a conditional offer in relation to the additional capacity, especially when such offer is contingent upon getting approval for expansion of the project, preferring such offer ignoring the offer of the writ petitioner cannot be sustained. The learned senior Counsel also pointed out how there are no approvals to the agreement and no acceptable material is placed to show how the 3rd respondent-Spectrum Power Generation Ltd., (in short hereinafter referred to as 'SPGL') in performing these obligations and unfortunately these form part and parcel of the definitive agreement. The learned senior Counsel also explained the time which may be taken in the event the offer of the petitioner being accepted or the offer of the 5th respondent being accepted. For reasons best known, the five years period had been given a go-bye in the case of the 5th respondent. The decision to be within the prescribed norms and parameters and when the decision making authority had transgressed the said limits, the decision making process is vitiated and the same to be declared as unfair and irrational. The learned senior Counsel also explained that in the initial bidding process, there were four parties and the 6th respondent also was one of them and no one knows at what stage the 5th respondent had intervened and why such favouritism had been shown in favour of the 5th respondent and this action does not stand to any reason or convincing rationale. The learned senior Counsel also specifically pointed out to the words 'any other law for the time being in force...' in Section 9 of the Act. While commenting on the aspect of delay, the learned senior Counsel pointed out that if the dates are carefully scrutinized and the events are followed, there is no delay in approaching this Court and even otherwise, the delay is not so inordinate so as to throw out the Writ Petition on the ground of laches. While further commenting on the fait accompli test the learned senior Counsel explained that the subsequent actions after filing of the Writ Petition cannot be taken as a

protective umbrella to ward off the attack of the writ petitioner when the grounds raised are sustainable grounds. The learned senior Counsel also explained the relationship between Kishan Rao and Raghuveer and also had taken this Court through the relevant portion of the order of the Company Court and would maintain that the dispute before the Company Court would stand totally on a different footing and the question to be decided by the writ Court being totally different, the adverse observations, if any of the learned Company Judge may not have any impact while deciding the present Writ Petition. Even otherwise, the learned senior Counsel would contend there are no observations made by the Company Judge in relation to the questions raised in the present Writ Petition. The learned senior Counsel also pointed out that the offer is not segregable and further pointed out the default clauses and also laid emphasis on the aspect that as can be seen from the proceedings, it is clear that the bidder is not making any payment to ARCIL and the 5th respondent to give corporate guarantee and also explained relating to the primary liability and the secondary liability as guarantor and the role of the 5th respondent and the 3rd respondent as well in this regardand would maintain that this would definitely go to show that the offer of the writ petitioner is a better offer. While concluding, the learned senior Counsel commented that the writ petitioner approached the Court at the earliest point of time and prayed for an interim order and while issuing rule nisi, notice had been ordered and the Writ Petition has been pending and this act of the Court i.e., pendency of the Writ Petition, not to cause prejudice to the petitioner and if otherwise the Court is satisfied that the writ petitioner is entitled for the reliefs prayed for, the Writ Petition to be allowed.

7. Sri S.R. Ashok, the learned senior Counsel representing the 1st respondent had explained paid up capital, accumulated losses and the secured share holders interest not to be paid and how there is total raising of equity loans and the secured creditors. The learned senior Counsel would maintain that this is a commercial transaction and the 1st respondent would be the best judge to decide in between the bidding bidders as to which offer is proper and it is not for the parties to dictate the terms. The learned senior Counsel also demonstrated how auctions can be made without interest and how auctions were made with interest and how the amounts under A, B, C not to go into D at all. The relevant Clauses also had been explained. The learned senior Counsel also pointed out to the relevant paras of the counter affidavit and also the relevant paras of the affidavit filed in support of the Writ Petition. While comparing the conditions and also the offers, the learned senior Counsel would contend that there is sufficient assurance from the 5th respondent when compared to the writ petitioner. The learned Counsel also pointed out to the relevant paras of the order made by the learned Company Judge and had pointed out the observation that even before the Company Judge, no better offer had been made by the writ petitioner. This is simply a matter relating to the creditor and debtor relationship and the remedy if any, can be only under the Private Law and this dispute would not fall under the Public Law domain. The learned Counsel also explained several factual issues and further placed reliance on certain decisions.

8. Sri Ranjeet Kumar, the Senior learned Counsel representing the 2nd respondent virtually adopting the submissions of the 1st respondent as well, further made elaborate submissions. The learned senior Counsel explained that the relief prayed for in the present Writ Petition is a discretionary relief and the credentials of the 3rd respondent and the credentials of the writ petitioner had been considered and the said credentials also had been taken into consideration. The learned senior Counsel also had explained the relationship between Kishan Rao and Raghuveer and would maintain that this would be a old wine in new bottle and ARCIL may not be getting any money. Further the proceedings also had been pointed out. The learned senior Counsel pointed out that the petitioners Company is concerned with a special purpose vehicle and Kishan Rao and sons being erstwhile promoters, they cannot be made responsible again. The learned senior Counsel also pointed out that the petitioner did not make a better offer even before the Company. Further, the petitioner did not approach the Court immediately. There is acquiescing of and fait accompli also would come into place. The learned senior Counsel also had given the relevant dates in relation to the Board Meeting, Extraordinary General Body Meeting, filing of the suit and the granting of the interim order and the vacation thereof and how the decision had been taken. While further elaborating his submissions, the learned senior Counsel pointed out that Raghuveer is the son of Kishan Rao and similar objections were raised in the Company

Petition and the learned Company Judge in fact decided the matter under Section 91 of the Indian Companies Act 1956. In elaboration, the learned senior Counsel had taken this Court through the relevant portions of the order and would maintain that the Writ Petition in a way became infructuous since the Scheme had been approved by the learned Company Judge though the very same objections had been raised. The learned senior Counsel also compared the offers and explained how the offer made by the 5th respondent would be a better offer. The subsequent events which had taken place even thereafter had been explained in elaboration. The learned senior Counsel also pointed out the requirements - the Company to be a debt-free Company, zero equity Company and there must be complete control over the Company. The preference shares would carry interest of 5% which would be payable to the share holders. Further, restructuring of the capital would be a better bid. The learned senior Counsel demonstrated the final offer made by the petitioner and how no interest is being added and how the offer made by the 5th respondent stands on a better footing where interest is payable. The learned senior Counsel also explained that ARCIL had been registered under the Indian Companies Act 1956. Section 9 of the Act is an enabling provision and by virtue of Section 37 of the Act, the application of other Laws is not barred. Sections 9 and 37 of the Act are to be read together. The 1st respondent is neither a State nor an Authority since it is not even a Government Company within the meaning of Section 617 of the Indian Companies Act 1956. It is in relation to the enforcement of the contractual obligations and nothing beyond. This is concerned with the restructuring of the loans, capital or debts and absolutely no public function is involved. The learned senior Counsel also had drawn the attention of this Court to different provisions of the Act and also different provisions of the Indian Companies Act 1956 and further explained the remedies available under the Company Law Board. The learned senior Counsel while laying emphasis on the aspect of the maintainability of the Writ Petition on the ground that the same is not maintainable, placed strong reliance on certain decisions and would conclude that in any event of the matter, such simultaneous proceedings, father raising certain objections in one proceeding and the son proceeding with yet another proceeding raising similar objections, definitely cannot be sustained and at any rate, the best judge would be the 1st and the 2nd respondents and it is not for the bidders to say which would be a better offer commercially and at any rate since this lis is concerned with bidding in relation to the contractual obligations, normally the writ Court not to interfere, especially with the 1st respondent, on application of mind exercised the discretion taking into consideration the relative merits and demerits of the offers made by the bidders. Thus, the learned senior Counsel would conclude that the Writ Petition to be dismissed.

9. Sri S. Ravi, the learned Counsel representing the 3rd respondent had taken this Court through the respective stands taken by the parties and the historical background and the health of the Company and the serious allegations of mismanagement made by the 4th respondent against Kishan Rao and family and would maintain that in the present situation it is beneficial to a share holder as well since the share holder would get some money. The Scheme of the 5th respondent had been explained in detail. The learned Counsel pointed out that no doubt the 4th respondent had not filed any counter affidavit whatsoever. However, the share holders had approved the Scheme and in the light of the facts and circumstances and also the specific stand taken by the respondents 1, 2 and 5 as well, the Writ Petition being devoid of merit, the same is liable to be dismissed.

10. Sri C.V. Mohan Reddy, the learned Advocate General representing the 5th respondent made elaborate submissions on the scope of judicial review in the realm of contracts and further in addition to the submissions made by the other Counsel on record representing the respondents would demonstrate how substantially the offer made by the 6th respondent/5th respondent would be a better offer. The I.E.I. does not prohibit the understanding between the 5th and the 6th respondents. There is no allegation by the petitioner how he is aggrieved of the same. The Certificates which had been already issued are practically irredeemable and it may not be in public interest to interfere at this stage. There is no offer of interest by the petitioner in any of the offers. In this way, the offer of the 5th respondent would be a better offer. The relevant portions of the pleadings also had been pointed out. The learned Advocate General also would contend that the entire share capital being redeemable shares, these transactions being just commercial transactions, this lis is not maintainable to writ jurisdiction. The Writ Petition is not maintainable since there is no violation of any

statutory provision as such. The learned Advocate General also placed reliance on certain decisions.

11. Sri E. Manohar, the learned senior Counsel representing the 6th respondent would maintain that the 5th respondent being a Company, the 6th respondent is not a necessary party. The learned senior Counsel pointed out to W.P.M.P. No. 14890/2007 wherein deletion of the 6th respondent had been prayed for. The 6th respondent only being a tenderer, ought not to have been impleaded. The 5th respondent's tender had been accepted. Further, all tenderers need not be impleaded and in the light of the same, the Writ Petition to be dismissed as against the 6th respondent with exemplary costs.

12. Sri M. Raghuveer, s/o. Sri M. Kishan Rao, the Director of the petitioner-Company had sworn to the affidavit filed in support of the Writ Petition, wherein it is stated that the petitioner-Company is a special investment vehicle floated by M. Raghuveer and his other family members who are some of the original promoters of the 3rd respondent-Company who had provided their personal and corporate guarantees to the banks and financial institutions apart from pledging their share holding in order to help the 3rd respondent-SPGL breath life. It is further stated that the 1st respondent-Company is a Company incorporated under the Companies Act, 1956 and it is registered as a Securitisation Company and Reconstruction Company pursuant to Section 3 of the Act having its registered office at 17th floor, Express Towers, Nariman Point, Mumbai. The 1st respondent-Company is also a trustee of SPGL in terms of Section 5 of the Act. The 1st respondent-Company had been sponsored by major public sector banks and financial institutions like the State Bank of India, ICICI Bank Ltd., Punjab National Bank, Industrial Development Bank of India and some other Banks. It is also averred that the 3rd respondent-Company-SPGL is duly incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of generation of power having set up a 208 MW combined cycle gas based power project in the State of Andhra Pradesh at Subbampeta Village near Kakinada in East Godavari District. The authorized share capital of the petitioner-Company as per the last audited balance sheet as on 31-3-2006 is Rs. 2,35,00,00,000/- (Rupees Two hundred and thirty five crores) divided into 23,50,00,000 equity shares of Rs. 10/- each and Mr. M. Raghuveer and his family members were the original promoters of the 3rd respondent-Company holding substantial stake in the said Company. The 4th respondent is also one of the Directors of the 3rd respondent-Company who is inimical to Mr. M. Raghuveer. It is also averred that the 3rd respondent-SPGL has several secured creditors such as IDBI, ICICI Bank, IFCI etc. The borrowings of the S.P.G.L. were initially secured by the assets of S.P.G.L. and also by the personal guarantees of M. Kishan Rao, M. Raghuveer, M. Subrahmanyam and their family members together with corporate guarantees of their group companies. It is further stated that right from the date of first operation, S.P.G.L. was under the able management and guidance of a professionally managed Board of Directors headed by Mr. M. Kishan Rao till 30-9-2003. The banks and financial institutions (lenders) also had their Nominee Directors on the Board of the S.P.G.L. It is also further stated that the 3rd respondent-S.P.G.L. was taken over by the lenders in an Annual General Meeting dated 30-9-2003. The financial health of S.P.G.L. took a beating once there was a change in the management. The banks and the financial institutions took over the management of the S.P.G.L. after they converted a part of their debt into equity. They appointed their own Nominee Directors and also constituted a Committee of Directors for day to day management of the Company. The Directors constituting the Committee of Directors were employees of the Banks and the financial institutions who nominated them on the Board of S.P.G.L. The financial health of the S.P.G.L. deteriorated during the period as there was a conflict of interest for the Nominee Directors as Directors on the Board. As persons looking after the day to day management of the Company, they were under obligation to do the best for the Company by negotiating with the Banks and financial institutions to reduce the interest rate for the loans or swap the loans with other Banks at a lower interest rate keeping in tune with the market trend. But the Nominee Directors managing the affairs of the Company instead of discharging their duties for the benefit of the Company, discharged their duties for the benefit of their employees i.e., Banks and the financial institutions and continued charging exorbitant interest @ 24% p.a. which includes penal interest, liquidity damages together with consequential interest. During the same period, huge loans similar to the loans availed by the S.P.G.L. taken by other borrowers were being charged around 8 to 9% p.a. during the said period. The said period in the history of S.P.G.L. can be marked as the beginning of the financial rot attributable solely to the Banks and the financial

institutions and S.P.G.L. had been incurring losses since the year 2003. As per the latest information released by S.P.G.L., it had accumulated losses to the extent of Rs. 14,03,08,843/- as on 31-3-2003 which had subsequently got aggravated to Rs. 2,44,49,98,645/- as on 31-3-2006. The earnings generated during the year 2006, even before the adjustment of depreciation, amortization/taxation, was not sufficient to service the interest and finance charges and therefore S.P.G.L. was not in a position to service the principal and interest amount. It is pertinent to note that the secured loans taken by S.P.G.L. had increased from Rs. 866,98,91,494/- in the year 2003 to Rs. 1100,40,31,924/- by 2006 in addition to the losses that had increased by the year. It is also averred that as on 31-3-2006, S.P.G.L.'s reserves were negative by Rs. 244,49,98,645/- and the operating surplus generated every year was not even sufficient to meet the interest obligation of the S.P.G.L. Thus, based on the current financials, there was no prospect of the lenders being even able to recover any part of their principal dues, without the encashment of the S.P.G.L.'s power generating capacity, restructuring of debt, infusion of equity and strengthening of the management. It is further stated that S.P.G.L. was under the total control of the financial institutions and Banks from 1-10-2003 to 10-3-2006 on which date the management of the Company was illegally taken over by the 4th respondent and his group. Further the is stated that an Extraordinary General Meeting of the S.P.G.L. was to take place on 10-3-2006 at 10.30 A.M. at Harihara Kala Bhavan, Secunderabad under the Chairmanship of Sri K.S.V. Krishnamachari (IIBI Nominee Director). While so, it is stated, the 4th respondent and his associates indulged in vandalism in a preplanned manner and threatened the Chairman with physical assault forcing the Chairman to declare the meeting adjourned. The Institutional Directors along with Mr. Kishan Rao had no alternative but to leave the venue. In the alleged meeting said to had taken place under the Chairmanship of the 4th respondent, the Institutional Directors were removed and he appointed his own persons as Directors and then went to the registered office of the Company, threatened the C.E.O. Mr. B. Ramachandra Rao and other officers and officials and illegally took over the office under his custody. It is also further stated that on the same day at 2.30 P.M. the meeting of the Board of Directors was held at Grand Kakatiya Hotel, Hyderabad in the presence of Mr. K.S.V. Krishnamachari (IIBI Nominee Director), Sri A.K. Chakraborthy (IFCI Nominee Director), Sri G.Soundararajan (IDBI Nominee Director), Sri M. Kishan Rao, Sri M. Shanker Narayanan (UTI Nominee Director), Sri M. Sudhendernath, Sri M.K. Anand and Sri V.V. Warty, and abruptly the 4th respondent along with unsocial elements entered the meeting hall, disrupted the proceedings and declared that the Board proceedings had no sanctity. The Chairman of the said meeting Sri K.S.V. Krishnamachari (IIBI Nominee Director) declared the meeting adjourned due to the illegal, indecent behaviour of the 4th respondent and the illegally elected new Directors. It is further stated, although complaints were lodged to the Chairman of IDBI on 11-3-2006 to the Regional Director, Ministry of Company Affairs, Shastri Bhavan on 17-3-2006, the Bench Officer, Southern Region Bench of the Company Law Board, Chennai on 17-3-2006, Director of Inspection & Investigation, Ministry of Company Affairs on 17-3-2006 by Sri M. Kishan Rao, no action was taken. None of the Institutional Directors raised their voice against the illegal activities of the 4th respondent. Further, even the 1st respondent when informed of the said developments merely stated in its letter dated 31-3-2006 that it is for the share holders to resolve the issue and it would not do anything about the said events. The 1st respondent-ARCIL also went on to the extent of validating the said resolutions of removal and nomination of Directors in its meeting of lenders dated 13-4-2006 and the same is also reflected in its letter dated 24-4-2006 addressed to S.P.G.L. The said act of the ARCIL headed by the 2nd respondent clearly establishes the unholy nexus with the other respondents and throws light person the things to follow and the same also shows collusion between the respondents 1, 2 and 4. Subsequently it came to light that the 4th respondent declared himself as Chairman of the S.P.G.L. and in that capacity held a so-called Board meeting and Extraordinary General Meeting on 10-3-2006. Further it is averred that the 1st respondent-ARCIL acquired from IDBI under an assignment agreement dated 31-12-2005 and from ICICI Bank under assignment agreement dated 29-12-2005, assignment of financial assistance granted to S.P.G.L. together with all underlying security interest and all their right, title and interest under various agreements entered into by S.P.G.L. with those Banks and the same was done pursuant to Section 5 of the Act. Under the said provision, ARCIL is deemed to be the lender of S.P.G.L. and all the rights of IDBI and ICICI Bank in relation to the financial assets and the underlying securities vested in the ARCIL by other Banks such as S.B.I., Punjab National Bank, State Bank of Hyderabad,

State Bank of Bikaner and Jaiper, Dena Bank, IFCI and others. Pursuant thereto, 9 trusts were created in respect of the assets of S.P.G.L. Thus, ARCIL acquired the financial assets approximately to the tune of 77.6% of the total debt of the S.P.G.L. and became entitled to enforce all the rights and obligations under various documents executed in respect of the financial assistances granted by its assignors (IDBI & ICICI Bank) from the date of acquisition of the financial assets. It is also further averred that the ARCIL acting in its capacity as trustee of trusts set up by it relating to the financial assets pertaining to S.P.G.L., initiated the process of resolution of the debt of S.P.G.L and issued an I.E.I. with a view to transfer the control of S.P.G.L. by way of sale of business/assets of S.P.G.L. This was done by the ARCIL as a Registered Securitisation and Reconstruction Company under Section 3 r/w. Section 5 of the Act and thus ARCIL was discharging a statutory public duty conferred on it under Section 5(2) & 5(3) of the Act. It is further stated that the said I.E.I. dated 28-7-2006 was made through private circulation and required the Expressors to outline the proposed transaction structure. Schedule I of the I.E.I. prescribed that the offer should be submitted in three parts; Part I - Credentials of the Expressor, Part-II - Business Plan for S.P.G.L. and Part III - Purchase Consideration for Business/Assets of S.P.G.L. It is further stated that both the petitioner and the 6th respondent were among the Invitees apart from Deuesche Bank and Edleweiss Capital Limited. By letter dated 8-8- 2006, ARCIL invited the petitioner to participate in the process in accordance with the I.E.I. In the I.E.I. certain time schedule was mentioned which was extended subsequently on various grounds by the ARCIL itself. The petitioner submitted initially a non binding Expression of Interest on 11-9-2006. On 14-9- 2006, ARCIL informed the petitioner that the petitioner was short-listed as one of the Final Expressors to undertake the detailed due diligence under the process. After the due diligence was done, the petitioner submitted its Bidding Final Offer on 24-10-2006. It is further stated that the 6th respondent was one of the Invitees who was asked to participate in the Bidding Process. Strangely out of the blue, at a latter point of time, some how the 5th respondent came into picture even though it was never in the scene at all during the bidding process. The petitioner reliably understands that the 5th respondent had been set up by Dr. A.V. Mohan Rao, the 4th respondent, in collusion with the 6th respondent as affront and that he has interests in the 5th respondent along with one Mr. Ravi Reddy and others. The very conduct of the ARCIL in allowing the 5th respondent to intervene in the Bidding Process at a late stage is arbitrary and illegal. The 5th respondent allegedly submitted its Expression of Interest on 24-10-2006 and the Final Bidding Offer on 22-11-2006 long after the petitioner submitted its Binding Final Offer on 24-10-2006. It is also further stated that by letter dated 26-10-2006, ARCIL asked the petitioner to come for discussions and for further negotiations on 10-11-2006. After such negotiations, the petitioner was asked by the ARCIL by its letter dated 10-11-2006 to submit a further revised bid on 16-11-2006. Accordingly on 16-11-2006, the petitioner submitted its revised offer. IDFC, who is one of the lenders supported the petitioner's bid by comfort letter dated 24-10-2006 addressed to the ARCIL. The petitioner also enclosed a letter dated 22-10-2006 from Spinnaker Capital Group, Singapore promising to fund the petitioner's bid, and, it is stated, these were not taken note of by the ARCIL. It is also further stated that the petitioner came to know long afterwards in the month of February 2007 that the ARCIL by letter ARG-II/PJ/FY 07/04568 dated 12-12-2006 accepted the bid of the 5th respondent. The petitioner was informed by letter dated 22-12-2006 by the ARCIL that its bid was not successful. The said letter dated 22-12-2006 was dispatched on 26-12-2006 at 6 p.m. and the same reached the petitioner's office only on 27-12-2006 by which time, S.P.G.L. entered into a definitive agreements with the 5th respondent. In fact, all through the Bidding Process, the 6th respondent was one of the bidders and was also short-listed, but the impugned letter shows the 5th respondent participated in the bid process which is a clear indication that ARCIL played foul in the process. It is also further stated that the petitioner addressed a letter on 16-2-2007 calling upon ARCIL to provide complete information with respect to the Bidding Process of S.P.G.L. The ARCIL instead of providing the information took shelter under the arbitrary clauses of the I.E.I. and refused to share any information at all. The refusal of ARCIL to provide information fortifies the fact that ARCIL's actions are illegal, arbitrary and unfair to the petitioner as the bid was decided in favour of the 5th respondent for some considerations. The said action of the 1st respondent in accepting the bid of the 5th respondent and rejecting the bid of the petitioner for the business and assets of the S.P.G.L. are challenged on the following grounds:

The 1st respondent acted arbitrarily, unfairly and illegally in accepting the bid of the 5th respondent and

rejecting the bid of the petitioner for the business and assets of S.P.G.L. Further, ARCIL and the 2nd respondent colluded with the respondents 4 and 6 in accepting the bid of the 5th respondent and rejected the bid of the petitioner for the business and assets of S.P.G.L. It is further stated that the conspiracy and the tacit understanding between the respondents in giving away S.P.G.L. to the 5th respondent in spite of the petitioner's bid being better in every respect has come to the fore after the 83rd Board of Directors meeting of the S.P.G.L. Further it is stated that the illegally elected Chairman (4th respondent) and the Directors of the S.P.G.L. proposed to hold the 83rd Board of Directors meeting on 26-12-2006 at 9.30 a.m. at Hotel Grand Hyatt, Santacruz, Mumbai. The holding of the 83rd Board meeting of S.P.G.L. is a classic example of the high handed behaviour of the respondents. It is further stated that 26-12-2006 fell on Tuesday and the two preceding days to 26-12-2006 had been 24th and 25th which were declared public holidays. 23rd which fell on Saturday was a working day and S.P.G.L. informed one of its Directors Mr. M. Kishan Rao about the 83rd Board meeting through a fax message sent to his office at 9.30 a.m. The modus-operandi adopted by the respondents was to see to it that Mr. Kishan Rao who is a Director on board of S.P.G.L. does not get the notice in time and hence would not attend the 83rd Board meeting and that the petitioner also should not get any information. It is in the said meeting that the S.P.G.L. discussed as agenda item No. 3, a letter from ARCIL to Pinnacle Overseas Assets Ltd. It is for the first time that the 5th respondent had come into picture and it is stated in the minutes of the said meeting that the 5th respondent had been declared as a successful bidder by ARCIL's sanction letter reference ARG-II-PJ-FY07-04568 dated 12-12-2006. It is also recorded in the minutes that one of the conditions of the sanction letter is that S.P.G.L. had to enter into definitive agreements within 15 days of the issuance of the sanction letter i.e., by 27-12-2006 and it is further stated in the minutes that the 5th respondent's sanction letter along with the draft definitive agreement were placed before the Board are discussed and subsequently the same were approved in a hasty manner. It is also further stated that the events as they unfolded and their corresponding dates and timing are of crucial importance to unveil the collusion among the respondents 1, 2, 4, 5 and 6 and the arbitrariness in finalization of the bids by the 1st respondent. The hurried manner in which S.P.G.L. took on record the letter addressed to it by the 1st respondent and the manner in which the petitioner is informed about its unsuccessful bid and the manner in which a delayed notice was issued to one of the Directors would very clearly reveal the game plan adopted by the respondents to push through the sanction letter of the 5th respondent. It is of great importance to note that even before the petitioner was informed about its unsuccessful bid, the S.P.G.L. in tacit understanding with the other respondents not only approved the 5th respondent's sanction letter but also approved the definitive agreements also. Curiously, S.P.G.L. never received any official communication from ARCIL about the 5th respondent's successful bid. The 5th respondent, which as on 26-12-2006 is an alien to the S.P.G.L. not only accepted the letter but without even any verification or without waiting for receiving an official communication from ARCIL, discussed the letter and approved it which very clearly goes to show that all the respondents were in a great hurry to push through the transaction and make it difficult for any one to question the same. All the respondents through the aforesaid tacit understanding made sure that the petitioner or any other Director would not be aware of these resolutions until 27-12-2006 by which time S.P.G.L. already entered into definitive agreements with the 5th respondent. Further it is stated that this entire episode of rushing through with the finalization of the bid transaction by the respondents happened when the orders of the Additional Chief Judge, City Civil Court, Hyderabad in O.S. No. 329/2006 and the orders of this Court in C.M.A. No. 785/2006 are still in force. The sum and substance of both these orders are to the effect that the S.P.G.L. cannot take any major decision and should not give effect to any of the resolutions passed in the Board meetings or General Body meetings. It is very clear from the proceedings that when the Court orders are in vogue, S.P.G.L. had taken major decisions of far reaching consequences thereby committed the offence of Contempt of Court. Further, before the 5th respondent's sanction letter was recognized, the illegally elected Directors of S.P.G.L. had submitted their resignations and new Directors in their place had been appointed. The S.P.G.L. headed by the illegally elected Chairman and Directors resorted to the said resignation and appointment drama to circumvent the Court proceedings filed questioning their acts. In spite of all their futile attempts, their malicious designs can be unveiled and can be exposed to show that the Bidding Process conducted by the ARCIL was a mere eye-wash and the successful bidder was already

decided upon by the ARCIL even before the I.E.I. was circulated. When all the aforesaid events are read in depth, it can be seen that the ARCIL headed by the 2nd respondent started its game plan of siding the 4th respondent on the day it validated the illegal resolutions in its meeting of lenders and more so when ARCIL itself moved the High Court of Bombay and obtained an order against the said Extraordinary General Meeting dated 10-3- 2006. Further, no reasons had been assigned by ARCIL for not accepting the bid of the petitioner although the petitioner's bid was clearly superior in all respects to that of the 5th respondent and the same on its face shows the arbitrariness of the ARCIL. It is stated that the comparison of totally positive aspects of the petitioner's bid and the totally unfavourable aspects of the bid of the 5th respondent are clear from the following table:

Petitioner

5th respondent

Option I: Offer for the purchase of the company as a going concern:

Total consideration = Rs. 417 croresSchedule of payment:

A. Upfront payment as share of the total sale consideration for purchase of Company as going concern at the time of transfer of the management to the petitioner (assuming transfer by 1-4-2007) = Rs. 100 crores.

B. Payment of balance outstanding consideration in 4 annual instalments starting in financial year 2007-08 and concluding in 2010-2011 = Rs. 317 crores.

Option II:

1. Purchase consideration/Financial offer for purchase of assets:

Scheme A: 100% Upfront payment of Rs. 356 crores on as is where is basis.

Scheme B: Combination of Upfront and instalment scheme.

(i) with no interest payable to 1st respondent on the outstanding amount = Rs. 480 crores.

a. Upfront payment as share of the total sale consideration for purchase of company as going concern at the time of transfer of management to petitioner (assuming transfer by April, 2007) = Rs. 200 crores.

b. Payment of balance outstanding consideration in 4 annual instalments starting in financial year 2007-08 and concluding in 2010-2011 = Rs. 280 crores.

(ii) With interest payable at 9% annually to the 1st respondent on the outstanding loan amount = Rs. 462 crores.

(a) Upfront payment as share of the total sale consideration for purchase of company as going concern at the time of transfer of the management to the petitioner (assuming transfer by 2-4-2007) = Rs. 200 crores.

(b) Payment of balance outstanding consideration in 4 annual instalments starting in financial year 2007-08 and concluding in 2010-2011 = Rs. 213 crores.

(c) Total interest payable to the 1st respondent starting from the financial year 2007-08 and concluding in 2010-2011 = Rs. 49 crores.

Scheme of payment as disclosed from the proceedings dated 12-12-2006 of the 1st respondent accepting the bid of the 5th respondent:

A. Payment of Rs. 50 crores within 15 days from 12-12-2006.

B. Payment of Rs. 150/- crores in 6 monthly instalments commencing from 30-4-2007 together with interest calculated @ 10% p.a. payable quarterly in arrears on the outstanding balance starting from 1-4-2007.

C. Payment of Rs. 175 crore as bullet payment on 31-3-2012. Interest shall be payable on the said payment @ 10% p.a. payable quarterly from 1-4-2007, first payment date being 30-6-2007.

D. Issuance of compulsorily convertible debentures (CCD) of Rs. 325 crores which shall carry a coupon rate of 5% p.a. payable half yearly to be converted into equity of S.P.G.L. at such price, that would convert to 10% equity stake of the fully diluted equity share capital of S.P.G.L. within 5 years post the equity infusion for the expansion project of upto 350 MW additional capacity. Such conversion shall happen at the time of achievement of financial closure for the expansion project and before any Initial Public Offer (IPO) in respect of equity shares of S.P.G.L.

E. The Residual debt of all existing lenders shall be written off.

F. The existing equity capital of S.P.G.L. shall be restructured through composite scheme by converting entire existing equity share capital of S.P.G.L. into redeemable preference shares with a coupon rate of 0.05% payable at the end of 20 years from the composite scheme become effective and by issuance of fresh equity in favour of the bidder and in the manner proposed in the bid.

It is also further stated that the provision in the 5th respondent's proposed Scheme which provides for payment by way of converting the existing share capital of S.P.G.L. into redeemable preference shares with a coupon rate of 0.05% payable at the end of 15 years takes out the entire life of that scheme and knocks down the very substance of the 5th respondent's offer and stands no where in comparison with the petitioner's offer of payment by four years (2010- 2011). From the above, it is obvious that the petitioner would make payments by 2010-2011 i.e., the whole amount would be paid in five years whereas the 5th respondent would make payments upto 31-3-2012 that too by way of issuing redeemable preference shares payable more than 15 years hence i.e., 2022. From the point of view of any lender, any early clearance of debt is obviously advantageous rather than its settlement in 15 years later since there may be any unforeseeable events occurring in such a long span of time which may frustrate the 5th respondent's scheme. It is shocking that such a totally disadvantageous scheme proposed by the 5th respondent was accepted by the ARCIL and not the scheme highly advantageous scheme of the petitioner. It is also further stated that the I.E.I. dated 28-7-2006 clearly mandated that the offers for sale of assets should be strictly on 'as is where is and as is what is' basis, but the 5th respondent in its offer proposed an additional expansion of 350 MW capacity of the S.P.G.L. apart from the existing 208 MW and based its payment proposal on such expansion too. Thus, the offer of the 5th respondent is not in conformity with the terms of the I.E.I. The action of the 5th respondent in accepting the bid of the 1st respondent is thus arbitrary and violative of Article 14 of the Constitution of India. The 1st respondent's action of considering the expansion plans of the respondents 5 and 6 is bad and illegal. When the 3rd respondent had already taken back the deposit made with Gas Authority of India Limited for allocation of additional Gas supply, it is out of comprehension as to how the expansion plans of the respondents can be taken into consideration by the ARCIL in deciding the bids. In fact, the petitioner had in its first offer dated 11- 9-2006 offered that if for any reason its offer is not in sync with the offers provided by any other bidder, it may be permitted to improve the offer to match with the best offer received by the ARCIL. The same was reiterated in the negotiations which took place on 10-11-2006 by the petitioner to the ARCIL. However, ARCIL did not inform the petitioner of its decision to award the bid to the 4th respondent nor did it care to ask the petitioner to match the said offer of the 4th respondent at any point of time, which is also arbitrary and illegal and violates the principle of legitimate expectation apart from the principle of fairness. It is settled Law that strict adherence to the conditions of the bid is necessary and any deviations therefrom is prima facie suspicious and not permissible. The mere fact that the I.E.I. empowered the 1st respondent to reject any bid without assigning any reasons does not give any arbitrary power to it to reject the bid of the petitioner merely because it has that power. As the ARCIL has acted in an arbitrary, unfair and unjust manner in the award of control of management and assets of the S.P.G.L., the petitioner is entitled to approach this

Court under Article 226 of the Constitution of India. Further, it is stated that ARCIL comes within the meaning of the term 'Authority' used in Article 226 of the Constitution of India as it is performing statutory functions and duties cast upon it under the Act to discharge the liabilities of public financial institutions as a trustee. As the petitioner-Company is promoted by one of the original promoters of the S.P.G.L. and as the offer of the petitioner is far superior to that of the 5th respondent-Company, ARCIL ought to have accepted the bid of the petitioner and not that of the 5th respondent. The action of the ARCIL in violating the terms of the I.E.I. and allowing the 5th respondent to participate in the bidding at a very late stage and favouring the 5th respondent is arbitrary, illegal, mala fide and violates Article 14 of the Constitution of India. Therefore the proceedings of the 1st respondent-ARCIL dated 12-12-2006 accepting the bid of the 5th respondent and the consequent proceedings dated 22-12-2006 rejecting the bid of the petitioner are amenable to the jurisdiction of this Court under Article 226 of the Constitution of India and are liable to be set aside. Further it is stated that it is now well settled that a Company like the 1st respondent-ARCIL is an 'authority' for purposes of Article 226 of the Constitution of India as it is performing statutory functions and has statutory duties under the Act as laid down in Zee Telefilms Ltd. v. Union of India : AIR 2005 SC2677 , Andi Mukta Sadguru v. V.R. Rudani : (1989)IILLJ324SC and Praga Tools Corporation v. C.A. Immanuel : (1969)IILLJ479SC . It is also averred that the S.P.G.L. has filed Company Petition No. 43/2007 before this Court praying for approval of its Scheme of Arrangement between itself and its secured creditors under Section 391 of the Companies Act, 1956 with a view to implement the restructuring and of its debt and capital after the S.P.G.L.'s management was taken over by the 5th respondent pursuant to the proceedings dated 12-12-2006 of the ARCIL. If the said Scheme of Arrangement is approved, grave and irreparable loss would be caused to the petitioner. In such circumstances, the writ petitioner approached this Court praying for the reliefs already specified supra.

13. In the counter affidavits filed by the respondents 1 and 2, sworn to by the Chief Manager of the 1st respondent-ARCIL, in para-4 specific stand has been taken that ARCIL is neither a State nor an Authority either within the meaning of Article 12 or 226 of the Constitution of India. It is also stated that the present lis relates to a private contract. Further, it is stated in para-5 that the Writ Petition has been filed against the action of the ARCIL that is purely contractual in nature and a Writ Petition under Article 226 of the Constitution of India cannot therefore be instituted for challenging such action. It is further stated that the entire sequence of events leading to the issuance of the letter dated 12-12-2006 in favour of the 5th respondent accepting its bid and the letter dated 22-12-2006 informing the writ petitioner of the rejection of its bid, proceed on the ARCIL's private contract rights obtained under various debts of assignment. The I.E.I. categorically mentioned that the ARCIL was only intending to take steps for resolution of the debt of the S.P.G.L. and provided for the transfer of the ARCIL's rights (as acquired and assigned in its favour) to another prospective bidder. It is stated that the following provisions of I.E.I. clearly spell out the scope and the role of the issuance of I.E.I.

ARCIL has acquired financial assets as above, approximately amounting to 77.6% of the total debt of S.P.G.L. for the year 2005-2006 (un-audited provided by the company).

Invitation and the process:

ARCIL intends to take steps for resolution of the debt of S.P.G.L. Accordingly it is exploring various feasibilities and possibilities towards opportunities available for the same. Expressors, if interested in the Business/assets of S.P.G.L. may participate in the process under this I.E.I. and submit their indicative offer along with their proposed transaction structure. The transaction shall be subject to the feasibility under all applicable laws, rules, regulations and all the necessary approvals, statutory or otherwise. It is thus very clear that what ARCIL offered in terms of I.E.I. was only its deliverables which are also reproduced below:

Please note that as far as deliverables by ARCIL under this option are concerned, the same shall be limited to:

(i) Secured Debt of S.P.G.L. not less than 75% in value of the total debt either by way of consent as the secured creditor or by way of assignment of such debt with underlying security interest (provided that in case of assignment, the stamp duty, registration fees and any other tax, cess etc., applicable and payable on the

same shall be entirely borne by the purchaser), and/or

(ii) Procurement of exercise of voting rights in respect of 5,45,58,000/- number of Equity shares in equity capital of S.P.G.L. of face value of Rs. 10/- each held by Banks/Financial institutions (30.92% of total paid-up equity capital of S.P.G.L.).

(iii) Procure of exercise of pro-rata voting rights in respect of Promoters' 2,65,00,000 number of shares held in equity capital of S.P.G.L. of face value of Rs. 10/- each pledged with lenders (15.01% of total paid-up equity capital of S.P.G.L.).

It is stated that from the aforecited provisions, it is clear and is established beyond doubt that ARCIL had offered to exercise and liquidate only its contractual rights as a lender and was not acting in 'discharge of public duty' as it is sought to be interpreted by the petitioner. In fact, based on ARCIL's limited deliverables, it was upto the prospective Expressors to indicate their respective transaction structures in their Expressions. Further, it was also made clear that:

The transaction shall be subject to the feasibility under all the applicable laws, rules, regulations and all the necessary approvals, statutory or otherwise.

It is averred in para-6 that in fact the ARCIL does not discharge any 'statutory public' functions the way it is sought to have been interpreted by the petitioner and is not acting in the realm of any Public Law sphere for entitling the petitioner to maintain a Writ Petition under Article 226 of the Constitution of India. The writ petitioner had participated in the Bidding Process after accepting the various terms and conditions that had been categorically spelt out in the I.E.I. Having acquiesced to the terms of the I.E.I. which inter alia entitled the ARCIL to accept bids in its discretion and which also permitted the ARCIL to carry out the scrutiny of bids at its sole discretion, the writ petitioner is clearly estopped from mounting a challenge to the various acts and actions initiated and conducted by the ARCIL in accordance with the I.E.I. The Writ Petition is thus liable to be dismissed on application of principles of acquiescence and as barred by doctrine of estoppel. Further it is averred that the writ petitioner was informed about the rejection of its bid by the letter of the ARCIL dated 22-12-2007 which, even according to the petitioner, was received by it on 27-12-2007. Even thereafter in response to the writ petitioner's letter, ARCIL by its letter dated 26-2-2007 had informed the petitioner of the acceptance of the bid of the 5th respondent as the successful bid and in pursuance of the same a composite scheme was also filed before this Court in its jurisdiction under the Companies Act. The writ petitioner was advised to approach the said Company Court in case it had any objections. Pursuant to the acceptance of the bid of the 5th respondent, various steps were taken in relation to S.P.G.L. including the signing of definitive agreements, payments of the initial amount of Rs. 50 crores, change in composition of the Board of Directors, filing of a composite scheme for consideration of this Court under Section 391 of the Companies Act, 1956, which were within the knowledge of the writ petitioner. The writ petitioner had in fact served notice of its intention to oppose the composite scheme submitted before this Court even prior to the filing of the present Writ Petition. It is also further stated that at this belated stage it would be entirely impermissible for the writ petitioner to invoke the discretionary relief of this Court under Article 226 of the Constitution of India. The Writ Petition is clearly barred by laches and is not maintainable. The writ petitioner is also not entitled to any equitable relief from this Court on account of various consequential steps that had been taken in pursuance of the acceptance of the bid of the 5th respondent which were to the knowledge of the petitioner and in respect of which no active challenge was laid. Further, no reasons had been given by the writ petitioner for not approaching this Court earlier and on this count alone the Writ Petition is liable to be dismissed. It is further stated that the averments made in para-3 of the affidavit filed in support of the Writ Petition had not been denied. It is however incorrect to state that the ARCIL is a trustee of the S.P.G.L. It is wholly false to state that the ARCIL had been sponsored only by major public sector Banks. The 1st respondent-ARCIL is a Company in the private sector and a majority of its shares are held by private sector banks and organizations. Further it is stated that it is on account of mismanagement of S.P.G.L. and the poor financial condition that it slipped into that had led to the exercise of option by the financial institutions and nomination of Board of

Directors leading to the change of management. There were financial defaults in payment of amounts to the lenders resulting in S.P.G.L. suffering huge losses which were compounded by internal bickerings and litigations. To prevent further erosion of finances and for protecting their interests, the financial institutions were compelled to exercise their rights. The answering respondents are not concerned with the allegations pertaining to the actions of the nominee Directors and are therefore restraining from traversing the same. Suffice to state that these allegations have no material bearing on the issues arising for adjudication in the Writ Petition. Similarly, the averments in para-V(iv) and (v) concerning the actions of the Board of Directors of the 3rd respondent and the alleged disruptions have no relevance or material bearing for the purposes of the instant Writ Petition. All these issues are subject matter of litigations pending before the jurisdictional Civil Courts and the same have nothing to do with the ARCIL's exercise of rights in relation the which the present Writ Petition had been filed. In reply to the averments in para VI(i)(ii) of the writ affidavit, it is stated that I.E.I. itself specified the details of the rights acquired by the ARCIL from various institutions on different dates. ARCIL had thus acted in pursuance of the contractual rights in causing the issuing the I.E.I. It is wholly incorrect to state that ARCIL is discharging any statutory public duty. In fact, the I.E.I. categorically recorded as follows: 'Please note that as far as deliverables by ARCIL under this option are concerned, the same shall be limited to being as a secured creditor holding secured debt of S.P.G.L. not less than 75% in value of the total debt either by way of consent/exercise of rights as the secured creditor or by way of assignment of such debt that underlying security interest'. All the contentions to the contra had been therefore denied. Further stand has been taken that there is nothing strange or inexplicable about the bid submitted by the 6th respondent by and on behalf of the 5th respondent as a nominee. The letter dated 26-2-2007 had been referred to and it is stated that in the said letter it was clearly clarified that the 6th respondent who was short-listed had submitted the successful and the relevant bid through and in the name of the 5th respondent. The 5th respondent is a special purpose vehicle constituted by the 6th respondent along with its associates and is the nominee of the short-listed 6th respondent and the successful bid was also submitted in the name of the 5th respondent. In reply to the averments made in para VI(vi) of the writ affidavit it is stated that it is not correct to state that any acts of the writ petitioner were not taken note of by the ARCIL. On a comprehensive evaluation of the relevant bids of the writ petitioner and the 5th respondent, it was found that the bid of the 5th respondent was qualitatively and substantially better and more beneficial to the ARCIL and the lenders. While the writ petitioner had submitted a revised bid of purchasing the assets of the S.P.G.L. for an amount of Rs. 356 crores on an upfront payment basis and amount of Rs. 462 crores on deferred payment without interest basis the offer made by the 5th respondent was demonstrably more beneficial to the lenders and the ARCIL. In fact, the bid of the writ petitioner is totally conditional and that too against the conditions of the I.E.I. which in second option made clear that assets would be offered on 'as is where is and as is what is' basis. The ARCIL had therefore proceeded to accept the bid of the 5th respondent and rejected the bid of the writ petitioner. The writ petitioner had failed to substantiate as to how its offer is in any manner more beneficial than the one made by the 5th respondent. Further, it had been averred that the writ petitioner was clearly aware of the various facts leading to the acceptance of the bid of the 5th respondent and the execution of the definitive agreements. Even if the writ petitioner or his family members could not attend the Board meeting on 26-12- 2007, the developments at the meeting and the various steps taken pursuant thereto were clearly within the knowledge of the writ petitioner and it is not explained as to why no complaint was made at any point of time until the letter dated 16-2-2007 was addressed by the petitioner. Even thereafter, the writ petitioner did not take any steps until the present Writ Petition came to be filed on 19-4-2007. It is further averred in para-23 of the counter affidavit that it is not correct to state that ARCIL acted in an arbitrary, unfair and illegal manner in accepting the bid of the 5th respondent. It is vehemently denied that the answering respondents had in any manner colluded with the respondents 4 and 6 in accepting the bid of the 5th respondent. The 5th respondent's bid was evaluated on its own merits and was found to be most beneficial for the respondents and the lenders and was therefore declared as the successful bid. It is wholly false to state that there was any conspiracy or a tacit understanding leading to the answering respondents awarding bid to the 5th respondent. It is denied that the petitioner's bid was better in response to that of the 5th respondent. The averments concerning the Board of Directors of the S.P.G.L. are not within the realm and

concern of the ARCIL. Suffice to submit that the ARCIL had acted independently and objectionably in seeking to protect its contractual rights and the rights of the other lenders in issuing the I.E.I. and in accepting the bid. All the contentions made with regard to the 83rd Board meeting pertain to the events subsequent to the declaration of the 5th respondent's bid as being successful. They in no manner are reflective of the correctness of the Bidding Process and the answering respondents cannot be accused of having got any pre-mediated or partisan manner. The various inferences sought to be drawn by the writ petitioner with regard to the said meeting are purely contractual and have no real or substantial basis. The answering respondents are not a party to the proceedings in O.S. No. 329/2005 and C.M.A. No. 785/2006 and had not acted in any manner that would be in violation of the Court proceedings. The various averments in ground B constitute the various consequential steps taken in pursuance of the bid which wholly disentitle the petitioner from making any grievance at this stage. The averments of ground C are completely incorrect and are denied. The tabulated statement given by the petitioner itself shows that the offer of the 5th respondent is superior and beneficial to the ARCIL and the lending institutions. In fact, the bid of the petitioner itself contemplates following clauses which takes the substance out of its challenge in respect of conversion of existing equity capital into redeemable preference shares under the successful offer:

The proposal as detailed above is subject to the following conditions:

i) write-down the total existing equity ( Rs. 176.47 cr. As on March 31, 2006) in the Company to zero. Alternatively clear management control with GIL.

ii) Peaceful handing over of the Management of S.P.G.L. to GIL.

iii) All the rights of the lenders subsisting as per the loan agreements for the financial assistance extended to Spectrum Power Generation Limited be transferred to GIL.

iv) Debt free company: The averments of ground D are misconceived and are legally untenable. It is only the assets that were offered for sale in a 'as is where is' basis and 'as is what is' basis in second option while successful expression is structured offer under first option and there has been no deviation from the said stipulation.

It is further stated that there has been no deviation from any conditions specified in the I.E.I. and the writ petitioner has wholly failed to make out any case of such deviation. Further, it is denied that ARCIL comes within the meaning of an authority or that the ARCIL had violated any terms of the I.E.I. It is incorrect to state that ARCIL is amenable to a review under Article 226 of the Constitution of India. Further, it is stated that it is not correct to state that the writ petitioner has no effective alternative remedy. Further, C.P. No. 43/2007 had been referred to and ultimately a request was made for dismissal of the Writ Petition.

14. The counter affidavit of the 3rd respondent-S.P.G.L. was sworn to by its Company Secretary. It is averred that the alleged resolution dated 5-4-2007 neither empowers Mr. M. Raghuveer to swear to the affidavit and depose on behalf of the petitioner-Company nor does it authorize him to institute any legal proceedings on behalf of the petitioner. Further stand had been taken that the SPGL is neither a State nor an instrumentality of the State and the Writ Petition would not lie. The petitioner is put to strict proof about the incorporation of the petitioner-Company and the objectives with which it had been incorporated/floated. The deponent without knowing any details and facts about the same had vaguely submitted about his family members being the original promoters of the SPGL and had alleged that they had provided personal and corporate guarantees and pledged their shares in favour of SPGL and such vague statements are inadmissible in the eyes of Law. Further it is averred that the majority of the secured creditors of SPGL had assigned/transferred their secured interest in the debt advanced to the SPGL to ARCIL withholding more than 75% of the secured debt advanced to the SPGL and is the major secured creditor of the SPGL. Certain aspects relating to the factum of incorporation were admitted. The deponent again had vaguely stated about he and his family members being the original promoters of SPGL without providing any details. The original promoters of SPGL were Spectrum Technologies Inc., U.S.A., National Thermal Power Corporation and Jaya Food Industries Ltd.

The 4th respondent is no longer a Director of the SPGL as the resignation tendered by him had been accepted by the Board of Directors of the SPGL. While answering the contents of para V(ii) of the affidavit, it is stated that the SPGL has several secured creditors including those as mentioned in the said para and it is also stated that the majority of the secured creditors including I.D.B.I., I.C.I.C.I. Bank and I.F.C.I. had transferred/assigned their debts to ARCIL. The debts of the SPGL were continued to be secured by its assets. In relation to the contents of para V(iii) of the affidavit, it is denied that the SPGL was professionally managed by the Board of Directors headed by Mr. M. Kishan Rao. It is further stated that the genesis of the financial mess that the SPGL finds itself as on date, has its roots in the period when the SPGL was being controlled by Mr. M. Kishan Rao. The Banks and the Financial institutions, because of the financial mismanagement of the SPGL by Mr. M. Kishan Rao, were forced to take over the management of SPGL on 30-9-2003. However, due to various factors including non-restructuring of the debt of the SPGL, the financial position of SPGL deteriorated. In relation to the contents of para V(iv) of the affidavit, it is stated that as far as they relate to the financial position of the SPGL, the same are matter of record. However, it is denied that on 10-3-2006, SPGL was illegally taken over the 4th respondent and its group. The contents of para V(v) of the affidavit had been denied and it is stated that the facts alleged in the corresponding paras are directly in issue and are sub judice in O.S. No. 329/2006 instituted by Mr. M. Kishan Rao against the SPGL before II Additional Chief Judge, City Civil Court, Hyderabad and also C.M.A. No. 785/2006. Further, it is stated that as on date, ARCIL is holding more than 75% of the total secured debt of the SPGL. The contents of the I.E.I. dated 28-7-2006 are matters of record. The 3rd respondent-SPGL entered into definitive agreement with the ARCIL and respondents 5 and 6 on 10-1-2007. It is further stated that the factum of issuance and the contents of I.E.I. issued by ARCIL are matters of record. Specific stand has been taken that the stand taken by the writ petitioner that the I.E.I. by ARCIL is in discharge of statutory or public duty had been denied. It is stated that the petitioner is neither the Director nor shareholder of SPGL and it does not have locus standi to allege about the internal management and functioning of SPGL. Without prejudice the above, it is stated that sufficient notice of the 83rd Meeting of the Board of Directors of SPGL was given to all the Board members and it is also pertinent to mention that in spite of sufficient notice of the said Board Meeting as also of the earlier Board Meetings of the SPGL held in the year 2006, Mr. M. Kishan Rao did not attend any of the Board Meetings of the SPGL. The Board of the SPGL considered the sanction letter dated 12-12-2006 in its Board Meeting held on 26-12-2006 and finding the terms and conditions mentioned therein being most beneficial and in the interest of the share holders and the secured creditors of SPGL, accepted and approved the said sanction letter and the definitive agreements to be executed thereunder. It is further stated that the pendency of O.S. No. 329/2006 pending before the II Additional Chief Judge, City Civil Court, Hyderabad and C.M.A. No. 785/2006 pending before this Court and the orders passed therein are a matter of record, suffice to state that the said orders related offer only to the holding of 82nd Board Meeting of the SPGL. It is further pertinent to mention that the petitioner not being the share holder of the SPGL, neither is nor can be party to the said legal proceedings and therefore does not have any locus standi to allege about the same. It is again reiterated that the SPGL entered into definitive agreement with the ARCIL and respondents 5 and 6 only on 10-1-2007. It is further stated that the SPGL, based on the terms and conditions of the sanction letter dated 12-12-2006 issued by ARCIL in favour of the 5th respondent filed Company Petition No. 43 of 2007 before this Court with a Scheme of Arrangement, under Section 391 of the Companies Act, 1956 for approval by this Court. This Court by its order dated 13-2-2007 directed the holding of the meeting of the share holders and the secured creditors of the SPGL for casting of votes on the said Scheme. In the said meeting which was held on 25-3-2007, the Scheme of Arrangement relating to restructuring of the share capital and secured debt of the SPGL was passed by majority of 99.99% of the share holders present and voting and majority of 98.49% of the secured creditors present and voting. It is further stated that ARCIL had exercised the voting power attached to the shares held by Mr. M. Kishan Rao and members of his family, including the shares held by the deponent of the affidavit under reply. In view of the fact that the supreme body of the share holders of the SPGL and the secured creditors of the SPGL had approved the said Scheme of Arrangement, it is established that it is in the best interest of the SPGL. It is relevant to point out that the writ petitioner which is claimed to be a concern of Mr. M. Kishan Rao and the members of his family, waited several months before approaching this Court and the same establishes the

oblique motive of the petitioner. It is stated that the contents of para VII(d), (e), (f) and (g) do not relate to SPGL. Certain other factual details also had been specified.

15. In the additional affidavit filed by the 3rd respondent-SPGL with the leave of the Court, it is stated that the SPGL had filed Company Petition No. 43/2007 under Section 391 of the Companies Act, 1956 before the Company Court of this Court for seeking sanction of Scheme of Arrangement which was formulated by the 3rd respondent on the basis, terms and conditions of sanction letter dated 12-12-2006 issued by the ARCIL in favour of the 5th respondent i.e., Pinnacle Overseas Assets Limited and which sanction letter was accepted and adopted by the SPGL. The sanction letter was issued by the ARCIL after running a process inter alia in respect of resolution of debt of the SPGL and the offer of the 5th respondent was selected and approved by the ARCIL. The petitioner- Company challenged the process run by the ARCIL and issue of sanction letter dated 12-12-2006 in favour of the 5th respondent. It is further stated that during the pendency of the Writ Petition, the Company Court of this Court by order dated 5-10-2007, allowed the Company Petition No. 43/2007 filed by the SPGL and thus sanctioned and approved the Scheme of Arrangement, filed by the SPGL which was based on the terms and conditions as enumerated in the sanction letter dated 12-12-2006, issued by the SPGL in favour of the 5th respondent. The sanctioned Scheme of Arrangement was registered with the Registrar of Companies, A.P., Hyderabad on 17th October 2007. The 3rd respondent-SPGL craved the leave of this Court to bring on record t following events which had taken place subsequent to the aforesaid order dated 5-10-2007. Pursuant to the sanction of the Scheme of Arrangement and in accordance with such sanction of the Scheme of Arrangement and in accordance with such sanction, the Board Meeting of the SPGL was held on 12-11-2007 and inter alia the following decisions had been taken in the said meeting:

a) The existing Equity Share capital of the Company had been restructured by converting entire existing Equity Share capital of the company into Redeemable Preference Shares with a Coupon rate of 0.05% payable at the end of 15 years;

b) On the basis of remittance of Rs. 50,00,00,000 remitted by M/s. Pinnacle Overseas Assets Limited as reflected in Certificate of Foreign Inward Remittance obtained from Societe Generale, Corporate & Investment Banking and also on the basis of remittance of Rs. 100,17,55,640 remitted by M/s. Pinnacle Overseas Assets Limited as reflected in Certificate of Foreign Inward Remittance obtained from Indian Overseas Bank, the Company issued 15,00,00,000 Equity Shares at a face value of Rs. 10 each and allotted the same to the 5th respondent for the said consideration;

c) In accordance with Clause (d) of Part-II of the Scheme of Arrangement approved by this Court/Company Court, Compulsorily Convertible Debentures (CCDs) of 32500000 at a face value of Rs. 100 each, have been issued to the secured creditors (pro-rata inter-se) of the Company on such terms and conditions as have been specified in the Scheme of Arrangement. M/s. IL & FS Trust Company Limited has been appointed as the Debenture Trustee of the Company for the purpose of issue of Rs. 325 crore Compulsorily Convertible Debentures.

16. Yet another affidavit filed by the 3rd respondent-SPGL specified that this Court was pleased to pass an order sanctioning the Scheme of Arrangement between SPGL and its share holders and Secured creditors upon considering the objections filed by Mr. Kishan Rao and Mr. Raghuveer along with various others. Mr. Raghuveer is incidentally a Director in the petitioner- Company which is controlled by Mr. Kishan Rao and his family members. A copy of the said order of the learned Company Judge also had been placed before this Court.

17. In the counter affidavit filed by the 6th respondent, it is stated that the 6th respondent is neither a necessary nor proper party and no relief had been claimed against the 6th respondent. The relief claimed in the Writ Petition is to declare the action of the ARCIL in accepting the bid of the 5th respondent as illegal and consequently direct the 1st respondent-ARCIL to accept the bid of the writ petitioner. Further stand had been taken that the matter in issue in the Writ Petition can be effectively decided without the presence of the 6th

respondent and hence the 6th respondent prayed this Court to strike off the 6th respondent from the array of the respondents in the Writ Petition.

18. A reply affidavit in detail had been filed by the petitioner to the counter affidavit filed by the respondents 1 and 2 and an additional reply affidavit also had been filed to the rejoinder of the respondents 1 and 2. In the reply affidavit, after narrating certain facts, it has been stated that specific provisions relating to some of the important functions and duties contemplated under the Act are as follows:

(i) Section 2(v) and (za) define Reconstruction Company and Securitisation Company to mean Companies formed for the purpose of asset reconstruction and Securitisation respectively;

(ii) Section 3 provides for the compulsory registration of Securitisation companies and Reconstruction companies with the Reserve Bank of India. It also provides the eligibility and other conditions for the registration of such companies by the Reserve Bank of India;

(iii) Section 4 provides for the cancellation of the Certificate of Registration of Securitisation Company for a Reconstruction Company by the Reserve Bank of India under certain conditions;

(iv) Section 5 empowers the Securitisation Company or a Reconstruction Company to acquire financial assets of any Bank or Financial Institution under certain conditions and in a given manner;

(v) Section 7 empowers a Securitisation Company or a Reconstruction Company to issue security receipt in accordance with the provisions of applicable laws and which receipt is exempted under Section 8 from the purview of Registration Act 1908;

(vi) Section 9 empowers a Securitisation Company or a Reconstruction Company to take the specified measures for asset reconstruction having regard to the guidelines framed by the Reserve Bank of India in this behalf. Section 9 reads:

Measures for assets reconstruction: Without prejudice to the provisions contained in any other law for the time being in force, a securitisation company or reconstruction company may, for the purposes of asset reconstruction, having regard to the guidelines framed by the Reserve Bank in this behalf, provide for any one or more of the following measures, namely:

(a) the proper management of the business of the borrower, by change in, or take over of, the management of the business of the borrower;

(b) the sale or lease of a part or whole of the business of the borrower;

(c) rescheduling of payment of debts payable by the borrower;

(d) enforcement of security interest in accordance with the provisions of this Act;

(e) settlement of dues payable by the borrower;

(f) taking possession of secured assets in accordance with the provisions of this Act.

(vii) Section 10 provides for Other functions of Securitisation Company or a Reconstruction Company and the same reads as hereunder:

(1) Any securitisation company or reconstruction company registered under Section 3 may-

(a) act as an agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be mutually agreed upon between the parties;

(b) act as a manager referred to in Clause (c) of Sub-section (4) of Section 13 on such fee as may be mutually

agreed upon between the parties;

(c) act as receiver if appointed by any court or tribunal:

Provided that no securitisation company or reconstruction company shall act as a manager if acting as such gives rise to any pecuniary liability.

(2) Save as otherwise provided in Sub-section (1), no securitisation company or reconstruction company which has been granted a certificate of registration under Sub-section (4) of Section 3, shall commence or carry on, without prior approval of the Reserve Bank, any business other than that of securitisation or asset reconstruction:

Provided that a securitisation company or reconstruction company which is carrying on, on or before the commencement of this Act, any business other than the business of securitisation or asset reconstruction or business referred to in Sub-section (1), shall cease to carry on any such business within one year from the date of commencement of this Act.

Explanation: For the purposes of this Section, 'securitisation company' or 'reconstruction company' does not include a subsidiary.

(viii) Section 12 empowers the Reserve Bank of India to determine the policy and issue directions to Securitisation Companies and Reconstruction Companies in the public interest with regard to their functions under the statute and the same reads as hereunder:

Power of Reserve Bank to determine policy and issue directions:

(1) If the Reserve Bank is satisfied that in the public interest or to regulate financial system of the company to its advantage or to prevent the affairs of any securitisation company or reconstruction company from being conducted in a manner detrimental to the interest of investors or in any manner prejudicial to the interest of such securitisation company or reconstruction company, it is necessary or expedient so to do, it may determine the policy and give directions to all or any securitisation company or reconstruction company in matters relating to income recognition, accounting standards, making provisions for bad and doubtful debts, capital adequacy based on risk weights for assets and also relating to deployment of funds by the securitisation company or reconstruction company, as the case may be, and such company shall be bound to follow the policy so determined and the directions so issued.

(2) Without prejudice to the generality of the power vested under Sub-section (1), the Reserve Bank may give directions to any securitisation company or reconstruction company generally or to a class of securitisation companies or reconstruction companies or to any securitisation company or reconstruction company in particular-

(a) the type of financial asset of a bank or financial institution which can be acquired and procedure for acquisition of such assets and valuation thereof;

(b) the aggregate value of financial assets which may be acquired by any securitisation company or reconstruction company.

(ix) Chapter IV of the Securitisation Act makes provision for the establishment, functioning and operations of a Central Registry for the purpose of registration of transaction of Securitisation and Reconstruction of Financial Assets and creation of Security Interest under this Act.

(x) Section 34 bars the jurisdiction of Civil Courts in respect of any action taken under the Securitisation Act;

It is further stated that the Reserve Bank of India in exercise of its authority under Clause (b) of Sub-section (i) of Section 3 of the Securitisation Act issued guidelines and direction on 24th April 2003 titled the

Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 and paragraph 7(2) and 7(6)(d) of the said directions of the Reserve Bank of India state:

7(2): Change or takeover of Management/Sale or lease of business of the borrower : No Securitisation Company and Reconstruction Company shall take the measures specified in Section 9(a) and (b) of the Act, until the Bank issues necessary guidelines in this behalf.

7(6): Plan for realization :

(i) Every Securitisation Company or Reconstruction Company may, within the planning period, formulate a plan for realization of assets, which may provide for one or more of the following measures:

(a) Rescheduling of payment of debts payable by the borrower;

(b) Enforcement of security interest in accordance with the provisions of the Act;

(c) Settlement of dues payable by the borrowers;

(d) Change or take over of the management, or sale or lease of the whole or part of business of borrower after formulation of necessary guidelines in this behalf by the Bank as stated in paragraph 7(2) herein above.

It is also pertinent in the context of the aforesaid provisions to refer to paragraph 8 of the directions of the Reserve Bank of India which prescribes the manner in which Securitisation Companies and Reconstruction Companies will securitise the assets and the relevant part of paragraph-8 reads:

A Securitisation Company or Reconstruction Company shall give effect to the provisions of Section 7(1) and (2) of the Act through one or more trusts set up exclusively for the purpose. The Securitisation Company or Reconstruction Company shall transfer the assets to the said trusts at the price at which those were acquired from the originator.

It is further stated that ordinarily any secured creditor has to proceed to recover the monies owed to it only through the ordinary courts of law by filing suits for recovery of the monies basing on the mortgaged security, bringing the security for sale and adjusting the monies realized on such sale towards the debt due. After the advent of the Recovery of Debts Due to Banks and Financial Institutions Act 1993, this process is permitted to be done before the Tribunals constituted under the said Act. However, the Act of 2003 goes further and permits enforcement of security interest by Banks and Financial Institutions under Section 13 of the Act without intervention of any Court or Tribunal. The Act of 2003 in addition to the provisions contained in Section 13, creates new rights in the Financial Institutions and Banks to assign their debt to Securitisation Companies and Reconstruction Companies under Section 5 and enables such Companies to inter alia sell whole of business of the borrower under Section 9 for the purpose of asset reconstruction. But for these provisions, Securitisation Companies like the 1st respondent-ARCIL could not have had any power in law to sell the business of the borrowers at all. They would have had to take recourse to the ordinary Courts or Tribunals under the Recovery of Debts Due to Banks and Financial Institutions Act 1993 for recovery of debts assigned to them by the Banks and Financial Institutions. So, when the ARCIL invited I.E.I. for sale of business of the SPGL, it was only discharging the statutory powers under Section 9(b) of the Act of 2002 and in doing so, its actions are similar to State Financial Corporations constituted under the State Finance Corporations Act 1951 exercising powers under Section 29 of the said Act. It is also further stated that the law for determining the nature and character of Corporation as agencies and instrumentalities of State or otherwise stipulates that even in the case of an entity incorporated under law such as Companies Act, 1956 where such Corporation is wholly controlled by Government not only in its policy making but also in carrying out functions entrusted to it by Law establishing it or by the charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of the State. In fact, it is well settled that even a private agency supported by the State in its functions and affairs relating to a public duty may be subject to the same Constitutional disciplines and limitations as the State. It is also trite law that if the purpose of the States

control is to meet the purpose for which the Corporation had been constituted or incorporated and such purpose is of public character, such a Corporation would be an instrumentality or agency of the State. It is also further stated that the Securitisation Companies and Reconstruction Companies perform functions of public importance that are closely related to the governmental functions relating to the economy and to the health of Banking/finance. The authority and functions prescribed for Securitisation Companies and Reconstruction Companies under the Act are totally controlled and directed by the Reserve Bank of India. In fact, Securitisation Companies and Reconstruction Companies are prohibited from engaging in any business other than the business of Securitisation and Asset Reconstruction. Therefore, the public nature of the functions of the ARCIL are so impregnated with the Governmental character that it is liable to be held to be an authority within the meaning of Article 226 of the Constitution of India and their actions are amenable to judicial review. It is also further stated that it is notable that the stake holders in the ARCIL include the State Bank of India, Punjab National Bank, I.D.B.I. and I.C.I.C.I. Bank, all of whom are either statutory Banks and Public Financial Institutions or are otherwise corporate entities in which the Central Government exercises deep and pervasive control. The public nature of the functions and orientation of these stake holders is not dissimilar to the public nature or functions to be discharged by ARCIL as a Securitisation Company and Reconstruction Company. It is also further stated that both by reasons of ARCIL being conferred with public functions, duties and responsibilities and equally by reasons of its stake holders being similarly charged with public functions, public duties and public responsibilities and the ARCIL cannot exercise any authority or function in an arbitrary and unreasonable or opaque manner. Further, the duties, functions and responsibilities of public nature and public character contemplated by the Act for Securitisation Companies and Reconstruction Companies had been enumerated as hereunder:

a) Efficient and focused recovery of public monies to reduce non-performing assets of publicly held Banks and financial institutions;

b) To employ and utilize securitized assets judiciously in public interest and not for private good;

c) To ensure that public monies are not blocked in non-productive assets and are utilized in the interest of economy;

d) To recover public monies and thereby improving the financial health of the banking and financial sector in public interest;

e) To employ and utilize the recovered assets gainfully in the interest of national economy;

It is further stated that the following illustrate and demonstrate the deep and pervasive control exercise by the Central Government in relation to the functions and duties of Securitisation Companies and Reconstruction Companies under the Act:

i) ARCIL is prohibited from carrying on business of Securitisation or asset reconstruction except in accordance with the provisions of the Act after due registration under Section 3 of the Act;

ii) The registration of ARCIL under Section 3 of the Act is liable to be cancelled for any of the reasons provided therein;

iii) ARCIL is prohibited under Section 9 from taking any measures for asset reconstruction except as per guidelines framed by the Reserve Bank of India in this behalf;

iv) ARCIL is prohibited under Section 10(2) of the Act from engaging in any business other than the business of Securitisation and Asset Reconstruction;

v) ARCIL is bound to follow the policy determined and directions issued by the Reserve Bank of India in terms of Section 12 of the Act;

It is further stated that in furtherance of the foregoing, as an instrumentality and agency of the State, Securitisation Companies and Reconstruction Companies such as ARCIL would in the exercise of any power or discretion be subject to the same Constitutional and Public Law limitations as the State. The settled Law in this respect prohibits arbitrary action in dealing with the public including for the purpose of entering into contracts. An instrumentality and agency of the State, cannot enter into relationship with any person without meeting the tests inter alia of acting fairly, reasonably and transparently. As such the ARCIL is also obliged to ensure fairness and equality of treatment in its actions and must base its actions on rationale and relevant principles that are not discriminatory and are not guided by any extraneous and irrelevant considerations. It is further stated that the Act contemplates inter alia that Securitisation Companies and Reconstruction Companies shall give effect to their prescribed role and function thereunder by entering into contracts with both private parties as well as with other public Corporations such as public sectors, bank and financial institutions. It is also relevant that the objective and subject matter of such contracts, including those that may be entered with private parties, is directly and indirectly the recovery of public funds and monies from defaulting debtors. It is well recognized that to meet such public objective and goals, the State may confer special privileges and rights to itself or its instrumentalities and even to private parties in general public interest. The Act does confer such rights and powers on the Securitisation Companies and Reconstruction Companies along with limited discretion to exercise them in public interest. The exercise of discretion by such Companies in turn confers certain privileges and rights under the contracts executed by them with the Securitisation Companies and Reconstruction Companies. However, in exercise of the discretion for selecting the recipients of such special privileges and rights, neither the State, nor its agencies/instrumentalities are free, as a private individual, and cannot lay down arbitrary or capricious or unreasonable standards for the choice of persons with whom it will deal. Further it is stated that it is settled principle that the State need not enter into any contract with anyone for any purpose but if it does so, it must do so fairly without discrimination and without unfair procedure. The said principle holds equally in all cases of dealings by the instrumentalities of State such as ARCIL, with the public, where the interest sought to be protected is a privilege or power protected by statute. Hence it is stated that the actions of the ARCIL are liable to be scrutinized under Article 226 of the Constitution of India. Further, the petitioner reliably understands that the Reserve Bank of India had not issued any guidelines for sale of the business of borrowers under Section 9(b) of the Act. Under Clause 7(2) of the Securitised Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003, until the Reserve Bank of India issues such guidelines, the measures specified in Section 9(b) of the Act shall not be taken. The said directions are binding on ARCIL under Section 12 of the Act and ARCIL therefore could not have proceeded with the sale of business of the SPGL in the absence of guidelines framed by the Reserve Bank of India in this regard. Such disregard is liable to be viewed seriously rendering its registration under Section 3 of the Act being cancelled under Section 4(1)(d) of the Act. In view of the violation of this statutory provision, a writ under Article 226 of the Constitution of India is maintainable. Further it is stated that the fact that the terms of the I.E.I. empowered ARCIL to accept bids in its discretion does not mean that the ARCIL, which is admittedly a 'trustee', has a licence to act arbitrarily and unreasonably and refuse to account for its actions however mala fide, arbitrary or unreasonable they are. Further, no question of estoppel arises when the terms of the I.E.I. are themselves violated by the ARCIL nor is the principle of acquiescence attracted to the facts and circumstances of the case. With reference to paras 8, 9 and 10, it is stated that the petitioner was informed by the ARCIL of rejection of the petitioner's bid vide its letter dated 22-12-2007 which was dispatched on 26-12-2007 at 6 p.m. and was received by the petitioner-Company on 27-12-2007 and by27-12-2007, definitive agreement had already been signed between ARCIL and the 5th respondent as a fait accompli. It is also stated that after the said letter was received by the petitioner on 27-12-2007, the deponent had contacted the officials of the ARCIL to disclose the details relating to the bidding process. ARCIL did not furnish any such details. The petitioner addressed a letter dated 16-2-2007 to ARCIL asking ARCIL to furnish these details specifically mentioning that he had made several requests even after 27-12-2006 to furnish the aforesaid details and there was no response from ARCIL. It is pertinent to note that in its reply dated 26-2-2007, ARCIL had not denied that it was requested by the deponent to furnish the details of the bidding process after 27-12-2006. Having deliberately delayed furnishing of details to the

petitioner till 26- 2-2007 and allowing certain events such as signing of definitive agreements, receiving Rs. 50 crores etc., to occur as a fait accompli, it is not open to the ARCIL to contend that the Writ Petition is belated. Further it is averred that the events such as signing of definitive agreements, change in composition of Board of Directors, payment of Rs. 50 crores etc., cannot be said to have irretrievably changed the situation rendering restoration of status quo ante impossible. Payments made can be returned and persons appointed to the Board of Directors can be removed/replaced. The definitive agreement itself does not create any rights unless it is approved by the Company Court. Admittedly the Scheme of Arrangement had been approved by the Company Court and any cosmetic changes such as these cannot confer any rights on the 5th respondent or make immune the action of ARCIL from challenge. Further it is stated that the fact that the deponent had also objected to the Scheme of Arrangement (under Section 391 of the Companies Act, 1956) before the Company Court) in his capacity as a share holder of SPGL does not disentitle the petitioner from challenging under Article 226 of the Constitution of India, the arbitrary action of ARCIL in accepting the bid of the 5th respondent. The person aggrieved by the illegality and arbitrary action committed in the bidding process is the petitioner. The Company Court can only go into the merits of the Scheme of Arrangement submitted for its approval by the 5th respondent keeping in view the interests of the share holders and creditors and it cannot judicially review the action of ARCIL in selecting the 5th respondent. Further, specific stand had been taken that the Writ Petition is not barred by laches. Further, certain aspects had been explained in paras 7, 8, 9 and also 10 of the reply affidavit. It is stated in para-11 that the petitioner had submitted its Binding Final Offer on 24-10-2006 and subsequent thereto the petitioner was asked by the ARCIL vide its letter dated 26-10-2006 to attend a meeting on 10-11-2006 at the office of the ARCIL. During the negotiations, the petitioner was informed by ARCIL's representatives that as per the guidelines of the Reserve Bank of India, it may have to sell the asset and receive complete purchase consideration within 5 years of the purchase of the distressed asset. The petitioner was therefore asked to revise its offer so as to be in accordance with the regulations of the Reserve Bank of India. It is further stated that believing the representation of the ARCIL's representatives, the petitioner submitted a revised offer on 16-11-2006. While in its earlier offer dated 24-10-2006, the petitioner had proposed the payments to end by 2015-16, in the revised offer submitted on 16-1-2006, the petitioner offered full payment by 2011-12 commencing from 1-4-2007 (i.e., within 5 years from the date of purchase of the asset). On the contrary, this rule i.e., that full payment within 5 years of the sale was not applied to the 5th respondent as admittedly the 5th respondent's bid envisaged payment at the end of 20 years from the Scheme approved by the Company Court being effective (Clause 3.2 of the letter dated 12-12-2006 of the respondent 1 to 5). Further, the 5th respondent was allowed to suggest expansion upto 350 MW additional capacity from the existing 208 MW and the said freedom was not allowed to the petitioner-Company by the ARCIL. Thus the offers of the petitioner and the 5th respondent were compared on two different yardsticks by the ARCIL with a view to favour the 5th respondent. It is further stated that by not applying the same criteria/standards to the bid of the petitioner and the 5th respondent at the time of considering the same, ARCIL had acted arbitrarily and illegally thereby violating Article 14 of the Constitution of India. Further, there is no denial by ARCIL (by way of another letter or in the present counter) of para-3 of the letter dated 16-11-2006 addressed by the petitioner to ARCIL wherein the aforesaid facts had been mentioned and therefore the same have to be accepted as true. Further it is denied that the bid of the 5th respondent was qualitatively and substantially better and more beneficial to the ARCIL and the lenders. In addition to the points set out in para VII C and D of the affidavit filed in support of the Writ Petition, the following points had been highlighted to show the superiority of the petitioner's bid over the bid of the 5th respondent:

Petitioner's Bid

5th Respondent's Bid

Comments

a) The petitioner, both in option I and II in its bid, came forward to make lumpsum payment as upfront payment. In option I, the upfront payment was Rs. 100 crores (in one payment). In option II, Scheme A (100%

upfront payment) of Rs. 356 crores was offered.

Under option I, the petitioner, besides upfront payment, agreed to pay the balance of Rs. 317 crores in four annual instalments in order to ensure that by the end of the 5th year i.e., 2010-11, the amount is totally discharged.

Even under option II (Scheme A), the op came forward to pay the entire amount of Rs. 356 crores immediately.

In the proposal under Scheme B 'combination of upfront and instalment scheme', two methods were proposed by the petitioner:

i) The total of Rs. 480 crores (with no interest) would be paid - Rs. 200 crores upfront; Rs. 280 crores in 4 annual instalments.

ii) With interest payable at 9% annually - Rs. 200 crores upfront; Rs. 262 crores in 4 annual instalments;

a) The 5th respondent's bid offered a mere Rs. 50 crores as upfront payment and Rs. 150 crores in 6 monthly instalments, that too commencing from 1-4-2007 with 10% interest on the outstanding balance.

A. Payment of Rs. 50 crores within 15 days from 12-12-2006.

B. Payment of Rs. 150 crores in 6 monthly instalments commencing from 30-4-2007 together with interest calculated @ 10% p.a. payable quarterly in arrears on the outstanding balance starting from 1-4-2007.

C. Payment of Rs. 175 crore as bullet payment on 31-3-2012. Interest shall be payable on the said amount @ 10% p.a. payable quarterly from 1-4-2007, first payment date being 30-6-2007.

D. Issuance of compulsorily convertible debentures (CCD) of Rs. 325 crores which shall carry a coupon rate of 5% p.a. payable half yearly to be converted into equity of SPGL at such price, that would convert to 10% equity stake of the fully diluted equity share capital of SPGL post the equity infusion for the expansion project of upto 350 MW additional capacity. Such conversion shall happen at the time of achievement of financial closure for the expansion project and before any Initial Public Offer (IPO) in respect of equity shares of SPGL.

E. The residual debt of all existing lenders shall be written off.

F. The existing equity capital of SPGL shall be restructured through composite scheme by converting entire existing equity share capital of SPGL into redeemable preference shares with a coupon rate of 0.01% payable at the end of 20 years from the composite scheme become effective and by issuance of fresh equity in favour of the bidder and in the manner proposed in the bid.

a) Thus the petitioner had proposed to make upfront payment more than that offered by the 5th respondent in its bid.

b) The sum of Rs. 200 crores became payable, as per the offer of the 5th respondent by 30-9-2007 whereas the petitioner under Scheme B had offered to pay the sum of Rs. 200 crores as 'upfront' payment only by 30-4-2007.

c) When the bid is for 'as is where is basis', the 5th respondent's offer suggesting a scheme of expansion from 208 MW by adding further capacity of 350 MW, should have been rejected outright as it was not in conformity with the I.E.I. ARCIL should have given importance to the quick and early resolution of its debt (within 5 years) rather be happy that is being paid 20 years hence after the proposed expansion and infusion of capita.

d) The scheme suggested by the 5th respondent jeopardizes the interests of the share holders and also the lenders as it envisages conversion of existing share capital into redeemable preference shares. This is not

permitted under the Companies Act, 1956.

Further, it is denied that the offer allegedly made by the 5th respondent was demonstrably more beneficial to the lenders and the ARCIL. It is further denied that the bid of the petitioner-Company was conditional or against the conditions of the I.E.I. If the said allegation was correct, ARCIL would not have short- listed the petitioner-Company (as stated in its letter dated 14-9-2006 addressed to the petitioner-Company) to undertake due diligence, asking the petitioner to submit a revised bid (Final Binding Offer) (accepted by ARCIL on 24- 10-2006) and after negotiations on 10-11-2006 accepting another revised offer on 16-11-2006. The alleged expansion specified in the bidding process is nothing but a myth. It stated that the Company already cancelled the allotment of additional allocation of 0.75 MMSCMD Gas and they had already cancelled the Bank guarantee given by M/s. IndusInd Bank in favour of M/s. GAIL (India) Ltd. for a sum of Rs. 7,76,25,500/- and received back the amount from the IndusInd Bank. It is ununderstandable how the petitioner can think of going for expansion in the absence of Gas. Further, it is stated that it is not correct that the petitioner-Company had failed to demonstrate how its bid was more beneficial than the one made by the 5th respondent. It is stated that in para VII(c) of the affidavit filed in support of the Writ Petition, the petitioner had clearly set out how its bid is superior to that of the 5th respondent and the petitioner reiterated the same.

19. In the reply affidavit filed by the writ petitioner to the counter affidavit of the 3rd respondent-SPGL, in reference to para 2(1), it is denied that the resolution dated 5-4-2007 does not empower the deponent to depose on oath on behalf of the petitioner-Company that it does not authorize him to institute any legal proceedings on behalf of the petitioner-Company. It is denied that the Writ Petition had not been validly and legally instituted on behalf of the petitioner and is liable to be dismissed on the said ground. With reference to reply on merits, in para-II, it is stated that the contentions of the SPGL that it is not a 'State' under Article 12 of the Constitution of India and therefore a Writ Petition under Article 226 is not maintainable is not correct. The Writ Petition is directed against the action of the ARCIL in transferring the business of the SPGL arbitrarily and illegally in violation of Article 14 of the Constitution of India. The petitioner had contended that the ARCIL comes within the definition of 'person' or 'authority' under Article 226 of the Constitution of India and that it is exercising statutory and public functions and therefore its actions are amenable to judicial review under Article 226 of the Constitution of India. As the SPGL, whose business was transferred by the ARCIL under the provisions of the Act, is a necessary party to the Writ Petition, it is shown as a party-respondent. However, it is denied that no Writ Petition can be legally maintained for violation of Article 300A of the Constitution of India. With reference to para-III, it is denied that the pleadings in the affidavit filed along with the Writ Petition are vague or inadmissible in the eye of Law. It is stated that the pleadings state the facts in so far as they are necessary for the purpose of filing the Writ Petition. Inasmuch as there is no denial by the SPGL about the fact that the deponent or his family members were original promoters of the SPGL or that they had provided personal and corporate guarantee and pledged their shares to the ARCIL, the said facts to be taken as true. With reference to para-IV, the contents in so far as the assignment of debt by secured creditors of SPGL to ARCIL had been admitted. Further, with reference to para V(i) of the counter affidavit of the SPGL, it is stated that SPGL had not given any date on which the 4th respondent allegedly resigned as a Director of the SPGL. The suppression of the said fact by the SPGL demonstrates that the 4th respondent was actively involved in the affairs of the SPGL at least till the bid of the 5th respondent was accepted by the ARCIL on 12-12-2006 and even subsequent thereto. In fact, the 4th respondent is the person behind M/s. Cellcap Securities Limited, the holder of 90% shares in the 5th respondent. The fact that the respondents 4 and 5 had not filed any counter in the Writ Petition and none of the other respondents gave any factual details of the shareholding of the 5th respondent creates any amount of suspicion that the 4th respondent or his associates are the persons having control of the 5th respondent. All the respondents may be directed to produce the facts relating to the date of incorporation of the 5th respondent and its shareholding during the period July 2006 to February 2007. If the said facts are disclosed, they would reveal a close nexus between the respondents 4 and 5. With reference to para V(ii), the contentions raised therein in so far as the debts of the SPGL being secured by its assets had been admitted. With reference to para V(iii), it is denied that Sri M.Kishan Rao was responsible for the financial mess of the SPGL and the origin of the same was the period the SPGL was under the management of Mr. M.

Kishan Rao. It is denied that there was financial mismanagement by Mr. M. Kishan Rao causing the Banks and financial institutions to take over the management of the SPGL on 30-9-2003. With reference to para V(iv), it is reiterated that on 10-3-2006, SPGL was legally taken over by the 4th respondent and his group. With reference to para V(v), SPGL is put to strict proof of the contentions raised therein and the same had been denied. Further, with reference to para VI(ii), it is stated that it is not correct to state that ARCIL was not discharging any statutory public duty in the matter of issuance of I.E.I. under the Act. It is denied that issuance of I.E.I. by ARCIL was a purely commercial decision taken by it in pursuance of its business activity. With reference to para VI(iii) to (vii) of the counter affidavit of the SPGL, it is denied that the definitive agreement was signed by SPGL with ARCIL and respondents 5 and 6 on 10-1-2007 and not on 27-12-2006. ARCIL in its counter had not chosen to deny the contentions of the petitioner that the definitive agreements were signed on 27-12-2006 and such lack of denial throws any amount of doubt on the plea of the SPGL that they were signed on 10- 1-2007. The non-production of a copy of the said agreement by the SPGL and ARCIL supports the stand of the petitioner. Further, with reference to para VII(B), it is denied that the petitioner has no locus-standi to allege about the internal management and functioning of the SPGL. Even though the petitioner is not a Director or a share holder of SPGL, the family of the deponent (who is a Director of the petitioner-Company) were the original promoters of SPGL. The petitioner is entitled to state the mismanagement and sharp practices indulged by the 4th respondent to highlight the background of the SPGL and the collusion between the respondents 2 and 4 to 6. With reference to para VII(C), it is stated that the contentions raised therein are not tenable. As regards the voting by share holders in the meeting held on 23-3-2007, pursuant to the order dated 13-2-2007 in C.P. No. 43/2007, admittedly the voting rights of Mr. M. Kishan Rao and his family were exercised by ARCIL and that was why there was not much of objection to the proposed Scheme of Arrangement. However, that does not preclude the petitioner from challenging the illegal action of ARCIL in the present Writ Petition as a bidder whose bid was unfairly and arbitrarily rejected by ARCIL. Further, it is stated that it is important to note that the Registrar of Companies, A.P. Ministry of Company Affairs, Government of India, Hyderabad, had filed a report in C.P. No. 43/2007 specifically stating that under Part III of the Scheme of Arrangement for which sanction from the High Court is sought in the above C.P., the existing equity capital of the Company shall be restructured by converting the entire equity share capital of the SPGL into redeemable preference shares with a coupon rate of 0.05% payable at the end of 15 years on coming into effect of the scheme, that such conversion of existing equity shares into redeemable preference shares is not permissible under the Companies Act, 1956. The report also mentions that the ARCIL had claimed that they were holding voting power in respect of 2,64,89,700 shares pledged to it but the Chairman's report mentions only 2,14,79,269 shares of value Rs. 21,57,92,690 considered for the purpose of voting rights and a difference of 50,10,431 of value Rs. 5,01,04,310 does not find any mention in the Chairman's report. In view of the said circumstances, it is highly doubtful that the scheme as proposed by the SPGL would be accepted by this Court in C.P. No. 43/2007. Further, it is denied that there was undue delay on the part of the petitioner in approaching this Court and that the petitioner had oblique motives to file the Writ Petition. With reference to para VII(G), it is denied that the Writ Petition is not legally maintainable against SPGL. Further, with reference to para VII(H), it is denied that there was no cause of action in favour of the petitioner as against ARCIL or SPGL and that the Writ Petition is not maintainable against SPGL. It is denied that this Court has no territorial jurisdiction to entertain the Writ Petition. In any event, after the Writ Petition was admitted by this Court, it is not open to the SPGL to raise this plea which was not even raised by the ARCIL in its counter. As the SPGL is admittedly registered within the jurisdiction of this Court and even application for confirmation of Scheme of Arrangement was admittedly filed in the High Court at Hyderabad, at least part of the cause of action can be said to have arisen within the territorial jurisdiction of this Court. In fact, no such plea was raised by any of the respondents 1 and 2 who were represented by a Senior Counsel and by Counsel for SPGL who had filed a caveat opposed the Writ Petition at the time of admission of the Writ Petition. Further, it is stated that any interim order in favour of the petitioner would jeopardize the restructuring of the debt and share capital of the SPGL which was being done in a time bound manner or that it would cause irreparable and irretrievable damage to the interest of the share holders and the secured creditors of the SPGL.

20. Respondents 1 and 2 filed a Rejoinder, sworn to by the Chief Manager of the 1st respondent-ARCIL, to the reply affidavit filed by the petitioner. While reiterating the pleadings in the counter affidavit it is stated that the entire exercise pertaining to the I.E.I. was in the realm of private contractual rights by the ARCIL and was not in discharge of any statutory or public authority or duty. Further it is specifically pleaded that the ARCIL was exercising such contractual rights in private law realm and hence the Writ Petition is not maintainable. Further, it is stated that the contentions that the ARCIL had acted in violation of Section 9 of the Act and the guidelines framed by the Reserve Bank of India in the year 2003 are purely misconceived, untenable and hence unsustainable. Further it is stated that the provisions of the Act are in addition and do not derogate any other rights that are available with any secured creditor including a Securitisation Company in respect of actions governing the recovery of amounts. It is also further stated that by the rights that had been assigned under various deeds of assignment, ARCIL is authorised in law to exercise any or all of such contractual rights as are available with the financial institutions/banks for the purpose of realization of its amounts. The entire exercise carried out by the respondents 1 and 2 is thus in exercise of such contractual rights available with the ARCIL. The actions had not been initiated on the basis of any sanction authorised by Section 9(a) or (b) of the Securitisation Act and all the contentions made to the contra are incorrect. It is further stated that the lenders could exercise only such of the powers as are vested in it either under the various documents and/or I the provisions of the applicable laws. The I.E.I. was not issued under Section 9(a) and (b) of the Act but it was issued very specifically in exercise of the private contractual rights available under the contracts governing the transaction being under the loan and security documents and the same is abundantly evident from the deliverables of the answering respondents specified in the I.E.I. Such deliverables had been clearly limited to rights available in respect of the debt held by the answering respondent and it was left to the prospective Expressors to indicate structure of transactions for resolution of dues keeping in mind the said deliverables and it was further clarified that the working out of any such structure was subject to its feasibility under applicable laws and necessary consents and provisions of the subsisting contracts and hence the Expression of Interest did not contemplate any sale under Section 9(a) and 9(b) of the Act. It is further stated that the Bombay High Court in GHCL Limited v. Asset Reconstruction Co. and Ors. W.P.(L) No. 417 of 2005 held:

The Securitisation Act is an enabling enactment and it is an enactment over and above the other relevant provisions of various statutes which otherwise prevail. The submission of the petitioners that the respondents ought to be directed to proceed in a particular manner cannot, therefore, be accepted in these circumstances. As noted above, Section 9 of the Securitisation Act itself records that the measures contemplated thereunder are without prejudice to the provisions contained in any other law for the time being in force. We may also note that Section 31(b) of the Securitisation Act specifically provides that the provisions of this Act shall not apply to a pledge of movables within the meaning of Section 172 of the Indian Contract Act. The shares of these two entities had been pledged and, therefore, to come out of the present difficulties of the Saurashtra Chemicals Ltd., this measure had been resorted to. It is not possible to accept that the measure is one under the Securitisation Act nor can therefore it be stated that the action is bad in law in any way for not complying with any of the RBI Guidelines. Petition is dismissed.

It is also further stated that at any rate the rights conferred by the provisions of the Securitisation Act entitling the secured creditors initiating action under Section 13 are not in any manner restricted by the non- issue of guidelines by the Reserve Bank of India which were to guide only the exercise of power under Section 9 of the Act. Even in respect of such actions under Section 9, the mere non-issue of guidelines cannot dilute or limit the operation of the Act by virtually rendering the provisions of Section 9 otiose or illusory. Hence, it is incorrect to contend that the ARCIL could not have taken steps for inviting Expressions of Interest pertaining to the SPGL.

21. Further, in the additional reply affidavit filed by the writ petitioner to the rejoinder of respondents 1 and 2 it is stated with reference to para-2 it is denied that the I.E.I. was in the realm of private contractual rights by the ARCIL and was not in discharge of any statutory or public authority or duty. Admittedly under Section 5(b) of the Act, ARCIL had acquired by agreement that Banks and Financial institutions, the financial asset of the

SPGL. It is further stated that in the I.E.I. it is stated 'ARCIL intends to take steps for resolution of the debt of the SPGL. Accordingly it is exploring various feasibilities and possibilities towards opportunities available for the same. Expressors, if interested in the business/assets of SPGL, may participate in the process under this I.E.I. and submit that their indicative offer along with their proposed transaction structure'. It is further stated that these words clearly indicate that the sale of business/assets proposed to be done pursuant to the I.E.I. is only a method of carrying on the transactions of sale of business of the SPGL under Section 9(b) of the Act and it is a measure of asset reconstruction traceable only to Section 9 of the Act. Once the respondents 1 and 2 admit that there are no guidelines issued by the Reserve Bank of India, the sale of business purported to be done by the ARCIL is not permissible in view of Rule 7(2) of the Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions 2003. Further it is stated that the contentions raised in paras 3, 4 and 5 are therefore not tenable. Further, in the additional reply affidavit, at para-4, it is stated that the respondents are not entitled to place any reliance on the decision of the Bombay High Court in W.P. No. 417/2005 GHCL v. Asset Reconstruction Co. and Ors. for the following reasons. The respondents had chosen only to mention about the order of the Bombay High Court dated 15-2-2005 but had suppressed the fact that an SLP (Civil) No. 4317 of 2005 was filed against the said order by M/s. GHCL and the said S.L.P. was decided on 8-4-2005 whereunder the parties were asked to approach the High Court in view of the contention raised by the GHCL that the points urged by it were not considered by the Bombay High Court. Subsequent thereto a Review Petition No. 30/2005 was filed by M/s. GHCL in the Bombay High Court and the said Review Petition was allowed on 4- 5-2005 by the said Court and the Writ Petition was restored to the file of the Bombay High Court. Subsequent thereto, the parties settled the matter by filing a compromise memo on 4-5-2005. It is very clear that the respondents 1 and 2 had chosen not to mention the aforesaid facts with a mala fide intention to mislead this Court. It is further stated that the contention of the respondents in para-7 is totally untenable. It is not the case of the respondents that they had acted under Section 13 of the Act because under Rule 7(4) of the Rules aforesaid, the sale of secured assets by a Securitisation Company or Reconstruction Company can be done only if the sale is conducted through a public auction. Neither the acquisition of the asset by the ARCIL nor its disposal by ARCIL is by public auction in the present case. Therefore, the contention based on Section 13 of the Act has no relevance. The further contention that mere non-issuance of guidelines cannot dilute or limit the operation of the Act is equally untenable and this is because every Securitisation Company has to follow the directions of the Reserve Bank under Section 12(1) of the Act and under Rule 7(2), till guidelines are issued for taking measures specified in Section 9(a)&(b), such measures shall not be taken by any Securitisation Company and such obedience will render the said Securitisation Company's certificate of registration to be cancelled by the Reserve Bank of India and will also render any such transaction null and void.

22. An application W.P.M.P. No. 14890/2007 was filed for deletion of 6th respondent and as stated supra, a counter affidavit also had been filed in this regard. The 6th respondent was the party who had initially participated in the bid and subsequent thereto, the 5th respondent came into picture. In fact, it is one of the grounds of attack raised by the petitioner while questioning the validity of the action in question. Hence, to contend that the 6th respondent is not a necessary party and further praying for deletion of such party on the ground that unnecessarily such party was impleaded, in the considered opinion of this Court, cannot be sustained. Hence, the application W.P.M.P. No. 14890/2007 is hereby closed.

23. Maintainability of the Writ Petition:

The Counsel on record made elaborate submissions relating to the maintainability of the Writ Petition - the learned senior Counsel representing the writ petitioner contending that though the present lis may fall in relation to the contractual field, in view of the public interest and the statutory flavour attached to the 1st respondent as governed by different provisions of the Act and the Reserve Bank of India guidelines as well, the Writ Petition is maintainable, and on the contrary the Counsel representing the respondents otherwise contending that this lis is concerned with purely a private contract between the parties and hence the said lis does not fall within the Public Law domain at all and hence the very remedy by way of a Writ Petition is a

misconceived remedy. In substance, these are the respective stands of the parties.

24. The petitioner-Company is a special investment vehicle floated by Mr. M. Raghuveer and his other family members who are some of the original promoters of 3rd respondent-Company-S.P.G.L. The 1st respondent-Company-ARCIL, is a Company incorporated under the provisions of the Indian Companies Act, 1956 and it is registered as a Securitisation Company and Reconstruction Company pursuant to Section 3 of the Act. It is also trustee of S.P.G.L. The 1st respondent-Company-ARCIL has been sponsored by major Public Sector Banks and having Institutions like State Bank of India, ICICI Bank, Punjab National Bank and Industrial Development Bank of India and the like. Further, it is stated that S.P.G.L. is duly incorporated under the provisions of the Indian Companies Act, 1956 and is engaged in the business of generation of power having set up a 208 MW combined cycle gas based power project in the State of Andhra Pradesh. The authorized share capital of the petitioner-Company as per the last audited balance sheet as on 31-3-2006 is Rs. 235 Crores, divided into 2,35,000 equity shares of Rs. 10/- each. It is also stated that 1st respondent-ARCIL acquired from I.D.B.I. under an assignment agreement dated 31-12-2005 and from I.C.I.C.I. Bank under an assignment agreement dated 29-12-2005, financial assistance granted to S.P.G.L. together with all underlying security interest and all their rights, title and interest under various the agreements entered into by S.P.G.L. with those Banks. This was done pursuant to Section 5 of the Act. Several further facts relating to these transactions with Banking Institutions also had been averred in the respective pleadings of the parties. It is also stated that the 1st respondent-ARCIL acting in its capacity as trustee of the Trust set up by it relating to the financial assistance pertaining to S.P.G.L., initiated the process of resolution of the debt of S.P.G.L. and it issued an I.E.I. with a view to transfer the control of S.P.G.L. by way of sale of its business and assets. This was done by 1st respondent-ARCIL as a registered Securitisation and Reconstruction Company under Section 3 r/w. Section 5 of the Act. Thus, the 1st respondent-ARCIL has been discharging a statutory Public duty conferred on it under Sections 5(2) & (3) of the Act. In the counter affidavit filed by the respondents 1 and 2, it is stated that the 1st respondent-ARCIL is neither a State within the meaning of Article 12 of the Constitution of India nor an authority for the purposes of Article 226 of the Constitution of India and all the actions of the 1st respondent-ARCIL which have been challenged in the present Writ Petition occur purely in the private contractual field and while the Act enjoins certain responsibilities upon the Securitisation Company or Reconstruction Company qua a borrower, even such responsibilities are in the nature of Private Law realm arising out of contracts where the actionable cause of action is available to borrower, that too in the Private Law sphere. Further, it has been stated that the Writ Petition has been filed against the action of the 1st respondent-ARCIL that is purely contractual in nature and the Writ Petition under Article 226 of the Constitution of India cannot therefore be instituted for challenging such action. It is also further averred that the entire sequence of events leading to the issuance of the letter dated 12-12-2006 in favour of the 5th respondent accepting its bid and the letter dated 22-12- 2006 informing the writ petitioner of the rejection of its bid, proceed on the ARCIL's private contract rights obtained under various debts of assignment. The I.E.I. categorically mentioned that the ARCIL was only intending to take steps for resolution of the debt of the S.P.G.L. and provided for the transfer of the ARCIL's rights (as acquired and assigned in its favour) to another prospective bidder. It is stated that the following provisions of I.E.I. clearly spell out the scope and the role of the issuance of I.E.I.

ARCIL has acquired financial assets as above, approximately amounting to 77.6% of the total debt of S.P.G.L. for the year 2005-2006 (un-audited provided by the company).

Invitation and the process:

ARCIL intends to take steps for resolution of the debt of S.P.G.L. Accordingly it is exploring various feasibilities and possibilities towards opportunities available for the same. Expressors, if interested in the Business/assets of S.P.G.L. may participate in the process under this I.E.I. and submit their indicative offer along with their proposed transaction structure. The transaction shall be subject to the feasibility under all applicable laws, rules, regulations and all the necessary approvals, statutory or otherwise. It is thus very clear that what ARCIL offered in terms of I.E.I. was only its deliverables which are also reproduced below:

Please note that as far as deliverables by ARCIL under this option are concerned, the same shall be limited to:

(iv) Secured Debt of S.P.G.L. not less than 75% in value of the total debt either by way of consent as the secured creditor or by way of assignment of such debt with underlying security interest (provided that in case of assignment, the stamp duty, registration fees and any other tax, cess etc., applicable and payable on the same shall be entirely borne by the purchaser), and/or

(v) Procurement of exercise of voting rights in respect of 5,45,58,000/- number of Equity shares in equity capital of S.P.G.L. of face value of Rs. 10/- each held by Banks/Financial institutions (30.92% of total paid-up equity capital of S.P.G.L.).

(vi) Procure of exercise of pro-rata voting rights in respect of Promoters' 2,65,00,000 number of shares held in equity capital of S.P.G.L. of face value of Rs. 10/- each pledged with lenders (15.01% of total paid-up equity capital of S.P.G.L.).

It is stated that from the aforecited provisions, it is clear and is established beyond doubt that ARCIL had offered to exercise and liquidate only its contractual rights as a lender and was not acting in 'discharge of public duty' as it is sought to be interpreted by the petitioner. In fact, based on ARCIL's limited deliverables, it was upto the prospective Expressors to indicate their respective transaction structures in their Expressions. Further, it was also made clear that:

The transaction shall be subject to the feasibility under all the applicable laws, rules, regulations and all the necessary approvals, statutory or otherwise.

Further it is averred in para-6 that the 1st respondent-ARCIL does not discharge any public functions or duties at all and it is not in any manner discharging any statutory Public functions and hence the list does not fall within the realm of Public Law sphere and the Writ Petition is not maintainable. In the counter affidavit filed by 3rd respondent-S.P.G.L. also it is stated that S.P.G.L. is neither a State under Article 12 of the Constitution of India nor an instrumentality of the State and the Writ Petition cannot lie against S.P.G.L. In the other counter affidavits and reply affidavits and also the rejoinders filed, the self-same stand had been reiterated. In the reply affidavit filed on behalf of the petitioner to the counter affidavit of the 3rd respondent- S.P.G.L., specific stand has been taken that the Writ Petition is directed against the action of the 1st respondent-ARCIL in transferring the business of the 3rd respondent arbitrarily and illegally in violation of Article 14 of the Constitution of India and the 1st respondent-ARCIL comes within the definition of 'person' or 'authority' under Article 226 of the Constitution of India, that it is exercising statutory and Public functions and therefore the actions are amenable to judicial review under Article 226 of the Constitution of India. The 3rd respondent-S.P.G.L., whose business was transferred by the 1st respondent- ARCIL under the provisions of the Act is a necessary party to the Writ Petition and it is also stated that it is denied that no Writ Petition can be legally maintained for violation of Article 300A of the Constitution of India. In the reply affidavit filed on behalf of the petitioner to the counter affidavit of respondents 1 and 2, Sections 2, 3, 4, 5, 7, 9, 10 and 12 of the Act had been referred to and it is stated that the Act is to create legal basis for facilitating the securitization and financial assets of Banks and financial Institutions. The absence of such legal provisions has created a slow and inefficient pace of recovery of defaulting loans and mounted levels of non- performing assets of Banks and financial Institutions. On the recommendations of the Narsimham Committee I and II and Andhyarujina Committee for banking sector reforms, the Central Government decided to make legal provision for securitisation and reconstruction by Companies such as 1st respondent-ARCIL. Their responsibilities and duties are either provided in the Act or are to be determined, regulated and supervised by the Reserve Bank of India. Such regulation of activities of the Securitisation Companies and Reconstruction Companies was found expedient in public interest keeping in view the onerous provisions of the Act relating to Enforcement of Securities and the wide powers attached to such Companies to resecure the secured assets. Ordinarily any secured creditor has to proceed to recover money through ordinary Court of Law by filing suits for recovery of money basing on mortgage security bringing security for sale and adjusting money on such sale towards the

debt due. After the advent of Recovery of Debts due to Banks and Financial Institutions Act, 1983, this process is permitted to be done before the Tribunals constituted under the said Act. However, the said Act goes further and permits the enforcement of security interest by Banks and Financial institutions under Section 13 of the Act without intervention of any Court or Tribunal. The Act, in addition to the provisions contained in Section 13 creates new rights in the financial Institutions and Banks to assign their debt to Securitisation Companies and Reconstruction Companies under Section 5 and enable such Companies to inter-alia sell away all the business of the borrower under Section 9 for the purpose of asset reconstruction. But for these provisions, the Securitisation Companies like the 1st respondent-ARCIL could not have had any power in Law to sell the business of the borrowers at all. They may have to take recourse to the ordinary Courts or Tribunals. Hence it is stated that when the 1st respondent invited expression of interest for sale of the business of the 3rd respondent-S.P.G.L., it was discharging the statutory powers under Section 9(b) of the Act. In doing so, these actions are similar to the actions of the State Financial Corporations constituted under the State Financial Corporations Act 1951 exercising powers under Section 29 of the said Act. It is further stated that the Law for determining the nature and character of Corporation as agencies and instrumentalities of State or otherwise stipulates that even in the case of an entity incorporated under law such as Companies Act, 1956 where such corporation is wholly controlled by Government not only in its policy making but also in carrying out functions entrusted to it by law establishing it or by the charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of the State. In fact, it is well settled that even a private agency supported by the State in its functions and affairs relating to a public duty may be subject to the same constitutional disciplines and limitations as the State. It is also trite law that if the purpose of the State's control is to meet the purpose for which the corporation had been established or incorporated and such purpose is of public character, such a corporation would be an instrumentality or agency of the State. It is also further stated that the Securitisation Companies and Reconstruction Companies perform functions of public importance that are closely related to the governmental functions relating to the economy and to the health of Banking/finance. The authority and functions prescribed for Securitisation Companies and Reconstruction Companies under the Act are totally controlled and directed by the Reserve Bank of India. In fact, Securitisation Companies and Reconstruction Companies are prohibited from engaging in any business other than the business of Securitisation and Asset Reconstruction. Therefore, the public nature of the functions of the ARCIL are so impregnated with the Governmental character that it is liable to be held to be an authority within the meaning of Article 226 of the Constitution of India and their actions are amenable to judicial review. It is also further stated that it is notable that the stake holders in the ARCIL include the State Bank of India, Punjab National Bank, I.D.B.I. and I.C.I.C.I. Bank, all of whom are either statutory Banks and Public Financial Institutions or are otherwise corporate entities in which the Central Government exercises deep and pervasive control. The public nature of the functions and orientation of these stake holders is not dissimilar to the public nature or functions to be discharged by ARCIL as a Securitisation Company and Reconstruction Company. Further it is stated that both by reasons of the 1st respondent being conferred with Public duties, functions and responsibilities and equally by reasons of its stake holders being similarly charged with Public functions, Public duties and Public responsibilities, the 1st respondent-ARCIL cannot exercise any authority or function in an arbitrary fashion. The following illustrate the duties and functions of public nature and public character contemplated by the Security Act, Securitisation Companies and Reconstruction Companies:

(i) Efficient and focused recovery of public monies to reduce non-performing assets of publicly held Banks and financial institutions;

(ii) To employ and utilize securitized assets judiciously in public interest and not for private good;

(iii) To ensure that public monies are not blocked in non-productive assets and are utilized in the interest of economy;

(iv) To recover public monies and thereby improving the financial health of the banking and financial sector in public interest;

(v) To employ and utilize the recovered assets gainfully in the interest of national economy;

25. The Writ Petition is filed questioning the action of the ARCIL in transferring the business of S.P.G.L. on the ground that the same was done in an arbitrary fashion and is violative of Article 14 of the Constitution of India. The twin contentions advanced relating to the maintainability of the Writ Petition are that ARCIL would not fall within the meaning of State or Authority under Article 12 of the Constitution of India or at any rate within the meaning of Authority under Article 226 of the Constitution of India and in view of the fact that the actions of the ARCIL to be guided by the relevant statutory provisions and also the guidelines of the Reserve Bank of India since public interest is involved and it should be taken that the ARCIL is discharging public duties and hence the Writ Petition is maintainable.

26. The 1st respondent-ARCIL is registered under Section 3 of the Act. Section 3 of the Act dealing with Registration of securitisation companies or reconstruction companies reads as hereunder:

(1) No securitisation company or reconstruction company shall commence or carry on the business of securitisation or asset reconstruction without-

(a) obtaining a certificate of registration granted under this section; and

(b) having the owned fund of not less than two crore rupees or such other amount not exceeding fifteen per cent of total financial assets acquired or to be acquired by the securitisation company or reconstruction company, as the Reserve Bank may, by notification, specify:

Provided that the Reserve Bank may, by notification, specify different amounts of owned fund for different class or classes of securitisation companies and reconstruction companies:

Provided further that a securitisation company or reconstruction company, existing on the commencement of this Act, shall make an application for registration to the Reserve Bank before the expiry of six months from such commencement and notwithstanding anything contained in this sub-section may continue to carry on the business of securitisation or asset reconstruction until a certificate of registration is granted to it or, as the case may be, rejection of application for registration is communicated to it.

(2) Every securitisation company or reconstruction company shall make an application for registration to the Reserve Bank in such form and manner as it may specify.

(3) The Reserve Bank may, for the purpose of considering the application for registration of a securitisation company or reconstruction company to commence or carryon the business of securitisation or asset reconstruction, as the case may be, require to be satisfied, by an inspection of records or books of such securitisation company or reconstruction company, or otherwise, that the following conditions are fulfilled, namely:

(a) that the securitisation company or reconstruction company has not incurred losses in any of the three preceding financial years;

(b) that such securitisation company or reconstruction company has made adequate arrangements for realization of the financial assets acquired for the purpose of securitisation or asset reconstruction and shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the qualified institutional buyers or other persons;

(c) that the directors of securitisation company or reconstruction company have adequate professional experience in matters related to finance, securitisation and reconstruction;

(d) that the board of directors of such securitisation company or reconstruction company does not consist of more than half of its total number of directors who are either nominees of any sponsor or associated in any manner with the sponsor or any of its subsidiaries;

(e) that any of its directors has not been convicted of any offence involving moral turpitude;

(f) that a sponsor, is not a holding company of the securitisation company or reconstruction company, as the case may be, or, does not otherwise hold any controlling interest in such securitisation company or reconstruction company;

(g) that securitisation company or reconstruction company has complied with or is in a position to comply with prudential norms specified by the Reserve Bank;

(h) that securitisation company or reconstruction company has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose;

(4) The Reserve Bank may, after being satisfied that the conditions specified in Sub-section (3) are fulfilled, grant a certificate of registration to the securitisation company or the reconstruction company to commence or carry on business of securitisation or asset reconstruction, subject to such conditions, which it may consider, fit to impose.

(5) The Reserve Bank may reject the application made under Sub-section (2) if it is satisfied that the conditions specified in Sub-section (3) are not fulfilled: Provided that before rejecting the application, the applicant shall be given a reasonable opportunity of being heard.

(6) Every securitisation or reconstruction company, shall obtain prior approval of the Reserve Bank for any substantial change in its management or change of location of its registered office or change in its name:

Provided that the decision of the Reserve Bank, whether the change in management of a securitisation company or a reconstruction company is a substantial change in its management or not, shall be final.

Explanation: For the purposes of this section, the expression 'substantial change in management' means the change in the management by way of transfer of shares or amalgamation or transfer of the business of the company.

Section 3(3)(g) & (h) of the Act would assume some importance and it is pertinent to note that Section 3(3)(h) of the Act has been introduced by the Enforcement of Security Interest and Recovery of the Debts Laws (Amendment) Act 2004. Section 2 of the Act deals with Definitions and Section 2(b) defines 'asset reconstruction' as:

Unless the context otherwise requires 'asset reconstruction' means acquisition by any securitisation company or reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realization of such financial assistance.

Section 2(c) defines 'bank' as 'bank' means:

(i) a banking company; or

(ii) a corresponding new bank; or

(iii) the State Bank of India; or

(iv) a subsidiary bank; or

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

Section 2(k) of the Act defines 'financial assistance' as:

Unless the context otherwise requires, 'financial assistance' means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit

facility extended by any bank or financial institution.

Section 2(m) defines 'financial institution' as:

(i) Unless the context otherwise requires a public financial institution within the meaning of Section 4A of the Companies Act, 1956 (1 of 1956);

(ii) any institution specified by the Central Government under Sub-clause (ii) of Clause (h) of Section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);

(iii) International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958); (iv) any other institution or non-banking financial company as defined in Clause (f) of Section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act.

Section 2(1)(za) of the Act defines 'securitisation company' as:

Unless the context otherwise requires 'securitization company' means any company formed and registered under the Companies Act, 1956 (1 of 1956) for the purpose of securitization.

Section 2(1)(zb) of the Act defines 'security agreement' as:

Unless the context otherwise requires, security agreement means any agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor including the creation of mortgage by deposit of title deeds with the secured creditor.

Likewise, Section 2(1)(zc) of the Act defines 'secured asset' as:

Unless the context otherwise requires, secured asset means the property on which security interest is created.

Section 2(1)(zd) of the Act defines 'secured creditor' as:

Unless the context otherwise requires, secured creditor means any bank or financial institution or any consortium or group of banks or financial Institutions and includes-

(i) debenture trustee appointed by any bank or financial institution; or

(ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or

(iii) any other trustee holding securities on behalf of a bank or financial institution in whose favour security interest is created for due repayment by any borrower of any financial assistance.

Secured debt, security interest and security receipt also are defined under Sections 2(1)(ze), (zf) and (zg) of the Act respectively. Section 2(2) of the Act specifies:

Words and expression used and not defined in this Act but defined in the Indian Contract Act, 1872 (9 of 1872) or the Transfer of Property Act, 1882 (4 of 1882) or the Companies Act, 1956 (1 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall have the same meanings respectively assigned in them in those Acts.

27. In Mardia Chemicals Ltd. and Ors. v. Union of India and Ors. : AIR 2004 SC2371 the Apex Court while dealing with Sections 13, 17 and 19 of the Act and Rule 9 of the Rules, observed at paras 66 and 67 as hereunder:

On behalf of the petitioners one of the contentions which has been forcefully raised is that existing rights of private parties under a contract cannot be interfered with, more particularly putting one party in an advantageous position over the other. For example, the present case, in a matter of private contract between the borrower and the financing bank or institution through impugned legislation rights of the borrowers have been curtailed and enforcement of secured assets has been provided for without intervention of the court and above all depriving them of the remedy available under the law by approaching the civil court. Such a law, it is submitted, is not envisaged in any civilized society governed by rule of law. As discussed earlier as well, it may be observed that though the transaction may have the character of a private contract yet the question of great importance behind such transactions as a whole having far-reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions, more particularly when financing is through banks and financial institutions utilizing the money of the people in general, namely, the depositors in the banks and public money of the people in general, namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Pub interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact on the socio-economic drive of the country. The two aspects are intertwined which are difficult to be separated. There have been many instances where existing rights of the individuals have been affected by legislative measures taken in public interest. Certain decisions which have been relied on behalf of the respondents, on the point are V. Ramaswami Aiyengar v. T.N.V. Kailasa Thevar : [1951]2SCR292 . In that case by enacting the Madras Agriculturalists' Relief Act, relief was given to the debtors who were agriculturists as a class, by scaling down their debts. The validity of the Act was upheld though it affected the individual interest of creditors. In Dahya Lala v. Rasul Mohd. Abdul Rahim : [1963]3SCR1 , the tenants under the provisions of the Bombay Tenancy Act, 1939 were given protection against eviction and they were granted the status of protected tenant, who had cultivated the land personally six years prior to the prescribed date. It was found that the legislation was with the object of improving the economic condition of the peasants and for ensuring full and efficient use of land for agricultural purpose. By a statutory provision special benefit was conferred upon the tenants in Madras city where they had put up a building for residential or non-residential purposes and were saved from eviction, it did though affect the existing rights of the landlords. See also Swami Motor Transports (P) Ltd. v. Sri Sankaraswamigal Mutt : AIR 1963 SC864 . Similarly, it is also to be found that in Kanshi Ra v. Lachhman : [2001]3SCR803 the law granting relief to the debtors protecting their property was upheld. Also see Pathumma v. State of Kerala : [1978]2SCR537 , Fatehchand Himmatlal v. State of Maharashtra : [1977]2SCR828 and Ramdhandas v. State of Punjab : (1961)IILLJ102SC . It is well known that in different States rent control legislations were enacted providing safeguards to the sitting tenants as against the existing rights of the landlords, which before coming into force of such law were governed by contract between the private parties. Therefore, it is clear that it has always been held to be lawful, whenever it was necessary in the public interest to legislate irrespective of the fact that it may affect some individuals enjoying certain rights. In the present case we find that the unrealized dues of banking Companies and financial institutions utilizing public money for advances were mounting and it was considered imperative in view of recommendations of Expert Committees to have such law which may provide speedier remedy before any major fiscal setback occurs and for improvement of general financial flow of money necessary for the economy of the country the impugned Act was enacted. Undoubtedly, such a legislation would be in the public interest and the individual interest shall be subservient to it. Even if a few borrowers are affected here and there, that would not impinge upon the validity of the Act which otherwise serves the larger interest.

28. Section 12 of the Act dealing with Power of Reserve bank to determine policy and issue directions reads as hereunder:

(1) If the Reserve Bank of is satisfied that in the public interest or to regulate financial system of the country to its advantage or to prevent the affairs of any securitisation company or reconstruction Company from being conducted in a manner detrimental to the interest of investors or in any manner prejudicial to the interest of

such securitisation company or reconstruction company, it is necessary or expedient so to do, it may determine the policy and give directions to all or any securitisation Company or reconstruction Company in matters relating to income recognition, accounting standards, making provisions for bad and doubtful debts, capital adequacy based on risk weights for assets and also relating to deployment of funds by the securitisation Company or reconstruction Company, as the case may be, and such Company shall be bound to follow the policy so determined and the directions so issued.

(2) Without prejudice to the generality of the power vested under Sub-section (1), the Reserve Bank may give directions to any securitisation Company or reconstruction Company generally or to a class of securitisation companies or reconstruction companies or to any securitisation Company or reconstruction Company in particular as to-

(a) the type of financial asset of a bank or financial institution which ca be acquired and procedure for acquisition of such assets and valuation thereof;

(b) the aggregate value of financial assets which may be acquired by any securitisation Company or reconstruction Company.

29. Section 12A of the Act dealing with Power of Reserve Bank to call for statements and information reads as hereunder:

The Reserve Bank may at any time direct a securitisation Company or reconstruction Company to furnish it within such time as may be specified by the Reserve Bank, with such statements and information relating to the business or affairs of such securitisation Company or reconstruction Company (including any business or affairs with which such Company is concerned) as Reserve Bank may consider necessary or expedient to obtain for the purposes of this Act.

Section 4 of the Act deals with Cancellation of certificate of registration and in Section 4(1)(e) specifies:

The Reserve Bank of India may cancel a certificate of registration granted to a securitisation Company or a reconstruction Company, if such Company fails to-

(i) comply with any directions issued by the Reserve Bank under the provisions of this Act; or

(ii) maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or

(iii) submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or

(iv) obtain prior approval of the Reserve Bank required under Sub-section (6) of Section 3:Provided that before canceling a certificate of registration on the ground that the securitisation Company or reconstruction Company has failed to comply with the provisions of Clause (c) or has failed to fulfill any of the conditions referred to in Clause (d) or Sub-clause (iv) of Clause (e), the Reserve Bank, unless it is of the opinion that the delay in canceling the certificate of registration granted under Sub-section (4) of Section 3 shall be prejudicial to the public interest or the interests of the investors or the securitisation Company or the reconstruction Company, shall give an opportunity to such Company on such terms as the Reserve Bank may specify for taking necessary steps to comply with such provisions or fulfillment of such conditions.

30. Certain admissions made by the 1st respondent-ARCIL in C.P. No. 43/2007 also had been pointed out to the effect that I.E.I. was issued by it in pursuance of the Act. Further, as reflected from the proceedings, it is not in serious controversy that ARCIL had taken either the duties of public financial Institutions like S.B.I., S.B.H., I.D.B.I., and the like Institutions which had lent public monies to S.P.G.L. and had transferred these debts to various trusts set up by the ARCIL under assignment deeds. Thus, in these transactions, an element

of public interest is involved.

31. In Binny Ltd. and Anr. v. V. Sadasivan and Ors. : (2005)IIILLJ738SC , it was observed:

The above guidelines and principles applied by English courts cannot be fully applied to Indian conditions when exercising jurisdiction under Article 226 or 32 of the Constitution. As already stated, the power of the High Courts under Article 226 is very wide and these powers have to be exercised by applying the constitutional provisions and judicial guidelines and violation, if any, of the fundamental rights guaranteed in Part III of the Constitution. In the matter of employment of workers by private bodies on the basis of contracts entered into between them, the Courts had been reluctant to exercise the powers of judicial review and whenever the powers were exercised as against private employers, it was solely done based on public law element involved therein. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel the public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to Halsbury's Laws of England 3rd ed. Vol. 30, page-682, 'a public authority is a body not necessarily a county council, municipal corporation or other local authority which has public statutory duties to perform and which perform the duties and carries out its transactions for the benefit of the public and not for private profit.' There cannot be any general definition of public authority or public action. The facts of each case decide the point.

Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not a State within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties. No doubt, the Apex Court also observed at para-30 as hereunder:

A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. But nevertheless it may be noticed that the Government or Government authorities at all levels in increasingly employing contractual techniques to achieve its regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce the contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably.

The stand taken by the contesting respondents is to the effect that the I.E.I. was distributed by ARCIL through private circulation and the complete process was in private and contractual Law realm and hence the Writ Petition is not maintainable. Strong reliance was placed on Federal Bank Ltd. v. Sagar Thomas : (2004)ILLJ161SC wherein it was observed at paras 18 and 27 as hereunder:

Learned senior Counsel appearing for the respondent has drawn our attention to the various provisions of the Reserve Bank of India Act, 1934 (for short 'the RBI Act'), the Banking Regulation Act, 1941 and the

Industries (Development and Regulation Act, 1951 so as to emphasise that there is deep and all pervasive statutory control and the control of the Central Government over the Scheduled Banks. It is submitted that these banks discharge functions of public nature and owe the statutory responsibilities, hence there is an element of public law, involved in the activities of the Bank. Section 22 of the Banking Regulation Act provides for licensing of banking companies. No company can carry on banking business in India unless it holds a licence issued by the Reserve Bank subject to such conditions as may be imposed. Before issuing any licence the Reserve Bank may satisfy itself about the conditions as laid down under Sub-section (3) of Section 22 as to whether the company fulfills those conditions or not..

The six factors which have been enumerated in the case of Ajay Hasia (supra) : (1981)ILLJ103SC and approved in the later decisions in the case of Ramana (supra) and the seven Judge Bench in the case of Pradeep Kumar Biswas : (1979)IILLJ217SC may be applied to the facts of the present case and see as to those tests apply to the appellant bank or not. As indicated earlier, share capital of the appellant bank is not held at all by the Government nor any financial assistance is provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant bank does not enjoy any monopoly status nor it can be said to be an institution having State protection. So far control over the affairs of the appellant bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant bank nor anyone of them is a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the malfunctioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purposes of maintaining the healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise, these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by the Reserve Bank of India under a Statute or the Central Government. Even if it was with the Central Government in place of the Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of All India Employees Association (supra) : (1961)IILLJ385SC does not advance the case of the respondent. It is only in case of malfunctioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, share holders or the company itself or to help the company to be out of the woods. In the times of normal functioning such occasions do not arise except for routine inspections etc., with a view to see that things are moved smoothly in keeping with fiscal policies in general.

32. In State of Gujarat v. M.P. Shah Charitable Trust : [1994]3SCR163 it was observed at para-22 as hereunder:

We are unable to see any substance in the argument that the termination of arrangement without observing the principle of natural justice (audi alteram partem) is void. The termination is not a quasi-judicial act by any stretch of imagination; hence it was not necessary to observe the principles of natural justice. It is not also an executive or administrative act to attract the duty to act fairly. It was as has been repeatedly urged by Shri Ramaswamy a matter governed by a contract/agreement between the parties. If the matter is governed by a contract, the writ petition is not maintainable since it is a public law remedy and is not available in private law field, e.g., where the matter is governed by a non-statutory contract. Bethat as it may, in view of our opinion on the main question, it is not necessary to pursue this reasoning further.

33. In Assistant Excise Commissioner v. Issac Peter : [1994]2SCR67 the Apex Court observed:

Learned Counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory at least to the extent of

previous year's supplies by applying the said doctrine. It is submitted that if this is not done, the licensees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness, Nor could the learned Counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract or rather more so. It is one thing to say that a contract every contract must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned Counsel for the licensees do not support their proposition. In Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay it was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. Shrilekha Vidyarthi v. State of U.P. was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned Counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State0, for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein.

34. In State of U.P. v. Bridge & Roof Co. (India) Ltd. : AIR 1996 SC3515 it was observed:

Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the

contract or for the civil court, as the case maybe. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a Writ Petition. The prayer in the Writ Petition viz., to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

35. Further strong reliance was placed on Ramana Dayaram Shetty v. International Airport Authority of India : (1979)IILLJ217SC , Life Insurance Corporation of India v. Escorts Limited : 1986(8)ECC189 . In G.J. Fernandez v. State of Karnataka : [1990]1SCR229 the Apex Court at paras 16 observed:

Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of paras III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to Court saying that the KPC should be stopped from doing so, the Court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non- conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the KPC made some changes in the time frame, originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed. But neither of these situations is present here. Sri Vaidhyanathan says that in this case one of the applicants was excluded at the preliminary stage. But it is not known on what grounds that application was rejected nor has that party come to Court with any such grievance. The question, then, is whether the course adopted by the KPC has caused arbitrary real prejudice to the appellant and other parties who had already supplied all the documents who had already supplied all the documents in time and sought no extension at all? It is true that the relaxation of time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in Ramana's case : (1979)IILLJ217SC (supra) will be readily applied by Courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before Court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits. The appellant had no doubt also urged that the MCC had no experience in this like of work and that the appellant was much better qualified for the contract. The comparative merits of the appellant vis--vis MMC are, however, a matter for the KPC (counselled by the TCE) to decide and not for the Courts. We were, therefore, rightly not called upon to go into this question.

36. Specific stand has been taken that since this Legislation itself had been thought of in public interest and when the ARCIL is a creature in pursuance of such statutory functions and governed by the provisions and also the guidelines of the Reserve Bank of India, if the actions of the ARCIL are challenged on the ground of

infraction of Article 14 of the Constitution of India or in violation of the Constitutional provisions and the statutory provisions and the rules as well, the Writ Petition is maintainable.

37. In Praga Tools Corporation v. C.A. Imanual, referred : (1969)IILLJ479SC supra, at para-6 it was observed:

In our view the High Court was correct in holding that the writ petition filed under Article 226 claiming against the company mandamus or an order in the nature of mandamus was misconceived and not maintainable. The writ obviously was claimed against the company and not against the conciliation officer in respect of any public or statutory duty imposed on him by the Act as it was not he but the company who sought to implement the impugned agreement. No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of habeas corpus, mandamus, etc, or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of restatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. In Regina v. Industrial Court, 1965-1 QB 377, mandamus was refused against the Industrial Court though set up under the Industrial Courts Act, 1919 on the ground that the reference for arbitration made to it by a minister was not one under the Act but a private reference. 'this Court has never exercised a general power' said Bruce, J. , in R. v. Lewisham Union 1897-1 QB 498, 501 'to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal and a specific right to enforce the performance of those duties'. Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities. [cf. Halsbury's Laws of England (3rd Ed.), Vol. II, p. 52 and onwards].

Further, the learned Senior Counsel representing the writ petitioner placed strong reliance on the decisions referred (1) and (2) supra. In the decision referred (2) supra, the Apex Court at para-20 observed:

In Praga Tools Corporation v. Shri C. A. Imanual : (1969)IILLJ479SC , this Court said that a mandamus can issue against a person or body to carry out the duties placed on them by the Statutes even though they are not public officials or statutory body. It was observed:it is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purpose of fulfilling public responsibilities.

38. In Zee Telefilms Ltd. v. Union of India referred (1) supra, the Apex Court observed at paras 32 and 33 as hereunder:

This Court in the case of Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani : (1989)IILLJ324SC has held:Article 226 confers wide powers on the High Court to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article

226, writs can be issued to 'any person or authority'. The term 'authority' used in the context, must receive a liberal meaning unlike the term in Article 12 which is relevant only for the purpose of enforcement of financial rights under Article 32. Article 226 confers on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party, no matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.

Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226. Therefore, merely because a non-governmental body exercises some public duty that by itself would not suffice to make such body a State for the purpose of Article 12. In the instant case the activities of the Board do not come under the guidelines laid down by this Court in Pradeep Kumar Biswas case 2002 (4) JT 146 (supra), hence there is force in the contention of Mr. Venugopal that this petition under Article 32 of the Constitution is not maintainable.

The strength of number of Judges of the Benches also had been pointed out and submissions were made to the effect that in view of the fact that the view expressed in the decision referred (2) supra had been approved by a Larger Bench of the Apex Court in the decision referred (1) supra, the contra views if any expressed by the Two Judge Benches like Federal Bank's case need not be followed. The decisions referred (8) and (9) supra i.e., and also had been distinguished on facts on the ground that they relate to post-contractual disputes whereas in the present case, the tendering process and the decision made in relation thereto before award of contract to the 5th respondent, these aspects are being challenged. The object of introducing the Recovery of Debts Due to Banks and Financial Institutions Act 1993 and the Act also had been elaborately argued. Section 13 of the Act creates new rights interest financial Institutions and the Banks to assign their debts to the Securitisation Companies and Reconstruction Companies under Section 5 and enables such Securitisation Companies and Reconstruction Companies, inter alia, to sell away the business of the borrower under Section 9 of the Act for the purpose of asset reconstruction.

39. Section 9 of the Act dealing with Measures for assets reconstruction reads as hereunder:

Without prejudice to the provisions contained in any other law for the time being in force, a securitisation company or reconstruction company may, for the purposes of asset reconstruction, having regard to the guidelines framed by the Reserve Bank in this behalf, provide for any one or more of the following measures, namely:

(a) the proper management of the business of the borrower, by change in, or take over of, the management of the business of the borrower;

(b) the sale or lease of a part or whole of the business of the borrower;

(c) rescheduling of payment of debts payable by the borrower;

(d) enforcement of security interest in accordance with the provisions of this Act;

(e) settlement of dues payable by the borrower;

(f) taking possession of secured assets in accordance with the provisions of this Act.

40. The order made in C.P. No. 43/2007 also had been pointed out which had been placed before this Court wherein it was admitted by the ARCIL that I.E.I. was issued by ARCIL in accordance with the Act. It is needless to say that ARCIL invited I.E.I. for sale of business of S.P.G.L. in discharge of statutory powers under Section

9(b) of the Act. This provision already had been referred to above.

41. The learned Senior Counsel representing both respondents 1 and 2 and also the Counsel representing the 3rd respondent and the learned Advocate-General representing the 5th respondent as well made certain submissions relating to the simultaneous remedies and also the non-maintainability of the Writ Petition. The learned Senior Counsel representing the 2nd respondent in particular had relied upon Section 391 of the Indian Companies Act, 1956 and would maintain that in the light of the decision made under the said provision it may have to be taken that the action is governed by the provisions of the Indian Companies Act, 1956 and hence the Writ Petition is not maintainable.

42. Section 391 of the Indian Companies Act, 1956 dealing with Power to compromise or make arrangements with creditors and members:

(1) Where a compromise or arrangement is proposed-

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company or, in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be to be called, held and conducted in such manner as the Tribunal directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed under the rules made under Section 643, by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Tribunal, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company:

Provided that no order sanctioning any compromise or arrangement shall be made by the Tribunal unless the Tribunal is satisfied that the compromise or any other person by whom an application has been made under Sub-section (1) has disclosed to the Tribunal, by affidavit or otherwise, all material facts relating to the Company, such as the latest financial position of the Company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the Company under Sections 235 - 351, and the like.(3) An order made by the Tribunal under Sub-section (2) shall have no effect until a certified copy of the order has been filed with the Registrar.

(4) A copy of every such order shall be annexed to every copy of the memorandum of the Company issued after the certified copy of the order has been filed as aforesaid, or in the case of a Company not having a memorandum, to every copy so issued of the instrument constituting or defining the construction of the Company.

(5) If default is made in complying with Sub-section (4), the Company, and every officer of the Company who is in default, shall be punishable with fine which may extend to one hundred rupees for each copy in respect of which default is made.

(6) The Tribunal may, at any time after an application has been made to it under this section stay the commencement or continuation of any suit or proceeding against the Company on such terms as the Tribunal thinks fit until the application is finally disposed of.

43. Section 617 of the Indian Companies Act, 1956 dealing with Definition of 'Government Company' reads as hereunder:

For the purposes of this Act Government Company means any Company in which not less than fifty-one per cent of the paid up share capital is held by the Central Government, or by arbitrary State Government or Governments, or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Government Company as thus defined.

44. Section 619 of the said Act dealing with Application of Sections 224 - 233 to Government Companies, reads as hereunder:

(1) In the case of a Government Company, the following provisions shall apply, notwithstanding anything contained in Sections 224 - 233.

(2) The auditor of a Government Company shall be appointed or reappointed by the Comptroller and Auditor-General of India:

Provided that the limits specified in Sub-sections (1B) and (1C) of Section 224 shall apply in relation to the appointment or re-appointment of an auditor under this sub-section.(3) The Comptroller and Auditor-General of India shall have power-

(a) to direct the manner in which the Company's accounts shall be audited by the auditor appointed in pursuance of Sub-section (2) and to give such auditor instructions in regard to any matter relating to the performance of his functions as such;

(b) to conduct a supplementary or test audit of the Company's accounts by such person or persons as he may authorize in this behalf; and for the purposes of such audit, to require information or additional information to be furnished to any person or persons so authorized, on such matters, by such person or persons, and in such form as the Comptroller and Auditor-General may, by general or special order, direct.

(4) The auditor aforesaid shall submit a copy of his audit report to the Comptroller and Auditor-General of India who shall have the right to comment upon or supplement, the audit report in such manner as he may think fit.

(5) Any such comments upon, or supplement to the audit report shall be placed before the annual general meeting of the Company at the same time and in the same manner as the audit report.

Section 392 of the said Act deals with Power of Tribunal to enforce compromise and arrangement.

45. In J.K. (Bombay) Private Ltd. v. New Kaiser-I-Hind Spinning and Weaving Co. Ltd. : [1969]2SCR866 it was held:

A scheme sanctioned by the Court does not operate as a mere agreement between the parties. It becomes binding on the company, the creditors and the share- holders and has statutory force. A scheme is statutorily binding even on creditors and shareholders who dissented from or opposed to its being sanctioned. It has statutory force in that sense and therefore cannot be altered except with the sanction of the Court even if the share-holders and the creditors acquiesce in such alteration. The effect of the scheme is to supply by recourse to the procedure thereby prescribed the absence of that individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity. The effect therefore, of a scheme between a company and its creditors is that so long as it is carried out by the company by regular payment in terms of the scheme a creditor who is bound by it cannot maintain a winding-up petition. But if the company commits a default, there is a debt presently due by the company and a petition for winding-up can be sustained at the instance of a creditor. The scheme, however, does not have the effect of creating a new debt; it simply makes the original debt payable in the manner and to the extent provided in the scheme. The proposition that a winding-up order can only be passed after compelling the company to complete the rights which are still incomplete is not correct.

46. In Punjab National Bank Ltd. v. Sri Bikram Cotton Mills Ltd. and Anr. : [1970]2SCR462 it was held that a binding obligation created under a composition under Section 391 of the Companies Act, 1956, between the Company and its creditors does not affect the liability of the surety unless the contract of suretyship otherwise provides.

47. In Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr. : (1986)IILLJ171SC it was held at para-69, as hereunder:

If there is an instrumentality or agency of the State which has assumed the garb of a Government Company as defined in Section 617 of the Companies Act, it does not follow that it thereby ceases to be an instrumentality or agency of the State. For the purposes of Article 12 one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State. The Central Inland Water Transport Corporation, squarely falls within these observations and it also satisfies the various tests which have been laid down. Merely because it has so far not the monopoly of inland water transportation is not sufficient to divest it of its character of an instrumentality or agency of the State....

48. In Heavy Engineering Mazdoor Union v. State of Bihar and Ors. : (1969)IILLJ549SC it was held that the mere fact that the entire share capital of the Company was contributed by the Central Government and the fact that all its share are held by the President and certain officers of the Central Government does not make any difference and the company and the share-holders being, distinct entities, this fact does not make the company an agent either of the President or the Central Government.

49. The learned Senior Counsel representing the 2nd respondent placing strong reliance on the decision made in C.P. No. 43/2007 would contend that the Writ Petition is not maintainable and in a way, at any rate, the Writ Petition became infructuous since similar objections or similar objections in fact had been raised by the father of the Deponent of the present affidavit filed in support of the Writ Petition. The learned Senior Counsel representing the writ petitioner laid emphasis on Clause 7(2) of the Securitisation Companies and Reconstruction Companies (Reserve Bank Guidelines) 2003 and also Section 9(b) of the Act and Sections 12, 3 and 4(1)(d) of the Act as well and would contend that in the light of the same, the stand taken by the 2nd respondent cannot be a sustainable stand. Further, it has been specifically pointed out that under Section 5(b) of the Act, the 1st respondent-ARCIL, registered under Section 3 of the Act, entered into agreements with secured creditors of the S.P.G.L. and got assigned 77.6% debts of S.P.G.L. and under Section 9(b) of the Act it issued I.E.I. for resolution of the debt of S.P.G.L. by sale of the business of the S.P.G.L. The relevant functions and certain of the admissions made by the 1st respondent in C.P. No. 43/2000 also had been highlighted.

50. On a careful analysis of the respective stands taken by the parties, the question to be decided is whether the action challenged in the Writ Petition is amenable to the writ jurisdiction of this Court for the purpose of judicial review or not. It is true that on the face, prima facie, the contentions advanced by the respondents on the aspect of maintainability appears to be attractive since it would fall under the realm of contractual field and even otherwise inasmuch as it is a lis concerned with such contract, the Writ Petition cannot be maintained. However, the question does not stop there. The 1st respondent-ARCIL, though it is discharging duties concerned with contractual transactions and commercial transactions, it cannot be forgotten that it is in a way is a creature of a statute or at any rate, definitely bound by the provisions of the Act and also further bound by the Reserve Bank of India directives. In the light of the same, it may not be laid down as a broad proposition that under no circumstances, the actions of such a party as the 1st respondent-ARCIL can be called in question before a writ Court. It is one thing to say that the Writ Petition itself is not maintainable and it is yet another thing to say that the power of judicial review not to be exercised inasmuch as a lis would fall within the realm of contractual field. This Court makes it clear that these are two different aspects altogether. When the governance of the statutory flavour on the operation of the actions and activities of the 1st respondent-ARCIL cannot be totally ruled out, then such actions to be in accordance with such provisions, guidelines or the rules and these infractions or violations, if any - may be just an irregularity or may be a grave illegality touching the very root of the transaction by virtue of which the action may be vitiated, such

actions not to be arbitrary and to be rational and reasonable and not to be violative of Article 14 of the Constitution of India. At least, to this limited extent, a writ Court may examine the grounds of attack raised by the writ petitioner. On over-all appreciation of all the facts and circumstances, this Court is of the considered opinion that the Writ Petition cannot be thrown out at the threshold and cannot be dismissed in limine on the ground of non-maintainability.

51. Merits and demerits:

The present lis between the parties appears to be which is the better offer. The learned Senior Counsel representing the respective parties while making assertions and counter-assertions were fair enough to admit the limitations of a writ Court in appreciating several of the factual Issues involved in this regard, but however when making elaborate submissions, the learned Senior Counsel for the petitioner asserted and pointed out certain infirmities in the decision making process and would maintain that these can be gone into in the Writ Petition and in the counter-assertions made by the Counsel representing the respondents, the learned Counsel pointed out in particular the limitations of interference in relation to a lis of this nature pertaining to contractual field and no doubt the Counsel also further asserted that there are no such deviations at all as pointed out by the learned Senior Counsel representing the writ petitioner. The decision of rejection of the petitioner's bid was communicated in the month of December 2006 and certain consequential steps also had been taken in pursuance of the acceptance of the bid of the 6th respondent and the said action was challenged in April 2007. By that time, the deposit of substantial amounts had been made and an application also was filed before the Company Court for restructuring of equity and debts. The news published in on-line edition of Economic Times dated 30-11-2006 and the letter dated 16-2-2007 addressed by the petitioner to ARCIL had been emphasized in this context. The contents of the letter dated 16-2-2007 which had referred to several meetings with the 1st respondent before and after 22-12-2006 also had been specifically pointed out. However, the writ petitioner in the affidavit filed in support of the Writ Petition and also in the reply affidavits had explained the series of events and under what circumstances the writ petitioner approached this Court by filing the present Writ Petition. It is brought to the notice of this Court that a news item in Economic Times appeared on 30-11-2006 and the bid of the 5th respondent was accepted on 12-12-2006 and hence it is stated that the news item is factually wrong not only because by the date of its publication, ARCIL had not accepted the bid of anybody and the 1st respondent awarded the business of S.P.G.L. to the 5th respondent and not to the 6th respondent as stated in the said news item. Even if immediately on such wrong information, if the Writ Petition had been filed, most probably the same would have been dismissed either being premature or on such like grounds.

52. Certain submissions were made that the reports in news papers being in the nature of hear-say, the facts specified therein cannot be taken judicial notice. In Laxmi Raj Shetty and Anr. v. State of T.N. : 1988 CriLJ1783 it was observed at paras 25 and 26 as hereunder:

As to the first, the accused Laxmi Raj Shetty was entitled to tender the newspaper report from the Indian Express of the 29th and the regional newspapers of the 30th along with his statement under Section 313 of the Code of Criminal Procedure, 1973. Both the accused at the stage of their defence in denial of the charge had summoned the editors of Tamil dailies Malai Murasu and Makkal Kural and the news reporters of the Indian Express and Dina Thanthi to prove the contents of the facts stated in the news item but they dispensed with their examination on the date fixed for the defence evidence. We cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is only hearsay evidence. A newspaper is not one of the documents referred to in Section 78(2) of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached under Section 81 of the Evidence Act to a newspaper report cannot be treated as proof of the facts reported therein. It is now well-settled that a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the fact reported. The accused should have therefore produced the persons in whose presence the seizure of the stolen money from appellant No. 2's house at Mangalore was

effected or examined the press correspondents in proof of the truth of the contents of the news item. The question as to the admissibility of newspaper reports has been dealt with by this Court in Samant N. Balakrishna v. George Fernandez : [1969]3SCR603 . There the question arose whether Shri George Fernandez, the successful candidate returned to Parliament from the Bombay South Parliamentary Constituency had delivered a speech at Shivaji Park attributed to him as reported in the Maratha, a widely circulated Marathi newspaper in Bombay, and it was said:

A newspaper report without any further proof of what had actually happened through witnesses is of no value. It is at best a second hand secondary evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible.We need not burden the judgment with many citations. There is nothing on record to substantiate the facts as reported in the newspapers showing recovery of the stolen amount from the residence of appellant No. 2 at Mangalore. We have therefore no reason to discard the testimony of PW 50 and the seizure witnesses which go to establish that the amount in question was actually recovered at Mardas on the 29th and the 30th as alleged.

53. In Ravinder Kumar Sharma v. State of Assam : AIR 1999 SC3571 it was observed:

Newspaper reports regarding the Central Government decision could not be any basis for the respondents to stop action under the Assam Control Order of 1961. The paper reports do not specifically refer to the Assam Control Order, 1961. In fact, the Government of Assam itself was not prepared to act on the newspaper reports, as stated in its wireless message. Section 81 of the Evidence Act was relied upon for the appellant, in this behalf, to say that the newspaper reports were evidence and conveyed the necessary information to one and all including Respondents 2 and 3. But the presumption of genuineness attached under Section 81 to newspaper reports cannot be treated as proof of the facts stated therein. The statements of fact in newspapers are merely hearsay Laxmi Raj Shetty v. State of T.N. : 1988 CriLJ1783 .

54. In para-6 of the affidavit filed in support of the Writ Petition, it was averred that the petitioner came to know long after in the month of February 2007 that the bid of the 5th respondent had been accepted and the writ petitioner also addressed a letter dated 16-2-2007 to the 1st respondent taking a stand that even though the petitioner met the officials of the ARCIL both before and after 22-12-2006 requesting them to furnish complete details of the Bidding Process, for reasons best known, the ARCIL had not furnished any information and this stand taken had not been specifically controverted by the ARCIL in its reply. The relevant counter affidavits also had been pointed out in this regard. Further, it is brought to the notice of this Court that it is not the case of the ARCIL that the letter dated 12-12-2006 had been furnished to the petitioner and specifically the averments made in the reply of the petitioner in para VII(f) to the counter affidavits of the respondents 1 and 2 had been pointed out wherein it was averred that with great difficulty the petitioner was able to procure the letter dated 12-12-2006 and then only the writ petitioner was in a position to file the Writ Petition. No doubt, the stand taken by the writ petitioner is that there is deliberate suppression of information by the ARCIL and the writ petitioner was kept in darkness at least for a couple of months and hence after securing the requisite information and after having been satisfied that some injustice was done to the writ petitioner by the arbitrary action of the ARCIL, the writ petitioner approached the Court. The delay even if carefully scrutinized is just a couple of months and this cannot be taken as such an inordinate delay so as to dismiss the Writ Petition on the ground of laches. It is needless to say that when the delay had been explained with certain convincing reasons, the said ground cannot be accepted as a ground to negative the relief in a Writ Petition.

55. The Bidding Process and the acceptance of the bid had been attacked on the ground of discrimination and also on the ground that the action is arbitrary. The principal stand which had been argued in elaboration by the learned Senior Counsel for the writ petitioner is that the bid of the 5th respondent/6th respondent is conditional and contrary to the terms of I.E.I. and the relevant portions thereof had been specifically pointed

out. Further, while pointing out the correspondence and the proceedings, it is commented that there is no final binding offer or bid submitted by the 5th respondent/6th respondent. The double standards adopted while appreciating the respective bids also had been commented upon. Further, serious comment was made that it is not known when the 5th respondent entered into the picture and accepting the 5th respondent as successful bidder though the 5th respondent was not one of the bidders initially also had been emphasized. The relevant portions of the material papers had been pointed out in this regard. The limitations of a writ Court in appreciating the relative merits and demerits of the offers of the bidders in contractual field had been repeatedly emphasized in a catena of decisions of the Apex Court. It is also true that when clear illegalities or contraventions are pointed out, those same cannot be totally ignored by the writ Court on the simple ground that the lis pertains to contractual field. All the relevant aspects may have to be balanced and to be duly weighed by a writ Court while arriving at a particular conclusion.

56. In Ramana Dayaram Shetty v. The International Airport Authority of India and Ors. : (1979)IILLJ217SC the Apex Court at para-10 observed:

Now, there can be no doubt that what para (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered IInd Class hotel or restaurant and he must have at least 5 years' experience as such and if he did not satisfy this condition of eligibility, his tender would not be eligible for consideration. This was the standard or norm of eligibility laid down by the Ist respondent and since the 4th respondents did not satisfy this standard or norm, it was not competent to the Ist respondent to entertain the tender of the 4th respondents. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in Vitarelli v. Seaton (1959) 359 US 535 : 3 L Ed 2d 1012 where the learned Judge said:An executive agency must be rigorously held to the standards by which it professes its action to be judged.... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.

This Court accepted the rule as valid and applicable in India in A. S. Ahluwalia v. State of Punjab : (1975)ILLJ228SC and in subsequent decision given in Sukhdev v. Bhagatram : (1975)ILLJ399SC , Mathew, J., quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanating from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's Administrative Law 4th Edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power- holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his 'The Law of the Constitution' or the definition given by Hayek in his 'Road to Serfdom' and 'Constitution of liberty' or the exposition set forth by Herry Jones in his 'The Rule of Law and the Welfare State', there is, as pointed out by Mathew, J., in his

article on 'The Welfare State, Rule of Law and Natural Justice' in Democracy, Equality and Freedom 'substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found'. It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.

57. In West Bengal State Electricity Board v. Patel Engineering Co. Limited 2001(2) SCC 451 it was observed at para-24 as hereunder:

The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is grater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest.

58. In Bharat Petroleum Corporation Ltd. v. Maddula Ratnavalli and Ors. : (2007)6SCC81 it was held by the Apex Court in paras 13, 16 and 24:

The appellant company is a 'State' within the meaning of Article 12 of the Constitution of India. It is, therefore, enjoined with a duty to act fairly and reasonably. Just because it has been conferred with a statutory power, the same by itself would not mean that exercise thereof in any manner whatsoever will meet the requirements of law. The statute uses the words 'if so desired by the Central Government'. Such a desire cannot be based upon a subjective satisfaction. It must be based on objective criteria. Indisputably, the 1976 Act is a special statute. It overrides the provisions of Section 107 of the Transfer of Property Act. The action of the State, however, must be judged on the touchstone of reasonableness. Learned Counsel for both the parties have replied upon a three-Judge Bench decision of this Court in Bharat Petroleum Corporation Ltd. v. P. Kesavan : AIR 2004 SC2206 wherein this Court held : SCC p.777, para 11:

11. The said Act is a special statute vis--vis the Transfer of Property Act which is a general statute. By reason of the provisions of the said Act, the right, title and interest of Burmah Shell vested in the Central Government and consequently in the appellant Company. A lease of immovable property is also an asset and/or right in an immovable property. The leasehold right, thus, held by Burmah Shell vested in appellant. By reason of Sub-section (2) of Section 5 of the Act, a right of renewal was created in the appellant in terms whereof in the event of exercise of its option, the existing lease was renewed for a further term on the same terms and conditions. As noticed hereinbefore, Section 11 of the Act provides for a non obstante clause....

An executive action must be informed by reason. An unfair executive action can only survive for a potent reason. An action which is simply unfair or unreasonable would not be sustained. Objective satisfaction must be the basis for an executive action. Even subjective satisfaction on the part of a State is liable to judicial review. The 'State' acting whether as a 'landlord' or a 'tenant' is required to act bona fide and not arbitrarily, when the same is likely to affect prejudicially the right of others..

With that we may add that a statutory order of discretion exercised by a statutory authority must also be tested on the anvil of Constitutional scheme.

59. In Reliance Energy Ltd. and Anr. v. Maharashtra State Road Development Corporation Limited and Ors. : (2007)8SCC1 the Apex Court observed:

It was further submitted in the said Writ Petition that the PQ document did not specify any accounting standard (AS) and in the circumstances it was not open to MSRDC to exclude REL/HDEC by applying AS 26; that the accounts of HDEC indicated 'net profits' for the FY ending December 31, 2002, 2003 and 2004 and on that basis it had calculated NCP in accordance with internationally accepted Ass (GAPP) which has been certified by KPMG, Chartered Accountants in Korea. According to REL/HDEC, no particular AS was mentioned in the PQ document and, therefore, it was implied that the consortium were free to adopt GAAP. That, in the circumstances, the impugned decision taken by MSRDC was arbitrary, unjust and wrongful and contrary to the tender document (PQ document) issued by MSRDC. By the impugned judgment dated 4-6-2007, the High Court ruled that admittedly HDEC had suffered net loss of approximately US $610 million in 2001; that they had earned net profits in 2002, 2003 and 2004; that audited accounts for 2004 were made available only after 10-1-2005 and, therefore, MSRDC was right in excluding REL/HDEC from the second stage of the bidding process. According to the impugned judgment, the basic debate was about accounting treatment to be given to 'non-cash expenses'. The High Court was of the view that it had no jurisdiction under Article 226 of the Constitution to interfere with the decision of MSRDC, particularly, when there were two different opinions regarding adjustment to net income. According to the High Court, the decision of MSRDC on the future cash impact of 'the provision for bad debts' made by the HDEC in its accounts for 2001 cannot be said to be arbitrary or unreasonable. For the aforesaid reasons, without going into the question whether provision for bad debts is or is not a 'non-cash expense' liable to be added back to arrive at net cash profit, the High Court dismissed the Writ Petition, hence this civil appeal.

60. The respective stands of the parties already had been referred to above. However, it may be appropriate to have a look at on certain relevant portions of the same, for the purpose of better appreciation of the facts of the case. In the grounds raised in the affidavit filed in support of the Writ Petition, it is specified that the conspiracy and the tacit understanding between the respondents in giving away S.P.G.L. to the 5th respondent inspite of the petitioner's bid being better in every respect has come to the fore after the 83rd Board of Directors meeting of the 3rd respondent-Company. Further, it is stated that the illegally elected Chairman-4th respondent and Directors of the SPGL proposed to hold the 83rd Board of Directors meeting on 26-12-2006 at 9.30 a.m. at Hotel Grand Hyatt, Santacruz, Mumbai. The holding of the 83rd Board meeting of SPGL is a classic example of the high-handed behaviour of the respondents. It is further stated that 26-12-2006 fell on Tuesday and the two preceding days to 26-12-2006 had been 24th and 25th which were declared public holidays. 23rd which fell on Saturday was a working day and S.P.G.L. informed one of its Directors Mr. M. Kishan Rao about the 83rd Board meeting through a fax message sent to his office at 9.30 a.m. The modus-operandi adopted by the respondents was to see to it that Mr. Kishan Rao who is a Director on board of S.P.G.L. does not get the notice in time and hence would not attend the 83rd Board meeting and that the petitioner also should not get any information. It is in the said meeting that the S.P.G.L. discussed as agenda item No. 3, a letter from ARCIL to Pinnacle Overseas Assets Ltd. It is for the first time that the 5th respondent had come into picture and it is stated in the minutes of the said meeting that the 5th respondent had been declared as a successful bidder by ARCIL's sanction letter reference ARG-II-PJ-FY07-04568 dated 12-12-2006. It is also recorded in the minutes that one of the conditions of the sanction letter is that S.P.G.L. had to enter into definitive agreements within 15 days of the issuance of the sanction letter i.e., by 27-12-2006 and it is

further stated in the minutes that the 5th respondent's sanction letter along with the draft definitive agreement were placed before the Board are discussed and subsequently the same were approved in a hasty manner. It is also further stated that the events as they unfolded and their corresponding dates and timing are of crucial importance to unveil the collusion among the respondents 1, 2, 4, 5 and 6 and the arbitrariness in finalization of the bids by the 1st respondent. The hurried manner in which S.P.G.L. took on record the letter addressed to it by the 1st respondent and the manner in which the petitioner is informed about its unsuccessful bid and the manner in which a delayed notice was issued to one of the Directors would very clearly reveal the game plan adopted by the respondents to push through the sanction letter of the 5th respondent. It is of great importance to note that even before the petitioner was informed about its unsuccessful bid, the S.P.G.L. in tacit understanding with the other respondents not only approved the 5th respondent's sanction letter but also approved the definitive agreements also. Curiously, S.P.G.L. never received any official communication from ARCIL about the 5th respondent's successful bid. The 5th respondent, which as on 26-12-2006 is an alien to the S.P.G.L. not only accepted the letter but without even any verification or without waiting for receiving an official communication from ARCIL, discussed the letter and approved it which very clearly goes to show that all the respondents were in a great hurry to push through the transaction and make it difficult for any one to question the same. All the respondents through the aforesaid tacit understanding made sure that the petitioner or any other Director would not be aware of these resolutions until 27-12-2006 by which time S.P.G.L. already entered into definitive agreements with the 5th respondent. Further it is stated that this entire episode of rushing through with the finalization of the bid transaction by the respondents happened when the orders of the Additional Chief Judge, City Civil Court, Hyderabad in O.S. No. 329/2006 and the orders of this Court in C.M.A. No. 785/2006 are still in force. The sum and substance of both these orders are to the effect that the S.P.G.L. cannot take any major decision and should not give effect to any of the resolutions passed in the Board meetings or General Body meetings. It is very clear from the proceedings that when the Court orders are in vogue, S.P.G.L. had taken major decisions of far reaching consequences thereby committed the offence of Contempt of Court. Further, before the 5th respondent's sanction letter was recognized, the illegally elected Directors of S.P.G.L. had submitted their resignations and new Directors in their place had been appointed. The S.P.G.L. headed by the illegally elected Chairman and Directors resorted to the said resignation and appointment drama to circumvent the Court proceedings filed questioning their acts. In spite of all their futile attempts, their malicious designs can be unveiled and can be exposed to show that the Bidding Process conducted by the ARCIL was a mere eye-wash and the successful bidder was already decided upon by the ARCIL even before the I.E.I. was circulated. When all the aforesaid events are read in depth, it can be seen that the ARCIL headed by the 2nd respondent started its game plan of siding the 4th respondent on the day it validated the illegal resolutions in its meeting of lenders and more so when ARCIL itself moved the High Court of Bombay and obtained an order against the said Extraordinary General Meeting dated 10-3- 2006. Further, the details furnished in the comparative table of the petitioner and the 5th respondent in Ground (C) also may be relevant and the same had been already referred to supra. It is also further stated that the provision in the 5th respondent's proposed Scheme which provides for payment by way of converting the existing share capital of S.P.G.L. into redeemable preference shares with a coupon rate of 0.05% payable at the end of 15 years takes out the entire life of that scheme and knocks down the very substance of the 5th respondent's offer and stands no where in comparison with the petitioner's offer of payment by four years (2010-2011). From the above, it is obvious that the petitioner would make payments by 2010-2011 i.e., the whole amount would be paid in five years whereas the 5th respondent would make payments upto 31-3-2012 that too by way of issuing redeemable preference shares payable more than 15 years hence i.e., 2022. From the point of view of any lender, any early clearance of debt is obviously advantageous rather than its settlement in 15 years later since there may be any unforeseeable events occurring in such a long span of time which may frustrate the 5th respondent's scheme. It is shocking that such a totally disadvantageous scheme proposed by the 5th respondent was accepted by the ARCIL and not the scheme highly advantageous scheme of the petitioner. Further, it is specifically stated that more over the I.E.I. dated 28-7-2006 clearly mandated that the offers for sale of assets should be strictly on 'as is where is and as is what is' basis, but the 5th respondent in its offer proposed an additional expansion of 350 MW

capacity of the S.P.G.L. apart from the existing 208 MW and based its payment proposal on such expansion too. Thus, the offer of the 5th respondent is not in conformity with the terms of the I.E.I. The action of the 5th respondent in accepting the bid of the 1st respondent is thus arbitrary and violative of Article 14 of the Constitution of India. The 1st respondent's action of considering the expansion plans of the respondents 5 and 6 is bad and illegal. When the 3rd respondent had already taken back the deposit made with Gas Authority of India Limited for allocation of additional Gas supply, it is out of comprehension as to how the expansion plans of the respondents can be taken into consideration by the ARCIL in deciding the bids. In fact, the petitioner had in its first offer dated 11-9-2006 offered that if for any reason its offer is not in sync with the offers provided by any other bidder, it may be permitted to improve the offer to match with the best offer received by the ARCIL. The same was reiterated in the negotiations which took place on 10-11- 2006 by the petitioner to the ARCIL. However, ARCIL did not inform the petitioner of its decision to award the bid to the 4th respondent nor did it care to ask the petitioner to match the said offer of the 4th respondent at any point of time, which is also arbitrary and illegal and violates the principle of legitimate expectation apart from the principle of fairness. C.P. No. 43/2007 also had been referred to and it is needless to say that the same had been decided by the learned Company Judge and it is stated that an Appeal had been preferred. The relevant stands taken in the counter affidavits of the respective parties already had been specified supra. The additional affidavits and the reply affidavits also had been filed and the subsequent events also had been brought to the notice of this Court.

61. The I.E.I. dated 28-7-2006 reads as hereunder:

This document shall be referred to as the Invitation for expression of interest ('I.E.I.'). The I.E.I. has been prepared by Asset Reconstruction (India) Limited acting in its capacity as trustee of trusts set up by it ('Arcil') relating to financial assets pertaining to Spectrum Power Generation Limited ('SPGL'). Arcil has not conducted any due diligence for the purpose of preparation of this I.E.I. and Arcil does not confirm or represent the accuracy, adequacy, sufficiency or otherwise of any information contained in this IRI. It is presumed and understood that by participating in this process, each of the persons to whom the I.E.I. is distributed by Arcil and who participates in this process ('Expressor') has made and/or should have made his own independent assessment. Investigation, due-diligence and have sought independent profession, financial and legal advice in respect of any or all matters, information, statements etc., covered/sought to be covered or contained in this I.E.I., the Confidential Information Memorandum prepared by SPGL ('CIM') and given by Arcil along with I.E.I. and any documents that may be given by Arcil/SPGL, during the course of the process pursuant to this I.E.I. The term 'I.E.I.' as used hereinafter should be deemed to have included by reference also the CIM and any documents that may be given by Arcil/SPGL during the course of the process pursuant to this IRI. The I.E.I. is not for public circulation and is not intended for distribution to any person other than the persons to whom it is addressed, and is not transferable. Recipients are not permitted to replicate this I.E.I. The information provided herein is for the limited and specific purpose of the process and should not be construed as an admission or otherwise. Arcil reserves the right to entertain and evaluate only the expressions/offers those are fully compliant with the terms and conditions as laid down in the IEI received from persons to whom Arcil has circulated this IEI ('Expressions').

This IEI may not contain all the information that recipients may desire or need or which recipients as Expressers are required to supposed to know. Accordingly the recipients/Expressors should conduct their own diligence, investigation and analysis including that of the information provided herein. In preparing this I.E.I., Arcil has not independently verified the information and has not made an appraisal.

Notwithstanding anything contained in this I.E.I., Arcil has not, nor shall it be deemed to have, made any representation or warranty whatsoever or given any covenant, whether express or implied in relation to anything contained herein.

62. A brief information about Financial Assets of ARCIL with respect to S.P.G.L. had been placed before this Court and in the I.E.I., it is specified 'Accordingly ARCIL has acquired Financial Assets as above approximately

amounting to 77.6% of total debt of S.P.G.L. for the year 2005-06 (un-audited provided by the Company). Under 'Invitation for Process', it is specified:

ARCIL intends to take steps for resolution of the debt of SPGL. Accordingly it is exploring various feasibilities and possibilities towards opportunities available for the same. Expressors, if interested in the Business/assets of SPGL., may participate in the process under this I.E.I. and submit their indicative offer along with their proposed transaction structure. The transaction shall be subject to the feasibility under all the applicable laws, rules, regulations and all the necessary approvals, statutory or otherwise'. In the 'Note', it is specified that Expressors acknowledge that ARCIL is not obliged to respond to questions or period clarifications. 'The process' specifies that Expressors will be provided with a copy of the Confidential Information Memorandum (CIM) along with this I.E.I. It is pertinent to note that it is also further specified that the Expressors have to outline the proposed transaction structure and ARCIL reserves the right to reject any Expressions at its sole discretion, including but not limited, for reasons that the proposed transaction structure is not feasible/acceptable to ARCIL, without assigning any reasons thereof. Further it is stated that ARCIL would not be required to communicate the rejection of the offers of the unsuccessful Expressors and ARCIL reserves its right to reject any or all proposals without assigning any reason at any stage in the process. Several of the portions no doubt had been pointed out, but this Court is referring to only certain of the important portions of the I.E.I. Further, under 'Discussions & Shortlisting' it is specified:

ARCIL will evaluate the Expressions and select one or more 'Best Expressions' as evaluated from the perspective of the secured lenders. All Expressors agree that the decision of ARCIL in this regard shall be final and binding. ARCIL shall not be obliged to disclose the reason(s) for its decision in relation to the selection of the Best Expressions.

Notwithstanding anything to the contrary contained in this I.E.I., ARCIL has the right, exercisable at its sole discretion, to accept or reject any Expression, without assigning any reasons for the same.

Much emphasis had been laid on 'Submission of the Final Expression(s) and Negotiations' whereunder it is specified:

The Best Expressor(s) will be required to submit their respective Final Expressions. It is the Best Expressor's sole responsibility to identify and comply with all steps to be undertaken prior to making the Final Expression including statutory/legal/corporate/governmental/share holders approvals. The Best Expressor(s) must clearly stipulate the detailed terms and conditions in their Final Expression on which their offer is based. Any conditionality in the Final Expression should not be in a way so as to make the Final Expression contingent on events related to a matters which are sub-judice or requiring government/statutory approvals.

Such Final Expression shall be in the nature of an offer for entering into Transaction which shall be binding on such Best Expressor. Such Best Expressor/s shall be required to submit all statutory and corporate approvals as also documentary evidence of their networth/credit worthiness along with the Final Expression (hereinafter referred to as 'Bid'). It is however clarified that ARCIL shall have the sole discretion to accept or reject any such Bid. ARCIL is not and shall not be under any obligation to offer or assign any reasons for accepting or rejecting any Bid.

Under 'Terms and conditions' it is specified:

This I.E.I., the process hereunder, the Expressions and the Final Expressions/Bids are and shall be always deemed to be strictly subject to terms and conditions contained in the Schedule II hereto in addition to the terms and conditions contained elsewhere in this I.E.I.

63. Elaborate submissions were made laying strong emphasis on '....Any conditionality in the Final Expression should not be in a way so as to make the Final Expression contingent on events related to a matters which are sub-judice or requiring government/statutory approvals'.

Schedule-I, Format of Expression also had been pointed out. Part-II - Business Plans for SPGL, reads as hereunder:

The Expressor shall provide its Business Plan for SPGL. The scope of the Business Plan may include:

1. Proposed strategy and operations of SPGL

(i) Strategy for existing businesses of SPGL

(ii) Capital/funding requirement envisaged for SPGL over the next three years and the proposed funding strategy.

(iii) Projected Cash Flow and Fund Flow statement for the next 3/5 years.

2. Any other relevant matters.

Several of the details had been pointed out and further the relevant portion also had been pointed out, which is as hereunder:

The Expressor should submit its Purchase Consideration/financial offer as also their preferred allocation amongst the different categories of liabilities as under. It is understood and accordingly will be deemed that the value that will be allocated by the Expressor has been given by it after taking into consideration the footnotes given in the table above.Further, the undernoted portion also had been pointed out in particular: 'Please note that as far as deliverables by ARCIL under this option are concerned, the same shall be limited to:

(i) Secured Debt of SPGL not less than 75% in value of the total debt either by way of consent as the secured creditor or by way of assignment of such debt with underlying security interest (provided that in case of assignment, the stamp duty, registration fees and any other taxes etc., applicable and payable on the same shall be entirely borne by the purchaser). And/or.

(ii) Procurement of exercise of voting rights in respect of 5,45,58.000 number of Equity shares in equal capital of SPGL of face value of Rs. 10/- each held by Bank/Financial institutions (30.92% of total paid up equity capital of SPGL).

(iii) Procurement of exercise of Pro-rata voting rights in respect of Promoters 2,65,00,000/- number of shares held in equity capital of SPGL of face value of Rs. 10/- each pledged with lenders (15.01% of total paid-up equity capital of SPGL).

Option-II: Assets of SPGL also had been pointed out and the same reads as hereunder:

The interest may be expressed by the Expressor for the purchase of assets of SPGL.

However, the structure and delivery in this option shall be subject to the applicable law and the procedure involved and more particularly under the Securitisation and Reconstruction of Financial assets and Enforcement of Security Interest Act, 2002 and/or the Recovery of Debts Due to Banks and Financial Assets Act, 1993 and Rules made thereunder. It may be noted that if so required in view of the same, the Expressor might be required to undergo the process of offer/bidding afresh.

Further, the assets if sold under this option shall be strictly on 'As is where is and As is what is' basis'. Neither ARCIL nor the secured creditors or lenders shall undertake any responsibility to procure any permission/licence etc., in respect of the assets which may be offered for sale. Further, ARCIL shall not accept/undertake any responsibility for any pending/outstanding statutory dues and any other dues such as water/electricity/service charges, transfer fees, dues of the Municipal Corporation/local authority dues, workmen's dues, sales tax or any other cess, duties, levies by whatever name it is called including interest, etc., if any. The assets if sold shall be with all the said liabilities, encumbrances, dues, charges whether known

or unknown, and all of those shall be completely borne by the successful purchaser over and above the purchase consideration. Further, in such an event, the stamp duty, registration charges, cess, sales tax (if applicable), transfer charges, if any, and all other incidental costs, charges and expenses in connection with the sale of the aforesaid assets/business shall be entirely payable and borne by the purchaser.

In Schedule II, under Clause (3) it is specified:During the course of the process, ARCIL in its sole discretion, may permit at any stage any further person to participate in the process and may provide additional information, procedure, guidelines and draft documentation and make suitable revisions and/or amendments, where necessary. Expressors shall have no objection to the same.

Further, the Litigation Impact Statement, Appendix-I, also had been pointed out. The Certificate from Chartered Accountant, Appendix- II and the other relevant portions also had been relied upon.

64. The letter dated 11-9-2006 addressed by the petitioner to the Managing Director and CEO, ARCIL, reads as hereunder:

Sub: Spectrum Power Generation Limited - Submissions of Non Binding Expression of interest - Regd.

We, Ghanta Infrastructures Limited is promoted by the founder promoters of SPGL, and the only promoters of SPGL who have provided the personal guarantee and also offered collateral security to the Lenders including Pledge of their personal shares. We are bidding for the project and hereby offer our Expression of Interest to take over the Assets of the Company either under Option-I for Business of SPGL or under Option II viz., Assets Purchase Scheme. The details of our requirement as enunciated in your letter under reference may be seen in the Annexure Enclosed. You may treat this as a non-binding offer from the Company as required under the bid offer. However, we may add that while selecting the final bidders for due diligence etc., we may also be selected not only for the reasons mentioned in Paragraph 1 above, but also for the fact that we have the experience in setting up a power project and also running it with tariff being the lowest in the country amongst the Private sector IPPs set up in the country so far.

We may also add that for any reason our offer is not in sync with the offers provided by any other bidder, then we may be permitted to improve the offer to match with the best offer received by your organization. This request is being made in view of what has already been stated above that we are the only group of promoters who have provided all the comforts needed for getting the loan sanctioned from the banks and institutions.

Thanking and assuring of our support at all times.

Yours truly,

For Ghanta Infrastructures Limited,

Sd/-

Mr. Raghuveer,

Director.

65. The news item published in Financial Express also had been placed before this Court and the relevant portions had been pointed out. The letter dated 24-10-2006 addressed to the ARCIL by the petitioner reads as hereunder:

Sub: Spectrum Power Generation Limited - Submission of Binding Final Offer - regd.

Ref: Our bid dated 11th September 2006 and your office letter ARG/GSC/FY07/02799

dated 14th September 2006.

With reference to the above we are herewith submitting our Binding Final Offer for (a) Option-I and (b) Option-II in the Annexure which is enclosed herewith. We confirm our compliance with all Bid conditions as determined by ARCIL. Kindly acknowledge the receipt of the above and do the needful.

We would be glad to furnish any other information that you may require in this regard.

Yours truly,

For Ghanta Infrastructure Limited,

Sd/-

M. Raghuveer,

Director.

66. The ARCIL's mail inviting petitioner-Company to make a presentation dated 6-11-2006 also had been pointed out. The letter dated 13-11-2006 addressed by the ARCIL to the petitioner-Company reads as hereunder:

Kind Attention : Mr. M. Raghuveer, Director.

Dear Sir,

Re: Invitation for Expression of Interest (I.E.I.) - Spectrum power Generation Limited (SPGL).

We have received letter dated November 10, 2006 from you and noted the content. Please note that we are unable to accept your request.

We therefore request you to submit your revised binding offer as per the dates mentioned in our letter Ref. No. ARG-I/PJ/FY07/03974 dated November 10, 2006.

Yours faithfully,

Sd/-

M. Sudhendranath

Executive Vice President.

67. The Revised Offer of the petitioner-Company dated 16-11-2006 reads as hereunder:

Sub: 10th November 2006 meeting at your office regarding our bid for Spectrum

Power Generation Limited (SPGL).

At the outset we would like to thank ARCIL for providing us an opportunity to make a presentation on our bid which we submitted and the details thereof.

Further, we would like to take this opportunity to reiterate our commitment to the project and make all endeavors for the transaction to reach its logical conclusion to the satisfaction of ARCIL.

Based on the valuable inputs (listed below) received from ARCIL during the captioned meeting, we are pleased to submit our revised offer. As per our understanding, following are the inputs received from ARCIL during the 10th November meeting:

1. ARCIL have expressed difficulty in formulating a workable solution under Option 1 since they are constrained/limited by relevant statutory provisions.

2. ARCIL's assistance will be available on best endeavors basis to GIL in their efforts to have the underlying commercial contracts such as PPA and Gas Supply Agreement transferred to the new entity.

3. As per RBI regulations, ARCIL may have to sell the asset and receive complete purchase consideration within 5 years of the purchase of the distressed asset. Accordingly we have revised our offer under Scheme B, Option 2 so as to be in accordance with the above mentioned RBI regulations.

Accordingly, based on the above, we are pleased to submit our revised offer to ARCIL. We confirm our offer is in compliance with bid conditions. We remain committed to the ARCIL process and look forward to your feedback.

Thanking you,

Yours truly,

For Ghanta Infrastructures Limited

Sd/-

M. Raghuveer

Director.

The news articles of Economic Times dated 30-11-2006 and ARCIL's letter dated 22-12-2006 also had been relied upon.

68. Several portions of the ARCIL's letter ARG-II/PJ/FY07/04568 dated 12-12-2006 addressed to the respondent 5 and 6 had been strongly relied upon by the Counsel on record and the relevant portions of the same are as hereunder : 'Pinnacle Overseas Assets Limited, the successful bidder, shall hereinafter be referred to as ('Bidder'). The Bidder is the special purpose vehicle, as stated in Bid, formed and organized by Lehman Brothers Commercial Corporation Asia Limited & affiliates ('LB') and its strategic partners, in which LB owns a significant minority interest while the majority is held by LB's strategic partners.'

In Definitions of the aforesaid letter, the undernoted may be relevant:

Existing Project means the gas based combined cycle power plant with an installed capacity of 208 MW at Upadda near Kakinada in East Godavari District, Andhra Pradesh designed for operation on both the gas and napththa.

Existing Project Assets means all movable and immovable assets and intellectual property rights and intangible assets of SPGL (present and future) in respect of the Existing Project i.e., (a) all the rights, title, interests, benefits, claims and demands whatsoever of SPGL in any letter of credit, guarantee, performance bond provided by any party in respect of the Existing Project and (c) insurance contracts or, as the case may be, insurance proceeds in respect of the Existing Project.

Existing Project Contracts shall mean the following contracts, agreements, as amended/as may be amended and supplemented from time to time in respect of the Existing Project:

(i) the power purchase agreements;

(ii) EPC Contract;

(iii) any operations and management contracts;

(iv) any supply contracts; and shall include all the necessary and incidental undertakings, powers of attorney, declarations, bonds, certificates, no-objections, Existing Project Clearances, approvals, and all the writings, deeds, instruments, documents in respect thereof and any other document relating to development, commissioning, construction, setting up, implementation, operation and maintenance of the Existing Project, fuel supply, and other similar agreements.

Existing Project Clearances shall mean any approval, no-objection, consent, license, registration, permit, sanction, certificate or other authorization of any nature obtained/required to be obtained from any government, governmental/statutory/regulatory/local/judicial/quasi-judicial authority/board corporation/commission/other body corporate/forum under the applicable law or contract, in connection with the New Project.

Investors shall collectively mean the persons other than the Bidder who are/shall become share holders of Pinnacle Overseas Assets Limited.

New Project shall mean the new power plant to be set up with such capacity and designed for operation on such fuel as proposed in the Bid.

New Project Clearances shall mean any approval, no-objection, consent, license, registration, permit, sanction, certificate or other authorisation of any nature obtained/required to be obtained from any Government, governmental/statutory/regulatory/local/judicial/quasi-judicial authority/board/Corporation/commission/other body corporate/forum under the applicable law or contract, in connection with the New Project.

New Project Assets shall mean all movable and immovable assets and intellectual property rights and intangible assets of SPGL (present and future) in respect of the New Project i.e., (a) all the rights, title, interests, benefits, claims and demands of SPGL under the New Project Contracts, (b) all the rights, title, interest, benefits, claims and demands of SPGL in or under New Project Clearances, (c) all the rights, title, interest, benefits, claims and demands whatsoever of SPGL in any letter of credit, guarantee, performance bond provided by any party in respect of the New Project and (c) insurance contracts or, as the case may be, insurance proceeds in respect of the New Project.

New Project Contracts shall mean the following contracts, agreements, as amended/as may be amended and supplemented from time to time in respect of the New Project and such other contracts and agreements that may be executed afresh for implementation of the New Project, including all the necessary and incidental undertakings, powers of attorney, declarations, bonds, certificates, no-objections, New Project Clearances, approvals, and all the writings, deeds, instruments, documents in respect thereof:

(i) the power purchase agreements;

(ii) EPC Contract;

(iii) any operations and management contracts;

(iv) any supply contracts

and include any other material document (in the opinion of ARCIL) relating to development, commissioning, construction, setting up, implementation, operation and maintenance of the New Project, fuel supply, and other similar agreements.

Residual Debt means such portion of the total existing aggregate debt of all Existing Lenders to SPGL, which portion shall be in excess of the obligations mentioned in Clauses 3.1.1, 3.1.2, 3.1.3, 3.1.4 and 3.1.9.

Under Clause 3.1: Restructuring of Debt, it is specified : 'The dues of the Existing Lenders as on December 13, 2006, shall be settled through the Composite Scheme to be approved by the Hon'ble High Court as under, and

the relevant portions of the same are as hereunder:

3.1.3 Payment of Rs. 175 crore, as bullet payment to the Existing Lenders pro- rata inter-se on March 31, 2012. Interest shall be payable on the said amount @ 10% per annum payable quarterly, from April 01, 2007, first interest payment date being June 30, 2007;

3.1.4: Insurance of Compulsorily Convertible Debentures (CCDs) of Rs. 325 crore to the Existing Lenders pro-rata inter-se, which shall carry a coupon rate of 5% per annum payable half-yearly to be converted into equity of the SPGL at such price, that would convert to 10% equity stake of the fully diluted equity share capital of SPGL post the equity infusion for the expansion project of upto 350 MW additional capacity. Such conversion shall happen at the time of achievement of financial closure for the expansion project and before any Initial Public Offer (IPO) in respect of equity shares of SPGL. Provided that from the date of conversion of CCDs into equity as above till the date of IPO, SPGL shall pay to Existing Lenders pro-rata inter-se, an additional amount calculated at the rate of 5% per annum (payable half-yearly on September 30 and March 30 of each year) on the converted amount. In case the IPO does not materialize within 5 years from the date of this letter, ARCIL and other Lenders shall have the put option on the Bidder for selling equitystake/CCDs of the Existing Lenders for a total value of Rs. 325 crore together with accrued interest at the above mentioned rate.

3.1.6: On successful pre-payment of the obligations mentioned in 3.1.2, 3.3.3 and 3.1.9 above and achievement of financial closure for expansion project of upto 350 MW additional capacity, Existing Lenders shall release pledge on such number of shares in equity capital of SPGL from the then pledged shares so as to continue with 26% of the Shareholding of SPGL (from time to time) under its pledge to secure the obligations of SPGL and Bidder mentioned in Clause 3.1.4 above.

3.1.8: The figures in respect of the outstanding dues and the Residual Debt above may undergo change upon reconciliation. However, the figures and obligations mentioned in Sub-clauses 3.1.1 to 3.1.4 and 3.1.9 shall not undergo any change.

3.2: Restructuring of Capital of SPGL: The existing equity capital of SPGL shall be restructured through the Composite Scheme by converting entire existing share capital of SPGL into redeemable preference shares with a coupon rate of 0.01% payable at the end of 20 (twenty) years from the Composite Scheme becoming effective and by issuance of fresh equity in favour of the Bidder and in the manner as proposed in the Bid.

3.3: Transaction Structure: Within the time frame specified herein below or such period as may be extended by ARCIL in writing, towards ARCIL's declaration of Bidder as successful bidder, and in part payment of consideration thereof :

3.3.2: Bidder shall within 15 days of this letter, on the day of first meeting of Board of Directors of SPGL held after the date hereof, execute and procure execution of a Definitive Agreement by SPGL and such existing promoters of SPGL as may be required by ARCIL, as per draft attached hereto as Annexure 'B'.

3.3.3: The Bidder shall within 15 days of this letter, execute a corporate guarantee in favour of Existing Lenders, irrevocably and unconditionally guaranteeing the due performance and fulfillment of the restructured obligations in Clauses 3.1.1, 3.1.2, 3.3.3, 3.1.4 and 3.1.9 above by SPGL except the repayment of the Residual Debt. Provided that the said guarantee shall become effective as far as the ARCIL is concerned, upon execution of Definitive Agreement in accordance with Clause 3.3.2 above, and as far as Other Lenders are concerned, from the date of sanction of Composite Scheme by the Hon'ble High Court. The corporate guarantee to be executed by the Bidder shall be in the form and substance as per the format annexed at Annexure 'C'. In the event any payments are made by Bidder to the Existing Lenders or obligations of SPGL are discharged by the Bidder, in pursuance of such guarantee, the rights of Existing Lenders as against SPGL shall be subrogated to the Bidder only in the event of and after all the obligations of SPGL as guaranteed as aforesaid are discharged by the Bidder in full and not at any time prior to such full discharge.

3.3.6: The Bidder shall within 45 days of this letter, ensure preparation and filing before the Hon'ble High Court of Andhra Pradesh, a Composite Scheme of Arrangement with the lenders and Restructuring of Share capital under Sections 81, 100, 391 - 394 and other relevant sections of the Companies Act, 1956 as may be applicable, (in this letter referred to as 'Composite Scheme'), in respect of SPGL, either by SPGL or the existing promoters of SPGL. The Composite Scheme shall, inter-alia, provide for achievement of the restructuring of debt and equity mentioned in Clauses 3.1 and 3.2 herein and the draft of the Composite Scheme shall be finalized in consultation with ARCIL.

3.3.8: Upon failure of agreement under this Letter by virtue of the Composite Scheme not having been voted upon favorably or sanctioned by the Hon'ble High Court within a period of twelve months from the date of this letter or any other reason as is provided for under this letter, all obligations undertaken by the Bidder as also any corporate guarantee executed by Bidder in terms of this letter except the obligation of Bidder related to forfeiture under Clause 3.4.2 of this letter, shall lapse automatically and any funds brought in except the amount of Rs. 50 Cr. as provided for in said Clause 3.4.2, by the Bidder in terms of this sanction letter shall be entitled to be returned to the Bidder or its nominee. Provided that amounts of upto Rs. 40 crore under Clause 3.3.5 shall be dealt with in accordance with Clause 3.3.5 while the amounts, if any, paid to Existing Lenders upto such period of twelve months pursuant to guarantee obligations shall be dealt with in accordance with Clause 3.3.3. In such event, dues of Existing Lenders shall be payable by SPGL as if no restructuring was agreed to and the nominees of Bidder shall resign from the Board of Directors of SPGL forthwith and the Bidder's right of appointing nominees on the Board of Directors shall stand cancelled forthwith.

5. ARCIL's deliverables:

The deliverables by ARCIL shall be limited to the following:

(i) Voting in favour of the Composite Scheme in the meeting of class of secured lenders in respect of debt of SPGL convened by the Hon'ble High Court, which voting shall not be less than 75% in value of such secured debt;

(ii) Procurement of voting in favour of the Composite Scheme in the meeting of share holders convened by the Hon'ble High Court, in respect of 5,45,58,000 number of Equity shares in equity capital of SPGL of face value of Rs. 10/- each held by Banks/Financial institutions (30.92% of total paid-up equity capital of SPGL);

(iii) Procurement of voting (pro-rata) in favour of the Composite Scheme in the meeting of share holders convened by the Hon'ble High Court, in respect of ARCIL's pro-rata shares of promoters' 2,64,89,700 number of shares held in equity capital of SPGL of face value of Rs. 10/- each pledged with Existing Lenders (15.01% of total paid-up equity capital of SPGL); Provided that:

(i) ARCIL's deliverables mentioned above shall be conditional upon the requirement of their exercise arising on or before the end of a period of twelve months from the date of this letter or as may be extended by ARCIL in writing.

(ii) It is clarified for removal of doubts that merely by virtue of issuance of this letter or exercise of its deliverables as above. ARCIL has not and should not be in any way deemed to have undertaken agreement on the part of Other Lenders for restructuring of their dues or restructuring of capital nor has ARCIL by virtue of issuing this letter given any consent on behalf of Other Lenders for any such restructuring. Any such restructuring as far as the same relates to them, shall be binding on them only upon their express consent or upon sanction by the Hon'ble High Court of the Composite Scheme which envisages such restructuring.

8. Expansion of the Project (New Project): The bidder shall through SPGL, ensure and procure effective and timely implementation of the New Project as proposed in the Bid.

9. Default and Remedies: In the event of default by the Bidder or SPGL, in fulfillment and performance of any of their obligations or terms and conditions contained or envisaged in this Letter, except where such default

is related to default in performance of terms and conditions of this Letter by ARCIL. ARCIL shall, apart from remedies contained elsewhere in the Letter as well as under law and contract, have the right to cancel the arrangements, agreements and concessions agreed to be granted under this Letter by ARCIL in favour of any of the Bidder, its nominee, and appropriate the money received by it, provided that the defaulting party is given a written notice by ARCIL to cure such default and the party in default fails to so cure the default within thirty days from the date of default.

Further, in Annexure-B, the undernoted portion had been relied upon:

Whereas

A. By and under an Invitation for Expression of Interest ('I.E.I.') dated 28th July 2006, Arcil, had invited Expression of Interest (EOI) for resolution of the debt of SPGL in the broad manner as stated in the I.E.I.

B. Pursuant to the due diligence conducted by Lehman and on satisfaction thereof, POA and Lehman have by and under their letter dated 24th October 2006 addressed to Arcil submitted POA's bid which was revised vide letter dated November 16, 2006 (the bid with revisions are hereinafter collectively referred to as the 'Bid').

C. Arcil declared POA as a successful bidder, however, subject to the terms and conditions as detailed in the Sanction Letter dated December 12, 2006 ('the Sanction Letter') issued by Arcil to POA and Lehman after discussion and negotiation with them and agreed to, accepted and confirmed by POA and acknowledged by Lehman, which inter alia provide for restructuring of debt and restructuring of equity capital of SPGL. A copy of the Sanctioned Letter is annexed hereto and marked as Annexure.

D. Lehman Brothers Opportunity Limited (hereinafter 'LBOL', a company organized under the Laws of Mauritius being a 100% indirect Subsidiary of Lehman Brothers Holding Inc.) is an affiliate of Lehman Brothers Commercial Corporation Asia Ltd. ('LBCCA'). LBOL together with Cellcap Securities Limited (hereinafter 'Cellcap', a company organized under the laws of British Virgin Islands. LBOL is currently holding 10% equity shares in POA while the balance 90% is held by Cellcap. The liability of share holders of POA, merely by virtue of them being such share holders, in respect of POA's obligations hereunder, vis--vis POA shall be limited to the extent of their respective shareholdings, in accordance with the memorandum and articles of association of POA.

E. The Parties are desirous of confirming, undertaking and agreeing to the understanding captured in the Sanction Letter as hereinafter appearing.

In Annexure-C, the Deed of Guarantee, it is specified:

B. WHEREAS pursuant to the sanction letter and the said Agreement, the Guarantor has agreed to give an unconditional and irrevocable guarantee to Arcil and Other Lenders for the due performance of the obligations and covenants in terms of Clauses 3.1.1, 3.1.2, 3.3.3, 3.1.4 and 3.1.9 of the Sanction Letter, by SPGL.

It is also further specified 'Now therefore this deed witnesseth as follows: and Clause (2) specifies: 'In the event of any default and/or failure by SPGL in performance of terms and conditions and obligations under the Clauses 3.1.1, 3.1.2, 3.1.3, 3.1.4 and 3.1.9 of the Sanction Letter, the Guarantor shall, within a period not exceeding 60 (sixty) days from the date of dispatch by Arcil/Other Lenders to the Guarantor of a notice in writing of such default by SPGL, perform and fulfill and/or cause to fulfill and/or perform such terms and conditions including to pay to Arcil and Other Lenders any amounts envisaged under such obligations of SPGL at Mumbai, on first demand without delay, demur or protest, and without any set-off or counter-claim, as specified in the notice.

In the Specific Conditions with respect to the Project Clause (i) deals with Implementation and (a) reads:

S.P.G.L. shall implement the new project within the overall Project Cost in accordance with the business plan and financing plan proposed in the Bid and further to be approved by the SPGL's Board of Directors and Arcil and shall achieve completion of Project on or before such dates proposed in the Bid or such later date as may be approved by the SPGL Board and Arcil ('Project Completion Date'). SPGL/Bidder shall implement the Project within the time frame that shall be agreed under the business plan/detailed project report.Further, under Clause (ii) dealing with Scope it is specified that S.P.G.L. shall get the scope of New Project approved by ARCIL. Clause (iii) deals with Project contracts, and under (B) it is specified, S.P.G.L. shall within such time frame as may be agreed to by Arcil and if so required by Arcil, make reasonable efforts to ensure amendment of the existing Project Contracts including the power purchase agreement with APTRANSCO and the supply contracts including for Gas and Napththa, so as to provide for a right to Existing Lenders shall be, on its own, able to assign, without requirement of any consent, approval of or reference to any of the parties, the rights and obligations of the SPGL under the said agreement and contracts to any person or persons, in any of the events of default'. Under 5-Special Conditions, Clause (d) it is specified:

S.P.G.L. shall be liable to duly perform the following:

(i) Obtain all the required clearances in respect of the New Project.

(iv) Obtain for New Project, NOC from the State Pollution Control Board;

(vi) Obtain approval/Clearance from government/Central Electricity Authority (CEA) for the power purchase agreement required for New Project, if any;

69. The letter dated 16-2-2007 addressed by the petitioner-company to the Managing Director of ARCIL reads as hereunder:

Ghanta Infrastructures Limited

The Managing Director, 16-02-2007

Asset Reconstruction Company India Ltd.

17th Floor, Express Towers, Nariman Point,

Mumbai-400021.

Dear Sir,

Sub: M/s. Spectrum Power Generation Limited, takeover of Security interest, Affairs - regarding.

Ref: 1) Ghanta Infrastructures Ltd.(GIL) binding final offer on 24-10-2006 and revised offer dated 16-11-2006.

2) Arcil's letter dated 22-12-2006.

This is in continuation of the several meetings that I had with you before and after 22-12-2006. Arcil had addressed a letter dated 22-12-06 received by us on 27-12-2006 informing us that our bid referred to above is not successful. Apart from that no other details as regards the number of bidders who participated in the bid, parameters if any set for evaluation of the bids, the reasons as to why our bid was unsuccessful etc., are not given in your letter. We were shocked to learn later that Pinnacle Overseas India Ltd., has been awarded the bid whereas the same was not even a short listed company. During my meetings with you in your office I requested you on number of occasions to give the complete details of the bidding process including the parameters and procedure adopted for evaluation of the bids. It is unfortunate that no information was forthcoming from you.

Sir, I once again request your good self to kindly furnish the following details immediately:

1) Details of the total number of bidders who participated and the short listed bidders.

2) Parameters if any set for evaluation of bids.

3) Reasons as to why our bid was treated as non responsive.

4) The details of the successful bidder and the bid terms of the successful bidder.

5) The agreement between Arcil and the successful bidder if any.

Sir, kindly furnish the above information within 7 days from the date of receipt of this letter. If the information is not furnished, we will be constrained to approach the Court of law besides approaching the Chief Vigilance Commissioner, Government of India, New Delhi for appropriate enquiry into the secretive and non transport procedures adopted by Arcil.

Thanking you,

For Ghanta Infrastructures Ltd.

Sd/-

M. Raghuveer

Director

70. The proceedings of the ARCIL in ARG-II/PJ/FY07/06158, dated 26-2-2007 reads as hereunder:

Mr. M. Raghuveer,

Director,

Ghanta Infrastructures Limited,

8-2-293/82/A, Plot No. 176,

Road No. 72, Prashasan Nagar,

Jubilee Hills, Hyderabad-500033.

Dear Sir,

Re: Invitation for Expression of Interest (I.E.I.) - SPGL.

We refer to your letter of February 16, 2007 received by us on February 20, 2007 requesting ARCIL to provide you with detail disclosure of the bid process and evaluation thereof. In this regard, we wish to state as follows:

1) Ghanta Infrastructures Ltd. (GIL) has participated in the bid process pursuant to signing a Non-Disclosure Agreement (NDA) with ARCIL, wherein both the parties are subject to obligation of strict confidentiality; and similar NDAs have been signed by ARCIL with other bidders. Accordingly, ARCIL is under strict obligation of confidentiality vis--vis other bidders.

2) GIL has submitted its bid pursuant to Invitation for Expression of Interest (I.E.I.). In this regard, we invite your attention to the third paragraph of page No. 7 of the I.E.I., which inter alia states 'It is however clarified that ARCIL shall have the sole discretion to accept or reject any such Bid. ARCIL is not and shall not be under any obligation to offer or assign any reasons for accepting or rejecting any Bid'. ARCIL is in compliance of the said terms and is not required to assign any reasons or furnish information as sought for by you. Your

Expression had been submitted subject to all the terms and conditions of I.E.I. including the aforesaid condition and you participated in the process subject to the same. Accordingly, you are stopped from taking any stand that is contradictory to the same.

3) We may also clarify that ARCIL's I.E.I. process also involved the other lenders and institutional share holders of SPGL in the decision making, by holding joint lenders meeting; and accordingly there is no 'secrecy' or 'non-transparency' as far as the tenders and institutional stakeholders are concerned.

4) We would like to further clarify that Pinnacle Overseas India Limited ('Pinnacle') is the special purpose vehicle and nominee of one of the short listed Bidders who was declared successful and the relevant bid(s) by the successful bidder was submitted in the name of Pinnacle.

We would like to mention that in terms of the structure of the successful bid, a Scheme inter alia under Sections 391 - 394 of the Companies Act, 1956, has been filed by SPGL before the Hon'ble High Court of Andhra Pradesh. This Scheme is for resolution of dues of the stakeholders of SPGL. As per provisions of law, such a scheme needs requisite approval of all class of share holders including lenders and share holders and is also subject to the scrutiny of the Hon'ble High Court. This process if now in judicial domain and the Scheme cannot be made effective without requisite majority of lenders and share holders. We have to also mention that you had addressed a letter dated December 22, 2006 to the Secretary (Financial Sector), Ministry of Finance wherein it was mentioned, 'Mr. M. Kishan Rao and family, the original promoters of SPGL have floated a special purpose vehicle by name Ghanta Infrastructure Limited and participated in the bid or acquiring the assets of SPGL'. It is very clear from the same that you are an SPV of some of the share holders of SPGL. The matter of resolution of dues of SPGL is before the Hon'ble High Court by way of the said Scheme filed by SPGL and any interested party including share holders may file their objections at relevant stage before the Hon'ble High Court.

You may, therefore, obtain copies of papers related to the said Scheme from the records of Hon'ble High Court.

Trust this clarifies the issues.

Yours faithfully,

Sd/-

M. Sudhendranath

Executive Vice President

71. The material papers relating to the suit O.S. No. 329/2006 on the file of II Additional Chief Judge, City Civil Court, Hyderabad also had been placed. The relevant portions of the meeting of the 83rd meeting of the Board of Directors of S.P.G.L., held on Tuesday, 12th December 2006 at 9.30 a.m. also had been placed before this Court and at para-4 it is specified:

To take note of Minutes of 82nd Board Meeting to be given effect as per the Order of Hon'ble High Court of Andhra Pradesh.

At para-5, it is specified:

To consider the letter from ARCIL to Pinnacle Overseas Assets Limited for resolution of the Debt of the Company and to take necessary steps as deemed appropriate and to pass the necessary resolutions thereto.

The Chairman informed the Board the Company has received a letter dated December 22, 2006 from Pinnacle Overseas Assets Limited (POA), intimating therein that POA has been declared as the successful bidder by Asset Reconstruction Company (India) Limited (ARCIL), vide ARCIL's Sanction Letter Ref: ARG-II/PJ/FY07/01568

dated December 12, 2006, for the resolution of the debt of the Company, POA also sent to the Company a copy of the said Sanction Letter (together with its enclosures) of ARCIL. One of the conditions of the Sanction Letter is that the Company, amongst other parties, has to enter into definitive agreements within 15 days of the issuance of the Sanction Letter i.e., by December 27, 2006. The letter of POA, the Sanction Letter issued by ARCIL along with the draft definitive agreements was placed before the Board. The Board perused the contents of the communication received from POA and discussed the matter in detail.

Mr. V.V. Warty was of the opinion that the Company is yet to receive a formal communication from ARCIL indicating the name of the successful bidder for the debt resolution of the Company. Mr.M.Sudhendranath was of the opinion that there is no such requirement of a formal letter from ARCIL and letter from POA is self explanatory, which was agreed to by other members of the Board. The Board after discussions, passed the following resolutions unanimously:

Resolved that the Sanction Letter, issued by ARCIL declaring Pinnacle overseas Assets Limited as the successful bidder containing inter alia the terms and conditions regarding the restructuring of debt and equity of the Company, the proposed definitive agreements annexed to the said Sanction Letter and the other enclosures, be and are hereby approved.

Resolved further that any one of Mr. T. Ravishankar, Chief Operating Officer or Mr. D.V. Sivaram, Company Secretary, be and are hereby authorized to sign the proposed definitive agreement and other documents and papers and prepare a composite Scheme of Arrangement with members, creditors, and inter alia for restructuring of equity capital under Sections 81, 100, 391 - 394 and other relevant provisions of the Companies Act, 1956, pursuant to the Sanction Letter issued by ARCIL vide their letter No. ARG-II/PJ/FY07/04568 dated December 12, 2006, in consultation with ARCIL and Pinnacle Overseas Assets Limited on behalf of the Company and to do all other acts, deeds and things which are necessary and incidental thereto.

Resolved further that common seal of the Company be affixed wherever necessary to implement and give effect to above resolutions; in the presence any one Director of the Company and the Company Secretary who shall sign any such document in token thereof.

It was observed that there is a need to convene a General Meeting of the Members of the Company in order to amend the Memorandum of Articles of Association of the Company to give effect to the provisions of the Sanction Letter issued by ARCIL. The Board after discussion, passed the following resolution:

Resolved that any one of Mr. T. Ravishankar, Chief Operating Officer and/or Mr. D.V. Sivaram, Company Secretary of the Company be and is hereby authorized to convene the Extra Ordinary General Meeting on or before January 27, 2007 and to do all acts and deeds as may be required to give effect to the provisions of the Sanction Letter issued by ARCIL and the definitive agreements entered into in respect of the same. The draft of the notice for convening EGM together with explanatory statement, which was tabled is hereby approved.

72. Certain other proceedings relating to the Extraordinary General Body Meetings also had been placed before this Court. The non-issuance of guidelines by Reserve Bank of India for sale of business of borrowers under Section 9(b) of the Act which in a way was admitted by the 1st respondent-ARCIL in its Rejoinder dated 16-7-2007 and also Clause 7(2) of Securitisation and Reconstruction Companies (Reserve Bank) Guidelines 2003 and the consequences thereof under Sections 3 and 4 of the Act as well also had been high-lighted and these contentions were made in relation to the maintainability of the Writ Petition in particular. Hence, what would be the resultant consequence, whether cancellation of registration or otherwise, need not be gone into in elaboration. The unreported decision of Bombay High Court in W.P. No. 417/2005 also had been referred to, but it appears the matter was carried as S.L.P. (Civil) No. 4317/2005 and the parties were directed to approach the High Court in view of the contention raised by the G.H.C.L. and the Points raised by G.H.C.L had not been considered by the Bombay High Court and subsequent thereto, Review Petition No. 30/2005 was filed and the same was allowed on 4-5-2005 and it appears the parties settled the matter for filing

Compromise Memo on 4-5-2005. This Court need not attach much importance to this aspect since the same would not seriously alter the situation as far as the present case is concerned.

73. In M.S. Sivani v. State of Karnataka : [1995]3SCR329 it was observed at paras 19 and 31 as hereunder:

The licencing authority, therefore, is conferred with discretion to impose such restrictions by notification or Order having statutory force or conditions emanating therefrom as part thereof as are deemed appropriate to the trade or business or avocation by a licence or permit, as the case may be. Unregulated video game operations not only pose danger to public peace and order and safety; but the public will fall into prey of gaming where they always stand to lose playing in the games of chance. Unless one resorts to gaming regularly, one can hardly be reckoned to possess skill to play the video game. Therefore, when it is a game of pure chance or manipulated by tampering with the machines to make it a game of chance, even acquired skills hardly assist a player to get extra tokens. Therefore, even when it is a game of mixed skill and chance, it would be a gaming prohibited under the statute except by regulation. The restriction imposed, therefore, cannot be said to be arbitrary, unbridled or uncanalised. The guidance for exercising the discretion need not ex facie be found in the notification or orders. It could be gathered from the provisions of the Act or Rules and a total consideration of the relevant provisions in the notification or order or conditions of the licence. The discretion conferred on the licencing authority, the Commissioner or the District Magistrate, cannot be said to be arbitrary, uncanalised or without any guidelines. The regulations, therefore, are imposed in the public interest and the right under Article 19(1)(g) is not violated..

It is settled law that every action of the State or an instrumentality of State must be informed by reason. Actions uninformed by reason may amount to arbitrary and liable to be questioned under Article 226 or Article 32 of the Constitution. The action must be just, fair and reasonable. Rejection of the licence must be founded upon relevant grounds of public interest. Fairplay and natural justice are part of fair public administration; non-arbitrariness and absence of discrimination are hallmarks for good governance under rule of law, therefore, when the State, its delegated authority or an instrumentality of the State or any person acts under a statutory rule or by administrative discretion, when its actions or orders visit the citizen with civil consequences, fairness and justness require that in an appropriate case, the affected citizens must have an opportunity to meet the case. Audi alteram partem is part of the principles of natural justice. Decided cases have not extended doctrine of hearing in every case. It depends upon facts in a given case. What has been stated in Mahabir Auto Stores v. Indian Oil Corporation : [1990]1SCR818 , which has been pressed into service by the appellants counsel to contend that opportunity of hearing was required to be given in every case. This requirement of natural justice cannot be put in a rigid mould, at which stating that before an adverse decision is taken, the affected person should be taken into confidence, it was observed in paragraph 18 that whether and in what circumstances that confidence should be taken into consideration cannot be laid down on any strait-jacket.' When constitutionality of the statute or the statutory rules was impugned, with a view to sustain the statute or statutory rules, this Court read down the law consistent with rule of natural justice including personal hearing. See C. B. Gautam v. Union of India : [1993]199ITR530(SC) , referred by learned Counsel for the appellants. In some cases like Maneka Gandhi, post-decisional hearing was regarded as sufficient.

74. In State of A.P. v. Mc.Dowell & Co. : [1996]3SCR721 the Apex Court held at para-44 as hereunder:

It is this paragraph which is strongly relied upon by Shri Nariman. We are, however, of the opinion that the observations in the said paragraph must be understood in the totality of the decision. The use of the word 'arbitrary' in para 7 was used in the sense of being discriminatory, as the reading of the very paragraph in its entirety discloses. The provisions of the Tamil Nadu Act were contrasted with the provisions of the Land Acquisition Act and ultimately it was found that Section 11 insofar as it provided for payment of compensation in instalments was invalid. The ground of invalidation is clearly one of discrimination. It must be remembered that an Act which is discriminatory is liable to be labelled as arbitrary. It is in this sense that the expression 'arbitrary' was used in para 7.

75. In Fasih Chaudhary v. Director General, Doordarshan and Ors. : AIR 1989 SC157 it was held at paras 5 and 6 as hereunder:

It is well-settled that there should be fair play in action in a situation like the present one, as was observed by this Court in Ram and Shyam Co. v. State of Haryana : AIR 1985 SC1147 . It is also well settled that the authorities like the Doordarshan should act fairly and their action should be legitimate and fair and transaction should be without any aversion, malice or affection. Nothing should be done which gives the impression of favouritism or nepotism. See the observations of this Court in Haji T.M. Hassan Rawther v. Kerala Financial Corporation : [1988]1SCR1079 .

While, as mentioned hereinbefore, fair play in action in matters like the present one is an essential requirement, similarly, however, free-play in the joints is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere as the present one. Judged from that standpoint of view, though all the proposals might not have been considered strictly in accordance with order of precedence, it appears that these were considered fairly, reasonably, objectively and without any malice or ill-will.

76. In Dwarkadas Marfatia & Sons v. Board of Trustees, Bombay Port : [1989]2SCR751 it was observed at paras 21 and 25 as hereunder:

We are unable to accept the submissions. Being a public body even in respect of its dealings with its tenant, it must act in public interest, and an infraction of that duty is amenable to examination either in civil suit or in writ jurisdiction..

Therefore, Mr. Chinai was right in contending that every action/activity of the Bombay Port Trust which constituted 'State' within Article 12 of the Constitution in respect of any right conferred or privilege granted by any Statute is subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest. Reliance may be placed on the observations of this Court in E.P. Royappa v. State of Tamil Nadu : (1974)ILLJ172SC , Menaka Gandhi v. Union of India : [1978]2SCR621 , R.D. Shetty v. International Airport Authority of India : (1979)IILLJ217SC , Kasturi Lal Lakshmi Reddy v. State of J&K; : [1980]3SCR1338 and Ajay Hasia v. Khalid Mujib Sehravardi : (1981)ILLJ103SC . Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the Executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14. The observations in paras 101 & 102 of the Escorts' case (supra) read properly do not detract from the aforesaid principles.

76. Wednesbury principle in the context of Judicial Review had been dealt with in a recent decision by the Apex Court in Union of India v. M.S. Mohammed Rawther : AIR 2007 SC3014 .

77. The acceptance of the 5th respondent as the successful bidder, though initially the 5th respondent was not one of the bidders had been made a ground of attack on the ground that I.E.I. is not for public circulation and is not intended for distribution to any person other than the person to whom it is addressed and is not transferable. Already the relevant portions where the right to exercise discretion in such matters had been specifically reserved had been referred to supra. Further, it is stated that the 5th respondent cannot be treated as a nominee of the 6th respondent and in the facts and circumstances of the case, permitting the 5th respondent to intervene and finalizing the bid of the 5th respondent cannot be sustained.

78. The petitioner-Company had submitted the Binding Final Offer on 24-10-2006 and the petitioner was asked by the 1st respondent by letter dated 26-10-2006 to attend the meeting on 10-11-2006 at the office of the ARCIL and during the negotiations the petitioner was informed by the ARCIL's representatives that as per Reserve Bank of India guidelines it may have to sell the asset and receive complete purchase consideration within 5 years of the purchase of the distressed asset. The petitioner was therefore asked to revise its offer so as to be in accordance with the regulations of the Reserve Bank of India. Believing the representation of the

ARCIL's representatives, the petitioner submitted a revised offer on 16-11-2006 and the petitioner had specifically alleged that in the meeting dated 10-11-2006 it was given to understand by the ARCIL that it has to outlay its bid so as to enable the ARCIL to recover the total consideration within 5 years. This stand had not been specifically denied by the 1st respondent either in the correspondence or in the counter affidavits. While in its earlier offer dated 24-10-2006 the petitioner had proposed the payments to end by 2015-16 in the revised offer submitted on 16-11-2006 the petitioner offered full payment by 20-11-2012 commencing from 1-4-2007 i.e., within 5 years from the date of purchase of the asset. But, this condition of full payment within 5 years of the sale had not been applied in the case of 6th respondent inasmuch as the bid of the 6th respondent envisaged payment at the end of 20 years from the Scheme which had been approved by the Company Court. Further, the 6th respondent was allowed to suggest expansion for 350 MW additional capacity from the existing 208 MW. Such freedom was not allowed to the petitioner by the ARCIL. Thus, this is the main ground of attack on the ground that double standards had been adopted in considering the respective offers and hence the same is arbitrary and illegal being violative of Article 14 of the Constitution of India.

79. In Kuldip Singh v. Govt. of NCT, New Delhi : AIR 2006 SC2652 it was observed at para-22:

Moreover, if the equality clause applied, the State could not have adopted different procedures for different applicants. (See Ramana Dayaram Shetty v. International Airport Authority of India and Ors. : (1979)IILLJ217SC .

80. The main ground of attack is relating to the validity of the bid of the 5th respondent/6th respondent and the same being contrary to the terms of I.E.I. Sufficient stress had been laid on the words 'Any conditionality in the Final Expression should not be in a way so as to make the Final Expression contingent on events related to a matters which are sub-judice or requiring government/statutory approvals'. The bid of the 6th respondent no doubt specifies 'on the expansion of the project of SPGL from 208 MW to 350 MW' as reflected from Clause 3.1.4 of the terms and conditions in ARCIL's letter dated 12-12-2006. It is the stand that the bid of the 6th respondent to be taken as a whole and cannot be viewed by splitting up the same as per the whims and fancies of the ARCIL so as to favour the 5th respondent/6th respondent. Further, the relevant portion in the I.E.I. had been pointed out as hereunder:

Such Final Expression shall be in the nature of an offer for entering into Transaction which shall be binding on such Best Expressor. Such Best Expressor/s shall be required to submit all statutory and corporate approvals as also documentary evidence of their networth/credit worthiness along with the Final Expression....

The letter dated 12-12-2006 and also the relevant Clauses 3.1.1, 3.1.4 and the other Clauses also had been pointed out.

81. It is not in controversy that the petitioner-Company is floated by Mr. Kishan Rao, one of the promoters of SPGL and no doubt certain submissions were made by the respective Counsel relating to the mismanagement of the said Company and the losses of the Company as well. It was stipulated in the I.E.I. that Expressors/Purchasers should indicate a structure of resolution of dues along with the bid and all the bidders had indicated their respective transaction structures and further the I.E.I. clearly provides that bidders shall provide business plans for SPGL and the scope and ambit of such business plan would include:

(i) Strategy for existing businesses of SPGL

(ii) Capital/funding requirement envisaged for SPGL over the next three years and the proposed funding strategy.

(iii) Projected Cash Flow and Fund Flow statement for the next 3/5 years.

The said amount had been proposed to be brought in for the expansion of the project i.e., the interest of SPGL and the share holders and the stakeholders. In the event of this amount of Rs. 350 Crores being

excluded from the offer of the 5th respondent, even then on a comparative analysis, the offer of the 5th respondent appears to be better when compared to the petitioner. The offer made by the 6th respondent providing for issue of Compulsorily Convertible Debentures, has built within it the provision for payment of Rs. 325 Crores together with interest at the end of 5 years notwithstanding the expansion or non-expansion of the capacity and non-expansion of Initial Public Offer (IPO). Thus, it is asserted that there is an element of definiteness in the bid of the 5th respondent/6th respondent. The relevant Annexures in this regard also had been referred to. The sum of Rs. 325 Crores to be offered as Compulsorily Convertible Debentures with a coupon rate of 5% is not contingent since whether or not the SPGL undertakes expansion programme, it is bound to issue Compulsorily Convertible Debentures of face value of Rs. 325 crores carrying a coupon rate of 5% payable half-yearly. Hence, even if there is no expansion at all and even if the SPGL continues only with the existing generating facilities, the obligation to issue the said Compulsorily Convertible Debentures in a sum of Rs. 325 Crores carrying 5% coupon rate would continue to operate and in the event of the SPGL not undertaking any expansion programme, the coupon rate of interest on Compulsorily Convertible Debentures would stand enhanced to 10%. Hence, the offer of money which the ARCIL is assured by the 5th respondent in terms of its bid after reckoning the interest on Rs. 907.11 Crores as against the offer made by the writ petitioner i.e., Rs. 458 Crores, would be the best offer - Scheme-B of the writ petitioner. If the SPGL undertakes expansion as envisaged, then the Compulsorily Convertible Debentures would be converted into equity of the SPGL entitling the ARCIL to 10% of the fully diluted equity of the SPGL and thus the gains of the ARCIL would be over and above the amount carried out under the Scheme.

82. It is no doubt true that the ARCIL was aware that the petitioner was floated by the group of Mr. M. Kishan Rao and being in know of things, at no point of time, the ARCIL objected to the bid of the petitioner on the ground the said Mr. M. Kishan Rao group had started GIL/petitioner-company and hence the said Group cannot participate in the bidding and cannot be a bidder. Such a plea was not raised. But, however certain submissions were made in this regard. The subsequent events had been brought to the notice of this Court.

83. C.P. No. 43/2007 and the order made therein by the learned Company Judge had been relied upon by both the contesting parties and the relevant portions had been pointed out. The learned Counsel for the petitioner would contend that despite the objections raised by Mr. Kishan Rao before the Company Court as one representing H.U.F. and though Mr. Raghuveer, the son of Mr. Kishan Rao, had sworn to the affidavit filed in support of the present Writ Petition, the scope and ambit of these litigations being different and in view of the fact that the decision making process or the bidding process not being under challenge before the Company Court, the same have to be independently gone into by this Court. It is no doubt true that the scope and ambit of these two litigations are slightly different, but at the same time, the observations made by the learned Company Judge cannot be totally ignored while deciding this matter. It is also true that it is brought to the notice of this Court that the order made in C.P. No. 43/2007 had not attained finality since an Appeal had been preferred.

84. In Meghal Homes Private. Ltd. v. Shree Niwas Girni K.K. Samiti : AIR 2007 SC3079 , the Scheme of Arrangement, the granting of sanction and modification of a Company had been dealt with.

85. Be that as it may, it may be appropriate to have a look at the relevant portions of the said order. C.P. No. 43/2007, the Company Petition, had been filed by the petitioner therein, i.e., SPGL/3rd respondent herein, under Section 391 of the Companies Act, 1956 r/w. Rule 79 of the Company Court Rules 1959, praying for approval of the Scheme of Arrangement between the petitioner- Company and its secured creditors and members under which the debts as well as the capital had been proposed to be restructured. Paras 24 to 29 of the order in C.P. No. 43/2007 read:

On behalf of ARCIL-Spectrum Power Generations Limited-I Trust, represented by its Trustee M/s. Asset Reconstruction Company (India) Limited, represented by its Chief Manager filed C.A. No. 1199/2007 to get itself impleaded as party respondent to submit the scheme of arrangement, as proposed by the petitioner company and opposed the objections raised by the other parties. Similarly, ARCIL-Spectrum Power

Generations Limited-II Trust, represented by its Trustee M/s. Asset Reconstruction Company (India) Limited, represented by its Chief Manager filed C.A. 1200/2007 to get itself impleaded as party respondent to support the scheme of arrangement, as proposed by the petitioner company and opposed the objections raised by the other parties.

Similarly, ARCIL-Spectrum Power Generations Limited-III Trust, represented by its Trustee M/s. Asset Reconstruction Company (India) Limited, represented by its Chief Manager filed C.A.1202/2007 to get itself impleaded as party respondent to support the scheme of arrangement, as proposed by the petitioner company and opposed the objections raised by the other parties.

Similarly, ARCIL-Spectrum Power Generations Limited-IV Trust, represented by its Trustee M/s. Asset Reconstruction Company (India) Limited, represented by its Chief Manager filed C.A.1201/2007 to get itself impleaded as party respondent to support the scheme of arrangement, as proposed by the petitioner company and opposed the objections raised by the other parties.

Identical affidavits are filed by the same person in all four applications. In the affidavit, it is stated that the applicant trust along with other trusts have acquired more than 80% of the financial assets pertaining to the company in question, and the company is stated to have committed various defaults in payment of amounts to its lenders on account of fiscal mismanagement leading to the said accounts being classified as non-performance account. It is stated that in accordance with the provisions of SARFAESI Act, the financial assets of the company were acquired by the applicant and other trusts through its trustee, Asset Reconstruction Company (India) Limited (ARCIL) being a securitisation and an asset reconstruction company.

Pursuant to the said acquisition and in accordance with the provisions of the said Act, ARCIL has invited Expressions of Interest for resolution of the dues of the company. It was clearly specified that the expressor has to mention its proposed transaction structure along with the offer for evaluation by ARCIL of the feasibility of the structure. It was stipulated in the said invitation that such structure may include a scheme under Section 391 and 394 of the Companies Act, 1956. In response to the said invitation, ARCIL received four offers and amongst the said four offers, ARCIL found the offers submitted by one Lehman Brothers Commercial Corporation (Asia) Limited on behalf of Pinnacle Overseas Assets Limited as being the most beneficial to the lenders.

Further, it may be relevant to have a glance at paras 33, 34, 35, 36 and 37 and the said paras read as hereunder:

Similar implead applications are filed on behalf of some of the share holders. C.A. 852/2007 is filed by Sri M. Kishan Rao individually, as well as on behalf of his HUF, representing the promoter shareholder of the company in question. Further, similar applications are also filed in C.A. Nos. 1071/2007 and 1240/2007 on behalf of two of his group companies viz., M/s. Bambino Agro Industries Limited and Bambino Finance Private Limited which are stated to be the share holders, to come on record as respondents, opposing the proposed scheme. Similarly, on behalf of 5 individual share holders, C.A.974 of 2007 is filed, to get themselves impleaded as party respondents, who sought to oppose the scheme. It is stated in the affidavit filed by Sri M. Kishan Rao that he is a share holder, holding 27,370 shares, while his HUF was holding 18,85,090 shares, apart from the share held by the group companies. It is stated that though their names are being shown in the register of share holders of the Company, but, however, they were not allowed to participate in the meeting by the ARCIL which issued a letter dated 20-3-2007, informing the applicants that ARCIL has been exercising its right to vote, and therefore, the applicants were asked not to participate in the meeting of the members of the company, which was convened as per the orders of this Court, appointing Chairpersons, for putting the scheme for consideration of the members of the company. It is stated that in view of the fact that they were prevented from participating in the meeting of the share holders, they could not raise any objections with regard to the scheme placed for consideration of the members, therefore, it is pleaded that they should be given an opportunity to raise their objections to the proposed scheme. It is stated that apart

from being share holders of the petitioner company, this applicants have substantial interest and stake in the company as the promoters and guarantors for the loans availed by the company from the banks and financial institutions. It is stated that the said guarantees subsequent to the change in the management of the applicant company in October, 2003, were never extended. The said guarantees also ceased to exist in the light of the recent developments wherein ARCIL took over the applicant company under the Securitisation Act and through a sham and dubious bidding process allotted the same to a company viz., Pinnacle Overseas Assets Limited.

It is stated that the entire bidding process conducted by ARCIL was during the period when the board of the applicant company consisted of an illegally elected Chairman and Directors whose election through a never held EGM on 10-3- 2006 was challenged by him through a suit being O.S. 329/2006 on the file of the II Addl. Chief Judge, City Civil Court at Hyderabad. It is stated that an interlocutory application was also filed as I.A.3023/2006, wherein an order was passed against the chairman and directors, preventing them from acting. But, however, the said order was modified in appeal by the High Court, confining the restriction from taking any major decision. When such is the case, it is surprising how the illegally elected chairman and directors could correspond with ARCIL and could do all in finalizing the bidding process in collusion with ARCIL.

It is stated that there are several discrepancies in the scheme being sought to be approved. The scheme as submitted to the Court and also the facts and figures as detailed in various annexures filed along with the company petition are full of distortions. The information provided is far away from truth and has been dented so as to suit the convenience of certain vested interests who are acting in the manner prejudicial to the interest of the applicant company. As an example it is stated that the statutory auditors A.F. Ferguson and Company, Chartered Accounts have submitted their limited review report. It is stated that the said auditors either turned blind eye to the reality or they were provided with insufficient information, which is clearly visible in the report, which is submitted by them. The scheme shows as if the guarantees provided the applicants, continue even on this day. It is further stated that the said statement made in the scheme and sought to be approved is false and mala fide in nature. The same defies the logic and appears to be a product of mala fide intentions. Even in the profit and loss account for the period 1-4-2006 to 12-12-2006 there are too many discrepancies and mistake of facts and the same are intentionally made so as to cause wrongful loss to the original promoters and guarantors of the applicant company.

Further, at para-39 of the order it was specified:

It is stated that the applicant along with his sons and group concerns together with National Thermal Power Corporation (hereinafter referred to as 'NTPC') and Spectrum Technologies USA Inc., have started the company. The installed capacity of the company is 208 MW of power generation. The applicant and his associates have invested a sum of Rs. 26.50 crores in equity of the petitioner company. Further, helped to raise loans to the tune of Rs. 544 crores from the banks and financial institutions, by giving personal guarantees as well as giving guarantees of assets of the applicant and his associates and family members.

Further, paras 42, 43, 45 and 47 of the order in the said Company Petition read as hereunder:

It is stated that the applicant has made it clear to the banks and other financial institutions that the pledge of the shares holds no more good, as the pledge was not even registered, therefore, it was claimed by the applicant that he and his associates would continue to be share holders of the company, despite which, the institutions and the company deprived the applicant and his associates from participating and exercising their rights at the share holders meeting. It is sale deed that the ARCIL after taking over the secured assets and management of the company, invited bids for expression of interest without following any uniform rule, rhyme or terms and conditions and the same was done with an intention to favour the present bidder.

It is stated that the applicant understood that ARCIL has not entertained the better bids received from others and finalized the offer in favour of one Lehman Brothers Commercial Corporation Asia Limited, for the

reasons best known to them. The scheme itself is silent as to how the affairs of the company were conducted and how the company was for a long time under the illegal management by Dr. A.V. Mohan Rao and how the bidding process was conducted. The whole binding process conducted by ARCIL is far from law and suffers from lack of transparency and the whole process was planned clearly to help the bidder to take over the project, almost for a song. The scheme and arrangement are silent as to the mode adopted opportunity ARCIL under Securitisation Act and there is absolutely no clarity as to whether the present scheme has anything to offer to other creditors or what would be the status of the company and other creditors under the scheme. ARCIL has not given vide publicity while inviting bids.

It is stated that no order sanctioning any arrangement shall be made unless the Court is satisfied that the company or any other person by whom an application has been made has disclosed to the Court by an affidavit or otherwise of all material and facts relating to the company, the latest financial position of the company and the latest auditors report etc. It is further stated that the scheme in question is violative of the provisions of Section 391 of the Companies Act, in addition to violation of the applicant and his associates' rights as share holders and creditors. It is stated that the scheme contains a hidden agenda to help the bidder to take over the project of the company, implemented, executed and established by the applicant by sacrificing his monies, properties and time, just for a peanut. The scheme also suffers from legal infirmities. It is also stated that the losses which were minimal by the time the management of the company was taken over by the financial institutions, it was mounted to Rs. 245 crores within short time of three years, for which the financial institutions owed obligation to explain the reasons and circumstances, under which the said losses have been mounted up, which the financial institutions have not explained.

It is stated that the appointed date was fixed as 13-12-2006 mischievously so as to circumvent the provisions of BIFR, as the company became sick as on 31- 3-2006 itself and the same was known as such to the Board on 27-1-2007, therefore, the appointed date was mischievously and calculatedly designed so as to circumvent the statutory provisions of SICA. The terms of the scheme, as proposed, cannot be considered as beneficial to the company and its share holders and the creditors, apart from that the scheme does not refer to the other bids if any given with respect to the terms. It is contended that the bidder has been given number of benefits not only the written off the residual debt, but also offered long term of 60 months to pay Rs. 150 crores and again the bulletin amount also is to be paid only at the end of 5 years while the part of the amount was converted as convertible debentures. It is stated that though a new project and expansion was shown, but there are no details as to how the finances are going to be raised for the purpose of new project for setting up of 350 MW additional capacity of power plant. The applicant also referred to various items of expenditure, which were stated to have been incurred exorbitantly, which is stated to have been the result for the company to become sick.

It may be relevant to have a glance at the substance of the relevant contentions as reflected at paras 57, 63 and 65 and the said paras read as hereunder:

On behalf of the ARCIL which filed applications, supporting the scheme, the learned senior Counsel, who appeared for ARCIL contended that while considering the scheme for approval, the scope and jurisdiction of the Court is very limited, as was held by the Apex Court in Miheer H. Mafatlal Industries Limited : AIR 1997 SC506 . It is contended that the jurisdiction of the Court is only supervisory and it is only the commercial wisdom of the share holders and the creditors who are entitled to exercise their voting in their commercial wisdom, which could not be interfered by going into the merits examining those as an appellate authority. The learned Counsel contended that as was observed by the Apex Court, the jurisdiction of this Court is only peripheral and supervisory and not appellate, and the Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not the umpire. Therefore, the learned Counsel sought to approve the scheme as the same is in accordance with the broad guidelines formulated by the Apex Court in Miheer H. Mafatlal Industries Limited (1 supra). The learned senior Counsel also relied upon the judgment of the Apex Court in Hindustan Lever v. State of Maharashtra : AIR 2004 SC326 where the

principles formulated by the Apex Court in Miheer H. Mafatlal Industries Limited (1 supra) were reiterated while holding that the jurisdiction of the Court is to see the compliance of the statutory requirements. Therefore, sought for approval of the scheme. The learned Counsel for the petitioner also relied upon the following decisions in (1) MPM Auto Industries Ltd., In Re. Vol. 80 (1994) Company Cases 290 (2) Spartek Ceramics India Ltd., rep. by its Group Deputy General Manager (Legal) and Company Secretary : 2006(1)ALT589 Jaypee Cement Ltd. In Re. 2004(2) Comp. L.J.105 (All) in support of his contentions.

It is also stated that the statements that are filed including the statements of limited review of the financial position contains full of distorted figures and the same does not co-relate with the figures that are given earlier, therefore, it has to be presumed that the scheme was presented without disclosing all the relevant material, with true and correct state of affairs. Therefore, sought for rejection of the scheme. The learned senior Counsel relied upon the following decisions in (1) J.S. Davar v. Shankar Vishnu 1967 Bombay 4576 (V 54 C 98), (2) Balakrishan v. Swadeshi Polytex Ltd. : [1985]2SCR854 , (3) Bharat Synthetics Ltd. v. Bank of India (1995) Vol. 82 of Comp. Cases 437, (4) KEC International Limited v. Kamani Employees Union and Ors. (2000) 1 Comp.L.J. 351 (Bom), (5) Arjun Prasad v. Shantilal Shankarlal Shah : AIR 1962 SC1192 and (6) Exedy Ceekay Ltd. and Ceekay Daikin Ltd. In Re. (2000) 4 Comp.L.J. 142 (P&H;) in support of his contentions.

Sri V.S. Raju, the learned Counsel, appearing for the four other share holders, who filed the application, objecting the scheme, contended that they were not served with notice of convening of the meeting of the share holders, even though their names were shown as share holders in the register of members. It is contended by the learned Counsel that though an amendment has been proposed by one of the share holders, much before the convening of the meeting of the share holders, though the same was received by the company, it did not communicated or circulated to the other members of the company before the date of meeting, as is contemplated under Section 190 of the Act. In view of the non-communication of the amendment that was sought for which was put for consideration in the meeting and in fact, approved, by incorporating the same as part of the scheme, the convening as well as conducting of meeting itself is illegal and vitiated. It is further stated that though the board passed a resolution, the same does not reflect the approval of the scheme, as is evident from the annual report for the year ending 31-3-2006, as the alleged meeting of the Board of Directors had taken place on 27-1-2007 on which date even the financial results of the company were approved. The non-reference of the alleged resolution dated 27-1-2007, approving the scheme clearly shows that what was claimed on behalf of the company, is not true and correct, with reference to the proposed scheme, therefore, sought for rejection of the scheme. The learned Counsel relied upon the decision in St. Mary's Finance Ltd. v. R.G. Jayaprakash (2000) Vol. 99 Comp. Cases 359) in support of his contentions.

At para-66 of the said order in C.P. No. 43/2007, the following Issues had been specified by the learned Company Judge:

(i) Whether the implead petitioners are to be allowed so as to consider their objections as to the sanction of the scheme?

(ii) Whether the scheme as proposed is in compliance with the provisions of the statute and can be approved?

At para-71, it was specified:

Coming to the applications of the share holders, who are one of the petitioner and his associates and companies, which are holding shares in the company in question, it is not in dispute that all the applicants in this group have pledged their shares in favour of the financial institutions at the time of raising loans for the purpose of setting up of the power generating plant. It is also not in dispute that the pledgee was given the right even to exercise the right of voting at the general body meeting or any other meetings of the share holders. It is also not in dispute that ARCIL, as a pledgee had, in fact, exercised its right to vote in the share holders meeting and voted in favour of the scheme.

While explaining the scope and ambit, para-75 had been pointed out while answering Issue No. 2. It was observed that it was also agreed between the parties that the proposed bidder has to come up with a scheme for restructuring the share capital, debts, bring in finance, better management and technology, and accordingly, the scheme has been formulated. Further, specifically, para-81 of the order of the Company Court referred supra had been pointed out whereat it was observed:

Before proceeding further it would be proper to refer to the decisions that are relied upon by both sides.

In Miheer H. Mafatlal Industries Limited (1 supra) the Apex Court had considered the scope and jurisdiction of the Company Court, while considering an application for sanctioning of a scheme of amalgamation or arrangement, contemplated under Section 391 of the Act. In that case, the respondent company was the Transferee Company and the Transferor Company was the Mafatlal Fine Spinning and Manufacturing Company Limited. The respective Board of Directors have passed resolutions and even with reference to the Transferor Company, which was within the jurisdiction of the Bombay High Court, the scheme presented for approval, was sanctioned. One of the Directors of the Transferor Company was a party for the decision which had obtained even sanction from the jurisdictional High Court, raised an objection with reference to the Transferee Company, which was within the jurisdiction of the Gujarat High Court. The Company Judge of the Gujrat High Court, after considering the objections raised, by a detailed order, sanctioned the scheme, as proposed by the Transferee Company that was confirmed by the Division Bench in Appeal. Hence, the matter came up before the Apex Court in further appeal.

The Apex Court while considering the scope and jurisdiction of the Company Court and the scheme that was presented for its approval, laid down broad guidelines. It would be appropriate to refer those guidelines hereunder:

The aforesaid provisions of the Act show that compromise or arrangement can be proposed between a company and its creditors or any class of them or between a company and its members or any class of them. Such a compromise would also take in its sweep any scheme of amalgamation/merger of one company with another. When such a scheme is put forward by a company for the sanction of the Court in the first instance the Court has to direct holding of meetings of creditors or class of creditors or members or class of members who are concerned with such a scheme and once the majority in number representing three-fourths in value of creditors or class of creditors or members or class of members, as the case may be, present or voting either in person or by proxy at such a meeting accord their approval to any compromise or arrangement thus put to vote, and once such compromise is sanctioned by the Court, it would be binding to all creditors or class of creditors or members or class of members, as the case may be, which would also necessarily mean that even to dissenting creditors or class of creditors or dissenting members or class of members such sanctioned scheme would remain binding. Before sanctioning such a scheme even though approved by a majority of the concerned creditors or members of the Court has to be satisfied that the company or any other person moving such an application for sanction under Sub-section (2) of Section 391 has disclosed all the relevant matters mentioned in the proviso to Sub-section (2) of that section. So far as the meetings of the creditors or members, or their respective classes for whom the Scheme is proposed are concerned, it is enjoined by Section 391(1)(a) that also required to be placed for consideration of the voters concerned so that the parties concerned before whom the scheme is placed for voting can take an informed and objective decision whether to vote for the scheme or against it. On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the share holders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a Court of law. No Court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal

scheme or is otherwise unfair or unjust to the class of share holders or creditors for whom it is meant. Consequently it cannot be said that a company Court before whom an application is moved for sanctioning such a scheme might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the company concerned, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme. It is trite to say that once the scheme gets sanctioned by the Court it would bind even the dissenting minority share holders or creditors. Therefore, the fairness of the scheme qua them also has to be kept in view by the Company Court while putting its seal of approval on the scheme concerned placed for its sanction. It is, of course, true that so far as the Company Court is concerned as per the statutory provisions of Sections 391 and 393 of the Act the question of voidability of the scheme will have to be judged subject to the rider that scheme sanctioned by the majority will remain binding to a dissenting minority of creditors or members, as the case may be, even though they have not consented to such a scheme and to that extent absence of their consent will have no effect on the scheme. It can be postulated that even in case of such a scheme or compromise and arrangement put up for sanction of a Company Court it will have to be seen whether the proposed scheme is lawful and just and fair to the whole class of creditors or members including the dissenting minority to whom it is offered for approval and which has been approved by such class of persons with requisite majority vote. However, further question remains whether the Court has jurisdiction like an appellate authority to minutely scrutinize the scheme and to arrive at an independent conclusion whether the scheme would be permitted to go through or not when the majority of the creditors or members of their respective classes have approved the scheme as required by Section 391 Sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a Court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire.... Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. It is obvious that the supervisor cannot ever be treated as the author or a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui jurisdiction with their open eyes and fully informed about the pros and cons the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinizing the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors or members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement.

Strong emphasis was laid on the relevant portion of the said decision viz.,

The Court cannot, therefore, undertake the exercise of scrutinizing the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors or members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement.

Further, the learned senior Counsel representing the respective parties placed strong reliance on paras 92, 96

and 98 and the said paras read as hereunder:

From the above case law relied upon by the parties, it is clear that while considering the scheme for approval under Section 391 of the Act, the same shall be based on the terms arrived at between the parties, and the jurisdiction of the Court while considering such scheme for approval is only supervisory to see that the statutory formalities required, are to be complied with, and the scheme shall not violate any provisions of law or contrary to public policy. It should not be unconscionable and the scheme should be beneficial to the Company. Though the scheme is approved by the statutorily required majority, the same shall not conclude and bind the Court and it is only one of the elements for consideration. It is obligatory on the part of the Company seeking approval of the scheme to disclose all the relevant material including the latest financial position before the Court i.e., showing the financial position of the Company up to the date of hearing of the petition for approval. The scheme can also be approved even after the same is implemented, since it takes effect from the date of the stipulation in the scheme and not from the date of the order approving the scheme. Finally, the Company Court is not a rubber stamp to approve the scheme, merely it was approved by the majority of the Members and the creditors of the Company.

Coming the other objection that there is no transparency in the bidding process conducted by the ARCIL, there was no proper publicity while inviting expression of interest and further the scheme was approved by illegally elected Chairman and Directors, the answer of the Company is that the bidding process is not the subject matter of the scheme. Further the expression of interests was invited by ARCIL, which is the leading secured creditor which took over the assets of the Company, having lost the hope of recovery of loan amount, which was mounted to the tune of Rs. 1,235 crore. Therefore, thought it fit to invite bidders who can invest capital and bring in technical and managerial expertise to strengthen the Company. In the process, ARCIL felt that the offer given by POA was the best one. In fact, the objectors also participated through their Company Ganta Infrastructures which was unsuccessful. Though the objectors are opposing the scheme, it is not their case that they gave any better offer than what was accepted. It is also not their case that even now there are any parties who are prepared to give any better offer to the Company. In the absence of any of the above, it is difficult for this Court to accept the contentions of the objectors that the offer is not just and proper to accept. Apart from this, the bidding process is not part of the scheme. The successful bidder was obligated to come up with the scheme for reconstitution of the capital, debt and management. The Chairman and Directors of the Company are not parties to the bidding process and in fact, as soon as bidding process was over, they have resigned and the nominees of the bidder were inducted into the Company since the bidder has paid or deposited Rs. 50 crore as per the agreed terms with the ARCIL. Therefore, there is no merit in this connection also. The objectors also claimed that while placing the scheme for approval, the interest of the Directors was not disclosed as is required under Section 393 of the Act. Therefore, there is a failure to disclose the material facts and hence, the scheme is liable to be rejected. But the contention of the petitioner-company is that the scheme as proposed clearly shows the fact that they are nominees of the bidder and except as nominees, there is no other interest in the Company. Since this is a known fact that the scheme envisages the change of management by inducting bidder into the management and as per the scheme even part of the amount towards share capital was paid. Therefore, there is no merit in the said contention.

In spite of such bad financial position, according to the Company and ARCIL, POA has come forward to bring in Rs. 150 crore of share capital; agreed to pay Rs. 150 crore with interest at the rate of 10% per annum quarterly payable in 60 instalments; Rs. 175 crore as bulletin figure at the end of five years with interest at the rate of 10% per annum quarterly payable and further agreed to convert Rs. 325/- crore into cumulative convertible debentures which carry 5% interest payable half-yearly, which would be converted into equity capital at the end of five years and further agreed to convert the existing share capital into redeemable preference shares carrying a coupon rate of 0.05% interest, redeemable at the end of 15 years. No other bidder has come up with any better offer than the one that was offered by POA through its representatives; Layman Brothers Commercial Corporation (Asia) which has set up POA as a special purpose vehicle. Therefore, it was decided that it is the best offer in the facts and circumstances of the case. Therefore, the

objections raised are devoid of merit.

Strong emphasis had been laid by the learned senior Counsel representing the respective parties on certain of the observations made at para-96 in particular wherein it was specified:.In fact, the objectors also participated through their Company M/s. Ganta Infrastructures which was unsuccessful. Though the objectors are opposing the scheme, it is not their case that they gave any better offer than what was accepted. It is also not their case that even now there are any parties who are prepared to give any better offer to the Company. In the absence of any of the above, it is difficult for this Court to accept the contentions of the objectors that the offer is not just and proper to accept....

Further, it was pointed out at para-98, the relevant portion on which emphasis had been made:.No other bidder has come up with any better offer than the one that was offered by POA through its representatives; Layman Brothers Commercial Corporation (Asia) which has set up POA as a special purpose vehicle. Therefore, it was decided that it is the best offer in the facts and circumstances of the case. Therefore, the objections raised are devoid of merit....

86. It is true that the bidding process or the decision making process cannot be said to be the subject matter of the Company Petition referred to supra. Certain of the observations made in this regard by the learned Company Judge also had been specifically pointed out. The aspect, scope and ambit of the proceeding which had been decided by the learned Company Judge and the scope and ambit of the present Writ Petition need not detain this Court any longer, suffice to state that the certain of the objections of the petitioner in a way also had been taken into consideration by the learned Company Judge and certain findings had been recorded overruling such objections while making the order. It is no doubt true that it is brought to the notice of this Court that the said order had not attained finality and the same had been carried by way of appeal.

87. On the aspect of reservation of right by the ARCIL in the tender conditions, the right to reject any Expression on its sole discretion though reserved, there cannot be arbitrary exercise relating to the same. Reliance was placed on Union of India v. Dinesh Engineering Corporation and Anr. : AIR 2001 SC3887 wherein at para-15 it was observed:

Coming to the second question involved in these appeals, namely, the rejection of the tender of the writ petitioner, it was argued on behalf of the appellants that the Railways under Clause 16 of the Guidelines was entitled to reject any tender offer without assigning any reasons and it also has the power to accept or not to accept the lowest offer. We do not dispute this power provided the same is exercised within the realm of the object for which this Clause is incorporated. This does not give an arbitrary power to the Railways to reject the bid offered by a party merely because it has that power. This is a power which can be exercised on the existence of certain conditions which in the opinion of the Railways are not in the interest of the Railways to accept the offer. No such ground has been taken when the writ petitioner's tender was rejected. Therefore, we agree with the High Court that it is not open to the Railways to rely upon this clause in the Guidelines to reject any or every offer that may be made by the writ petitioner while responding to a tender that may be called for supply of spare parts by the Railways. Mr. Iyer, the learned Senior Counsel appearing for EDC drew our attention to a judgment of this Court in Sterling Computers Ltd. v. M & N Publications Ltd. : AIR 1996 SC51 which has held:Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the Courts, such decisions are upheld on the principle laid down by Justice Holmes, that Courts while judging the Constitutional validity of executive decisions must grant certain measure of freedom of 'play in the joints' to the executive.

88. Further, strong reliance was placed on Miheer H. Mafatlal v. Mafatlal Industries : AIR 1997 SC506 wherein at para-29 it was observed:

However further question remains whether the Court has jurisdiction like an appellate authority to minutely

scrutinize the scheme and to arrive at an independent conclusion whether the scheme would be permitted to go through or not when the majority of the creditors or members or their respective classes have approved the scheme as required by Section 391 Sub-section (2). On this aspect the nature of compromise or arrangement between the company and the creditors and members has to be kept in view. It is the commercial wisdom of the parties to the scheme who have taken an informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the parties concerned to the compromise as the same would be in the realm of corporate and commercial wisdom of the parties concerned. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority. Consequently the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game according to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire. The supervisory jurisdiction of the Company Court can also be culled out from the provisions of Section 392 of the Act which reads as under:

392(1). Where a High Court makes an order under Section 391 sanctioning a compromise or an arrangement in respect of a company, it - (a) shall have power to supervise the carrying out the compromise or arrangement; and (b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

(2) If the Court aforesaid is satisfied that a compromise or arrangement sanctioned under Section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under Section 433 of this Act.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act under Section 153 of the Indian Companies Act, 1913 (7 of 1913), sanctioning a compromise or an arrangement.

Of course this section deals with post-sanction supervision. But the said provision itself clearly earmarks the field in which the sanction of the Court operates. It is obvious that the supervisor cannot ever be treated as the author of a policy-maker. Consequently the propriety and the merits of the compromise or arrangement have to be judged by the parties who as sui juris with their own eyes and fully informed about the pros and cons of the scheme arrive at their own reasoned judgment and agree to be bound by such compromise or arrangement. The Court cannot, therefore, undertake the exercise of scrutinizing the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the concerned creditors and members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement. The aforesaid statutory scheme which is clearly discernible from the relevant provisions of the Act, as seen above, has been subjected to a series of decisions of different High Courts and this Court as well as by the courts in England which had also occasion to consider schemes under pari materia English Company Law. We will briefly refer to the relevant decisions on the point. But before we do so we may also usefully refer to the observations found in the oft-quoted passage in Buckley on the Companies Act, 14th Edn. They are as under:

In exercising its power of sanction the court will see, first that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably

approve.

The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is found in the scheme.

In the case of Alabama, New Orleans, Texas and Pacific Junction Rly. Co. Re (1891) 1 Ch.213 : (1886-90) All.E.R. Rep.Ext.1143 the relevant observations regarding the power and jurisdiction of the Company Court which is called upon to sanction a scheme of arrangement or compromise between the company and its creditors or share holders were made by Lindley, L.J. as under:

What the court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the minority has been acting bona fide. The court also has to see that the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than that, the court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can reasonably be taken by businessmen. The court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve it.

To a similar effect were the observations of Fry, L.J. which read as under:

The next enquiry is: Under what circumstances is the court to sanction a resolution which has been passed approving of a compromise or arrangement I shall not attempt to define what elements may enter into the consideration of the court beyond this, that I do not doubt for a moment that the court is bound to ascertain that all the conditions required by the statute have been complied with; it is bound to be satisfied that the proposition was made in good faith; and, further, it must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it. What other circumstances the court may take into consideration I will not attempt to forecast.

In Anglo-Continental Supply Co. Ltd. Re (1922) 2 Ch.723 : 91 L.J. Ch.658 Asshtury, J., a century later reiterated the very same propositions as under:

Before giving its sanction to a scheme of arrangement the court will see firstly that the provisions of the statute have been complied with; secondly that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and, thirdly, that the arrangement is such as a man of business would reasonably approve.

The learned Single Judge of the Calcutta High Court in the case of Mankam Investments Ltd., Re (1995) 4 Comp.L.J. 330 (Cal) relying on a catena of decisions of the English courts and Indian High Courts observed as under on the power and jurisdiction of the Company Court which is called upon to sanction a scheme of merger and amalgamation of companies:

It is a matter for the share holders to consider commercially whether amalgamation or merger is beneficial or not. The court is really not concerned with the commercial decision of the share holders until and unless the court feels that the proposed merger is manifestly unfair or is being proposed unfairly and/or to defraud the other share holders. Whether the merged companies will be ultimately benefited or will be able to economise in the matter of expenses is a matter for the share holders to consider. If three companies are amalgamated,

certainly there will be some economics in the matter of maintaining accounts, filing of returns and various other matters. However, the court is really not concerned with the exact details of the matter and if the share holders approved the scheme by the requisite majority, then the court only looks into the scheme as to find out that it is not manifestly unfair and/or is not intended to defraud or to injustice to the other share holders.

We may also in this connection profitably refer to the judgment of this Court in the case of Employees' Union v. Hindustan Lever Ltd. 1995 Supp.(1) S.C.C. 499 wherein a Bench of three learned Judges speaking through Sen,J on behalf of himself and Venkatachaliah, C.J. and with which decision Sahai, J., concurred, Sahai, J., in his concurring judgment in the aforesaid case has made the following pertinent observations in this connection in the Report : 'But what was lost sight of was that the jurisdiction of the court in sanctioning a claim or merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction..

Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to the public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered between parties that it should not be unfair or contrary to the public policy or unconscionable. In amalgamation of companies, the courts have evolved, the principle of 'prudent business management test' or that the scheme should not be a device to evade law. But when the court is concerned with a scheme or merger with a subsidiary of a foreign company then the test is not only whether the scheme shall result in maximizing profits of the share holders or whether the interest of employees was protected but it has to ensure that merger shall not result in impeding promotion of industry or shall obstruct growth of national economy. Liberalised economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective. Reliance on English decisions Hoare & Co. Ltd., Re (1933 All.E.R. Rep. 105 Ch.D) and Bugle Press Ltd., Re (1961 Ch. 270 : (1960) 1 All.E.R. 768 : (1960) 2 WLR 658) that the power of the court is to be satisfied only whether the provisions of the Act have been complied with or that the class or classes were fully represented and the arrangement was such as a man of business would reasonably approve between two private companies may be correct and may normally be adhered to but when the merger is with a subsidiary of a foreign company then economic interest of the country may have to be given precedence. The jurisdiction of the court in this regard is comprehensive.

Sen., J., speaking for himself and Venkatachalaiah, C.J., also towed the line indicated by Sahai, J., about jurisdiction of the Company Court while sanctioning the scheme and made the following pertinent observations:

An argument was also made that as a result of the amalgamation, a large share of the market will be captured by HLL. But there is nothing unlawful or illegal about this. The Court will decline to sanction a scheme of merger, if any tax fraud or any other illegality, is involved. But that is not the case here. A company may, on its own, grow up to capture a large share of the market. But unless it is shown that there is some illegality or fraud involved in the scheme, the Court cannot decline to sanction a scheme of amalgamation. It has to be borne in mind that this proposal of amalgamation arose out of a sharp decline in business of TOMCO. Dr. Dhavan has argued that TOMCO is not yet a sick Company. That may be right, but TOMCO at this rate will become a sick Company, unless something can be done to improve its performance. In the last two years, it has sold its investments and other properties. If this proposal of amalgamation is not sanctioned, the consequence for TOMCO may be very serious. The share holders, the employees, the creditors will all suffer. The argument that the Company has large assets is really meaningless. Very many cotton mills and jute mills in India have become sick and are on the verge of liquidation, even though they have large assets. The Scheme has been sanctioned almost unanimously by the share holders, debenture-holders, secured creditors, unsecured creditors and preference share holders of both the Companies. There must exist very strong reasons for withholding sanction to such a scheme. Withholding of sanction may turn out to be disastrous for 60,000 share holders of TOMCO and also a large number of its employees.

In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the

Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 Sub-section (2).

3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at meetings concerned as contemplated by Section 391 Sub-section (1).

5. That all the requisite material contemplated by the proviso of Sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the same rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a scheme of compromise and arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction.

89. Certain submissions were made in relation to fait accompli and also estoppel. The relevant portions of the proceedings already had been referred to supra in detail and the same need not be repeated again in elaboration. The substance of the contentions of the Senior Counsel representing the writ petitioner is that the decision making process suffers from several illegalities and hence the writ Court can definitely interfere under Article 226 of the Constitution of India.

90. In Sterling Computers Limited v. M & N Publications Limited : AIR 1996 SC51 the Apex Court at para-12

observed:

From the facts of the case of Kasturi Lal Lakshmi Reddy : [1980]3SCR1338 (supra), it shall appear that every year the State used to auction the blazes in different forests. Most of the contractors bidding at the auction had their factories outside Jammu and Kashmir. A decision was taken that from the year 1979-80 onwards resin extracted from its forests should not be allowed to be exported outside the territories of the State and should be utilised only by industries set up within the State. There were certain forests which were out of access on account of their distance from the roads and no contractor could be found for taking tapping contracts even on the basis of royalty. The Chief Conservator of Forests and other Forest Officers at a meeting took a decision which was also confirmed at a subsequent meeting between the Forest Minister, the Forest Secretary and the Chief Conservator of Forest, that the blazes for such inaccessible areas should be allotted to some private party. In view of that decision the second respondent who had earlier addressed a letter to the State Government offering to set up a factory for manufacture of resin turpentine oil and other derivatives in the State and had sought for allotment of 10,000 metric tonnes of resin annually was sanctioned the allotment of 11. 85 lac blazes in the inaccessible areas for a period of10 years on the terms and conditions set out in the order. This was challenged in the aforesaid case. This Court said that whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position and as such every activity of the Government which has a public element in it must be reasonable and not arbitrary. However, the allotment of the contract in favour of the second respondent was upheld. It was pointed out that the blazes were situated in inaccessible areas and in spite of the offers given no bidders were attracted and as such the State had no option but to allot the said contract on basis of the offer made by the second respondent.

91. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. : AIR 2005 SC2299 the Apex Court at paras 12 and 15 observed:

After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure..

The law relating to award of contract by the State and public sector corporations was reviewed in AIR India Ltd. v. Cochin International Airport Ltd. : [2000]1SCR505 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation. It was further held that the State, its corporation, instrumentalities and agencies have the public duty to be fair to all concerned.

Even when some defect is found in the decision making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

The decisions Noble Resources Ltd. v. State of Kerala : AIR 2007 SC119 and Rajasthan Housing Board v. G.S. Investments : (2007)1SCC477 also may be conveniently referred to in this context.

92. Apart from Section 9 of the Act dealing with Measures for Asset Reconstruction, Section 37 of the Act also had been relied upon. Section 37 of the Act dealing with Application of other laws not barred reads as hereunder:

The provisions of the Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of the Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

Certain submissions were made that the action would fall under the Companies Act, 1956 and in the light of Section 37 of the Act, since such action can be taken under the said Act, in the said view also the Writ Petition to be dismissed. From the definition of 'Asset Reconstruction' it is clear that the functions of such Company, the 1st respondent-ARCIL, is for realization of financial assistance acquired by it. The I.E.I. is within the realm of contractual field, cannot be in controversy at all. Meticulous mathematical and arithmetical calculations had been placed before the Court to demonstrate which offer would be the better offer. This is just a comparative analysis of the respective offers made by the parties and in the realm of contractual field concerned with the commercial activity, the discretionary decision taken by the ARCIL normally cannot be disturbed unless it suffers from serious illegality or such decision is so unreasonable or arbitrary and cannot withstand the legal scrutiny at all. As can be seen from the conditions, several safeguards had been specified and from the series of events, it is clear that transparent method had been adopted while ultimately arriving at a conclusion of awarding the bid in favour of the 5th respondent. In the comparative statement given in the affidavit filed in support of the Writ Petition, the interest element made in the offer of the 5th respondent had not been high-lighted for reasons best known. Though at a particular point of time, the Counsel for petitioner had placed unsigned and unverified statement of the comparative chart, subsequent thereto the relevant material had been placed before the Court. Even while making up the statement, the petitioner had not high-lighted the actual interest which the 5th respondent had offered to pay on different instalments and if the exercise as suggested by the petitioner to be taken, then notional interest upon the real interest offered by the 5th respondent also be computed, which would again make the offer of the 5th respondent far superior. The offer made by the SPGL is further carried out by corporate guarantees. The 5th respondent is a special purpose vehicle set up by the 6th respondent which is having huge presence in power sector all over the world. Thus, the ARCIL would receive large sum of money and further the chances of the ARCIL getting the sums also being much better, the ARCIL was thoroughly convinced that both the qualitatively and quantitatively the offer made by the 5th respondent would be a superior offer when compared to the offer made by the petitioner. Incidentally, the association of Mr. Kishan Rao group with the SPGL and the loss made by the SPGL due to mismanagement might have been taken note of. But though this ground was raised during the course of arguments, no serious factual foundation as such had been laid in this regard in the respective pleadings. While balancing the rights on comparative analysis of the offers, the writ Courts to be slow in disturbing the either acceptance or rejection while exercising the power of judicial review, the same being limited unless the same is arbitrary, unreasonable or suffers from any other serious illegality and the discretion exercised in this arena to be carefully scrutinized while disturbing such a decision. Any conditionality in the I.E.I. also cannot be said to have been contravened in the light of the specific and clear explanation offered in this regard by the ARCIL. The ground that the bidder was 6th respondent only and the 5th respondent as an intermediary entered the picture which may have to be taken as without authority, this ground of attack also cannot be sustained since it is specified:

The Expressors have to outline the proposed transaction structure. ARCIL reserves the right to reject any Expressions at its sole discretion, including but not limited, for reasons that the proposed transaction structure is not feasible/acceptable to ARCIL, without assigning any reasons thereof. ARCIL would not be required to communicate the rejection of the offers of the unsuccessful Expressors. ARCIL reserves its right to reject any or all proposals without assigning any reason at any stage in the process.' It is further pertinent to note that it was specified 'ARCIL will evaluate the Expressions and select one or more 'Best Expressions' as

evaluated from the perspective of the secured lenders. All Expressors agree that the decision of ARCIL in this regard shall be final and binding. ARCIL shall not be obliged to disclose the reason(s) for its decision in relation to the selection of the Best Expressions. Notwithstanding anything to the contrary contained in this I.E.I., ARCIL has the right, exercisable at its sole discretion, to accept or reject any Expression, without assigning any reasons for the same.

Further, it is specified that 'Such Final Expression shall be in the nature of an offer for entering into Transaction which shall be binding on such Best Expressor. Such Best Expressor/s shall be required to submit all statutory and corporate approvals as also documentary evidence of their networth/credit worthiness along with the Final Expression (hereinafter referred to as 'Bid'). It is however clarified that ARCIL shall have the sole discretion to accept or reject any such Bid. Under the Terms and Conditions, it is specified:

This I.E.I., the process hereunder, the Expressions and the Final Expressions/Bids are and shall be always deemed to be strictly subject to terms and conditions contained in the Scheme II hereto in addition to the terms and conditions contained elsewhere in this I.E.I.

It is also pertinent to note, under Schedule-II, it is specified:

During the course of the process, Arcil, in its sole discretion, may permit at any stage any further person to participate in the process and may provide additional information, procedure, guidelines and draft documentation and make suitable revisions and/or amendments, where necessary. Expressors shall have no objection to the same'. These conditions being self-explanatory, these would be an answer to almost all the grounds of attack inclusive of the participation of the 6th respondent only initially and the entry of the 5th respondent at a later point of time. The reservation of right as specified by the ARCIL always cannot be taken that by virtue of the same, ARCIL can act in an arbitrary, unreasonable or discriminatory manner. But however, these conditions relating to certain of the reservations and liberties would in a way mitigate the permissible contraventions, if any, committed by the ARCIL. Further, it is not as though there is any conflict of interest between the 6th and the 5th respondents. When that being so, it is within the discretion of the ARCIL to take an appropriate decision in this regard and the same cannot be found fault. The comparative charts placed before the Court also had been explained by the ARCIL and ably the same was demonstrated before this Court how the offer of the 6th respondent/5th respondent would be a better offer. The discretion exercised by the ARCIL in the light of the commercial benefit demonstrated before this Court normally cannot be interfered with under Article 226 of the Constitution of India. The learned Company Judge made certain observations and though the decision making process relating to the bidding cannot be taken as the question in controversy directly involved before the Company Court, these observations definitely can be taken into consideration in balancing the rights of the parties and also in deciding the comparative evaluation of the offers. The series of events, if carefully examined also do not disclose any favouritism or blameworthy conduct on the part of the representatives of the ARCIL. Even if the general interest of the share holders to be taken into consideration, the decision in question cannot be found fault. At any rate, the question of superiority or inferiority of the respective offers and the comparative study relating thereto, normally these are to be evaluated by the ARCIL, the competent authority to take a decision in this regard and unless serious legal infirmities touching the very root are pointed out either on the ground of unreasonableness, the ground of discrimination or the ground of arbitrariness or the like in the context of Article 14 of the Constitution of India, the writ Court cannot interfere with such decision even if it is to be taken that the writ Court may examine the decision making process. On the over-all facts and circumstances, even keeping the public interest and also the interest of the share holders and the stake holders, especially in the light of the subsequent events, though on the ground of delay or laches, the relief prayed for by the writ petitioner cannot be negatived since much water had flown thereafter to disturb the existing scenario especially in the light of the approval made by the Company Court to the Scheme in question, this Court is not inclined to interfere with the decision taken by the ARCIL in this regard. Several of the controversies mostly related to the facts which had been elaborated need not detain this Court any further in the light of what had been already observed supra. It is needless to say that the Writ Petition being devoid of merit, the same shall stand

dismissed. However, in the facts and circumstances of the case, the parties to bear their own costs.