IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 6223 of 2011
With
SPECIAL CIVIL APPLICATION No. 12009 of 2011

For Approval and Signature:

HONOURABLE THE **CHIEF JUSTICE**
MR.BHASKAR BHATTACHARYA
AND
HONOURABLE **MR.JUSTICE J.B.PARDIWALA**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?`
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SUNDARAM FINANCE LIMITED
Versus
STATE OF GUJARAT - THROUGH SECRETARY & ORS.

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Appearance :
MR PERCY KAVINA, SR. ADVOCATE WITH MR SANJAY R GUPTA for Petitioner.
MR KAMAL B TRIVEDI, ADVOCATE GENERAL WITH MS SANGEETA VISHEN, ASSTT. GOVERNMENT PLEADER for Respondent No. 1
MR SN SOPARKAR, SR.ADVOCATE WITH MR AMAR N BHATT for Respondent No. 3

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CORAM :	HONOURABLE THE CHIEF JUSTICE MR.BHASKAR BHATTACHARYA
	and
	HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 06/09/2012

COMMON CAV JUDGMENT

(Per : HONOURABLE THE CHIEF JUSTICE MR.BHASKAR BHATTACHARYA)

1. As common questions are involved in these writ-petitions, they were heard together and are disposed of by this common judgment. However, for discussion of the facts, Special Civil Application No. 6223 of 2011 is taken as the lead matter.

2. By this application under Article 226 of the Constitution of India, the writ-petitioner, a Company, incorporated under the provisions of the Companies Act and registered with the Reserve Bank of India under Section 45-IA of the Reserve Bank of India Act, 1934 ["RBI Act"], has prayed for declaration that the provisions of the Gujarat Money-Lenders Act, 2011 and its applicability to the petitioner as a Non Banking Financial Company ["NBFC" for short] registered under the RBI Act, are illegal and *ultra vires* the Constitution, and for further declaration that the Gujarat Money-Lenders Act, 2011 ["GML Act" for

short] is unconstitutional in so far as it applies to the petitioner-Company as NBFC registered under the RBI Act in the absence of legislative competence.

3. The writ-petitioner has further prayed for restraining the respondent no.1 from issuing any notification under Section 1[3] of the GML Act, notifying the Act.

4. The case made out by the writ-petitioner may be summarized thus:

4.1 The petitioner is a Company incorporated under the provisions of the Companies Act and registered with the Reserve Bank of India under Section 45-IA of the RBI Act. The said Company was originally classified as a Hire Purchase Company which came to be later reclassified as an Asset Finance Company Deposit Taking.

4.2 The respondent no.2 had, in the past, issued a notice under Section 13A of the Bombay Money Lenders Act, 1946 [“BML Act” for short], calling upon the petitioner to produce certain documents with a view to ascertain whether the petitioner was a money-lender under the said Act. Pursuant to such notice, the petitioner, in its reply, had asserted that since it was a company incorporated under the provisions of the Companies Act and held a valid registration certificate issued by the RBI, it was governed by the provisions of the

RBI Act, more particularly, Chapter IIIB of the RBI Act. Despite such fact, since the respondent no.2 threatened to initiate action and proceeded further against the petitioner under the BML Act, earlier, the petitioner filed Special Civil Application No. 13163 of 2008 before a learned Single Judge of this Court, thereby, contending that the provisions of the RBI Act would prevail over the said enactment and therefore, the provisions of the said enactment would not be applicable to the NBFCs like the petitioner. The petitioner further contended that Chapter IIIB of the RBI Act in itself is a self-contained Code covering all the aspects of business of NBFCs right from the registration, conditions for registration, deposit mobilization & its repayment and accounting standards. Therefore, according to the petitioner, the State legislation yielded to the Central legislation. The petitioner also placed reliance upon Section 45Q of the RBI Act which contains a non-obstante clause having overriding effect against all the laws.

4.3 A learned Single Judge of this Court, *vide* oral judgment dated January 13, 2010 passed in the said petition held in paragraph-25 of the judgment that the provision of the Constitution is supreme over all the enactments and if the scheme of the Constitution provides for making a room for operation of the laws made by the Parliament for a particular class of companies, its effect cannot be diluted nor can it be dissected. It was further observed that if the provisions of Chapter IIIB of the RBI Act were allowed to operate qua NBFCs, by the purported

application of the BML Act, not only an anomalous situation might arise but there would also be conflict of both the laws qua applicability of the Companies which are NBFCs. Based on the above findings, the learned Single Judge allowed the writ-application by quashing and setting aside the impugned notices issued by the respondent no.2 under the BML Act.

4.4 Being dissatisfied with the said judgment, the respondent no.2 filed Letters Patent Appeal No. 1095 of 2010 before a Division Bench of this Court and the said Division Bench, *vide* the judgment dated April 26, 2011 disposed of the said appeal by dismissing the same and thereby holding that Chapter IIIB of the RBI Act occupied the field with regard to the control, penal action etc. against those Companies, i.e. the petitioner herein and the said law, namely, the BML Act would transgress on the field occupied by the law of Parliament. In view of Section 45Q of the RBI Act, according to the said judgment of the Division Bench, the provisions of Chapter IIIB of the RBI Act shall have an overriding effect over the BML Act.

4.5 In the background of the aforesaid fact, the writ-petitioner was shocked to receive a copy of the Gujarat Government Gazette, published on April 8, 2011, introducing the GML Act. Section 58[1] of the GML Act provides that BML Act was thereby repealed. According to Section 2[5] of the GML Act, a Company means a Company defined under the Companies Act, 1956 and according to Section 2[10]

thereof, “Money-Lender” means [i] an individual; [ii] a Hindu Undivided Family; [iii] a company; [iv] a pawn broker; and [v] an un-incorporated body of individuals, including a firm who or which [a] carries on the business of money lending in the State; [b] has his or its principal place of such business in the State. The petitioner further found that according to Section 5[2] of the GML Act, NBFCs registered under the provisions of the RBI Act with the Reserve Bank of India shall be deemed to have been registered for the purposes of the said Act and they shall intimate to the concerned Registrar about their such registration with the RBI in the prescribed proforma. Therefore, the doctrine of implied registration under Section 5[2] of the GML Act by the respondent no.1 speaks of the mindset at the time of framing such provision and the sole object of the GML Act was to frustrate, dilute or defeat the judicial pronouncement passed by the learned Single Judge and the Division Bench of this Court.

4.6 The GML Act and its applicability to the NBFCs by making a mandate which is not to be found in other States clearly seeks to infringe the fundamental right of the petitioner to carry on trade or business which is so zealously safeguarded under Article 19[1][g] of the Constitution of India.

4.7 It also places an unreasonable restriction on the freedom of trade and commerce of the petitioner Company and as such, is violative of Article 301 of the Constitution of India.

4.8 The GML Act has been passed by the State Legislature and has received the assent of the Governor on April 6, 2011. From the perusal of the said Act, it appears that the said Act has been published on April 8, 2011 and will come into force on such date as the State Government may, by notification in the official gazette, appoint. To the best of the information of the petitioner, no such notification under Section 1[3] of the GML Act had been published. Over and above, the notification of the GML Act will have a direct effect of challenging and nullifying the judgment dated April 26, 2011 passed by a Division Bench of this Court and is, therefore, independent of the grounds mentioned above, *ultra vires* the Constitution of India.

5. The application is opposed by the State of Gujarat, by filing affidavit-in-reply and the defence taken by the respondent no.1 may be summed up thus:

5.1 There is no repugnancy or inconsistency between the provisions of the RBI Act on one hand and the GML Act on the other, as alleged. It was denied that the GML Act had been enacted with a view to bring the NBFCs within the purview of money-lending and also with a view to defeating the judgment dated April 26, 2011 of the Division Bench of this Court. It was also denied that the GML Act placed an unreasonable restriction on the freedom of trade and commerce of

the petitioner-Company, as alleged.

5.2 It was contended that so far as the NBFCs are concerned, the RBI is entrusted with the responsibility of regulating and supervising the same by virtue of the power vested in it under Chapter IIIB of the RBI Act which came to be inserted by Act of 55 of 1963. The objects and reasons of insertion of Chapter IIIB are as follows:

> *"The existing enactments relating to banks do not provide for any control over companies or institutions, which, although they are not treated as banks, accept deposits from the general public or carry on other business which is allied to banking. For ensuring more effective supervision and management of the monetary and credit system by the Reserve Bank, it is desirable that the Reserve Bank should be enabled to regulate the conditions on which deposits may be accepted by these non-banking companies or institutions. The Reserve Bank should also be empowered to give to any financial institution or institutions directions in respect of matters, in which the Reserve Bank, as the Central Banking institution of the country, may be interested from the point of view of control over the credit policy. The Reserve Bank's powers in relation to commercial banks should also be enhanced and extended in certain directions, so as to provide for stricter supervision of the operations and working of such banks."*

5.3 It was further contended that a plain reading of the aforesaid objects and reasons made it clear that the intention of the Parliament to insert the provisions of Chapter IIIB of the RBI Act was to control

and regulate the conditions for acceptance of deposits and to control the credit policy of the Financial Institutions and the NBFCs.

5.4 Since the petitioner was proceeded against by issue of the notice under the provisions of the BML Act to verify whether the provisions of the said Act were being complied with or not, the petitioner, along with other similarly situated persons, filed a group of writ-applications being Special Civil Applications No. 13163 of 2008 and others, which came to be disposed of by a learned Single Judge of this Court by a common judgment dated January 13, 2010, holding *inter alia,* that the impugned notices issued under the BML Act deserved to be quashed and set aside and accordingly, those were quashed. Against the said judgment of the learned Single Judge, a Letters Patent Appeal was preferred which was disposed of by judgment dated April 26, 2011, affirming the aforesaid judgment of the learned Single Judge with the following directions:

> *"33. ... Therefore, we hold that Chapter-III-B of the Act of the Reserve Bank of India Act occupied the field with regard to control, penal action, etc. against those companies and thereby the State law, namely, Money-Lenders Act, 1946 cannot transgress on the field occupied by law of Parliament. In view of section 45-Q of the RBI Act, the provisions of Chapter III-B of the RBI Act shall have overriding effect on the Bombay Money Lenders Act, 1946.*
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> *We hold that in absence of any notification under section 2[10]*

[iii-a] Non Banking Finance Companies are not covered by definition of 'money-lenders' and thus the State Government or its authorities have no jurisdiction to take any regulatory measure or penal measures under the Bombay Money Lenders Act, 1946."

5.5 The RBI Act is relatable to Entry 38 of the Union List of the 7th Schedule to the Constitution of India and the provisions contained in Chapter IIIB are enacted mainly with the objective of ensuring the protection of the interest of the depositors. As against this, Entry 30 of the State List in the 7th Schedule of the Constitution, deals with "money-lending" and "money-lenders". It was with reference to the said State Entry that the respondent no. 1 State had framed a legislation, named, BML Act, which did neither have a specific definition of the NBFCs nor did it deal with the debtors/borrowers. In view of this, a Bill relating to a new legislation called the GML Act came to be introduced in the month of March, 2011 in the State Legislature. The Bill has been passed by the State Legislature and came to be ultimately assented to by the Hon'ble the Governor on April 6, 2011. Section 1[3] of the GML Act provides that the same shall come into force on such date as the State Government may, by notification in the Official Gazette appoint. Accordingly, the notification dated April 30, 2011 came to be issued appointing May 2, 2011 as the date on which the GML Act would come into force.

5.6 The new Act, i.e. the GML Act, came to be enacted keeping in

mind the provisions of Chapter IIIB of the RBI Act so as to avoid any repugnancy or inconsistency. The GML Act has been enacted mainly with a view to preventing exploitation of the debtors/borrowers, being the people belonging to the weaker sections of the society as also to providing the deterrent punishment for violation of the provisions of the GML Act. As against this, the provisions of Chapter IIIB of the RBI Act are aimed at providing for protection of the interest of the depositors. The RBI Act does not make any provision for a debtor or borrower. This aspect needs to be appreciated while deciding the constitutional validity of the new Act i.e. the GML Act. The focus of the new Act is on the borrowers/debtors and various other aspects centering there around like the rate of interest, molestation of debtors, illegal money-lending and fair practices of recovery. Both the new Act [GML Act] and the RBI Act stand together and they do not conflict with each other. As there is no regulatory provision to protect the interests of the borrowers/debtors in Chapter IIIB of the RBI Act, the new Act cannot be said to be in conflict.

6. The Reserve Bank of India, the newly added respondent, as the respondent no.3 has filed separate affidavit-in-reply and its case may be summarized thus:

6.1 The RBI has the power to register the NBFCs to regulate and supervise the NBFCs, prescribe the rate of interest that may be charged by them and also to submit the concerns of the RBI in case

the GML Act is made applicable to the NBFCs.

6.2 Before the commencement of the present GML Act, the BML Act was in operation in the State of Gujarat. Some of the NBFCs, including the petitioner had challenged the initiation of action taken against them by the State authorities under the BML Act by preferring several Special Civil Applications, on the ground that the NBFCs are regulated and governed by the provisions of the RBI Act and that they are under the control and supervision of the RBI for the purpose of issue of instructions and guidelines and, therefore, they are not governed by the provisions of the BML Act, which is a State Act. The RBI was not a party in those petitions. In the BML Act, the money-lender is required to make an application for grant of a license. The NBFCs having certificate of registration from the RBI, have to apply separately for a license under the said Act. However, according to the new Act, the NBFCs registered with the RBI shall be deemed to have been registered for the purpose of the new Act. The GML Act also deals with the manner of calculating interest. However, these differences do not have a bearing on the law laid down by this Court in the earlier litigation.

6.3 With respect to the applicability of the provisions of the Kerala Money-Lenders Act, 1958, to the NBFCs registered with the RBI, similar cases are pending before the Supreme Court wherein the RBI has filed its counter affidavit. The RBI reiterates its stand taken in the

matter of Kerala Money-Lenders Act, 1958 pending before the Supreme Court and its applicability to the NBFCs in the present case.

6.4 The legislative competence in respect of the money-lending is with the State Legislature under Entry 30 of List II of 7th Schedule of the Constitution of India. However, the legislative competence to regulate the financial corporations such as the NBFCs is with the Parliament under Entry 43 of List I of 7th Schedule. The regulation of financial corporations such as NBFCs would include regulating the rate of interest charged by them.

6.5 The GML Act deals with the money-lenders and provides for appointment of authorities for implementation of the said Act under Section 3, the registration of the money-lenders to commence and carry on the business of money-lending under Section 5, the refusal for grant or renewal of registration under Section 10, the suspension of registration under Section 13, and the cancellation of registration in certain cases and debarring money-lenders whose registration has been suspended or cancelled under Section 17. The Act also has the provisions empowering the State Government to fix the maximum rate of interest to be charged by the money-lenders in any local area under Section 33 and the manner of calculation of interest under Section 37. The penal provisions under Sections 40, 41, 42, 43 & 44 and the power of Court to suspend or cancel registration of money-lenders in certain cases under Section 45 have also been provided in

the new GML Act.

6.6 Chapter IIIB of the RBI Act contains the provisions relating to Non Banking Institutions receiving deposits and Financial Institutions. The said Chapter confers upon the RBI the power to issue certificate of registration to the NBFCs under Section 45-IA, to prescribe as to what percentage of assets have to be maintained by such NBFCs under Section 45-IB, and the reserve funds to be maintained by them under Section 45-IC. The RBI has the power to regulate the issue of prospectus or advertisement for soliciting deposits under Section 45J and to determine the policy and issue directions to the NBFCs under Section 45JA. The RBI can call for the information and issue directions relating to deposits under Section 45K. The RBI has also power to determine the policy and issue directions, *inter alia,* to regulate the credit system of the country and to give directions to the financial institutions regarding the conduct of business and to call for information on various matters including the rate of interest charged by such financial institutions under Section 45L. The RBI may prohibit the NBFCs from accepting deposits under Sections 45K and 45MB and has also the power to file petitions for winding up of the NBFCs under Section 45MC. The RBI has the power to inspect the NBFCs under Section 45N. Chapter V of the RBI Act empowers the RBI to take penal action, *inter alia,* against the NBFCs for non-compliance of the provisions of the RBI Act and the directions, orders, guidelines, etc. issued thereunder by the RBI from time to time. The RBI has also

power to impose fine on the NBFCs, *inter alia*, for non-compliance of the directions issued by it.

6.7 The provisions of the RBI Act very clearly demonstrate that the power to determine the policy with respect to the rates of interest and to prescribe the rates of interest with respect to the loans and advances granted by the financial institutions whenever it is considered necessary by the RBI is vested in it. As the RBI has been constituted as the Central Banking Authority for the country with a view to securing monetary stability in the country, the rate of interest prescribed by the RBI with respect to the entities coming within the regulatory jurisdiction of the Reserve Bank should prevail over the rate of interest specified in any State enactment or fixed by the State Government from time to time. In consequence, the GML Act must be read down to exclude the regulation of the NBFCs by treating them as deemed to have been registered under the GML Act.

6.8 So far, the RBI has not prescribed the rate of interest or the ceiling on the rate of interest that may be charged by the NBFCs to their borrowers. However, the RBI has issued directions/guidelines in respect to the Fair Practices Code and the methodologies for determination of the rate of interest that may be charged by the NBFCs to their borrowers.

6.9 The directions issued by the RBI [a] with respect to Fair

Practices Code; [b] providing guidance for determining the rate of interest; and [c] the rate of interest or ceiling on rate of interest that may be prescribed by the RBI from time to time should apply to NBFCs registered with the RBI under the RBI Act and the provisions of Section 33 and 37 of the GML Act with respect to rate of interest should not apply to the NBFCs registered with the RBI.

6.10 Chapter IIIB of the RBI Act has an overriding effect over any law inconsistent therewith for the time being in force or any instrument having effect by virtue of any such law.

6.11 The NBFCs registered with the RBI under Section 45-1A of the RBI Act should not be required to comply with the provisions of the GML Act to the extent the provisions of the GML Act are in conflict with the provisions of the RBI Act or directions issued to the NBFCs. The provisions of Sections 33 and 37 of the GML Act with respect to the rate of interest shall not apply to the NBFCs registered with the RBI. The provisions of Sections 10,13,14, 15 and 17 relating to the registration, suspension and cancellation of the registration, debarring from carrying on the business of money-lending etc. and Section 42 relating to the penalty for contravention of Section 33 of the GML Act shall not apply to the NBFCs registered with the RBI under Section 45-1A of the RBI Act.

7. Mr. Percy Kavina, learned Senior Advocate appearing with Mr.

Sanjay R. Gupta on behalf of the petitioner, has, at the outset, contended that the previous decision of the Division Bench of this Court between the petitioner and the State Government should be held to be *res-judicata* in the present proceedings as the issue raised therein is similar to the one involved herein.

7.1 Mr. Kavina secondly contended that the purpose of enactment of the GML Act is to get rid of the earlier judgment delivered by the Division Bench of this Court although the State Government did not prefer any appeal against such decision. According to Mr. Kavina, the Legislature has no power or authority to overrule a decision passed by a judicial authority and, therefore, the present Act, i.e. the GML Act should be held to be *ultra vires* the Constitution of India on the above ground alone.

7.2 Mr. Kavina thirdly contended that even under the provisions of the GML Act, the petitioner being a Corporation established under the RBI Act, would come within the purview of Section 2[9][o][1] of the GML Act and, therefore, the said Act will have no application to the activities of the petitioner. Lastly, Mr. Kavina contends that the GML Act having encroached in the field of legislation of the Parliament so far as the activities of his client, to that extent the GML Act is invalid. In support of these contentions, Mr. Kavina relies upon the following decisions:

[i] ***Peerless General Finance & Investment Co. Limited &***

Anr. v. Reserve Bank of India, reported in [1992] 2 SCC 343.

[ii] ***Bhanu Kumar Jain v. Archana Kumar & Another, reported in [2005] 1 SCC 787.***

[iii] ***Mathura Prasad Bajoo Jaiswal & Ors. v. Dossibai N.B. Jeejeebhoy, reported in [1970] SCC 613.***

[iv] ***Hope Plantations Ltd. v. Taluk Land Board, Peermade & Anr., reported in [1999] 5 SCC 590.***

[v] ***Sushil Kumar Mehta v. Gobind Ram Bohra [Dead] through His LRs.***

[vi] ***State of Himachal Pradesh v. Narain Singh, reported in [2009] 13 SCC 165.***

[vii] ***M.P. AIT Permit Owners Assn. And Anr. v. State of M.P., reported in [2004] SCC 320.***

[viii] ***Ishwar Dutt v. Land Acquisition Collector & Anr. Reported in [2005] SCC 190.***

[ix] ***Satyadhyan Ghosal and Others v. Smt. Deorjin Debi and Anr., reported in AIR 1960 SC 941[1].***

[x] ***Ramchandra Dagdu Sonavane [Dead] by LRs and Others v. Vithu Hira Mahar [Dead] By LRs and others, reported in [2009] 10 SCC 273.***

8. Mr. Kamal B. Trivedi, learned Advocate General, appearing with Ms. Sangeeta Vishen, learned AGP on behalf of the State-respondent, has, however, opposed the aforesaid contentions. Mr. Trivedi has contended that in the previous litigation between the parties which has since been disposed of by a Division Bench of this Court, there was no scope of investigating the provisions contained in the GML Act and thus, the issue involved in the present application was not the issue involved in the earlier application. Mr. Trivedi, therefore,

contended that the principle of *res judicate,* does not apply to the facts of the present case.

8.1 As regards the question of repugnancy between the GML Act and the RBI Act, Mr. Trivedi contended that the State Legislature is entitled to enact the law by taking aid of Entry 30 of List II of 7th Schedule, which gives power upon the State Legislature to promulgate the law relating to money-lending and money-lenders. According to Mr. Trivedi, Entries 38 and 43 of List I of 7th Schedule, on the other hand, deal with the RBI, and the incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies respectively. Mr. Trivedi, therefore, contends that there is no repugnancy between the two fields of legislation.

8.2 In this connection, Mr. Trivedi placed reliance upon the decision of the Privy Council in the case of ***Prafulla Kumar Mukherjee and others, v. Bank of Commerce Ltd., Khulna, reported in A.I.R. [34] 1947 Privy Council 60***, wherein, the Privy Council, while dealing with the similar provisions contained in the Bengal Money-Lenders Act, held that the same was not *ultra vires* the Government of India Act, 1935, 7th Schedule List I, Item Nos. 28 and 38.

8.3 Mr. Trivedi further contended that the aforesaid decision of the Privy Council has all along been approved by the Supreme Court in all

the subsequent cases and thus, the contention of the petitioner that the two Acts are in conflict, is not tenable in the eye of law.

8.4 Mr. Trivedi further contended that the present petitioner cannot be said to be a corporation established either by or under an Act of the Parliament or the Legislature of a State. According to Mr. Trivedi, the LIC established under Section 3 of the Life Insurance Corporation Act, 1956, or the FCI established by Section 3 of the Food Corporations Act, 1964, or the State Bank of India established under Section 3 of the State Bank of India Act, 1955, are the instances where Corporation by name is established by an Act of the Parliament. Similarly, according to Mr. Trivedi, the expression "Corporation established under the Act" means the Corporation which is brought into existence under the Act wherein several such Corporations are contemplated and such Corporation is not a body specific. For instance, according to Mr. Trivedi, the State Financial Corporation established under Section 3 of the State Financial Corporations Act, 1951 and/or the State Electricity Board established under the Act are also the statutory Corporations and they are "State" within the meaning of Article 12 of the Constitution and such Corporations established under the Act should share common object as envisaged under the Act, whereas a "company" incorporated under the Companies Act, 1956 means a company which comes into existence in accordance with the provisions of the Companies Act, 1956 and such company cannot be said to have been established by

or under the Companies Act. By giving reference to the society which comes into existence in accordance with the Societies Registration Act, 1860 or companies incorporated or registered under the Companies Act, Mr. Trivedi contended that those are non-statutory Societies or Corporations. According to Mr. Trivedi, the petitioner being duly incorporated and registered under the Companies Act, 1956, cannot, by any stretch of imagination, be considered to be a Corporation established by or under an Act and therefore, Section 2[9][o][1] of the GML Act does not exclude the cases of the loans being advanced by the petitioner company, from the purview of the GML Act.

8.5 Mr. Trivedi, in support of his contentions, has relied upon the following decisions:

[i] ***Prafulla Kumar Mukherjee and others v. Bank of Commerce Ltd., Khulna, reported in A.I.R. [34] 1947 Privy Council 60***

[ii] ***A.S. Krishna and others v. State of Madras, reported in AIR 1957 SC 297***

[iii] ***Ch. Tika Ramni and others etc. v. The State of Uttar Pradesh and others, reported in 1956 Supreme Court 676***

[iv] ***M/s. Fatehchand Himmatlal & Ors. v. State of Maharashtra etc.***

[v] ***Hoechst Pharmaceuticals Ltd. v. State of Bihar & Ors,***

reported in [1983] 4 SCC 45

[vi] ***Offshore Holding Pvt. Ltd. v. Bangalore Development Authority & Ors, reported in [2011] 3 SCC 139***

[vii] ***Kerala State Electricity Board v. The Indian Aluminum Co.Ltd. & Ors, reported in AIR 1976 SC 1031***

[viii] ***Central Bank of India v. State of Kerala & Ors., reported in [2009] 4 SCC 94***

[ix] ***M/s. Sundaram Finance Ltd. v. State of Kerala & Ors., reported in AIR 2010 Kerala 80***

8.6 Mr. Trivedi, therefore, prays for dismissal of the writ-application.

9. Mr. Saurabh Soparkar, learned Senior Advocate, appearing with Mr. Amar N.Bhatt for the respondent no.3-Reserve Bank of India, on the other hand, has partly supported the petitioner, thereby contending that in some of the fields as incorporated in the affidavit-in-reply of his client, there are conflicts between the two Acts and in those fields, his client will have the full control and not the authorities under the GML Act. According to Mr. Soparkar, to those extents, where two Acts are conflicting, the RBI Act would prevail.

10. Therefore, the first question that arises for determination in this application is whether the earlier judgment dated April 26, 2011, passed by a Division Bench of this Court in Letters Patent Appeal No. 1095 of 2010 and other cognate matters is *res judicata* in these

proceedings.

11. After hearing the learned counsel for the parties and after taking into consideration the various decisions cited by the learned counsel for the parties, we are of the opinion that the principle of *res judicata* does not apply in these proceedings. We are of the view that the earlier decision delivered by the Division Bench indicated above, cannot be *res judicata* in the present proceedings for the following reasons:

11.1 First, in the previous proceedings, the Division Bench had no occasion to consider the scope of GML Act inasmuch as at that point of time, the GML Act did not see the light of the day.

11.2 Secondly, in the earlier proceedings, the challenge was made against initiation of action under the provisions of the BML Act against the present petitioner mainly on the ground that it was not covered under the provisions of the said Act, since no notification in the Official Gazette had been issued as required under Section 2[10][v] of the said Act specifying the Institution of the petitioner as money-lender and hence, the State authorities had no jurisdiction to take any regulatory or penal measures under the said Act. In the said judgment, the Division Bench also highlighted the pure question of law that Chapter IIIB of the RBI Act occupied the field with regard to control, penal action etc. against NBFCs receiving deposits and in

such circumstances, it further held that the State Act could not transgress into the field occupied by the Central Act, namely, the RBI Act with reference to the depositors. However, the finding regarding transgression by a State Law on the field of Reserve Bank of India was a pure question of law enunciated by the Division Bench and for that reason also, the principle of *res judicata* does not apply. It is now well-settled law that there is no application of doctrine of *res judicata* in respect of a pure question of law. (See Supreme Court Employees Welfare Association vs. Union of India reported in AIR 1990 SC 334).

11.3 Thirdly, as the scope of the GML Act was not the subject-matter of the issue, the decision rendered in the light of the BML Act cannot be *res judicata* in the present proceedings.

12. We, therefore, find no substance in the first contention of Mr. Kavina that this case is hit by the doctrine of res *judicata.* The various decisions cited by Mr. Kavina deal with the principle of *res judicata* and its applicability to subsequent proceedings including interlocutory proceedings which are well-settled and there is no scope of disputing the correctness thereof. But as pointed out earlier, since in the previous proceedings, the Division Bench had no occasion to consider the various provisions of the GML Act, the issue as to transgression of the field of RBI Act on the enactment of GML Act was not the subject-matter and at the same time, as the other finding regarding scope of transgression by a State law on the field of Central law is a pure

question of law, without considering the scope of GML Act, those decisions are of no help to Mr. Kavina.

13. The next question is whether purpose of enactment of the GML Act was to overcome the effect of the earlier judgment delivered by the Division Bench indicated above and on that ground, the present Act should be declared *ultra vires*. Once we hold that the previous decision is not *res judicata* in the present proceeding, it is not possible to accept the contention of Mr. Kavina that the purpose of enactment of the GML Act is to overcome the effect of the said decision. There is no dispute that the Gujarat State Legislature has the competence to enact laws relating to Entry No. 30 of List II of the 7th Schedule of the Constitution which deals with money-lending and money-lenders. In such circumstances, if the State Legislature decides to enact a new law on the subject by repealing the old BML Act, the new State legislation cannot be branded as *ultra vires* the Constitution of India. A State Legislature within its legislative field is competent to enact any law and so long as the said Act is not violative of any of the provisions of the Constitution of India [excluding Chapter IV thereof], the same cannot be declared as *ultra vires.* We, therefore, find no substance even in the second contention of Mr. Kavina.

14. The next and most important question that arises for determination is whether the GML Act encroaches upon the field of legislation of the Parliament so as to declare any part thereof as *ultra*

vires.

15. According to Entries No. 38 and 43 of List I of the 7th Schedule of the Constitution, the Parliament has the exclusive jurisdiction over the subject of Reserve Bank of India and the incorporation, regulation and winding up of trading corporations including the banking, insurance and financial corporation but not including the co-operative societies. Similarly, under Entry No. 30 of List II of 7th Schedule, the State Legislature has the exclusive authority of enacting any legislation relating to money-lending and money-lenders and relief of agricultural indebtedness.

16. Chapter IIIB [Sections 45-H to 45-QB] of the RBI Act aims at providing protection to the interest of the depositors and NBFCs, whereas the object of GML Act is to provide protection in respect of interest of borrowers/debtors who are involved in the money-lending within the State. There is no dispute that both the legislations operate in two separate and distinct fields and unless a situation arises where both the statutes are not capable of being obeyed, there cannot be any valid objection to the allegation of encroachment upon the field by one over the other.

17. We find that the pith and substance of GML Act is to regulate money-lending which includes the aspects revolving around the borrowers/debtors, rate of interest, molestation of debtor, illegal

money-lending, unfair practices of recovery etc. On the other hand, the objects and reasons behind insertion of Chapter IIIB of the RBI Act are for ensuring more effective supervision and management of the monetary credit system by Reserve Bank. By virtue of entries 38 and 43 of the List I of the Seventh Schedule coupled with the passing of RBI Act, the Reserve Bank is enabled to regulate the conditions on which deposits may be accepted by this non-banking companies or institutions and to give any financial institution or institutions directions in respect of matters, in which the Reserve Bank, as the Central Banking institution of the country, may interfere from the point of view of control over the credit policy. The further object of the incorporation of Chapter IIIB of the RBI Act was to enhance the power of the Reserve Bank in relation to commercial banks and to extend in certain directions so as to provide for stricter supervision of the operations and working of such banks and institutions.

18. In our opinion, so long as both the State law and the Central Law can co-exist without interfering with the other's dominion, there is no problem of encroachment. A State Legislature is entitled to enact law relating to money-lending and money-lenders as provided in Entry No. 30 of the List II. Similarly, the Reserve Bank of India is also authorized to exercise its power by virtue of the provisions contained in the RBI Act. In the case before us, the petitioner has been registered under Chapter IIIB of the RBI Act and in the matter of exercising its right as an NBFC, which is the subject-matter of the RBI

Act, it is bound to follow guidance of Reserve Bank of India and no other State law can interfere with its business activities if it conforms to the provisions of the RBI Act. However, if in addition to its activity which is governed under Chapter IIIB, the petitioner wants to enter into the field of the State laws, it is bound to comply with the relevant provisions of the State laws.

19. In the case before us, it appears that under Section 45 I of the RBI Act, the word “deposit” has been defined. Similarly, the petitioner also comes within the purview of an NBFC. Therefore, for the purpose of carrying on the business of NBFC, the petitioner should not be bound by any restriction imposed by any other State law. According to the GML Act, it appears that if an NBFC is registered under the RBI Act, it automatically becomes registered under the GML Act and comes within the purview of the State legislation. To that extent, in our opinion, the GML Act encroaches upon the provisions of the RBI Act.

20. Although Mr. Trivedi tried to convince us that GML Act is in no way conflict with Chapter IIIB of the RBI Act as there is no specific provision enacted in Chapter IIIB which is in conflict with GML Act, we are not impressed by such submission. In our opinion, if the petitioner restricts its activities strictly within the provisions of Chapter IIIB of the RBI Act, the GML Act cannot impose any further restriction upon the petitioner in addition to ones imposed by the Reserve Bank of

India in exercise of the power under the RBI Act. It appears from the provisions of GML Act that the State legislature was quite conscious of such position of law and for the above reason, in Section 2[9], while defining “loan”, it has excluded from its operation, the deposit of money or other property in Bank, Govt. Post Office, a Company or a Cooperative Society, but not excluded the activities of a Company which is registered under Chapter IIIB of the RBI Act for the reasons best known to it. As provided in the definition indicated in Section 45 I (f) of the RBI Act, the petitioner as its principal business is entitled to receive any deposits under any scheme or arrangement or in any other manner or *lending in any manner* under the supervision of the RBI.

21. If a bank is excluded from the operation of the GML Act, there is no reason why an NBFC, which is also controlled by the RBI in the same way a Banking Corporation is controlled, should not be excluded from its operation.

22. In our opinion, to bring an entity, which is under the control of the Reserve Bank of India in performance of its business prescribed in Chapter IIIB of the RBI Act, under the purview of the GML Act amounts to encroachment upon the field of Central law and to that extent, the same is violative of the provisions of the Constitution of India for legislative incompetence. We have already pointed out that as provided in Section 45 I (f) of the RBI Act, the petitioner is entitled

to run its principal business of lending in any manner in accordance with the RBI Act and thus, no encroachment in that field is permissible at the instance of the GML Act.

23. We now propose to deal with the decisions cited by Mr. Kamal Trivedi:

23.1 In the case of ***Prafulla Kumar Mukherjee and others***] [supra], the Bengal Money-Lenders Act, 1940 relatable Entry 27 of List II of the Government of India Act, 1935 was held to be valid on the ground that in pith and substance, it was the law relating to money-lending and not relating to "promissory note" falling under Entry 28 of List I even though there may be some incidental encroachment, but on that ground alone, the Bengal Money-Lenders Act could not be held to be *ultra vires*. In the case before us, by GML Act, there has been a blatant encroachment upon the field of legislation of the RBI Act by directing that an NBFC registered under the RBI Act would be automatically registered under the GML Act and will be subject to such provision in addition to those indicated in RBI Act . Thus, the said decision cannot have any application to the facts of the present case.

23.2 In case of ***A.S. Krishna and others*** [supra], the Supreme Court upheld the validity of a provincial legislation called Madras Prohibition Act, 1937 referable to Entry No. 31 of List II as against the Central legislation, namely, Criminal Procedure Code, 1898 relatable

to Entry No. 2 of List III and Evidence Act, 1872 relatable to Entry No. 5 of List III, by holding, *inter alia,* that though some of the provisions of the Madras Prohibition Act, 1937 deal with the matters of procedure and evidence in relation to crimes, yet, on that ground alone, the aforesaid State legislation could not be said to be repugnant to the above-referred two Central legislations and that Madras Prohibition Act was in its entirety, a law within the exclusive competence of the provincial legislature and therefore, the question of repugnancy did not arise.

23.2.1 In the case before us, we are not disputing for a moment the authority of the State legislature to enact GML Act in relation to money-lending and money-lenders, but it cannot encroach upon the activity of a registered NBFC under the Reserve Bank of India Act which is doing non-financial business as provided in the said Act. According to the definition provided in RBI Act, an NBFC is an institution which is a company and which does principal business of receiving of deposits under any scheme or arrangement or *lending in any other manner*. Thus, within the scope of the activity of an NBFC as provided in the RBI Act, the State Legislation has encroached upon by imposing its control over it in addition to that imposed under the RBI Act.

23.3 In the case of ***Chaudhari Tika Ramji & others*** [supra], U.P. Sugar Factories Central [Amendment] Act, 1952 relatable to Entry 27

of List II was held as not repugnant to Central legislations, i.e. Industries [Development & Regulation] Act, 1951 mentioned in Entry 52 of List I and the Essential Commodities Act, 1955 read with Sugar Control Order, 1955 issued under Entry No. 33 of List III as they covered different fields.

23.3.1 In the case before us also, in respect of the provisions of GML Act not encroaching in the field of an NBFC as indicated above, the Act is quite valid but the moment it tries to impose its authority upon an NBFC registered under Chapter IIIB in performance of its activity provided under said Chapter, direct repugnancy arises. Thus, the said decision is of no avail to Mr. Trivedi's client.

23.4 In the case of ***M/s. Fatehchand Himmatlal & Co.*** [supra], Maharashtra Debt Relief Act, 1976 dealing, *inter alia,* with money-lending involving gold and incidentally, gold transaction under Entry 30 of List II was held to be valid even though it incidentally trenched upon the Gold Control Act, 1968 relatable to Entry No. 52 of List I.

23.4.1 In the case before us, we have already pointed out that it is not a case of incidental trenching upon the field of RBI Act but one of direct interference over non banking activity of an institution registered under the RBI Act and in our opinion, the State could not have imposed any restriction as it has restrained itself from its operation over the activities of the other banks doing similar business

under the direct supervision of the RBI Act in the same way the petitioner is performing its business including *lending in any manner*.

23.5 In the case of ***Hoechst Pharmaceuticals Ltd.*** [supra], it was held by the Supreme Court that Bihar Finance Act, 1981 mentioned in Entry No. 54 of List II and provisions of Control Order issued under Section 3 of the Essential Commodities Act relatable to Entry No. 33 of List III operate on two separate and distinct fields and both were capable of being obeyed. In our opinion, in a case where there is even scope of conflict having regard to the field of legislation of Central law, to that extent, the State law should restrain itself from interfering which was not the case in the abovementioned matter before the Supreme Court.

23.6 In the case of ***Offshore Holding Pvt. Ltd.*** [supra], Bangalore Development Authority Act, 1976 relatable to Entries No. 5 and 18 of List II was held not being repugnant to the Land Acquisition Act, 1894, relatable to Entry No. 42 of List III, even though the State law incidentally dealt with the acquisition of land while undertaking the development. In our opinion, having regard to the scope of Entries No. 5 and 18 of the List II and that of the State law, which was the subject-matter in that case, there was no repugnancy which is not possible in the case before us, the moment the State law automatically extends its operation over the NBFCs like the petitioner by virtue of their registration under the RBI Act.

23.7 In the case of ***Kerala State Electricity Board*** [supra], the Supreme Court held that Kerala Essential Articles Control [Temporary Powers] Act, 1961 and the Kerala Electricity Supply Surcharge Order issued thereunder were valid against the Central legislations, i.e. Electricity Act, 1910 and Electricity [Supply] Act, 1948 because of the fact that all the three legislations could not be said to be relatable to Entry No. 43 of List I relating to incorporation, regulation and winding up of Electricity Board. On the other hand, in the case before us, the GML Act, so far as it intends to take control over an NBFC due to its registration under the RBI Act, definitely interferes with the subject-matters governed under the RBI Act. Therefore, the principle laid down in the said decision cannot have any application to the facts of the present case.

23.8 In the case of ***Central Bank of India*** [supra], Bombay Sales Tax Act, 1959 and Kerala General Sales Tax Act, 1963, relatable to Entry No. 54 of List II, were found to be valid and not in conflict with the Debt Recovery Tribunal Act and Securitization Act enacted by the Parliament. In the said decision, there was no scope of encroachment over the field of Central legislation.

23.9 In the case of ***M/s. Sundaram Finance Ltd.*** [supra], although it has been held that Kerala Money Lenders Act, 1958 is not violative and both the RBI Act and the provisions of the Kerala Money Lenders

Act simultaneously apply to the NBFCs, in view of what have been stated above, with great respect, we are unable to agree with the decision of the said Division Bench of Kerala High Court.

24. On consideration of the entire materials on record, we, therefore, hold that the GML Act is *ultra vires* the Constitution of India for legislative incompetence of the State Legislature only to the extent it seeks to have control over the NBFCs registered under the RBI Act in the matter of carrying on their business under Chapter IIIB of the RBI Act.

25. The Special Civil Applications are allowed with the above declaration. The State Respondent is restrained from applying the provisions of the GML Act against the petitioners while carrying on their activities governed under Chapter IIIB of the RBI Act. No costs.

[BHASKAR BHATTACHARYA, C.J.]

mathew **[J.B.PARDIWALA. J.]**