



2	Scope of power of the RBI under section 35AA vis-a-vis the impugned circular.	<p>a. A cursory reading of section 35A makes it clear that there is nothing in the aforesaid provision which would indicate that the power of the RBI to give directions, when it comes to the Insolvency Code, cannot be so given. The width of the language such as ‘public interest’, ‘banking policy’, etc. used in section 35A makes it clear that if otherwise available, use of section 35A as a source of power for the impugned circular cannot be interdicted on the ground that the Insolvency and Bankruptcy Code, 2016 (Code) could not have been in the contemplation of Parliament in 1956, when section 35A was enacted.</p> <p>b. If a specific provision of the Banking Regulation Act makes it clear that the RBI has a specific power to direct banks to move under the Code against debtors in certain specified circumstances, it cannot be said that they would be acting outside the four corners of the statutes which govern them, namely, the RBI Act and the Banking Regulation Act.</p> <p>c. Section 35AA makes it clear that the Central Government may, by order, authorise the RBI to issue directions to any banking company or banking companies when it comes to initiating the insolvency resolution process under the provisions of the Code. Therefore, without authorisation of the Central Government, no such directions can be issued by the RBI.</p> <p>d. Prior to the enactment of section 35AA, it may have been possible for the RBI to issue directions under sections 21 and 35A to a banking company to initiate insolvency resolution process under the Code. But after introduction of section 35AA, it may do so only within the four corners of section 35AA.</p> <p>e. If a statute confers power to do a particular act and has laid down the manner in which that power has to be exercised, it necessarily prohibits the doing of the act in any manner other than that which has been prescribed.</p>	<p>24/52</p> <p>26/55</p> <p>29/60</p> <p>30/65</p> <p>31/65</p>
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		<p>f. The RBI can only direct banking institutions to move under the Code if two conditions precedent are specified, namely, (i) that there is a Central Government authorisation to do so; and (ii) that it should be in respect of specific defaults. The section, therefore, by necessary implication, prohibits this power from being exercised in any manner other than the manner set out in section 35AA.</p> <p>g. The words “without prejudice” appearing in a section make it clear that powers that are enumerated are only illustrative of a general power and do not restrict such general power. The power to issue directions given by section 35AB is, therefore, in addition to the power under section 35A.</p> <p>h. The scheme of sections 35A, 35AA, and 35AB is as follows:  (i) When it comes to issuing directions to initiate the insolvency resolution process under the Code, section 35AA is the only source of power.  (ii) When it comes to issuing directions in respect of stressed assets, which directions are directions other than resolving this problem under the Code, such power falls within section 35A read with section 35AB.</p> <p>i. When one section of a statute grants general powers, as opposed to another section of the same statute which grants specific powers, the general provisions cannot be utilised where a specific provision has been enacted with a specific purpose in mind.</p> <p>j. Stressed assets can be resolved either through the Code or otherwise. When resolution through the Code is to be effected, the specific power granted by section 35AA can alone be availed by the RBI. When resolution <i>de hors</i> the Code is to be effected, the general powers under sections 35A and 35AB are to be used. Any other interpretation would make section 35AA otiose.</p>	<p>31/66</p> <p>35/71</p> <p>38/73</p> <p>39/74</p> <p>40/75</p>
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3	Constitutional validity of the impugned circular issued by the RBI.	<p>a. Section 35 AA enables the Central Government to authorise the RBI to issue such directions in respect of “a default”. Default would mean non-payment of a debt when it has become due and payable and is not paid by the corporate debtor. Therefore, what is important is that it is a particular default of a particular debtor that is the subject matter of section 35AA. Any directions which are in respect of debtors generally would be <i>ultra vires</i> section 35AA.</p> <p>b. The power to be exercised under the authorisation of the Central Government requires “due deliberation and care” and hence refer to specific defaults.</p> <p>c. There is nothing to show that the provisions of section 45L(3) have been satisfied in issuing the impugned circular. The impugned circular nowhere says that the RBI has had due regard to the conditions in which and the objects for which such institutions have been established, their statutory responsibilities, and the effect the business of such financial institutions is likely to have on trends in the money and capital markets.</p> <p>d. The impugned circular applies to banking and non-banking institutions alike. Non-banking financial institutions are inseparable from banking institutions insofar as the application of the impugned circular is concerned. It is very difficult to segregate the non-banking financial institutions from banks so as to make the circular applicable to them even if it is <i>ultra vires</i> insofar as banks are concerned.</p> <p>e. In view of the above, the impugned circular is <i>ultra vires</i>, and has no effect in law. Consequently, all actions taken under the said circular, including actions by which the Code has been triggered must fall along with the said circular. As a result, all cases where debtors have been proceeded against by financial creditors under section 7 of the Code, only because of the operation of the impugned circular, are non-est.</p>	<p>41-42/ 76-78</p> <p>44/80</p> <p>45/83</p> <p>45/83</p> <p>45-46/84</p>
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