JOURNAL SECTION

Debt Recovery Tribunals : The Road Ahead*

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I am thankful to the organisers of the seminar for giving me an opportunity to present my views in this inaugural address on the working of Debt Recovery Tribunals/Appellate Tribunals under the Debt Recovery Act. The Reserve Bank is closely associated with the question of recovery of dues of the banks and financial institutions. This subject has been handled by various committees from different angles and there is a wealth of material available on this subject. I propose to give a brief bird's eye-view of the important recommendations made by different committees. In 1981, the question was examined when the Reserve Bank appointed a Committee under the Chairmanship of late Shri T Tiwari, the then Chairman of the erstwhile Industrial Reconstruction Corporation of India (IRCI), Calcutta. This Committee had examined the legal and other difficulties faced by the banks and financial institutions in the rehabilitation of sick industrial undertakings and to suggest remedial measures including changes in the law. The question was therefore, examined from the point of view of industrial sickness. The Committee submitted its report in 1984 and suggested among others, setting up of special tribunals to deal with recovery of dues of banks and financial institutions. The broad outline for the constitution and functioning of special tribunals was also furnished by the Tiwari Committee.

In 1986, another Committee headed by Shri Vesuvalla, Chairman of Bank of India examined this question and submitted its report along with draft of the Bill, "Recovery of Dues (Public Sector Banks and Financial Institutions) Bill, 1986." This Bill contained provisions for setting up of tribunals to take care of the recovery problems of banks and financial institutions in respect of claims above Rs.50 lakhs.

In 1991, the first Committee on Financial System headed by Shri M Narasimham considered setting up of the special tribunals with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of financial sector reforms.

On 6.1.1992, the Reserve Bank appointed another Committee under the Chairmanship of Shri V G Hegde, the then Principal Legal Adviser of the RBI to examine the existing legal framework and proposed certain amendments by way of short-term and long-term measures. The Hegde Committee recommended self-financing tribunals with a lean out-fit presided over by officers bearing the background of commercial litigation and fixing the minimum claims at Rs.5 lakhs. The Committee further recommended that the claims below Rs.5 lakhs would be dealt with by recovery officers of banks and financial institutions themselves, the special officers being notified on the lines of Estate Officer under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. This Committee wanted the tribunals to follow summary procedures on the lines of summary suits under the Civil Procedure Code (CPC) and to act on certain presumptions regarding

existence of debts; there being no discretion given to the tribunal to reduce the contracted rate of interest. By way of long-term measures, they suggested codification of hypothecation law and conferring the right of seizure and private sale of the hypothecated property of the creditor in the event of borrower's default. They also suggested rationalization of section 69 and 69A of the Transfer of Property Act to confer on the banks and financial institutions the right of private sale of mortgaged property and to empower the receivers appointed by the banks and financial institutions to sell the property without the intervention of courts. It also recommended revitalizing the BIFR so as to make a voluntary kind of institution to examine the possibility of revival of sick industrial units or to sell the assets and realize the dues of banks and financial institutions. This Committee had examined the possibility of creating new institution called "Debt Collecting Agency" for recovery of dues of banks and financial institutions by providing suitable safeguards such as licensing and supervision of such agencies. Lot of emphasis was laid by this Committee also on non-statutory and voluntary measures like review of documentation so as to concentrate on the rights available to banks and financial institutions and getting such documents properly executed. They also recommended conferring by suitable documentation, the power of sale on the receivers appointed in the debenture trust deeds and mortgage deeds for realizing the dues of the banks and financial institutions. Eventhough the recommendations of this committee were quite pragmatic and could have been incorporated in the Act but were not be incorporated since the report was delayed and could not reach on time the Finance Ministry, which was in the process of finalizing the draft of 1993 Bill. Therefore, these recommendations stood overlooked.

On 24th June 1993, an ordinance was promulgated by the President viz. Recovery of Dues to Banks and Financial Institutions Ordinance, 1993 which was replaced by an Act of Parliament which received the President's assent on 27th August 1993. Under the Act, initially, nine Debt Recovery Tribunals were established. However, the process of establishment of tribunals received a set back in 1995 when the Delhi High Court set aside the Act declaring it unconstitutional and void. While deciding the writ petition filed by Delhi High Court Bar Association under Article 226 of the Constitution of India, the petition has challenged inter alia the constitutional validity of the Act on the ground that the Act is unreasonable and is violative of Article 14 of the Constitution and that it was beyond the legislative competence of Parliament to enact such law.

Steps were taken by the Union Government to move the Supreme Court by way of a Special Leave Petition and the Hon'ble Court stayed the orders of the Delhi High Court. Successively, a large number of cases have been filed in various courts challenging the validity of the Act. Therefore, the Government filed a transfer petition for transferring the cases where stay orders have been granted by the various high courts to the Supreme Court so that the question of validity of the Act at the national level could be decided by the Apex Court. The Hon'ble Supreme Court by its orders on the transfer petition dated 27.11.1995 stayed further proceedings in the writ petition and subsequently on 18.3.1996 modified its orders directing the DRTs to resume their function notwithstanding any stay orders passed in any of the writ petitions.

Taking a serious note of the prevalent situation as also the deteriorating condition of the recovery management of the banks, the Central Board of the Reserve Bank on 22.1.1998

reviewed the effectiveness of the DRTs and came to the conclusion that the DRTs are falling short of their expectation by not creating a fast track system for recovery of banks dues and they were not serving the purposes for which they were set up. Therefore, the Central Board directed a working group comprising of officers of Banking Division, some bankers along with RBI officers to set up to look into the various issues and suggest measures for their effective function. This group had given an interim report on 18.6.1998 and a final report on 31st August 1998.

The working group had carried out its study by issuing questionnaires to different target groups like the Presiding Officers of DRTs/DRATs, Recovery Officers and Advocates working for both applicants and respondents i.e. borrowers, etc. Based on these responses to the questionnaire, this group had given its findings. In all, this group had given recommendations on as many as 43 items, in addition to the recommendations given in the interim report. Majority of these recommendations have been accepted and incorporated in the amendment subsequently mooted to the DRT Act. However, some of the recommendations could not be considered by the Government.

On the DRT functioning, the Rajya Sabha Committee on Subordinate Legislation had also given in its 118th report dated 12.6.1998, its findings. The Rajaya Sabha Committee concluded in para 3.9 of its report that debt recovery mechanism under the Act and Rules has failed to achieve the object for which the tribunal was set up. According to this committee, the legal infirmities, the bottlenecks in the rules and infrastructural constraints contributed together in making this unhappy situation. This committee had also adversely commented on the vast geographical jurisdiction of the DRTs. It has stressed the need to have separate tribunal for large States so that the burden of the cases on the existing tribunals is lessened.

Around 6th December 1997, the National Institute of Banking Studies and Corporate Management at New Delhi organised a seminar on the DRTs/ DRATs and made several suggestions for improving the working of the DRTs. These suggestion were considered by the working group appointed by the Reserve Bank in its report dated 31.8.1998. In 1998, the Report of the Committee on Banking Sector Reforms headed by Mr.Narasimham (popularly known as second Narasimham Committee Report) also emphasised the need to amend the DRT Act and to vest inter alia the Presiding Officers of the Tribunal with power of attachment before judgement, appointment of interim Receiver and passing order for preservation of property.

In response to the suggestions and recommendations of the various committees and working groups, the Recovery of Debts due to Banks and Financial Institutions (Amendment) Bill, 1999 had been introduced in the Parliament on 5th March 1999. This Bill sought to provide for -

(i) appointment of one or more Recovery Officers in a Debt Recovery Tribunal instead of only one Recovery Officer as at present;

(ii) set-off and counter claims;

(iii) appointment of Receivers and Commissioners by the Debt Recovery Tribunal;

(iv) transfer of cases from one Tribunal and to another and appraisal of work of Presiding Officers of Tribunals by the Appellate Tribunal;

(v) empowering Debt Recovery Tribunal to straightaway issue certificate for recovery on the basis of decree or order of Civil courts;

(vi) enabling the Tribunal to issue certificate for recovery modifying its earlier certificate for enhancing the amount of recovery on the basis of final decision of the Appellate Tribunal;

(vii) laying of notifications under certain provisions of the Act before the Parliament.

The above amendments were considered by the Committee of experts appointed by the Government under the Chairmanship of Shri T R Andhyarujina on 15.2.99. The Andhyarujina Committee, which was appointed pursuant to the Second Narasimham Committee Report, took into consideration the recommendations of the Working Group appointed to review the functioning of DRTs and supplemented them with their recommendations on expeditious disposal of the case. This Committee is of the view that those powers which are necessary and which contributes to the expeditious disposal should be expressly conferred under the DRT Act. The Supreme Court has observed in this connection that the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice. Please see ICICI Ltd. Vs Grapco Industries 1999 (4) SCC 710, 716]. In another case, the Supreme Court has also held that the scope and extent of the power of the Tribunal are mainly referred to in Section 22(1) and Section 19(6) does not in any way limit the generality of the power in section 22(1). Section 19(6) does not exhaust the type of injunctions and stay orders by the tribunals. [Please see, Allahabad Bank, Calcutta Vs. Radhakrishna Maity and Others, JT 1999 (6) SC 527]. The experience of the Tribunal has shown that the functioning of the tribunal is affected due to lack of clear power in certain areas. It is in this context that the Andhyarujina Committee had made the above recommendations.

Another recommendation made by this Committee was to make a provision to allow parties to refer, complex matters to specialist arbitrators and to change the eligibility criteria of the Presiding Officers of the Tribunals. This Committee is of the view that the need for expertise in this tribunal was particularly more in view of complex transactional matters such as project financing, securitization and new kinds of debt instruments involving high stake which may come up in future, before this tribunal. However, the committee thought that since it was not pragmatic to restructure the tribunal to have two members thus making radical changes in the Act, Government may consider changing the set up of tribunal to include a member having such expertise in future. The committee also recommended that section 17 of the DRT Act should be amended to clarify that the exclusive jurisdiction of the tribunal will not come in the way of resort to arbitration. The committee also deliberated at length on the desirability of conferring the powers on the tribunal and the appellate tribunal, punishing for contempt. In law the power of punishing for contempt vests on Courts of Record but the power of punishing for contempt may be conferred on other judicial bodies also as in case of section 13B of the MRTP Act, 1969 which confers power of the High court on the Monopolies Commission for punishing for

contempt. On these lines, the committee recommended power of punishing for contempt to be conferred on these tribunals.

On 17.1.2000, the Government has come out with an ordinance amending the Recovery of Dues due to Banks and Financial Institution (Amendment) Ordinance 2000 incorporating inter alia most of the changes recommended in the Amendment Bill of 5th March 1999.

It may be clear from the discussion above that the banks and financial institutions are experiencing insurmountable difficulties in recovering loans and enforcement of securities charged. The Government and the RBI have taken initiatives from time to time to get over these difficulties faced in the recovery of dues. It should be seen from the budget proposals moved on 29.2.2000 that the Government has proposed to establish seven more tribunals out of which 4 would be established in Mumbai, taking into consideration the quantum of pending cases at Mumbai due to the delay in establishment of DRTs there. Increase in number of tribunals is expecteed to reduce the backlog of pending cases in Mumbai and other centres. The amendments made from time to time to the Act clearly show the awareness of the Government and the RBI to the problems faced by the banks and financial institutions in getting their dues recovered through DRTs and DRATs. The Supreme Court has also shown keen interest by making valuable suggestions to the Government during the pendency of the case and by monitoring implementation of amendments to the Act. For example, while the case was pending the Government put in place the recruitment procedures for the Presiding Officers for the DRTs and DRATs under the properly constituted recruitment committees. In the guidance of the Supreme Court, the amendment made to the Act have brought improvements and simplification in many of the areas of the Act. Nevertheless, the Act still suffers from certain infirmities in the infrastructure as well as their administration which in turn affects and causes delay in the disposal of cases and consequent recoveries of dues of banks and financial institutions.

It may not be out of order to mention here certain initiatives thought of by the Reserve Bank and which are under active consideration. The Banking Ombudsman Scheme which today looks into the complaints of the deficiency in service of the banks is in addition to the Consumer Protection Forum. It is now proposed to utilize this institution set up by the RBI i.e. the Banking Ombudsman, to decide the disputes between banks and customers arising out of financial transactions as also the disputes between the banks and banks. This is proposed to be done by obtaining a joint consent from the banks and borrowers to the effect that they are subjecting their dispute to the jurisdiction of the Banking Ombudsman and appoint the Banking Ombudsman as Arbitrator of their dispute by conferring on him the powers of a Banking Arbitrator. The RBI will be adopting the method of institutional arbitration to decide the cases up to Rs.10 lakhs. It is proposed in future to direct the banks to include in their loan document a clause by which the loan document will provide for dispute arising between the bank and the borrower to be adjudicated by the Banking Ombudsman acting as Banking Arbitrator. At present, the disputes between two banks are referred to the RBI by the Government for arbitration when the amount involved does not exceed Rs.50,000/-. It is now proposed to include such matters up to Rs.10 lakhs also for the arbitration on the basis of consent by both the

banks for appointing the Banking Arbitrator. Once the parties agree to refer the dispute to the Banking Arbitrator, it is proposed to provide that the Banking Arbitrator would be deciding the dispute of arbitration under the Arbitration and Conciliation Act of 1996 and all the provisions of that Act will ipso facto apply to such arbitration. Based on the experience gathered from such arbitration it is proposed to consider increasing the limit to Rs.10 lakhs which is contemplated at present. In case the Bank succeeds in setting up the Banking Arbitrator to decide the disputes expeditiously it is likely to lighten the burden of the DRTs. However, in this context the recommendation of the Andhyarujina Committee to amend Section 17 of the DRT Act so as not to allow the exclusive jurisdiction of DRTs to come in the way of recourse to arbitration gains importance.

In the light of the discussion above, this seminar may consider undertaking a strict introspection of the procedures followed by the DRTs and DRATs, as also see the system followed by the banks in making use of DRTs, for getting their dispute resolved and suggest ways and means by which the adjudication could be simplified and delays reduced. It is suggested that the procedure could be simplified by giving more powers to the Registrars of the tribunals to undertake pre-trial procedure at their level and allow the cases to be heard by the DRTs only when all other pre-trial formalities are completed. In matters like service of notice, DRTs can be freely make use of the service of banks available for Dasti service i.e. through lawyers of the banks. Also, the recommendations of the Hegde Committee mentioned earlier of appointing Debt Collecting Agency may be considered for execution of claims through private agencies. This would reduce pressure on the Recovery Officers and may incidentally also generate employment when more and more debt recovery agencies are formed. These are some of the thoughts which I wanted to share with you and which may be dwelt upon in the seminar in the coming two days. The RBI will be pleased to consider any suggestions for taking initiatives in this matter which would enable the DRTs to expedite disposal of claims before them. In case the DRTs have any difficulties which arise because the banks are not cooperating or lacking proper mechanism or system to handle the cases before them, such suggestions may be made to the RBI and the RBI would definitely consider taking up such issues with the concerned banks or the banks as a class.

I once again thank the NIBSCOM for giving me an opportunity to share my views with you all in this august gathering. With these few words, I declare this seminar as inaugurated.

Malafide : In bad faith.

Mandamus : A writ of command issued by a Higher Court to a lower Court/Govt./ public authority.

Mens areat: Guilty intention, criminal intention.

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* Inaugural address at the Joint Seminar of Chair-Persons of Debt Recovery Appellate Tribunals, Presiding Officers and Recovery Officers of DRTs and Senior Executives of Banks/Financial Institutions.

Collective Investment Schemes-Salient Features

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Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999* (Regulations) have been notified by SEBI. The expression Collective Investment Scheme (CIS) has been defined to include any scheme or arrangement framed with respect to any property for the propose of enabling the investors to receive profits or income or produce. Some kinds of schemes are exempted from the applicability of the Regulations. The Regulations cover inter alia, the schemes of plantation companies and time-share companies.

2. The Regulations contemplate a scheme to be constituted as a trust managed by a trustee appointed by the Collective Investment Management Company (CIMC). CIMCs are required to obtained a certificate of registration from SEBI before carrying on or sponsoring or launching a CIS. The Regulations provide an opportunity of being heard to CMIC before rejecting the application for grant of certificate of registration. This makes the decision taken by the regulators more informed and fair to the CIMC. The possible challenge to the order of rejection on the ground of non-compliance with the rules of natural justice is also rendered remote. Further it gives an opportunity to the regulators themselves to seek clarifications on the vague statements, if any, made in the application. The Regulations provide for appraising of the schemes by specialised agencies empanelled with SEBI and rating by registered credit rating agencies. The investor will thus have the advantage of expert opinion in respect of the schemes.

3. This paper examines how the Regulations propose to ensure the following :

(a) The management of CIS does not go into the hands of undesirable elements.
(b) The funds collected by CIS are not diverted for purposes other than that of the scheme.
(c) The scheme is managed in a professional way in compliance with the regulatory requirements.

Undesirable elements

4. It is not desirable to have persons having criminal antecedents in the management of the companies accepting public investments. It is quite difficult to exhaustively list out the crimes for this purpose. As such, a very general expression is used in many statutes and persons guilty of offences involving ‘moral turpitude’ are not entitled to hold important positions. The Regulations have specified some offences in addition to that general category.

Economic offences

5. The Directors or key personnel of a CIMC shall consist of persons of honesty and integrity having professional experience and who “have not been convicted of an offence involving moral turpitude or for any economic offence or for the violation of any securities laws”. (Emphasis added) The expression ‘Securities Laws’ means SEBI Act 1992, Securities Contracts (Regulation) Act, 1956 and Depositories Act, 1996.

6. Disqualifying persons guilty of any economic offence or any violation of the Securities Laws from becoming Directors or Key Personnel of CIMC has at least two advantages.

Firstly, the expression, ‘offence involving moral turpitude’ is rather vague. At times it could be quite difficult to determine whether a given offence for which a person is convicted, involved moral turpitude. Further, the regulator may not be ware of such

convictions, outcome of appeals etc. Disqualifying a person convicted for violation of Securities Laws and economic offences brings in an amount of clarity, as it will not be necessary for the regulator to decide whether those cases involved moral turpitude. Further, SEBI could have first hand information regarding violations of some of the securities laws.

Secondly, economic offences and violation of securities laws have a direct nexus to the nature of duties that will have to be performed by the Directors or Key Personnel of such companies.

Past rejections

7. SEBI has to make sure that no person directly or indirectly connected with the applicant has in the past been refused registration by SEBI. This is obviously to ensure that if the application of a company is rejected, the same persons behind that company do not float another company with a different name and seek registration.

Independent Directors

8. One common modus operandi adopted by many promoters is to float different companies with a common basic name by same or largely same set of promoters and use the name of one of the companies, which acquires a good reputation, to market the schemes floated by other companies. The assets and liabilities of these different companies are mixed up and the investors are confused as to from which company they have to recover their dues back. The companies take advantage of such confusion and delay or even avoid legal process against them for recovery.

9. Such a situation is sought to be averted in the Regulations by requiring that at least 50% of the Directors shall consist of persons who are independent and are not directly or indirectly associated with the persons who have control over CIMC. This may be expected to avoid intermingling of the assets and liabilities of all companies in the group so as to confuse the investing public. The 50% of the Directors on the Board of the CIMC who are independent may be expected not to allow such intermingling and misuse of funds.

Transfer of controlling interest

10. Many instances have come to light where after misappropriating the funds collected, the persons in-change of the companies have transferred the controlling interest and management to some other persons when the affairs of the company get into trouble. Such transfers are timed in such a way that the violations start taking place only after the persons responsible for collecting huge funds have ceased to be in the management of the company. After such sudden change of management the investors discover that the persons in whom they had reposed confidence while investing their funds are no more in-charge of the company or their funds and some totally insignificant and unknown persons are managing their funds. The regulations require that no change in the controlling interest of a CIMC shall be made without obtaining prior approval of SEBI, the trustee and the unit holders holding at least one half of the nominal value of the unit capital of the scheme.

11. Stringent regulations have been put in place. It may be argued that the concept of independent personality of a company is eroded in so far as the company is identified with the persons behind it. However, the present day scenario calls for such strict regulations.

Diversion of funds

12. The companies, which accept money from the public sometimes, deploy the same in other business carried on by the company. For instance, if a plantation company deployes the funds collected by sale of units in plantations for purposes other than plantation, it is obvious that the business connected with plantation will not flourish for want of sufficient funds thereby resulting in default. As such, to prevent diversion of funds to other businesses, the Regulations stipulate that CIMC shall not carry on any business other than that of managing a CIS.

13. It would appear as though the fundamental right to carry on any business guaranteed under the Constitution of India is affected insofar as a CIMC is prohibited from carrying on any other business. This will have to be justified on the ground that it is a reasonable restriction meant to protect the interest of the investing public. The large scale defaults committed by various companies and the difficulties faced by the investing public which have attracted the attention of the Government and various statutory bodies, may be expected to justify the restrictions imposed by the Regulations as reasonable.

Compliance officers

14. It is not sufficient merely to keep in place effective regulatory measures. It is necessary that the regulatory measures introduced by the regulatory authorities are strictly complied with. The regulations require that there should be an in-built mechanism within the CIMC to make sure that the regulatory requirements are complied with. CIMC and the trustees are required to make sure that the CIMC has prepared a proper compliance manual and has appointed a compliance officer to comply with the provisions of SEBI Act and the Regulations and to redress the grievances of the investors. This may be expected to go a long way in ensuring compliance with the regulatory measures and building up internal financial discipline, which ultimately would be in public interest. Further the regulators would know who is responsible for violations. It has to be examined whether it is necessary to stipulate that the compliance officer should not be a mere hired employee but one of the Directors.

Conclusion

15. The regulations are interesting in many ways. The present day problems have been addressed directly. If these regulations are successful and achieve the desired object of protection of the interest of the investors, it may be expected to boost public confidence in such investments thereby giving a fillip to that industry.

Caveat : A warning enjoining from certain acts or practices.
Caveat emptor : let the buyer beware.
Caveat actor : let the doer beware.
Caveat venditor : let the seller beware.
Lis : A suit cause of action.
Lis pendens : A pending suit.
Locus standi : Right of a party to an action to appear and be heard on the question before any tribunal.

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* Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 (Gazette of India Extraordinary Part II. Section 3 -- SUB-SECTION (ii) Notification dated October 15, 1999.

Judicial Adventurism vis-a-vis The Doctrine of Precedent with Special Reference to Invocation of Bank Guarantee

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Introduction

The Supreme Court has time and again reiterated the precedential value of its judgements and cautioned the lower Courts against ignoring its settled decisions and passing judicial orders which are clearly contrary to the settled legal position. In the case of Dwarikesh Sugar Industries Ltd., vs. Prem Heavy Engineering Works (Pvt.) Ltd. & Others(1) the court has observed that "judicial adventurism cannot be permitted", and further made clear that "the Apex court strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwanted relief to one of the parties"(2). In that case the Apex Court has clearly stated that "it is the time that this tendency needs to be stopped"(3). Hence, this write up is an attempt to sum up the views expressed by the Apex Court, in various judgements relating to issue of injunctions against the enforcement of bank guarantees and examine the various instances where the High Courts have interfered with the enforcement of bank guarantees and in appeal the Apex Court reversed the judgements of High Court.

II. Precedent

The common law system has adopted the technique of 'Precedent' to provide some extent of certainty and predictability to court decisions. According to Osborn's Concise Law Dictionary, Precedent is defined as a "judgement or decision of a Court of Law cited as an authority for deciding a similar set of facts. A case which serves as an authority for the legal principle embodied in its decision"(4). The importance of judicial precedents has always been a distinguishing characteristic of English Law (5). A judicial precedent speaks in England with authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established(6).

In England, courts give high respect for observance of doctrine of Precedent. Observance of the Precedent is a rule of convenience because subjects can predict the law and law must be always certain, uniform and predictable. Emphasizing the need and necessity of binding precedents, Salmond an authority on Jurisprudence, observed that "it is necessary to treat precedents as absolutely binding to secure the certainty of the law, predictability of decisions being more important than approximation to an ideal; any very unsatisfactory decision can be reversed for the future by Statute"(7).

In India even before the constitution Precedent had a statutory status under Section 212 of the Government of India Act, 1935. The law declared by the Federal Court and Privy Council were binding on all Courts. In Independent India, which is governed by a judicial system consisting of a hierarchy of Courts, the doctrine of Precedent is a cardinal feature of its jurisprudence.

Article 141 of the Constitution of India embodies and recognizes the doctrine of precedent in India. Article 141 states that the Law declared by the Supreme Court shall be binding on all other Courts within the territory of India. Judgements of the Supreme Court unless and until reviewed and reversed must be followed with out reservation [(8)]. A decision of the High Court in ignorance of the Supreme Court decision, would be bad in law as if it is a *per incuriam* decision[(9)].

III. Contract of Guarantee

Law relating to guarantees are dealt with in Sections 126 to 138 of the Indian Contract Act 1872. Section 126 of the Act defines 'guarantee as "a contract to perform the promise or discharge the liability of a third person in case of a default'. A bank Guarantee is a commercial document. The surety is a favoured debtor and he is liable to satisfy the claims made by the creditor. However, the courts have opined that the commencement of liability depends upon the terms of the guarantee. A bank guarantee generally provides for unconditional obligations to be honored by the bank at the instance of the guarantor[(10)]. In a contract of guarantee, the certainty of honouring the obligation of the guarantor is of high commercial significance as the bank guarantee is a commercial document to counter business risk.

There are different types of guarantees that a bank can provide, namely, performance guarantee/ bond and letters of credit etc. One of the prevalent types of guarantees, popular in commercial dealings, is the performance guarantee which is usually executed by the banks in favour of Govt. Depts., semi-Govt. and public undertakings etc. on behalf of contractors who undertake the payment in the event of non-fulfillment of the contract [(11)]. In the case of default or breach of agreement by the one of the parties to the contract the other party, at whose instance the guarantee is provided may enforce the bank guarantee. Say for example, Mr. Contractor (Mr. C) entered into a contract with Mr. Beneficiary (Mr. B), for construction of 100 flats with all amenities subject to the conditions mentioned therein. In case of default Mr. C shall pay 10% of cost of project as penalty to Mr. B. Therefore, at the instance of Mr. C Bank provides the guarantee, that in case Mr. C fails to meet the terms of the agreement then Mr. B can invoke the bank guarantee and encash the same absolutely.

At this stage, judicial relief available to Mr. C is to approach the Civil Court for grant of injunction restraining the Bank from honouring the bank guarantee under Order 39, rules 1 and 2 of the C P C. If the court refuses to grant injunction, an appeal or a revision may be preferred before the High Court requesting for grant of injunction restraining the bank from paying to Mr. B. Generally, in such cases, courts are empowered[(12)] to grant injunction on two grounds,

a) Fraud.[(13)]

b) Irretrievable injustice.[(14)]

However, one should be careful in alleging 'fraud', because, the fraud that the courts talk about is fraud of an 'egregious nature as to vitiate the entire underlying transaction'. It is

fraud of the beneficiary, not the fraud of somebody else[15]. Further, there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee[16].

Law on this point is well settled. In Dwarakeswari Sugar Mill's Case, the Apex Court has observed :

"The law relating to invocation of such bank guarantee is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realise such bank guarantee in terms thereof irrespective of any pending disputes. The bank giving such guarantee is bound to honor it as per its terms irrespective of any dispute raised by its customer"[17].

However, very often the Courts are interfering with the beneficiary's right to invoke the bank guarantee disobeying the Apex Court's decisions and with out examining the facts and circumstances of the case. Some recent decisions of Allahabad, Bombay and Orissa[18] High Court are instances of such attitude/tendency of diluting the spirit of the doctrine of Precedent. Since 1980, Apex Court has laid down a precedent restraining the courts below from interfering with the enforcement of bank guarantees and the right of the beneficiary to invoke the same.

The primary question that strikes our mind is whether the High Courts are justified in restraining beneficiaries from invoking bank guarantee. A careful study of the Court judgements shows that the lower courts have a tendency, to interfere with the enforcement of bank guarantee. This tendency is apparent in one of the decisions of the Allahadbad High Court[19]. The learned single Judge of the High Court allowed the revision petition and held that the invocation of the performance guarantees were illegal.

Another notable case of judicial adventurism has come to focus in Dwarkish Sugar Industries Ltd.'s case. (1997)[20]. Incidentally, the same Allahabad High Court, (single judge decision) restrained the Bank to honour the bank guarantees. But in this case, the High Court restrained the invocation of bank guarantee from an altogether different angle. The single judge observed that "the liability of the Bank under the guarantee was absolute, and the authority of the beneficiary to encash the bank guarantee can not be questioned but the same could not be a guideline for allowing the defendant to encash the bank guarantee undue enrichment thereby"[21]. (emphasis supplied).

It is humbly submitted that the High Court has introduced the principle of undue enrichment, which is unknown to the law of bank guarantees, making the settled law more complex. The courts are trying to distinguish each case to escape the binding force of precedents laid down by the Supreme Court, but in that anxiety to adopt the technique of "distinction", the courts are unknowingly making the law complex, unpredictable and uncertain. Expressing the concern the supreme court said

> "we also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee". Further the supreme court

emphasised that "If the High Court had taken the trouble to see the law on the point it would have been clear that in encashment of bank guarantee, the applicability of the principle of undue enrichment has no application"[(22)].

III. Set back to doctrine of Precedent

a) Allahabad High Court :

In a recent landmark judgement in Dwarikesh Sugar Industries's case, the supreme court has expressed its dissatisfaction over the attitude of the High Court of Allahabad, restraining the bank to honour the guarantee.

The facts in belief are as follows :

Under an agreement entered into between the Sugar Industries (Appellants) and Prem Heavy Engineering Works (Respondent No. 1), Respondent No. 1 had agreed to supply billing house equipment, as per the schedule of the supply agreed by the parties. According to one of the clauses of the aforesaid agreement, Respondent No. 1 had agreed to furnish bank guarantees in favour of the Appellant. Bank guarantee was issued to ensure timely delivery of equipment and supply by Respondent No. 1. On 21/11/1995 Appellants invoked the bank guarantee for failure to supply machinery and equipment by the Respondent No. 1. The Respondent bank did not make the payment. Respondent No. 1 filed original suit No. 1182 of 1995 before the Court of Civil Judge, Meerut, under Section 20 of the Indian Arbitration Act, 1940 claiming relief that the dispute between the parties should be referred to an arbitrator and also filed an application for the grant of injunction restraining the appellant herein from encashing the bank guarantee. On 28/11/95 Respondent No. 1 could manage to obtain ex-parte injunction from the Court of Civil Judge, Meerut, restraining the appellant from encashing the bank guarantee. By an order dated 20.8.96, the trial court, Meerut, vacated the ex-parte injunction and after referring to a number of decisions of the supreme court reached the conclusion that there was no basis, in law, for the grant of any interim prohibitory order. Basing on the strength of the trial court order, the appellant on 22.8.96 again approached the Respondent bank for the encashment of the bank guarantee, but in vain. On 10/9/1996, Respondent 1 filed a Revision Petition before the Allahabad High Court against the trial court order dated 20/8/1996. The Single Judge of the High Court, after remanding the matter back to trial court for a fresh decision, directed that till the disposal of injunction application the bank guarantees in question shall not be invoked or encashed. Due to dilatory tactics adopted by Respondent No. 1 the said injunction applications not disposed of with the result that the injunction granted by the single judge of the High Court vide order dated 10.9.96 continued till the appellant challenged the same before the apex court.

The Supreme Court, setting aside the High Court's order, observed :

> "It is unfortunate, that notwithstanding the authoritative pronouncement of this court, the High Courts and the courts subordinate thereto, still seem intent on affording to this Court innumerable opportunities for dealing with this area of law, thought by this Court to be well settled. <u>When a position in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts</u> including the High Courts to ignore the settled decisions

and then to pass a judicial order, which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the selled principles and in passing whimsical orders, which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."[23] (emphasis supplied)

The Supreme Court expressing its dissatisfaction over the High Court's performance in going through the documents on record and following the rule of precedent observed :

"it is unfortunate that the High Court did not consider it necessary to refer to various judicial pronouncements of this Court in which the principles which have to be followed while examining an application for grant of interim relief have been clearly laid down. The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it in avoiding to follow and apply the law as laid down by this Court"[24]. (emphasis supplied)

b) Bombay High Court

In another instance, the Bombay High court granted a temporary injunction restraining the United Commercial Bank from invoking letter of credit/ guarantee. On appeal the Supreme Court[30] observed :

"...In the instant case, the Bombay High Court has assumed that the plaintiffs had a prima facie case. It has not touched upon the question where the balance of convenience lay, nor has it dealt with the question whether or not the plaintiffs would be put to irreparable loss if there were no injunction granted. In dealing with the prima facie case, the High Court assumes that the appellant has in breach. There is no basis for this assumption at all, the High Court in this case has prejudged the whole issue by holding the appellant could not unilaterally impose the condition of payment under reserve nor was it justified in holding that the documents were clean. The question whether the appellant was in breach is an issue to be tried in the suit. The question whether the documents were clear or unclear is a vexed question on which no opinion could be expressed at this stage. It is also premature at this stage to assume that there was no due presentation of the bills of exchange and their refusal".

Underlining the importance of credibility to the banking system and highlighting the sanctions/ duties of the High Courts, the Apex Court has pointed out that,

"The Courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of a Letter of Credit or a bank guarantee between one bank and another of such temporary injunctions were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank or in terms of the letter or guarantee or credit executed by it, the whole banking system in the country would fail".[25]

IV. Conclusion

Apex Court's approach has been to reiterate the need to observe the doctrine of precedent, but High Courts have adopted an approach that may unsettle the settled law. It is interesting to note that the Courts below are in favour of adventurism under the guise of judicial activism[(26)]. It is submitted that the High Courts have adopted a diversified approach and in the enthusiasm to interpret the law dynamically upon the technique of "distinction" by saying that the facts and circumstances are different. So the High Courts have paved the way for the law to become more complex, unpredictable and uncertain. The common man perceives judicial decisions to be objective and predictable. Such perceptions have to be sustained without sacrificing the innovative element of the judicial process or denying its essentially uncertain character[(27)]. In these circumstances there should be an approach of "Restrictive Positive Activism "instead of "Unrestricted and Uncontrolled Activitism" in the shadow of" judicial adventurism".

References :

1. Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. (1997) 006 SCC 450; AIR 1997 SC 2477.
2. Ibid at 2484.
3. Id.
4. Second Edition 1946, at 243.
5. See, Wayne Morrison "Jurisprudence : From the Greeks to Postmodernism", Lawman (India) Pvt. Ltd., New Delhi, First Edition, 1997.
6. P.J. Fitzgerland "Salmond on Jurisprudence", Sweet & Maxwell, 12th Edition, 1966 at 142; See, I.C. Saxena, "The Doctrine of Precedent in India, A study of some of its aspects". In "Essays in Indian Jurisprudence",(Ed) by G.S. Sharma, Luck Eastern Book Co. 1964, at 110.
7. Ibid. at 143.
8. Sher Singh vs. St. of Punjab, AIR 1983 SC 4659. HRE vs. Laxmi Narasingham (1990) Supp. SCC 164; See, "Justice Bhagbati Prosad Banerjee", Writ Remedies, Wadhwa & Company, Nagpur, Second Edition, 1998.
9. Ibid.
10. T.S. Venkatesa Iyer's, "The Law of Contracts and Tenders", Eastern Law House, Calcutta, New Delhi, 6th Edition, 1994; See, Paul R. Vemrkuil, "Bank Solvency and Guarantee Letters of Credit", 25 Stanford Law Review 719, (1972-73).
11. S.K. Roy Chawdhury and H.K. Saharay "Dutta on Contract", Eastern Law House, Calcutta, 8th edn. 1994.
12. However, Supreme Court in United Commercial Bank vs.
Bank of India [1981] 2 SCC 766; AIR 1981 SC 1426] is of the view that High Courts are justified in granting injunctions restraining the beneficiary from invoking are bank guarantee under Order 39, Rules 1 and 2 of the CPC, 1908. It is observed "Civil Courts are empowered to grant civil injunction Under Order 39, Rules 1 and 2 of CPC, 1908. However, this power of the civil court was assumed by the High Court and granted temporary injunction". Further it is stated that "the grant of a temporary injunction by the High Court under Order 39, Rules 1 and 2, CPC appars to be wholly unwarranted...we fail to appreciate any justification for grant of a temporary injunction to the plaintiffs the effect of which virtually is to restrain a transaction between a banker and banker. The Courts view with disfavour the grant of such temporary injunction."
13. As per the observation of Shetty J. in UPCB Ltd., (supra) at p. 193, it has perhaps for the first time that the said exception of fraud has been applied by Shientag, J. in the American Case of Sztejn vs. J. Henry Schroder Banking Corporation (31 NYS); the exception of fraud created in the above case has been codified in Sections 5-114 of the Uniform Commercial Code. Courts in England have accepted it. See : i) Hamzeh Melas and Sons vs. British Imex Industries Ltd. (1958) 2 QBD 127; (ii) R.D. Harbottle (mercantile) Ltd. vs. National Westminster Bank Ltd. (1977) 2 All ER 862; (iii) Edward Owen Engineering

Ltd. vs. Barclays Bank International Ltd. (1978) 1 All ER 976; (iv) UCM (Investments) vs. Royal Bank of Canada (1982) 2 All ER 720.
14. As per the observations of Sabya Sachi Mukherji as well as Shetty, JJ. In UPCF Ltd.,'s casa (supra) the expression "to prevent irretrievable injustice" appears to have been taken from the decision of the Court of Appeal in England in the case of Elian and Rabbath (Trading as Elian and Rabbath) vs. Matsas and Matsas (1966) 2 Lloyd's List Law Reports 495, Limited. It was held by the court of Appeal that "it was a special case in which court should grant injunction to prevent what might be irretrievable injustice"
15. UPCB Ltd.'s case, supra note 14, at p. 197.
16. Ibid. Also see General Electric Technical Services Co. Inc. vs. Punj Sons (P) Ltd. (1991) 4 SCC 230.
17. *Supra* note 1, at p. 2482 (AIR).
18. Svenska Handelshanken vs. M/s. Indian Charge Chrome (1994) 1 SCC 502 (Orissa High Court granted injunction restraining the Bank from honouring the bank guarantee (India) Ltd. vs. Vinmar Impex Inc., (1986) 4SCC 136.
19. Larsen & Toubro Ltd. vs. Maharashtra State Electricity See also, Hindustan Steel Works Construction Ltd. vs. G.S. Atwal & Co. (Engineers) Pvt. Ltd. (1995) 6 SCC 76.
20. Supra note 1.
21. Ibid.
22. Ibid. at para 29, page 2484
23. Ibid.
24. Ibid. vide order dated 11.10.1991). Also see, Centax
25. Ibid at Para 41, (1981) 2 SCC 766.
26. See on Activism, Upendra Baxi, "Taking Suffering Seriously : Board (1995)6 SCC 68 (High Court kept alive the bank Social Action Litigation the Supreme Court of India", 8 and guarantee till the successful completion of trial operations). 9 Delhi Law Review, (1979 and 1980) 91.
27. S.P. Sathe, "Judicial Process : Creativity and Accountability", in "Principles of Legislation and Juficial Process" (Ed.) Prof. C.J. Samuel. First Edition 1992, Department of Law, University of Poona, Pune. Also see, Benjamin N. Cardozo. "The at para 18, page 2481. Nature of the Judicial Process". New Heaven & London. Yale University Press, 1966.

JUDGEMENTS SECTION

Deficiency of Service and Limitation for making claim before Consumer Forums

Corporation Bank and Anr. vs. Navin J. Shah, Supreme Today — Part 12 — 2000 (1), 282

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In Civil Appeal No. 631 of 1994 filed by the Corporation Bank against the order passed by the National Consumer Disputes Redressal Commission, New Delhi, the Hon'ble Supreme Court of India was confronted with two main legal issues. Firstly, whether there was deficiency of service on the part of the appellant bank so as to attract the provisions of the Consumer Protection Act, 1986. Secondly, whether the claim made by the respondent before the National Commission was time barred under the law of limitation.

2. Brief facts

The complainant/respondent had filed a petition before the National Commission in which it was stated that the complainant was engaged in the business of exporting tea since 1970 and that during the period from 11th December 1980 to 2nd March 1981, the complainant had exported 13 consignments of tea to M/s. Sudan Tea Company, Khartoum, Sudan. The appellant bank (complainants' banker) had granted credit

facilities. The complainant entrusted the documents relating to the tea export to the appellant bank for the purpose of realising the export proceeds from the consignee M/s. Sudan Tea Co. Khartoum. The appellant bank negotiated the documents relating to exports through M/s. El Nilein bank, Khartoum, Sudan ("the foreign bank"). The complainant contended that the appellant bank was required to realise payment of the export value of the tea consignments in U.S. Dollars and only thereafter release the shipping documents to the consignee to enable it to take delivery of the consignments as denoted by the expression "cash against documents". The complainant also disputed that the appellant bank was instructed to negotiate the export documents through any particular bank and alleged that the appellant bank had on its own appointed the foreign bank without consulting or seeking the opinion of the complainant. The complainant contended that the appellant bank should not have released the export documents without receiving the export value from the consignee in U.S. Dollars.

The complainant had insured the said tea exports with the Export Credit and Guarantee Corporation of India (ECGC) to cover the risks involved in export business. The appellant bank informed the complainant that they could not realise the export proceeds in U.S. Dollars due to certain restrictions imposed by the Government of Sudan and advised the complainant to invoke the insurance policy and to settle the claim. Accordingly ECGC paid ninety per cent of the export proceeds covered by the documents. The complainant alleged that the appellant bank illegally recovered the balance ten per cent from the complainant through the account maintained by the complainant with them. It is further alleged that the appellant bank also recovered a sum of Rs. 97,482.19p. towards foreign exchange fluctuation charges from the complainant. The complainant also claimed a sum of Rs. 52,816.76. towards interest for the period of delay which amount was alleged to have been debited to the account of the complainant.

3. Arguments of complainant

It was the contention of the complainant before the National Commission that the appellant bank had totally failed to abide by the specific instructions of the complainant to release the export documents to the consignee only after receiving the export proceeds in U.S. Dollars. As a result of this negligence, the goods were released to the consignee without receiving the value for and on behalf of complainant. It was stated that the appellant bank had originally purchased the export documents and appellant bank was responsible for the delay in the matter of repatriation of export proceeds but the Reserve Bank of India had been pressuring the complainant for repatriation of export proceeds. The complainant claimed a sum of Rs. 2,25,377.04p. in U.S. dollars towards export proceeds from Sudan which were covered by the documents given to the appellant bank. The complainant further argued that the complainant had hired the services of appellant bank for consideration and was a consumer under the C.P. Act, 1986 and that since there was absolute breach of agreement in the performance of the duty, there was total deficiency of service on the part of the appellant bank.

4. Arguments of appellant bank

The appellant bank submitted before the National Commission that the complainant was not a consumer as defined in the C.P. Act, 1986 and that the National Commission had no jurisdiction. Secondly, the claim put forth by the complainant had become stale since it

related to transactions of 1979 to 1982 and so the claim ought to be rejected. Thirdly, the complainant does not have any locus-standi since appellant bank did not have any transactions with the complainant and that the customer of the bank was a partnership firm by name M/s. Javerilal & Sons. Finally, the appellant bank argued that there was no deficiency of service on its part because it had performed its duty as a collecting bank by sending the documents including the bills of exchange to the foreign bank in Khartoum and it was not its responsibility to ensure that the payments are collected.

5. Order of National Commission

The National Commission rejected the contention that the claim was stale or that the claim was barred by limitation. The National Commission stated that the invoices were drawn in U.S. Dollars and in the 'Advice of Bill purchased' the value recoverable from the drawee is shown in U.S. Dollars.

Further, the Reserve Bank of India directives required repatriation to India of the export proceeds in U.S. Dollars and not in any other currency. The National Commission referred to the instructions in Exchange Control Manual, 1978 issued by Reserve bank of India and observed that the appellant bank being an authorised dealer, the said instructions were clear to fix the responsibility of the appellant bank and that the appellant bank was negligent in releasing the consignments against local currency without ensuring realisation and repatriation of the export value in U.S. Dollars. The National Commission decided the issue of exchange rate fluctuation in favour of complainant. The National Commission allowed interest on the damages claimed and granted the reliefs claimed.

6. Grounds of appeal

The Corporation bank challenged the said order in appeal before the Supreme Court of India on the following grounds :

i) The respondent is not a consumer within the meaning of the definition of "Consumer" under Section 2(d) of the C.P. Act. Hence the National Commission had no jurisdiction to entertain the complaint.

ii) The appellant bank's customer was a firm by name M/s. Javerilal & Sons and the appellant bank had no dealing whatsoever with the respondent. The petition filed before National Commission contained no averment that the respondent was acting on behalf of the firm.

iii) The appellant bank performed its duties promptly by sending the documents to the named foreign bank and it was required to receive the export proceeds as and when the same was sent by the foreign bank. Hence no deficiency of service can be attributed to the appellant bank.

iv) The complaint relating to transactions which took place in 1981-82 was filed in 1992 and so the claim before the National Commission was wholly time barred. Hence the claim is liable to be rejected.

v) In a transaction dealing with documentary credits banks deal only with the documents and there was no failure on the part of appellant bank to provide the service that it was expected to.

The appellant bank argued that no relief whatsoever could be granted to the respondent.

7. Findings of the Supreme Court a) On limitation

The Supreme Court observed that the transactions of export took place in the year 1979 and 1981. Due to the impossibility of realising the export value in U.S. Dollar, the claim before the ECGC invoking the insurance policy was made as early as in December 1982. As against this, the petition before the National Commission was filed in September 1992 that is clearly a decade after the claim had been made before the ECGC and the taking place of export transactions.

The Court observed that at the relevant time of filing the petition, no period of limitation was prescribed under the C.P. Act, 1986 to prefer a claim before the National Commission. It was only in the year 1993 that the Consumers Protection (Amendment) Act, 1993 inserted Section 24A in the C.P. Act prescribing a limitation period for filing of complaints before the District Forum, state Commission or National Commission. The Court was of the view that even then, this does not mean that the claim could be made after unreasonably long delay. The claim ought to have been made within a reasonable time after having approached the ECGC. The reasonable time depends upon facts of each case.

The Court referred to and relied upon the relevant provision of Limitation Act under which three years period has been prescribed as the reasonable time to lay a claim for money. The Court stated that this period should be the appropriate standard for computing the reasonable time to raise a claim in the matter of this nature. Hence, the Court held that the claim made by the respondent ought to have been rejected by the National commission on the ground that it was time barred.

b) On deficiency in service

The Supreme court found that the agreement dated 19.3.79 was entered into between M/s. Javerilal & Sons and Sudan Tea Company for export of tea. Clause (5) thereof provided the mode of payment and states that the payment to the seller shall be made on the basis of cash against documents on the arrival of the ship at Port Sudan through EL NILEIN BANK, Khartoum. The export documents had been delivered to appellant bank which had also purchased the Bills of exchange to negotiate the same through the foreign bank.

In this context, the following observations of the Supreme Court are of importance :

“When a bank, after purchasing or discounting an instrument from a customer, credits the customer with the amount of the instrument and allows the customer to draw against the amount as credited before the bill or instrument is cleared, then the bank would be collecting the money not for the customer but chiefly for itself. If the bills and the relevant documents presented by its drawer are accepted by a banker with endorsement in its favour and the same are immediately discounted by the banker without waiting for its collection by giving full credit for the entire amount of the document, so presented, the banker itself becomes a purchaser and the holder thereof for full value. A banker discounts a bill as opposed to taking it for collection or as security for advances, when he takes it definitely and at once as transferee for value and that it does not matter that the amount of the bill, less discount, is carried to current account as in the case of a customer that is the usual course and where the transaction is really one of discounting, the banker is of course at liberty to deal with the bill as he pleases rediscounting or transferring it”.

The contention of the appellant bank was that the respondent had entrusted the appellant bank to negotiate the export documents through a named foreign bank and since that foreign bank had failed to collect the proceeds in the indicated foreign exchange but

collected only in local currency in Sudan, no liability at all can be fastened on the appellant bank. But the respondent would submit that the appellant bank having purchased the documents were in fact collecting the monies for their own benefit and not for the benefit of the respondent when the documents had clearly indicated the manner in which the consignee is to get the goods.

The agreement clearly indicated that the documents had to be negotiated through the foreign bank and the payment was to be received through the foreign bank. If that be so, the appellant bank was acting for and on behalf of the respondent when they sent the documents to the named foreign bank and they could not have sent the documents to any other bank but only the named foreign bank inasmuch as payments had to be made only through that foreign bank which could not realise payments in U.S. Dollars on account of policy of Sudan Government.

The Court observed that the appellant bank negotiated the documents as per provisions of the agreement; so did the foreign bank. However, conversion of local currency into U.S. Dollars was frustrated by reason of the governmental action. There is no cause how the appellant bank could be held responsible for the same. The National Commission had failed to appreciate this aspect. The Court was of the opinion that irrespective of the collection procedure, whether by discount or purchase of the bills or otherwise, it is evident that both the appellant bank and foreign bank had fulfilled all the requirements as per terms of the agreement and contract. Therefore, the Court held that the National Commission was not justified in arriving at the conclusion that there was deficiency of service on the part of the appellant bank.

c) On locus standi

The Court observed that in the cause title, the respondent is shown to be an individual, whereas in the statement of facts, the respondent is described as a partnership firm engaged in export business. In the petition, reference is made to the firm and not to the individual. It is not clear whether the respondent is a partner of the firm or whether he was authorised by the firm to lay the claim since such facts have not been pleaded. Hence the court was of the view that the respondent did not have locus-standi to make the claim petition before the National Commission.

8. Decision

In the above circumstances, the Court held that any one of the above grounds is sufficient to reject the claim of the respondent and allowed the appeal and set aside the order of the National Commission and dismissed the complaint filed by the respondent.

9. Comments

In this judgement, the Supreme Court has wielded the axe to eliminate petitions which are filed before the Consumer Forums after unreasonable or inordinate delay. If this dictum is followed, it will reduce the large number of pending cases and discourage consumers from moving the Forums at their sweet will and pleasure. For the commercial banks, this decision is a triumph, for it clearly establishes that where the bank has performed its contractual duties, the allegation of deficiency of service cannot hold water. Needless to say, with this decision of the Apex Court, the banks would be strongly equipped to deal with the cases filed in the Consumer Protection Forums.

LEGISLATION SECTION

I. THE SECURITIES LAWS (AMENDMENT) ACT, 1999

[This Act of Parliament received the assent of the President on the 16th December, 1999 and was published in the Gazette of India, (Extra.), Part II Sec. 1, No. 44, dated December 16, 1999/ Aghrayana 25, 1921].

Parliament Act no. 31 of 1999

An Act further to amend the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992.

Be it enacted by Parliament in the Fiftieth Year of the Republic of India as follows :—

1. Short title and commencement. — (1) This Act may be called the Securities Laws (Amendment) Act, 1999.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of section 2. — In section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) (hereinafter referred to as the principal Act), —

(a) after clause (a), the following clause shall be inserted, namely :—

(aa) "derivative" include —

(A) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences of any other form of security;

(B) a contract which derives its value from the prices, or index of prices of underlying securities;

(b) in clause (h), after sub-clause (i), the following sub-clauses shall be inserted, namely :—"(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes'.

3. Insertion of new section 18A. — After section 18 of the principal Act, the following section shall be inserted, namely :—

"18A. Contract in derivative. —
Notwithstanding anything contained in any other law for the time being in force, contracts in derivative shall be legal and valid if such contracts are —

(a) traded on a recognised stock exchange;

(b) settled on the clearing house of the recognised stock exchange, in accordance with the rules and bye laws of such stock exchange.".

4. Amendment of section 21. — In the heading occurring above section 21 of the principal Act, the words "BY PUBLIC COMPANIES" shall be omitted.

5. Amendment of section 22. — In section 22 of the principal Act, —

(a) after the words "public company", the words "or collective investment scheme" shall be inserted;

(b) after the word "company", the word "or scheme" shall be inserted.

6. Amendment of section 23. — In section 23 of the principal Act, in sub-section (1), after clause (c), the following clause shall be inserted, namely :—

"(d) enters into any contract in derivative in contravention of section 18A or the rules made under section 30.".

7. Amendment of section 24. — In section 24 of the principal Act, after sub-section (2), in the Explanation, for sub-clause (b), the following clause shall be substituted, namely :—

"(b) "director", in relation to —

(i) a firm, means a partner in the firm;

(ii) any association of persons or a body of individuals, means any member controlling the affairs thereof.'.

8. Insertion of new section 27A. — After section 27 of the principal Act, the following section shall be inserted, namely :—

"27A. Right to receive income from collective investment scheme. — (1) It shall be lawful for the holder of any securities, being units or other instruments issued by the collective investment scheme, whose name appears on the books of the collective investment scheme issuing the said security to receive and retain any income in respect of units or other instruments issued by the collective investment scheme declared by the collecitve investment scheme in respect thereof for any year, notwithstanding that the said security, being units or other instruments issued by the collective investment scheme, has already been transferred by him for consideration, unless the transferee who claims the income in respect of units or other instruments issued by the collective investment scheme from the transfer or has lodged the security and all other documents relating to the transfer which may be required by the collective investment scheme with the collective investment scheme for being registered in his name within fifteen days of the date on which the income in respect of units or other instruments issued by the collective investment scheme became due.

Explanation. — The period specified in this section shall be extended —

(i) in case of death of the transferee, by the actual period taken by his legal representative to establish his claim to the income in respect of units or other instrument issued by the collective investment scheme;

(ii) in case of loss of the transfer deed by theft or any other cause beyond the control of

the transferee, by the actual period taken for the replacement thereof; and

(iii) in case of delay in the lodging of any security, being units or other instruments issued by the collective investment scheme, and other documents relating to the transfer due to causes connected with the post, by the actual period of the delay.

(2) Nothing contained in sub-section (1) shall affect —

(a) the right of a collective investment scheme to pay any income from units or other instruments issued by the collective investment scheme which has become due to any person whose name is for the time being registered in the books of the collective investment scheme as the holder of the security being units or other instruments issued by the collective investment scheme in respect of which the income in respect of units or other instruments issued by the collective scheme has become due; or

(b) the right of transferee of any security, being units or other instruments issued by the collective investment scheme to enforce against the transferor or any other person his rights, if any, in relation to the transfer in any case where the company has refused to register the transfer of the security being units or other instruments issued by the collective investment scheme in the name of the transferee."

. Substitution of new section for section 20A. — For section 29A of the principal Act, the following section shall be substituted, namely :—

"29A. Power to delegate. — The Central Government may, by order published in the Official Gazette, direct that the powers (except the power under section 30) exercisable by it under any provision of this Act shall, in relation to such matters and subject to such conditions, if any, as may be specified in the order, be exercisable also by the Securities and

Exchange Board of India or the Reserve Bank of India constituted under section 3 of the Reserve Bank of India Act, 1934 (2 of 1934).".

10. Amendment of section 30. — In section 30 of the principal Act, in sub-section (2), for clause (h), the following clause shall be substituted, namely :—

"(h) the requirements which shall be complied with —

(A) by public companies for the purpose of getting their securities, listed on any stock exchange;

(B) by collective investment scheme for the purpose of getting their units listed on any stock exchange;

11. Amendment of Act 15 of 1992. — In the Securities and Exchange Board of India Act, 1992, —

(i) in section 2, in sub-section (1), after clause (b), the following clause shall be inserted, namely :—

(ba) “collective investment scheme” means any scheme or arrangement which satisfies the conditions specified in section 11AA;’;

(ii) after section 11A, the following section shall be inserted, namely :—

“11AA. Collective investment scheme. —
(1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) shall be a collective investment scheme.

(2) Any scheme or arrangement made or offered by any company under which, —

(i) the contributions, or payments made by the investors, by whatever name called, are pooled and utilised for the purposes of the scheme or arrangement;

(ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement;

(iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;

(iv) the investors of not have day-to-day control over the management and operation of the scheme or arrangement.

(3) Notwithstanding anything contrined in subsection (2), any scheme or arrangement —

(i) made or offered by a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912), or a society being a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State;

(ii) under which deposits are accepted by anon-banking financial companies as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(iii) being a contract of insurance to which the Insurance Act, 1938, applies;

(iv) providing for any scheme, pension scheme or the insurance scheme framed under the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 (1 of 1952);

(v) under which deposits are accepted under section 58 A of the Companies Act, 1956 (1 of 1956);

(vi) under which deposits are accepted by a company declared as a Nidhi or a Mutual Benefit Society under section 620A of the Companies Act, 1956 (1 of 1956);

(vii) falling within the meaning of chit business as defined in clause (e) of section 2 of the Chit Funds Act, 1982 (40 of 1982);

(viii) under which contributions made are in the nature of subscription to a mutual fund; shall not be a collective investment scheme.”.

II. THE SECURITIES LAWS (SECOND AMENDMENT) ACT, 1999

This Act of Parliament received the assent of the President on the 16th December, 1999

and was published in the Gazette of India, (Extra.), Part II Sec. 1, No. 45, dated December 16, 1999/ Aghrayana 25, 1921.

Parliament Act No. 32 of 1999

An Act further to amend the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992 and the Depositories Act, 1996.

Be it enacted by Parliament in the Fiftieth Year of the Republic of India as follows :—

CHAPTER I

PRELIMINARY

1. Short title. — This Act may be called the Securities Laws (Second Amendment) Act, 1999.

CHAPTER II

AMENDMENTS TO THE SECURITIES CONTRACTS (REGULATION) ACT, 1956

2. Amendment of section 2. — In section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) (hereinafter in this Chapter referred to as the principal Act), after clause (g), the following clause shall be inserted, namely :—

‘(ga) “Securities Appellate Tribunal” means a Securities Appellate Tribunal established under sub-section (1) of section 15K of the Securities and Exchange Board of India Act, 1992 (15 of 1992)’;

3. Insertion of new section 2A. — After section 2 of the principal Act, the following section shall be inserted, namely :—

“2A. Interpretation of certain words and expressions. — Words and expressions used herein and not defined in this Act but defined in the Companies Act, 1956 (1 of 1956) or the

Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) shall have the same meanings respectively assigned to them in those Acts.”.

4. Amendment of section 22. — In section 22 of the principal Act, the following proviso shall be inserted, namely :—

”Provided that no appeal shall be preferred against refusal, omission or failure, as the case may be, under this section on and after the commencement of the Securities Laws (Second Amendment) Act, 1999.”.

5. Insertion of new sections 22A, 22B, 22C, 22D, 22E and 22F. — After section 22 of the principal Act, the following sections shall be inserted, namely :—

‘22A. Right of appeal to Securities Appellate Tribunal against refusal of stock exchange to list securities of public companies. — (1) Where a recognised stock exchange, acting in pursurance of any power given to it by its bye-laws, refuses to list the securities of any company, the company shall be entitled to be furnished with reasons for such refusal, and may,—

(a) within fifteen days from the date on which the reasons for such refusal are furnished to it, or

(b) where the stock exchange has omitted or failed to dispose of, within the time specified in sub-section (1A) of section 73 of the Companies Act, 1956 (1 of 1956) (hereafter in this section referred to as the “specified time”), the application for permission for the shares or debentures to be dealt with on the stock exchange, within fifteen days from the date of expiry of the specified time or within such further period, not exceeding one month, as the Securities Appellate Tribunal may, on sufficient cause being shown, allow, appeal to the Securities Appellate Tribunal having jurisdiction in the matter against such refusal, omission or failure, as the case may be, and thereupon the Securities Appellate Tribunal may, after giving the stock exchange, an opportunity of being heard, —

(i) vary or set aside the decision of the stock exchange; or

(ii) where the stock exchange has omitted or failed to dispose of the application within the specified time, grant or refuse the permission, and where the Securities Appellate Tribunal having jurisdiction sets aside the decision of the recognised stock exchange or grants the permission, the stock exchange shall act in conformity with the orders of the Securities Appellate Tribunal.

(2) Every appeal under sub-section (1) shall be in such form and be accompanied by such fee as may be prescribed.

(3) The Securities appellate Tribunal shall send a copy of every order made by it to the Board and parties of the appeal.

(4) The appeal filed before the Securities Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

22B. Procedure and powers of Securities Appellate Tribunal. — (1) The Securities Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Securities Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Securities Appellate Tribunal shall have, for the purpose of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely :—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) reviewing its decisions;

(f) dismissing an application for default or deciding it *ex parte;*

(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed.

(3) Every proceeding before the Securities Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Securities Appellate Tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

22C. Right to legal representation. — The appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Securities Appellate Tribunal.

Explanation. — For the purposes of this section, —

(a) "chartered accountant" means chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(b) "company secretary" means a company secretary as defined in clause (c) of sub-section (10 of section 2 of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(c) "cost accountant" means a cost accountant as defined in clause (b) of subsection (1) of section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.

22D. Limitation. — The provisions of the Limitation Act, 1963 (36 of 1963), shall, as far as may be, apply to an appeal made a to a Securities Appellate Tribunal.

22E. Civil court not to have jurisdiction. —

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Securities Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

22F. Appeal to High Court. — Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of fact or law arising out of such order :

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period jot exceeding sixty days.'.

6. Amendment of section 23. — In section 23 of the principal Act, in sub-section (2), after the word and figures "section 22, the words "or with the orders of the Securities Appellate Tribunal" shall be inserted.

7. Amendment of section 30. — In section 30 of the principal Act, in sub-section (2), for clause (ha), the following clause shall be substituted, namely :"(ha) the form in which an appeal may be filed before the Securities Appellate Tribunal under section 22A and the fees payable in respect of such appeal;".

CHAPTER III

AMENDMENTS TO THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992

8. Amendment of Section 15K

In Section 15K of the securities and Exchange Board of India Act 1992 (15 of 1992) (hereafter in this chapter referred to as the Principal Act), in sub-section (i), offer the words "under this Act" the words "or any other law for the time being in force" shall be inserted.

9. Amendment of section 15T. — In section 15 T of the principal Act, —
(a) for sub-section (1), the following sub-section shall be substituted, namely :—

"(1) Save as provided in sub-section (2), any person aggrieved, —

(a) by an order of the Board made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the rules or regulations made thereunder; or

(b) by an order made by an adjudicating officer under this Act, may prefer an appeal to a Securities appellate Tribunal having jurisdiction in the matter."

(b) for sub-section (2), the following sub-section shall be substituted, namely :—

"(2) No appeal shall lie to the Securities Appellate Tribunal from an order made —

(a) by the Board on and after the commencement of the Securities Laws (Second Amendment) Act, 1999;

(b) by an adjudicating officer, with the consent of the parties.";

(c) in sub-section (3), for the words "a copy of the order made by the adjudicating officer", the words "a copy of the order made by the Board or the adjudicating officer, as the case may be, shall be substituted;

(d) in sub-section (5), for the word "parties", the words "Board, the parties" shall be substituted.

10. Substitution of new section for section 15V. — For section 15V of the principal Act, the following shall be substituted, namely :—

'15V. Right to legal representation. — The appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Securities Appellate Tribunal.

(a) "chartered accountant" means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act:

(b) "company secretary" means company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.'.

11. Amendment of section 20. — In section 20 of the principal Act, in sub-section (1), for the words "an order of the Board made", the words, brackets and figures "an order of the Board made, before the commencement of the Securities Laws

(Second Amendment) Act, 1999," shall be substituted.

12. Amendment of section 20A. — In section 20A of the principal Act, —

(a) for the word "Board" wherever it occurs, the words "Board or the adjudicating officer" shall be substituted;

(b) for the word and figures "section 20", the words, figures and letter "section 15T or

section 20" shall be substituted.

CHAPTER IV

AMENDMENTS TO THE DEPOSITORIES ACT, 1996

13. Amendment of section 2.— In section 2 of the Depositories Act, 1996 (22 of 1996) (hereafter in this Chapter referred to as the principal Act), after clause (k), the following clause shall be inserted, namely :—

'(ka) "Securities Appellate Tribunal" means a securities Appellate Tribunal established under sub-section (1) of section 15K of the Securities and Exchange Board of India Act, 1992 (15 of 1992);'.

14. Amendment of section 23. — In section 23 of the principal Act, in sub-section (1), for the words, "an order of the Board made", the words, brackets and figures "an order of the Board made before the commencement of the Securities Laws (Second Amendment) Act, 1999" shall be substituted.

15. Insertion of new sections 23A, 23B, 23C, 23D, 23E and 23F. — After section 23 of the principal Act, the following sections shall be inserted, namely :—

'23A. Appeal to Securities Appellate Tribunal.
— (1) Save as provided in sub-section 92), any person aggrieved by an order of the Board made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the regulations made thereunder, may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Securities Appellate Tribunal from an order made by the Board with the consent of the parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the Board is received by the person referred to in sub-section (1) and it shall be in such form and be accompanied by such fee as may be prescribed :

Provided that the Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of forty five days if it is satisfied that there was sufficient cause for not filling it within that period.

(4) On receipt of an appeal under sub-section (1), the Securities Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Securities Appellate Tribunal shall send a copy of every order made by it to the Board and parties to the appeal.

(6) The appeal filed before the Securities Appellate Tribunal under sub-section (1) shall

be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

23B. Procedure and powers of Securities Appellate Tribunal. — (1) The Securities Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Securities Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Securities Appellate Tribunal shall have, for the purpose of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely :—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) reviewing its decisions;

(f) dismissing an application for default or deciding it ex parte;

(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed.

(3) Every proceeding before the Securities Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Securities Appellate Tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

23C. Right to legal representation. — The appellant may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of its officers to present his or its case before the Securities Appellate Tribunal.

Explanation. — For the purposes of this section, —

(a) “chartered accountant” means a chartered accountant as defined in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 (38 of 1949) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act:

(b) “company secretary” means a company secretary as defined in clause (c) os sub-

section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(c) "cost accountant" means a cost accountant as defined in clause (b) of sub-section (1) of section 2 of the Cost and Works Accountants Act, 1959 (23 of 1959) and who has obtained a certificate of practice under sub-section (1) of section 6 of that Act;

(d) "legal practitioner" means an advocate, vakil or an attorney of any High Court, and includes a pleader in practice.

23D. Limitation. — The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to an appeal made a to a Securities Appellate Tribunal.

23E. Civil court not to have jurisdiction. —
No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Securities Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

23F. Appeal to High Court. — Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of fact or law arising out of such order :

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.'.

16. Amendment of section 24. — In section 24 of the principal Act, in sub-section (2), after clause (c), the following clause shall be inserted, namely :—

"(d) the form in which an appeal may be filed before the Securities Appellate Tribunal under section 23A and the fee payable in respect of such appeal.".

III. THE NOTARIES (AMENDMENT) ACT, 1999

This Act of Parliament received the assent of the President on the 17th December, 1999 and was published in the Gazette of India, (Extra.), Part II Sec. 1, No. 49, dated December 20, 1999/ Aghrayana 29, 1921

Parliament Act No. 36 of 1999

An Act further to amend the Notaries Act, 1952

Be it enacted by Parliament in the Fiftieth Year of the Republic of India as follows :—

1. Short title. — This Act may be called the Notaries (Amendment) Act, 1999.

2. Amendment of section 2. — In section 2 of the Notaries Act, 1952 (53 of 1952) (hereinafter referred to as the principal Act), for clause (c), the following clause shall be

substituted, namely :—

‘(c) “legal practitioner” means an advocate entered in any roll under the provisions of the Advocates Act, 1961 (25 of 1961).’

3. Amendment of section 5. — In section 5 of the principal Act, —

(a) in sub-section (1), —

(i) in the opening portion, for the word “shall” the word “may” shall be substituted;

(ii) in clause (b), for the words “three years” the words “five years” shall be substituted.

(b) for sub-section (2), the following sub-section shall be substituted, namely :—

“(2) The Government appointing the notary, may, on receipt of an application and the prescribed fee, renew the certificate of practice of any notary for a period of five years at a time.”

4. Amendment of section 8. — In section 8 of the principal Act, in sub-section (1), —

(a) after clause (h), the following clauses shall be inserted, namely :—

“(ha) act as a Commissioner to record evidence in any civil or criminal trial if so directed by any court or authority;

(hb) act as an arbitrator, dediator or conciliator, if so required,”.

5. Amendment of section 10. — In section 10 of the principal Act, —

(i) in clause (d), the word “or” shall be inserted at the end;

(ii) after clause (d), the following clauses shall be inserted, namely :—

“(e) is convicted by any court for an offence involving moral turpitude; or

(f) does not get his certificate of practice renewed.”.

6. Amendment of section 12. — In section 12 of the principal Act, for the words “three months”, the words “one year” shall be substituted.

7. Amendment of section 15. — In section 15 of the principal Act, in sub-section (2), for clause (c), the following clause shall be substituted, namely :—

“(c) the fees payable for appointment as a notary and for the issue and renewal of a certificate of practice, area of practice or enlargement of area of practice and exemption whether wholly or in part, from such fees in specified classes of cases.”.

IV. THE INDIAN MAJORITY (AMENDMENT) ACT, 1999

[This Act of Parliament received the assent of the President on the 16th December, 1999

and was published in the Gazette of India, (Extra.), Part II Sec.1 No. 46, dated December 16, 1999/ Aghrayana 25, 1921]

Parliament Act No. 33 of 1999

An Act further to amend the Indian Majority Act, 1875

Be it enacted by Parliament in the Fiftieth Year of the Republic of India as follows :—

1. Short title. — This Act may be called the Indian Majority (Amendment) Act, 1999.

2. Amendment of preamble. — In the Indian Majority Act, 1875 (9 of 1875) (hereinafter referred to as the principal Act), in the preamble, for the words "to prolong the period of nonage, and to attain more uniformity and certainty respecting the age of majority that now exists", the words "to specify the age of majority" shall be substituted.

3. Amendment of section 1. — In section 1 of the principal Act, the word "Indian" shall be omitted.

4. Substitution of new section for sections 3 and 4. — For sections 3 and 4 of the principal Act, the following section shall be substituted, namely :—

"3. Age of majority of persons domiciled in India. — (1) Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

(2) In computing the age of any person, the day on which he was born is to be included as a whole day and he shall be deemed to have attained majority at the beginning of the eighteenth anniversary of that day."

V. THE ADMINISTRATORS-GENERAL (AMENDMENT) ACT, 1999

[This Act of Parliament received the assent of the President on the 16th December, 1999 and was published in the Gazette of India, (Extra.), Part II Sec. 1, No. 47, dated December 16, 1999/Agrayana 25, 1921].

Parliament Act No. 34 of 1999

An Act further to amend the Administrators-General Act, 1963.

Be it enacted by Parliament in the Fiftieth Year of the Republic of India as follows :—

1. Short title. — This Act may be called the Administrators-General (Amendment) Act, 1999.

2. Amendment of sections 9, 10, 29 and 36 of Act 45 of 1963. — In section 9, section 10, section 29 and section 36 of the Administrators-General Act, 1963, for the words "fifty thousand", wherever they occur, the words "two lakhs" shall be substituted.

VI. THE MARRIAGE LAWS (AMENDMENT) ACT, 1999

[This Act of Parliament received the assent of the President on the 29th December, 1999

and was published in the Gazette of India, (Extra.), Part II Sec. 1, No. 52, dated December 29, 1999/Pausa 8, 1921].

Parliament Act. No. 39 of 1999

An Act further to amend the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954.

Be it enacted by Parliament in the Fiftieth Year of the Republic of India as follows :—

1. Short title. — This Act may be called the Marriage Laws (Amendment) Act, 1999.

2. Amendment of section 5 of Act 25 of 1955.
— In section 5 of the Hindu Marriage Act, 1955, in clause (ii), in sub-clause (c), the words "or epilepsy" shall be omitted.

3. Amendment of section 4 of Act 43 of 1954.
— In section 4 of the Special Marriage Act, 1954, in clause (b), in sub-clause (iii), the words "or epilepsy" shall be omitted.

The minute you read something and you can't understand it, you can be sure it was written by a lawyer. Then, if you give it to another lawyer to read and he don't know just what it means, then you can be sure it was drawn up by a lawyer. If its in a few words and is plain, and understandable only one way, it was written by a non-lawyer.

Everytime a lawyer writes something, he is not writing for posterity. He is writing so endless others of his craft can make a living out of trying to figure out what he said. Course perhaps he had'nt really said anything, thats what makes it hard to explain.

Anyhow, they are like a lot more of the crafts that many of us live by, great but really useless. One level headed smart man could interpret every law there is. If you commit a crime, either you did or you did'nt, without Habeus Corpus, change of venue, or any other legal shindig.

— ROGERS, Will, as quoted in Kraemet, Sandy F., "Will Rogers — The Legal Profession's Best Critic," 59 ABAJ 1431 (December, 1973).

BIBLIOGRAPHY & BOOK REVIEW

Select Bibliography

V. Raghavendra Prasad
Legal Officer

(1) A.A.K. Azad, "Judicial Activism (Indian Judiciary A Savior of Life And Personal Liberty)", AIR 2000 Journal 17 – discusses the changing faces of Article 21 of the Constitution of Indian with the help of case law and observes that judicial activism is helpful and good for the institutional growth of democracy.
(2) C. Achutha Menon, "Too Many Judgements", AIR 2000 Journal 25 – focuses on the point of too many judgements in one judgement and concludes that even when five

judges sit together to decide one case, the decision should be embodied in one judgement.
3(a) D. Sura Reddy, "Article 44 : A Dead Letter?", (1996) 38 JILI 405 – elucidates the progressive attitude of the Apex Court in its Judgement in Sarla Madgal, President, Kalyani vs. Union of India (1995) 3 SCC 635 wherein the apex court observed that one country and one law shall be the lodestar and personal laws must make room for UCC thus infusing life into Article 44 of the Constitution which has still remained a dead letter since the Constitution came into force in 1950.
3(b) D. Sura Reddy, "Apex Court's Verdict Apropos of Article 324 – An Appraisal", (1996) 38 JILI 249 – points out the assertive and opposite attitude adopted by the Apex court apropos of T.N. Seshan, Chief Election Commissioner of India vs. Union of India (1995) 4 SCC 611 equating the Chief Election Commissioner to other Election Commissioners – stresses the need for a comprehensive electoral reform law in order to contain the deadly electoral syndromes plaguing the nation.

(3) Dr. K.R. Chandratre, "Importance of 'Appointed Date in Merger', (2000) 23 SCL 45 (magazine) – examines the significance of 'appointed date' or 'transfer date' and the 'effective date' in cases of amalgamation of companies, especially from the point of view of tax laws.
(4) Dr. V. Balachandran, "Consequences of Non-payment of Annual Listing Fee", (2000) 23SCL 36 (Magazine) – discusses a question, i.e., should a company whose securities are listed on a particular stock exchange be delisted by the stock exchange merely on the ground of non-payment of listing fee by the company in terms of the listing agreement.
(5) Dr. Shobha Saxena, "Parliamentary Privileges and the JMM Case", AIR 2000 Journal 26 – a note on the JMM bribery case.
(6) Dr. Lalit K. Bansal, "Credit Rating Agencies Regulations – Sans Accountability", (2000) 23 SCL 27 (Magazine) – examines the role played by a credit rating agency in the capital market and looks at the above mentioned regulations to find out how far these will be effective in ensuring healthy functioning of credit rating agencies.
(7) Dr. Shobha Saxena, "Child Marriages in Rajasthan A Challenge to Child Marriage Restraint Act", AIR 2000 Journal 44-highlights legislative efforts since 1929 to ban child marriages and provisions of Child Marriage Restraint Act, 1978 and points out the reasons why the said Act failed to bring complete success.
(8) G.P. Sahi, "Law Relating to Collective Investment Scheme", (2000) 23 SCL- 43 (Magazine) – a brief note on salient features of the SEBI (Collective Investment Scheme) Regulations, 1999 issued by the SEBI on October 15, 1999.
(9) Gopal Shankaranarayanan and Arjun Lall, "The Position of a Nominee in Insurance Law : Are We on the Right Track?", (2000) 23 SCL 16 (magazine) – a critical note on the provisions of nomination under section 39 of the Insurance Act, 1938 and discusses at length with the help of court decisions as to whether the nominee has the right to dispose of the amount received by him by virtue of his nomination at his sweet will or he receives it only as a trustee on behalf of the legal heirs of the deceased.
(10) Gopal Chalam, "Corporate Governance and Shareholders", (2000) 23 SCL 50 (Magazine) –explains the concept of Corporate Governance and brings out its significance in the context of the draft report of the Mangalam Committee set by the SEBI to suggest changes in the listing agreement of Companies with Stock Exchanges with a view to promoting Corporate Governance.

(11) Gopichand Rohra, "Confirmation of Shifting of the Registered Office from One State to Another – Relevant Considerations", (2000) 23 SCL 70 (magazine) – explains the procedure laid down in the Companies Act, 1956 and the rules and regulations to be complied with by the company if it wishes to shift its registered office from one State to another.

(12) Gujjar Mal, "Remedies for Deficiencies of Banking Services Under the Consumer Protection Act, 1986", 23 SCL (Magazine) – examines the concept of deficiency of banking service under Consumer Protection Act, 1986 and discusses a few types of deficiencies with the help of case law, viz. banks' failure to disburse loan, charging of higher rate of interest by bank against terms of agreement, delay in closing account, compensation of the losses, non-grant of loan despite completion of all formalities.

(13) N. Haridas, "Constitutionality of a Rajya Sabha Session to Discuss War?", AIR 2000 Journal 27 – examines the question of constitutionality of a Rajya Sabha Session to discuss war and illustrates and compares the experiences of Britain and China.

(14) Madhumita Dhar Sarkar, "Status of Woman and International Politics – Some Observations'', AIR 2000 Journal 30 – discusses the various international covenants relating to the status of woman and examines section 125 of Cr. P.C. relating to maintenance and observes that there must be an effective enforcement procedure both at the national and international level.

(15) K.S. Ravichandran and Dr. V. Balachandran, "Pitfalls of Buy-back Rules", – (2000) 23 SCL (Magazine) – examines the rules announced by the Dept. of Company Affairs vide Notification FSR No. 502 (E) dated July 6, 1999 for buy back of shares by Private and closely held companies and points out several gray areas, ambiguities and anomalies and lacunae therein which can generate unnecessary litigation.

(16) P.P. Rao, "Basic Features of the Constitution", (2000) 2 SCC1 (Journal) – this article is an abridged version of Dr. Alladi Krishnaswamy Ayyar Memorial Lecture, 1999 delivered by the author – an extensive study of basic features of the Constitution as enunciated in the land mark case Kesavananda Bharati vs. State of Kerala, (1973) 4 SCC 225 and throws light on few individual basic features namely rule of law, democracy, secularism and judicial review.

(17) Professor K.L. Bhatia, "Judicial Independence and Judicial Appointment : Independence from External And Internal Control", AIR 2000 Journal 33 – elucidates the importance and need of judicial independence in relation to judicial appointments and analyses the judicial responses to judicial independence and selection as well as appointment of justices of superior Courts.

(18) Sabita Bandyopadhyay, "Reforms in Judiciary – A Loud Thinking", AIR 2000 Journal 23 – briefly examines the reforms in judiciary in respect of appointment of High Court and Supreme Court Judges, importance of proper legal education, contempt of court and accountability of Judges.

(19) Sanjiv Agrawal, "Mid-term Credit Policy : A Balanced Approach", (2000) 23 SCL 152 (Magazine) – analyses the mid term credit policy announced by the Reserve Bank of India which will operate through the second half of the current financial year and indentifies the salient features of the policy and also pin points the likely impact of the policy on entities governed by it and on the national economy in general.

(20) Vinay Reddy, "Recovery of Debt Due to Banks and Financial Institutions Act, 1993 and Companies Act, 1956 : Some Anomalies", (2000) 23 SCL 33 – points out the conflict

between Section 34 of the DRT Act, 1993 and Section 446 read with section 529A(1) of the Companies Act, 1956 as both give overriding effect to the respective Acts in the winding up of a Company. Under Section 529A(1) of the Companies Act, 1956 workmen's dues are to be paid in priority over all other debts; under Section 446 of the Companies Act, no other law shall interfere with the winding up procedure given in section 446 of the Act; under section 34 of the DRT Act, the provisions of the said Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

(21) Vinay Reddy and Prakash N, "Insider Trading – Need to Strengthen Legal Regulations", (2000) 23 SCL 1 (magazine) – deals with the meaning of insider trading and suggests that the SEBI (Insider Trading) Regulations, 1992 need to be strengthened.

(22) Yash J. Ashar, "Foreign Exchange Regulation Act, 1973 vs. Foreign Exchange Management Bill, 1999", (2000) 23 SCL 135 (Magazine) – an elaborate comparative study of the provisions of FERA and the FEMA and discusses the definition clauses, powers of Reserve Bank of India, regulation and management of foreign exchange, convertibility, concept of resident and non-resident, prosecution and punishment under FERA and FEMA.

Lawyers give the highest prestige to corporate and big business lawyers, including securities, antitrust, patents, banking, public utilities and general corporate law. Lowest is given to poverty law and low prestige of criminal law, family law, consumer law, personal injury law and divorce.

— See The practicing Attorney's Letter, April 28, 1977 p. 66

A leader who doesn't bend with every breeze may not be universally loved, but he is very likely to be respected.

— Editorial "Minimal Response", the Wall Street Journal, April 8, 1980, p. 24 col. 2

The banker, the lawyer, and the politician are still our best bets for a laugh. Audiences haven't changed at all, and neither has the three above professions.

— The Autobiography of will Rogers, edited by Donald Day p. 394

BOOK REVIEW
Joint Ventures
International Business with Developing Countries
By Dr. M.B. Rao

Vikas Publishing House Pvt. Ltd., 576, Masjid Road, Jangpura, New Delhi-110 014
1999, 1st Edition Price Rs. 595/- (HB)

P.S.N. Prasad
Asst. Legal Adviser

The author, Dr. M.B. Rao is a former member of the Law Commission of India. He has an excellent academic record with, B.L. degree from Madras University, LL.M. in Revenue and Company Law from the University of London, and Ph.D. in International Economic Law and Double Taxation from the University of Delhi. He has done extensive research work in Contract Law (including Mercantile Law) at the Madras University during 1948-50 and International Economic Law and Double Taxation at the Academy of

International Law in Hague (Netherlands). He was enrolled as an Advocate in the year 1951 and has held various government posts. In the 1974-75 and 1983, he acted as Tax Law expert for the United Nations in Trinidad and Tobago. He participated in a number of International Conferences and was a leader of the Indian delegation to the United Nations Conference on International Trade Law in 1982. His earlier work titled **Taxation of Foreign Income – India's Double Tax Treaties** has received good response from the readers.

2. This work is a representation of the authors vast knowledge and experience and gives the reader an indepth analysis of the concepts underlying joint ventures, the negotiations involved and the terms of joint venture agreements. The broad features of the work do include explanation of joint venture agreements from the time of formation to establishment, Bilateral Investment treaties between two contracting states, guaranteeing of investments against expropriation, a special chapter on Indian Law on Intellectual property and elaboration of tax implications of joint ventures; includes topics like Multilateral Investment Guarantee Agency (MIGA), Settlement of disputes between joint venture partners through UNCITRAL rules, ICSID Rules, etc., protection of foreign investments through bilateral investment treaties and trade marks, patents, copy rights etc. and also explains the precautions to be taken against the infringement of these intellectual property rights.

3. This work focuses on the methodology of entering into joint ventures and the consequences arising thereform. It deals with the various issues like the terms and conditions under which agreements for investment of capital and provision of goods and services are entered into and the problems of protection to foreign investments against expropriation by host countries. It highlights the tax implications of an investment decision not only to the country of residence and the host country, but also the foreign enterprise which make investments or which provide goods and services, as well as to the local enterprises in the host countries which enter into the joint venture agreement. Exemption provided under the national laws to attract foreign exchange as well as competent technical personnel are dealt with. Indian law on Intellectual property rights, foreign exchange regulations and company law applicable to foreign companies are also dealt with.

4. The contents of the book are divided into five parts. Part I consist of five chapters dealing with (1) the joint ventures concept, (2) the motives to set up the joint ventures, (3) requirements for joint venture project negotiations and its organisations, (4) arrangements between joint ventures partners, and (5) the kinds of agreements and terms and conditions for technology. The change in international business has unlocked lot of challenges and opportunities. The specific method employed by the companies operating in international environment can be classified in four categories viz., marketing abroad directly, establishing co-operative contractual relationship with foreign companies, operating wholly owned facilities in other nations and entering into strategic alliances (page 4). The author has said that five essential features may be noticed to characterise a joint venture. They are as follows :

1. An agreement between the parties on common long term business objectives such as production, purchasing, sales, maintenance, repair, research co-operation, consultants, financing etc.
2. A pooling by parties, for the achievement of the agreed objectives, of assets such as

money, plant, machinery, equipment, management know-how, intellectual property rights and other facilities.

3. A characterisation of pooled assets as capital contribution by the parties.
4. Pursuance of the agreed objectives through management organs which are separate from the management organs of the parties; and
5. A sharing between the parties, usually in proportion to their respective capital contributions, of the profits, resulting from the risks associated with, the pursuance of agreed objectives, the liabilities of the parties being normally limited to their capital contributions.

From the point of view of legal nature and organisation, the joint ventures can be established in two different forms i.e. either as **equity joint venture or as contractual joint venture** (page 3).

5. In the next part (Part II) the author has dealt with the attempts by the State to safeguard foreign direct investment. One chapter deals with bilateral investment treaties entered into between the host Government and the home Government of the foreign investors to protect the investments. The author has analysed various clauses usually found in the bilateral investment treaties; types of investment, persons and the territory that are covered under the treaties; fair and equitable treatment, non discrimination rules on currency transfer either for repatriation of capital and/or earnings in the host country, convertibility and rate of exchange, most favoured nations treatment, and when expropriation/nationalisation of capital investment is made, compensation for losses etc. The author further observes that another way of protecting the investment is to provide for financial guarantee and for that purpose, World Bank has set up Multilateral Investment Guarantee Agency (MIGA). The various articles of convension adopted by the World Bank members and the commentary thereon guaranteeing non commercial risk in the investment made in the host country are also dealt with.

6. The author has given special importance to the settlements of disputes arising out of investments. This is dealt with in Part III of the book. Any agreement may lead to differences between the contracting parties, either in implementing the joint ventures agreement, or in the terms of bilateral investment treaties, or in the insurance guarantee by the MIGA, etc. The author has dealt with the resolution of disputes, by conciliation between the disputant parties failing which by negotiations, in both the cases with the help of outside independent persons. Failing these two methods, the author has opined that it should be resolved by arbitration, either by single arbitrator or by two arbitrators, each side nominating an arbitrator or by three arbitrators, consisting of a nominee of each side and the umpire being selected by both the parties or by an agreed third party, generally by an international organisation, consisting a nominee of each side and the umpire being selected by both the parties or appointed by an agreed third party, generally by international organisation, the award being made final and binding on the parties. In this context, the UNCITRAL rules, ICSID rules, ICSID Additional Facility Rules, ICC rules, and Indian Arbitration and Conciliation Act, 1996 are also dealt with by the author to give the reader a proper understanding of the resolution of disputes.

7. While discussing Indian Law on Intellectual Property Rights (Part IV) on copy rights, patents, trade marks, designs etc., the author has cited the relevant case law. As a joint venture agreement on intellectual property will have to co-relate with Indian Law in

India, the Indian laws dealing with intellectual property rights are examined. Further, the author has emphasised the need for amending the laws to bring them in the line with the obligations undertaken in international context. Technical know-how includes all the undivulged technical information, whether capable of being patented or not, the test necessary for information, whether capable of being patented or not, the test necessary for industrial reproduction of a product or process directly or under the same conditions. Inasmuch as it is derived from experience, knowhow represents what a manufacturer cannot know from mere examination of the product and mere knowledge of the progress of the technique (page 141). The author has stated that technical knowhow may be broadly in four forms viz. (i) foreign consultancy (ii) drawings and designs (iii) technical development and training of personnel and (iv) small values of balancing equipments (page 141). The author has explained the obligations to maintain secrecy attached to both stages of the transfer with the help of decided case law. In **John R. Brady vs. Chemical Process Equipment's Pvt. Ltd. (AIR 1987 Delhi 372)** certain drawings of a machinery were supplied by the foreign collaborator to an Indian party. When the Indian party made an unauthorised use of the same, though the negotiations for the transfer of knowhow fell through, i.e. in breach of confidence the Indian party started to manufacture machine which were a substantial imitation of the drawings supplied by the foreign collaborator, the foreign collaborator was granted an injunction. Though the injunction was granted for infringement of copy rights, the case is important in that it emphasises the concept of confidentiality or secrecy to be maintained in supply of know-how as well.

8. The tax provisions are dealt with in Part V –how the tax issues affect the investors, the foreign enterprises and Indian partners and the joint ventures by Indian partners abroad. In Chapter X, the tax treatment of joint venture agreement are discussed with the help of important court decisions. Chapter XI deals with tax treatment of the Indian collaborator/partner. Chapter XII details are exemption of income from tax in India to attract foreign exchange inflows and technical personnel, interest income from bonds/certificate etc. The special rates of tax on interest, royalty and the dividends related tax issues are also discussed. The liberalised economic approach of India and the special rates of tax on foreign exchange inflows from foreign institutions are also highlighted. Chapter XIII speaks of joint ventures floated by Indian partners abroad. The beneficial tax treatment to Indian professional/technicians working abroad who bring valuable foreign exchange and to Indians who render technical services abroad/to foreign enterprises and remit convertible foreign currency as per the provisions of FERA are dealt with. The author may, in the next edition, require to modify this Chapter in the light of FEMA. In a separate chapter i.e. Chapter XIV, the tax concessions provided in the 1998 budget for infrastructure projects for greater inflow of foreign exchange from NRDS by issue of bonds etc. are dealt with by the author.

9. It is well known that double taxation is a very difficult concept to understand but the author has dealt with the same in Part VI of his work in such way as to make us understand how to avoid/ prevent international double taxation of the same income once in the country of source where it is earned and again the country of residence of investors/foreign enterprises. Double Taxation acts as a deterrent against free flow of capital, goods and services from one country to another. The author has also touched upon various Articles in UN Model Convention to avoid double taxation indicating their scope and effect.

10. Part VII consists of two Chapters. Chapter XVI deals with Form of Regulation and deals with inflow and outflow of foreign exchange and how the Reserve Bank of India keeps a tab on them. Chapter XVII deals with the Indian Company Law, especially those provisions relating to winding up of foreign companies under the Act. An operating joint venture may be carried on by floatation of a new entity, generally under the Companies Act. In this Chapter a brief outline of the law to be complied with by new entity in India is given. With the help of decided case law, as well as referring to the provisions of Companies Act, the author has explained how the Indian authorities keep a watch on foreign companies in India.

11. While dealing with winding up of foreign companies, the author has given a useful extract of the principles enunciated by **Megarry J. in Re Compania Merabello San Nicholas S.A. (1972)** **(3 AII ER 448)** regarding the existence of jurisdiction to make a winding up. The principles, in brief, are the following :

(1) There is no need to establish that the company ever had a place of business here.
(2) There is no need to establish that the company ever carried on business unless the petition is based on carrying on or having carried on business;
(3) A proper connection with the jurisdiction must be established by sufficient evidence to show :
    (a) that the company had some assets within the jurisdiction and
    (b) that there are one or more persons concerned in the proper distribution of the assets over which the jurisdiction is exercisable;
(4) It suffices that the assets of the company, within the jurisdiction of any nature, need not be commercial assets or assets which indicate that the company formerly carried on business here;
(5) It also enunciates that the assets need not be distributed to the creditors by the liquidator in the winding up and that they will be of benefit to the creditor or creditors in some other way;
(6) If it is shown that there is no reasonable possibility of benefit accruing to the creditors from making the winding up order, the jurisdiction is excluded.

The Author has stated that the above observations have been referred to and followed in a number of cases (page 270).

12. Copies of the New Industrial Policy Resolution, the Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS), the guide for use in drawing up contracts for transfer of know-how drawn up by Economic Provisions for Europe (United Nations) and specimens of joint venture agreement, agreement on transfer of know-how and financial collaboration agreement are also appended for reference. Copies of the Notifications of Reserve Bank of India under FERA are also enclosed. This particular sub-chapter may require revision in due course as FERA is replaced by FEMA.

13. The Book evidently speaks of the legal aspects and other related aspects of joint ventures and the reader will definitely be interested in knowing the various aspects to be looked into before interacting with foreign enterprises and capital importing countries like India. Since this sub-continent is in its transition period of international business, the business formulations, especially equity joint ventures and contractual joint ventures need to be understood in their legal and operational aspects. This book provides a good insight

into the basic tenets of negotiations involved and terms of joint venture agreements. The book also represents the author's practical exposure in the field of joint ventures and international business formulations.

14. In short, Shri M.B. Rao has presented the economic laws of joint ventures in the international context with special reference to Indian environment in a very lucid manner. The book is worth its value and will of be an essential guide for providing a clear understanding of joint ventures in international business with developing countries.

LD News

Shri N.V. Deshpande, Principal Legal Adviser inaugurated the Joint Seminar of Chair Persons of Debt Recovery Appellate Tribunals, Presiding Officers and Recovery Officers of DRTs and Senior Executives of Banks and Financial Institutions conducted by the National Institute of Banking Studies and Corporate Management on March 6, 2000 at New Delhi.

Welcome

Smt. Geetha G. has joined the services of the Bank as Legal Officer in Gr. 'B' on 28th February 2000. Smt. Pujar, Steno has been posted to Legal Dept. with effect from 11th February 2000.

Transfer

Shri A.A. Deshpande, Stenographer was transferred to DEAP with effect from 1st February 2000.

Certiorari : A writ by which record of procedures are removed from inferior courts to High Court.
Cestui que trust : The person who possesses the equitable right to property and receive the rents etc.
Consensus ad item : Common consent necessary for a binding contract.
Contemporanea expositio est optima et fortissima legf :
A contemporaneous exposition or language is the best and strongest in law.
Corpus delicti : Body/gist of the offence.
Ly Pres — As nearly as may be practicable.

We could all save ourselves a lot of words if we'd only remember that people rarely take advice unless they have to pay for it.

Bits & Pieces, August 1982, p. 20.

I don't care whether you follow any advice or not, and it doesn't bother me if you do or not.

Wilson John

Mail Bag

Dear, Sir,

I had an opportunity to go through the contents of the July-September 1999 issue of your quarterly publication "RBI Legal News and Views". I appreciate your efforts to bring out this journal for the benefit of Banks and Financial Institutions, especially for Legal field.

I request you to include my name in the mailing list of those who are desirous of getting copy of your esteemed unpriced publication so as to enlight/update myself with the latest debatable articles/ developments/judgements.

My mailing Address :

Y. Raja Rajeshwar H.No. 40/2, Kazi Street, Near South End Circle, Basavanagudi, Bangalore-560 004.

Thanking you for your time.

Yours faithfully,

(Y. RAJA RAJESHWAR)

Dear Sir,

Sub : Request to send us copy of "R.B.I. LEGAL NEWS & VIEWS"

We came across a recent copy of your bulletin in Bankers Training College, Mumbai. We found the same well informative and very much useful for our branch since we are dealing with NPAs & suit filed accounts. We request you to please keep our name in your mailing list. Our address is as below.

The Asst. General Manager,
INDIAN BANK,
Asset Recovery Management Branch,
89-B–Sundaram, Opp. Rupam Cinema,
Sion (East), Mumbai-400 022.
Tel. : 401 4502, 409 95 566.

We shall be obliged, if you can arrange to send us the copies of earlier issues of your bulletin.

Thanking you,

Yours faithfully,
Asst. General Manager

Dear Sir,

Reg. : RBI Legal News and Views

The journal, RBI Legal News and Views published by Legal Department of Reserve Bank of India is quite informative and useful for our office and officers attached to it. As

the journals are very often referred to while adjudicating the complaints, we have been keeping the same in our liabrary, (issue upto December 1998 collected from your office).

We shall be thankful if you could kindly arrange to mail the journals published during the year 1999 to this office and our name is included in the regular mailing list for future publications/issues.

Yours faithfully,

S.L. Gaur
Secretary
Office of Banking Ombudsman,
Gujarat & UTS of Dadra & Nagar Haveli,
Daman & Diu La Gajjar Chambers,
RBI Building, 4th Floor, Ashram Road,
Post Bag No. 1, Ahmedabad.

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I had an opportunity to go through the contents of the July-September 1999 issue of your quarterly publication "RBI Legal News and Views". I appreciate your efforts to bring out this journal for the benefit of Banks and Financial Institutions, especially for Legal field.

I request you to include my name in the mailing list of those who are desirous of getting copy of your esteemed unpriced publication so as to enlight/update myself with the latest debatable articles/ developments/judgements.

My mailing Address :

Varada Ramakrishna
C/o. Narasimhulu Naidu,
No. 1241, 9th Main, 5th Cross,
Srinivasa Nagar, BSK I Stage,
Bangalore-560 060.

Thanking you for your time.

Yours faithfully,

(VARADA RAMAKRISHNA)

Sir,

Sub : Inclusion in mailing list

I am working as Manager (Law), Indian Bank, Legal Department, Central Office, Chennai.

I shall be grateful if you will please include my name in your mailing list, as I consider that your Journal "RBI Legal News & Views" would be of immense use in my fuction as

Manager (Law).

Thanking You,

Yours faithfully,

(S. RAJAGOPAL)

S. Rajagopal, B.A. B.L.,
Manager (Law),
Indian Bank,
CO : Legal Department,
31, Rajaji Salai,
Chennai-600001.

Dear Editor,

RBI : Legal News & Views

While I was at Bankers Training College Mumbai recently, I had an opportunity to go through the captioned magazine. The articles are very much informative and useful to the Law Officers in Banks. The Journal Section, Judgement Section and Legislative Section are well compiled.

I would like to be a regular reader of your esteemed magazine and I would request you to enrol my name for subscription. The magazine may please be sent to me at my residential address as stated below.

Thanking you Sir,

Yours faithfully,

(R.G. Patnaik)

Rajgopal Patnaik
Flat No. 311,
97/1, Chandi Ghosh Road,
Tollygunge,
Calcutta-700 040.

Dear Sir,

R.B.I. Legal News and Views — House Journal of the Legal Department

It is indeed a pleasant surprise to go through the issue of the R.B.I. Legal News & Views, the House Journal of Legal Department of Reserve Bank of India.

I shall be thankful if you kindly enroll me on your direct mailing list.

Kindly also advise about acceptabililty of and guidelines for the contributions of articles on law.

Thanking you,

Yours faithfully,

(SHRIKANT)

SHRIKANT
Chief Manager (Legal),
Legal Service Division,
Corporation Bank,
Head Office, Pandeshwar,
Mangalore-575 001.

Ed. Note : We are including the names of the readers in the mailing list as requested.

Life is painting a picture, not doing a sum.
— HOLMES, Oliver Wendell, "Class of '61," Speeches (Boston : Little, Brown and Company, 1913),
p. 96.
Life is action, the use of one's powers. As to use them to their height is our joy and duty, so it
is the one end that justifies itself.
— HOLMES, Oliver Wendell, Speech to Bar Assoc. of Boston, Speeches (Boston : Little, Brown
and Company, 1913), p. 85.