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Form The Editorial Desk

People love holidays. Oxford Dictionary defines a holiday a day on which ordinary occupations of an individual or a community are suspended; a day of exemption or cessation from work (generally does not include Sundays). Public holidays include Sunday and any other day declared by the Government by notification in the Official Gazette to be public holiday (negotiable Instruments Act, 1881, Section 25, Explanation). Public holidays declared under the Negotiable Instruments Act have financial implications and are usually applicable to Government institutions and banks only. But some times even commercial establishments and industrial undertakings also adopt these holidays. These holidays are off-days granted by the employers to the employees either voluntarily or compulsorily under the force of law. India is the home of different communities and religions and various States have fixed the number of holidays under the N.I. Act accordingly. India, Court have observed on more than one occasion that there are too many public holidays in our country. The urgent and paramount need in the direction of increasing the country's productivity is the reduction of number of holidays, particularly, in the matter of public utilities and other concerns which are producing essential goods and services in the country. Employers' Federations Employees' Unions have always differed in their

suggestions about the level at which uniformity in number of holidays should generally be achieved in different States of the country. There is a need to rationalise public holidays in the banking industry. Every employee shall be allowed in each calendar year National Holidays of whole day on January 26 (Republic Day), August 15 (Independence Day) and October 2 (Mahatma Gandhi's Birth day). In addition to the three National Holidays, no employee shall get more than say, five festival and other holidays as may be notified by the State Government or by such other authority as may be prescribed by law so that the total public holidays in a calendar year shall not exceed eight. Keeping in mind the contentions of the management and workers as well as economic needs of the country and its expectations from them and the industries, as a step in the direction of reduction of public holidays, a judicial review in a Court of law, if challenged, is imperative. Indeed in the past, [Pfizer Case (1963) Supw SCR627] Constitution Bench of Five Judges of the Apex Court had considered and upheld reduction of paid holidays to 8 from 27 enjoyed by workmen for long as public holidays under the N.I. Act.

In this issue, we begin the journal section with an article on the legal issues of electronic funds transfer (electronic payment and settlement system). Another article examines the 'alarming' legislative tendencies seen in the Finance Act, 2001. In the Legislation Section we have included the Fiscal Responsibility and Budget Management Bill, 2000. The judgement section section covers a number of recent judgements of the Supermen Court on a variety of subjects of current interest particularly to banks and financial institutions. In our Bibliography Section, we have, as usual given the gist of articles appearing in different journals on legal matters relevant to banks and financial institutions. The Book Review relates to Law Relating to Power of Attorney by S. Parameshwaran. We have also included a list of important new arrivals in the L.D. Library. Finally, we conclude this issue with the regular features like LD News and Mail Bag.

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Legal Issues In Electronic Funds Transfer (Electronic Payment And Settlement System)*

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I. Introduction

Electronic payment system denote implementation of a payment system electronically. A payment system consists inter alia of payment instruments, its transfer, payment settlement, infrastructure therefor, supervision and regulation thereof. Establishment of infrastructure of an electronic payment system needs consideration of technology issues which are taken care of by information technology experts. Legal issues arising out of payment instruments, its transfer, settlement and regulation including infrastructure are the concerns of legal experts and can be handled either on contractual or statutory basis.

2. In India electronic payment system had preceded the requisite legal framework to support it. Whenever legal support has been felt necessary, in absence of availability of proper legislation in

this behalf, contractual legal support has been resorted to by execution of various complex agreements between the parties and application of analogous laws and the general principles of common law. Various efforts have been made by the institutions concerned and the Reserve Bank of India to examine legal issues involved and identify the existing laws to be amended and new laws to be enacted.

II. Electronic Instruments and its transfer

3. Cash is traditionally a secure instrument of a payment system. Paper based instruments including negotiable instruments as defined under Section 13 of the Negotiable Instruments Act are an alternate to Cash. Recently, electronic funds transfer is gaining momentum. For transfer of funds electronically, either message for transfer of funds is sent electronically or image of instrument of transfer of funds is sent electronically or electronic file containing the details of the funds transfer is sent by electronic media or an electronic cheque can be sent electronically or funds are transferred by various types of plastic cards. That apart, the securities can be issued in demat form and transferred electronically by creating electronic transfer forms and sending the same electronically.

III. Legal Issues in electronic funds transfer

4. Shere Committee has examined various transactional issues relating to Electronic Funds Transfer such as:

(A) Type of Transfers; i.e.

(a) **Credit Transfer;** Payment of fixed amounts at regular intervals i.e. payment of interest, dividends by various companies and institutions etc. In this the instruction is given by person making the payment.

(b) **Debit transfer;** Payment of bills of telephone, electricity etc. In this the instruction is given by person receiving the payment. In debit transfer, banks make payment out of their customer's account to third person who instruct the bank to transfer the amount to his own account with his bank. This will be done if the customer of the paying bank gives it an appropriate mandate for the purpose. The payment is therefore initiated by the payee.

(c) **High Value and Low Value Fund Transfers:** Credit transfers are divided into two types:

- **(i)** **Low Value Fund Transfer (High Volume):** Low value fund transfer instructions are executed in batches through an automatic clearing house. The settlement of obligations between banks is done on an end of the day on netting basis.
- **(ii)** **High Value Fund Transfer :** These are executed on real time basis and settlement is normally done on gross basis in respect of each transfer.

(d) **Automated Transfer Machine(ATM) Transfer :** The ATM system is generally operated through an electronic device and is used for withdrawing of cash, depositing of cash and cheques and connected operations like transfer of funds from one account to another account. The relationship between the bank and the customer is determined by the contract.

(e) **Electronic Funds Transfer at Point of Sale (EFTPoS) :** EFTPoS is basically an Electronic Clearing System which can accept credit card entries and transaction cards or debit cards, ATM Cards and charge cards. In EFTPoS, the two minimum parties to a credit card transaction are the purchaser who uses the card to pay and the merchant who accepts the payment. Additional parties include the bank that issued the card to the purchaser and the bank which enrolled the merchant in the credit card system and the credit card corporation who usually process the transaction. The legal relationship between the participants are normally built by a complex chain of contracts

(f) **Cheque Truncation :** Cheque Truncation is a process in which the image of the relevant data of a cheque is electronically captured and transmitted to enable payment of that cheque to the payee's account and simultaneously debiting the account of the drawer without the physical movement of the cheque itself.

5. Shere Committee has identified following legal issues in Electronic Funds Transfer (EFT) and observed as under:

(a) Irrevocability - Finality of Payment
(b) Liability for loss in case of fraud, technical failure and errors
(c) Allocation of loss in case of insolvency
(d) Cheque truncation
(e) Evidence and burden of proof
(f) Preservation of Records
(g) Data Protection
(h) Dispute resolution
(i) Prevention of fraud
(j) Settlement of inter-bank payment obligations

(a) Irrevocability - Finality of Payment :

Irrevocability

6. The point of time upto which electronic payment instructions can be varied or revoked/rescinded by the issuer is not provided by the existing law. By analogy it could be

- A payment instruction becomes irrevocable once it is issued by the originator.
- Payment instruction order becomes irrevocable when the sending bank issues it or executes it.
- Payment instruction becomes irrevocable when the beneficiary bank receives it.
- Payment instruction becomes irrevocable when the beneficiary's bank credits the beneficiary's account with the amount of the payment order.
- Payment instruction becomes irrevocable when the beneficiary's bank commits itself irrevocably by issue of advice of credit to the beneficiary.

But the Shere Committee has recommended that the electronic payment instructions, shall become irrevocable when it is executed by the sending bank. A payment order is treated as

executed when the sending bank communicates the payment order to its service branch for further processing of the order. Information Technology Act, 2000 ("I.T. Act") provides that despatch of an electronic record occurs when if enters computer resource outside control of the sender (Section 13).

Finality of Payment

7. The Negotiable instruments Act which provides for rules of finality of payment cannot be applied to EFT as EFT do not involve any paper instrument. The point of time at which payment is deemed to be made could be any of the following

- Payment is made when the beneficiary is advised of the credit from his bank (receipt of credit advice by the beneficiary).
- Payment is made when the beneficiary's bank despatches credit advice to the beneficiary.
- Payment is made when the beneficiary's bank credit the beneficiary's account.
- Payment is made when the beneficiary's bank receives the payment order for credit to the beneficiary's account.

But the Shere Committee has recommended that payment under the EFT shall be final when the receiving bank credits the funds to the account of the beneficiary whether or not the beneficiary is advised of the credit. Section 13 of the I.T. Act provides that receipt of the electronic record occurs -

(a) if the addressee has designated a computer resource for the purpose of receiving electronic records,-

(i) at the time when the electronic record enters the designated computer resource; or
(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, at the time when the electronic record is retrieved by the addressee.

(b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

(b) Liability for loss in case of fraud, technical failure and errors

8. Study of the systems in other countries indicate that loss arising on account of errors may be different from loss arising on account of negligence though at times negligence may lead to error. The rule for allocation of loss arising on account of errors are generally based on principles of Contracts and Torts. Generally, if the loss can be attributed to the conduct of the party to the transaction, that party becomes liable for it. Where neither party directly liable under the principle of "party at fault", the equity rule provides that the party whose conduct lead to the fraud to take place or caused an error to take place, must bear the loss. In terms of provisions of Section 79 of the I.T. Act, a network service provider is not liable under the Act, rules or regulations made thereunder for any information dealt with by it if he proves that the offence or contravention was committed without his knowledge or that he exercised all due diligence to

prevent the commission of such offence or contravention.

(c) Allocation of loss in case of insolvency

9. EFT is a method or means. But the incidence of insolvency of any bank involved in an EFT could be substantially different from those arising in a paper based payment. In EFT, there could be a float between the point of time a payment order is issued by a customer to the point of time when payment is complete. The issue that needs to be focussed is, if payment is suspended by any bank participating in the EFT before settling its payment obligation, on whom does the loss fall? Should the beneficiary bear the loss? Should the initiator of the payment order bear the loss? Or, should the sending bank or beneficiary's bank bear the loss?

10. Under the English Law, on which most of Indian banking law principles are based, the following position is stated:

- If a bank having given a commitment to pay becomes insolvent before discharging its obligations, the bank to whom that commitment was given has no claim to any funds. It will only have a mere claim in the insolvency in competition with other creditors, while the creditor customer for whom the commitment constituted conditional payment has a right to demand payment from the debtor customer.
- Where the receiving bank becomes insolvent after the payee's account has been credited, the creditor customer has to bear the loss.
- If a bank goes into liquidation before it has collected a cheque, it has no right to recover the sum in question back from its customer.
- A credit transfer, once initiated, may be reversed by the paying bank up to midnight on the day of the transfer (but not later), even though the credit has not been communicated to the beneficiary. There is no reason to distinguish an in-house transfer from an external payment in this respect.

11. The Companies Act or the Banking Regulation Act, 1949 (BR Act) in India, do not provide any satisfactory solution. In practice, by operation of Clearing House Rules, netting of transactions (clearing inward and clearing outward) on the date of suspension of payment by a bank is resorted to and the surplus, if any, is treated as money held in trust in the hands of the liquidator. These provisions also do not provide a satisfactory solution. In case of RTGS (Real Time Gross Settlement), the rule of reversing the credit can not be applied. Therefore, a legal provision is necessary to be made in an appropriate legislation that the transaction once cleared through RTGS would not be reversed even in case of insolvency.

12. In case of EFT, apart from the nature of legal relationship of the party, the point of time at which the customer's account is debited and the point of time at which the settlement between banks take place may have significance for considering the incidence of insolvency. The following options could be considered:

- Establishment of a contingency fund.
- Distribution of loss among the participants.
- Provision for collateral.

- Provision for insurance.

13. A predetermined fee towards the corpus of the contingency fund could be raised from the participating members. This, however, will not be possible unless the existing provisions of the Insurance Act is amended. Alternatively, sharing of loss may be pursued on some principles like the size of the participants or volume of transaction for distribution of loss. The other alternative is to require each participant to keep collateral. This would involve policy consideration as it may immobilise resources of banks. Which of these alternatives may have to be pursued, will ultimately have a bearing on a suitable clearing and settlement procedure to be adopted.

(d) Cheque truncation

14. There are basically three issues which need to be considered :

- Does our existing law permit cheque truncation?
- Does the advantage of cheque truncation outweigh the accompanying risk involved in the process?
- What changes are called for in law, at this stage of development of technology in India, for following cheque truncation system?

Under the Negotiable Instruments Act, 1881 (NI Act), cheques have to be presented for payment to the bank on which these are drawn. Without such presentment, no cause of action arises against the drawer. Section 64 of the Act ibid declares that in default of presentment of a cheque to the drawee for payment, other parties to the cheque are not liable to the holder. A collecting bank, by implied contract assumes an obligation to present the cheque at the drawee bank and that obligation is discharged only when the cheque is so presented. The fact that the presentment for this purpose means physical presentment is clear from the following addition made to Section 64 by an amendment in 1885.

"Where authorised by agreement or usage, a presentment through the post office by means of registered letter is sufficient."

15. By banking practice, both in India and in England it is open to banks to agree to presentment at any place other than the branch, such as at a clearing house.

16. The right of the paying bank to require physical presentation and possession of the cheque is designed to provide it with an opportunity to examine the signature or other authentication of the cheque, to examine the "apparent tenor" for its accord with the formal requirement of law, to be sure that there is no material alteration and that a paid cheque is not presented for second time. In large measure the existing requirements are designed for the protection of the drawer.

17. If a customer claims that the payment by his bank against the cheque was without proper mandate, the paying bank can rebut his claim only by producing the paid cheque (in original), and showing that it had discharged its obligation under law by verifying the signature and apparent tenor and that the payment was in due course. In the absence of such proof, the paying

banker is bound in law to recredit the amount. In the U.K., banks have tried to reduce the risk by obtaining customer consent agreements to enable them to waive physical presentment of cheques. Section 76 of the N I Act in India, which deals with waiver of presentment, specifically recognises the drawer's right to waive the presentment.

18. The requirement of physical presentment is a legal requirement but this is meant for the benefit of the drawer. Courts in India have held that an individual can waive his legal right if there is no public policy behind the right conferred by law. On this basis also it should be possible for the banks in India, like the banks in U.K. to introduce the cheque truncation process on the basis of customer agreements. But in the long term, unless the law is changed, the process of truncation of cheques may not make such headway. The definition of "presentment" in Section 64 of the NI Act may have to be suitably amended to permit electronic presentment of essential data or image of the cheque. This, however, involves a greater probe into the status of technology at the branch level and the extent of dishonour of cheques for alteration/forgery etc.

19. Section 1(4)(a) of the I.T. Act, 2000 provides that the Act shall not apply to a negotiable instrument as defined in Section 13 of the N.I. Act, 1881. In order to bring conformity between I.T. Act and N.I. Act and also to facilitate evolution and use of payment instruments in electronic mode as well as hybrid instruments, the Government of India, Ministry of Finance by its order dated 9th January 2001 constituted a working group with Shri N.V. Deshpande, Principal Legal Adviser, RBI, as Chairman to suggest inter-alia amendments to Negotiable Instruments Act, 1881 to conform it with provisions of I.T. Act. The Working Group has made recommendations and also given the draft of Negotiable Instruments and Other Connected Laws (Amendment) Bill, 2001 in its report which covers inter alia - :

(a) Amendment to Section 6 of N.I. Act to include electronic image of a truncated cheque and a cheque in electronic form in the definition of "cheque" and also included Explanation (i) and Explanation (ii) to define "truncated cheque" and "cheque in electronic form".

(b) Amendment to Section 64 of N.I. Act by adding new sub-section (2) providing that notwithstanding anything contained in Section 6, where an electronic image of a truncated cheque is presented for payment, the drawee bank is entitled to demand any further information regarding the truncated cheque from the Bank holding the truncated cheque in case of any reasonable suspicion about the genuineness of the apparent tenor of instrument, and if the suspicion is that of any fraud, forgery, tempering, or destruction of the instrument, it is entitled to further demand the presentment of the truncated cheque itself for verification. Provided that the truncated cheque so demanded by the Bank shall be retained by it, if the payment is made accordingly.

(c) Amendment to Section 81 of N.I. Act by adding new sub-sections (2) and (3) providing that where a cheque is the electronic image of a truncated cheque, even after the payment the banker who receives the payment shall be entitled to retain the truncated cheque; and a certificate issued on the foot of the print out of the electronic image of a truncated cheque, by the banker who paid the instrument, shall be prima facie, proof of such payment.

(d) Amendment to Section 89 of N.I. Act by adding new sub-sections (2) and (3) providing that

any difference in apparent tenor of the electronic image of the truncated cheque and the truncated cheque shall be a material alteration and it shall be the duty of the bank or the Clearing House, as the case may be, to ensure the exactness of the apparent tenor of the electronic image and the truncated cheque while truncating and transmitting the image; and any bank or a Clearing House which receives a transmitted electronic image of a truncated cheque, shall cross verify from the party who transmitted the image to it, that the image so transmitted to it and received by it is exactly the same.

(e) Amendment to Section 131 of N.I. Act by adding Explanation (ii) providing that it shall be the duty of the banker who receives payment based on an electronic image of a truncated cheque held with him, to verify the prima facie genuineness of the cheque to be truncated and any fraud, forgery or tampering apparent on the face of the instrument that can be verified with due diligence and ordinary care.

(f) Amendment to Section 1 of I.T. Act to delete clause (a) of sub-section (4) of Section 1.

(e) Evidence and burden of proof

20. By I.T. Act, Indian Evidence Act, 1872 has been amended to give legal recognition to electronic records as documents produced for inspection in the Court as "evidence" and also acceptance of opinion of the Certifying Authority for proving the digital signature. It further amended Section 65 to include special provisions as to evidence relating to electronic record and admissibility of electronic records. New Sections i.e. Section 67A and Section 73A have been introduced regarding proof as to digital signature and proof as to verification of the digital signature. Further, Sections 85A, 85B, 88A and 90A have been added regarding presumption as to electronic records, digital signatures, electronic messages, electronic agreements and presumption of digital signature affixed on five years old electronic records.

(f) Preservation of records

21. Books, accounts and other documents as well as instruments handled by banks, apart from their evidentiary value, have special significance from supervisory angle. Section 45Y of the BR Act, 1949 enables the Central Government to make rules for the period of preservation of records. Pursuant to this, the Banking Companies (Period of Preservation of Records) Rules, 1985 have been made by the Central Government, in consultation with the Reserve Bank of India. The Rules prescribe the period for which banking companies are required to preserve specified ledgers, registers and other records. A period of five to eight years is prescribed as a period for which specific records are to be preserved. Of the various records listed in the Rules ibid, the entries pertaining to Drafts, TTs and Mail Transfer Registers, Remittance Registers, despatch and receipt advice of remittances could be of special significance to EFT. The preservation of records may also have significance in regard to litigation. Although the Rules ibid are not driven by the considerations of period of limitation for enforcement of claims, banks may, in their own interest, have to preserve records consistent with the Law of Limitation and evidence to take care of future litigation. The question of amending the existing Rules for preservation of records in relation to EFT needs to be considered as a matter of policy by the Reserve Bank having regard to the supervisory and regulatory requirements. There is no specific

entry pertaining to EFT in the existing Rules. A specific entry, therefore, would have to be considered and a suitable period and the method of preservation, after considering the supervisory policy and technological aspects of preservation of records has to be decided. The Working Group appointed by the Government of India under the Chairmanship of Shri Deshpande have recommended that the Banking Companies (Period of Preservation of Records) Rules, 1985 may be suitably amended to make it in consonance with the period permitted for enforcing a claim in accordance with the provisions of the Limitation Act, 1963.

(g) Data Protection

22. I.T. Act has given legal recognition to creation of electronic records, transmission of electronic records and retention of electronic records. A clear understanding of the risk involved in transmission of payment data through a communication network and keeping records of transactions in computers and other electronic devices is necessary. The Saraf Committee made a reference to Data Protection Act, 1984 in the U.K. This Act is aimed at protection of personal data of individuals stored or processed on electronic media against unauthorised disclosure and unauthorised use. The Act establishes a system of Registration of Data Users and Computer Bureaux and prohibits holding by any person of personal data on electronic media unless he is registered under the Act. The Act also confers specific rights on individuals who are Data subjects. These rights include right of access to the data, compensation for accuracy in the data, compensation for loss on account of unauthorised disclosure, etc. The Act exempts holding and use of personal data by certain specific categories of data users like statutory authorities. This Act is not specifically aimed at electronic banking or EFT. As such the Act is a general legislation initiated for the purpose of dealing with potential unauthorised access or abuse of personal data by computer network providers and others. Electronic banking records of a bank's customers are personal data under the Data Protection Act, and customers are "data subjects". The Act provides for defences to the bankers. These are, that the financial institutions are not liable if access to computer information is by a person in the registered entry, or if they can prove that they have taken reasonable care to prevent unauthorised access and consequential loss. It would seem that the banker's liability will ultimately depend on the precaution taken to prevent non consensual access. As discussed above, Section 79 of the I.T. Act provides that network service provider shall not be liable under this Act, rules or regulations made thereunder for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention. That apart, tampering with computer documents, hacking of computer system have been treated as offences under the I.T. Act and imprisonment upto 3 years or with fine which may extent upto 2 lakh Rupees, or with both have been prescribed as punishment (Section 65 and 66).

(h) Dispute Resolution

23. Provision for a separate investigation and dispute resolution mechanism is felt necessary especially in regard to high value funds transfers. In the U.S., in regard to EFT of all types, specific statutory provisions are made to provide for an effective mechanism for investigation and resolution of disputes. This assumes special significance in India, as EFT transactions are highly technical and need a clear understanding of the concepts and technological aspects in

investigating and resolving disputes.

24. Under the existing framework of Indian Law, the bank customers have the following remedies :

- To approach civil courts by way of suit for damages, injunction or specific performance.
- To approach Consumer Forums established under the Consumer Protection Act.
- To avail Customer Grievance Redressal Machinery provided within the banking system. (Such as complaint to Banking Ombudsman, complaint to Reserve Bank's Grievance Cell, etc.)

25. Resorting to civil courts for resolution of disputes could be extremely expensive and time consuming. Given the existing rules of Evidence Law and the general delay in judicial system, resolution of grievances through courts may not be suited to EFT disputes.

26. In U.K., for resolving customer disputes in banking services, a system of Ombudsman has been introduced. There are both voluntary and statutory models of separate Ombudsman system in U.K. In India, until 1995, customer grievances were handled at the branch level, at the controlling office level and at the head office level of the banks. With a view to improve customer service the Reserve Bank of India had set up separate Customers Grievance Cell to co-ordinate redressal of customer grievances. The Reserve Bank of India introduced in 1995 a system of Banking Ombudsman, which was introduced as a directive issued under Section 35A of the B R Act. The existing system of Ombudsman for banking sector in India is a mixture of principles of conciliation, mediation and adjudication. The remedy through Ombudsman is an additional remedy and not exclusive. The Ombudsman award becomes enforceable only if the complainant accepts it.

27. The question whether a separate system of arbitration or other form of adjudication of disputes between banks and their customers, arising under the EFT would be necessary, can be better considered when a clear idea about the type of disputes commonly raised and the number of such disputes are known. Resolution of disputes between bank customers and banks may have to be treated differently. A separate mechanism for the investigation and resolution of claims between banks or between a bank and Reserve Bank, however needs to be considered on a priority basis. Necessary provisions in this regard may be introduced in the proposed Electronic Funds Transfer Act to be enacted in India.

(i) Prevention of Fraud

28. Fraud in an EFT involves an unauthorised instruction, alteration of the amount or alteration of the name of the beneficiary etc. Prevention is the elimination of the cause itself, by directing the incidence on the person who causes it. There are basically two issues involved here:

- What should be the responsibility of the service providers and users in regard to design of the system?
- Whether fraud in EFT should be made a punishable offence and if so, what elements should constitute the offence?

Misuse of computers and other electronic devices through unauthorised access is not the problem of EFT only; rather, it is common to all computer based transactions. It is of special significance for EFT due to high potential and intensity, given the sums involved, especially in high value transfers, and the ease with which it can be perpetrated. The common sources of EFT fraud inter alia, are :

- Dishonest employees of the customers.
- Fraudulent use of customer activated terminus.
- Dishonest bank employees.
- Taping telecommunication transmission.
- Unauthorised access to the electronic records.

29. Fraud by itself is not an offence under the Indian Penal Code (IPC) and as such, "Fraud" is not defined in criminal law in India. However, certain acts when done "fraudulently" are made offences. "Mischief", "Theft", "Cheating" are some of the offences which have elements of fraud. But these offences require some additional ingredients, like "moving a moveable property out of the possession of another" as in the case of "theft" (Section 378 of IPC), "intentionally causing wrongful loss or destruction of property" as in the case of mischief (Section 435 of IPC); and "dishonestly or fraudulently removing, concealing etc. of property" as in the case of "cheating" (Section 421 of IPC). In most of these cases the definition of offences are directed against "property". An EFT being a message in electronic media or an electronic record may not fall within the description of "property". However, in view of amendment of Indian Penal Code (IPC) by I.T. Act, electronic record fall in the definition of "document" in regard to the category of offences against documents. In the Law of Torts, fraud means deceit. It requires intention to deceive and actual deceit. Indian Contract Act, 1872, defines fraud in relation to a contract as, commission of any specified acts with intent to deceive. The acts specified are, "a suggestion which is not true, made by a person does not believed to be true; the concealment of a fact; a promise made without any intention of performing it; any other act or omission as the law specifically declares to be fraudulent".

30. I.T. Act has in Chapter XI relating to offences, provided for various offences and punishment therefor, such as tampering with computer source documents, hacking with computer system, breach of confidentiality and privacy, publishing false digital signature certificate and publication for fraudulent purpose.

(j) Settlement of Inter-bank Payment Obligations

31. There are different methods in banking system of each country for settlement of inter bank payment obligations arising out of clearing of collection items. Two banks may bilaterally establish a correspondent arrangement in which case normally payment obligations are settled by appropriate book-keeping entries in the account maintained by one of them. Alternatively, two or more banks may maintain account with the third bank for settlement of payment obligations between them. In such cases settlement of individual items or batches of items are made by a debit and corresponding credit entry made in the respective accounts maintained with the third bank. In most of the cases banks establish clearing houses which also serve as settlement

agency. The amounts transferred to and received by each of the participating bank, at predetermined intervals, are totaled and settled by banks with a net debit position in favour of those with a net credit position. The concept of netting has several variations. In most of the systems, the Central Bank or in the absence of Central Bank, the biggest bank, functions as the settlement bank in the clearing system. The time gap between clearing and settlement is the zone of risk of failure of a bank to settle its position to which the entire banking system is exposed and which normally triggers the systematic risk. It is mainly for this reason apart from the reasons of lending moral and credit support to the settlement system by virtue of its position, that a country's Central Banking Authority is concerned with the efficient functioning of settlement mechanism. In an EFT environment, the following specific aspects need special mention:

- The frequency with which the transactions are netted;
- The period of time after netting, within which settlement of net balance is made;
- Whether netting and settlement is by pairs of banks or for the clearing as a whole; and
- The means of settlement.

32. In an EFT credit transfer system, depending on the settlement system, the beneficiary's bank may assume an irrevocable obligation to the beneficiary by crediting the amount to his account before it has received value (before inter bank settlement takes place). It may so happen that since the creation of the debit balance arises out of the sending and receiving payment instructions, no bank in the network may know until the end of the day, whether it will finish the day with a net debit or credit balance. In general, EFT in low values are settled on Deferred Net Settlement System (DNS System), while high value EFTs are settled individually on gross basis i.e. by way of Real Time Gross Settlement (RTGS) in which the risk of settlement is minimised/not there.

IV. National Payments Council

33. Reserve Bank of India has constituted Payment System Advisory Committee (PSAC) in the Bank consisting of heads of departments of all the functional departments and Regional Directors of major centres. PSAC meets once in a month and deliberate on various issues relating to electronic payment system. Payment System Group (PSG) has been constituted under the Chairmanship of Chief General Manager In-charge, DIT, which on the advice of PSAC works on various projects for effective implementation of electronic payment system. National Payments Council has been constituted by the Bank under Chairmanship of the Bank's Ex-Deputy Governor, Shri S.P. Talwar. The National Payments Council has constituted various Task Forces , including Legal Task Force which is headed by Shri S.S. Kohli, Chairman, IBA and Shri N.V. Deshpande, Pr. Legal Adviser is a Member Secretary of the Task Force. Members of Legal Task Force visited Australia and Hong Kong to study the laws of those countries and suggested enactment of laws relating to electronic payment system similar to laws of Australia which are more akin to the Indian laws and suggested engagement of international consultant for preparing comprehensive draft legislation with the help of an Indian draftsman. The Committee of Central Board of the Bank has approved the appointments of M/s. Herbert Smith as International Consultant and Shri P.M. Bakshi as Indian draftsman for the purpose. Briefing sessions have already been held with them and they are likely to give outline of the draft legislation of Electronic Funds Transfer Act, Payment System Regulation Act and Payment Obligations

(Netting, Clearing and Settlement) Act. The work relating to preparation of legislation regarding RTGS will be taken up in consultation with an another International Consultant later on.

34. In designing the settlement system, the need for integrity as well as efficiency of the funds transfer system as a whole may have to be given priority, especially in the initial stages of developing the EFT system.

V. Powers of Reserve Bank of India to regulate multiple payment systems in India

35. The existing provisions of the RBI Act and BR Act give power to RBI to regulate payment system only within the banking and financial sector. Separate legislative framework either by further empowerment of RBI or a separate Act is necessary if multiple EFT systems should be allowed to be developed.

36. EFT has wide applications. It includes credit transfer and debit transfer. The existing law does not provide any system of licensing private initiatives to organise different EFT system. New law/rules are required for regulation of the growth of multiple EFT system.

37. In this regard various issues have arisen for consideration on policy grounds, such as:

(a) Whether RBI should function exclusively as a Regulator (Regulating Agency) or should also act as a Service Provider. If RBI should not act as Service Provider, whether the service providing function can be entrusted to a separate agency (Company) or a subsidiary of Reserve Bank of India.
(b) Whether multiple EFT system should be allowed to be developed in India.

If multiple EFT systems are allowed to be developed in India, RBI Act need to be amended to empower Reserve Bank of India to regulate establishment and operation of multiple EFT systems. At present, sub-section (6) of section 17 of RBI Act empower the Reserve Bank of India for the issue of demand drafts, telegraphic transfers and other kinds of remittances made payable at its own offices or agencies, the purchase of telegraphic transfers, and the making, issue and circulation of bank post bills. It does not empower the Reserve Bank to regulate establishment and operation of multiple EFT systems. A suitable amendment to Section 17 of the RBI Act may be necessary. RBI has suggested the following amendment to Section 17(6) of the RBI Act for regulation of multiple payment system by introducing Section 17(6A) as under:

"(6A) regulating transfer of funds, regulation and constitution of multiple payment and settlement systems managed by banks or other persons."

VI. Relevant laws need to be amended

- The Reserve Bank of India Act, 1934
- The Banking Regulation Act, 1949
- The Evidence Act, 1872
- The Negotiable Instruments Act, 1881
- The Indian Penal Code, 1860

- Indian Contract Act, 1872
- Income-tax Act, 1961
- Indian Stamp Act, 1899
- Insolvency Law
- Rules relating to preservation of records
- Rules relating to customer confidentiality and data protection

VII. INFINET

38. Indian Financial Network (INFINET) has been set up with its HUB at Institute for Development and Research in Banking Technology, Hyderabad (IDRBT). The Bank has framed INFINET (Membership) Regulations (INFINET Regulations) providing for management and regulation of INFINET for effective transfer of electronic records and providing for role of Reserve Bank of India, IDRBT as the service provider and regarding the membership of the INFINET and for matters connected therewith or incidental thereto. The INFINET Regulations are not statutory but contractual. No provision has been made for resolution of dispute among the members of INFINET called Close User Group (CUG).

VIII. Real Time Gross Settlement System (RTGS)

39. The Bank is going ahead with implementation of RTGS. The various legal issues involved in implementation of RTGS will be dealt with by separate legislation to be enacted in consultation with International Consultant and the Indian draftsman as recommended by the Legal Task Force of National Payments Council.

IX. Establishment of Clearing Corporation of India (CCI) and Negotiated Dealing Screen (NDS)

40. Clearing Corporation of India (CCI) has been constituted by registering itself as a company under the Companies Act. It would function as a settlement agency for settlement of funds and the securities. Various legal issues in this regard are being deliberated to enable the CCI to start functioning effectively at the earliest. For transfer of securities under the Negotiated Dealing Screen, the securities need to be transferred electronically. The Public Debt Rules do not provide for transfer of securities electronically. Accordingly, P.D. Rules are being amended by amending the Form for transfer of securities in SGL Form. Pending the amendment to the P.D. Rules, it is proposed to provide that the parties i.e. the buyer and the seller would agree for electronic transfer of transfer form for transfer of the securities in SGL Form by putting a clause under the existing prescribed transfer form.

X. Provisions of Information Technology Act, 2000

41. I.T. Act received assent of President of India on 9th June 2000, but that came into force on 17th October 2000. It is based on UNCITRAL Model and is similar to Singapore Information Technology Act. India is the 9th Country in the world which have Information Technology Act.

The Act is not applicable to Negotiable Instruments as defined in Section 13 of the N.I. Act,

1881 (Working Group under the Chairmanship of Shri N.V. Deshpande, Pr. Legal Adviser, Reserve Bank of India have recommended for deletion of clause (a) of subsection (4) of Section 1 of the I.T. Act and amendment to the N.I. Act for the applicability of the I.T. Act with regard to electronic instruments like electronic cheque and cheque truncation within the ambit of N.I. Act. It has also recommended amendment to the Bankers' Books Evidence Act).

42. As pointed out earlier, I.T. Act has given legal recognition to creation, transmission and retention of electronic record; and formation of electronic contracts. However, I.T. Act has not given legal recognition to payment - leg of the electronic contracts. A separate legislation is required for giving legal recognition to payment -leg of the electronic contracts.

43. In paper based instruments, authentication is done by the signature. But in electronic instruments authentication cannot be done by signature in writing. Therefore, I.T. has made provisions for digital signatures for authentication of an electronic record. This would provide for transfer of electronic record in a secured environment. Under the Act the Central Government has been empowered to make rules prescribing the security procedure having regard to commercial circumstances prevailing at the time when the security procedure is used, including -

(a) the nature of the transaction;
(b) the level of sophistication of the parties with reference to their technological capacity;
(c) the volume of similar transactions engaged in by other parties;
(d) the availability of alternatives offered to but rejected by any party;
(e) the cost of alternative procedures; and
(f) the procedures in general use for similar types of transactions or communications.
1. (Section 16)

44. The Shere Committee had recommended framing of RBI (EFT System) Regulations under Section 58 of the Reserve Bank of India Act 1934 (RBI Act). I.T. Act has amended Section 58 of the RBI Act by inserting clause (pp) after clause (p) of sub-section 2 of Section 58 as under:

"(pp) the regulation of fund transfer through electronic means between the banks or between the banks and other financial institutions referred to in clause (C) of Section 45-I, including the laying down of the conditions subject to which banks and other financial institutions shall participate in such fund transfers, the manner of such fund transfers and the rights and obligations of the participants in such fund transfers."

45. RBI has framed RBI (EFT System) Regulations, which are pending clearance from the Ministry of Finance, Government of India.

46. Section 6 of the I.T. Act provides for electronic filing of records in any office, authority, body or agency owned or controlled by the Government in a particular manner; grant of any licence, permit, sanction or approval by the Government ; and the receipt or payment of money in a particular manner. The appropriate Government may for this purpose by rules, prescribe-

a) the manner and format in which such electronic records shall be filed, created or issued;
b) the manner or method of payment of any fee or charges for filing, creation or issue any

electronic record under clause (a). (Section 6)

However, no right is conferred upon any person to insist the State/Central Government to accept, issue, create, retain and preserve any document in electronic form or effect monetary transaction in electronic form (Section 9).

47. I.T. Act does not provide as to the time, place and manner of formation of contract. However, as stated above, an electronic record is attributed to the originator, if it is sent by the originator himself, or by a person acting on behalf of the originator or by a system programmed by or on behalf of the originator to operate automatically. Receipt of the electronic record occurs when it enters the designated computer resource of the addressee or when it is retrieved by the addressee (when the computer resource is not designated by the addressee). An electronic record is despatched when it enters the computer resource outside the control of the originator i.e. when it becomes available for processing with the information system.

Authorities under the I.T. Act

48. Certifying Authorities: Provisions have been made under the I.T. Act for appointment and regulation of certifying authorities. The Certifying Authority have been empowered to issue the digital signature certificate. Provisions have been made for revocation and suspension of digital signature certificates. Such suspension or revocation shall be done after giving proper opportunity for hearing where suspension or revocation is not done at the request of the subscriber. Duties of the subscriber have been prescribed under the Act i.e. generation of key pair, obtaining and accepting digital signature certificate, control of private key, informing certifying authority in case of compromise of private key. There is a proposal to appoint IDRBT as certifying authority for banking industry. Working Group headed by Shri N.V. Deshpande, Pr. Legal Adviser, RBI has recommended for appointment of Reserve Bank to act as certifying authority for banking industry. The Act provides for recognition of any foreign certifying authority as certifying authority for the purpose of this Act, with the previous approval of the Central Govt. and by notification in the Official Gazette.

49. Controller of Certifying Authorities: The Act provides for appointment of Controller for the purpose of regulating the functions of certifying authorities and to act as regulator and repository of the digital signature certificates.

50. Adjudicating Officer : Central Government has been empowered under the Act to appoint any officer not below the rank of Director to Government of India or an equivalent officer of the State Government to be an Adjudicating Officer for purpose of adjudicating under the Act whether any person has committed a contravention of any of the provisions of the Act or any rule, regulation, direction or order made thereunder after giving reasonable opportunity for hearing.

51. Cyber Appellate Tribunal : The Central Government has been empowered under the Act to establish Cyber Appellate Tribunal . Appeal from the order of the Controller or an Adjudicating Officer shall lie to the Cyber Appellate Tribunal having jurisdiction in the matter. Appeal from the order of Cyber Appellate Tribunal shall lie to the High Court, which can be filed within 60

days from the date of communication of the decision or order of the Cyber Appellate Tribunal to the person aggrieved. (Section 57, 62)

52. Power of Police Officer or other officer to enter, search etc. : An officer not below the rank of DSP or any officer authorised by the Central/ State Government in this behalf may enter any public place and search and arrest without warrant any person found therein who is reasonably suspected or having committed or of committing or of being about to commit any offence under the Act. There is a common feeling in the society that this power ought not have been conferred to the police as the same can be misutilised by the police authorities. (Section 80).

53. Power of Controller to intercept : Controller has been empowered under the Act to intercept any information transmitted through any computer resource if he is satisfied and records reasons in writing that it is necessary or expedient so to do in the interest of the sovereignty or integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence. (Section 69)

54. Offences or contravention committed outside India : Provisions of the I.T. Act shall apply to offences or contravention committed outside India by any person irrespective of his nationality if the offence or contravention committed outside India involves a computer, computer system or computer network located in India. (Section 75).

55. Offences : Various offences have been prescribed under the Act and the punishment of imprisonment for certain number of years including fine have been imposed.

56. Overriding effect : The Act shall override all the laws for the time being in force.

"Finish each day and be done with it. You have done what you could; some blunders and absurdities have crept in; forget them as soon as you can. Tomorrow is a new day; you shall begin it serenely and with too high a spirit to be encumbered with your old nonsense."

— Ralph Waldo Emerson

It's not your blue blood, your pedigree or your college degree. It's what you do with your life that counts."

— Millard Fuller

"Never be bullied into silence. Never allow yourself to be made a victim. Accept no one's definition of your life; define yourself."

— Harvey Fierstein

The commission has no authority to enforce these finding. These findings may never result in the

respondent feeling the pinch of administrative action.

— Douglas, William O. Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 619 (19 & 4)

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Finance Act, 2001 — Alarming Legislative Tendencies

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Legal Officer

1. Introduction

The cardinal fault of the new pattern of taxation is its absolute instability and uncertainty. Not a year passes-sometimes not even half a year-without some material changes in the Income-tax Act. Nowadays that Act is like a railway ticket-good only for one journey in time, from the 1st April of one year till the 31st March of the next and sometimes not even for the whole of that journey[1]. The Income Tax Act, 1961 would be subjected to a large number of amendments by reason of introduction of new tax, widening the tax net by increasing the tax base, amendments to quantum of deductions and exemptions, etc. making the legislation more complex. The present Finance Act, 2001 is one of the examples of adding complexities to the existing provisions of law with more of stringent and deterrent fragrance.

2 Finance Act, 2001 — 'Standardized' Penalty

The Finance Act, 2001 has introduced the concept of "standard penalty" for the specified default committed under the Income-tax Act, 1961. The provisions relating to the levy of penalty are mostly grouped from sections 270 to 275 of Chapter XXI of the Act. Penalty is levied over and above the amount of any tax or interest payable by the assessee. The various sections relating to penalties prescribe the minimum and maximum penalties that can be levied in certain cases. The authority concerned has been given certain discretion to levy or not to levy the penalty if the assessee can establish that he was prevented by a reasonable cause for not complying with the provisions of the law. According to section 271(1) of the Act, the assessing Officer and Commissioner (Appeals) may impose penalty if they are satisfied in the course of any proceedings under the Act that the default enumerated in clause (b) or (c) has been committed by any person. Further, the Commissioner in some cases is empowered to reduce or waive the penalty. The Table lists out the cases where such degree of discretion is available to the assessing officer under the Act.

3 Quantum of Penalty — Prior to Finance Act, 2001

Hitherto, failure to comply with a notice under section 142(1) or section 143(2) or failure to comply with a direction issued under section 142(2A) rendered the defaulter assessee liable to penalty under clause (ii) to section 271(1) which ranges from a minimum of one thousand rupees to a maximum amount of twenty thousand rupees for each of the said failures. However, with effect from 1st June 2001, a fixed amount of ten thousand rupees shall be levied for each of

such failure.

The penalty of two thousand rupees to one hundred thousand rupees which was imposable under section 271A for failure to keep, maintain or retain books of account, documents, etc. shall now be twenty-five thousand rupees.

Again, in view of the substituted section 271F, failure to furnish return before the end of the relevant assessment year or failure to furnish return on or before the due date as specified by proviso to section 139(1) shall attract a uniform penalty of five thousand rupees, of course, in place of existing penalty of one thousand rupees and five hundred rupees, respectively.

Comparative Table showing the changes brought about by the Finance Act, 2001 (w.e.f. 1-6-2001)

Section	**Provision**	**Quantum of Penalty-Prior to Finance Act, 2001**	**'Standardised Penalty' Finance Act, 2001**
271 (1)	For failure to comply with a notice u/s 142(1) or section 143(2) or failure to comply with a direction regarding getting of accounts audited u/s142(2A).	Minimum of Rs. 1000 to a maximum amount of Rs. 20,000 for each of the said failure.	A fixed amount of Rs. 10,000 shall be levied for each failure.
271A	For failure to keep, maintain or retain books of account, documents etc. as required u/s 44AA and rules there under.	Penalty of Rs. 2,000 to Rs. 10,000	Fixed amount of penalty of Rs. 25,000
271F	For failure to furnish return before the end of the relevant AY u/s 139 (1) Or	Rs. 1,000	Penalty of Rs. 5,000
	For failure to furnish return on or before the due date as specified by provision to section 139(1).	Rs. 500	Penalty of Rs. 5000
272A	For failure to answer questions, sign statements, furnish information, allow inspection or failure to comply with the provisions of section 139A.	Rs. 500 to Rs. 10,000	Standard sum of Rs. 10,000 for each default
272BB(1)	For failure to comply with the provisions of section	Maximum penalty of Rs. 5,000	Standard penalty of Rs. 10,000

Further, failure to comply with the provisions of section 203A which attracted a maximum penalty of five thousand rupees under section 272BB shall now be a fixed from of ten thousand rupees.

4.Discretionary Power — Penalty

4.1 Meaning of 'discretion'

Every statute confers some degree of discretionary power on administrative authorities. Lord Diplock in Secretary of State for Education and Science Vs. Metropolitan Borough of Tameside[2] observed

A discretionary power enables a decision-maker "to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred".

4.2 Need for conferring discretion

The need for "discretion" arise because of the necessity to individualise the exercise of power by the administration; i.e. the administration has to apply a vague or indefinite statutory provision from case to case. There are at least three good reasons, in the opinion of M.P. Jain, an authority on Administrative Law, for conferring discretion on administrative authorities :

(a) the present-day problems which the administration is called upon to deal with are of complex and varying nature and it is difficult to comprehend them all within the scope of general rules.

(b) Most of the problems are new, practically of the first impression. Lack of any previous experience to deal with them does not warrant the adoption of general rules.

(c) It is not always possible to foresee each and every problem but when a problem arises it must in any case be solved by the administration in spite of the absence of specific rules applicable to that situation[3].

4.3 Disadvantages of exercising discretionary power

The authority vested with discretionary power has to act judiciously. While reaching a decision the assessing officer is supposed to comply the conditions laid down under the provisions of the Act. Although, the legislators fix the limits on exercise of discretionary power by the authority, it is obvious that the assesses will be put to hardship as the decisions vary from case to case.

In the words of M.P. Jain, there are three disadvantages in the administration following the 'case to case' approach as compared with the adoption of a general rule applicable to all similar cases. They are,

(a) In case to case approach, the individuals may be caught by surprise and may not be able to adjust his affairs in the absence of his ability to foresee future administrative action.

(b) The case to case approach involves the danger of discrimination amongst various individuals; there arises a possibility of not getting like treatment under like circumstances.

(c) The process is time-consuming and involves decision in a multiplicity of cases[4].

5. Necessity of Discretionary Power and Limits of Discretion

The control of discretionary power is the biggest enigma of the modern administrative law. The adoption of "welfare state" concept has burdened the State with obligation of discharging public works for the welfare of the people. It is imperative for the administration to function without powers to take decision as it is impossible to approach the legislators for taking decisions. Therefore there is a vast growth of administrative law in the advent of the 21st century. There are plethora of legislations conferring administrative discretion on the executive/authorities. Thus, the reasons mentioned above makes the point clear that their is no escape from keeping away the power of discretion from the administrative authorities. However the important question that arises for consideration is to what extent the power of discretion should be granted to the authorities under the legislation.

The broader the discretion, the greater the chance of its abuse. Justice Douglas of the US Supreme Court observed, "where discretion is absolute, man has always suffered ... Absolute discretion ..... is more destructive of freedom than any of man's other inventions"[5]. And also, "absolute discretion, like corruption, marks the beginning of the end of liberty."[6]

It thus becomes necessary to devise ways and means to minimise the danger of absolute discretion. To achieve such an objective, a multi-pronged strategy has to be adopted. Laying done standards, as discussed above, is one strategy for the purpose for this makes discretion less than absolute. The strategy of laying down limits to check the possible excesses of the authorities under the Income Tax Act is evident under the Chapter XXI dealing with levy of penalties for specified default by the assessees. The existing provisions take sufficient care to curtail arbitrary exercise of discretionary power by the tax authorities by laying down upper limit of imposing penalties.

Administration of justice is just not possible and complete unless the authorities are conferred with desired discretionary power under the statute. Thus the entire growth of administrative discretion can be seen in large volume only in the 21st Century. The object of conferring discretion on the authorities is do justice to the genuine and *bona fide* cases. For instance, if the assessee because of health disorder or for the reasons beyond his control could not file his return before the end of the assessment year, the quantum of penalty fixed under the amended provision is Rs. 10,000. Whereas under the existing provision the assessing officer may on satisfaction of the material placed before him may impose penalty of Rs. 1,000 to the maximum of Rs. 20,000.

More so, under the existing law, Clause (c) of section 271 (1) of the Act lays down the

conditions precedent for the assessing officer or other authority concerned assuming jurisdiction to initiate penalty proceedings for concealment of income. The concealment referred is concealment from the assessing officer. So, the power to impose penalty under section 271 depends upon the satisfaction of the assessing officer in the course of any proceedings under the Act, regarding the commission of defaults by the assessee and it cannot be exercised if he is not so satisfied and has not recorded his satisfaction about the existence of the conditions specified therein[7]. What is contemplated is subjective satisfaction of the penalising authority. If the assessing officer is to proceed on a purely subjective satisfaction, there is little scope for interference regarding the quantum of penalty or even in regard to the question whether penalty shall be imposed at all in appeal proceedings[8].

It is submitted that unless the discretion is controlled and statutorily circumscribed, the amended provisions i.e. standardising the quantum of penalty does not rise to the test of prudence and justice. However, The Hon'ble Finance Minister, while introducing the amendments to the Chapter XXI of the Act, observed that "it is a friendly measure to the taxpayer to provide/specify statutorily the quantum of penalty for the default concerned, of course, by eliminating the discretion hitherto exercised by the tax-official in determining the amount of penalty". What is, however, frustrating is that the proposed amendment in the realm of income-tax penalty, far from being friendly to taxpayer, is but an injustice personified as it would certainly injure marginal and small fries[9].

The recent amendments to the provisions of the penalties reminds us of the observation of N.A. Palkhivala, who while pointing to the fallacies of our direct tax policies said that "our direct tax policies suffer from five patent defects which can be easily remedied but which the government has so far resolutely refused to tackle :

(i) Absolute uncertainty; changes in laws and rates of tax, which are as unpredictable as they are frequent.
(ii) Complexity which verges upon incomprehensibility.
(iii) Excessive and cumulative burdens which make dishonesty immeasurably more rewarding than integrity and hard work, and make India the highest taxed nation.
(iv) Injustices inherent in fatuous laws; and
(v) Arbitary provisions which stem from individual whims and are not based on any discernible principle of legislation or taxation."[10]

Conclusion

It is submitted that the recent amendments standardising the quantum of penalties must be withdrawn with immediate effect for the reasons discussed above. It is further submitted that the total elimination of administrative discretion will not show any solution to control the administrative misuse of provisions by the authorities but it further aggravates the difficulties of the honest taxpayers. What is required is checks and balances to ensure the proper and fair exercise of the administrative discretion by the authorities.

The instrument of taxation is not objected for extraction of hard earned money of the poor creating fear of payment of tax to the exchequer[11]. It appears from the recent amendments to the

chapter on penalties that our finance minister, in an anxiety to enhance the targets of tax collections[12], is in his sixes and sevens subjecting the honest and sincere taxpayers to pay more for genuine human errors. The new budget will join several past budgets, with their absurd levels of taxation. It is suggested that the Finance Minister should remember whilst introducing the amendments that law is not an instrument of injustice or hardship to a person; it is meant for justice and relief to the person or the assessee.

"People only see, what they are prepared to see."

— Ralph Waldo Emerson

"There is no security on this earth; there is only opportunity."

— Douglas MacArthur

"Perhaps the best thing about the future is that it comes only one day at a time."

— Dean Acheson

"Learn from yesterday live for today, hope for tomorrow."

— Anon

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1. N.A. Palkhivala, We, the People, India – The Largest Democracy, (1984), Stand Book stall. At p. 124.
2. (1976) 3 All E.R. 665, 695
3. Jain and Jain, Principles of Administrative Law, (1981), N.M. Tripathi Pvt. Ltd., Bombay. At p. 276.
4. Supra. Also see. M.P. Jain, The Evolving Indian Administrative Law, (1983), N.M. Tripathi Pvt. Ltd., Bombay.
5. U.S. vs. Wunderlich, 342 U.S. 98, 101 (1951).
6. New York vs. United States, 342 U.S. 882, 884 (1951).
7. CIT vs. Angidi Chettiar, (1962) 44 ITR 739 (SC).
8. Supra.
9. See. Minu Agarwal, Standardisation of Quantum of Penalty – Whether Unfair and Unjust, (2001) 166 CTR (Articles) 190.
10. Supra note 1, at p. 97.
11. Economic Times 12th October, 2000. Total collection of income tax during the first six months stood at Rs. 12,938.91 crore as compared to Rs. 8,925.28 crore till 30th September 1999. Corporation tax collection during the period under review was placed at Rs. 13,450.33 crore as compared to Rs. 9,506.36 crore till 30th September, 1999. Total collections during September alone amounted to Rs. 21,5154.81 crore as compared to Rs. 18,710.28 crore during September, 1999, registering a growth of 14,99 per cent.
12. Economic Times; 19th April 1999. Revenue collections have been short of budget projections by about Rs. 10,000 crore for two years in a row.

Recent Judgements Relevant To Bankers

D.N. Tripathi Jt. Legal Adviser
and

Joseph Raj Asst. Legal Adviser

I. Sh. Sailen Medhi vs. Union of India and Others

Judgement of Gauhati High Court in PIL No. 22 of 1998 decided on 15-5-2001 (J.N. Sarma and D. Biswas J.J.)

SSI Sector credit – Prayer for direction to comstitute a Parliamentary Committee

Facts

Petitioner, an advocate filed a public interest writ petition in Gauhati High Court seeking remission of interest on loans and advances made by the banks to the Small Scale Industrial Sector including young entrepreneurs, small units, hotel owners and artisans of the entire North-Eastern region. Petitioner further prayed for issue of a rule for constituting a high level committee consisting of all the members of Parliament (both Houses) representing eastern states to go into the problems faced by the young entrepreneurs, small scale industrial units including service industries like hotel, restaurants etc. in the north eastern region and to chalk out remedial measures by remitting the lending interest altogether retrospectively from 1978, if not earlier, till a further period of 10 years from the time of filing the petition with a view to industrial and commercial development of the region and with a view to encouraging small scale industrial sector and young entrepreneurs of the region and to save them from frustration, disappointment and desperateness for a new congenial atmosphere of the backward region and of North East India. The Reserve Bank was impleaded as Resondent No. 7 in the writ petition. In response to the notice from the Court, the Reserve Bank submitted its counter affidavit giving the details of the various steps taken from time to time for making adequate and timely bank credit available to small scale sectors including small scale industries, entrepreneurs, hotel owners and artisans and the special status given to North Eastern region under the scheme framed.

Issue

Whether the High Court could issue a direction to constitute a committee of members of Parliament as prayed for?

Observations of the Courts

After considering a submissions made by the counsels for the parties, the High Court dismissed the public interest litigation observing that these are matters with regard to financial discipline, revenue and fiscal affairs, and the Court does not have the expertise for the purpose. Further by granting the relief, the Court will step in a field where perhaps it does not have the jurisdiction. Court cannot direct the members of Parliament to constitute a committee to review the matter. They may constitute the committee in ther own wisdom. The Court cannot give a direction to the members of Parliament as prayed for.

Decision

Petition was dismissed accordingly.

II. UCO Banks vs. M/s Bhogals and Another

Decision dated 11th April 2001 of National Consumer Disputes Redressal Commission,New Delhi in First Appeal No. 64 of 1999 against Order dated 21-12-1998 in CC No. 8/97 of State Commission, Haryana

Claim under Government's Scheme for riot affected borrowers

Facts

The Respondent M/s Bhogals, a partnership firm of Faridabad approached UCO Bank on 25th February, 1989 for grant of facility for opening of account, grant of commercial loan and overdraft facilities without disclosing the fact that they were one of the 1984 riot affected victims. UCO Bank sanctioned loan and overdraft facilities on the terms and conditions mentioned in its sanction letter. The firm did not pay the dues of the UCO Bank. UCO Bank filed suit for recovery before Debt Recovery Tribunal, Jaipur in 1994. The Respondent firm claimed interest subsidy of Rs. 12,50,105/- under Central Interest Subsidy Scheme (Revised) for November, 1984 Riot Affected Borrowers framed by Government of India, for the period 31st March, 1989 to 31st March, 1992. Initially, UCO Bank allowed the interest subsidy and claimed amount through the Reserve Bank from the Central Government Account. The Reserve Bank considered the matter and advised UCO Bank to call for the audited balance-sheet of the Respondent firm for the last three years. UCO Bank considered the balance-sheets submitted by the Respondent firm and observed that the Respondent firm was able to service the debt and also earn profit. The claim of the Respondent firm was rejected as it was not a deserving case. The firm filed a complaint before Banking Ombudsman, New Delhi for alleged deficiency in service by UCO Bank in not granting interest subsidy. The complaint was ultimately rejected by the Banking Ombudsman. The Respondent filed complaint No. 8 of 1997 before State Consumer Disputes Redressal Commission, Haryana against UCO Bank and Reserve Bank of India for grant of interest subsidy amounting to Rs. 12,50,105/- under Central Interest Subsidy Scheme (Revised) for November, 1984 Riot Affected Borrowers framed by Govermment of India and circulated by Reserve Bank of India and for loss of business and demand of higher rate of interest amounting to Rs. 5,00,000/-. UCO Bank submitted before the State Commission that Reserve Bank was not a necessary party to the dispute as Reserve Bank did not offer any service in the matter. The State Commission passed order dated 21st December, 1998 allowing the compaint of the firm directing Reserve Bank of India as well as UCO Bank to release the interest subsidy to the complaint as claimed by it with costs of litigation as quantified Rs. 2000/- UCO Bank filed appeal before the National Commission against the order of State Commission. Reserve Bank also appeared and filed its reply to the appeal before the National Commission.

Issues

(1) Whether the Reserve Bank offered any service to the firm?

(2) Whether State Commission has Jurisdiction in this case?

(3) Whether the State Commission should have proceeded with the case when the suit for recovery was pending before DRT?

(4) Whether Reserve Bank was liable to make payment?

Observations of the National Commission : Issue Nos. 1 & 2

The National Commission observed that it is not free from doubt as to whether this case would fall within the jurisdiction of the fora provided under the Consumer Protection Act. Because, among other things, the fact as to whether the Complainant would be entitled to the benefits of certain scheme prima-facie would not by itself amount to hiring of any service for consideration as comtemplated under the Consumer Protection Act. The Complainant is seeking relief under a scheme formulated by RBI. Whether they are covered by the scheme or not is for the authority concerned to decide, the question of hiring of services for consideration under the scheme does not arise.

Issue No. 3

The National Commission held that the State Commission, in the facts and circumstances of the case, should not have proceeded with this case particularly, when the fact of pendency of the suit and all the grounds which are the basis of the complaint were pending adjudication in such suit was brought to its notice. The very filing of this complaint when the suit had already progressed considerably, before a competent court wherein the complaint had already filed a defence taking all the pleas which are the basis of the present complaints, appears to be only a counter blast and an absue of the process of law.

Issue No. 4

The National Commission observed that RBI had no privity of contract with the Complainant. RBI had made the scheme only for the banks to follow who had to determine the question whether the complainant was a “deserving case”. Mere framing a scheme for Banks to follow, cannot by itself fasten any liability on the Reserve Bank of India. Therefore, the order of payment against RBI cannot be sustained in any case.

Decision

The National Commission allowed the appeal of the UCO Bank.

III. Shri Ishwar Alloys Steel Ltd. vs. Jayaswals NECO Ltd. (AIR 2001 SC 1161)

Negotiable Instruments Act (26 of 1881), Sections 3, 5, 6, 72 and 138 — Dishonour of cheque — Offence of — Presentation of cheque to the Bank within a period of six months from the date on which it is drawn is mandatory requirement — post dated cheque-six months period for presentation has to be reckoned from the date written on the cheque — post dated cheque becomes a cheque under the Act on the date which is written on the said

cheque — Till that date it is only a bill of exchange — Presentation of cheque within six months from the date on which it is drawn has to be on drawee bank on which cheque is drawn either directly or indirectly through collecting bank of payee — use of direct article "The" in words "The bank" — Indicates the intention of legislature.

Facts

The appellant issued cheque No. 2477186 dated 21st July 1997 for Rs. 10 lakh drawn on the State Bank of Indore, Industrial Estate Branch, Indore in favour of the respondent. When the cheque was presented on 26th September 1997, it was returned unpaid. Again on 20th January 1998, the respondent presented the cheque to its bank, State Bank of India at Raipur. The cheque reached the drawer bank on 24th January 1998, admittedly after six months from the date it became payable. The cheque was returned unpaid by the bank of the respondent on 3-2-1988. A notice under proviso (b) to Section 138 of the Negotiable Instrument Act was issued on 10-2-1998 which was received by the appellant on 16-2-1998. A criminal complaint was filed before the Court of the Judicial Magistrate, First class, Raipur under Section 138 of the Negotiable Instrument, Act against the appellant. The appellant filed a criminal revision petition No. 190 of 1998 before the Sessions Court, Raipur contending that the cheque was prescribed for payment beyond the period of six months as prescribed under proviso (a) to Section 138 of the Negotiable Instrument Act, 1881. The revision petition was allowed. The respondent filed further revision petition before the High Court which was also allowed. Hence the present appeal.

Observations of the Court

To make an offence under Section 138 of the Negotiable Instrument Act, 1881, it is mandatory that the cheque is presented to 'the bank' within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier. A postdated cheque becomes a cheque under the Act on the date which is written on the said cheque and the six months period has to be revoked, for the purpose of Section 138 of the Act from the said date. The use of the words "a bank" and "the bank" in the Section is indicator of the intention of the legislature. The former is indirect article and the latter is pre-fixed by direct article. Section 138 permits a person to issue cheque on an account maintained by him with "a bank" and makes him liable for criminal prosecution if it is returned by "the bank" unpaid.

The payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or payee bank on which the cheque is drawn within a period of six months from the date on which it is shown to have been issued.

The non-presentation of the cheque to the drawee bank within the period specified in the section would absolve the person issuing the cheque of his criminal liability under section 138 of the Act, who shall otherwise may be liable to pay the cheque amount to the payee in a civil action initiated under the law. A combined reading of Sections 2, 72 and 138 of the Act would leave no doubt that the law mandates the cheque to be presented is necessarily to be made within six months at the bank on which the cheque is drawn whether presented personally or through

another bank, namely, the collecting bank of the payee.

Decision

The impugned judgement of the High Court being contrary to law is thus not sustainable. The appeal is accordingly allowed and the impugned judgement is set aside.

IV. Clarence Pais and Others vs. Union of India (2001)4 SCC 325.

[Writ Petition No. 137 of 1997 with WP No. 674 of 1998] — Succession Act 1925 — Section 213 — Held not discriminatory against Indian Christians — Section 213(2) (as amended by Kerala Act 1 of 1997) — Probate not mandatory for Indian Christians — where petitioners Indian Christians, residents of Kerala named legatee in a will of deceased aunt, also Keralite Indian Christian, in respect of her flat in New Delhi, but record of co-operative housing society shows that another person had been named as nominee in respect of same flat and so housing society has refused to hand over flat in absence of court directions — such anomalies are bound to raise in a Federal setup — Petition dismissed alongwith main petition challenging Section 213 of Succession Act — Constitution of India, Schedule VII, List III, Entry 5 — Matters governed by personal law.

Facts

These two writ petitions had been filed challenging Section 213 of the Indian Succession Act 1925 as unconstitutional and to restrain the Union of India from enforcing the provisions thereof against Indian Christians. The contention of the petition was that there is no rational or discernible basis for making the requirement of probate necessary for only a limited section of Indian citizens such as Indian Christians, excluding other sections. It is also brought to the notice of the court that in view of harsh procedure contemplated in these provisions under challenge the Kerala Legislature has enacted an amendment known as the Indian Succession (Kerala Amendment) Act, 1986 dated 14-3-1997 by which sub-Section (2) of Section 213 of the Act has been amended to the effect that after the word “Muhammadans” the word or “Indian Christians” shall be inserted. Accordingly, a christian residing in the State of Kerala owning property therein if dies after making a will, the legalee thereto need not obtain a probate in terms of Section 213 of the Indian Succession Act before establishing their right, while those residing in other parts of the country are required to do so.

Arguments of the Government of India

The defence taken by the Government of India is that the members of the Christian community are not put to any discrimination. It is open to the State Legislatures to undertake any legislation of the nature of Section 213 of the Indian Seccession Act. The state governments bring in changes in personal law from time to time as per the social conditions prevailing in the particular state. Therefore, the amendment made in the State of Kerala would not discriminate the persons residing in other parts of the country. It is further submitted that the Central Government has been consistently following a policy of non-interference in the personal laws of the minority communities unless the necessary intitiative for amendments or repeal from a majority or

sizeable cross-section of the community arises.

Observations of the Court

Section 213(2) of the Act indicates that its applicability is limited to cases of persons mentioned therein. The bar that is imposed by this Section is only in respect of the establishment of the right as an executor or legalee and not in respect of the establishment of the right of any other capacity. The section does not prohibit the will being looked into for purposes other than those mentioned in the section. The bar to the establishment of the right is only for its establishment in a Court of justice and not its being referred to in other proceedings before administrative or other tribunals. The effect of Section 213(2) of the Act is that the requirement of probate or other representation mentioned in Sub-Section (i) for the propose of establishing the right as an executor or legatee in a court is made inapplicable in case of a will made by Muhammadans and in the case of wills coming under Section 57(c) of the Act. The contention put forth on behalf of the petitioners that Section 213(1) of the Act is applicable only to Christians and not to any other religion is not correct. Only on the basis that some differences arise in one or the other States in regard to testamentary succession, the law does not become discriminatory so as to be invalid. Such differences are bound to arise in a Federal set-up.

Decision

The petitions stand dismissed.

V. Shri K.M. Hidayathulla vs. Bank of India —AIR 2001 Mad 251 — [C.R.P. No. 3896 of 1999]

Contract Act, 1872, Section 176 — Pawning of Goods — Default of Pawnor — Right of Pawnee — He can either file suit for recovery or resort to sale of goods with reasonable notice to pawnor — Both remedies are disjunctive —Mere fact that a period is prescribed for filing suit cannot mean that same would apply in the event of the pawnee resorting to alternate course of sale.

Facts

The petitioner had pledged certain gold jewels with the respondent as security for borrowing money from them on 10-12-1993. As the petitioner failed to repay the borrowed amount, the respondent bank brought the jewels for auction after giving reasonable notice to the petitioner. The petitioner’s grievance was that under Section 176 of the Indian Contract Act, 1982 the period of filing of suit for recovery of the debt and the period prescribed for filing a suit is 3 years. Hence, the provisions contained in the said Section enableing the pawnee to sell the pledged goods on auction after giving reasonable notice for the said sale should also be done within the prescribed period mentioned in said section.

Observations of the court

If the pawnor commits any default in making payment of the borrowed amount within the time

limit the pawnee can either file a suit against the pawnor or resort to sale of the pledged goods after giving a reasonable notice to the pawnor. The remedies provided to the pawnee are disjunctive in nature. There is absolutely no scope for holding that merely because there is a period prescribed for filing a suit, in the event of the pawnee resorting to alternate course of sale also the period prescribed for the suit should be extended.

Decision

The revision petition was dismissed.

VI. Krishnadevaraya Education Trust vs. L.A. Balakrishna — C.A. No. 8628 of 2001 — [Arising out of SLP(c) No. 11995 of 2001]

Principle

Termination order without mentioning the reason for termination does not mean that the services of the petitioner were terminated by way of punishment.

Facts

The petitioner was appointed to the post of Assistant Professor (on probation) on 22nd September 1990. The services of the petitioner were terminated during the period of probation vide order dated 16th June 1991. The order was set aside by the Educational Tribunal. Again a fresh order of termination was passed during the probation period. Accordingly the Respondent was terminated from service with effect from 1-8-1991. When the said order was challenged before the Education Tribunal, the Tribunal set aside the order and High Court upheld the decision of the Tribunal. The petitioners preferred the present appeal against the said order of the High court.

Observations of the court

During the period of probation, the suitability of the appointee has to be seen. If the employer found that the services rendered by the appointee are not satisfactory or he is not suitable for the post in which he was recruited, the employer has the right to terminate his service. If the reason for termination is not mentioned in the order, such order has to be challenged on the ground of being arbitrary. The probationer is on test and the employer has the right to terminate his services if the performance of the probationer is found not to be satisfactory.

Decision

Appeal is allowed and set aside the order passed by the High Court is set aside.

VII. Modern Syntak (I) Ltd. vs. Debt Recovery Tribunal, Jaipur and Others — AIR 2001 Raj. 170 — Civil Writ Petition No. 4811 of 2000

Constitution of India Act 226 — Alternative remedy — petition seeking an interpretation

of intricate questions of law or interpretation of provisions of Constitution or raising issue of jurisdiction — Alternative remedy, no bar — Recovery of Debts due to Banks and Financial Institutions Act, 1993 — Rajasthan Relief undertakings (Special Provisions) Act, 1961 — State is competent to suspend legal proceedings including those instituted under Recovery of Debts due to Bankers and Financial Institutions Act, 1993 — There is no repugnancy in two Acts.

Facts

The State Bank of Bikaneer and Jaipur filed original application No. 431/2000 before the DRT, Jaipur for recovery of Rs. 25,86,923.70/- from Modern Syntax (I) Ltd. and from the guarantors. The bank's original application was opposed by the defendants on the ground that a notification was issued by the Govt. of Rajasthan under which the company was declared a relief undertaking under the Rajasthan Relief Undertaking Act, 1961 and accordingly under section 4(1) (b) of the Act, the application for recovery was not liable to be proceeded with. By order dt. 13-10-2000, the DRT Jaipur rejected the application. Being aggrieved, the petitioner filed the above writ petition to quash and set aside the order of the DRT.

Observations of the court

The two legislations in question deal with two separate and distinctive matters. The said legislations occupy two different fields. The central legislation occupies the field of Banking under List I and provides for the incidental issue of adjudication of banking disputes, while the state legislation occupies the field of social security and providing unemployment relief falling under the concurrent list. Thus the parliamentary legislation and the state legislation occupy different fields and deal with separate and distinctive matters. Hence, the plea of repugnancy is not available to the respondent bank. Both the legislations are valid laws made by different legislatures exercising powers under different lists. Both deal with different subjects. The feilds occupied by the two statutes in their pith and substance are separate and there is no direct inconsistency between the two Acts. The duty cast on the courts is to harmoniously construe the two provisions. Based on the above observations the court held that the proceedings initiated by respondent Bank before the DRT Jaipur for recovery of its dues due from the petitioner company stands stayed till the expiry of the period mentioned in the Notification dt. 15-2-2000 issued by the State of Rajasthan under the Rajasthan Relief undertakings Act, 1961. The Respondent Bank may proceed further for recovery of the dues from the writ petitioner after expiry of the period mentioned in the notification and can proceed in the very same original application No. 431/2000 and obtain appropriate orders.

Decision

The writ petition was ordered accordingly.

VIII. Gorakhpur University & Others vs. Shitle Prasad Nagendra & Others — Civil Appeal No. 1874 of 1999 — JT 2001(6) SC 285.

Principle

Unauthorised occupation of quarters, allotted while in service even after retirement has been viewed to be not a valid ground to withhold the disbursement of the terminal benefits. Pension and gratuity are no longer matters of any bounty to be distributed by Govt. but are valuable rights acquired and property in their hands and any delay in settlement and disbursement whereof should be viewed seriously and dealt with severally by imposing penalty in the form of payment of interest. The amounts payable towards provident fund is immune from attachment and deduction or adjustement as against any other dues from the employee.

Facts

The first respondent was initially appoionted as a teacher in the Sociology Dept. of the Gorakhpur University on 23-3-1963 and subsequently promoted as Professor. The appellant university had provided him with accommodation on 20-5-1986. Thereafter the first respondent was appointed as Vice-Chancellor of the University of Lucknow, but inspite of the same, he continued to hold the accommodation. After his tenure as Vice-Chancellor, he rejoined the University and continued till 11-1-90, the date on which he attained the age of superannuation. Thereupon he was entitled to payment of pension and settlement of his claim. Since the University did not settle the claim for terminal benefits, the 1st Respondent had filed a writ petition before the High Court of Allahabad which was opposed by the University on the ground that the 1st Respondent, having not vacated the quarters held by him when he retired and within the permissible extended period, was liable for payment of penal rent in respect of such accommodation. The Court vide order dated 17-8-98 overruled the objections of the University holding that the pension and other retiral benefits cannot be withheld or adjusted or appropriated for the satisfaction of any other dues outstanding against the retired employee. Hence the University had preferred this appeal.

Observations of the Court

Withholding of quarters allotted while in service, even after retirement without vacating the same has been viewed to be not a valid ground to withhold the disbursement of terminal benefits. The lethargy shown by the University in not taking any action according to law to enforce their right to recover possession of the quarters from the respondent or fix liability or determine the so called penal rent after giving prior show cause notice or any opportunity to him before proceeding to recover the same from the respondent renders the claim for penal rent not only a seriously disputed or constested claim but the University cannot be allowed to recover summarily the alleged dues according to its whims in a vindictive manner by adopting different and discriminatory standards. The claim of the University cannot be said to be in respect of an admitted or conceded claim or sum due.

Decision

The appeal fails and therefore, shall stand dismissed. No costs.

IX. Dena Bank vs. Bhikhabhai Prabhudas Parekh & Company and Others — (Civil Appeal No. 2853 of 1993 before the Supreme Court of India).

Facts

Dena Bank had filed a suit for recovery of a sum of Rs. 19,27,142.29 along with interest and costs against a partnership firm, namely, M/s. Bhikhabhai Prabhudas Parekh & Co. and its partners on account of the mortgage by deposit of title deeds made by the said firm and its partners. The suit sought for enforcement of the mortgage. Hoever, during the pendency of the suit the State of Karnataka tried to attach and sell the mortgaged properties for recovery of sales tax arrears due and payable by the firm. The State of Karnataka was also impleded in the suit. The trial court dismissed the suit on the ground that Shri R.K. Mehta, the Chief Manager and Power of Attorney holder of the bank was not proved to be a person duly authorised to sign and verify the plaint and institute the suit. The bank preferred an appeal before the High Court of Karnataka which was allowed. However it was mentioned in the judgement that the State is benefited by getting its right of preference adjudicated in a suit filed by the bank. The bank had come up in appeal by Special Leave before the Supreme Court being aggrieved by the decree of the High Court to the extent to which it recognised the request of the State Government to proceed against the suit property and that too in preference to the bank's right to proceed against the mortgaged property for realisation of its dues.

Observations of the Court

The two questions arising for consideration are whether the recovery of sales tax dues (amounting to crown debt) shall have precedence over the right of the bank to proceed against the property of the borrowers mortgaged in favour of the bank and whether property belonging to the partners can be proceeded against for recovery of dues on account of sales tax assessed against the partnership firm under the provisions of the Karnataka Sales Tax Act, 1956.

The principle of priority of Govt. debts is founded on the rule of necessity and public policy. The well recognised principle is that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, as a sovereign, the State would not be able to discharge its functions efficiently. The basic justification for the claim of priority of State debts is the rule of necessity and wisdom of conceding to the State the right to claim priority in respect of its tax dues. The doctrine may not apply in respect of debts due to the State if they are contracted by citizens in relation to commercial activities which may be undertaken by the State for achieving socio-economic goals. Where Welfare State enters into commercial fields which cannot be regarded as an essential and integral part of the basic Government function of the State and seek to recover debts from its debtors arising out of such commercial activities, the applicability of the doctrine of priority shall be open for consideration.

The Supreme Court has considered Section 158 of the Karnataka Land Revenue Act, 1964, in terms of which a claim of the State Government to any money recoverable under the provisions of the Act shall have precedence over any other debt, demand or claim whatsoever whether in respect of mortgage, judgement decree, execution or attachment or otherwise howsoever against any land or the holder thereof. Further Section 190 of the said Act provides that all sums declared by the Act or any other law for the time being in force, to be recovered as an arrears of land revenue. The Supreme Court has also referred to its earlier decisions in M/s. Builders

Supply Corporation vs. Union of India (AIR 1965 SC 1061), Collector of Aurangabad vs. Central Bank of India (AIR 1967 SC 1831) and Bank of Bihar vs. State of Bihar and Others (AIR 1971 SC 1210) and summarised the settled law in this regard in the above referred decision as follows:

"The arrears of tax dues to the State can claim priority over private debts. The common law doctrine about the priority of crown debts which was recognised by the Indian High Courts prior to 1950 constitutes law in force within the meaning of Article 372(1) and continues to be in force. The doctrine may not apply in respect of debts due to State if they are contracted by the citizens in relation to the commercial activities, which may be undertaken by the State for achieving socio-economic good. The crown's preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The common law of England or principles of equity and good conscience do not accord the crown a preferential right of recovery of its debts over a mortgagee or a pledgee of goods or a secured creditor".

The State shall have a preferential right to recover its dues over the right of the appellant bank and the property of the partners shall also be liable to be proceded against.

Decision

For the above reasons, the appeal is dismissed.

"But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens... The sure guaranty of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, national and state, of every right that inheres in civic freedom, and of the equality before the law of all citizens of the United States without regard to race.

— HARLAN, John Marshall, in Plessy v. Ferguson, 163 U.S. 537, 559-560 (1896).

"Everybody talks of the constitution, but all sides forget that the constitution is extremely well, and would do very well, if they would but let it alone.

— WALPOLE, Horace, to Sir Horace Mann, 18, 19 January, 1770, in 23 The Yale Edition of Horace Walpole's Correspondence (Lewis, U.S., ed, New Haven : Yale University Press, 1967), p. 176.

"Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be.

— HOLMES, Oliver Wendell, in United States v. Schwimmer, 279 U.S. 644, 654 (1929)

The Fiscal Responsibility And Budget Management Bill, 2000
A Bill

to provide for the resonsibility of the Central Government to ensure inter-generational equity in fiscal management and long-term macro-economic stability by achieving sufficient revenue surplus, eliminating fiscal deficit and removing fiscal impediments in the effective conduct of monetary policy and prudential debt managememt consistent with fiscal sustainability through limits on the Central Government borrowings, debt and deficits, greater transparency in fiscal operations of the Central Government and conducting fiscal policy in a medium-term framework and for matters connected therewith or incidential thereto.

Be it enacted by Parliament in the Fifty-first Year of the Republic of India as follows :

1. (1) This Act may be called the Fiscal Responsibility and Budget Management Act, 2000.

(2) It extends to the whole of India.

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

2. In this Act, unless the context otherwise requires, —

(a) "annual budget" means the annual financial statement laid before both Houses of Parliament under article 112 of the Constitution;

(b) "fiscal deficit" means the excess of —

(i) total disbursements from the Consolidated Fund of India, (excluding repayment of debt), over total receipts into the Fund, excluding the debt receipts, during a financial year; or

(ii) total expenditure from the Consolidated Fund of India (including loans but excluding repayment of debt) over tax and non-tax revenue receipts (including external grants) and non-debt capital receipts during a financial year which represents the borrowing requirements, net of repayment of debt, of the Central Government during the financial year;

(c) "fiscal indicators" means the measures such as numerical ceilings and proportions to gross domestic product, as may be prescribed, for evaluation of the fiscal position of the Central Government;

(d) "Reserve Bank" means the Reserve Bank of India constituted under sub-section (1) of section 3 of the Reserve Bank of India Act, 1934;

(e) "revenue deficit" means the difference between revenue expenditure and revenue receipts which indicates increase in liabilities of the Central Government without correponing increase in assets of that Government;

(f) "prescribed" means prescribed by rules made under this Act;

(g) "total liabilities" means the liabilities under the Consolidated Fund of India and the public account of India.

3. (1) The Central Government shall lay in each financial year before both Houses of Parliament the following statements of fiscal policy alongwith the annual budget, namely :—

(a) the Medium-term Fiscal Policy Statement;

(b) the Fiscal Policy Strategy Statement;

(c) the Macro-economic Framework Statement.

(2) The Medium-term Fiscal Policy Statement shall set forth a three-year rolling target for prescribed fiscal indicators with specification of underlying assumptions.

(3) In particular and without prejudice to the provisions contained in sub-section (2), the Medium-term Fiscal Policy Statement shall include an assessment of sustainability relating to —

(i) the balance between revenue receipts and revenue expenditures;
(ii) the use of capital receipts including market borrowings for generating productive assets.

(4) The Fiscal Policy Strategy Statement shall, *inter alia,* contain —

(a) the policies of the Central Government for the ensuing financial year relating to taxation, expenditure, market borrowings and other liabilities, lending and investments, pricing of administered goods and services, securities and description of other activities, such as, underwriting and guarantees which have potential budgetary implications;

(b) the strategic priorities of the Central Government for the ensuing financial year in the fiscal area;

(c) the key fiscal measures and rationale for any major deviation in fiscal measures pertaining to taxation, subsidy, expenditure, administered pricing and borrowings;

(d) an evaluation as to how the current policies of the Central Government are in conformity with the fiscal management principles set out in section 4 and the objectives set out in the Medium-term Fiscal Policy Statement.

(5) The Medium-term Fiscal Policy Statement, the Fiscal Policy Strategy Statement and the Macro-economic Framework Statement referred to in sub-section (1) shall be in such form as may be prescribed.

4. (1) The Central Government shall take appropriate measures to eliminate the revenue deficit and fiscal deficit and build up adequate revenue surplus.

(2) In particular, and without prejudice to the generality of the foregoing provision, the Central Government shall —

(a) reduce revenue deficit by an amount equivalent to one-half per cent, or more of the estimated gross domestic product at the end of each financial year beginning on the 1st day of April, 2001;

(b) reduce revenue deficit to nil within a period of five financial years beginning from the initial financial year on the 1st day of April, 2001 and ending on the 31st day of March, 2006;

(c) build up surplus amount of revenue and utilise such amount for discharging liabilities in excess of assets;

(d) reduce fiscal deficit by an amount equivalent to one-half per cent, or more of the estimated gross domestic product at the end of each financial year beginning on the 1st day of April, 2001;

(e) reduce fiscal deficit for a financial year to not more than two per cent of the estimated gross domestic product for that year, within a period of five financial years beginning from the initial financial year on the 1st day of April, 2001 and ending on the 31st day of March, 2006 :

(f) not give guarantee for any amount exceeding one-half per cent of the estimated gross domestic product in any financial year;

(g) ensure within a period of ten financial years, beginning from the initial financial year on the 1st day of April, 2001, and ending on the 31st day of March, 2011, that the total liabilities (including external debt at current exchange rate) at the end of a financial year, do not exceed fifty per cent of the estimated gross domestic product for that year.

Provided that revenue deficit and fiscal deficit may exceed the limits specified under this sub-section due to ground or grounds of unforeseen demands on the finances of the Central Government due to national security or national calamity :

Provided further that the ground or grounds specified in the first proviso shall be placed before both Houses of Parliament, as soon as may be, after such deficit amount exceeded the aforesaid limits ;

5. (1) The Central Government shall not borrow from the Reserve Bank.

(2) Notwithstanding anything contained in subsection (1), the Central Government may borrow from the Reserve Bank by way of advances to meet temporary excess of cash disbursement over cash receipts during any financial year in accordance with the agreements which may be entered into by that Government with the Reserve Bank :

Provided that any advances made by the Reserve Bank to meet temporary excess cash disbursement over cash receipts in any financial year shall be repayable in accordance with the provisions contained in sub-section (5) of section 17 of the Reserve Bank of India Act, 1934.

(3) Notwithstanding anything contained in subsection (1), the Reserve Bank may subscribe to the primary issues of the Central Government securities during the financial year beginning on the 1st day of April, 2001 and subscription two financial years.

(4) Notwithstanding anything contained in subsection (1), the Reserve Bank may buy and sell the Central Government securities in the secondary market.

6. (1) The Central Government shall take suitable measures to ensure greater transparency in its fiscal operations in public interest and minimise as far as practicable, secrecy in the preparation of the annual budget.

(2) In particular, and without prejudice to the generality of the foregoing provision, the Central Government shall, at the time to presentation of the annual budget, disclose in a statement as may be prescribed, —

(a) the significant changes in the accounting standards, policies and practices affecting or likely to affect the computation of precribed fiscal indicators;

(b) as far as practicable, and consistent with protection of public interest, the contingent liabilities created by way of guarantees including guarantees to finance exchange risk on any transactions, all claims and commitments made by the Central Government having potential budgetary implications, including revenue demands raised but not realised and liability in respect of major works and contracts.

7. (1) The Minister incharge of the Ministry of Finance, shall review, every quarter, the trends in receipts and expenditure in relation to the budget and place before both the Houses of Parliament the outcome of such reviews.

(2) Whenever there is either shortfall in revenue or excess of expenditure over pre-specified levesl during any period in a financial year, the Central Government shall proportionately curtail the sums authorised to be paid and applied from and out of the Consolidated Fund of India under any Act to provide for the appropriation of such sums :

Provided that nothing in this sub-section shall apply to the expenditure charged on the Consolidated Fund of India under clause (3) of article 112 of the Constitution.

(3) The Minister incharge of the Ministry of Fnance, shall make a statement in both the Houses of Parliament explaining —

(a) any deviation in meeting the obligations cast on the Central Government under this Act;

(b) whether such deviation is substantial and relates to the actual or the potential budgetary outcomes; and

(c) the remedial measures the Central Government proposes to take.

8. (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(a) the fiscal indicators to be prescribed for the purpose of sub-section (2) of section 3 and clause (a) of sub-section (2) of section 6;

(b) the forms of the Medium-term Fiscal Policy statement, Fiscal Policy Strategy Statement and Macro-economic Frame Work Statement referrred to in sub-section (5) of section 3;

(c) the form of statement under sub-section (2) of section 6; and

(d) any other matter which is required to be, or may be, prescribed.

9. Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall threafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

10. No suit, prosecution or other legal proceedings shall lie against the Central Government or any officer of the Central Government for anything which is in good faith done or intended to be done under this Act or the rules made thereunder.

11. The provisions of this Act shall be in addition to, and not in derogation of, the provision of any other law for the time being in force.

12. (1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to be necessary for removing the difficulty :

Provided that no order shall be made under this section after the expiry of two years from the commencement of this Act.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before

each House of Parliament.

Select Bibliography*

D.V. Sekhar
Asst. Legal Adviser

1. Vinod Kumar Dhingra, "Issues Arising From Certain Amendments Made by the Companies (Amendment) Act, 2000" : [2001] 31 SCL 46 —picks out some of the amendments and pinpoints certain issues that arise therefrom which need to be resolved.

2. Dr. K.R. Chandratre, "Can All Directors of Company be Officers In Default Under the Companies Act?", 2000 : [2001] 31 SCL 55 — examines the issue in detail and cites judicial rulings to show that criminal liability of ordinary directors of a company would arise only in respect of a company which has no managing director or a whole — time director or a manager and where particular directors are not specified to be liable by the company.

3. T.N. Pandey, "New Responsibilities Cast On Company Directors by the Companies (Amendment) Act, 2000" : [2001] 31 SCL 9 — makes a crucial examination of some of the amendments which have enhanced the responsibilities of the directors of a company in some crucial areas. In efficient discharge of such increased responsibilities, directors will have not only to devote greater time and energy in the conduct of affairs of the company, they will also have to exercise greater care and caution in discharging their duties, as the penalties for various defects have been made very stringent. Whether the new measures will succeed in improving corporate governance, only time will tell.

4. Gauri Manglik & Shwetashree Majumdar, "Credit Rating Agencies — The Indian Experience" : [2001] 31 SCL 20 — analyses the Indian experience in the filed of Credit rating agencies.

The authors explain the concept of credit rating and dwell upon the role of a credit rating agencies in the capital market. In India, there are, as of now, only three credit rating agencies and each one of them has been promoted by corporates who themselves are likely to be rated by them. Thus, a question mark hangs over the credibility of the credit rating agencies. The authors highlight the importance of independence and objectivity of credit rating agencies. The author also give a brief account of the SEBI Guidelines for credit rating agencies. The basic purpose of these guidelines is to protect the interest of investors. The authors find that though the SEBI Guidelines or regulations have solved many problems connected with credit rating agencies, certain issues still remain to be resolved.

5. G.D. Agarwal, "Financial Companies Regulation Bill, 2000 — A Critique" : [2001] 30 SCL 81 — makes a critical analysis of the Financial Companies Bill, 2000. In this article, the author, who is a strong proponent of having one authority under one law for protecting the interests of corporate depositors, has noted and criticised the fact that at present, although the CLB is the authority under both the Companies Act, 1956 (as amended by the Companies Amendment) Act, 2000 and the Financial Companies (Regulation) Bill, 2000, the procedure prescribed under them

for redressal of grievances of depositors is different. The author pleads for bringing about greater uniformity in this respect.

6. N.R. Moorthy, “Nominees Accountable to Legal Heirs and/ or Legatees” : [2001] 30 SCL 85 —examines the question of rights and obligations of a nominee in the event of death of the holder of the security, deposits, account, etc. Based on a judgement of the Apex Court, the author propounds the legal position that although the nominee is entitled to receive the payment in the aforementioned eventually, he remains accountable for the same to the legal heirs of the deceased. Legally any amount paid to the nominee becomes the estate of the deceased which devolve upon all persons entitled to succession under law, custom or testament of the deceased. Consequently, the nominee is bound to make good the payment to the legal heirs.

7. G.P. Sahi, “Voting by Postal Ballot — Implications” : [2001] 31 SCL 4 — discusses the details of the procedure prescribed for postal ballot and opines that it will be a very costly proposition for companies, though it may not even serve the purposes of ensuring wider participation of shareholders in the process of decision making. The author points out several snags that are likely to come up in the implementation of the scheme. He also makes certain suggestions in this regard.

8. Satyajit Dhar, Audit Committees in Corporate India — Certain Issues : [2001] 31 SCL 41 — discusses the importance and implications of the concept of an audit committee of a corporate board in the Indian context. The author also points out the variations between the K.M. Birla Committee Code and the provisions as introduced in the Companies Act, 1956 by the Companies (Amendment) Act, 2000. The author has identified certain points and issues on which further clarification is necessary.

9. Sudhir R. Singh, “Companies (Amendment) Act, 2000 — An Analysis” : [2001] 30 SCL 87 —The Companies (Amendment) Act, 2000 has brought about a sea-change in the Companies Act, 1956 by bringing in certain totally new provisions like those pertaining to shelf prospectus, passing of certain resolutions by postal ballot, constitution of an audit committee of the board of directors of a company, and also by making amendment with far-reaching implications in certain existing provisions. Many of the amendments made are of a consequential nature. In this article, the author has picked out some of the major amendments for a critical analysis.

10. K.B.V. Narayan, “Companies (Amendment) Act, 2000 — Some Grey Areas” : [2001] 30 SCL 150 — picks out some of the major amendments for analysis and discussion, e,g., those pertaining to issue of equity shares with differential rights, secretarial compliance certificate, constitution of audit committee, disqualification of directors, requirement of minimum paid-up capital for public and private companies, interim dividend etc. In the author’s view, as stated in this article, some of the amendments have generated grey areas in the law, i.e., there are certain aspects thereof which are vague or ambiguous and need to be clarified by the authorities.

11. Vivek Sadhale, “On-line Issue of Shares” : [2001] 31 SCL 15 — explains the legal requirements and procedural details of an ‘on-line’ offer of securities in a public issue. This system has been highly successful in western capital markets, but only time will tell how it is going to fare in India.

12. Amitav Ganguly, "Some Comments On the Companies (Amendment) Act, 2000" : [2001] 31 SCL 36 — singles out some of the amended provisions for critical comment. As seen by him, these provisions contain certain ambiguities and, therefore, call for appropriate clarification or modification.

13. N. Sridharan, "Applicability of the Newly Introduced Provisions of the Companies (Amendment) Act, 2000 On Disqualification of Directors" : [2001] 30 SCL 167 — examines in detail the implications of this amendment and raises certain questions about the date of applicability of the new provisions. The author also discusses the question of applicability of the amended provisions to persons holding directorship in companies which have been registered as sick companies under the Sick Industrial Companies (Special Provisions) Act, 1985.

14. Dr. V. Balachandran & K.S. Ravichandran, "Action Against Infringement and Passing Off Under the Law Relating to Trademarks — A Case Study : [2001] 30 SCL 178 — presents a hypothetical case study pertaining to the problem of infringement and 'passing off' arising under the law relating to trademarks, as embodied in the Trade Marks Act, 1999. The author explains that this Act gives only the proprietor of a registered trademark the statutory right to bring action against anybody for infringement of a registered trademark. However, the proprietor of a unregistered trade mark is not left totally unprotected. Action for passing off is the remedy available to him.

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* Ed. Note : This section covers articles on banking and other areas of the law relevant to bankers like industrial law and company law.

Law Relating To Powers Of Attorney
by Shri S. Parameshwaran, Senior Advocate, High Court of Kerala
P.S.N. Prasad
Asst. Legal Adviser

'Law Relating to Powers of Attorney' by Shri S. Parameswaran, Sr. Advocate, High Court of Kerala ("Espee"), deals with the law laid down by the Power of Attorney Act, 1882. The Act has been deftly commented upon, section-wise and by including the latest case law on the subject. The book also deals with the various enactments wherein Power-of-Attorney is an essential ingredient. Specimen forms of powers-of-attorney as well as more than a hundred model forms are also included.

Right from the time of barter and cartel in the world of business and finance, contract started playing an important role in human life. As man became busier and busier, it became more and more necessary for him to depend on others for getting his things done. Hence, he started delegating his functions. The result was the evolution and development of agency as a concept and as a practice, particularly in the world of business, commerce and Industry. The word "agent" is derived from the Latin word 'agree' which means 'to see'. Thus an agent is a person, who acts for another person who authorises to do for him in accordance with the maxim **'qui facit per siium facit per se',** meaning that he who does anything by another does it by himself. Agency involves a triangular relationship involving the principal, the agent and the third party.

The Law relating to Powers-of-Attorney in fact falls within the Law of Agency.

The contents of the book is divided into three parts — Part I consists of The Powers of Attorney Act, 1882 wherein the author has discussed the Act Section-wise. In Part-II the relation between Powers of Attorney Act and the miscellaneous enactments such as the Advocate's Act, 1961, the Bar Council's Act, 1961, the Registration Act, 1908, the Indian Evidence Act, 1872, the Notaries Act, 1952, the Stamp act, 1899, the Transfer of Property Act, 1882, the Income-tax Act, 1922, the Agricultural Income-tax Act, 1950, the Insolvency Act, the Limitation Act, 1963, the Companies Act, 1956, the Negotiable Instruments Act, 1881, the Industrial Disputes Act, 1947, the Specific Relief Act, 1963, the Lunacy Act, 1912, the Civil Procedure Code, 1908 and the Stamp Act, 1899. Part-III of the book provides various specimen Forms of Powers of Attorney (General Powers of Attorney to deal with property) with Modal Forms. In Appendix-I, the Power of Attorney Act in U.K. which is the basis for Indian Law on Powers of Attorney is also given.

Powers of Attorney must be strictly perused, and construed as giving only such authority as they confer expressly or by necessary implication. In Atma Ram Sahni vs. Chitra Production Co., AIR 1952 Punj 99, a person entered into an agreement with a film company agreeing to finance the company in the production of a certain film on certain conditions. He subsequently informed the company by a letter in the following terms : "I (my agent) will conduct and supervise all financial arrangements entered into by me with you as per your agreement dated 9-12-1946. He has got full authority and all his commitments will be binding upon me." The Court was of the opinion that the authority of the agent must be construed as being subject to the financial arrangements contained in the various clauses of the agreement, and he had no authority to act outside the clauses of the agreement. Powers-of-attorney must be strictly perused and construed as giving only such authority as they confer expressly or by necessary implication. The Court added that there are four most important rules of construction. They are as follows :

1. The operative part of the deed is controlled by the recitals.
2. Where authority is given to do particular acts, followed by general word, the general words are restricted to what is necessary for the proper performance of the particular acts.
3. General words do not confer general powers, but, are limited to the purpose for which the authority is given, and are constructed as enlarging the special powers when necessary and only when necessary for that purpose.
4. The deed must be construed so as to include all medium powers necessary for its effective execution.

In M. John Kotaiah vs. A. Divakar, AIR 1985 AP 30, the Andhra Pradesh High Court held that if the interest created in the agent is the result of the proceeding arising after the exercise of the power, then the agency is revocable and cannot be said to be an irrevocable agency. However, if the interest in the subject-matter, say a debt payable to the principal, is assignment to the agent of a security simultaneously with the creation of the power and thereafter the agent exercises the power to collect the debt for discharge of an obligation owed by the principal in favour of the agent or owed by the principal in favour of a third party, then the agency becomes irrevocable. The Court was of the further view that if, on a construction of the power of attorney, and in the light of the facts and circumstances obtaining in the case, the document does not prima facie satisfy the requirements for the creation of a power coupled with interest, then merely because

the document itself described the agency to be an irrevocable one, it does not become an irrevocable agency. Under the impugned power of attorney, the attorney-holder was to manage, control-supervise and develop the property of the principal, to let out any part of that property, realise rent, prevent encroachment, appeal before any authority for the benefit of the principal etc. subject to the condition of receiving remuneration at 5% of the total market value of the property and the amount lying in bank. There was thus no existing obligation in favour of the agent-power of-attorney-holder such as debt before the execution of the power of attorney; nor was such an obligation created simultaneously with the execution of the power-of-attorney. The interest created in favour of the agent for payment of either his dues or his remuneration was in effect arising out of the exercise of the power and, therefore, it is clear, prima facie, that the impugned power-of-attorney, even though it contained a stipulation that the power would not be revoked for ten years, did not create and irrevocable power-of-attorney.

Order III, rule 4, Civil Procedure Code, 1908 requires the appointment of a counsel to act in court by a document in writing. There is no distinction between the power of counsel in England, Scotland and Ireland and hat of advocates in India. The only requisite is a written authority of appointment. When that is given, it leaves the counsel so appointed free to 'act', and draws no distinction between various kind of acting. If the legislature draws no distinction, there is no justification for the court to make one. When counsel is appointed under a document, the enumeration of certain powers in it would not exclude the implied powers necessarily inherent in the appointment, however, exhaustive be the enumeration of the powers necessary for the proper discharge of the work of counsel in court.

In M/s. Rudnap Export Import vs. Eastern Associates Co., AIR 1984 Del 20, the Delhi High Court observed that where a power-of-attorney filed in a suit in a court in Delhi by a permanent representative of a company incorporated in Yugoslavia was executed before a Judge in Yugoslavia and is authenticated by the judge in a court of that country, and thereafter through the foreign office of Yugoslavia Government, signatures of officials were attested by the office of the Indian Embassy and the power-of-attorney was received by the person filing it, the court in India was entitled to presume the existence of the document in question, this being the common course of business in getting the power-of-attorney of a foreigner in another country.

On the whole, "Espee" (Shri S. Parameswaran) on the Law Relating to Power-of-Attorney in India" is a service to the lawyer and the lay alike, and may legitimately claim a place not merely in the library of the lawyer, but also of all other allied professions and the mercantile community. It may be noted that the careful marshalling of materials, a better tidying up of topics and a more selective highlighting of landmark rulings have enhanced the worth of the volume.

The book is priced at Rs. 295/- and published by Universal Law Publishing Co. Pvt. Ltd., New Delhi and has already received appreciation from the Bench as well as Bar and the interested sections of the society.

"In three words I can sum up everything I've learned about life : it goes on."

— Robert Frost

..... the liability for conspiracy is not taken away by its success, — that is, by the accomplishment of the substantive offense at which the conspiracy aims.

— HOLMES, Oliver Wendell, in Heike vs. United States, 227 U.S. 131, 144 (1913)

The Constitution as a continuously operating charter of government does not demand the impossible or the impractical.

— STONE, Harlan F., in Hirabayashi vs. United States, 320 U.S. 81, 104 (1943)

The Comstitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

— CARDOZO, Benjamin N., in Baldwin vs. Seelig, 294 U.S. 511, 523 (1935)

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* Compiled by Smt. J.M. Khire, Asst. Librarian

Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought in conflict.

— SUTHERLAND, George, Jones v. Securities & Exch. Com., 298 U.S. 1, 24 (1936).

LD News

Foreign visit

Shri S.C. Gupta, Legal Adviser visited New York, Washington and London from 22nd April to 4th May 2001 as Member Secretary of the Committee on Legal Aspects of Bank Fraud, to study legal systems in combating fraud.

Welcome

Kum. Mona Anand, Dy. Legal Adviser has been transferred to the Department from Legal Cell, Calcutta with effect from 2-5-2001.

Good Bye

Shri Ghadi, Record Clerk, retired from the services of the Bank at the close of business on 31st May 2001 after completing 38 years of services in the Bank.

Congrats

Shri V.K. Jayakar, Asst. Legal Adviser, Gr. C has been promoted to Dy. Legal Adviser, in Gr. D with effect from 8th May 2001.

Shri Paunikar, Steno has been promoted and transferred to RBI, Nagpur as Private Secretary, Gr. A with effect from 23rd April 2001.

Shri Nazarath Clerk/CNE Gr. I has been promoted and transferred to Issue Department as Teller with effect from 12th June 2001.

Transfer

S/Shri V.K. Jayakar and P.S.N. Prasad, Asst. Legal Advisers Gr. 'C' have been transferred to Legal Cell, Chennai and Calcutta with effect from 19th April 2001 and 18th April 2001 respectively.

Study Circle

Shri Daniel Laford, Dy. General Counsel, Bank for International Settlement (BIS) visited the Department on 13th June 2001 and delivered a lecture on the repurchase of BIS shares.
Shri K.G.P. Srikumara and Ms. Fernando of the Central Bank of Sri Lanka visited the Department on 11th June 2001 for discussions on "Legal Aspects of Payment and Settlement System".

The greatest expounders of the Constitution, from John Marshall to Oliver Wendell Holmes, have always insisted that the strength and vitality of the Constitution stem from the fact that its principles are adaptable to changing events.

— JACKSON, Robert H, The Struggle for Judicial Supremacy
(New York : Alfred A. Knopf, 1941), 0. 174

Mail Bag

Dear Sir,

I am working as legal officer in a leading NBFC. I had an opportunity to read your House Journal 'RBI Legal News and Views'. It is very useful for a legal officer like me. I request you to send me a copy of the journal to the address mentioned below :

N. Narayanan
7, Abdul Aziz Street,
T. Nagar,
Chennai-600 017.
Tamil Nadu
Phone : 044-4335160

I am looking forward to your early response.

Thanking you,

Yours Truly,
N. Narayanan

The Editor,
R.B.I. Legal News & Views,
Legal Department,
Central Office Bldg., 23rd Floor,
Shahid Bhagat Singh Road,
Reserve Bank of India
Mumbai-400 001.

Respected Sir,

I had an opportunity to go through your house journal "R.B.I. Legal News & Views", October-December-2000 during my visits to self learning centre in my D.N.B.S. Deptt. at Ahmedabad. I found it precious and rewarding as it had a very wide coverage. I feel that I have missed a lot. This will enrich my legal knowledge & help in dicharging my duty more efficiently.

I shall be highly obliged if you kindly include my name in the mailing list. My address is as mentioned below. If there is any subscription payable, please let me know. If there are past issues available, please send the same & oblige.

Thanking you,

J.G. Deshpal
Deptt. of Non-Banking Supervision, R.B.I.,
La-Gujjar, Ahmedabad.

Dear Sir,

I had an occasion to read October-December 2000 issue of RBI Legal News & Views, borrowed from a friend. If I am not exaggerating, the articles were so engrossing and informative. I was forced to continue reading well after office hours.

As, I find the 'Newsletter' of immense value, I request you to include my name in the 'Mail list' and send a copy to my residential address given below.

Yours faithfully,
B.S. Shekhar
9/44, 'Panduranga'.
Ambagilu,
Udupi-576 125

The Editor,
RBI, Legal News & Views,

C.O. Legal Department,
23rd Floor, C.D. Building,
Shahid Bhagatsingh Road,
Mumbai-400 001.

Respected Sir,

I am working at L.V.B., Divisional Office, Madurai after transfer from Administrative Office, Karur.

I used to read your RBI Legal News and Views House Journal, which is educative and informative.

After my transfer, I could not go through your journal. I shall be grateful if you will kindly arrange to put my name on the mailing list of your journal.

Thanking you,

Yours faithfully,
L. Selvaraju,
Law Officer,
Lakshmi Vilas Bank Ltd.,
Divisional Office,
97, Palace Road,
Madurai-625 001.

RBI Legal News and Views,
RBI, Central Office,
23rd Floor, Central Office Bldg.,
Shahid Bhagat Singh Road,
Mumbai-400 001.

Sir,

Ref. : Inclusion in Mailing List

I have been a regular reader of 'RBI LEGAL NEWS & VIEWS' for the last two years while working in my head office. I find the journal very useful and informative and helps me tremendously in discharging my duties. Now I have been transferred to Chennai, Zonal Office. I request you to include my name in the mailing list. I also request you to sent me back issues from April 2000.

Thanking you,

Riza Mohamed K.S.
Asst. Manager (Law),
State Bank of Travencore,
Zonal Office,
304 & 305, Anna Salai,
Chennai-600 018.

The Editor,
R.B.I. Legal News & Views,
Legal Department, 23rd Floor,
Central Office Building,
Shahid Bhagat Singh Road,
Reserve Bank of India,
Mumbai-400 001.

Dear Sir,

Ref. : RBI Legal News & Views — Request to include my name in the mailing list

I had the privilege of scanning through your journal "RBI Legal News and Views". It contains useful information for professionals. I shall be much obliged if you can arrange to mail this journal regularly to my above address.

If there is any subscription, kindly let me know so that I could subscribe.

Thanking You,

Yours faithfully,
R. Balasubramaniam
No. AG-15, Santhi Colony,
Annanagar, Chennai-600 046.

Legal Department
Central Office Building, 23rd Floor,
Shahid Bhagat Singh Road,
Reserve Bank of India,
Mumbai-400 001.

Dear Sir,

We are in receipt of your journal for October-December 2000 which was the last issue of the

Millennium.

In the Journal section of this issue, the Article on Debt Recovery Laws and Procedures with particular referenece to Recovery of Debts due to Banks and Financial Institutions is exhaustive and gives elaborate information for management of NPAs. While each article is very much informative, we are really enlightened by the article "The Modern Face of the Central Bank" which gives a comparative study on the constitutional Status of Central Banks under various constitutions of the World.

The legislation section gives useful information by bringing the Banking Companies (Acquisition and Transfer of Undertakings) and Financial Institutions Laws (Amendment) Bill, 2000 to the notice of bankers.

We thank you very much for sending the last issue of the Millennium. At the same time, we shall be much obliged if you kindly include our address in your mailing list of the journal, so that we will not miss the opportunity to read your journal regularly and enrich our knowledge. As we are interested to subscribe for it, kindly let us know so that we could send the subscription.

Yours faithfully,
R.K. Aggarwal
Deputy General Manager,
Indian Overseas Bank,
Legal Services Department,
Central Office, 762, Anna Salai,
Chennai-600 002.

Dear Sir,

Ref. : Departmental publications-placing on the mailing list-requested

I wish to introduce myself as Deputy General Manager (Rtd.), Bangalore Office, President, RBI Retired Officers' Association, Bangalore and presently practicing as an Advocate. I request you kindly to place my name on the mailing list for complimentary copies of the periodicals, journals and other publications of the Department and oblige.

Thanking you,

Yours faithfully,
Mohd. Shafi Ahmed
'Mubash', 984, 23rd Main Road,
IV Block 'T', Jayanagar,
Bangalore-560 041.

Dear Sir,

Ref. : Non-receipt of your magazine-change of address

I have to submit that I was enrolled on the permanent mailing list of your magazines RBI Legal News & Views. It was being despatched to me and was being received by me till May 2000. Thereafter, I am not receiving the same. The said magazines is very useful and helpful for me in the discharge of my official duties. Therefore, I hereby request you to please continue the supply of the said magazines to me at the address given below :

S.L. Garg,
D-101, SBI Officers Flats,
1-Khatipura Road, Hasanpura,
NBC Road, Jaipur.

Yours faithfully,
S.L. Garg
Dy. Manager (Law),
State Bank of India,
Zonal Office, Jaipur.

Dear Sir,

Ref. : Request for enrolling my name on the mailing list of your magazine
RBI Legal News & Views

I had an occasion to go through your abovesaid magazine and have to submit that I found the same very useful as much as that the same imparts knowledge about the latest legislation and decisions on Banking. I shall be thankful to you, if my request for enrolling me on your permanent mailing list is acceded to by your goodself.

Yours faithfully,
B.L. Meena
Chief Manager (Law),
C-124, SBI Officers Flats,
1-Khatipura Road,NBC Road,
Hasanpura, Jaipur.

Dear Sir,

I happened to see “RBI LEGAL NEWS AND VIEWS” edited by you with Mr. M.S. Ahuja

working with us at Mumbai.

I found it so informative and full of readable articles, that I could not resist sending you this letter.

I would be happy to be on your mailing list so that I get it regularly and enjoy reading it. Kindly it may be sent to me at Nagpur address given below.

With regards,
Wijay D. Chitaley,
Managing Director,
All India Reporter Pvt. Ltd.
Congress Nager, Nagpur-440 012.

Dear Sir,

Reg. : Subscription of Journal "RBI Legal News & Views".

I am working as Law Officer in the Law Department Central office of "The Bank of Rajasthan Limited" since last 10 years and possess educational qualification M.COM., L.L.B., DLL & CAIIB. I am looking after all types of legal matters & documentation of the Bank. I have also appeared in the exam of LLM-Part II this year and awaiting for result.

Sir, I have an opportunity to see your Journal RBI Legal News & Views and extremely impressed by the latest and rich coverage of it. The articles are very useful for a banker and particularly a person bearing responsibility of legal matters.

Sir, I would be obliged if you kindly record my name in the mailing list of your esteemed magazine and advise if any fee is to be paid for it. The magazine may kindly be sent to the under noted address.

Thanking you,

Yours sincerely,
Rakesh Kumar Sharma
Law Officer
The Bank of Rajasthan Ltd.,
Law Deptt. Central Office
C-3, Sardar Patel Marg, C-Scheme,
Jaipur-302 001 (Rajasthan).

Dear Sir,

At the outset I introduce myself. I am Tom P. Roy, working as Assistant Manager in the Chairman's Secretariat of Federal Bank at Aluva. Earlier I was in the Legal Department of Federal Bank and is very interested to pursue legal knowledge and expertise.

Recently I have come across your publilcation RBI LEGAL NEWS AND VIEWS and found very useful for Bankers interested to sharpen legal knowledge. I shall therefore be much obliged if you could include my name and address in the subscribers list of the publication. My mailing address is given below.

Hope you will consider this request and do what is needed.

Thanking you,

Yours faithfully,

Tom P. Roy
Assistant Manager,
Chairman's Secretariat
Federal Bank
Federal Towers
ALUVA, Kerala Pin-683 101.

Ed. Note : The request for recording change of address and inclusion in mailing have been noted.