

RBI Legal News and Views

[From the Editorial Desk](#)

Journal Section

[Financial Companies: Legal Issues in Enforcing Repayment of Deposits](#)

[Copyright Law Vis-A-Vis Legal and Technological Issues](#)

Guest Column

[Financial Companies Regulation Bill, 2000 — An Overview](#)

Judgements Section

[Recent Judgements Relevant to Bankers](#)

Legislation Section

[Freedom of Information Act, 2002](#)

[The Prevention of Money-Laundering Act, 2002](#)

Bibliography & Book Review

[Select Bibliography](#)

Book Review

[Law Relating To Securitisation & Reconstruction Of Financial Assets & Enforcement Of Security Interest](#)

[LD News](#)

[Mail Bag](#)

From the Editorial Desk

Financial sector reforms have brought derivatives contracts sharply in focus. The question that still lurks in the minds of scrupulous market participants is whether derivatives contracts are "wagering contracts" and as such, void under the laws as they exist and as interpreted by judiciary. Black's Law Dictionary refers to "wagering contract" as one in which the parties stipulate that they shall gain or lose, upon the happening of an uncertain event, in which they have no interest except that arising from the possibility of such gain or loss.

One of the earliest decisions of a court of law on the subject is *Carlill v. Carbolic Smoke Ball Co.* (1892) 2 QB. 484. According to that judgment, a wagering contract is one by which two persons professing to hold opposite views, touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties.

In India, though the expression 'wager' is not defined in the Indian Contract Act, 1872, under Sec. 30 of that Act,- "Agreements by way of wager are void. No suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to a person to abide the result of any game or other uncertain event on which any wager is made." This section lays down an exception in favour of certain prizes for horse-racing.

Judicial pronouncements show that the nature of the contract, whether it is a wager or not, depends upon the intention of the parties at the time of making the contract. Such common intention may be express or may be implied from the course of dealings and other circumstances on record. The intention may also be gathered from the position of the parties and the history of the dealings. The modus operandi may be such as to raise a presumption against the existence of a common intention to wager. Generally speaking, the courts would lean towards a construction favouring the validity of the contract rather than its illegality.

Laws framed in an entirely different era are applied decades later to situations in emerging markets as a result of growing privatization, liberalization and globalization for contracts entered into for bona fide commercial purposes. Uncertainty remains on the question how the existing laws are going to be interpreted by judiciary in respect of transactions that may involve high stakes for several parties across the board. Market participants are reluctant to take any risk whatsoever and are discouraged to venture in the field until certainty of laws relevant to transactions being construed as wager are put beyond all doubts. To put the entire issue of legality in proper perspective, a section of market-participants advocate a comprehensive legislation duly considered, debated and passed by the Parliament. Others suggest a quick amendment by way of clarification to the existing laws for the purpose. But there are no two opinions that the legislature must step in where the judiciary is yet to tread.

The present issue begins with an article on the legal issues in enforcing repayment of deposits with the financial companies. It is followed by an article dealing with the copyright law vis-à-vis legal and technological issues. In the Guest Column, we have the pleasure of presenting the views of Shri S. Ramaiah, former Law Secretary, Government of India, on Financial Companies Regulation Bill, 2000.

In the Judgements Section, we have included a variety of judgements of different High Courts and the Supreme Court, which will be of interest to bankers. The Legislation Section covers Freedom of Information Act and Prevention of Money-Laundering Act, 2002. In the Book Review and Bibliography Section we have reviewed a book on Law Relating to Reconstruction of Financial Assets & Enforcement of Security Interest by Shri M.R. Umarji. The Bibliography Section as usual covers recent articles on law of interest to bankers. In FAQ we have clarified some of the queries on Consumer Protection Act. Apart from the above, we have all our usual features like LD News and Mail Bag.

M.A. Batki
Legal Adviser

Journal Section

Financial Companies: Legal Issues in Enforcing Repayment of Deposits

K.D. Zacharias
Legal Adviser

1. Introduction

A company accepting deposits from the public has a statutory obligation¹ to repay such deposits, unless renewed, in accordance with the terms and conditions of such deposits. However, the cases of companies defaulting in repayment of deposits is so rampant that the law has been unable to keep pace. The Reserve Bank of India has, as an adjunct to its monetary and credit policy², been regulating the acceptance of deposits by financial companies under Chapter IIIB of the Reserve Bank of India Act³. Although the legal framework for regulation of these companies has undergone many changes, the last being the amendments to the Reserve Bank of India Act in 1997, the safeguards for depositors have not been found adequate. Hence, for comprehensively dealing with the issues faced by financial companies a separate legislation has been initiated by introducing the Financial Companies Regulation Bill, 2000 before the Parliament⁴. In this context, we take an overview of the current legal position as also the proposed changes in the law for enforcing repayment of deposits accepted by financial companies.

2. Power to order repayment of deposits

Although under Chapter IIIB of the Reserve Bank of India Act, Reserve Bank is the regulator of financial companies, the Act does not confer any specific powers on the Bank for ordering repayment of deposits. Under Section 45 QA (2), the Company Law Board (CLB/Board)⁵ may, on its own motion or on an application made by a depositor, order repayment of deposits by a nonbanking financial company. The Board has to be satisfied that it is necessary to order repayment of the deposits or a part thereof. The order may be to pay forthwith or within such time and subject to such conditions as may be specified in the order. Further, the Board has to give a reasonable opportunity of being heard to the company and other persons interested in the matter.

3. Enforcement of CLB orders

The RBI Act does not contain any provisions for enforcement by the Company Law Board of its orders. Under Section 634 A of the Companies Act, any order made by the Board may be enforced by that Board⁶ in the same manner as if it were a decree made by a Court in a suit pending before it and in case of its inability to execute such order, the Board is authorised to send the Order to the court within the local limits of whose jurisdiction the registered office of the company is situated. However, the RBI Act does not incorporate these provisions of the Companies Act (providing for execution of orders of the Board) into it or make any reference thereto. Similar is the case with the provisions of Section 10 F of the Companies Act relating to appeals against orders of the Board. As such, these provisions may not be of avail to the aggrieved parties. Further, there are no specific provisions in the RBI Act relating to any revision or modification of the orders passed by the Company Law Board. The Board has, however, been hearing applications by companies seeking time for repayment and revising the schedule of repayment apparently, in exercise of its powers under Section 45A(2) to order repayment 'within such time and subject to such conditions as may be specified'.

4. Prosecution of companies

4.1 The failure of a company to comply with any order made by the Company Law Board under Section 45 QA(2) is punishable⁷ with imprisonment for a term of up to 3 years and fine of not less than Rs.50 for every day during which the non-compliance continues. The company as also every person who at the time of the default was in charge of and was responsible to the company for the conduct of its business shall be deemed to be guilty of the contravention and shall be liable to be punished accordingly⁸.

4.2 Any prosecution for non-compliance with the orders of the CLB can be initiated only by the Reserve Bank as stipulated in Section 58E of the Reserve Bank of India Act⁹. The complaint has to be filed before a Metropolitan Magistrate or Judicial Magistrate of the First Class.

4.3 The penal provisions for non-compliance of CLB order are apparently stringent, and in fact, some of the defaulting companies and their directors have been punished. This has its deterrent effect. However, the complexities in proving charges against companies and their directors in a criminal court and the consequent delays in prosecution affect the utility of this process in enforcing repayment of deposits. Further, as prosecution may lead to punishment of a company or its directors but does not automatically lead to repayment of deposits, prosecution as a mode of enforcing repayment of deposits has its limitations.

5. Role of Consumer Forum

5.1 There are no specific provisions in Consumer Protection Act, the Reserve Bank of India Act or any other statute stipulating that the Forums constituted under the Consumer Protection Act may adjudicate the claims of depositors against defaulting companies for repayment of deposits. Under the Consumer Protection Act, a complaint can be made to the Consumer Forums if the services¹⁰ hired or availed of or agreed to be hired or availed of by any person suffer from deficiency¹¹ in any respect. In *Indian Medical Association v. V.S. Santha*¹², the Supreme Court analysed the definition of service in section 2(1)(o) of the Act as under

" The definition of `service' in section 2(1)(o) of the (Consumer) Act can be split up into three parts - the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines service to mean service of any description which is made available to the potential users. The inclusionary part expressly includes the provisions of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information. The exclusionary part excludes rendering of any service free of charge or under a contract of personal service."¹³

Construing failure of companies in repayment of deposits according to the agreed terms as a deficiency in service under the Consumer Protection Act, the Consumer Forums have been exercising jurisdiction and adjudicating the applications of aggrieved depositors.

5.2 The role of the Consumer Forums vis-a-vis the Company Law Board has been examined by the National Consumer Commission and the Courts. The Andhra Pradesh High Court has, in *Prudential Capital Market Ltd. Vs. State of Andhra Pradesh and Others*¹⁴ held that a depositor may either approach the Consumer Forum or the Company Law Board and that there is no

exclusion of jurisdiction of the Consumer Forum from entertaining a dispute at the instance of the depositor. The remedy under Section 45QA of the RBI Act is in addition to that available under the Consumer Protection Act. The provisions of Sections 45Q and 45QA of the RBI Act and Section 58A of the Companies Act do not either expressly or impliedly bar the jurisdiction of the Forums constituted under the provisions of the Consumer Protection Act from entertaining a consumer dispute case at the instance of a depositor claiming repayment of the deposit from a non-banking financial company. Further, in view of Section 3¹⁵ of the Consumer Protection Act, the remedy under the said Act is an additional remedy and it cannot be taken away either by the RBI Act or by the Companies Act. It is for the depositor to decide which is the most effective remedy as far as he is concerned.¹⁶

5.3 In *M/s.Alliance Capital and Management Services Ltd. vs UPGrover and Others*¹⁷, the National Commission had taken the view that as the Company Law Board was seized of the matter and the petitioner company was adhering to the scheme of repayment framed by the Board, any grievance of non- payment according to the schedule drawn by the Board can be raised before the Board. On that basis the matter was not entertained by the Commission. Recently, the Commission has, vide its common order dated 30th January, 2003, in **Lloyds Finance Ltd. Vs. Ms Napeena Singh**¹⁸ and connected cases reviewed the above position following the Andhra Pradesh decision. The Commission has observed that considering the huge pendency of cases in Consumer Forums against non-banking financial companies by the depositors all over the country, it is unfortunate that these very NBFCs take shelter in the safe haven of schemes framed by the Company Law Board in any of the regions of the country much to the chagrin of the poor depositors. The Commission further observed¹⁹

"These revisions by the petitioner, a NonBanking Financial Company has the usual defence of scheme framed by Company Law Board, Western Region when most of the depositors had no notice of hearing before the Company Law Board. That reflects the unjustness of the case for a depositor living in far corner of the country and when he is in a dark even to enforce the payment under the scheme. For one he is a depositor who was not a party to the proceedings before the Company Law Board and is not aware of the order and then for breach of the scheme he has to approach the Reserve Bank of India to take cognizance of the offense committed by the NBFC and then the usual endless proceedings before a Criminal Court as he has no control over the criminal proceedings, if any, instituted by the RBI."

5.4 A depositor cannot certainly choose both the remedies simultaneously and once he files an application under section 45QA of the RBI Act before the Company Law Board, he cannot file a complaint in a Consumer Forum under the Consumer Protection Act. Further, the National Commission has clarified that the order of the Commission in the Alliance Capital and Management Services case²⁰ is with reference to the facts of that case and cannot have application in other cases and observed as under:

"...if the complainant has not filed any application before the Company Law Board under Section 45QA of the RBI Act or has not received any notice from the Company Law Board in the proceedings initiated by any other depositor or has not participated in the proceedings before the Company Law Board, he will be entitled to file a complaint before the Consumer Forum under the Consumer Act.²¹"

6. State Laws on Investor Protection

State legislation like the Maharashtra Protection of Interests of Depositors (in Financial Establishments) Act, 1999 have been enacted for safeguarding the interests of depositors of financial establishments. The definition of 'financial establishment' in some State enactments²² does not include companies and covers only individuals and unincorporated bodies. However, the recent State laws cover any person accepting deposit including companies but may not include a corporation or a co-operative society owned or controlled by any State Govt. or the Central Govt. or a banking company. Thus, in the States where the Act applies to companies, the financial companies which fraudulently defaults in repayment of deposit on maturity or fraudulently fails to render the service assured against the deposits shall be liable for punishment with imprisonment which may extend to six years and with fine of upto one lakh rupees. These Acts also authorize attachment of properties on fraudulent default in return of deposits. Any person who fails to repay the deposit due to the inability arising out impracticable or commercially unviable promises made while accepting such deposit, shall be deemed to have committed a default or failed to render the specific service fraudulently. The competent authority appointed by the State Govt. may attach properties resulting in vesting of such properties in the competent authority and on application by the competent authority, the designated court under the Act may make such order of attachment absolute, or modify or reverse the order . The provisions for prosecution for fraudulent default coupled with that for attachment of properties provide teeth to the State machinery to enforce repayment of deposits by defaulters. Such laws have been challenged as unconstitutional being outside the legislative competence of the States but have been upheld as valid and constitutional.²³

7. Provisions of Recovery under the Bill

7.1 Powers of the Board

The Financial Companies Regulation Bill, 2000 provides for different modes of recovery of unpaid public deposits²⁴ by a Recovery Officer to be appointed by the Company Law Board. The aggrieved depositor may initiate action by making an application before the Board²⁵ . The Board shall thereupon issue summons to the financial company requiring to show cause within 20 days of the service of summons. The company has to file its statement of defence in the first hearing itself or within such time as the Board may permit. The company may also make any claims of set off, or counter claim including claims in the nature of damages against the depositor's demand for any ascertained sum of money legally recoverable from him. The Board is empowered to make any order by way of injunction or stay or attachment against the financial company from transferring, alienating or otherwise dealing with or disposing of any property or asset belonging to it without the permission of the Board. Board has also power to order any person disobeying its orders for payment of deposits to be detained in civil prison upto a period of 3 months. Further, there are provisions for appointment by the Board of Receiver of properties and Commissioner for preparation of inventory of properties of financial companies. The Board is also expected to dispose of applications before it within 180 days from the date of receipt of application. The jurisdiction of civil courts except that of the Supreme Court, and the High

Courts under Article 226 or 227 of the Constitution, is barred. However, there is a provision for appeal to the High Court.

7.2 Recovery Officer

If the financial company fails to comply with an order passed by the Board, the Board may appoint one or more Recovery Officers and issue Certificate to the Recovery Officer for recovering the unpaid amount. The Recovery Officer may adopt the modes of attachment and sale of movable or immovable properties of the financial companies or of any other person against whom the order is passed, or arrest any person who at the time of receiving public deposit or default in repayment of deposits was in charge of and was responsible to the financial company for the conduct of its business, and detain him in prison. In addition to this, the Recovery Officer may at any time by notice in writing require any person from whom money is due or may become due to the company or to any person who holds or may subsequently hold money for the company to pay the recovery officer so much of the money as is sufficient to pay the amount of public deposit repayable by the financial company. Any person making payment accordingly shall get valid discharge and non-compliance with such orders shall render such persons personally liable for the payment of the amount mentioned in the notice. The Recovery Officer may also recover any amount of deposits due from a financial company by distraint and sale of movable properties in the manner laid down in the Third Schedule to the Income-tax Act, 1961. Any person aggrieved by the order of the Recovery Officer may make an appeal to the Board.

7.3 Cognizable Offence

In addition to the provisions for effecting recovery by the Board and the Recovery Officer appointed by the Board by civil means, there is also a provision in the Bill for making non-compliance with the CLB order a cognizable offence ²⁶. Accordingly, police can arrest the defaulter without warrant on his disobeying the orders of the Board .

8. Conclusion

The mode of enforcing repayment of unpaid deposits against financial companies by moving CL13 for ordering repayment and then waiting for the Reserve Bank to take criminal proceedings in the case of non-compliance with the CLB orders has been cumbersome for the depositors. Under the pending legislation, this process would give way to a relatively efficient recovery mechanism through a Recovery Officer having wide powers of attachment of properties, arrest and distraint and sale of movables. Although the powers conferred on the police for arrest without warrant by making non-compliance of the orders of the Board a cognisable offence might be arguably stringent, the enormity of the problem of unpaid deposits should account for such measures. The State laws on investor protection can play a significant role provided all States enact such laws and implement them, although the jurisdiction of such laws is not limited to companies, and it is important for the State agencies to curb unauthorised acceptance of deposits by unincorporated bodies as well. The finding of the National Commission that the depositor may, in all cases where he is not a party to the proceedings before the CLB or he has not had notice of such proceedings, approach the Consumer Forum would

provide an additional remedy to the depositor closer home²⁷. In conclusion, with the ongoing reforms and ensuing changes in laws, the position of recovery of deposits of financial companies is bound to improve and under a sound regulatory regime, financial companies may prove to be a strong and reliable limb of the financial system.

*It is wrong to ask who will rule. The ability to vote a bad government out of office is enough.
That is democracy.*

- Karl Popper

Freedom is when the people can speak, democracy is when the government listens.

- Alastair Farrugia

Melt their weapons, melt their hearts, melt their anger with love.

- Shirley Mac Laine

For every problem there is a solution that is simple, direct and wrong.

- H. L. Mencken

*Our political institutions work remarkably well. They are designed to cling against each other.
The noise is democracy at work.*

- Michael Novak

-
1. Section 45QA(1) of the RBI Act, 1934; Section 58 A of the Companies Act, 1956.
 2. See, Objects and Reasons of the RBI (Amendment) Act, 1997.
 3. The Companies Act, 1956 (Sections 58A, 58AA and 58AAA) provide for regulation of acceptance of deposits by non-banking non-financial companies.
 4. Based, inter alia, on the recommendations of the report of Vasudev Committee appointed by the Government of India in 1998.
 5. Constituted under section 10E of the Companies Act,1956. Sections 10FA, 10FB and 10FR of the Act inserted by the Companies (Second Amendment) Act,2002 provide for dissolution of the Board on coming into force of the Amendment Act and also for constitution of a National Company Law Tribunal and an Appellate Tribunal by the Central Government.
 6. The National Company Law Tribunal envisaged under Section 10FB of the Companies Act on dissolution of the Board may also enforce its orders like a decree of the court under Section 10FZA(3) of that Act.
 7. Under Section 58B(4AAA) of the RBI Act.
 8. Section 58C of the RBI Act. The question whether every director of the company by virtue of section 291 of the Companies Act is liable for the company's offence has been considered by the Supreme Court in Delhi

Municipality vs. Ramakrishna (AIR 1983 SC 67), Delhi Municipality vs. Ramesh AIR 1993 SC 158), and recently in State of Haryana vs. Brij Lal Mittal (1998) 5 SCC 343. It has been held that the vicarious liability of a person for being prosecuted for an offence under the Act committed by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable.

9. Section 5E deals with cognizance by Courts of offences under the RBI Act .
10. "**Service**" means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service [sec 2 (1)(o)].
11. "**Deficiency**" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service [sec 2 (1)(g) 1.
12. IR 1996 SC 550.
13. Ibid p. 556.
14. (1) (2001)CPJ 230.
15. Section 3 of the Consumer Protection Act provides that the provisions of the Consumer Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.
16. See, 14 Supra.
17. (I)(2000)CPJ 617 (NC).
18. Revision Petition No.739 of 2001 and connected cases.
19. Ibid, Second Para of the Order.
20. See, 17 Supra.
21. Revision Petition No.739 of 2001 and connected cases
22. Tamil Nadu Act of 1997 and Andhra Pradesh Act of 1999 for instance.
23. Thiru Muruga Finance And Others vs State of T.N. and Others, AIR 2000 Mad 137.
24. Clause 2 , sub clauses(i) and (s) provides the definition of 'deposit' and 'public deposit' respectively.
25. This may be modified to confer the powers on the National Company Law Tribunal to be constituted under Section 10FB of the Companies Act.
26. "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer 'may, in accordance with the First Schedule of the Code of Criminal Procedure or under any other law for the time being in force, arrest without warrant (See, Section 2 (c),Code of Criminal Procedure, 1973).
27. The Consumer Forums operate at the District level, while the authorities under the Companies Act operate only at selected Regional centres.

Copyright Law Vis-A-Vis Legal and Technological Issues*

V. Raghavendra Prasad
Legal Officer

The digitization of information and the development of computer networks such as the Internet are posing a new and far-reaching challenge to copyright¹. The Indian Copyright Act, 1957 was amended to incorporate 'computer program' into the category of 'literary work' to keep pace with the changing media of expression and to make the law more deterrent for the infringers. Computers are electronic machines capable of storing and /or processing data which have revolutioned our present world. Computers have become indispensable tools more in public administration, scientific research, industrial and commercial enterprises than domestic application which are nonetheless significantly important.² In this paper an effort has been made to analyse how far the Indian Copyright Act is compatible to the changing technologies in the area of computer software as patentable on the lines of foreign laws and other issues in relation to Internet.

2. LEGAL PROVISIONS

The relevant provisions dealing with computer related 'literary works' under Indian Copyright Act, 1957 are mentioned below;

Section 2

(a) adaptation means-

(i) ***

(ii) in relation to a literary work, the conversion of the work into a non-dramatic work by way of performance in public or otherwise;

(ff) "communication to public"

means making any work available for being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion other than by the issuing copies of such work regardless of whether any member of the public actually sees, hears or otherwise enjoys the work so made available.

Explanation- For the purposes of this clause, communication through satellite or cable or any other means of simultaneous communication to more than one household or place of residence including residential rooms of any hotel or hostel shall be deemed to be communication to public;

(ffb) "computer"

includes any electronic or similar device having information processing capabilities;

(ffc) "computer program"

means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.

(hh) "duplicating equipment"

means any mechanical contrivance or device used or intended to be used for making copies of any work:

(m) "infringing copy" means,-

(i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of cinematographic film;

(o) "literary work"

includes computer programs, tables and compilations including computer data basis;

Section 3 - Meaning of publication-

For the purposes of this Act, " publication" means making a work available to the public by issue of copies or by communicating the work to the public.

Section 51: When copyright infringed

Copyright in a work shall *be deemed* to be infringed-

(a) when any person, without a licence granted by the owner of the copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act -

(i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

(ii) permits for profit any place to be used for the communication of the work to the public where such communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication to the public would be an infringement of copyright or

(b) when any person-

- (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
- (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
- (iii) by way of trade exhibits in public, or
- (iv) imports into India,

any infringing copies of the work:

Provided that nothing in sub-section (iv) shall apply to the import of one copy of any work for the private and domestic use of the importer.

Explanation- For the purpose of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an "infringing copy".

Section 52 - Certain acts not to be infringement of copyright-

(1) the following acts shall not constitute an infringement of copyright, namely:-

- (a) a fair dealing with a literary, dramatic, musical or artistic work (not being a computer program) for the purpose of-
 - (i) private use, including research
 - (ii) criticism or review, whether of that work or of any other work
- (aa) the making of copies or adaptation of a computer program by the lawful possessor of a copy of such computer program, from such copy-
 - (i) to utilise the computer program for the purpose for which it was supplied or
 - (ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilise the computer programme for the purpose for which it was supplied.

Before we dwell upon the issue, it is relevant to discuss what is computer 'software' as different to computer 'program'.

3. COMPUTER HARDWARE- SOFTWARE PROGRAM

A computer system may be divided into two parts constituting of hardware and software. Hardware usually constitutes the "mechanical, magnetic, electronic and electrical devices of a computer."³ Technically, the machines and its accessories are called 'computer hardware'. The explanations, instructions, commands and systems which have been developed to run the said machines- are called the 'computer software' or simply the 'computer program'. The computer program includes program descriptions, explanatory material concerning the application of computer programs. A computer program governs the operations of a computer, in accordance with the object to be achieved. For example, the storage and constant updating of data concerning stocks of merchandise kept by a commercial enterprise.⁴ The WIPO Model Provisions on the protection of Computer Software has defined the 'computer software' as, "a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task or result."⁵

In Psi Data Systems Ltd., Vs. Collector of Central Excise⁶ the Hon'ble Supreme Court of India quoted with authority a judgment delivered by the Supreme Court of Illinois in the case of First National Bank of Springfield Vs. Deptt. of Revenue, wherein the word 'software' has been discussed. it was observed

In the computer industry, computer hardware is the tangible part of the machinery itself. Software denotes the information loaded into the machine and the directions given to the machine (usually through the media of punch cards, discs or magnetic tapes as to what it is to do and upon what command. Software also may include counseling and expert engineering assistance furnished by the seller of software, as well as flow charts and instruction manuals.

There are two basic types of software programs. An operational program controls the hardware and actually makes the machine operate. It is fundamental and necessary to the functioning of the hardware. An application program is designed to perform specific functions once the programming information is fed into the computer.

Therefore, the term 'software' is used to describe all of the different types of 'computer programs'. Computer programs are basically divided into 'application programs and 'operating system programs'. Application programs are designed to do specific tasks to be executed through the computer and the operating system programs are used to manage the internal functions of the computer to facilitate use of application program. These two **types of programs** can be written in three levels of computer language- high level, lower level and lowest level. High level languages, which are commonly used, are BASIC, COBOL, FORTRAN etc. This consists of English words and symbols and are easy to learn. Lower level language is assembly language which consists of alphanumeric labels. This language is also easily understandable by programmer. Statements of these two languages are referred to as written in 'source code'. The third, lowest level, language is the machine language. This is a binary language using two symbols "0" and "1" called 'bits'. This is the only language which can be followed by the machine but very difficult for the programmer to utilize. Statements in machine language are

referred to as written in 'object code'. However, in India the Copyright Act, 1957 has very widely used the word 'code' within the definition of 'computer program' under section 2(ffc).

In the background of the above technological base of what is software and the levels of its application the issue that requires the attention is whether the software should be patentable or should be given protection of copyright.

4. SOFTWARE - PATENT OR COPYRIGHT

There has been forceful argument that the computer program should be covered as a Patent rather than as copyright. Patent is granted for 'innovation'. In India Patents are issued only for inventions. The Patent Act, 1977 of U.K. it has been specifically stated that the invention must be capable of industrial application. For satisfying the test of invention, it -has to pass test of novelty, utility etc. Many new items have been included as inventions by interpreting the terms 'process', 'method or manufacture', 'alleged inventions' etc.⁷ In USA the Courts have examined and recognised the patent to computer related inventions. Though the Courts in U S have, in the early stages of development of computer technology, rejected granting license under patent to the computer related programs, subsequently, to a limited extent Courts have accepted the granting of patent. In the early stages, patent was denied on the ground of statutory compulsion. [patent was denied based on 'mental steps doctrine'. According to this doctrine, if the method of calculation involved some mental calculation patent was denied]. In Gottschalk Vs. Benson's⁸ case an application for Benson's method of converting numerical information from binary-coded decimal numbers into binary numbers, which could be used to program a computer, was rejected by the Supreme Court for grant of Patent on the ground that the claimed programming algorithm was not a 'process' as defined by the Patent Act, and reasoned that an algorithm, or mathematical formula, was analogous to law of nature which was not patentable. [An algorithm is defined to mean, (a) A statement of the steps to be followed in the solution of a problem. (b) A procedure, process, or rule for the solution of a problem in a finite number of steps. Thus a algorithm is a statement of the step-by-step procedure for solving complex problems by simple steps.] In Parker Vs. Flook's case⁹ the Court rejected the claim on the ground that it was only a mental operation and did not come within the statutory definition. In this case the applicant sought patent protection for a method of updating alarm limits using in connection with catalytic conversion process. This was employed in a novel algorithm. In re Freeman's case¹⁰ the Court of Customs and Patent Appeal has laid down two-pronged test to determine whether a computer - related invention could be patentable. His Lordship Rodau said, "1. The patent claim must first be evaluated to determine if it directly or indirectly recited an algorithm which is defined as procedure for solving a given type of mathematical problem; 2. Then, if it was found to relate to an algorithm, the claim was analysed to determine whether, in its entirety, the claim wholly preempted the use of that algorithm, and was therefore, unpatentable subject matter." However, first time the Court in U.S. in Diamond Vs. Diehr's case¹¹ recognized a computer -related invention as a patentable subject matter. In this case the application was made for grant of patent for invention wherein a process for molding raw, uncured synthetic rubber into cured precision products was claimed. The contribution constituted the process of constantly measuring the actual temperature inside the mould. These temperature measurements being automatically fed into a computer which recalculated the true time by use of the mathematical equation and ultimately signaled a device to open the press at the correct moment. Distinguishing the earlier

two cases i. e. Benson and Flook the Hon'ble Justice Rehnquist observed that the protection sought was for a process of curing synthetic rubber. The process included a well known equation and the use of a digital computer. Allowing patent claim, the Court reasoned that " a claim drawn to subject matter otherwise statutory does not become non statutory simply because it uses a mathematical formula, computer program, or digital computer. The Court added that a claim must be considered as a whole. In determining the patentability, according to the Court, the claim must be examined to ascertain whether it contained a mathematical formula. If it is an abstract formula patent cannot be granted. The Court, however stated that" when a claim containing a mathematical formula implements or applies that formula in a structure or process which, when considered as a whole, is performing a function which the patent law were designed to protect (e.g. transforming or reducing an article to different state of thing), then the claim satisfies the requirements of S. 101". Based on this reasoning, the claim in this case was held patentable. The refined two step analysis is as follows:

"the claim in question must first be evaluated to determine whether it clearly includes a mathematical algorithm in the form of a mathematical formula or procedure for solving a mathematical problem;

secondly, if such a mathematical formula or procedure is included, then the claim must be further analyzed to determine whether it includes only the mathematical algorithm and is therefore unpatentable subject matter, or whether it encompasses an application of the algorithm that includes statutory subject matter and is therefore patentable.¹²

Thus, two categories of software-related inventions may be defined: (a) computer programs that produce a technical effect within the computer or on other hardware components; and (b) computer programs that produce technical effects different from those described in (i), entailing changes in the state of physical matter, such as effects on equipment applied to a specific industrial task [(Guglielmetti, 1996, P 70)]¹³

5. EFFECT OF PATENTING SOFTWARE

The merit of granting patent to software is that unlike copyright, it protects the idea of the author. Thus, Warshofsky reports that Cadtrak Corporation applied for a patent on a computer screen display and included the exclusive-or statement as one of 15 claims. "They were granted US Patent No. 4,197, 590, and as a result, anyone who wants to put a cursor on a computer screen either pays Cadtrak or runs the infringement gauntlet. More than 300 hardware and software companies, including IBM, Texas Instruments, and Fujitsu, chose the easy way and are paying royalties to license that single patent".¹⁴ In another case, "Paul Heckel, a California programmer, was granted US Patent No. 4,486,857 and 4,736,308 for a system that displays records or strings of information and then allows the operator to scroll, or browse, through them. Heckel sued Apple Computer, alleging their Hypercard program violated those patents. Despite the fact that scrolling and sub-windows, the techniques incorporated in the patents, were quite well known, using them in a combination may now be considered illegal. Rather than fight what is considered a nuisance suit, Apple simply took out a licence".¹⁵

In the **United States**, the Patent Office and case law have assumed a favorable attitude with regard to the possibility of obtaining patents on computer programs. Since the decision in the leading case Diamond Vs. Diehr, until 1994 more than 3,500 software patents were granted (Warshofsky, 1994, P 162). In 1997, around 12,000 software patents were issued in that country. (Patent-news, 19.5.1998).¹⁶

In **Europe**, patenting of computer programs has been less permissive than in the United States. The European Patent Convention forbids the patenting of computer programmes as such. Patents have not been granted in cases where the program only undertakes mathematical operations, analyzes test data (e.g., application by Siemens, 1989) or permits the graphic presentation of data (application by IBM, 1993), among others. In exchange, computer programs that generate a transformation in physical reality by guiding the operation of other means have been deemed patentable, such as a computer-operated radiologic device (Koch & Sertzel, 1987) and a system to automatically manage the order of the supply of services to clients at different sites (Queuing System, 1994) (Guglielmetti, 1996, pp.78-89).¹⁷

U. K.

In England, the Copyright, Designs and Patents Act, 1988 contains provisions dealing with "computer generated works". Because a computer generated work is not created by a human, there are special rules for determining authorship and duration of copyright.

Computer programs and other items of software are generally excluded from patents. However, it is possible to obtain a patent for an invention that includes a programmed computer if there is a technical effect and the application is directed towards the technical effect rather than the computer program. Section 1(2) of the Patents Act 1977 states that a computer program, *inter alia*, is not patentable as such.

Patents confer stronger rights than copyrights.

6. DISTINCTION BETWEEN COPYRIGHT AND OTHER SIMILAR RIGHTS

"Copyright law is, in essence, concerned with the negative right of preventing the copying of physical material existing in literature and the arts. Its object is to protect the writer and artist from the unlawful reproduction of his material. It is concerned only with the copying of physical material and not with reproduction of ideas and it does not give a monopoly to any particular form of words or design. It is thus to be distinguished from the rights conferred by patent, trade mark and design legislation, which give to the registered proprietor an exclusive right to the registered material, even as against a person who has reproduced such material innocently and from an independent source. If it could be shown that two precisely similar works were in fact produced wholly independently of one another, the author of the work that was published first would have no right to restrain the publication by the author of that author's independent and original work. A patentee, on the other hand, has the right to prevent another from using his invention if it in fact infringes the former's patent, notwithstanding that the latter's invention was the subject of independent investigation on his part. As was stated by Diplock, L.J., in the case of

Francis Day & Hunter Ltd. Vs. Brom: "the copyright work must be the source from which the infringing work was derived"¹⁸

Besides the issues raised above, there are some important points that may be thrown light. The issues are mentioned below

7. COPYRIGHT AND INTERNET

Another area of study in the field of Copyright law is computer software in case of Internet. The Internet grew significantly after the introduction of the World Wide Web, through which it became graphical and interactive. The World wide Web is a network of sites that can be searched and retrieved by a special protocol known as HyperText Transfer Protocol (HTTP). This protocol simplified the writing of addresses, automatically searched the Internet for the address indicated and 'called up' the document for viewing. The computer software is today protected under the provisions of the copyright law. However, the existing provisions fall short of protecting the computer software when it comes to Internet.¹⁹

8. COPYRIGHT - WEB PAGES

With digitization, all kinds of data and copyright works may be recorded and compressed in the same, binary, format. While this allows copies to be reproduced without any degradation (every copy is perfect), developments in software permit the manipulation of data, images, etc., "sampling" and alteration of works by interactive techniques (Pearson, 1996).

Data transmission, on the other side, is no longer limited to a one-to one basis, but can now be effected on a one-to-many or even one-to-all basis. A large computer network, such as Internet, thus becomes a "broadcasting" system. The growth of the system and the improvement of transmission techniques challenge the market position of several industries and services, including those related to voice transmission (Rowley, 1995), radio broadcasting and phonograms, and publishing of literary works (Heker, 1995) as well as of computer programs.

These developments have polarized opinion on the ways in which copyright law should react to protect the producers and suppliers of different forms of information.

9. COPYRIGHT ROM/RAM

The issue is whether software storage in RAM when the user is on-line would amount to infringement of copyright under the Copyright Act, 1957. Memory is of two types one, temporary (Read Only Memory) and two, permanent (Random Access Memory). When the user access information on-line, the computer system will receive automatically the software and get into the temporary memory. This can be generated into a copy by the user by downloading the files. Otherwise the data in temporary memory will get vanished the moment user disconnect the Internet connection. In MAI Systems Corm. Vs. Peak Computer, Inc., case²⁰ the Federal Court had held that the " loading of a copyrighted computer software from a storage medium into the memory of the computer causes a copy to be made". Therefore, copies made into a computer's RAM are copies. A contrary view has been expressed by US District Court in Religious

Technology Vs. Netcom.²¹ It was held that temporary copying involved in browsing is the functional equivalent of reading and does not implicate the copyright laws.²² In India, section 52(1) (a) of the Copyright Act, 1957 has exempted the user from making one copy for personal use subject to conditions mentioned therein.

As regards the issue of data getting into the RAM is concerned, the point is a little ambiguous. Section 3 of the Act defines "publishing" as `making' a work available to the public by issue of copies or by communicating the work to the public amounts to publication. Section 52(1) (aa) of the Indian Copyright Act, 1952, however, provides that making of copies or adaptation of a computer program by the lawful possessor of a copy of such computer program, may utilize the program and make back-up copies for protection. Such utilization is allowed and kept out of infringement of Act. This section does not visualizes the on-line data accessibility and only comprehends the off-site data storage. Therefore, it is submitted that an amendment may be introduced clarifying the on-line data accessibility by the user.

10. Conclusion

It may be remembered that all computer-related programs are not patentable. It is not out of place to mention that in India, Computer software does not form subject matter of patents, as the requirement of the Patent Law is that the "process must result in something "tangible" and "vendible". Under the present circumstances, though the technology/computer software/process results in `determining the value of similar memorabilia from other sports" this end result does not qualify as "tangible " and "vendible " under the Indian Patent Law. Therefore, Computer Software is considered "literary work" under Section 2(o) of the Copyright Act, 1957 (as amended by the Copyright (Amendment) Act, 1994, effect from 10.5.1995).²³ However, in U.S. only inventions that satisfies the test as laid down in the above cases are given patent. The difficulty is to draw a line demarcating patentable and unpatentable computer programs. It is submitted that in India also the test laid down by the judiciary in U.S. should be brought under the purview of the Indian Copyright Act, 1957 thereby the computer related software involving invention may be granted patent rather than branding every program as a copyright. Therefore, the computer related programs, which are not purely based on mathematical calculations but involves invention, must be granted patent and should be treated as invention by the author. This grants, in our view, more safety to the author of the program against plagiarism.

In the light of the legal and judicial position discussed above, it is submitted that it is the high time that the lawmakers should bring amendments incorporating the relevant changes in the Indian Patent and Copyright laws on the lines of tests laid down by the Court of Customs and Patent Appeal of U.S. in Daimond's and in re Freeman's cases.

The mark of an educated man, one of our great professors used to tell his classes, is the ability to act on the basis of all the available evidence at the moment when action is indicated.

- VANDERBILT, Arthur T, "The Primary Responsibility of the Colleges Today," Association of American Colleges Bulletin, Volumes XXXII, Number 3 (October, 1946), p. 370

Another suitor was found in the Duke of Somerset. To this lord of vast possessions, who had played his part in history, she returned her famous answer, "If I were young and handsome as I was, instead of old and faded as I am, and you could lay the empire of the world at my feet, you should never share the heart and hand that once belonged to John, Duke of Marlborough." Somerset respected her all the more, and she was a help to him in his later marriage.

- CHURCHILL, Winston S., Vol. VI Marlborough, His Life and Times (New York: Charles Scribner's Sons, 1950, p. 650

When shall we look upon his like again? When may we again hope to see so much moderation with so much firmness; so much sagacity with so much modesty; so much learning with so much purity; so much wisdom with so much gentleness; so much splendor of talent with so much benevolence; so much of everything to love and admire, with nothing, absolutely nothing to regret?

STORY, Joseph, in The Miscellaneous Writings of Joseph Story, edited by William W. Story (Boston: Charles C. Little and James Brown, 1852), p. 696

* Paper presented at National Seminar on "Copyright law - Emerging Trends" at S.K. University, Anantpur AP (16-2-2002 - 17-2-2002).

- 1 Carlos M Correa, "Intellectual Property Rights, the WTO and Developing Countries- The TRIPS Agreement and Policy Options", Zed Books, Third world Network, (2000) at p.,134.
- 2 Bee. N.S. Gopalakrishnan, "Intellectual Property and Criminal Law", National Law School of India University, Bangalore, (1994).
- 3 See. Jeff Maynard, Dictionary of Data Processing (London: Butterworths, 2nd edn, 1981), p. 86.
- 4 Satyawrat Ponshe, "The Management of Intellectual Property", Bhate& Ponkshse, Patent Attorneys Publication Division, Pune. First Edn. 1991.
5. See. Salil K. Roy Chowdhury & H.K.Saharay, "Laws of Trade Mark, Copyright, Patents and Designs", Kamal Law House, Calcutta, 2nd Edn, (1999).
- 6 (1997)2 SCC 78 at para 4.
- 7 Supra note 2., at p. 201.
- 8 [409 U.S. 63 (1972)].
- 9 (437 U.S. 584 (1978).
- 10.573 F. 2d 1237 (C.C.PA. 1978).
- 11.450. U.S.175 91981
- 12 N.S. Gopalkrishnan, op.cit. at p. 209.
- 13 Carlos M. Correa, op. cit. at p.134.
- 14 Warshofsky, 1994, 8164.

15 Warshofsky, 1994, p.163.]

16 Supra note, at p. 134.

17 Ibid.

18 Copinger and Skone James on Copyright, 12 Edn., P.3 (Para1)

19 See. Nandan Kamath, "Law Relating to Computers Internet & E-Commerce", Universal Law Publishing CO.PVT. Ltd. , New Delhi, 2nd Edn. (2000).

20 991 F. 2d 511 (9th Cir. 1993)

21 [907 F. Supp. 1361, See. <http://www.crwed.htm>

22 [ibid. at p. 171.

23 Rodney D. Ryder, "Guide to Cyber La

Guest Column

Financial Companies Regulation Bill, 2000 — An Overview S. Ramaiah

Shri S. Ramaiah, Advocate is a distinguished jurist known for his vast experience in legislative drafting and in the law and practice of Intellectual Property Rights. He was formerly Law Secretary to the Government of India, Director, World Intellectual Property Rights Organisation, Geneva and Chairman of the Copyrights Board, Government of India. In this column, Shri Ramaiah shares with us his views on the Financial Companies Regulation Bill, 2000 and answers the queries raised by Shri K.D. Zacharias, Legal Adviser for the RBI Legal and Views on some of the significant reforms sought to be brought about by this legislation now pending before the Parliament.

The Financial Companies Regulation Bill, 2000 seeks to consolidate and amend the law for regulation of financial institutions and to protect the interests of depositors. The Bill more or less reproduces the existing provisions of Chapters III-B and III-C of the Reserve Bank of India Act, 1934 with certain changes like the constitution of an Advisory Board, increased minimum and maximum of net owned funds by financial companies, a grievance redressal procedure specifying the Company Law Board as the authority and giving more powers to recover unpaid deposits and specifying more penalties.

1. Do you think that there is a need for a separate legislation as proposed under the Financial Companies Regulation Bill, 2000 in the place of the existing Chapters III-B and III-C of the RBI Act for regulation of Non-Banking Financial Institutions?

The Statement of Objects and Reasons appended to the Bill (S.O.R.) states that in spite of sufficient safeguards provided in Chapter III-B and III-C of the RBI Act by the amendments in 1997, the existing provisions were not adequate because of the large number of defaulting non-banking financial institutions (NBFCs) and the absence of an efficient and quick system for

redressal of grievances of individual depositors. The S.O.R. makes a reference to the appointment of the Task Force to go into the adequacy of the existing legislative framework and to examine the need for a separate regulatory agency. It is said that most of the recommendations of the Task force have been given effect to by means of directions and the remaining recommendations would require statutory force by an Act of Parliament. It is stated that the Bill has been brought about to give effect to the recommendations of the Task Force. The Task Force has only stated that its recommendations require statutory force by an Act of parliament and did not say that it should be by a separate enactment. As mentioned above, in so far as the bill reproduces the existing provisions of the RBI Act, the recommendations of the Task Force could very well have been given effect to by suitable amendments in the RBI Act. The Bill also does not provide for a regulatory agency and only empowers the RBI to administer the provisions with an Advisory Board. I, therefore, feel that there is no need for a separate legislation as in the Bill. Perhaps, the Government of India and the RBI had taken a policy decision to govern this matter by a separate enactment instead of by the RBI Act.

2. The definition of ‘business of financial institution’ contained in the Bill covers chits funds which are already regulated by the Chit Funds Act, 1982. Do you think that chits should be excluded from the purview of the Act if they do not take deposits?

The definition of ‘business of financial institution’ as contained in sub-clause (e) of clause 2 (1) of the Bill more or less reproduces the definition of the expression ‘financial institution’ as contained in clause (c) of section 45-I of the RBI Act with two minor changes and as such the reference to the business of conducting chits has also been included in the definition. So the provisions of the Bill will apply to Chit Funds also. The twin objectives of the Bill are for the registration of the financial companies as such and for authorisation to accept and hold public deposits to be recorded by the RBI in the certificate of registration. The subsequent provisions mostly provide for the regulation of the acceptance of deposits by these companies. The control, management and supervision of Chit Funds organisations are regulated by Chit Funds Act, 1982 and it is administered by the State Governments with a supervisory and advisory role for the RBI. Under that Act, the chit fund organisations could be individual proprietorship, firm, company or other association of individuals. Irrespective of their status, they are required to be registered by the concerned Registrar of Chits appointed by the State Governments only before the commencement of a new chit. In view of this, the provision contained in the Bill providing for registration as a financial institution separately may not be necessary. The other objective of authorisation by the RBI to accept and hold public deposits would not also be necessary as most of the chit organisations do not accept deposits from the public either by the nature of their business or in the course of their normal operations. Hence, if the chit funds do not take deposits in the normal business, it would not be necessary to apply the provisions of the Bills to them. Even assuming that the provisions of the Bill should be made applicable to those chit fund companies accepting deposits, the higher requirements of keeping net owned funds and maintenance of assets as provided in the Bill will be difficult to implement in view of the nature of the companies being very small and it is feared that most of them would go out of business. So even if it is decided to regulate the acceptance of deposits by chit fund companies, it would be better to do so within the parameters of the Chit Funds Act or allow it to be governed by section 58-A of the Companies Act. I am, therefore, of the opinion that the chits should be excluded from the purview of the provisions of the Bill by invoking the power to exempt as contained in

the Bill. It is understood that chit funds are at present also excluded from the operation of the provisions of Chapter III-B of the RBI Act.

3. Currently, the unincorporated bodies which carry on the business of a financial institution are not permitted to accept deposits from the public (except from relatives) while those engaged in non-financial business are permitted to accept deposits without any limits? Do you think that this is discriminatory and calls for a change?

It is presumed that the statement in the query that unincorporated bodies which carry on the business of financial institution are not permitted to accept public deposits (except from relatives) while those engaged in non-financial business are permitted to accept deposits without any limit is based on section 45-S of the RBI Act and there is no other statutory provision regulating the acceptance of public deposits by unincorporated bodies carrying on non-financial business. If so, I do not find anything discriminatory, as both the institutions are not similarly situated so as to attract article 14 of the Constitution. In fact, by their very nature, specifying different regulations for these institutions would be necessary and justified.

4. Do you think the provisions of clause 45 (1) of the Bill making certain offences cognisable and clause 45(5) giving wide powers including that of arrest to police officers are justified? Are the provisions of clause 45(5) relatable only to cognisable offences or do they apply to other offences as well?

The offences made cognisable by clause 45(1) of the Bill are serious in nature and classification of these offences as cognisable is justified. Further, as per Part II of the First Schedule to the Code of Criminal Procedure, 1973 dealing with classification of offences against other laws, if an offence is punishable with imprisonment for three years or upwards, it would be a cognisable offence.

Clause 45(5), which makes provision for search, seizure, arrest, etc. in clause (a) thereof specifically provides for contraventions connected with the conduct of any financial institution or acceptance of deposit in contravention of the provisions of the Act. This means that this power is available only for offences under sections 6 and 7 of the Act (covered by clause 43 (4)) and not for any other offence specified in the Bill whether they are cognisable or otherwise. Further, the entry, search and seizure under this clause are made not only subject to the provisions of the Code of Criminal Procedure which provide for sufficient safeguards against excessive use of these powers, but the clause itself provides for certain inherent safeguards such as production of persons taken into custody before any Judicial Magistrate and submission of necessary reports. The powers given to police officers under the clause would therefore, be necessary in view of the seriousness of the offences.

5. Money lending firms registered under State laws being unincorporated bodies are prohibited under the RBI Act from accepting public deposits (except from relatives). Do you think that the lending business of these entities being regulated under State laws, there is a case for permitting them to accept public deposits?

Money lending firms as mentioned in the query are unincorporated bodies. So long as the

intention of the Bill is to prohibit acceptance of deposits by unincorporated bodies, the question of permitting them to accept public deposits would not arise. Further, the business of the bodies is confined or restricted to smaller areas and in any case, would not extend beyond the territorial jurisdiction of the States. In view of this also, bringing these bodies within the regulatory framework of the RBI under the provisions of the Bill would not be justified.

6. Do you think that there is a need for restricting the scope of the Act to deposit taking companies for a more focused regulation of these companies?

I agree that if the intention is to regulate the acceptance of deposits effectively, for the purpose of prompt repayment of deposits and to afford protection to investors, the emphasis should be only to regulate deposits by companies as they only accept large deposits from all over the country and consequently larger defaults in the repayment of either the principal or the interest on the deposits. The recommendations of the Task Force are also to this effect. It may be mentioned that though the Bill proposes to apply its provisions to all the financial institutions, the focus is already on acceptance of deposits by financial companies.

7. The Bill envisages a recovery mechanism under the CLB and the Recovery officers to be appointed under the Act. Do you think this would be effective?

It is true that the Bill provides for a detailed procedure for the recovery of unpaid deposit. Three modes of recovery are provided. To say whether these provisions would be effective or not would depend on their implementation. Many Acts provide for different methods for recovery of dues. But how much they are effective depend on so many factors. In any case, the query has now become academic and hypothetical in so far as the Company Law Board is proposed to be abolished and a new Tribunal and an Appellate Authority are envisaged in its place and as such the Bill would require suitable amendments before it is passed.

8. Do you think that it would be desirable to have a specific provision authorising Consumer Forums to exercise jurisdiction in cases of default in repayment of public deposits.

9. Is there a case, in your opinion, to extend the jurisdiction of DRTs to NBFCs?

The Consumer Forums constituted under the Consumer Protection Act, 1986 and the Debt Recovery Tribunals established under the DRT Act, 1993 had been formed for certain specific objectives. Although there may not be any objection in amending those Acts to confer on them the jurisdiction to recover public deposits by NBFCs, the objective to be achieved for doing so should be to recover the amounts due on public deposits effectively. There is a feeling that both the above authorities are already over burdened with a large number of cases and they are finding it difficult to cope up with their work though the recovery procedure may be efficient. In fact, the procedure for recovery specified in these two Acts and the new Tribunal under the Companies Act for the implementation of their decisions is the same, that is to say, to treat them as a decree from a Civil Court. While being so, it would be preferable to entrust these functions to the new Tribunal and the Appellate Authority proposed to be constituted under the Companies Act, instead of making amendments in any of the aforesaid Acts which is likely to raise objections. In

addition, the new Tribunal would be in a better position to deal with cases under the Bill also in view of the proposed large strength of 62 members to the Tribunal. It may not be out of place to mention here that the new section 10 FB inserted in the Companies Act which provides for the constitution of a National Company Law Tribunal enables it to exercise and discharge not only such powers and function under that Act but also under any other law for the time being in force.

The first Parkinson's Law, originated by British writer C. Northcote Parkinson, concerns the belief that bureaucracy creates work for itself in order to insure its own survival. Once established, a bureaucracy will increase at a rate unrelated to the amount of work to be done. The forces at work will tend to prevent any decrease in the number of bureaucrats. "Under a monarchy the process may be undone when the King wants the money for something else. But no one can reduce the civil service in a democracy".

— Parade, June 5, 1966, p. 2, "Walter Scott's Personality Parade".

I'm living so far beyond my income that we may almost be said to be living apart.

— E.E.C. Cummings

Judgements Section

Recent Judgements Relevant to Bankers

Joseph Rai
Asst. Legal Adviser

I. Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) S 34(2). State Financial Corporation Act, 1951 (SFC Act) - Section - 32G. Uttar Pradesh Public Monies (Recovery of Dues) Act, 1972, (UP Act) - Section 3. Invoking of revenue recovery procedure under UP Act. Before the Supreme Court of India - Unique ButyleTube Industries Pvt. Ltd. vs. U.P. Financial Corporation and others (2003)113 Comp. Cas 374(SC)

Issue

Whether the certificate issued by the Uttar Pradesh Financial Corporation under the Uttar Pradesh Public Monies (Recovery of Dues) Act, 1972 is enforceable and maintainable in view of Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Facts

The appellant challenged the certificate issued under the Provisions of the Uttar Pradesh Public Monies (Recovery of Dues) Act, 1972 on the ground that after the enactment of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act) the Proceedings under the provisions of the U.P. Act for recovery of loans were not maintainable. Also the appellant relied on the provisions of Section 32 G of the State Financial Corporation Act. The stand of the

Corporation was that though alternative modes for recovery were prescribed under different statutes one cannot stand in the way of the other mode. The Division Bench of the High Court concluded the issue as follows.

"The choice is clearly left open to the Financial corporation which may proceed under the D.R.T Act or may proceed under the other modes of recovering the debts as are permissible under the S.F.C. Act, i.e., it can proceed under the provisions of the U. F! Public Monies (Recovery of Dues) Act'.

Aggrieved by the said order, the appellant preferred the present appeal before the Supreme Court.

Observations of the Supreme Court

DRT Act requires the Tribunal alone to decide applications for recovery of debts due to banks and financial institutions. The jurisdiction of the Tribunal in regard to adjudication is exclusive. Basically the Tribunal is to adjudicate the liability of the defendant and then it has to issue a certificate under Section 19(22) to the Recovery Officer for recovery of the debt specified in the certificate. The Jurisdiction of any other court or authority which would otherwise have had jurisdiction but for the provisions of the DRT Act is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal. (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under article 226 or 227 of the Constitution of India). However, Section 34(2) of DIRT Act makes it clear that its provisions are applicable in addition to the Acts mentioned therein. Since SFC Act is included in Section 34(2) of DRT Act, a bank or financial institution has the option or choice to proceed either under the DRT Act or under the modes of recovery permissible under the State Financial Corporation Act. The U.P Act deals with separate modes of recovery and such proceedings are not relatable to prosecution under the State Financial Corporations Act.

As regards the intepretation of the statutes the Court observed that the primary rule of costruction is that the intention of the legislature must be found in the words used by the Legislature itself. While interpreting a provision, the Court only interprets the law and cannot legislate it. The Court held that it could not read UP Act into Section 34(2) of DRT Act and quash the proceedings initiated under the UP Act.

Decision

Appeal is allowed

2. Companies Act, 1956 -Part IX -Sections 565, 566, 575, 576, 577. Multi-State Co-operative Societies Act (the Multi-State Act), 1984, Section 17 - Banking Regulation Act, 1949 (B.R. Act) Section 22 - Society registered under Multi State Co-operative Societies Act may be converted to a company - Certificate of Incorporation of a Company issued by Registrar of Companies is conclusive - Writ does not lie to challenge that certificate -Only remedy is winding up. In the High Court of Bombay - Salim Akbarali Nanji and others vs. Union of India and others (2003) 113 Comp.Cas 141.

Issue

The main issue involved was whether the Development Co-operative Bank Ltd. (Respondent No. 10) deemed to be registered under the MultiState Act could be converted into a Joint Stock (banking) Company under the provisions of part IX of the Companies Act.

Facts

The Petitioner was a member/Share holder of Respondent No. 10 and became a Share holder of Respondent 11 (Joint Stock Banking Company). Respondent No. 10 was deemed to be a co-operative society registered under the Multi State Act as it had branches in the States of Maharashtra and Andhra Pradesh at the time of coming into force of the Multi State Act. The respondent No. 10 converted itself into a joint stock banking company under part IX of the Companies Act by passing resolutions and obtaining the necessary certificates. According to the petitioner, conversion of Respondent No. 10 into a Joint Stock Banking Company would affect the interest of the employees and share holders of Respondent No. 10, the period of notice given by Respondent no. 10 to its shareholders to consider the conversion of Respondent No. 10 into a Joint Stock Banking Company under Part IX of the Companies Act, was extremely short, the meeting was conducted in a high-handed manner and the resolution passed, by a show of hands in the meeting held on 28th January 1995 was not proper. The Government of India conveyed their no objection for registration of Respondent No. 10 as a Company under Part IX of the Companies Act, 1956. Registrar of Companies (Respondent No. 5) issued a Certificate of Incorporation to Respondent No. 11 after its conversion. RBI granted licence under Section 22 (1) of the Banking Regulation Act, 1949 to Respondent 11 to carry on banking business in India subject to certain conditions mentioned therein. Pursuant to the licence granted by RBI, Respondent No. 11 issued a circular to all its branches informing them about the conversion and also issued a letter to all its share holders to deliver their Share Certificate issued by Respondent No. 10 for endorsement that those are now shares of Respondent No. 11. The petitioner challenged the legality and propriety of the certificate of incorporation issued by Respondent No. 5 (ROC), and inter alia, sought a direction to RBI to withdraw/ cancel the permission and further direction to Respondent No. 5 to withdraw the certificate of incorporation.

Observations of the Court

The reference made to the expression 'company' in part IX of the Companies Act is to a group, assembly or association of persons which has been incorporated under an Act of Parliament or otherwise duly constituted according to law, and consisting of seven or more members. The word 'company' used in section 566 of the Companies Act includes within its purview, a co-operative society registered under any Co-operative Societies Act. As such, Respondent No. 10 could be converted into a joint stock banking company if all other criteria were fulfilled.

Though there is no express provision under the Multi State Act to allow conversion of a Co-operative Bank into a Banking Company under part IX of the Companies Act, there is no provision prohibiting such conversion in the said Act if all requirements contemplated under part IX of the Companies Act are complied with. In view of Sections 575, 576 & 577 of the

Companies Act, 1956 upon incorporation of Respondent No. 11 as a Company under Companies Act, all property movable, immovable including actionable claims belonging or vested in Respondent No. 10 bank and liabilities at the date of registration passed to and vested in Respondent No. 11. Once the Company is born, the method to get it extinguished is not by assailing its incorporation as the certificate of incorporation issued ROC is conclusive but by resorting to the provisions of the Companies Act which provides for winding up of the companies. Under section 17 of the Multi-State Act, when the whole of the assets or liabilities of Multi State Cooperative Society are transferred to another entity, the registration of that Multi State Society stands cancelled and the Society shall be deemed to have been ispo facto dissolved and shall cease to exist as a corporate body. As such, the society stands dissolved on its conversion as a Joint Stock company under part IX of the Companies Act. The certificate of incorporation issued by the Registrar of Companies is conclusive and precludes a party from seeking a declaration that the registration was illegal. Once the company is incorporated, the only method of extinguishing it, is winding it up. It is not possible to challenge its incorporation in Writ Proceedings.

Decision

Petition is dismissed.

3. Deposit Scheme for Retired Government Employees 1989 (Scheme) Para 6 - Interest on deposits may be reduced in accordance with economic policy. In the High Court of Rajasthan (Jaipur) - D.B. Civil Writ Petition No. 3080 of 2000 - Dr. Balwant Singh vs. UOI, SBI & RBI (AIR 2003 RAJ 56).

Issue

Whether the rate of interest on existing deposits under the Scheme may be reduced?

Facts

Government of India notified vide notification dated 7-6-1989 the Deposit Scheme for Retired Government Employees 1989. On the basis of the said Notification, RBI advised SBI and other nationalised banks to implement the Scheme. In terms of the Scheme, the deposit made under the Scheme carried interest @9% p.a. Subsequently, by a notification dated 15-3-1993 the Scheme was modified and the rate of interest was increased to 10%, on deposits made under the scheme on or after 15th March 1993. The Scheme was further modified by a notification dated 1-1-1999 and the interest under the scheme was again fixed at 9% p.a. with effect from 1-1-1999. The Petitioner had deposited a sum of Rs. 11 lacs under the scheme in 1995 and was given the advantage of the amendment made by notification dated 15th March 1993. However, since by Notification dated 1-1-1999 the interest under the Scheme had been fixed at 9% p.a. the petitioner was paid interest @9% to his deposit of Rs. 11 lacs w.e.f. 1-1-1999.

2. In the Writ Petition, the Petitioner prayed for, inter alia, a declaration that the notification dated 1-1-1999 is illegal, unsustainable/ not applicable to the deposits made prior to 1-1-1999 and to direct the second respondent (SBI through its Chairman, Mumbai) to continue to make

payment of interest to the petitioner on his deposit @ 10% as long as the deposit continues with respondent No. 4 (Manager, SBI, NCRB, Jaipur).

Observations of the Court

The Court summed up the written submissions filed by the Bank relating to payment of interest as under: "The further submission of the RBI is that the payment of interest on the deposits by the Banks depends upon many factors relating to monetary policy besides other availability of funds to the Banks and the ability of the Banks to advance loan to the various parties at a particular rate. The payment of interest relates to monetary policy and economic policy". In view of the economic policy of the Union of India, Reserve Bank of India is competent to alter the rate of interest. The notification dated 1st January 1999 cannot be declared illegal as it is based on the economic policy of the Union of India. The said notification cannot be termed as discriminatory qua the petitioner. Till the issuance of notification the petitioner was paid interest @ 10% p.a. but he is not entitled to claim interest at this rate after issuance of the notification dated 1-1-1999. The petitioner is free to discontinue his account if he feels that the scheme is no longer beneficial to him. The petitioner is not entitled to compel the respondent to make payment of interest @ 10% so long as the deposit continues with the Respondent No. 4. The act of RBI cannot be tantamount to betrayal of the promise that was given to the depositors in the scheme. The petitioner has not been subjected to hostile discrimination as RBI reduced the rate of interest as per the economic policy and the said policy has overall effect on all the deposits. The wisdom of policy decision of RBI is not a subject matter for consideration by this Court under Article 226 of the Constitution. It did not infringe any statutory or fundamental rights of the petitioner.

Decision

The petition is dismissed.

4. Indian Contract Act 1872, Section 17 -Bankers General Lien-FDR as Surety -Recovery of time barred debt - In the High Court of Karnataka - S. Vasupalaiah vs. Vysya Bank, (2003) 113 Comp.Cas. 95

Issue

Whether fixed deposits of surety created subsequent to principal loan transaction can be adjusted against the debts of which recovery is barred by limitation.

Facts

The Plaintiff stood as a surety for the loan availed of by one Shri Ramakrishna in 1983 from the defendant bank. The Plaintiff had purchased Janatha Cash Certificate on 3-9-1985 which was due for encashment on 3-3-92. When the principal debtor did not repay the loan, the surety was informed of the same and advised to get the loan repaid. Thereafter the surety endorsed the cash certificate in favour of the defendant to enable them to adjust the amount against the loan. When the endorsement was made, the claim against the principal debtor had become time barred. The bank adjusted the amount on the ground that the plaintiff being a guarantor his liability is co-

extensive with that of the Principal Debtor. The suit filed by the Plaintiff was dismissed by the Small Causes Court. Aggrieved by the order of the lower court, the plaintiff preferred the present revision petition.

Observations of the Court

Though the remedy to recover the debt from the Principal Debtor is barred by limitation, the liability still subsists and the bank is entitled to appropriate the debt due from the amounts which are in its possession either belonging to the principal debtor or the surety. The liability of the surety is coextensive with that of the principal debtor. The Court has also relied on the judgement of the Supreme Court in Punjab National Bank vs. Surendra Prasad Sinha (1992) 75 Comp.Cas 699, 701; AIR 1992 SC 1815, wherein it was held that through the remedy to recover the debt from the principal debtor is barred by limitation, the liability still subsists. In terms of the contract, the bank is entitled to appropriate the debt due. The banker has a general lien over the securities and amounts in its possession. In Syndicate Bank vs. Vijayakumar (1992) 79 Com.Cas. 597 - AIR 1992SC 1066 the Honourable Supreme Court examined various English authorities and authors and summed up the legal position and stated that the Banker's general lien extends to all forms of securities including Negotiable Instruments and fixed deposits deposited as security. The Bank has the right to use the proceeds towards adjustment of the debt due to it from the customer. The court held that bank has the right to adjust the loan amount against the maturity proceeds of the fixed deposits though it was created subsequent to the loan transaction. The fact that fixed deposit was created subsequent to the loan transaction would not make a difference.

Decision

Petition is dismissed.

5. Negotiable Instruments Act, 1881 (NI Act) - Sections 138, 141 - Criminal Procedure Code, 1973 - Section 482 - A director resigning after receipt of notice under Section 138 of NI Act regarding dishonour of cheque cannot escape liability. Before the High Court of Andhra Pradesh - Krishna Bhoopal vs. Sanam Jhansi Devi and another (2003) 113 Comp.Cas 363 A.P.

Issue

Whether the director who signed the cheque can escape criminal liability by resigning from the post of director?

Facts

Director of a Company who tendered resignation after receipt of the Statutory Notice of dishonour of cheque cannot escape from his liability under Section 138 of the Negotiable Instruments Act. The fact that the resignation after its acceptance by the board of directors relates back to the date of resignation can have no relevance. If a director of a company who drew the cheque on behalf of that company thinks it fit to tender resignation after having received the

notice of dishonour and demand for payment of the cheque drawn by him, can avoid criminal liability under section 138 of the Act it may result in in-congruous situations. The director appointed in his place subsequently can plead that he was not in charge of the affairs of that company when the cheque was drawn and so he cannot be made liable. In the circumstances like this, though the offence under section 138 of the Act becomes complete only if payment is not made within 15 days of receipt of the statutory notice, since the director who tendered the resignation could pay the amount covered by the dishonoured cheque and then resign, he cannot escape his liability under section 138 of the Act by tendering resignation after receipt of statutory notice of dishonour without making the payment demanded. From Section 141 of the Act, it is clear that apart from the Company, the person who has drawn the cheque also is liable for punishment under Section 138 of the N. I. Act. So merely because the Company was not shown as an accused in the complaint, it cannot be said that the complaint against the petitioner is not maintainable.

The first respondent had deposited Rs. 1,00,000 with the company and the cheque drawn by the petitioner and another was issued towards payment of the said amount. It is for the petitioner to establish that the cheque for Rs. 1,00,000 which was dishonoured, was not in fact issued towards the discharge of the legally enforceable debt or liability due to the first respondent. The question as to whether there is a legally enforceable debt or liability to the first respondent or not can be decided only after the parties adduce evidence during the trial, but not at this stage.

Decision

Criminal Revision Petition is dismissed.

6. Constitution of India - Art. 14 -Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Second) Ordinance, 2002, Sections 13,17,18, 19. In the High Court of Gujarat - M.R. Utensils vs. Union of India (2003) 113 Comp.Cas 667.

Issue

Whether the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Second) Ordinance, 2002 (the Ordinance) violates the provisions of Article 14 of the Constitution of India in as much as it does not provide for any remedy to the aggrieved borrower against the action taken by the secured creditor under Section 13 of the Ordinance and whether the impugned Ordinance is liable to be struck down as arbitrary and unconstitutional.

Facts

Petitioners challenged the Constitutional validity of the Ordinance though no notice has been received by the petitioners from their unidentified and undisclosed secured creditors. It was alleged that the Ordinance is arbitrary as there is no remedy to the aggrieved borrower.

Section 13 of the Ordinance provides that notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced without the intervention of Court or Tribunal by such creditor

in accordance with the provisions of the Ordinance Sub-section (2) of Section 13 of the Ordinance provides that action by the secured creditor against the borrower may be initiated by a notice in writing calling him to discharge in full his liabilities within 60 days from the date of notice failing which the secured creditor may exercise all or any of the rights under Sub-section (4) of the Ordinance. Under Section (4) of Section 13 of the ordinance, the secured creditor may have recourse to one or more of the following measures to recover his secured debt namely-

- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
- (b) take over the management of the secured assets
- (c) appoint any person to manage the secured assets
- (d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower

Observations of the Court

The provisions regarding notice to the borrower, two appeals etc. contained in Section 13, 17, 18 and 19 of the Ordinance sufficiently and adequately take care the interest of the borrower against the action taken against him by the secured creditor under Section 13 of the Ordinance. The impugned Ordinance is not arbitrary or violative of article 14 of the Constitution of India. The provisions enabling banks and financial institutions to proceed against security without intervention of court is valid.

In the absence of any notice from the secured creditor to the petitioners, no cause of action can be said to have arisen for maintaining the instant petition. The exercise of examining the validity of the Ordinance is merely academic, and an exercise in futility. It cannot be gainsaid that the special and extraordinary jurisdiction under article 226 of the Constitution should not be exercised merely for academic purposes.

Decision

The Petition is dismissed.

7. Jurisdiction and Scope of DRT and BOS

Recovery of Debts Due to Bank and Financial Institutions Act, 1993 (DRT Act) - Section 19 - Banking Regulation Act, 1949 – Section 35A-Pendency of complaint of the customer before the Banking Ombudsman does not come in the way of the continuation of the proceedings initiated by the bank before the Debt Recovery Tribunal. In the High Court of Allahabad - Hindustan Ferru and Industries Ltd. and another vs. Debt Recovery Tribunal and another (2003) 113 Comp. Case 58

Issue

Whether a borrower is entitled to seek stay of the recovery proceedings initiated against him by the bank under DRT Act before the Tribunal on the ground that the complaint against the bank filed by him before the Banking Ombudsman is pending?

Facts

An agreement was executed by the petitioner in 1990 with the 2nd respondent, State Bank of India for grant of credit facility on hypothecation of stock, stores, spares, finished goods etc. This apart U.P Financial Corporation Ltd. and another have also granted term loans to the Petitioners and they have the first priority/charge to claim fixed assets of the company such as land, building, plant, machinery etc. The bank had charged Rs. 20 lacs as interest, as the Company could not pay off the loan amount. It became a sick unit in 1998. Thereafter, the promoters took over the company and the bank had issued a clean credit to a tune of Rs. 70 lacs, to the Promoters. The Petitioners have repaid an amount of Rs. 46,56,565/-. As the bank continued to charge interest the petitioners preferred a complaint to the Banking Ombudsman. During the pendency of the matter before the Banking Ombudsman, the bank issued a notice to the petitioners to make payment within 10 days from the date of receipt of the notice. As the petitioners failed to make payment, the bank moved an application before the Debt Recovery Tribunal (DRT) under Section 19 of the DRT Act for recovery of Rs. 39,24,379.51. The application moved by the petitioners before the DRT for stay of the proceedings a/s 19 of the DRT Act on the ground that the matter is subjudice before the Banking Ombudsman was rejected by the DRT vide order dated 1-12-2000. In the present Writ Petition the petitioners have prayed for quashing of the order dated 1-12-2000 and for a direction in the nature of mandamus commanding Respondent No. 2 to stay the proceedings till the complaint filed before the Banking Ombudsman is finally decided.

Observations of the Court

The scope, object and purpose of the Banking Ombudsman Scheme (the Scheme) formulated by RBI under the provisions of Banking Regulation Act and that of the DRT Act) are entirely distinct and different. The object of the scheme is to enable resolution of complaints relating to provisions of banking service and to facilitate the satisfaction or settlement of such complaints. Whereas the purpose of the Act is to provide for the establishment of tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. The scheme has nothing to do with the proceedings for recovery of debts due to banks and financial institutions. The scheme cannot override or nullify the provisions of the Act.

Decision

Writ Petition is dismissed.

8. Negotiable Instruments Act, 1881-Section 138. Post dated cheque is a bill of exchange till the date mentioned in the cheque and section 138 of NI Act is not applicable to it till then. On the date mentioned in the postdated cheque, it becomes a cheque. If the cheque is

presented within a period of six months from the date mentioned on the cheque, section 138 is attracted. In the High Court of A.P. - Sheelam Raji Reddy vs. Samudrala Bixmaiah and another (2003) 113 Comp. Cas 517.

Issue

Whether the period of limitation of six months prescribed by Section 138 of the Negotiable Instruments Act, 1881 (NI Act) begins from the actual date of drawal of the cheque or from the date which is found on the cheque?

Facts

The respondent filed a complaint under Section 138 of the NI Act before the Magistrate Court, Nalgonda against the Petitioner alleging that on 7th July 2000 the petitioner issued two post-dated cheques dated 28-3-2001 for Rs. 75,000/each. On 28-3-2001 when he presented the cheques for encashment those cheques were returned for want of funds. Thereafter the respondent has initiated proceedings under Section 138 of the NI Act 1881. This petition is filed to quash the proceedings before the Magistrate on the ground that the complaint is barred by time because the cheques admittedly issued on 7-7-2000, were in fact presented on 28-3-2001 which is beyond the period of 6 months contemplated by Section 138 of the NI Act.

Observations of the Court

The Supreme Court in *Ishar Alloy Steels Ltd. vs. Jayawals NECO Ltd.* (2001)105 Comp. Cas 1 has held that a post dated cheque becomes a cheque for the purpose of section 138 of the Act only on the date mentioned thereon. Till that date it is only a bill of exchange. The period limitation mentioned in Section 138 of the Act begins to run only from the date mentioned in the cheque but not the date of drawal of the cheque. Accordingly the period of six months has to be reckoned from the date 28-3-2001 and not from the date of issue of the cheques. Hence, it is clear that the cheques were presented within the period mentioned in Section 138 of the Act and therefore, there are no grounds to quash the complaint against the petitioner.

Decision

Petition is dismissed.

It's hard to lead a cavalry charge if you think you look funny on a horse.

- Addai Stevenson

To be a leader you have got to lead human beings with affection.

- J.D.R. Tata

Democracy is a process by which the people are free to choose the man who will get the blame.

- Laurence Peter

Obstacles are those frightful things you see when you take your eyes off your goals.

- Henry Ford

Legislation Section

Freedom of Information Act, 2002

PREAMBLE

An Act to provide for freedom to every citizen to secure access to information under the control of public authorities, consistent with public interest, in order to promote openness, transparency and accountability in administration and in relation to matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:--

CHAPTER I

Preliminary

1. Short title, extent and commencement.--

- (1) This Act may be called the Freedom of Information Act, 2002.
- (2) It extends to the whole of India except the State of Jammu and Kashmir.
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.--

In this Act, unless the context otherwise requires,--

(a) "appropriate Government" means in relation to a public authority established, constituted, owned, substantially financed by funds provided directly or indirectly or controlled--

- (i) by the Central Government, the Central Government;
- (ii) by the State Government, the State Government;
- (iii) by the Union territory, the Central Government;

(b) "competent authority" means--

- (i) the Speaker in the case of the House of the People or the Legislative Assembly and the Chairman in the case of the Council of States or the Legislative Council;
- (ii) the Chief Justice of India in the case of the Supreme Court;
- (iii) the Chief Justice of the High Court in the case of a High Court;

(iv) the President or the Governor, as the case may be, in the case of other authorities created by or under the Constitution;

(v) the administrator appointed under article 239 of the Constitution;

(c) "freedom of information" means the right to obtain information from any public authority by means of,--

(i) inspection, taking of extracts and notes;

(ii) certified copies of any records of such public authority;

(iii) diskettes, floppies or in any other electronic mode or through print-outs where such information is stored in a computer or in any other device;

(d) "information" means any material in any form relating to the administration, operations or decisions of a public authority;

(e) "prescribed" means prescribed by rules made under this Act by the appropriate Government or the competent authority, as the case may be;

(f) "public authority" means any authority or body established or constituted,--

(i) by or under the Constitution;

(ii) by any law made by the appropriate Government,

and includes any other body owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government;

(g) "Public Information Officer" means the Public Information Officer appointed under sub-section (1) of section 5;

(h) "record" includes--

(i) any document, manuscript and file;

(ii) any microfilm, microfiche and facsimile copy of a document;

(iii) any reproduction of image or images embodied in such microfilm (whether enlarged or not); and

(iv) any, other material produced by a computer or by any other device;

(i) "third party" means a person other than the person making a request for information

and includes a public authority.

CHAPTER II

Freedom Of Information And Obligations Of Public Authorities

3 Freedom of information.--

Subject to the provisions of this Act, all citizens shall have freedom of information.

4. Obligations on public authorities.--

Every public authority shall--

(a) maintain all its records, in such manner and form as is consistent with its operational requirements duly catalogued and indexed;

(b) publish at such intervals as may be prescribed by the appropriate Government or competent authority,--

(i) the particulars of its organisation, functions and duties;

(ii) the powers and duties of its officers and employees' and the procedure followed by them in the decision making process;

(iii) the norms set by the public authority for the discharge of its functions;

(iv) rules, regulations, instructions, manuals and other categories of records under its control used by its employees for discharging its functions;

(v) the details of facilities available to citizens for obtaining information; and

(vi) the name, designation and other particulars of the Public Information Officer;

(c) publish all relevant facts concerning important decisions and policies that affect the public while announcing such decisions and policies;

(d) give reasons for its decisions, whether administrative or quasi-judicial to those affected by such decisions;

(e) before initiating any project, publish or communicate to the public generally or to the persons affected or likely to be affected by the project in particular, the facts available to it or to which it has reasonable access which in its opinion should be known to them in the best interests of natural justice and promotion of democratic principles.

5. Appointment of Public Information Officers.--

(1) Every public authority shall for the purposes of this Act, appoint one or more officers as Public Information Officers.

(2) Every Public Information Officer shall deal with requests for information and shall render reasonable assistance to any person seeking such information.

(3) The Public Information Officer may seek the assistance of any other officer as he considers necessary for the proper discharge of his duties.

(4) Any officer whose assistance has been sought under sub-section (3), shall render all assistance to the Public Information Officer seeking his assistance.

6. Request for obtaining information.

A person desirous of obtaining information shall make a request in writing or through electronic means, to the concerned Public Information Officer specifying the particulars of the information sought by him:

Provided that where such request cannot be made in writing, the Public Information Officer shall render all reasonable assistance to the person making the request orally to reduce it in writing.

7. Disposal of requests.--

(1) On receipt of a request under section 6, the Public Information Officer shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request, either provide the information requested on payment of such fee as may be prescribed or reject the request for any of the reasons specified in sections 8 and 9:

Provided that where the information sought for concerns the life and liberty of a person, the same should be provided within forty-eight hours of the receipt of the request:

Provided further that where it is decided to provide the information on payment of any further fee representing the cost of providing the information, he shall send an intimation to the person making the request, giving the details of the fees determined by him, requesting him to deposit the fees and the period intervening between the despatch of the said intimation and payment of fees shall be excluded for the purpose of calculating the period of thirty days referred to above.

(2) Before taking any decision under sub-section (1), the Public Information Officer shall take into consideration the representation made by a third party under section 11.

(3) Where a request is rejected under subsection (2), the Public Information Officer shall communicate to the person making request,--

(i) the reasons for such rejection;

- (ii) the period within which an appeal against such rejections may be preferred;
- (iii) the particulars of the appellate authority.

(4) Information shall ordinarily be provided in the form in which it is sought unless it would disproportionately divert the resources of the public authority or would be detrimental to the safety or preservation of the record in question.

8. Exemption from disclosure of information.--

(1) Notwithstanding anything hereinbefore contained, the following information not being information relating to any matter referred to in sub-section (2), shall be ex-empted from disclosure, namely:--

- (a) information, the disclosure of which would prejudicially affect the sovereignty and integrity of India, security of the State, strategic scientific or economic interest of India or conduct of international relations;
- (b) information, the disclosure of which would prejudicially affect public safety and order, detection and investigation of an offence or which may lead to an incitement to commit an offence or prejudicially affect fair trial or adjudication of a pending case;
- (c) information, the disclosure of which would prejudicially affect the conduct of Centre-State relations, including information exchanged in confidence between the Central and State Governments or any of their authorities or agencies;
- (d) Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers;
- (e) minutes or records of advice including legal advice, opinions or recommendations made by any officer of a public authority during the decision making process prior to the executive decision or policy formulation;
- (f) trade or commercial secrets protected by law or information, the disclosure of which would prejudicially affect the legitimate economic and commercial interests or the competitive position of a public authority; or would cause unfair gain or loss to any person; and
- (g) information, the disclosure of which may result in the breach of privileges of Parliament or the Legislature of a State, or contravention of a lawful order of a court.

(2) Subject to the provisions of clause (a) of sub-section (1), any information relating to any occurrence, event or matter which has taken place occurred or happened twenty-five years before the date on which any request is made under section 6 shall be provided to any person making a request under that section:

Provided that where any question arises as to the date from which the said period of twenty-five years has to be computed, the decision of the Central Government shall be final.

9. Grounds for refusal to access in certain cases.--

Without prejudice to the provisions of section 8, a Public Information Officer may reject a request for information also where such request--

(a) is too general in nature or is of such a nature that, having regard to the volume of information required to be retrieved or processed would involve unreasonable diversion of the resources of a public authority or would adversely interfere with the functioning of such authority:

Provided that where such request is rejected on the ground that the request is too general, it would be the duty of the Public Information Officer to render help as far as possible to the person making request to reframe his request in such a manner as may facilitate compliance with it;

(b) relates to information that is required by law, rules, regulations or orders to be published at a particular time and such information is likely to be so published within thirty days of the receipt of such request;

(c) relates to information that is contained in published material available to public; or

(d) relates to information which would cause unwarranted invasion of the privacy of any person.

10. Severability.--

(1) If a request for access to information is rejected on the ground that it is in relation to information which is exempted from disclosure, then notwithstanding anything contained in this Act, access may be given to that part of the record which does not obtain any information that is exempted from disclosure under this Act and which can reasonably be severed from any part that contains exempted information.

(2) Where access is granted to a part of the record in accordance with sub-section (1), the person making the request shall be informed,--

(a) that only part of the record requested, after severance of the record containing information which is exempted from disclosure, is being furnished; and

(b) of the provisions of the Act under which the severed part is exempted from disclosure.

11. Third party information.--

(1) Where a public authority intends to disclose any information or record, or part thereof, on a

request made under this Act which relates to, or has been supplied by a third party and has been treated as confidential by that third party, the Public Information Officer shall, within twenty-five days from the receipt of a request, give written notice to such third party of the request and of the fact that the public authority intends to disclose the information or record, or part thereof:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.

(2) Where a notice is given by the Public Information Officer under sub-section (1) to a third party in respect of any information or record or part thereof, the third party shall, within twenty days from the date of issuance of notice, be given the opportunity to make representation against the proposed disclosure.

(3) Notwithstanding anything contained in section 7, the Public Information Officer shall, within sixty days after receipt of the request under section 6, if the third party has been given an opportunity to make representation under sub-section (2), make a decision as to whether or not to disclose the information or record or part thereof and give in writing the notice of his decision to the third party.

(4) A notice given under sub-section (3) shall include a statement that the third party to whom the notice is given is entitled to prefer an appeal against the decision under section 12.

12. Appeals.--

(1) Any person aggrieved by a decision of the Public Information Officer may, within thirty days of receipt of such decision, prefer an appeal to such authority as may be prescribed:

Provided that such authority may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) A second appeal against the decision under sub-section (1) shall lie within thirty days of such decision, to the Central Government or the State Government or the competent authority, as the case may be:

Provided that the Central Government or the State Government or the competent authority, as the case may be, may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(3) The appeals referred to in sub-sections (1) and (2) shall be disposed of within thirty days of the receipt of such appeals or within such extended period, as the case may be, for reasons to be recorded in writing.

(4) If the decision of the Public Information Officer against which the appeal is preferred under sub-section (1) or sub-section (2) also relates to information of third party, the appellate authority

shall give a reasonable opportunity of being heard to that party.

CHAPTER III

Miscellaneous

13. Protection of action taken in good faith.--

No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act or any rule made thereunder.

14. Act to have overriding effect.--

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 (19 of 1923), and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

15. Bar of jurisdiction of courts.--

No court shall entertain any suit, application or other proceeding in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal under this Act.

16. Act not to apply to certain organizations.--

(1) Nothing contained in this Act shall apply to the intelligence and security organisations, specified in the Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government.

(2) The Central Government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organisation established by that Government or omitting therefrom any organisation already specified therein and on the publication of such notification, such organisation shall be deemed to be included in or, as the case may be, omitted from the Schedule.

(3) Every notification issued under sub-section (2) shall be laid before each House of Parliament.

(4) Nothing contained in this Act shall apply to such intelligence and security organisations which may be specified, by a notification in the Official Gazette, by a State Government from time to time.

(5) Every notification issued under sub-section (4) shall be laid before the State Legislature.

17. Power to make rules by Central Government.--

(1) The Central Government may, by notification in the Official Gazette, make rules to carry 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) intervals at which matters referred to in sub-clauses (i) to (vi) of clause (b) of section 4 shall be published;

(b) the fee payable under sub-section (1) of section 7;

(c) the authority before whom an appeal may be preferred under sub-section (1) of section 12;

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

18. Power to make rules by State Government.--

(1) The State Government may, by notification in the Official Gazette, make rules to carry 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 fee payable under sub-section (1) of section 7;

(b) the authority before whom an appeal may be preferred under sub-section (1) of section 12;

(c) any other matter which is required to be, or may be, prescribed:

Provided that initially the rules shall be made by the Central Government by notification in the Official Gazette.

19. Rule making power by competent authority.--

(1) The competent authority may, by notification in the Official Gazette, make rules to carry 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 fee payable under sub-section (1) of section 7;

(b) the authority before whom an appeal may be preferred under sub-section (1) of section 12;

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

20. Laying of rules.--

(1) Every rule made by the Central Government 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 thereafter 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.

(2) Every rule made under this Act by a State Government shall be laid, as soon as may be after it is notified, before the State Legislature.

21. Power to remove difficulties.--

(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 appear to it to be necessary or expedient for removal of the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date of the commencement of this Act.

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

THE SCHEDULE

(See section 16)

intelligence and security organisations established by the central government

1. Intelligence Bureau.
2. Research and Analysis Wing of the Cabinet Secretariat.
3. Directorate of Revenue Intelligence.
4. Central Economic Intelligence Bureau.
5. Directorate of Enforcement.
6. Narcotics Control Bureau.
7. Aviation Research Centre.
8. Special Frontier Force.
9. Border Security Force.
10. Central Reserve Police Force.
11. Indo-Tibetan Border Police.
12. Central Industrial Security Force.
13. National Security Guards.

14. Assam Rifles.
15. Special Service Bureau.
16. Special Branch (CID), Andaman and Nicobar.
17. The Crime Branch--C.I.D.--CB, Dadra and Nagar Haveli.
18. Directorate of Vigilance including Anti-Corruption Branch, National Capital Territory of Delhi.
19. Special Branch, Lakshadweep Police.

K.N. CHATURVEDI,
Additional Secy. to the Govt. of India.

The Prevention of Money-Laundering Act, 2002

[Act No. 15 of 2003]
[17th January 2003.]

PREAMBLE

An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.

WHEREAS the Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its seventeenth special session on the twenty-third day of February, 1990;

AND WHEREAS the Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 calls upon the Member States to adopt national money-laundering legislation and programme;

AND WHEREAS it is considered necessary to implement the aforesaid resolution and the Declaration.

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:—

CHAPTER I :

PRELIMINARY

1. Short title, extent and commencement.—

(1) This Act may be called the Prevention of Money-laundering Act, 2002.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the

Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. Definitions.—

(1) In this Act, unless the context otherwise requires,—

(a) “Adjudicating Authority” means an Adjudicating Authority appointed under sub-section (1) of section 6;

(b) “Appellate Tribunal” means the Appellate Tribunal established under section 25;

(c) “Assistant Director” means an Assistant Director appointed under sub-section (1) of section 49;

(d) “attachment” means prohibition of transfer, conversion, disposition or movement of property by an order issued under Chapter III;

(e) “banking comp any” means a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949) applies and includes any bank or banking institution referred to in section 51 of that Act;

(f) “Bench” means a Bench of the Appellate Tribunal;

(g) “Chairperson” means the Chairperson of the Appellate Tribunal;

(h) “chit fund company” means a company managing, conducting or supervising, as foreman, agent or in any other capacity, chits as defined in section 2 of the Chit Funds Act, 1982 (40 of 1982);

(i) “co-operative bank” shall have the same meaning as assigned to it in clause (dd) of section 2 of the Deposit Insurance and Credit Guarantee Corporation Act, 1961 (47 of 1961);

(j) “Deputy Director” means a Deputy Director appointed under sub-section (1) of section 49;

(k) “Director” or “Additional Director” or “Joint Director” means a Director or Additional Director or Joint Director, as the case may be, appointed under sub-section (1) of section 49;

(l) “financial institution” means a financial institution as defined in clause (c) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934) and includes a chit fund company, a cooperative bank, a housing finance institution and a non-banking financial company;

(m) “housing finance institution” shall have the meaning as assigned to it in clause (d) of section 2 of the National Housing Bank Act, 1987 (53 of 1987);

(n) “intermediary” means a stock-broker, sub-broker, share transfer agent, banker to an issue, trustee to a trust deed, registrar to an issue, merchant banker, underwriter, portfolio manager, investment adviser and any other intermediary associated with securities market and registered under section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992);

(o) “Member” means a Member of the Appellate Tribunal and includes the Chairperson;

(p) “money-laundering” has the meaning assigned to it in section 3;

(q) “non-banking financial company” shall have the same meaning as assigned to it in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(r) “notification” means a notification published in the Official Gazette;

(s) “person” includes—

(i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a firm,

(v) an association of persons or a body of individuals, whether incorporated or not,

(vi) every artificial juridical person not falling within any of the preceding sub-clauses, and

(vii) any agency, office or branch owned or controlled by any of the above persons mentioned in the preceding sub-clauses;

(t) “prescribed” means prescribed by rules made under this Act;

(u) “proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property;

(v) “property” means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located;

(w) “records” include the records maintained in the form of books or stored in a computer or such other form as may be prescribed;

(x) “Schedule” means the Schedule to this Act;

(y) “scheduled offence” means—

- (i) the offences specified under Part A of the Schedule; or
- (ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more;

(z) “Special Court” means a Court of Session designated as Special Court under sub-section (1) of section 43;

(za) “transfer” includes sale, purchase, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien;

(zb) “value” means the fair market value of any property on the date of its acquisition by any person, or if such date cannot be determined, the date on which such property is possessed by such person.

(2) Any reference, in this Act or the Schedule, to any enactment or any provision thereof shall, in relation to an area in which such enactment or such provision is not in force, be construed as a reference to the corresponding law or the relevant provisions of the corresponding law, if any, in force in that area.

CHAPTER II

OFFENCE OF MONEY-LAUNDERING

3. Offence of money-laundering.—

Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.

4. Punishment for money-laundering.—

Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees:

Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words “which may extend to seven years”, the words “which may extend to ten years” had been substituted.

CHAPTER III

ATTACHMENT, ADJUDICATION AND CONFISCATION

5. Attachment of property involved in money-laundering.—

(1) Where the Director, or any other officer not below the rank of Deputy Director authorised by him for the purposes of this section, has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(a) any person is in possession of any proceeds of crime;

(b) such person has been charged of having committed a scheduled offence; and

(c) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding ninety days from the date of the order, in the manner provided in the Second Schedule to the Income-tax Act, 1961 (43 of 1961) and the Director or the other officer so authorised by him, as the case may be, shall be deemed to be an officer under sub-rule (e) of rule 1 of that Schedule:

Provided that no such order of attachment shall be made unless, in relation to an offence under—

(i) Paragraph 1 of Part A and Part B of the Schedule, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974); or

(ii) Paragraph 2 of Part A of the Schedule, a police report or a complaint has been filed for taking cognizance of an offence by the Special Court constituted under sub-section (1) of section 36 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985).

(2) The Director, or any other officer not below the rank of Deputy Director, shall, immediately after attachment under sub-section (1), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Adjudicating Authority, in a sealed envelope, in the manner as may be prescribed and such Adjudicating Authority shall keep such order and material for such period as may be prescribed.

(3) Every order of attachment made under subsection (1) shall cease to have effect after the expiry of the period specified in that sub-section or on the date of an order made under sub-section (2) of section 8, whichever is earlier.

(4) Nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under sub-section (1) from such enjoyment.

Explanation.—For the purposes of this subsection, “person interested”, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

(5) The Director or any other officer who provisionally attaches any property under subsection (1) shall, within a period of thirty days from such attachment, file a complaint stating the facts of such attachment before the Adjudicating Authority.

6. Adjudicating Authorities, composition, powers, etc.—

(1) The Central Government shall, by notification, appoint one or more Adjudicating Authorities to exercise jurisdiction, powers and authority conferred by or under this Act.

(2) An Adjudicating Authority shall consist of a Chairperson and two other Members: Provided that one Member each shall be a person having experience in the field of law, administration, finance or accountancy.

(3) A person shall, however, not be qualified for appointment as Member of an Adjudicating Authority,—

(a) in the field of law, unless he—

(i) is qualified for appointment as District Judge; or

(ii) has been a member of the Indian Legal Service and has held a post in Grade I of that service;

(b) in the field of finance, accountancy or administration unless he possesses such qualifications, as may be prescribed.

(4) The Central Government shall appoint a Member to be the Chairperson of the Adjudicating Authority.

(5) Subject to the provisions of this Act,—

(a) the jurisdiction of the Adjudicating Authority may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson of the Adjudicating Authority with one or two Members as the Chairperson of the Adjudicating Authority may deem fit;

(c) the Benches of the Adjudicating Authority shall ordinarily sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson, by notification, specify;

(d) the Central Government shall, by notification, specify the areas in relation to which each Bench of the Adjudicating Authority may exercise jurisdiction.

(6) Notwithstanding anything contained in subsection (5), the Chairperson may transfer a Member from one Bench to another Bench.

(7) If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit.

(8) The Chairperson and every Member shall hold office as such for a term of five years from the date on which he enters upon his office:

Provided that no Chairperson or other Member shall hold office as such after he has attained the age of sixty-two years.

(9) The salary and allowances payable to and the other terms and conditions of service of the Member shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Member shall be varied to his disadvantage after appointment.

(10) If, for reasons other than temporary absence, any vacancy occurs in the office of the Chairperson or any other Member, then, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Adjudicating Authority from the stage at which the vacancy is filled.

(11) The Chairperson or any other Member may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that the Chairperson or any other Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is the earliest.

(12) The Chairperson or any other Member shall not be removed from his office except by an order made by the Central Government after giving necessary opportunity of hearing.

(13) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the Chairperson of the Adjudicating Authority until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(14) When the Chairperson of the Adjudicating Authority is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson of the Adjudicating Authority until the date on which the Chairperson of the Adjudicating Authority resumes his duties.

(15) The Adjudicating Authority shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Adjudicating Authority shall have powers to

regulate its own procedure.

7. Staff of Adjudicating Authorities.—

(1) The Central Government shall provide each Adjudicating Authority with such officers and employees as that Government may think fit.

(2) The officers and employees of the Adjudicating Authority shall discharge their functions under the general superintendence of the Chairperson of the Adjudicating Authority.

(3) The salaries and allowances and other conditions of service of the officers and employees of the Adjudicating Authority shall be such as may be prescribed.

8. Adjudication.—

(1) On receipt of a complaint under sub-section (5) of section 5, or applications made under subsection (4) of section 17 or under sub-section (10) of section 18, if the Adjudicating Authority has reason to believe that any person has committed an offence under section 3, it may serve a notice of not less than thirty days on such person calling upon him to indicate the sources of his income, earning or assets, out of which or by means of which he has acquired the property attached under sub-section (1) of section 5, or, seized under section 17 or section 18, the evidence on which he relies and other relevant information and particulars, and to show cause why all or any of such properties should not be declared to be the properties involved in money-laundering and confiscated by the Central Government:

Provided that where a notice under this subsection specifies any property as being held by a person on behalf of any other person, a copy of such notice shall also be served upon such other person:

Provided further that where such property is held jointly by more than one person, such notice shall be served to all persons holding such property.

(2) The Adjudicating Authority shall, after—

(a) considering the reply, if any, to the notice issued under sub-section (1);

(b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and

(c) taking into account all relevant materials placed on record before him,

by an order, record a finding whether all or any of the properties referred to in the notice issued under sub-section (1) are involved in money-laundering:

Provided that if the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the

property is not involved in money-laundering.

(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of section 5 or retention of property or record seized under section 17 or section 18 and record a finding to that effect, such attachment or retention of the seized property or record shall—

(a) continue during the pendency of the proceedings relating to any scheduled offence before a court; and

(b) become final after the guilt of the person is proved in the trial court and order of such trial court becomes final.

(4) Where the provisional order of attachment made under sub-section (1) of section 5 has been confirmed under sub-section (3), the Director or any other officer authorised by him in this behalf shall forthwith take the possession of the attached property.

(5) Where on conclusion of a trial for any scheduled offence, the person concerned is acquitted, the attachment of the property or retention of the seized property or record under sub-section (3) and net income, if any, shall cease to have effect.

(6) Where the attachment of any property or retention of the seized property or record becomes final under clause (b) of sub-section (3), the Adjudicating Authority shall, after giving an opportunity of being heard to the person concerned, make an order confiscating such property.

9. Vesting of property in Central Government.—

Where an order of confiscation has been made under sub-section (6) of section 8 in respect of any property of a person, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances:

Provided that where the Adjudicating Authority, after giving an opportunity of being heard to any other person interested in the property attached under this Chapter, or seized under Chapter V, is of the opinion that any encumbrance on the property or lease-hold interest has been created with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or lease-hold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrances or lease-hold interest:

Provided further that nothing in this section shall operate to discharge any person from any liability in respect of such encumbrances which may be enforced against such person by a suit for damages.

10. Management of properties confiscated under this Chapter.—

(1) The Central Government may, by order published in the Official Gazette, appoint as many of

its officers (not below the rank of a Joint Secretary to the Government of India) as it thinks fit, to perform the functions of an Administrator.

(2) The Administrator appointed under subsection (1) shall receive and manage the property in relation to which an order has been made under sub-section (6) of section 8 in such manner and subject to such conditions as may be prescribed.

(3) The Administrator shall also take such measures, as the Central Government may direct, to dispose of the property which is vested in the Central Government under section 9.

11. Power regarding summons, production of documents and evidence, etc.—

(1) The Adjudicating Authority shall, for the purposes of this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a banking company or a financial institution or a company, and examining him on oath;

(c) compelling the production of records;

(d) receiving evidence on affidavits;

(e) issuing commissions for examination of witnesses and documents; and

(f) any other matter which may be prescribed.

(2) All the persons so summoned shall be bound to attend in person or through authorised agents, as the Adjudicating Authority may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.

(3) Every proceeding under this section shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code.

CHAPTER IV

OBLIGATIONS OF BANKING COMPANIES, FINANCIAL INSTITUTIONS AND INTERMEDIARIES

12. Banking companies, financial institutions and intermediaries to maintain records.—

(1) Every banking company, financial institution and intermediary shall—

(a) maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions integrally connected to each other, and where such series of transactions take place within a month;

(b) furnish information of transactions referred to in clause (a) to the Director within such time as may be prescribed;

(c) verify and maintain the records of the identity of all its clients, in such manner as may be prescribed:

Provided that where the principal officer of a banking company or financial institution or intermediary, as the case may be, has reason to believe that a single transaction or series of transactions integrally connected to each other have been valued below the prescribed value so as to defeat the provisions of this section, such officer shall furnish information in respect of such transactions to the Director within the prescribed time

(2) The records referred to in sub-section (1) shall be maintained for a period of ten years from the date of cessation of the transactions between the clients and the banking company or financial institution or intermediary, as the case may be.

13. Powers of Director to impose fine.—

(1) The Director may, either of his own motion or on an application made by any authority, officer or person, call for records referred to in subsection (1) of section 12 and may make such inquiry or cause such inquiry to be made, as he thinks fit.

(2) If the Director, in the course of any inquiry, finds that a banking company, financial institution or an intermediary or any of its officers has failed to comply with the provisions contained in section 12, then, without prejudice to any other action that may be taken under any other provisions of this Act, he may, by an order, levy a fine on such banking company or financial institution or intermediary which shall not be less than ten thousand rupees but may extend to one lakh rupees for each failure.

(3) The Director shall forward a copy of the order passed under sub-section (2) to every banking company, financial institution or intermediary or person who is a party to the proceedings under that sub-section.

14. No civil proceeding against banking companies, financial institutions, etc., in certain cases.—

Save as otherwise provided in section 13, the banking companies, financial institutions, intermediaries and their officers shall not be liable to any civil proceedings against them for furnishing information under clause (b) of sub-section (1) of section 12.

15. Procedure and manner of furnishing information by banking company, financial institution and intermediary.—

The Central Government may, in consultation with the Reserve Bank of India, prescribe the procedure and the manner of maintaining and furnishing information under sub-section (1) of section 12 for the purpose of implementing the provisions of this Act.

(To be continued)

Bibliography & Book Review

Select Bibliography

V. Raghavendra Prasad

Legal Officer

Dr. K. R. Chandratre, "Neither a Shareholder nor a Director Has Any Right in Property and Assets of Company - A Brief Review of Law", (2003) 41 SCL 9 (Magazine) - examines the decision of Delhi High Court in H.C. Shastri vs. Dolphin Can Pack (P) (1988) 93 Comp. Cas 201 in which it was observed that simply because one G, since deceased, was the Director and shareholder, the assets of the company could not be regarded as forming part of the estate of the deceased.

Mrs. Padmini Srivastan, "Nominee Director -Thou Art Blessed", (2003) 41 SCL 15 (Magazine) - elucidates the special privilege conferred on the nominee directors in the context of Section 274 (1) (g) of the Companies Act and the circular of Department of Company Affairs (No.2/5/2001-CLV) General circular No. 5/2002 dated March 3, 2002.

N. R. Moorthy, "Defining Private and Public Companies", (2003) 41 SCL 6 (Magazine) - considers the applicability of Sections 3(1) (d) (iii) and 3 (5) of the Companies Act, 1956 as amended with effect from 13.12.2000 on the existing companies Opines that it is in the interest of justice and also in the interest of administration to amend this provision so as to make it applicable to newly incorporated companies.

Pawan Agarwal, "Setting Aside of Arbitration Awards", (2003) 41 SCL 12 (Magazine) - explains the grounds and procedure for setting aside an arbitration award in the light of the provisions of Arbitration and Conciliation Act, 1996.

Vinod K. Shah, "Electronic Fund Transfer", (2003) 41 SCL 1 (Magazine) - elaborately discusses the modes of payment system and various facets of Electronic Fund Transfer, e-money and check truncation in the light of the provisions of Negotiable Instruments Act, 1881.

For banker-management contravenes the fundamental laws of human limitations : First, that no man can serve two masters; second, that a man cannot at the same time do many things well.

— *BRANDEIS, Louis D., Other People's Money*
(New York : Frederick A. Stokes Company, 1932), pp. 201-202

Book Review

Law Relating to Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest

By Shri M.R. Umarji
Former Executive Director, RBI

D.V. Sekhar
Asstt. Legal Adviser

The recent enactment of “Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest” Act, 2002 is a right step in the direction of accelerating financial sector reforms as it provides the necessary statutory backing for securitisation and asset reconstruction, regulation of the companies carrying on that business and enforcement of security interest.

“Law Relating to Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest” by Shri M.R. Umarji, Former Executive Director, RBI, presents a detailed outline of Securitisation & Reconstruction of financial assets as well as enforcement of security interest by banks and financial institutions in the country. The book under review has been published by Taxman Allied Services Private Ltd., 59/32 New Rohtak Road, New Delhi 110 005.

In the introduction part, a brief idea about Reforms in Financial Sector, Uniform Commercial Code of USA and Historical background of the of the new legislation viz., Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 are outlined. The process of reforms in the financial sector which started in 1991 following the report of the Committee on Financial System and which is under constant review in the context of major changes taking place in the global and domestic economics, and new measures being introduced by the Government of India and the Reserve Bank of India with a view to building up a strong and efficient financial system have been referred to. Certain areas such as securitisation, asset reconstruction and enforcement of security interest, in which the banks and financial institutions lacked a level playing field as compared to other players in the financial markets in the world, have also been touched upon.

The contents of the book are divided into three divisions. The first division is further divided into Six Chapters. In the first division the author has discussed Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

In first division, Chapter I deals with short title, extent and commencement of the Act and the discussion on various definitions embodied in the Act.

Chapter II deals with Regulation of Securitisation and Reconstruction of Financial Assets of banks and Financial Institutions. Throughout the Act, expressions ‘securitisation’ and ‘reconstruction’ are used together. Provisions relating to registration with Reserve Bank of India and other provisions are made applicable to both activities. Para 4(ii) of the Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 provides that a securitisation company or reconstruction company, which has obtained

registration under section 3 of the Act, can undertake both securitisation and asset reconstruction activities. Issue & cancellation of licences and the functions of the securitisation company and reconstruction company are also discussed in this Chapter.

In Chapter III, the author has discussed the Enforcement of Security Interest. He has reviewed the existing law relating to secured credit under reference to enforcement of security i.e., selling the security in the event of default and realise the loan available to pledge (pawnee) of movables under section 176 of the Indian Contract Act and to a mortgagee under an English mortgage; the Indian Law in respect of non-possessory securities where the lenders did not have powers to enforce securities like their counterparts in other financial markets; etc.

The provisions of the Act relating to Central Registry have been discussed in Chapter IV. Sections 22 to 26 of the Act deals with the appointment, powers and other procedures relating to the Central Registrar.

In Chapter V, the provisions relating to offences and penalties, cognizance of offences, etc., are discussed. In Chapter VI the miscellaneous matters such as overriding provisions, bar on civil court's jurisdiction, overriding affect etc., are dealt with.

In the second division, divided into six chapters, the author has discussed the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Chapter I deals with preliminary background and various definitions used in the Recovery of Debts Due to Banks and Financial Institutions Act 1993 and its Constitutional validity. "Constitutional validity of the DRT Act was challenged in Delhi High Court. The Delhi High Court declared the law to be unconstitutional, void and hit by Article 14. The High Court also held that Parliament has no power to constitute banking tribunals in the absence of any provision for them in articles 323A and 323B for setting up of Administrative Tribunals and Tribunals for other matter. On appeal to the Supreme Court the above decision of the Delhi High Court was overruled and set aside".

The establishment of Debt Recovery Tribunal, presiding officer, their term & qualifications, Appellate Jurisdiction, etc., have been discussed in Chapter II, covering Sections 3 to 16 of the Recovery of Debts Due to Banks and Financial Institutions Act 1993. The Jurisdiction, Powers and Authority of Debt Recovery Tribunal are discussed under Chapter III.

The procedure of Debt Recovery Tribunal have been exhaustively discussed in Chapter IV. Section 22(1) which expressly declares that the Tribunal and Appellate Tribunal are not bound by the provisions of Code of Civil Procedure, 1908 and that they can regulate their own procedure including the places at which they will have their sittings subject to provisions of that Act and the rules framed thereunder and principles of natural justice have been explained.

Various modes of recovery of debts, validity of the certificate of recovery issued by the Debt Recovery Tribunal, stay thereof, appeal against the order of Recovery Officer etc., are discussed in Chapter V.

The last Chapter deals with miscellaneous matters such as transfer of pending cases from Civil Court to Debt Recovery Tribunals, Power of Tribunal to issue Certificate of Recovery in case of

Decree or Order, Overriding effect of the Act, Rule making powers of the Central Government etc.

In the third division, the author has compiled various guidelines and directions issued by the Reserve Bank of India under the Act. Various other Rules and Guidelines are also appended in the book as Appendix 1 to 27. On the whole the book will be useful for all players in the banking and financial industry including lawyers, risk managers etc., for reference. The book is priced Rs. 300/-

Faq

Frequently Asked Questions About The Consumer Protection Act, 1986 (68 Of 1986) (Act) (A Compilation)

1. What is the Act all about?

The Act is all about providing a mechanism for summary, speedy, simple and inexpensive redressal of consumer grievances. To achieve that object, three levels of quasi-judicial machinery at the District, State and National levels have been set up.

2. How does the Act promote and protect the interests of consumers?

The interests of consumers are sought to be protected *inter alia* by setting up consumer protection councils. Central Government is required¹ to establish the Central Consumer Protection Council under the Chairmanship of the Minister in charge of the consumer affairs with other official and non-official members representing different interests. Similarly, the State Government is required² to establish State Consumer Protection Councils under the chairmanship of the minister in charge of consumer affairs in the state. The State Council shall consist of official and non-official members representing different interests appointed by the State Government & the Central Government. The State Govt. is required³ also to establish District Consumer Protection Council for every district under the chairmanship the collector of the district. The District Council will consist of other official and non-official members representing different interests. The objects⁴ of the Central Council, the State Council and the District Council are to promote and protect the rights of the consumers, such as, -

- (a) the right to be protected against the marketing of goods (and services) which are hazardous to life and property;
- (b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods (or services, as the case may be) so as to protect the consumer against unfair trade practices;
- (c) the right to be assured, wherever possible, access to a variety of goods (and services) at competitive prices;
- (d) the right to be heard and to be assured that consumer's interests will receive due

consideration at appropriate fora;

- (e) the right to seek redressal against unfair trade practices (or restrictive trade practices) or unscrupulous exploitation of consumers; and
- (f) the right to consumer education.

3. Who is a consumer?

The word 'consumer' in respect of goods⁵, means a person who buys the goods for consideration, which has been paid or promised to be paid or partly paid and partly promised to be paid or a person who buys under any system of deferred payment; and includes any user of such goods who uses the goods with the approval of the purchaser. A person who obtains goods for resale or for any commercial purposes is not a consumer under the Act.

In respect of services⁶, 'consumer' means a person who hires or avails of any service or services for a consideration which has been paid or promised to be paid or partly paid and partly promised to be paid or a person who has availed of the services under any system of deferred payment; and includes any beneficiary of such services if such services are availed of with the approval of the person who has actually hired or availed of the same. A person who avails of any services for any commercial purposes is not a consumer under the Act.

Commercial purpose⁷ does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment.

4. What is the meaning of 'Goods' and 'Service'?

Goods means⁸ goods as defined in Section 2(7) of Sale of Goods Act, 1930. It means every kind of moveable property other than actionable claims and money and includes among others, stock and shares. Service means service⁹ of any description including the provision of facilities in connection with banking, financing, insurance, transport, processing or supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information. Service rendered free of charge or under a contract of personal service is not included within the meaning of service.

5. When can a consumer seek relief under the Act?

A consumer may seek relief¹⁰ under the Act in the following circumstances.

- (i) An unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;
- (ii) The goods bought by him or agreed to be bought by him suffer from one or more defects;
- (iii) The services hired or availed of or agreed to be hired or availed of by him suffer from

deficiency in any respect;

- (iv) A trader or the service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price –
 - (a) fixed by or under any law for the time being in force;
 - (b) displayed on the goods or any package containing such goods;
 - (c) displayed on the price list exhibited by him by or under any law for the time being in force;
 - (d) agreed between the parties;
- (v) Goods which will be hazardous to life and safety when used are being offered for sale to the public, -
 - (a) in contravention of any standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;
 - (b) if the trader could have known with due diligence that the goods so offered are unsafe to the public;
- (vi) Services which are hazardous or likely to be hazardous to life and safety of the public when used, are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety;

6. How is the grievance redressal mechanism initiated?

The grievance redressal mechanism is initiated by filing a complaint¹¹ against a person or entity against whom the consumer has any grievance. Under the Act, a complaint means¹² any allegation made in writing by any person entitled to file a complaint about a loss or damage suffered due *inter alia* to unfair trade practices adopted by any trader or the goods suffer from one or more defects, or the services suffer from deficiencies in any respect or when a trader has charged a price more than that displayed on goods or fixed under any law.

7. What should be the contents of the complaint?

The following details have to be furnished in the complaint.

- a) Name, description and address of the complainant.
- b) Name, description and address of the opposite parties.
- c) Facts relating to the complaint (when and where it arose)

- d) Documents, if any (supporting the averments contained in the complaint)
- e) The details of relief (what complainant is seeking)
- f) Signature of the complainant or his authorised agent.
- g) Verification.

8. What is the period of limitation for filing a complaint under the Act?

Two years¹³. District Forum, State Commission or the National Commission shall not admit a complaint unless it is filed within a period of two years from the date on which, the cause of action has arisen. It may be stated in general terms that cause of action arises on the date on which the consumer comes to know of the deficiencies in service or the defect in goods or the thing complained of.

9. Whether any person other than the consumer may file a complaint?

Yes. A complaint may also be filed¹⁴ by voluntary consumer Associations, the Central Government or any State Government or one or more consumers where there are numerous consumers having the same interest. In the case of the death of a consumer, his legal heir or representative may file a complaint under the Act.

10. Whether any Fee is to be Paid on the Complaint?

Yes¹⁵. The quantum of fee to be paid may be prescribed by rules made by Central Government under Section 30 (1) of the Act.

11. Where should the complaint be filed?

Complaint should be filed in the District Forum or State Commission or National Commission depending upon the claim amount. Consumer Disputes Redressal Forum to be known as the District Forum established¹⁶ in each District by the State Government shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed does not exceed Rs. 20 lakhs¹⁷. If the amount so claimed is more than Rs.20 lakhs and less than Rs. 1 crore¹⁸, the Consumer Disputes Redressal Commission to be known as the State Commission established¹⁹ by the State Government shall have the jurisdiction to entertain the complaint. The National Consumer Disputes Redressal commission to be known as the National Commission established²⁰ by the Central Government shall entertain complaints claiming an amount of more than Rs. 1 crore²¹.

12. How does the Consumer Protection Act ensure speedy disposal of complaints?

Speedy disposal is sought to be achieved by laying down time bound steps. The procedure²² to be followed by District Forum on admission of a complaint stipulates a time frame for each step, such as, notice, reply etc. and provides that every complaint shall be heard as expeditiously as

possible and that endeavour shall be made to decide the complaint within a period of three months from the date of receipt of notice by opposite party where the complaint does not require analysis or testing of commodities. It provides for a period of five months in cases where analysis and testing of commodities is required. The procedure applicable to District Forum is also applicable to State Commission²³ and National Commission²⁴ with such modifications as may be considered necessary by the respective Commissions.

13. What kind of relief may be granted?

One or more of the following relief²⁵ may be granted.

- a) Removal of defect/s from the goods
- b) Replacement of the goods with new goods of similar description, which shall be free from any defect.
- c) Return to the complainant the price paid by the complainant.
- d) Payment of compensation.
- e) Such other and further reliefs, which deem and proper including interim reliefs.

14. How is the order enforced?

The order is enforced by providing serious consequences for not obeying the order. Property of any person not complying with the order may be ordered to be attached²⁶. The District Forum or the State Commission or the National Commission may issue a certificate to the Collector of the District for the amount due to the complainant and the Collector shall proceed to recover it in the same manner as arrears of land revenue²⁷. Further, where a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, State Commission or the National Commission, such person shall be punishable²⁸ with imprisonment for a term which shall not be less than one month but which may extend to three years or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees, or with both.

15. Is there any protection against frivolous or vexatious complaints?

Yes. The District Forum, the State Commission or the National Commission may dismiss frivolous or vexatious complaints after recording the reasons in writing and make an order²⁹ that the complainant shall pay to the opposite party, costs not exceeding Rs.10,000 as may be specified in order.

16. What is the remedy available to a person aggrieved by the order of the District Forum or State Commission or National Commission?

A person aggrieved by the orders of District Forum may prefer³⁰ an appeal to the State

Commission of that State within a period of 30 days from the date of the order. A person aggrieved by an order of State Commission on a complaint claiming an amount exceeding Rs.20 lakhs but less than Rs.1 crore may prefer³¹ an appeal to the National Commission within a period of 30 days of the date of the order. A person aggrieved by an order made by the National Commission on a complaint claiming an amount of more than Rs.1 crore may prefer an appeal³² to the Supreme Court within a period of 30 days from the date of the order. The Appellate Authorities in each of these appeals may entertain an appeal filed after the expiry of the said period of 30 days if they are satisfied that there was sufficient cause for not filing the appeal within that period.

Art is a collaboration between God and the artist, and the less the artist does the better.

— *Andre Gide*

1. Section 4.
2. Section 7.
3. Section 8A.
4. Sections 6, 8 and 8B.
5. Section 2(1)(d)(i).
6. Section 2(1)(d)(ii).
7. Section 2(1)(d) Explanation.
8. Section 2(1)(i).
9. Section 2(1)(o).
10. Section 2(1)(c).
11. Sections 11 (1), 17(1)(a)(i) and 21(a)(i).
12. Section 2(1)(c).
13. Section 24A
14. Section 2(1)(b).
15. Section 12(2).
16. Section 9(a).
17. Section 11(1).
18. Section 17(1)(a)(i).
19. Section 9(b).
20. Section 9(c).
21. Section 21(a)
22. Section 13.
23. Section 18.
24. Section 22.
25. Section 14.
26. Section 25(1).
27. Section 25(3).
28. Section 27.
29. Section 26.
30. Section 15.
31. Section 19.

32. Section 23.

LD News

Foreign Visits

Shri N.V. Deshpande, Pr. Legal Adviser attended the Seminar on Cross-Border Insolvency Organised by Swiss Federal Banking Commission at Switzerland from 26th to 30th March 2003.

Shri S.R. Kolarkar, Legal Adviser attended a Seminar on “Comparative Banking and Financial Law” organised by Bank of France at Marne-la-Vallee, France from 20th January 26th March 2003.

Seminar/Lecture/Training

Shri S.R. Kolarkar, Legal Adviser delivered a lecture on Anti-money Laundering Laws & POTA provisions at a programme for the officers of the Bank organised by Staff Training College, Chennai.

Shri K.D. Zacharias, Legal Adviser delivered the keynote address on Overview of the Asset Securitisation Market at a conference on Asset Securitisation : Development and Opportunities organised by Marcusevans at Taj Landsend, Mumbai on 6th February 2003. He also addressed the senior officers of the State Governments and the Police at the CAB, Pune on protection of interests of depositors under the RBI Act and the State investor protection laws.

Congrats

Shri G.S. Hegde, Deputy Legal Adviser (in Grade D) attached to DNBS, Legal Division has been promoted to the post of Joint Legal Adviser (Grade E) and transferred to Legal Department, Central Office, with effect from 1-1-2003.

Shri A. Unnikrishnan, Dy. Legal Adviser attached to Legal Cell, New Delhi got married on 23rd March 2003.

Shri Srihari Phanikumar, Legal Officer attached to DNBS, Legal Division, got married on 7th February 2003.

Welcome

Shri Andrew Joseph, Asst. Legal Adviser attached to Legal Cell, New Delhi has been transferred to DNBS, Legal Division with effect from 13th January 2003.

Shri V.M. Khamkar, Clerk Gr. I reported to Legal Department from ECD on 4-3-2003.

Shri M.B. Darate, Clerk Gr. I reported to Legal Department from ECD on 25-3-2003.

Shri R.S. Dakawe, Record Clerk, reported to Legal Department from DAPM on 27-3-2003.

Transfers

Shri R.K. Gupta, Dy. Legal Adviser attached to Legal Department, Central Office has been transferred to DNBS, Legal Division with effect from 1-1-2003.

Shri P.R. Thakur, Duftry, attached to Legal Department has been transferred to DEBC with effect from 5-3-2003.

Release of Annual Volume

Shri G.P. Muniappan, Deputy Governor released the Annual Volume of the Magazine on 26-3-2003.

Sad Demise

Shri S.P. Sawant, Record Clerk attached to Legal Department, Central Office expired on 28-1-2003 after a short illness.

Mail Bag

We have received letters from M/s. Bank of Baroda, Legal Department, Patna; Presiding Officer, Debt Recovery Tribunal III, Kolkata; Shri Padmanabhan, Senior Manager, Syndicate Bank, Manipal; Shri Arun Khanna, Asstt. Manager (Law), State Bank of Mysore and the Asst. General Manager, Karnataka Bank Ltd.

The names of the above readers have been included in the mailing list.

Statement about ownership and other particular concerning RBI LEGAL NEWS AND VIEWS FORM IV

- | | |
|--|--|
| 1. Place of publication | : Mumbai |
| 2. Periodicity of publication | : Quarterly |
| 3. Editor, publisher and printer's name
nationality and address | : Shri N.V. Deshpande
Indian,
Reserve Bank of India,
Legal Department,
Central Office,
Shahid Bhagat Singh Road,
Mumbai-400 001. |
| 4. Names and addresses
of individuals who | Reserve Bank of India,
Legal Department, |

own the newspaper

Central Office,
Shahid Bhagat Singh Road,
Mumbai-400 001.

I, N.V. Deshpande, hereby declare that the particulars given above are true to the best of my knowledge.

Dated : March 2003

N.V. Deshpande
Signature of Publisher