From the Editorial Desk

Generally, the Service Regulations regarding disciplinary proceedings provide for appeal only against the penalty imposed by the prescribed or competent authority under the relevant Regulations. This right of appeal is usually available to the employee who has been subjected to the penalty upon him for his misconduct. While the Service Regulations of the Reserve Bank do not provide for enhancement of penalty by the Appellate Authority, some of the organizations, as part of their service conditions applicable to the employees, do authorise Appellate Authority to enhance the quantum of penalty imposed by the prescribed authority. This right, in practice is exercised by the Appellate Authority only when the concerned employee decides to prefer an appeal against the order of penalty imposed on him. Such a right of appeal in such situation proves to be a double edged weapon. The Supreme Court, in a recent case had to deal with such a case where the employee, to his dismay, had to face far reaching penalty of dismissal from service imposed by the Appellate Authority. In this, the Supreme Court was concerned with a case of an officer of a public sector bank who unauthorisedly having sanctioned loan to his wife, on the disciplinary proceedings being initiated against him, was visited with a minor penalty of reduction in salary by one increment by the disciplinary authority. However, on his preferring an appeal against such penalty, the Appellate Authority after issuing a notice under the relevant service conditions, passed an order dismissing him from the service. This order of enhancement of penalty in the Appellate Authority was unsuccessfully challenged before the High Court and finally before the Supreme Court. While dismissing the appeal, the Supreme Court examined the question whether the penalty imposed on the officer was commensurate with the misconduct. The Supreme Court observed that the officer was holding the high position and honesty and integrity were inbuilt needs of his function and therefore such cases could not be dealt with lightly and upheld the penalty of dismissal. The only saving grace in his case was that even though his dismissal from the service was upheld by the Supreme Court, in view of the peculiar circumstances of the case, he was given the benefit of pension and gratuity to which under the relevant regulations, he may not have been entitled. This judgement will be of some importance to the banking industry and is included in this issue of the journal.

The present issue begins with an article on legal and regulatory framework for cooperatives. It is followed by another article of topical interest namely Construction of the Reconstruction Act. 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 the Enforcement of Security Interest and Recovery of Debts, Laws (Amendment) Ordinance, 2004. In the Book Review and Bibliography Section, we have reviewed a book, ‘Fundamental Rights, a Study of Their Inter-relationship’ by Shri P.Ishwara Bhat. The Bibliography Section as usual covers recent articles on law which would be of interest to bankers. Apart from the above, we have our usual features like L.D.News and Mail Bag.

S.C. Gupta
Legal Adviser-in-charge

Legal and Regulatory Framework for Co-operatives - K.D.Zacharias

1.1 Constitution and governing laws

The incorporation, regulation and winding up of co-operative societies (other than those operating in more than one State) is a State subject[1] and is governed by the State laws on co-operative societies[2]. In the case of co-operatives with objects not confined to one State, their incorporation, regulation and winding up fall in the central domain[3] and are governed by the Multi-State Co-operative Societies Act, 2002. As the vast majority of co-operative societies are operating only in one State, the State Government and the Registrar of Co-operative Societies appointed by the State are the main regulatory authorities for the co-operative societies.

1.2 Banking co-operatives

When co-operative societies engage in banking business, in addition to the regulatory laws applicable to co-operative societies, the central laws governing banking[4] are attracted. Thus, the Banking Regulation Act, 1949 has been made applicable to co-operative banks, but as provided

1.Constitution of India, Schedule VII, List II, Item 32.

2. Enactments like AP Co-operative Societies Act, 1964 and the AP Mutually Aided Co-operative Societies Act, 1995

3. Constitution of India, Schedule VII, List I, Item 44.

4. A central subject under List I, Item 45 of Schedule VII of the Constitution.

5. Section 3 of the Banking Regulation Act, 1949.

6. Section 56(o)(i) ibid.

7. Section 2,ibid.

8. Madhav Rao Committee Report (1999) p.100.

in Section 56 thereof, in a modified manner, limiting thereby the extent of regulation by the Reserve Bank of India. This has resulted in the duality of regulation- under State laws for incorporation, regulation and winding up of cooperative societies and under banking regulation laws for regulation of banking business. However, all co-operative societies engaged in the business of banking are not regulated by the Banking Regulation Act, 1949 as the Act does not apply to Primary Agricultural Credit Societies and Land Development Banks[5] and the regulatory provisions including that on licencing are not applicable to primary credit societies[6], thus leaving them under the regulatory purview of the State.

2. Duality of Control -Conflict of laws

In the case of banking companies, which are registered under the Companies Act and are also governed by the provisions of the Banking Regulation Act in respect of their banking business, if the provisions of the Banking Regulation Act are in conflict with the Companies Act, the former prevails[7]. Hence, the Reserve Bank has full regulatory powers over the banking companies.
In the case of co-operative banks, although they are required to obtain a licence under Section 22 of the Banking Regulation Act, they are subject to a lesser extent of regulatory oversight under the modified provisions of BR Act as provided in Section 56. The High Power Committee on Urban Co-operative Banks (Madhav Rao Committee) has made an attempt to list[8] the banking-related functions and co-operative functions as under :

Banking Related Functions which should be under the domain of Reserve Bank of India		Co-operative Functions which should be under the domainofthe Registrar of Co-operative Societies for concerned State	
1.	Issues relating to interest rates,loan policies,investments,prudential exposure norms,forms of financial statements, reserve requirements, appropriation of profits etc.	1.	Registration of co-op. societies.
2.	Brach licensing, area of operation	2.	Approval and amendment to by-laws.
3.	Acquisition of assets incidental to carrying on banking functions	3.	Elections to Managing Committees.
4.	Policy regarding remission of debts.	4.	Protection of members' rights
5.	Audit.	5.	Supersession of Managing Committee for violation on items 1 to 4 above.
6.	Change of Management and appointment of CEO.		
7.	Appointment of Administration.		
8.	Any other banking related function to be notified by RBI from time to time.		

Banking being a Central subject and co-operatives operating within a State being a State subject under the Constitution, providing over-riding effect to the banking laws over the law governing cooperative societies in case of conflict is a contentious issue. Hence, although regulation of the management of banks is also essential for proper regulation of banking business (as is done in the case of banking companies), such powers are not available to the Reserve Bank. However, for the purpose of providing deposit insurance cover under the DICGC Act, as stipulated under that Act[9], Reserve Bank has been given the powers (by amending the State laws on cooperatives)[10] to issue direction to the Registrar for winding up, reconstruction and supercession of Board of insured banks when necessary.

9. See Section 2(gg) read with Section 13A and 13C of the DICGC Act.

10. For instance, Section 110A of the Maharastra Cooperative Societies Act, 1964

2.2 Regulation of Banks - Uniform regulations

For the proper regulation of the banking system in the country, it would be essential to have a more or less uniform regulatory regime for all kinds of banks irrespective of their constitution as company, co-operative society or statutory corporation, as these provisions are meant for proper regulation of the business of banking and not in respect of their constitution as such. Any regulation on management, in so far as it is essential for proper management of the business of banking, has to be considered as incidental to the main regulatory provisions on banking and therefore justified even if it touches the subject of regulation of co-operatives which is a State subject. In the case of co-operatives which for any reason do not want to be subject to the discipline of the banking system, they may be given the option to go out of the system and work as thrift and credit societies. Those co-operatives, which continue in the banking system, should be subject to regulation under the Banking Regulation Act on the lines of the provisions applicable to banking companies.

3. Opting Out of Banking - Thrift and Credit

Banking as defined in Section 5(a) of the Banking Regulation Act means accepting for the purpose of lending or investment of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise. Thus acceptance of deposit from the public is an essential feature of banking and if a society does not accept deposit from the public, it would not be engaged in the business of banking. Hence, societies not accepting public deposit would be outside the purview of the banking regulation Act. If any co-operative society does not want to be subjected to the regulatory regime for banks, such societies may be permitted to go outside the purview of the Banking Regulation Act by not accepting deposits from public and thereby ceasing to do banking business as defined in Section 5 (a) of the BR Act. They may also thereby cease to be part of the clearing, settlement and payment system of banks.

3.2 Deposit and public deposit

A relevant question is whether acceptance of deposits from members has to be treated as public deposits and regulated. Financial Companies which accept public deposits but are not engaged in banking business are regulated by the Reserve Bank under the RBI Act[11] and other companies by DCA under the Companies Act[12] and Companies (Acceptance of Deposits) Rules made thereunder.
Deposit or public deposit is not defined in the Banking Regulation Act. In the RBI Act "deposit" is defined in Section 45 I (bb) (for the purpose of regulation of NBFCs and UIBs) to cover all kinds of receipts of money including loans but excluding share capital, security deposit, advance for purchase of goods etc. and loans from banks, financial institutions etc. "Public deposit" is not defined in the RBI Act. However, there is a definition of "public deposit" in the Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 1998[13] which provides that all deposits except certain categories.

11. See Chapter IIIB of the RBI Act.

12. See Sections 58A, 58AA and 58AAA.

13. Para 2(1)(xi).

14. Rule 2(b)(ix).

15. Guidelines for Nidhis have been issued vide Notification-

of deposits specified therein are public deposits. These directions specifically exempt amounts received from a person who at the time of receipt of the amount was a Director of a company or any amount received from its shareholders by a private company from the definition of public deposit. Similar provisions exist in the Companies (Acceptance of Deposits) Rules[14] also. However deposits of members of public companies are not exempted from the definition of public deposits. In any case, mere acceptance of public deposits would not make co-operative society a bank just as companies accepting public deposits without having other features of banking are not banks and are regulated separately as non- banking companies.

3.3 Nidhis and thrift societies

Although, deposit acceptance from a limited number of members may not be problematic as the members themselves will be managing the societies, its impact when the numbers and the amount of deposit increase will have to be considered. If the society ceases to be a bank and has no linkages with other banks, failure of a society may not lead to systemic risk for banks or the banking system. However, when large number of members and large amounts are involved, there would be a wider impact of the failure of such societies and it may lead to hue and cry on the ground of affecting public interest. A case in point is that of Nidhis or Mutual benefit companies which accept deposits only from members, but, hold very huge deposits. These public companies (Nidhis/mutal benefit companies) are not engaged in banking business but accept deposits from the members and lend to their members. They are not subject to

regulation under the RBI Act or the Companies (Acceptance of Deposit) Rules but are registered under section 620A of the Companies Act with DCA. The failure of some of these Nidhis and the consequent uproar has resulted in the Government of India coming out with detailed guidelines[15] for the operation of the Nidhis. In the same manner, it will be for the State Government to regulate the societies which are not engaged in banking and accept deposits only from members and are outside the purview of banking regulation.

3.4 Membership rights

The societies doing business only with their members are considered to be able to manage their own affairs as the society is managed by them and public intervention may not be necessary. However, many societies accept deposits from the public enrolling the depositors as nominal members who may not be eligible to full membership rights and therefore, having no effective control over the management of the society. While allowing societies to go outside the Banking Regulation Act by restricting deposits to member deposits, it may be insisted that such members may have full and equal rights in participation of the affairs of the societies.

3.5 Consequences of opting out

The decision of a co-operative bank to opt out of the banking system may lead to certain consequences. These may relate to (i) use of the term bank, banker or banking in the name[16] (ii) losing the status of bank and the consequent ineligibility[17] for insurance cover under the DICGC Act, (iii) finance/refinance from other credit institutions/banks, (iv) acceptance of deposits withdrawble by cheques[18] and (v) loss of eligibility to participate in payment and settlement systems of banks.

3.5.1 Bank/banker/banking

Section 7 of the Banking Regulation Act prohibits the use of the term "bank, banker or banking" by a co-operative society other than a co-operative bank in its name or in connection with business and no co-operative society shall carry on the business of banking without using any of such words as part of its name. A co-operative bank as defined in sec 5(cci) of B R Act (AACS) is a primary co-operative bank or Central Co-operative bank or a State co-operative bank. However, a

16. Prohibition was Section 7, BR Act read with Section 56.

17. Section 2(gg) of DICGC Act.

18. Section 49A, BR Act.

19. The States of AP, Karnataka, MP, Uttaranchal, Orissa.

20. See the judgement of Supreme Court in Apex Bank Case AIR 2004 SC 141.

primary credit society, a co-operative society formed for the protection of mutual interest of cooperative banks, a co-operative land mortgage bank and co-operative societies formed by employees of banks are exempted. Further, as the B R Act as such does not apply to a primary agricultural credit society, a view can be taken that these provisions do not apply to such societies.

3.5.2 Issuance of cheque

Section 49A of the Banking Regulation Act restricts acceptance of deposits by any person other than a banking company, Reserve Bank, State Bank or any other banking institution, firm or other person notified by the Central Government. However, a primary credit society is exempted from these provisions.

4.1 Mutually Aided Co-operative Societies

The dependence of co-operative societies on Government and the consequent rigors of regulation by Government on co-operative societies has led to the enactment of Mutually Aided Co-operative Societies Act or Self Financing Co-operative Societies Act in several states[19]. In the societies under the enactments, , Government capital is prohibited and the management of the societies is vested in the Board of Directors and the policies are decided by the General Body subject to limited regulatory powers exercised by the Registrar by way of registration of society, registration of bye laws, etc. These State enactments are in addition to the existing State laws on co-operative societies and provides alternative legal framework for co-operative societies. However, in some States (like Orissa), the State enactments provide for creation of a cooperative as distinguished from a co-operative society .This could lead to the position that the entity in question is not co-operative society and the enactment concerned is not a State law on co-operative societies, and that would render the co-operative ineligible to be licenced as a cooperative bank under section 22 of the BR Act (AACS)[20].

4.2.1 Migrating to MACS

The enactments providing for Mutually Aided Co-operative Societies also provide for conversion of existing co-operative societies into MACS by repaying the Government capital, if any, and amending the bye laws prohibiting holding of Government capital. As these co-operatives are organized based on the principles of thrift and credit and self reliance as member- driven entities, existing co-operative societies may be encouraged to move out to the MACS regime. This would help such societies to manage their affairs with a certain level of autonomy. If some of the cooperative banks stop accepting non-member deposits and become thrift and credit societies, it will be possible for such societies also to convert into MACS. As some MACS Acts provide for acceptance of deposits from other than members , this may be restricted to members' deposits except in the case of any banking societies.

4.2.2 MACS and banking

If a MACS wants to engage in the business of banking, such society should be subjected to the provisions of the Banking Regulation Act as applicable to other banks. Currently, those MACS which call themselves as co-operative societies may be eligible, for approaching the Bank for a licence to do banking business as they are cooperative societies registered under a State law on co-operative societies. But, some of these statutes do not provide for conferring powers on the Reserve Bank for directing winding up etc. of insured banks as provided in the DICGC Act and therefore, the societies registered under those statutes would not fall within the definition of eligible co-operative bank[21] under that Act for the purpose of insurance cover. MACS can, however, be recommended as a prototype for legislation for member driven co-operative societies on thrift and credit basis with some caveats. A MACS may not be permitted to undertake banking business unless they come within the purview of the regulatory discipline as applicable to other cooperative banks.

21. As defined in Section 2(gg) of the DICGC Act.

22. Report of Madhav Rao Committee (1999), pp. 90-109 and 210-217.

4.3 Licencing of Co-operative banks

In the co-operative banking hierarchy of Primary, Central and State co-operative banks, several banks including CCBs are not licenced. Currently, applications of several CCBs are pending with the Bank for licence. The Bank is neither allowing nor rejecting them as they are not currently eligible for licence and if licence is rejected, it may affect the system of co-operative in the State. If, such cooperative banks are not able to improve the financial position over a definite time-frame, it is prudent to reject licence. It would be possible to allow such societies to go outside the purview of the BR Act and work as thrift and credit societies, if they choose so.

5. Legislative reforms and other measures

5.1 Madhav Rao Committee Recommendations

Madhav Rao Committee has made certain recommendations[22] for legislative reforms which include -

- Amending Sections 5(ccv) and 22 of BR Act (AACS) to stop automatic conversion of primary credit societies into primary co-operative banks
- Amending Section 5 (ccvi) of BR Act (AACS) to define a primary credit society as a cooperative society whose primary object is to provide financial accommodation to members alone.
- Amending Section 49 A of the Banking Regulation Act (AACS) to prohibit acceptance of deposits withdrawable by cheques by primary credit societies
- Amending section 7 of BR Act (AACS) to provide that only such of the primary cooperative societies which have been specifically licenced to carry on banking business should be allowed the use of the word "bank/banker/ banking".
- Amending section 30 of BR Act (AACS) for appointment of Chartered Accountants approved by the Reserve Bank as auditors of urban co-operative banks.
- Amending Section 36 of BR Act (AACS) to require urban co-operative banks to make changes in management as required by Reserve Bank.
- Amending Part II A and Part II C of BR Act on control over management and acquisition of undertaking respectively to make these applicable to co-operative banks.
- Amending Section 45 of the BR Act (AACS) to further extend its application to co-operative banks
- Amending State Co-operative Societies Acts and Multi State Co-operative Societies Act to confer powers on the Reserve Bank in respect of all issues relating to banking, acquisition of assets incidental to carrying on banking functions, policy regarding remission of debts, audit, change of management and appointment of CEO, appointment of Administrator and other banking related functions to be notified by the Reserve Bank, and not to issue licence or branch licence to any urban co-operative bank unless the Acts are so modified.

The above reforms which require amendments to the Banking Regulation Act and Co-operative Societies Acts may be undertaken in due course. There is an urgent need to enact such legislation broadly on the lines of the Banking Regulation (Amendment) and Miscellaneous Provisions Bill, 2003 (lapsed) which provided for wide- ranging amendments to B R Act to increase the minimum capital requirements of co-op. banks and to extend most of its provisions applicable to companies to co-operative banks.

5.2 Interim measures

As legislative amendments stated above would take their own time, in the meantime, we may look for other measures which may be undertaken at the administrative level. Under Section 58 of the Reserve Bank of India Act, Reserve Bank may make regulations for regulation of Clearing, and Payment and Settlement Systems. The relevant provisions of Section 58 (2) are as under: (p) the regulation of clearing-houses for banks (including post office savings banks); "(pp) the regulation of fund transfer through electronic means between the banks or between the banks and other financial institutions referred to in clause (c) of section 45-I, including the laying down of the conditions subject to which banks and other financial institutions shall participate in such fund transfers, the manner of such fund transfers and the right and obligations of the participants in such fund transfers".

These provisions empower the Reserve Bank to make regulations for regulation of the clearing houses for banks and also to make regulations for regulation of electronic fund transfer for banks and financial institutions. In such regulations, the Bank may lay down the conditions subject to which banks and other financial institutions shall participate in clearing or fund transfers thereby effectively restraining ineligible banks from participating in the system. Primary credit societies (which have not graduated to banks) will not be eligible to participate in the Payment and Settlement Systems of banks, and any cheques, if drawn on them will not be getting currency into the banking system and they will only be like withdrawal slips or payment orders which can be encashed at the respective society counters only. Further, by stipulating suitable conditions for joining the Payment and Settlement Systems, weak banks can be compelled either to improve their systems and be in the banking system or to go outside the banking system, back to the role of credit and thrift societies. The kinds of conditions and restrictions which can be imposed in this regard have to be worked out.

5.3 Recapitalisation scheme

Any scheme for recapitalising the co-operatives may stipulate as terms and conditions of such scheme that certain measures of discipline should be followed for such recapitalisation. These terms and conditions can be adopted by agreement among the parties concerned without waiting for statutory changes.

Construction of the Reconstruction Act - G.S.Hedge

In the case of Mardia chemicals[1], the Supreme Court upheld the constitutional validity of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) (for short, 'the Act') except subsection (2) of section 17 of the Act under which the Debts Recovery Tribunal (Tribunal) shall not entertain the appeal unless the borrower deposits with Tribunal, 75% of the amount claimed in the notice issued under subsection (2) of section 13.

2. This paper attempts to analyse the reasons given by the Hon Supreme Court, for holding subsection (2) of section 17 of the Act as unreasonable, arbitrary and violative of Article 14 of the Constitution.

Grounds of Challenge

3. The main grounds of challenge to Section 17 were as under.

(i) The remedy before the Tribunal under section 17 of the Act is illusory, as it is burdened with the onerous and oppressive condition of deposit of 75% of the amount of demand, before the Tribunal can entertain the appeal.

(ii) That provision impedes access to the Tribunal which is meant for redressal of the grievance of a borrower

1. Mardia Chemicals Ltd Etc. v. Union of India and others, JT 2004 (4) SC 308.

2. Seth Nandial v. State of Haryana, 1980 (Supp.) SCC 574, Anant Mills Co. Ltd. v. State of Gujarat, 1975 (2) SCC 175 at p. 202, Vijay Prakash D. Mehta and Anr. v. Collector of Customs (Preventive) Bombay, 1988(4) SCC p. 402.

(iii) Where the possession of the secured assets or the management of the secured assets of the borrower, including the right to transfer the same has already been taken over, it is not at all necessary to burden the borrower doubly with deposit of 75% of the demand amount.

(iv) It would not be possible for a borrower to raise funds to deposit the huge amount of 75% of the demand, once he is deprived of the possession/management of the secured assets.

The Answer

4. The said challenge was sought to be met on the following grounds.

a) The condition of pre-deposit has been held to be valid by the Supreme Court in many cases[2].

b) Under the proviso to subsection (2) of section 17, the Tribunal has the power to waive or reduce the amount. The Tribunal, which is presided over by a Member of the Higher Judicial Service, would exercise its discretion and may waive or reduce, in deserving cases, the amount required to be deposited.

c) The secured assets, which may be taken possession of or sold, may fall short of the dues.

d) The right of appeal is a statutory right and it can be circumscribed by the conditions.

Suits v. Appeals

5. The Court observed that the reference to the remedy provided under section 17 of the Act as an appeal is a misnomer. It is the initial action, which is brought before a forum as provided under the Act for raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit. The requirement of pre-deposit at the stage of initiation of proceedings does not stand on the same footing as the requirement of pre-deposit at the stage of filing appeal.

6. The Supreme Court quoted with approval the observations made by it in Smt. Ganga Bai & Others v. Vijay Kumar and others [3] regarding the distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature. A suit for its maintainability requires no authority of law and it is enough that no statute bars a suit. The position in regard to appeals is quite the opposite. An appeal for its maintainability must have the clear authority of law. The requirement of pre-deposit at the stage of initiation of proceedings impedes the inherent right of a party to approach a judicial forum for redressing his grievances. If the law provides that an appeal can be filed only upon depositing a portion of the amount in dispute, such a law is valid as it conferred on the party (though subject to pre-deposit), a right to appeal that was not there, but for such law.

3. (1974) 2 SCC 393.

4. Seth Nandial v. State of Haryana, 1980 (Supp.) SCC 574, Anant Mills Co. Ltd. v. State of Gujarat, 1975 (2) SCC 175 at p. 202, Vijay Prakash D. Mehta and Anr. v. Collector of Customs (Preventive) Bombay, 1988(4) SCC p. 402.

5. Order XXXVIII rules 5 and 6 of the Code of Civil Procedure, 1908.

6. Order XL rule 1 ibid.

7. Order XXXIX ibid.

8. " In section 17 of the principal Act,-(a) in sub-section (1),-
(i) for the words "may prefer an appeal", the words "may make an application along with such fee, as may be prescribed," shall be substituted and shall be deemed to have been substituted with effect from the 21st day of June, 2002;"

7. The decisions [4] relied upon by the respondents relate to appeals. In suits, under the Code of Civil Procedure, it is permissible to attach[5] the property before the judgement is passed or to appoint receivers[6] and to make provision by way of interim measure[7] in respect of the property, before decree. For obtaining such orders, a case has to be made out in accordance with the relevant provisions of the Code of Civil Procedure. There is no such provision in the Act.

Reasons

8. In view of the following, the Court concluded that the condition of pre-deposit is bad, rendering the remedy illusory.

- It is imposed while approaching the adjudicating authority of the first instance, not an appeal.
- There is no determination of the amount due as yet.
- The secured assets or its management with transferable interest is already taken over and is under the control of the secured creditor.
- There is no special reason for requiring double security in respect of amount due yet to be determined and settled.
- 75% of the amount claimed by no means would be a meagre amount.
- It would leave the borrower in a position where it would not be possible for him to raise the funds to make deposit of 75% of the undetermined demand.
- Such conditions are not only onerous and oppressive but also unreasonable and arbitrary.

Amendment

9. By the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004 , Section 17 has since been amended[8]. The petition to the Tribunal under that Section is now being referred to as an application and not as an appeal. It is now provided[9] that the Appellate Tribunal shall not entertain the appeal of the borrower unless the borrower deposits 50% of the amount of debt due from him or the amount determined by the Debts Recovery Tribunal, whichever is less.
10. It may be expected that since the requirement of pre-deposit is now at the appellate stage and the amount to be deposited is also reduced to 50% which may further be reduced to 25% by the Appellate Tribunal, the amended provisions would be held as constitutionally valid.

9. "Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:
Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso."

10. Andhyarujina Committee.

11. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms.

12. The Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004

13. "(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:
Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A:
Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt."

14. ibid.

Committees

11. It is submitted that the Court has noted that the question of non-recoverable or delayed recovery of, debts advanced by banks and financial institutions had been attracting the attention of Government of India and RBI and that the matter was considered in-depth by the committee[10] consisting of experts in the field specially constituted. The Court rightly upheld the validity of the Act, which was passed after taking into consideration the recommendations of various committees[11] of experts and considering the totality of circumstances and the financial climate in the country.

Section 13 Is Valid

12. Even though the text of section 13 does not contemplate the communication of reasons for not accepting the objections of the borrower, the Court said that it goes with logical reason that before the secured creditor takes the measures like taking over possession of the secured assets, he communicates to borrower, the reasons for not accepting his objections. The Court rightly held that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to the notice issued to him under subsection (2) of section 13 of the Act.
The Court rightly noted that the requirement to communicate the reasons to the borrower is in keeping with the concept of right to know and lenders' liability. Such a measure, the court felt, caters to the cause of transparency and is conducive to building up of confidence in the commercial practices. The Court had no hesitation in holding that such a safeguard was inherent under section 13 of the Act. The Court has in fact read down the provisions of section 13 by requiring the secured creditor to give reasons and thereby made the provisions of that section logical and reasonable. Section 13 has since been amended[12] and the secured creditor is now required[13] to communicate the reasons to the borrower for not accepting his objections.

13. The second proviso[14] to subsection (3A) of section 13 clearly states that the borrower does not get the right to make an application to the Tribunal on the secured creditor communicating the reasons for not accepting the objections. The
explanation added to Section 17[15] is also to the same effect and makes it clear that the borrower cannot approach the Tribunal immediately after the communication of the reasons and thwart the recovery process.

What is Reading Down?

14. The Supreme Court[16] has explained the concept of reading down of the statutes while upholding the constitutional validity of section 23 of the Urban Land Ceiling Act. Section 23 of that Act provided for the allotment of acquired vacant land by the State Government. Dealing with the challenge to the said provisions on the ground that compulsory acquisition of property from some private owners for transferring to other private owners would not be in public interest and is susceptible to misuse, the Court observed as under.

'If the power is used for favouring a private industrialist or for nepotistic reasons the oblique act will meet with its judicial Waterloo. To presume as probable graft, nepotism, patronage, political clout, friendly pressure or corrupt purpose is impermissible. The law will be good, the power will be impeccable but if the particular act of allotment is mala fide or beyond the statutory and constitutional parameters such exercise will be a casualty in court and will be struck down. We must interpret wide words used in a statute by reading them down to fit into the constitutional mould. The confusion between the power and its oblique exercise is an intellectual fallacy we must guard against. Fanciful possibilities, freak exercise and speculative aberrations are not realistic enough for constitutional invalidation.'

15. "Explanation.- For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17."

16. Bhim Singhji v. Union of India, 1981(1) SCC166 = AIR 1981 SC 234.
(Emphasis added)

'To sustain a law by interpretation is the rule. To be trigger-happy in shooting at sight every suspect law is judicial legicide. Courts can and must interpret words and read their meanings so that public good is promoted and power misuse is interdicted. "As Lord Denning said : 'A judge should not be a servant of the words used. He should not be a mere mechanic in the powerhouse of semantics'. May Lord Denning live long, and his shadow never grow less!" "Lawyer" October 1980 Silver Jubilee Issue, p. 172' (Emphasis added).

In the light of the above, it ought to have been brought to the notice of the Court that section17 of the Act was a fit case for reading down. The discretion vested in the Tribunal to waive or reduce the amount to be deposited with it before entertaining the proceedings under section 17, could be read as requiring the Tribunal to take into consideration, inter alia, the value of the secured assets which have been repossessed or sold and the terms and conditions which could be imposed to protect the interest of both the borrower and the creditor, while passing the order on the application for waiving or reducing the amount to be deposited. In other words, it ought to have been pointed out that the provisions of subsection (2) of section

17 have to be read down as requiring the Tribunal to take into consideration the value of the secured assets, the management of which has been taken over by the secured creditor or which is repossessed by the secured creditor or sold by the secured creditor and adjust the same against the amount required to be deposited with it under that section. That would have ensured that the secured creditor does not get double protection of the possession or management of the secured assets and the deposit of money.

Perhaps, the contention of the borrowers that it is impossible for them to arrange for 75% of the demand amount after the possession of the secured assets is taken over by the creditor could have been analysed with reference to one of the main causes for default, namely, diversion of funds. The Tribunal could have been required to examine while passing an order on an application for waiving or reducing the amount to be deposited, whether there is any evidence to show that the borrower had diverted the funds. If the Tribunal found any such evidence in any particular case, the Tribunal would be justified in requiring the borrower to deposit 75% of the demand amount even though the secured assets have been taken over by the creditor. The Tribunal, which is presided over by a Member of the Higher Judicial Service could have been reasonably expected to exercise its discretion to meet the ends of justice in a given case.

The Supreme Court[17] has observed in a recent case[18] that a court should not be overzealous in searching ambiguities or obscurities in words, which are plain. It is also stated that it is well settled that when an expression is capable of more than one meaning, the court would attempt to resolve the ambiguities in a manner consistent with the purpose of the provisions and with regard to the consequences of the alternative constructions[19]. If these principles were applied in the case of Mardia chemicals, the validity of section 17 of the Reconstruction Act could have been upheld.

Tax and Dues of Banks and Financial Institutions

18. Income Tax Act contains provisions[20] for payment of tax in advance. It is not disputed that tax being an amount due to the sovereign, stands on a different footing than the amount to be

17. Tata Consultancy Services v. State of Andhra Pradesh (2005) 1 SCC 308.

18. Where it has examined the question whether the software and computer programs written on CDs and other media are goods for the purposes of the Andhra Pradesh General Sales Tax Act

19. (2005) 1 SCC 308, paragraph 68 at page 339

20. Sections 207 and 208.

recovered by banks and financial institutions. However, in view of the special status of banks and financial institutions and their utility to the economy, the requirement to pay 75% of the claim before the Tribunal could have been considered as reasonable. Further, the safeguard provided to the borrower in the proviso to subsection (2) of section 17 of the Act (power with the Tribunal to waive or reduce the amount to be deposited by recording reasons in writing) ought to have been held to be sufficient.

Is Section 17 Really Different from Code of Civil Procedure?

19. The discretion vested in the Tribunal to waive or reduce the amount required to be deposited is similar to the power conferred on a civil court to attach properties before decree. Under the Code of Civil Procedure, the creditor has to satisfy the Court to obtain an order for attachment of properties (of the debtor) before the judgement. Under section 17 of the Act the debtor has to satisfy the Tribunal that there are grounds for waiving or reducing the amount to be deposited. The difference between the two provisions is only in respect of the burden of proof.
It may be appreciated that the borrowers invariably apply for waiving or reducing the amount to be deposited under section 17. The borrowers would deposit the amount only after the Tribunal rejects their application for waiving or reducing the amount to be deposited. In practical terms therefore, the borrowers would be required to deposit the amount only after the Tribunal which is presided over by a Member of the Higher Judicial Service passes an order on the application for waiving or reducing the amount to deposited. There is no doubt that the Supreme Court could have laid down as to what are the relevant factors to be taken into consideration by Tribunal before exercising the discretion conferred on it under the statute.

20. The requirement to deposit 75% of the claim was obviously a step calculated to improve recovery by banks and financial institutions for recycling the funds in the interest of the economy. The quashing of the said provision seriously affects recovery by banks and financial institutions.

Conclusion

21. The amendments since carried out in the Act remedy the defects pointed out by the Supreme Court in the above judgement. The said amendments provide a reasonable protection to the borrowers. Though the amount required to be deposited is postponed to the stage of appeal and the amount required to be deposited is reduced to 50% as against 75% at the initial stage before the Tribunal itself (under the erstwhile provisions), the amendments may be expected to help recovery as there is sufficient disincentive to the borrowers to file appeals to avoid or postpone recovery. The amendment may be regarded as a balanced step in the right direction.

Men are not hang'd for stealing Horses, but that Horses may not be stolen.

— **SAVILE, George, The Complete Works of George Savile, First Marquess of Halifax, edited with an introduction by Walter Releigh (Oxford : Clarendon Press, 1912), ';Of Punishment,'; p. 229**

It is better for all the world if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

—HO LMES, Oliver Wendell, in Buck v. Beil, 274 U.S. 200, 207 (1927)

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion.

—JACKSON, Robert H., in Morissette v. United States, 342 U.S. 246, 250 (1952)

Recent Judgements Relevant to Bankers - G.S.Hedge, M.Unnikrishnan and B.S.Bohra

I. Ganesh Santa Ram Sirur Vs. State Bank of India & Anr. (2005) 1 SCC 13

Service Law - Dishonest sanction of loan -Removal from service - Held, Sanctioning of loan by a bank manager to his spouse in contravention of service rules not an honest decision and therefore punishment of removal from service is just and proper.

Natural Justice - Personal hearing – Held, principles of natural justice cannot be put in a straitjacket – Where relevant service rule did not provide for a personal hearing, then a decision taken with full application of mind but without giving personal hearing cannot be said to be vitiated.

Facts

The appellant was issued with a charge sheet for certain irregularities committed by him while working as Branch Manager of the respondent bank. Out of the various charges imputed against him, the enquiry officer, after completion of the enquiry, held only the charge pertaining to grant of advance by the appellant to his wife as proved. Thereafter, on the recommendation of the disciplinary authority , the punishing/appointing authority imposed on the appellant the punishment of reduction in substantive salary by one stage. On appeal, the appellate authority initially proposed to enhance the punishment to dismissal. However, after examining the reply given by the appellant to the proposed punishment, the appellate authority imposed on the appellant the punishment of removal from service. The appellant's request for a review by the Chairman of the respondent bank was also not entertained. The writ petition filed by the appellant to quash the order of the appellate authority and for directions to reinstate him with back wages and arrears of service and other service benefits was dismissed by the Division Bench of High Court of Bombay. Being aggrieved by the same, the appellant preferred the present appeal.

Issues

1. Whether enhancement of punishment by the appellate authority to removal from service, of a bank manager for sanctioning loan to his spouse in contravention of service rule, is just and proper especially when the cheque issued pursuant to the loan was not encashed?

2. Whether the enhancement of punishment by the appellate authority without giving a personal hearing to the appellant was in order?

3. Whether the appellant, having filed appeal after the period of limitation, can contend that his appeal being time barred should not have been considered by the appellate authority?

4. Whether taking into account of unproved charges in the departmental enquiry by the appellate authority while enhancing the punishment in appeal is in order?

Arguments on behalf of the appellant

(i) The appeal should not have been considered by the appellate authority as the same was time barred.

(ii) The appellate authority while enhancing the punishment considered charges which were not proved in the enquiry.

(iii) The order of removal is unsustainable as no personal hearing was given to the appellant by the appellate authority before enhancement of punishment.

(iv) The order of enhancement of punishment by the appellate authority is not just when it is not recommended by the disciplinary authority and that too in the appeal filed by the delinquent employee.

(v) Though loan was granted by the appellant to his wife under a Scheme meant for educated unemployed youth in violation of Service Rules, the bank cheque issued by the appellant was not encashed, it was only an attempt and no loss has been caused to the bank.

(vi) Therefore, impugned action of the respondent bank in enhancing the punishment to removal is unjust, unwarranted, violative of statutory rights as also the principles of natural justice.
Various case laws were cited on behalf of the appellants[1] in support of the above contentions and it was pleaded that the punishment of removal be set aside and the punishment imposed by the disciplinary authority be restored.

Arguments on behalf of the respondents

(i) Under Service Rule 34(3)(1) of the respondent bank, granting of loan by an employee to his spouse is prohibited. The appellant deceitfully granted the loan to his wife in her maiden name in order to prevent the offence from coming to light. It was sanctioned under a Scheme meant for educated unemployed youth, which reveals the evil intention of the appellant.

1. Ram Chander v. Union of India (1986) 3 SCC 103:; Ram Niwas Bansal v. State Bank of Patiala (1998) 4 SLR 711 (P&H); Makeshwar Nath Srivastava v. State of Bihar (1971) 1 SCC 662; Bhagat Ram v. State of H.P. (1983) 2 SCC 442; Ranjit Thakur vs. Union of India (1987) 4 SCC 611; Dev Singh v. Punjab Tourism Development Corpn.Ltd.(2003) 8 SCC 9; State of Madras v. T.K. Gopala Iyer AIR 1963 Mad 14; Kailash Nath Gupta v. Enquiry Officer (2003) 9 SCC 480; Union of India vs. M.A. Jaleel Khan 1999 SCC (L&S) 637.

2. Disciplinary Authority-cum-Regional Manager vs. Nikunja Bihari Patnaik (1996) 9 SCC 69; Union of India v. Jesus Sales Corpn (1996) 4 SCC 69; State Bank of Patiala v. S.K. Sharma (1996) 3 SCC 364; Regional Manager, U.P. SRTC v. Hoti Lal (2003) 3 SCC 605

(ii) Although the cheque granting loan was not encashed, the intention of the appellant is clear and Rule being one of integrity the appellant cannot be continued in service as he was holding a responsible position.

(iii) The order passed by the appellate authority is just and proper and is passed in accordance with the Service Rules. In terms of Rule 69(2) of the Service Rules, the appellate authority had issued show cause to the appellant on the proposed enhancement of penalty and had considered the detailed explanation submitted by the appellant and for reasons recorded has reduced the penalty of dismissal to that of removal.

(iv) The above said Rule does not provide for a personal hearing or a personal interview

(v) Good conduct and discipline are inseparable for the functioning of every officer, manager or employee of the bank, who deals with public money. There is no defence available to the appellant to say that no loss or profit resulted in the case, when the manager acted without authority and contrary to the Rules and the Scheme which is formulated to help the educated unemployed youth.

(vi) There is no extenuating factor to reduce the punishment imposed on the appellant.
Certain case laws[2] showing the current trend of cases on principles of natural justice as well as on the proportionality of punishments in disciplinary proceedings were cited on behalf of the respondents.

Observations of the Court

"Although the cheque for the loan which was sanctioned, had not been encashed, the intention of the appellant to disburse the same in a dishonest way to his wife was amply proved."

"The appellant was well aware while filing the appeal that his appeal was not filed within the period of limitation as provided under Rule 51(2) of the Service Rules. The appellant having filed the appeal cannot now go around and say that the appeal should have been dismissed on the ground of limitation. The reason is obvious. We, therefore, do not find any merit or substance in the submission in regard to the consideration of the appeal on merits even though it is time-barred. It has to be presumed, that delay, if any, was condoned by the appellate authority while entertaining the appeal and decide the same on merits. Rule 69(5) expressly provides that the authority competent there under may, for good and sufficient reasons or if sufficient cause is shown , extend the time specified there under for anything required to be done there under or condone any delay……."

" …….. According to Mr. Ramamoorthy (Counsel for the appellant), the appellate authority was merely concerned with Charge 5 regarding disbursement of loan to the wife of the appellant in violation of Rule 34(3)(1) of the Service Rules and that the order of the appellate authority does not in any manner disclose that the same was passed by considering the circumstances germane to the charge against the appellant which had been proved. Even accepting the contention of Mr. Ramamoorthy on Charge 1, the appellant cannot come out of Charge 5, which is more serious and grave in nature. However, we observe that the observations made by the appellate authority on Charge 1 while considering Charge 5, should be treated only as a passing observation and at the same time we cannot ignore or close our eyes in regard to the finding of the appellate authority on Charge 5 which is more serious and grave in nature. The appellate authority had enhanced the punishment imposed by following the procedure laid down in the Service Rules and we see no reason to interfere with the same. As already noticed, the appellant had himself admitted his misconduct and therefore, there is no reason why the appellate authority's finding on Charge 5 should not be accepted."

"A reading of the show cause notice and the final order passed by the appellate authority clearly goes to show that the appellate authority has thoroughly considered the detailed submissions made by the appellant and has reached its conclusion on the facts and circumstances of the case and has modified the proposed penalty of dismissal to that of penalty of removal. There is total application of mind on the part of the appellate authority in arriving at the conclusion in regard to punishment."

'"..... principles of natural justice cannot be reduced to any hard- and-fast formulae and as said in Russel v. Duke of Norfolk [(1949)1All. E.R. 109 (CA)], these principles cannot be put in a straitjacket. Their applicability depends upon the context and the facts and circumstances of each case. The objective is to ensure a fair hearing, a fair deal to a person whose rights are going to be affected. In our opinion, the approach and test adopted in Karunakar case [(1993) 4 SCC 727] should govern all cases where the complaint is not that there was no hearing, no notice, no opportunity and no hearing but one of not affording a proper hearing that is adequate or a full hearing or violation of a procedural rule or requirement governing the enquiry."

" The bank manager/officer and employees of any bank, nationalised/or non-nationalised, are expected to act and discharge their functions in accordance with the rules and regulations of the bank. Acting beyond one's authority is by itself a breach of discipline and trust and a misconduct. In the instant case Charge 5 framed against the appellant is very serious and grave in nature .We have already extracted the relevant Rule which prohibits the bank manager to sanction a loan to his wife or his relative or to any partner. While sanctioning the loan the appellant did not appear to have kept this aspect in mind and acted illegally and sanctioned the loan. He realized the mistake later and tried to salvage the same by not encashing the draft issued in the maiden name of his wife though the draft was issued but not encashed. The decision to sanction a loan is not an honest decision. Rule 34(3)(1) is a rule of integrity and therefore, as rightly pointed out by Mr.Salve, the respondent Bank cannot afford to have the appellant as bank manager. The punishment of removal awarded by the appellate authority is just and proper in the facts and circumstances of the case. Before concluding, we may usefully rely on the judgement Regional

Manager, U.P. SRTC v. Hoti Lal [(2003) 3 SCC 605] wherein this Court has held as under: (SCC p. 614, para 10).

'If the charged employee holds a position of trust where honesty and integrity are inbuilt requirements of functioning, it would not be proper to deal with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and unexceptionable. Judged in that background, conclusions of the Division Bench of the High Court do not appear to be proper. We set aside the same and restore order of the learned Single Judge upholding the order of dismissal.'

35. W e entirely agree with the above observations made in the above judgement."

Decision

Appeal was dismissed and the order passed by the Division Bench of High Court was confirmed. However, in the peculiar facts and circumstances of the case appellant was held to be entitled to full pension and gratuity irrespective of his total period of service.

II. Simco Rubber Products (P) Ltd. Vs. Bank of India – (2004) 51 SCL 272 (All).

Constitution of India – Article 226 – There is no error of law on the face of the record to issue Certiorari. There is no statutory duty to be complied with for issue of Mandamus.

Banking Regulation Act, 1949 Section 36 -Guidelines framed by Reserve Bank of India for recovery of dues relating to non-performing assets of public sector banks, cannot be utilized by borrowers who have willfully defaulted in repayment of loan and have diverted funds to other businesses.

Facts

The petitioner company had availed certain credit facilities from the respondent bank. Pursuant to the guidelines dated 27.07.2000/29.1.2003 framed by Reserve Bank for recovery of dues relating to NPAs of public sector banks, the petitioner company approached the respondent bank for one time settlement (OTS) under the said guidelines, as their account fell under the category of NPA prescribed in the guidelines. In response to the same, the bank informed the petitioner company vide their letter dated 8.03.2003 that its account does not fall under the guidelines for OTS. The petitioner company filed the above writ petition praying for issuance of a writ of certiorari to quash the said letter of the bank and for a writ of mandamus to direct the bank to accept their offer for OTS.

Issues

1. Whether RBI guidelines for recovery of dues relating to NPAs can be utilized as a handle by borrowers who have willfully defaulted in repayment of loans and have diverted funds to other businesses through other banks in violation of contractual liability with the bank?

2. Whether a writ of mandamus could be granted against the respondent bank to accept the proposal of one time settlement in the absence of a statute or rule casting such a duty on the bank ?

Arguments on behalf of the petitioner

(i) The cash credit facility falls under the category of NPA from 31.12.1997 upto 31.3.2000.

(ii) The account became a doubtful asset since it remained NPA for a period exceeding two years on 31.3.2000.

(iii) A compromise settlement as stated in clause (A)(i) as mentioned in the letter dated 29.3.2003 became applicable to the petitioner's case.

(iv) The bank's contention that the petitioner company is not entitled to OTS was patently illegal as no reason has been given by the bank as to why the petitioner's account does not fall under the guidelines.

(v) The guidelines of RBI are statutory in nature and hence, it was obligatory on the part of the respondent bank, being a nationalized bank, to comply with the same.

Arguments on behalf of the Respondent

(i) The petitioner is a willful defaulter, trying to get undue advantage of the guidelines to get the benefit of OTS to which he is not entitled.

(ii) If petitioner's claim is granted, it will open a Pandora's box for unscrupulous borrowers who will seek declaration of their account as NPA.
(iii) The guidelines are only directory in nature and that the guidelines are not framed for borrowers who have willfully defaulted in repayment of the loan and have diverted the funds to other business through other banks illegally.

(iv) The petitioner never produced the balance sheets nor informed the bank about its financial difficulties and that no request for rehabilitation, stock revival or inability to pay was ever received by the bank till 4.03.2003 when suddenly the petitioner demanded for OTS.

(v) The petitioners made false averments that they deposited the sale proceeds with the bank. In fact, they were not routed through the respondent bank but diverted to other banks, thus committing willful default and malfeasance apart from manipulating and misquoting the position of its account by not showing the credit of the account.

(vi) The guidelines dated 27.07.2000 do not apply to the petitioners since their account was neither classified in doubtful category nor under the loss making category as required under the guidelines, because the petitioner continued to deposit amounts which saved the account from becoming NPA.

(vii) The assets of the petitioner company and of the guarantors are such as would enable them to recover their dues.

Observations of the Court

"No party has a legal right to get a one time settlement. We agree with the contention in paragraph 3 of the counter affidavit that the RBI guidelines have been framed for recovering the money from chronic non performing assets and it cannot be utilized as a handle by borrowers who have willfully defaulted in repayment of loan and have diverted the funds to other businesses through other banks in violation of the contractual liabilities with the Bank.

7. As held by a Division Bench of this Court in M.M.Accessories v. U.P. Financial Corpn.2002 (46) ALR 261 (per G.P. Mathur, J.), a settlement means a settlement or compromise between the two parties to which both have given their consent. Since the Bank has not given its consent to one time settlement the petitioner cannot insist on getting a one time settlement.

8. It may be clarified that a one time settlement, like an order granting facility of repaying the loan in instalments, really amounts to rescheduling the loan. In our opinion it is only the Bank or financial institution which has granted the loan which can reschedule the same. This Court cannot direct one time settlement because that would mean the Court directing rescheduling of a loan. This Court has already held in several decisions that the Court cannot direct repayment of bank loans in instalments as that would mean rescheduling of a loan.

9. A writ of certiorari lies when there is an error of law apparent on the face of the record. It does not lie only to get a direction for rescheduling of a loan by one time settlement or fixing instalments, even when there is no error of law.

10. Similarly, as held by this Court in M.M. Accessories' case (supra) no mandamus can be issued directing one time settlement of a loan.';

After discussing in detail the principles on which a writ of mandamus can be issued as stated in

"The Law of Extraordinary Legal Remedies – by F.G. Ferris and F.G. Ferris Jr." and citing various case laws[1] adopting the said principle in our country to the effect that, a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation, the Court observed as under:

"11. In a matter where a creditor is enforcing its liability upon the debtor, the debtor has no legal right to claim that the claim be settled on favourable terms proposed by him whereby the claim of the creditor is reduced. Therefore, in our opinion, the prayer made by the petitioners that this Court should issue a writ of mandamus to the respondents to accept the proposal of one time settlement made by them cannot be granted as it does not come within the principles on which a writ of mandamus can be issued under Article 226 of the Constitution."

"13. The RBI guidelines are not meant for willful defaulters like the petitioner who has deliberately defaulted in repayment of loan and has diverted the funds to other businesses through other banks in violation of the contractual liability with the respondent Bank. The RBI guidelines vide clause (A)(i)(a)(c)[2] excludes willful defaulter like the petitioner. We are satisfied that the petitioner is wrongly trying to get itself classified as NPA. This cannot be allowed otherwise unscrupulous borrowers will take similar benefit to get this N.P.A. The petitioner has manipulated and misquoted the position of its accounts by not showing credit side of the account which kept on upgrading the status of the account and it never became a loss making, substandard and doubtful asset. As stated in the counter affidavit, the petitioner has continued to deposit the amount, which has saved the account from becoming substandard and his interest liability is cleared."

Decision

The writ petition was dismissed.

III. Pearlite Liners (P) Ltd. Vs. Manorama Sirsi 2004 (3) SCC 172

Specific Relief Act, 1963 - Sections 14(b) &34
- Enforcement of contract of personal service -Held, an employer cannot be forced to take an employee with whom relations have reached a point of complete loss of faith between the two.
Transfer - Held, a transfer is a normal incidence of service, unless there is a term to the contrary in the contract of service.

Code of Civil Procedure 1908 - Order VII Rule 11(d) - Dismissal of suit at threshold - Held - it is not necessary to proceed with the trial of the suit which is bound to be dismissed for want of jurisdiction of a court to grant the reliefs prayed for.

Facts

Smt. Manorama Sirsi (the plaintiff/respondent), an officer of Pearlite Liners (P) Ltd. (defendant/ appellant), was transferred from the head office of the company to its sales office-cum-godown located at Shankar Rice Mill Godown, Shimoga belonging to M/s. Bharat Founders. The plaintiff, however, did not comply with the transfer order, since according to her the location of the office was not good and no amenities for the staff were available at the said office, and continued to be unauthorisedly absent from work. Pursuant to the same, a charge sheet was issued to the plaintiff, to which she did not reply. A suit was filed by her seeking declaration that her transfer order is illegal, void and inoperative and that she is in the service of the defendant company and entitled to all emoluments. She also prayed for a permanent injunction to restrain the defendant from holding any enquiry against her on charges of non-compliance of transfer order/ insubordination etc. as stated in the articles of charges. The issue of non-maintainability of the suit was raised by the defendant on the ground that the prayers in the suit really amount to enforcement of a contract for personal service, a relief which a civil court cannot grant. The trial court rejected the plaint holding that civil court had no jurisdiction and the judgement of the trial court was affirmed by the appellate court also. However, on second appeal, the High Court, holding that the defendant failed to prove that the suit was not maintainable, directed the trial court to dispose of the suit on merits in accordance with law. The present appeal was filed by the appellant/defendant company aggrieved against the said judgement of the High Court.

Issue

1. Can a contract of personal service be specifically enforced and whether a declaration that plaintiff/respondent continued to be in service of the appellant is permissible?

2. Whether declaration of invalidity of transfer order and injunction restraining employer from holding domestic enquiry for misconduct, would amount to enforcement of contract for personal service?

Arguments on behalf of the appellants

It was contended by the appellant that the prayer in the suit seeking reinstatement of the plaintiff/ respondent really amounts to specific performance of a contract of personal service which is specifically barred under the provisions of Specific Relief Act.

Arguments on behalf of the respondents

It was contended inter alia on behalf of the Respondent that her transfer was illegal. It was also contended that the place to which she had been transferred was not suitable to work. She has also alleged that Secretary of the company had issued a memo to her about her attendance and had demanded her resignation, which she refused. The Secretary issued her a notice stating that she had not worked for two years and this was followed by the impugned transfer order. Her representation against the transfer order was also not considered and she was served with a notice of enquiry.

Observations of the Court

"It is a well settled principle of law that a contract of personal service cannot be specifically enforced and a court will not give a declaration that the contract subsists and the employee continues to be in service against the will and consent of the employer. This general rule of law is subject to three well-recognised exceptions: (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India. (ii) where a worker is sought to be reinstated on being dismissed under the industrial law; and (iii) where a statutory body acts in breach of violation of the mandatory provisions of the statute. (Per Executive Committee of Vaish Degree College vs. Lakshmi Narain (1976) 2 SCC 58

8. The present case does not fall in any of the three exceptions. It is neither a case of public employment so as to attract Article 311 of the Constitution of India nor is a case under the Industrial Disputes Act. The defendant is not a statutory body. There is no statute governing her service conditions. The present is a case of private employment which normally would be governed by the terms of the contract between the parties. Since there is no written contract between the parties, the dispute cannot be resolved with reference to any terms and conditions governing the relationship between the parties. The plaintiff has neither pleaded nor has there been any effort on her part to show that the impugned transfer order was in violation of any term of her employment. In the absence of a term prohibiting transfer of the employee, prima facie, the transfer order cannot be called in question. The plaintiff has not complied with the transfer order as she never reported for work at the place where she was transferred. As a matter of fact, she also stopped attending the office from where she was transferred. Non-compliance with the transfer order by the plaintiff amounts to refusal to obey the orders passed by superiors for which the employer can reasonably be expected to take appropriate action against the employee concerned. Even though it is a case of private employment, the management proposed to hold an enquiry against the delinquent officer, that is, the plaintiff. In case of such insubordination, termination of service would be a possibility. Such a decision purely rests within the discretion of the management. An injunction against a transfer order or against holding a departmental enquiry in the facts of the present case would clearly amount to imposing an employee on an employer, or to enforcement of a contract of personal service, which is not permissible under the law. An employer cannot be forced to take an employee with whom relations have reached a point of complete loss of faith between the two. "

"Unless there is a term to the contrary in the contract of service, a transfer order is a normal incidence of service. Further, it is to be considered that if the plaintiff does not comply with the transfer order, it may ultimately lead to termination of service. Therefore, a declaration that the transfer order is illegal and void, in fact amounts to imposing the plaintiff on the defendant in spite of the fact that the plaintiff allegedly does not obey order of her superiors in the management of the defendant company. Such a relief cannot be granted. Next relief sought in the plaint is for a declaration that she continues to be in service of the defendant company. Such a declaration again amounts to enforcing a contract of personal service which is barred under the law. The third relief sought by the plaintiff is a permanent injunction to restrain the defendant from holding an enquiry against her. If the management feels that the plaintiff is not complying with its directions it has a right to decide to hold an enquiry against her. The management cannot be restrained from exercising its discretion in this behalf. Ultimately, this relief, if granted, would indirectly mean that the court is assisting the plaintiff in continuing with her employment with the defendant company, which is nothing but enforcing a contract of personal service. Thus, none of the reliefs sought in the plaint can be granted to the plaintiff under the law. The question then arises as to whether such a suit should be allowed to continue and go for trial. The answer in our view is clear, that is, such a suit should be thrown out of the threshold. Why should a suit which is bound to be dismissed for want of jurisdiction of a court to grant the reliefs prayed for be tried at all? Accordingly, we hold that the trail court was absolutely right in rejecting the plaint and the lower appellate court rightly affirmed the decision of the trial court in this behalf. The High Court was clearly in error in passing the impugned judgement whereby the suit was restored and remanded to the trial court for being decided on merits."

Decision

The appeal was allowed. The judgement of the High Court was set aside and the judgement of the trial court and lower appellate court were restored. Therefore, the plaint in the suit was rejected.

IV. Dale & Carrington Invt. (P) Ltd. and another V. P.K. Prathapan and others, (2005) 1 Supreme

Court Cases 212 (Civil Appeals Nos.5915-16 of 2002 with Nos. 5917 -18 of 2002)
Companies Act, 1956 - Ss. 291, 81, 26 and 391

- Additional shares issued by private limited company- Duties and powers of Directors/ Board of Directors - Director and company -Fiduciary nature of relationship- '; Oppression';

- Majority shareholder being reduced to minority shareholder by a mala fide act of the company or Board of Directors - Hence allotment set aside.

Facts

Appellant 1 was the company in which Ramanujam (R), the Appellant 2, and Prathapan (P), the Respondent No.1 and his wife, Respondents 2 were all shareholders. The litigation was about its control and management. The Company acquired a hotel for Rs.6 lakhs, P sent Rs.5 lakhs to his mother by bank draft because P was an NRI and the company could not receive money directly from him P's mother paid Rs.5 lakhs and other respondents paid the balance. R did not make any financial contributions. Sometime in the year 1998 P came to India whereupon he discovered that the company's authorized capital was increased from Rs.15 lakhs to Rs.25 lakhs and thereafter to Rs.35 lakhs without the knowledge of P, a principal shareholder of the company. Further, in an alleged meeting of the Board of Directors of the company said to have been held on 24.10.1994, chaired by R, the Board of Directors of the company was said to have been informed about a sum of Rs.6,86,500/ - standing to the credit of R in the books of the company. He made a proposal for allotment of shares in lieu of that amount in his favour. As per the case of R the Board allotted 6865 equity shares of Rs.100/- each in the said meeting in his favour. Again on 26.03.1997 he managed to get allotted further 9800 equity shares to himself. The alleged allotment reduced P, who was a majority shareholder in the company, to a minority shareholder in the company. P challenged this alleged allotment of shares in favour of R by filing a petition under Section 397 and 398 of the Companies Act, 1956 (';the Act';) before the Company Law Board in July 1999. These appeals by special leave arose because the High Court had set aside the said allotment of shares, reversing the order of the Company Law Board.

Issues

1) Validity of allotment of equity shares of the company in favour of R whereby he became the majority shareholder and P and his wife became minority shareholders.

2) What is the effect of not obtaining permission of Reserve Bank of India under the Foreign Exchange Regulation Act (FERA) by P regarding transfer of shares in his and his wife's favour? Did P and his wife Pushpa have no locus standi to file the petition under Section 397 and 398 of the Companies Act before the Company Law Board?

3) Scope of power of the High Court in an appeal under Section 10-F of the Companies Act.

Arguments of the Appellant

(i) The Articles of a company are its constituent document and are binding on the company and its Directors. In the present case, Article 4(iii) of the Articles of Association prohibits any invitation to the public for subscription of shares or debentures of the company. Article 8 provides that shares of the company shall be under the control of the Directors who may allot the same to such applicants as may think desirable of being admitted to membership of the company. Article 10 provides that allotment of shares ';shall exclusively be vested in the Board of Directors, which may in its absolute discretion allot such number of shares as it thinks proper…'; The Articles of Association of the company gave absolute power to the Board of Directors regarding issue of further share capital. The Board of Directors exercised the power while issuing further shares in favour of R and the same cannot be challenged.

(ii) Section 10-F refers to an appeal being filed on a question of law. The High Court could not disturb the findings of fact arrived at by the Company Law Board.

(iii) The High Court has recorded its own finding on certain issues which the High Court could not go into and, therefore, the judgment of the High Court is liable to be set aside. P and his wife have no locus standi to file a petition under Section 397/398 of the Companies Act, 1956 before the Company Law Board in view of FERA violation by P.

Arguments of the Respondents

(i) Company's authorized capital was increased from Rs.15 lakhs to Rs.25 lakhs and thereafter to Rs.35 lakhs without the knowledge of Respondents.

(ii) No notice was given to Respondents of the alleged meetings of the company wherein R managed to get allotted further equity shares to himself which resulted in reducing P who was a majority shareholder to a minority shareholder in the company.

Observations of the Court

"A company is a juristic person and it acts through its Directors who are collectively referred to as the Board of Directors. An individual Director has no power to act on behalf of a company of which he is a Director unless by some resolution of the Board of Directors of the company specific power is given to him/her. Whatever decisions are taken regarding running the affairs of the company, they are taken by the Board of Directors. The Directors of the companies have been variously described as agents, trustees or representatives, but one thing is certain that the Director act on behalf of a company in a fiduciary capacity and their acts and deeds have to be exercised for the benefit of the company"

"They have a duty to make full and honest disclosure to the shareholders regarding all important matters relating to the company. It follows that in the matter of issue of additional shares, the Directors owe a fiduciary duty to issue shares for a proper purpose. This duty is owed by them to the shareholders of the company. Therefore, even though Section 81 of the Companies Act, 1956 which contains certain requirements in the matter of issue of further share capital by a company does not apply to private limited companies, the Directors in a private limited company are expected to make a disclosure to the shareholders of such a company when further shares are being issued. This requirement flows from their duty to act in good faith and make full disclosures to the shareholders regarding affairs of a company. The acts of Directors in a private limited company are required to be tested on a much finer scale in order to rule out any misuse of power for personal gains or ulterior motives. Non-applicability of Section 81 of the Companies Act in case of private limited companies casts a heavier burden on its Directors'"

"The manner in which the shares were issued in favour of Ramanujam without informing other shareholders about it and without offering them to any other shareholders, the action was totally mala fide and the sole object of Ramanujam in this was to gain control of the company by becoming a majority shareholder. This was clearly an act of oppression on the part of Ramanujam towards the other shareholder who has been reduced to a minority shareholder as a result of this act. Such allotment of shares have to be set aside".

"Courts in the commonwealth countries including England and Australia have emphasized that the duty of the directors does not stop at ';to act bona fide" requirement.

6. (1967) 1 Ch 254: (1966) 3 All ER 420: (1966) 3 WLR 995 (Ch D)

12. (1986) 1 SCC 264
They have evolved a doctrine called the "proper purpose doctrine" regarding the duties of company directors. In Hogg V.Cramphorn[6] explicit recognition was given to the proper purpose test over and above the traditional bona fide test".

"So far as the question of permission of Reserve Bank of India under FERA is concerned, the same can be obtained ex post facto. This stands concluded by judgment of this Court in LIC of India V. Escorts Ltd.[12] The statute does not provide any time limit for obtaining the permission. We cannot lose sight of the subsequent developments in this connection. FERA stands repealed and the statute brought in force by way of replacement of FERA i.e. Foreign Exchange Management Act (FEMA), does not contain any such requirement';. Since they were registered as shareholders of the company on the date of filing of the petition and they held the requisite number of shares in the company, they could maintain the petition".

"It is settled law that if a finding of fact is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on question of law. The perversity of the finding itself becomes a question of law. In the present case we have demonstrated that the judgment of the Company Law Board was given in very cursory and cavalier manner. The Board has not gone into the real issues, which were germane for the decision of the controversy involved in the case. The High Court has rightly gone into the depth of the matter".

Decision

All the Appeals were dismissed with costs.

V. Tata Consultancy Services V. State of A.P., (2005) 1 Supreme Court Cases 308. (Civil Appeals No.2582 of 1998 with Nos. 2584-86 of 1998)
A.P. General Sales Tax Act, 1957 - S.2 (1)(h)-Constitution of India - Art. 366(12)- "goods"-Generally - held that intellectual property including software once it is put on a medium become goods, which are susceptible to sales tax.

Facts

The appellants provided consultancy services including computer consultancy services. As part of their business they prepared and loaded on customers' computers custom-made software (';uncanned software';) and also sold computer software packages off the shelf (';canned software';). The canned software packages were of the ownership of companies/persons who had developed those software. The appellants were licensees with permission to sub-license those packages to others. The canned software programs were programs like Oracle, Lotus, Master Key, N-Export, Unigraphics, etc. In respect of the canned software the Sales Tax Authorities of Andhra Pradesh passed an order of assessment under the provisions of the Andhra Pradesh General Sales Tax Act, 1957 (the said Act). The Appellant filed a tax revision case in the Andhra Pradesh High Court, which was dismissed by the impugned judgment dated 12.12.1996, hence this appeal.

Issues

Whether the canned software sold by the appellants can be termed to be "goods" and as such assessable to sales tax under the said Act.

Arguments of the Appellants

(i) The term "goods" in section 2(1)(h) of the said Act only includes tangible moveable property and the word "all materials, articles and commodities" also cover only tangible movable property and computer software is not tangible property.

(ii) As per the definition of "computer" and "computer programme" in the Copyright Act, 1957, a computer program falls within the definition of literary work and is intellectual property of the programmer.

(iii) A software is completely unlike a book or a painting. In the case of software, the consumer does not get any final product but all that he gets is a set of commands which enable his computer to function. Having regard to its nature and inherent characteristic, software is intangible property which cannot fall within the definition of the term "goods" in Section 2(1)(h) of the said Act. Majority of American courts have held that software is an intangible property.

17. (2001) 4 SCC 593

Arguments of the Respondent

Under American Statutes, what is taxable is "tangible personal property". It is this definition, which required the American courts to consider whether software is tangible or intangible. The definition of the term "goods" in the A.P. Act is a very wide definition. "Goods" have been defined to mean all kinds of movable property except those specified, namely, actionable claims, stocks, shares and securities. Under Article 366(12) of the Constitution of India, the term "goods" includes all materials, commodities and articles. The term "goods" has been held to include even incorporeal and/or intangible properties in a number of cases by the Supreme Court.

Observations of the Court

"In India the test to determine whether a property is "goods" for the purposes of sales tax, is not whether the property is tangible or intangible or incorporeal. The test is whether the item concerned is capable of abstraction, consumption and use and whether it can be transmitted, transferred, delivered, stored, possessed, etc. Admittedly in the case of software, both canned and uncanned, all of these are possible".

"In our view, the term "goods" as used in Article 366(12) of the Constitution and as defined under the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. We are in complete agreement with the observations made by this Court in Associated Cement Companies Ltd.[17] A software program may consist of various commands which enable the computer to perform a designated task. The copyright in that program may remain with the Originator of the program. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property once it is put on to a media, whether it be in the form of books or canvas (incase of painting) or computer discs or cassettes, and marketed would become "goods". We see no difference between a sale of a software program on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purpose of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up".

"What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction/sale of computer software is clearly a sale of "goods" within the meaning of the term as defined in the said Act. The term "all materials, articles and commodities" includes both tangible and intangible/ incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed, etc. The software programs have all these attributes".

"We, in this case, are not concerned with the technical meaning of computer and computer program as in a fiscal statute plain-meaning rule is applied. (See Partington V. Attorney General[41], LR at p.122). In interpreting an expression used in a legal sense, the courts are required to ascertain the precise connotation which it possesses in law. It is furthermore trite a court should not be overzealous in searching ambiguities or obscurities in words which are plain. (See IRC v. Rossminster Ltd.[42], All ER at p.90). It is now well settled that when an expression is capable of more than one meaning, the court would attempt to resolve that ambiguity in a manner consistent with the purpose of the provisions and with regard to the consequences of the alternative. (See Clark & Tokeley Ltd. (t/a spellbrook) v. Oakes[43]. In IRC v.

41. (1869) LR 4 HL 100: 21 LT 370

42. (1980) 1 All ER 80

43. (1998) 4 All ER 353 (CA)

44. 1984 Ch 382 : (1983) 3 All ER 481 : (1984) 2 WLR 178 (CA)

Trustee of Sir John Aird's Settlement[44] it is stated:

"… Two methods of statutory interpretation have at times been adopted by the court. One, sometimes called literalist, is to make a meticulous examination of precise words used. The other sometimes called purposive, is to consider the object of the relevant provision in the light of the other provisions of the Act -— the general intendment of the provisions. They are not mutually exclusive and both have their part to play even in the interpretation of a taxing statute".

"It is not in dispute that when a program is created it is necessary to encode it, upload the same and thereafter unload it. Indian law, as noticed by my learned Brother, Variava, J., does not make any distinction between tangible property and intangible property. A "goods" may be tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods".

Decision

Appeals dismissed.

VI. Tayeb v HSBC Bank plc and Anr. (2004)

4 All ER QBD 1024

Criminal Justice Act, 1988(UK Act) - Section 93A - Clearing Houses Automated Payment System (CHAPS) transfer - Suspicion of money laundering by payee's bank does not justify reversing the transfer on the next business day.

Facts

The claimant owned a database of registered Internet names relating to Libya. He sold the database to a Libyan company and the consideration was to be paid to him in England. The claimant opened an account in April 2000 in a sub-branch of HSBC in Derby. On 21st September 2000, the Libyan company signed a CHAPS transfer form instructing Barclays Bank, Westminster Branch, to transfer the agreed consideration of £ 944,114.23 to the claimant's account in Derby Branch of HSBC.

The transfer by CHAPS via Bank of England was received by Derby Branch of HSBC at 1357 hrs. and an automated logical acknowledgement (LAK) was sent to Barclays Bank. The claimant's account was credited at 1403 hrs. About two hours later, HSBC placed a marker on the claimant's account and prevented automatic withdrawals or account operations without the bank's approval as HSBC was suspicious of the nature and origin of the large sum. The following day, HSBC returned the transfer by CHAPS to the originator account.(Barclays Bank)

The claimant later accepted that the circumstances surrounding the transfer to his account justified HSBC being suspicious and HSBC later accepted that the origin of the payment was completely innocent and honest.

The claimant commenced the proceedings against HSBC for recovering £ 944,114.23 and interest.

Issue

Whether HSBC Bank was justified in returning the payment to the originator account on the ground of suspicion of money laundering activity?

Arguments of claimant

(i) After HSBC sent LAK, it became indebted in that amount to the claimant and no subsequent event released it from that indebtedness.

(ii) HSBC's arguments that it had never accepted the transfer was misconceived as it had opened the account of the claimant into which 'electronic same day payments could be made'.

(iii) HSBC's arguments that following receipt of the CHAPS transfer it became agent of Barclays, although true upto the moment of the transmission, could not be correct after issue of LAK.

Arguments of Defendant (HSBC)

(a) Nothing in CHAPS rules or terms of the banker/customer relationship requires a bank to accept moneys transmitted via CHAPS about which there is a genuine suspicion.

(b) Good banking practice set in the context of Sections 93A-93D of the UK Act as amended in 1993 and the statement, ';Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering'; issued in December 1988 by the Basel Committee on Banking Regulations and Supervisory Practices supported its action.

(c) It was an offence to receive and retain money in an account, when the bank had suspicion. By reporting as required in Section 93A(3) or the Guidelines issued, the bank gets a statutory defence for crediting money to the account of the customer. The bank is not required to put itself in a position where it is obliged to rely on a statutory defence to what would otherwise be criminal misconduct.

Observations of the Court

The Court noticed that under CHAPS rules, the transmission could be returned if the authentication failed or with the authorization of the account holder. This was not the position in this case.
The relevant portion of Section 93A of the UK Act reads as under:

"93A - (1) Subject to subsection (3) below, if a person enters into or is otherwise concerned in an arrangement whereby - (a) the retention or control by or on behalf of another ("A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or (b) A's proceeds of criminal conduct - (i) are used to secure that funds are placed at A's disposal; or (ii) are used for A's benefit to acquire property by way of investment, knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence.

(2) In this section, references to any person's proceeds of criminal conduct include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of criminal conduct.

(3) Where a person discloses to a constable a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct or discloses to a constable any matter on which such a suspicion or belief is based - (a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise; and (b) if he does any act in contravention of subsection (1) above and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if - (i) the disclosure is made before he does the act concerned and the act is done with the consent of the constable; or (ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it.';

The Money Laundering Guidance Notes, 1997 which explain the effect of the UK Act, contain specific recommendations as to compliance and HSBC could have reported the suspicious transactions to the authorities and there was no requirement to return the transfer.

"In my judgment, the imposition of the marker did not cancel the debt due to the claimant. Nor did it reverse the account entries on the bank's computer. It simply had the effect of postponing for an indefinite period the time when the bank would respond to an instruction from the claimant for payment out of the account. But the credit balance and the debt remained intact".

"The payment via CHAPS having been unconditional, HSBC, having credited the claimant's account, were thereafter indebted to the claimant in the amount of the credit balance. The proposition that by reason of its justifiable suspicions, the bank retained an overriding discretion to reverse the transfer into the account after the 12 noon deadline on the next banking day on the basis of banking practice has not been established on the evidence. Any such practice would not only be fundamentally inconsistent with the bases of the contract with its customer and with the CHAPS rules, as I have demonstrated, but would go well beyond what was reasonably required either for compliance with the criminal law or for the reasonable protection of the bank against the risk of liability as a constructive trustee. As I have already indicated, any such practice would therefore have to be the subject of cogent evidence. Such evidence has not been adduced in this case.

Accordingly, I conclude that the transfer by CHAPS of the sum of £ 944,114.23 to HSBC had by 14.03 hrs on 21 September 2000 created a valid credit on the claimant's account and a subsisting debt in that amount due from HSBC to the claimant. Repayment of that debt having been refused, that is the amount which is now payable with interest to the claimant.';

Decision

Claim allowed.

VII. Allahabad Bank Vs. Chandigarh Construction Co. Pvt. Ltd. 2005 (1) CPR 77 (NC)

The Consumer Protection Act, 1986, Sections 2 (g) & (o) – Deficiency in banking service - Held - Non release of FDRs held as security by the bank after the expiry of the bank guarantee amounts to deficiency in service.

Facts

Allahabad Bank (the bank) issued a bank guarantee on behalf of Chandigarh Constructions Co. Pvt. Ltd (the company) for a sum of Rs. 1,52,000/- in favour of Executive Engineer, Construction Division, Mohali. Fixed Deposit Receipts (FDRs) worth Rs. 1,50,000/- were obtained by the bank as security. The validity period of the bank guarantee was upto 28.09.1990. Even after the expiry of the bank guarantee, as the bank did not release the FDRs to the company, the company filed a complaint before the District Consumer Forum praying for return of the FDRs and other reliefs. The bank contended that the beneficiary had invoked the guarantee within time by letter dated 25.09.1990 and therefore complaint is frivolous. However, the bank failed to produce any receipt/register to show the date on which they received the letter of invocation of guarantee. At the same time, in response to the letters sent by the Executive Engineer stating that their claim invoking the guarantee was registered within time and demanding the bond amount , the bank gave a registered notice to the Executive Engineer stating that the guarantee bond should be returned in view of the clause in the guarantee bond providing for automatic cancellation of the guarantee after 28.09.1990, until unless extension is granted. The District Forum allowed the complaint and directed the bank to pay the value of the FDRs with interest @ 18% apart from awarding Rs. 2000/- for harassment and Rs. 500/- towards costs. While directing so, it was observed by the Forum that the material date for invoking the bank guarantee is the date on which the letter of the Executive Engineer invoking the bank guarantee fell into hands of the bank and not the date of the letter. Further, since the letter of invocation has not been received within the stipulated time, the bank should have suo moto released the FDRs and that even if the Punjab Government had invoked the guarantee within the prescribed time, it would not have had any legal effect since the contingency contemplated by the parties under the guarantee bond had not arisen to provide a cause of action to the Punjab Government to lodge a claim. Aggrieved by the above order of the District Forum, an appeal was preferred by the bank, but was dismissed by the State Commission, Chandigarh vide its orders dated 26.02.2003. Hence, the present revision petition.

Issues

1. Whether the bank was justified in withholding the FDRs even though the bank guarantee invocation letter was not received on 28.09.1990?

2. Whether there was any reason to withhold the FDRs after the District Forum passed the order on 15.11.1993?

Observations of the Court

8. It is the contention of Bank that by letter dated 25.9.1990 the Executive Engineer issued a letter invoking the bank guarantee. The said letter was delivered to the bank on 1.10.1990. Admittedly, the city of Chandigarh was under curfew from 22.9.1990 till 28.9.1990.

9. Firstly, it is to be stated that there was no justifiable reason for the Bank to retain the FDR after the District Forum passed order dated 15.11.1993. Even thereafter the FDRs were not returned but were returned only when this Commission passed the order on 8.5.2003.

10. Secondly, before the District Forum it was pointed out that the Executive Engineer who has written the alleged letter invoking the bank guarantee had made payments by account payee cheques to the Opposite Party on 29.8.1990.

11. Thirdly, admittedly the bank guarantee invocation letter dated 25.9.1990 was received on 1.10.1990, i.e. after the prescribed date and the letter itself is vague. ……..

12. Apart from the aforesaid vague invocation letter which was not received by the Bank before the expiry of bank guarantee, the relevant terms of the bank guarantee leave no doubt that the bank guarantee was required to be invoked on or before 28th September, 1990 and that stood cancelled automatically The terms of are as under :

Notwithstanding anything here in before contained our liability under this guarantee is restricted to maximum amount of Rs. 1.52 lakhs (Rupees One lakh and fifty two thousand only). Our guarantee shall remain in force untill 28th September, 1990. Unless a suit or action to enforce your claim or claims under the guarantee is filed against us before the said date, all your rights under the said guarantee shall be forfeited and we shall be released and discharged from all liabilities thereunder. This guarantee shall be deemed to be cancelled automatically after 28th September, 1990, until unless extension is granted by us".

"16. It is also to be noted that before the District Forum Petitioners have failed to produce anything on record to the effect that the letter dated 25th September, 1990 was sent by Registered Post by the office of the Executive Engineer. In any set of circumstances, there is nothing on record to establish that the Government has taken any action against the contractor for recovering any amount. The terms of the bank guarantee as quoted above specifically provides that unless a suit or action to enforce a claim under the guarantee is filed the rights under the said guarantee would stand forfeited.

17. Despite all these facts, the officers of the Bank remained adamant and refused to release the FDRs. As stated above, there was no justifiable reason for the Bank to withhold the same after
May, 1991. In this view of the matter, the order passed by the State Commission confirming the order of the District Forum cannot be said to be in any way illegal or erroneous.

18. However, with regard to rate of interest, in our view, the order requires to be modified, and the same is reduced from 18 % to 12 % p.a."

Decision

Revision Petition was partly allowed . The impugned order holding that there is deficiency in service on the part of the bank was confirmed. However, the bank was directed to pay interest @12% from 1.10.1990 till the amount was paid in 2003 pursuant to the orders of National Commission.

Q. Sir John, is Britain getting a crime problem like the one in America?

A. No. Our crime situation differs from yours in that there is practically no gangster crime here. Practically none.

Then, of course, we have less crime because we have a more homogeneous country. It's smaller. We can catch hold of people easier, though we don't have the continental system of papers or identity cards.
Then, in the trial of criminals, our system is much less cumbersome, much less legalistic than yours. We reformed our laws in the nineteenth century – and the Americans didn't.

— FOSTER, Sir John, Interview wth a British authority on the Anglo Saxon legal system, U.S. News & World Report, March 22, 1965, p. 42

The Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004

[Ordinance No. 5 of 2004]
[11th November, 2004]

Promulgated by the President in the Fifty-fifth Year of the Republic of India.

An Ordinance to amend the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, and further to amend the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Companies Act, 1956.

WHEREAS Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

Now, THEREFORE, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:-

CHAPTER I
PRELIMINARY

1. Short title and commencement:

(1) This Ordinance may be called the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004.

(2) Save as otherwise provided in this Ordinance, the provisions of this Ordinance shall come into force at once.

CHAPTER II

AMENDMENTS TO THE SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002

2. Amendment of section 2:

In section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) (hereafter in this Chapter referred to as the principal Act), in sub-section (1),-

(i) after clause (h), the following clause shall be inserted, namely:-

'(ha) "debt" shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);';

(ii) in clause (j), the words "in accordance with the directions or guidelines issued by the Reserve Bank" shall be omitted;

(iii) in clause (o), for the words "doubtful or loss asset in accordance with the directions or under guidelines relating to assets classifications issued by the Reserve Bank", the following shall be substituted, namely:-

"doubtful or loss asset,-

(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;

(b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank";

(iv) in clause (U), for the words "trustee or any asset management company making investment on behalf of mutual fund or provident fund or gratuity fund or pension fund", the words, brackets and figures "trustee or securitisation company or reconstruction company which has been granted a certificate of registration under sub-section (4) of section 3 or any asset management company making investment on behalf of mutual fund" shall be substituted;

(v) in clause (zd), for sub-clause (if), the following sub-clause shall be substituted, namely:-

"(ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or".

3. Amendment of section 3.

In section 3 of the principal Act, in sub-section (3), after clause (g), the following clause shall be inserted at the end, namely:-

"(h) that securitisation company or reconstruction company has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose.".

4. Amendment of section 4.--

In section 4 of the principal Act, in sub-section (2),-

(a) the words "rejection of application for registration or" shall be omitted;

(b) for the words "such order of rejection or cancellation", the words "such order of cancellation" shall be substituted.

5. Insertion of new section 5A.--

After section 5 of the principal Act, the following section shall be inserted, namely:-

"5A. Transfer of pending applications to any one of Debts Recovery Tribunal in certain cases.--

(1) If any financial asset, of a borrower acquired by a securitisation company or reconstruction company, comprise of secured debts of more than one bank or financial institution for recovery of which such banks or financial institutions has filed applications before two or more Debts Recovery Tribunals, the securitisation company or reconstruction company may file an application to the Appellate Tribunal having jurisdiction over any of such Tribunals in which such applications are pending for transfer of all pending applications to any one of the Debts Recovery Tribunals as it deems fit.

(2) On receipt of such application for transfer of all pending applications under subsection (1), the Appellate Tribunal may, fatter giving the parties to the application an opportunity of being heard, pass an order for transfer of the pending applications to any one of the Debts Recovery Tribunals.

(3) Notwithstanding anything contained in the Recovery of Debts Due to Banks and Financial

Institutions Act, 1993 (51 of 1993), any order passed by the Appellate Tribunal under subSection (2) shall be binding on all the Debts Recovery Tribunals referred to in sub-section (1) as if such order had been passed by the Appellate Tribunal having jurisdiction on each such Debts Recovery Tribunal.

(4) Any recovery certificate, issued by the Debts Recovery Tribunal to which all the pending applications are transferred under sub-section (2), shall be executed in accordance with the provisions contained in sub-section (23) of section 19 and other provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) shall, accordingly, apply to such execution.".

6. Amendment of section 7.--

In section 7 of the principal Act,-

(i) after sub-section (2), the following sub-section shall be inserted, namely:-

"(2A) (a) The scheme for the purpose of offering security receipts under sub-section (1) or raising funds under sub-section (2), may be in the nature of a trust to be managed by the securitisation company or reconstruction company, and the securitisation company or reconstruction company shall hold the assets so acquired or the funds so raised for acquiring the assets, in trust for the benefit of the qualified institutional buyers holding the security receipts or from whom the funds are raised.

(b) The provisions of the Indian Trusts Act, 1882 (2 of 1882) shall, except in so far as they are inconsistent with the provisions of this Act, apply with respect to the trust referred to in clause (a) above.";

(ii) in sub-section (3), for the words "security receipts issued by such company", the words "security receipts issued under a scheme by such company" shall be substituted.

7. Insertion of new section 12A.

After section 12 of the principal Act, the following section shall be inserted, namely:-

"12A. Power of Reserve Bank to call for statements and information.-- The Reserve Bank may at any time direct a securitisation company or reconstruction company to furnish it within such time as may be specified by the Reserve Bank, with such statements and information relating to the business or affairs of such securitisation company or reconstruction company (including any business or affairs with which such company is concerned) as the Reserve Bank may consider necessary or expedient to obtain for the purposes of this Act".

8. Amendment of section 13.--

In section 13 of the principal Act,-

(i) after sub-section (3), the following sub-section shall be inserted, namely:-

"(3A) If, on receipt of the notice under subsection (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.";

(ii) in sub-section (4), for clause (b), the following clause shall be substituted, namely:-

"(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt;".

9. Amendment of section 15.--

In section 15 of the principal Act, in sub-section (1), for the words, "When the management of business of a borrower is taken over by a secured creditor", the words, brackets, letters and figures "When the management of business of a borrower is taken over by a securitisation company or reconstruction company under clause (a) of section 9 or, as the case may be, by a secured creditor under clause (b) of sub-section (4) of section 13" shall be substituted.

10. Amendment of section 17.--

In section 17 of the principal Act,-

(a) in sub-section (1),-

(i) for the words "may prefer an appeal", the words "may make an application along with such fee, as may be prescribed," shall be substituted and shall be deemed to have been substituted with effect from the 21st day of June, 2002;

(ii) after sub-section (1), the following proviso shall be inserted and shall be deemed to have been inserted with effect from the 21st day of June, 2002, namely:-

"Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.";

(iii) after the proviso as so inserted, the following Explanation shall be inserted, namely:-

"Explanation.- For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.";

(b) for sub-sections (2) and (3), the following sub-sections shall be substituted, namely:-

"(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and fee rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by, order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under subsection (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.".

11. Insertion of new section 17A.--

After section 17 of the principal Act, the following section shall be inserted, namely:-

"17A. Making of application to Court of District Judge in certain cases.-- In the case of a borrower residing in the State of Jammu and Kashmir, the application under section 17 shall be made to the Court of District Judge in that State having jurisdiction over the borrower which shall pass an order on such application.

Explanation.- For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons shall not entitle the person (including borrower) to make an application to the Court of District Judge under this section.".

12. Amendment of section 18.--

In section 18 of the principal Act,-

(a) in sub-section (1),-

(i) for the words and figures "under section 17, may prefer an appeal", the words and figures

"under section 17, may prefer an appeal along with such fee, as may be prescribed" shall be substituted and shall be deemed to have been substituted with effect from the 21st day of June, 2002;

(ii) after sub-section (1), the following proviso shall be inserted and shall be deemed to have been inserted with effect from the 21st day of June, 2002, namely :-

"Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:";

(iii) after the proviso as so inserted, the following provisos shall be inserted, namely:-

"Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.".

13. Insertion of new sections 18A and 18B.--

After section 18 of the principal Act, the following sections shall be inserted, namely:-

"18A. Validation of fees levied.-- Any fee levied and collected for preferring, before the commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004, an appeal to the Debts Recovery Tribunal or the Appellate Tribunal under this Act, shall be deemed always to have been levied and collected in accordance with law as if amendments made to sections 17 and 18 of this Act by sections

11 and 12 of the said Ordinance were in force at all material times.

18B. Appeal to High Court in cert ain cases.-- Any borrower residing in the State of Jammu and Kashmir and aggrieved by any order made by the Court of District Judge under section 17A may prefer an appeal, to the High Court having jurisdiction over such Court, within thirty days from the date of receipt of the order of the Court of District Judge:

Provided that no appeal shall be preferred unless the borrower has deposited, with the Jammu and Kashmir High Court, fifty per cent. of the amount of the debt due from him as claimed by the secured creditor or determined by the Court of District Judge, whichever is less:

Provided further that the High Court may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of the debt referred to in the first proviso.".

14. Substitution of new section for section 19.--

For section 19 of the principal Act, the following section shall be substituted, namely:-

"19. Right of borrower to receive compensation and costs in certain cases.-- If the Debts Recovery Tribunal or the Court of District Judge, on an application made under section 17 or section 17A or the Appellate Tribunal or the High Court on an appeal preferred under section 18 or section 18A, holds that the possession of secured assets by the secured creditor is not in accordance with the provisions of this Act and rules made thereunder and directs the secured creditors to return such secured assets to the concerned borrowers, such borrower shall be entitled to the payment of such compensation and costs as may be determined by such Tribunal or Court of District Judge or Appellate Tribunal or the High Court referred to in section 18B.".

15. Amendment of section 25.--

In section 25 of the principal Act,-

(a) after sub-section (1), the following sub-section shall be inserted, namely:-

"(1A) On receipt of intimation under subsection (1), the Central Registrar shall order that a memorandum of satisfaction shall be entered in the Central Register.";

(b) in sub-section (2), for the words "The Central Registrar shall, on receipt of such intimation", the words, brackets and figures "If the concerned borrower gives an intimation to the Central Registrar for not recording the payment or satisfaction referred to in subsection (1), the Central Registrar shall on receipt of such intimation" shall be substituted.

16. Amendment section 28.--

In section 28 of the principal Act, for the words and figures "under section 12", the words, figures and letter "under section 12 or section 12A" shall be substituted.

17. Amendment of section 31.--

In section 31 of the principal Act, in clause (g), for the words "any properties not liable to attachment", the words arid brackets "any properties (including the properties specifically charged with the debt recoverable under this Act)" shall be substituted.

18. Amendment of section 38.--

In section 38 of the principal Act, in sub-section

(2), after clause (b), the following clauses shall be inserted, namely:-

"(ba) the fee for making an application to the Debts Recovery Tribunal under sub-section (1) of section 17;

(bb) the form of making an application to the Appellate Tribunal under sub-section (6) of section 17;

(bc) the fee for preferring an appeal to the Appellate Tribunal under sub-section (1) of section 18;".

CHAPTER III

AMENDMENTS TO THE RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993

19. Amendment of section 2.--

In section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993), (hereafter in this Chapter referred to as the principal Act), in clause (h), after sub-clause (i), the following sub-clause shall be inserted, namely:-

"(ia) the securitisation company or reconstruction company which has obtained a certificate of registration under sub-section (4) of section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002);".

20. Amendment section 19.--

In section 19 of the principal Act, after sub-section (1), the following provisos shall be inserted, namely:-

"Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004 for the purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), if no such action had been taken earlier under that Act:

Provided further that any application made under the first proviso for seeking permission from the Debts Recovery Tribunal to withdraw the application made under sub-section (1) shall be dealt with by it as expeditiously as possible and disposed of within thirty days from the date of such application:

Provided also that in case the Debts Recovery Tribunal refuses to grant permission for withdrawal of the application filed under this sub-section, it shall pass such orders after recording the reasons therefor.".

CHAPTER IV

AMENDMENTS TO THE COMPANIES ACT, 1956

21. Amendment of section 4A.--

In section 4A of the Companies Act, 1956 (1 of 1956) (hereafter in this Chapter referred to as the principal Act), in sub-section (1), clause (vii) shall be omitted.

22. Amendment of section 424A.--

In section 424A of the principal Act, in subsection (1), after the second proviso, the following provisos shall be inserted, namely:-

"Provided also that in case any reference had been made before the Tribunal and a scheme for revival and rehabilitation submitted before the commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004 such reference shall abate if the secured creditors representing three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower have taken measures to recover their secured debt under sub-section (4) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002):

Provided also that no reference shall be made under this section if the secured creditors representing three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower have taken measures to recover their secured debt under sub-section (4) of section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement Security Interest Act, 2002 (54 of 2002)."

I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly.

— FORTESCUE, John, De Laudibus Legum Angliae, ch. 27,
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Seela Rai, "Harmonising Interest and Efficiency -A Study of Corporate Structure", (2004) 49 SCL 61 (Magazine) - analyses the various models of corporate structure in the light of prevalent theories, issues and interests involved.

Shrikant S. Kamath, "Securitisation", (2004) 49 SCL 125 (Magazine) - focuses the salient features of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - exclusively discusses certain relevant definitions and the process of securitisation, advantages of securitisation, the accounting treatment, and the tax implications.

Subhrarag Mukherjee and Vatsal Arya, "Curbing the Menance of NPAs in the Indian Banking Sector - will the Securitisation Act be Effective", (2004) 55 SCL 39 (Magazine) - scans the provisions relating to Securtisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 as the latest measure to curb this evil, and pointes out many flaws in the Act which need to be set right in order to make the Act function smoothly -highlights the judicial views on the said Act including the Supreme Court's judgement in Mardia Chemicals' case - suggests that, in the light of the criticisms made by the Supreme Court on certain provisions in the Act, the loopholes and inequalities in the said Act may be ironed out through appropriate legislative measures without tampering with the basic structure of the Act.

Vijay Kumar Gaba, "Investor Protection", (2004) 49 SCL 100 (Magazine) - elaborately discusses as to who is an investor, why he is to be protected and, how he is to be protected - examines the practices which adversely affect investors' interest and makes a comparative study of measures taken by U.S.A., U.K. Singapore, Canada, Australia and India.

Vijay Kumar Gaba, "Study of the Confidence of Market Participants' in Market Mechanism", (2004) 49 SCL 1 (Magazine) - focuses the need of the reform and revitalisation of Indian securities markets initiated during 1992 aimed at improving stock market performance by increasing liquidity and transparency, enhancing efficiency, and reducing trading costs and volatility - analyses the impact of reforms on the confidence level of various market participants.

V.L. Iyer, "Draft Companies Bill, 2004 - Provisions concerning meetings, powers of the Board and Related party transactions", (2004) 55 SCL 49 (Magazine) - explains the provisions from sections 72 to 81 of the Draft Companies Bill, 2004 which deal with the Board meetings, the Board's powers and restrictions on the same, the inter-corporate loans and statements, the interest of directors in the contracts or arrangements with the company and the maintenance of registers thereof.

Vivek Dhamankar & Sandeep Jain, "Concept of 'Debt' Appearing in the Recovery of Debts Due to Banks & Financial Institutions Act, 1993" (2004) 55 SCL 59 (Magazine) - explains the concept of 'debt' under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 with particular emphasis on the distinction between 'debt' and 'loan' - also highlights the use of the term 'debt' instead of the term 'loan' in the Act.

Fundamental Rights - Study of their Inter-relationship - P.S.N.Prasad

Shri P. Ishwara Bhat, Dean, Faculty of Law, University of Mysore has restructured and revised his Ph.D. thesis and brought out the book titled "Fundamental Rights – A Study of Their Interrelationship".

The present book has four Parts. Part One consists of 3 Chapters, viz., the Chapter 1 and Chapters 2 and 3. Chapter 2 discusses jurisprudential basis for and the doctrinal thrusts involved in interaction of civil rights values. The synthesis of interests of personality, the application of concern for justice and the consequent relations amidst multitude strands of equality and liberty under the value matrix of equal liberty of all are discussed here in the light of politico-legal philosophies. Chapter 3 focuses on the Indian historical experiences about interrelationship of basic rights. The ancient Indian tradition of basing the rights on performance of social duties, and the positive and negative scenario arising from compliance or non-compliance with the value of equal liberty of all at various stages and spheres of historical development have been discussed in this chapter.

In Part Two, which consists of 4 Chapters (4 to 7), the discussion concentrates on interrelationship principles and practices in a sphere where Fundamental Rights project the claims for justice. Fairness in procedural due process norms (Chapter 4), Substantive due Process Development (Chapter 5). Right to Equality (Chapter 6) and Right to constitutional Remedies (Chapter 7) are analysed from the perspective of interrelationship of rights.

In Part three are grouped 6 Chapters (Chapters 8 to 13) that deal with interrelationships connected with aspects and attributes of dignified life, personal liberty, freedoms and right to property. Positive dimensions of right to dignified life and personal liberty (Chapter 8), right against exploitation (Chapter 9), the freedoms under Article 19 relating to speech, expression, assembly, association, movement, residence, business, profession and occupation (Chapter 10), freedom of religion, secularism and denominational rights (Chapter 11), educational and cultural rights (Chapter 12) and right to property (Chapter 13) are discussed keeping in mind the implications and impact of interrelationship of rights.

In Part four there are four Chapters. Since interrelationship of rights is a pat of the larger phenomenon of interrelated working of various provisions of the Constitution, in Chapter 14 the impact of other parts of the constitution relating to Directive Principles of State Policy, Fundamental Duties, Democracy, Federalism and Emergency Provision upon the interrelationship of rights is analysed. Chapter 15 bring out international human rights discourse from the perspective of interrelationship of rights. It analyses the genesis and development of international human rights instruments, their operation and impact, regional system like European Convention on Human Rights, the British Human Rights Act, 1988, and the impact of international human rights norms upon India’s constitutional jurisprudence on fundamental rights. Chapter 17 deals with the contemporary issues, whether Part III of the Constitution requires any amendment. The proposals made in the Constitution Papers and the Final Report released by the National Commission for Review of Working of the Constitution are discussed from the perspective of interrelationship of fundamental rights. In Chapter 16 the issues of prioritisation of rights in the background of this study is discussed and general conclusions are drawn.

The following observations of Prof. Bhat are good food for thought :

Firstly, some of the directive principles of State policy, which are related to distributive justice, moulded the property relations by influencing the interrelationship doctrine, both directly and indirectly.

Secondly, the interrelationship doctrine is very much influenced by Article 39A of the Constitution which provides for equal justice and free legal aid in the justice delivery system.

Thirdly, the directive principles of State shall strive to secure its citizens right to an adequate means of livelihood and make the effective provision for securing right to work.

Fourthly, the directive principle that "tender age of children are not abused", and that "children are given opportunities and facilities to develop in a healthy manner and in a conditions of freedom and dignity that childhood and youth are protected against exploitation against moral and material abandonment'; [Article 39(f) have provided the spirit of law to the Apex Court.

Fifthly, the directive principle of "Equal pay for equal work" and "participation of workers in management" were received through right to equality under Article 14 in Part III, in various cases, such as Randhir Singh (AIR 1982 SC 469)and National Textile Workers Union case (AIR 1983 SC 75).

Sixthly, the directive principles relating to uniform civil code has the potentiality of using the interrelationship doctrine for its implementation.

Seventhly, the promotion of educational and economic interest of Scheduled Caste and Scheduled Tribe and other weaker section of the society, contemplated under Article 46 provides a guidance for affirmative actions under Article 15(4) and 16(4) and a pointer for resolving tension between formal and substantive equality by laying emphasis on infusing of strength and ability to compete, through eduction and training to weaker sectors (M.R. Balaji vs. State of Mysore – AIR 1963 SC 649).

Finally, the directive principle that the State shall endeavour to foster respect for international law and treaty obligations has a great potentiality of absorbing the international principles relating to guarantee of human rights, and thus influence the interrelationship doctrine.

The author’s convictions are reflected as under :

(i) The impact of directive principles upon the interrelationship doctrine or vice-versa is not only theoretical but also practical and rewarding. Interrelationship doctrine has given impetus to, and got animated by the process of reading the directive principles into Part III of the Constitution.

(ii) It is true to say that the interrelationship doctrine has its roots in the very text of the constitution. This can be seen when the objects set in the Preamble, followed by Juxtaposing of right to equality with classification, the flexibility imbibed in fundamental rights, the spirit of law (operation of whole Part-III of the Constitution visa-vis the impugned law) rejection of compartmentalised treatment of fundamental rights and finally, the distinction between citizens and non-citizens with regard to availability of fundamental rights and the possibility of invoking a fundamental right to avail a suspended fundamental right during emergency are taken into account with a conscious approach of unity in diversity.

Former Chief Justice of India Shri M.N. Venkatachelaiah, in his foreword to the above book, said that professor Bhat examines the relationship of fundamental rights inter se and the jurisprudential and constitutional foundations of that interrelationship. The interrelationship is also a necessary implication of constitutionalism and Rule of Law. It was viewed that professor Bhat, in his elegant analysis, indicates the "parallel streams" and ‘cross-currents’ of fundamental rights and how these rights inform and enrich each other. This discourse has its familiar ring in the International Human Rights Regime, and the principles of their universality, indivibility and interdependence.

The Eastern Law House Pvt. Ltd., 54, Ganesh Chunder Avenue, Kolkat a 700 013 have published and processed the book and priced at Rs. 650/-.

Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

— HOLMES, Oliver Wendell, in Missouri, Kansas and Texas Railway Company of Texas v. May, 194 U.S. 267, 270 (1904)

Wherefore a Man ought not to rest upon the Letter of an Act, nor think that when he has the Letter on his Side, he has the Law on his Side in all Cases.

—PLOWDEN, Edmund, Eyston v. Studd (1574) 2 Plow, 460, 464

LD Library : Important New Arrivals

1.	Bidani, S.N. Credit risk management/ S.N.Bidani, P.K.Mitra and Pramod Kumar-- New Delhi : Taxmann, 2004.16,174p. ISBN : 81-7496-532-7. 332.12068 BID AND OTH	6.	Naik, Keshav S. FEMA : Foreign exchange management in India /Keshav S.Naik and Vinita Naik - Danait -- 2nd -- Mumbai : Snow-White 2003 cxl, 1228p ISBN : 81-8159-025-2 343 54032 NAI AND NAI-DAN
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4.	Sekar, K.R. Landmark judgements of supreme Court on Direct Taxes Analysis including quotes, words and phrases defined /K.R.Sekar -- Mumbai : Snow White Publications, 2003. xxxii, 815p. ISBN: 81-8159-006-6. 343.040264 SEK	9.	Kang The Law and Practice of Income Tax/ Kanga, Palkhivala and Vyas 9th -- New Delhi : Lexix Nexis (Butterworths), 2004 2v. (cccxiv, 2768p.) ISBN : 81-8038-045-9. 343.54052 KAN AND OTH
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12.	Cheshire Law of Contract / Cheshire, Fifoot and Furmstone -- 14th -- New Delhi: Butterworths (Lexis Nexis), 2003 (Indian Reprint). ixi, 762p. ISBN : 81-8038-040-8. 346.54020263 CHE AND OTH	18.	Parthasarthy, M.S. Cheques in law and practice/ M.S.Parthasarthy -- 6th -- New Delhi: Universal Law Publishing,2003, lxxxii, 897p. ISBN : 81-7534-335-4. 346.54096 PAR
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16.	Ramaiya A. Guide to the Companies Act/ A.Ramaiya; rev.ed.by Y.V.Chandrachud and S.M.Dugar -- 16th -- Nagpur: Wadhwa, 2004 3v., 3appendices.vp. 346.54066 RAM 4034; Part 1 4035; Part 2 4036; Part 3, 4037; Appendix 1 Appendix 2 4039; Appendix 3	22.	Agarwal, Sanjiv Corporate governance: Concept and dimensions / Sanjiv Agarwal-- Mumbai : Snow White, 2003. xxxii, 423p. ISBN: 81-8159-024-4. 658.4 AGA
	4038		**3861**

L.D. News

Core Group

Shri P.S. Bindra, Jt Legal Adviser has been nominated as a member to the Core Group setup by Govt. of India Ministry of Consumer Affairs, Food & Public Distribution for drafting Ware House Receipts Act and also nominated as a member to the working group set-up by the Bank on Ware House receipts and Commodity Futures.

Shri P.S. Bindra, Jt. Legal Adviser has been nominated as Nodal Officer of the Dept. in the Inter Deparmental Core Group, set-up to coordinate Regulatory and Supervisory concerns involving Anti Money Laundering, between the Core Group and the Depts.

Congrats!

Shri R.K. Gupta, Deputy Legal Adviser has been promoted to the post of Joint Legal Adviser (Gr. E) with effect from 7th July 2004.

Shri N.V. Nikalje, has been promoted as Rajbhasha Officer with effect from 8th November 2004 and retained in Legal Department.

Transfer

Shri E.M. Sali, Assistant Legal Adviser attached to Legal Cell, Chennai has been transferred to Legal Cell, Lucknow with effect from 1-11-2004.

Smt. B. Jhanshree, Legal Officer, Central Office, Mumbai has been transferred to Legal Cell, Hyderabad with effect from 6-11-2004.

Shri G.R. Reddy, Legal Officer, Legal Cell, Hyderabad has been transferred to Legal Cell, Chennai with effect from 27-11-2004.

Welcome

Shri C. Pushparaj, PS Gr. B reported to Legal Department on 4-10-2004 from Secretary's Department.

Shri S.T. Chavan, Peon from RBI Services Board has been promoted to the post of Subedar Gr. B and reported to Legal Department on 1-10-2004.

Shri V.N. Kadav, Subedar Gr. II has been promoted to Subedar Gr. I and reported to Legal Department on 1-10-2004 from the Department of Non-Banking Supervision.

Hindi Day

The Department celebrated Hindi Day on 9th November 2004 with great enthusiasm.

Training

Shri R.K. Gupta, Joint Legal Adviser attended the training programme on Advanced Central Banking from 29-11-2004 to 4-12-2004 conducted by Bankers Training College.

Shri B.S.V. Nair, Assistant Legal Adviser attended the 48th Programme on Currency Management from 6-12-2004 to 11-12-2004 conducted by Reserve Bank of India Staff College, Chennai.

Legal Study Circle

Shri R.N. Trivedi, Law Secretary, Govt. of India, delivered lecture on Prevention of Money Laundering Act, 2002 and the obligation of Baking Companies, Financial Institutions etc.

Good bye

Shri N.V. Deshpande, Pr. Legal Adviser retired from the services of the Bank at the close of business on 31st December 2004.

Mail Bag

We have received letters from Shri S.D. Tiwari, Pratapgarh Kshetriya Gramin Bank, Shri K. Ratnakar, the Assistant General Manager, State Bank of India, Staff Training Centre, Chennai, the Chairman, United Western Bank Ltd., Shri J. Radhakrishnan, Advocate, S/Shri Mohit Shukla and Mohit Kapoor of Citibank and Shri P.R. Gopala Rao, Banking Ombudsman, A.P. for including their names in the mailing list.

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

"I am willing," he said, "to serve in durance vile if it will accomplish the desired purpose." But, he went on, "I know of nothing more futile than a penal sentence that contributes to nothing but the ridiculous."

— ALMOND, Gov. J. Lindsay, Jr., New York Times, Jan. 29, 1959 p. 1, col. 7.

Juvenile delinquency is a universal phenomenon. In Russia, even the Russians report banks of youngsters mugging and robbing older citizens. Juvenile delinquency is rampant in Norway, in Finland, in England, in France and in Italy. May I suggest that the reason for that is that the children believe that they are living five minutes to midnight, that there may be no future. In our youth, if you worked hard and you developed your character, you had a future. But if the children today believe that there may be no future, if the future is not what it used to be, then you seize the present.

— NIZER, Louis, "Ministers of Justice," Tennessee Law Review, Vol. 31, No. 1 (Fall, 1963), p. 17

A Man may plead not guilty, and yet tell no lye; for by the Law no Man is bound to accuse himself, so that when I say, Not guilty, the meaning is, as if I should say by way of Paraphrase, I am Not so guilty as to tell you; if you will being me to Tryal, and have me punished for this you lay to my Charge, prove it against me.

— SELDON, John, Table Talk; Law, in No. 6 English Reprints (Arber, Edward, ed., London, 1869), p. 65