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