RBI Legal News and Views

From the Editorial Desk

Alvin Toffler, in his book "Third Wave" has referred to three waves which have swapped the World - agricultural wave, industrial wave and electronic wave - the last one is still sweeping the World. In India, initiatives for payment system legislative measures have already begun considering its importance and complexity in right earnest. The Reserve Bank of India, as the monetary authority and Central Bank of the country has taken the lead. It is said that payment system is an integral part of the financial system which no Central Bank can afford to ignore and the RBI is no exception to the rule. A well functioning payment system is sine qua non for

overall economic growth of the country. In contrast, an inefficient payment system threatens the stability of financial system and the economy. Hence it has to be ensured that payment system must be reliable, secure, open, coherent, participative, transparent, accountable, rule-based, flexible, self-sustaining, cost effective and above all, players friendly in which public confidence should become the order of the day. There is a marked shift in payment system over a period of years from paper-based manual processing to electronic-transfer-based computer processing. Payment system to be real and successful must be free from systemic risk which are generally due to improper disclosure, fraud , computer errors, customers dissatisfaction and so forth. Dispute resolution mechanism has to be put in proper place for vibrant and robust payment system in any country. Experiences of several countries in payment system mechanism is contributing a lot in improving payment system and its adoption in developing countries including India. In a fast moving financial world, now time is for "real time" and as such in India also, the move is towards Real Time Gross Settlement mechanism and to make it as an integral part of payment system legislative measures. History of progress of mankind has shown that sometimes it is law which precedes development but more often, law needs to evolve for dedicated development. Time is ripe in India for payment system legislative measures to be taken as an integral part of financial sector reforms.

The present issue begins with an article on the initiatives taken by the Reserve Bank in the current legal reforms in the banking and financial sector. It is followed by an article dealing with the problems and perspective of enforcement of arbitral awards under the Arbitration and Conciliation Act, 1996. Yet another article examines the issue whether bank account is `property' and whether the police have powers to seize bank accounts. Further, there is also a write up on repealing of amending Acts in the context of the recent large scale repeal of Acts.

In the Judgements Section, we have covered the recent judgements of the High Courts and the Supreme Court relevant to banker. In the Legislation Section, we have included the Prevention of Terrorism Act, 2002. In the Book Review and Bibliography Section, we have reviewed a book on bank frauds including computer crimes and credit card crimes by Dr. B.R. Sharma. In the Bibliography Section, we have as usual covered articles on law of interest to the bankers. Apart from the above, we have all our usual features including LD News and Mail Bag. From the next issue, we propose to begin two new features, FAQ (frequently asked questions) and a guest column.

M A Batki
Legal Adviser

For the Attention of Readers

From this ussue, the RBI Legal News & Views is coming in a new format with four different sections numbered separately so that a the end of the year, the four issues of the year can be dismantled and compiled according to running numbers of each section and bound into a separate volume of the year for future reference.

Readers may, therefore, preserve the present issue and all subsequent issues till the year end as these issues will not be available latter.

JOURNAL SECTION

Current Legal Reforms - Initiatives by Reserve Bank of India*

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CHAPTER – I

1. INTRODUCTION

A good legal system implies both relevant and appropriate laws and a judicial delivery system with settling issues speedily, efficiently and impartially. Law is dynamic and changes according to the needs and requirements of the society. The face of the law of any polity reflects the legal system to which the country is committed. The year 1991 is an important landmark in the economic history of post independent India. The country went through the severe economic crises triggered by a serious balance of payment situation. In view of this legislative changes became imperative in the context of the changes in the economic environment. A whole host of legislation has already undergone a big change partly to give effect to certain institutional changes, such as the participation of private capital in nationalised banks and partly to be in tune with the new economic philosophy in the backdrop of the Narasimham Committee Report. Thus, it is relevant to remember Earl Warran, who said, "our system faces no theoretical dilemma but a single continuous problem; how to apply to ever-changing conditions the never-changing principles of freedom.

1.1 FINANCIAL REFORMS - NARASIMHAM COMMITTEE

The Financial system in India has built up a vast network of financial institutions and markets over time, and sector is dominated by the banking sector, which accounts for about two-thirds of the assets of the organised financial sector. The problems in south-east Asian economies, the recessionary trends in the Japanese economy, the financial sector problems encountered. In Latin American economies and more recently, in some central European economies have provided graphic evidence of how a weak banking sector can undermine confidence in macroeconomic policies. It is, therefore, no longer possible for developing countries to delay the introduction of structural reforms, stricter prudential and supervisory norms, greater transparency and increased accountability not only to ensure the stability of the financial system, but also to enhance competitiveness. Since the initiation of reform process in India, considerable attention has been devoted to improve the efficiency and health of the banking sector.

The Financial sector of an economy is important because it helps in mobilising the savings of the people and allocating them to the most productive uses. Considering the strategic importance of the financial sector, the Government set up a Committee on financial system in 1991 under the Chairmanship of Mr. M. Narasimham. It was asked to examine all aspects relating to the structure, organization, functions and procedures of the financial system. The Committee submitted its report in November 1991. It was presented to parliament in December 1991.

The first phase of current reforms of financial sector was initiated in 1992, based on the recommendations of the Committee on financial system (CFS or the Narasimham Committee).

While reform of the financial sector are under way following the recommendations of the Committee on Financial System (CFS), 1991, the second Committee under Mr. M. Narasimham, who chaired the CFS was constituted to advise the Government on banking sector reforms necessary in future to make India's banking system stronger and better equipped to meet the global competition.

The report of the Committee (April 1998) provides a framework current phase of reforms. The RBI has already acted on many of the recommendations as per announcement made in October 1998 Monetary and Credit Policy Review statement.

The major important recommendations, among other, are given as follows :

a) The Committee has made a radical recommendations to dilute Government equity in nationalised banks to 33%. It has also suggested that the RBI nominees on bank boards step down.

b) Non performing assets have been the bane of the industry. The panel has identified poor credit decisions by managements, cyclical changes in the economic environment directed credit and crude forms of behest-lending as the factors responsible for the poor asset quality. The Narsimham Committee has recommended for creation of an Asset Re-construction Fund (ARF), which will take over the bad debts of banks from their balancesheets to enable them to start on a clear slate.

c) The Committee felt recaptilisation through budgetary infusion is not a sustainable option.

d) The Committee has recommended that net NPAs brought down to less than 5% by the year 2000 and 3% by the year 2002.

e) The Committee has recommended that bank should not lend to defaulters.

f) The Committee has recommended increasing capital adequacy under tightening provisioning norms. It targets 9% capital adequacy by the year 2000 and 10% by the year 2002.

g) The Committee suggest foreign bank seeking to set up business in India should have a minimum start up a capital of $ 25 million as against the current requirement of $10 million. Further it suggest that foreign banks can be allowed to set up subsidiaries and joint ventures that should be treated on a par with private banks.

h) The Committee recommends that there should be separation of the regulatory and supervisory functions of the Reserve Bank of India.

A major part of the reform measures recommended by the Committee were primarily aimed at strengthening the banking sector, which can be broadly grouped as under: Strengthening of capital adequacy including explicit capital for market risk

? Tightening of the prudential and disclosure standards in line with international best practices

? Consolidation of banking system

? Restructuring of weak public sector banks

? Dilution of government equity in public sector banks to 33 per cent and providing functional autonomy to government banks

? Technology improvements to modernize Indian banking

? Adoption of scientific tools for management of risks

? Legal reforms to expedite recovery of banks' dues

In the direction of bringing suitable legislative reforms to combat the deficiencies to effectively implement the recommendations of the Committee, the Reserve Bank of India has initiated number of measures including preparation of draft legislations and suggesting amendments to the respective legislations.

CHAPTER – II

GLANCE AT LEGISLATIVE REFORMS

The progress in regard to various initiatives for legal reforms are given below :

? The Working Group constituted by the Government for suggesting changes in the provisions of Negotiable Instruments Act, 1881, to bring it in conformity with the Information Technology Act, 2000 and also to examine the incorporation of electronic cheque, securitised certificates and other evolving products within the ambit of Negotiable Instruments Act has since submitted its recommendations to the Government in June 2001. The Group, inter alia, recommended the introduction of truncation of cheques and electronic cheques and suggested appropriate legal amendments.

? The Working Group on Asset Securitisation has drafted a Bill on Asset Securitisation which is under consideration of the Government.

? The draft legislation prepared by another Working Group constituted by the Government to examine the vesting of powers with banks and financial institutions for taking possession and sale of securities without intervention of the courts has been put on the RBI Website in August 2001 seeking comments from the public. The draft Bill is under the consideration of the Government.

? Proposals regarding amendments to the Reserve Bank of India Act, 1934, Banking Regulation Act, 1949, Government Securities Bill in replacement of the Public Debt Act, 1944, are currently under consideration of the Government.

? To improve the legal system relating to payments in India, the Legal Task Force of the National Payments Council submitted a set of recommendations for preparing a new legislation for regulating the payment systems in India. For drafting a legislation on Payment Systems in India, an international consultant and an eminent Indian draftsman have been appointed by RBI in consultation with the National Payments Council.

? An Expert Committee on Bank Frauds (Chairman : Dr.N.L.Mitra) submitted its Report to RBI in September 2001 which has been put on the RBI website. The Committee examined and suggested both the preventive and curative aspects of bank frauds. The important recommendations of the Committee include : a need for including financial fraud as a criminal offence and amendments to the Indian Penal Code by including a new chapter on financial fraud; amendments to the Indian Evidence Act to shift the burden of proof on the accused person and special provision in the Code of Criminal Procedure for transferring the properties involved in the financial fraud and confiscating unlawful gains; and preventive measures including the development of Best Code Procedures by banks and financial institutions. The Report is being examined by the Reserve Bank.

? Proposal to repeal the existing DICGC Act and replace it with a new Act is under consideration.

? Financial Companies Regulation Bill providing for a separate enactment in place of Chapter III and Chapter III C of the Reserve Bank of India Act and amendments to Banking Companies (Acquisition and Transfer of Undertaking) Acts, 1970 & 1980 bringing down the equity holding of the Government in the nationalised banks and also for enabling financial restructuring of weak banks have been introduced in the Lok Sabha.

CHAPTER – III

CURRENT LEGAL REFORMS – INITIATIVES BY RBI

3.1 INTERNATIONAL FINANCIAL STANDARDS AND CODES

The annual policy statement of April 2001 mentioned about the significant progress made by the Advisory Group on International Financial Standards and Codes. All the Advisory Groups constituted by the Standing Committee on International Financial Standards and Codes have submitted their Reports to the Chairman of the Standing Committee and these reports are placed on RBI website www.rbi.org.in for wider dissemination. Copies of the Reports are being sent to various experts, economists, professionals, academicians, banks and institutions for their comments. The Chairmen of individual Advisory Groups have been requested to explore the possibility of organising seminars on the themes. The Standing Committee will also prepare its own report indicating, inter alia, the course of follow-up/reforms required and the regulatory agencies involved in such follow-up actions.

3.2 BANK FRAUDS (DR.MITRA'S REPORT)

In the last decade, the instances of 'scam' have gone up. People, banks and financial institutions

have suffered losses of thousands of crores. Financial fraud is a very sensitive issue. It affects the structure of the system. The whole banking system is predominantly based on public faith.

Repeated market failure, undetected fraud in financial institutions and collusion of employees in financial frauds cause frustration in the public, which is a challenge to any good governance. In the background of this, the Board of Financial Supervision of the Reserve Bank of India has constituted an Expert Committee on "Legal Aspects of Bank Frauds" under the chairmanship of Dr.N.L.Mitra, Vice Chancellor, National Law University, Jodhpur. The Committee was asked to :-

a) Examine how the financial fraud can be defined and brought into an effective criminal justice jurisprudence.

b) What investigating agencies shall be necessary for effective investigation, tracing, attachment and restoration of the property and prosecution.

c) What type of justice delivery mechanism should be adopted to have quick and effective justice to investing public.

d) What effective regulations could be made effective to see that officials taking decisions based on business prudence and bona fide can be protected from unnecessary harassment in cases of investigation and prosecution on account of financial and banking fraud.

e) How cross-boarder financial frauds are required to be handled specifically in view of the questions of (i) foreign judgement; (ii) foreign proceedings; (iii) Indian proceedings having foreign players outside the country; (iv) help of foreign courts; (v) status of foreign and Indian legal representative; (vi) foreign investigation by Indian investigator; (vii) cooperation by Indian investigator in foreign investigation and (viii) enforcement of court decision.

On exhaustive study of the legal systems of various countries, the Committee had recommended, inter alia, a Bill for establishing a Bureau for investigating serious financial frauds - and has also suggested a fast-track special court with sitting or retired High Court judges to preside over. The Committee has divided its recommendations into two parts. The Part-I deals with the preventive aspects of management of financial fraud. To keep it happen only in rare cases. This part suggests steps to contain a clean in-house financial management. The Part-II deals with prohibition of financial fraud and introduction of a deterrent jurisprudence so that financial fraud, being a serious offence to derail a system as a whole, is adequately and firmly dealt with. The Committee has suggested a few measures in respect of in-house preventive management as a part of good governance. They are :(a) development of best practice code; (b) system of internalisation of best practice code; (c) internal check and internal control; (d) legal compliance certificate; (e) legal compliance audit; (f) data building on the exercise of discretionary power and monitoring the same; (g) appropriate incentive system; (h) liability of the accounting and auditing profession and (i) responsibility of Reserve Bank of India in frauds reported by banks. In the Part-II of the recommendations, the Committee has dealt with prohibitive aspects of financial fraud and administration of criminal justice, it suggested for separate legislation to deal with financial fraud. The draft legislation emphatically focused on criminalisation of financial

fraud and division of offence of financial fraud into financial fraud and serious financial fraud. The Committee has recommended a separate statute to deal with financial fraud under the title "Financial Fraud (Investigation, Prosecution, Recovery and Restoration of Property) Act, 2001".

3.3 THE WORKING GROUP ON NI ACT -(DESHPANDE COMMITTEE)

In order to meet the challenges posed by the technological developments across the globe and to make the existing regional laws to the standards of the technological developments, the Government of India has constituted Working Group on Negotiable Instruments Act, 1881 under the chairmanship of Shri N.V.Deshpande, Principal Legal Adviser, RBI. The Committee was constituted with an object to examine the modalities for bringing about conformity with the Information Technology Act, 2000 and Negotiable Instruments Act, 1881. The IT Act has provided legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication. However, the IT Act has specifically excluded from its application the instruments covered under the NI Act. The negotiable instruments or paper-base instruments used for making the payments and settling the liabilities. Therefore, it has become difficult for the mercantile community to make payments electronically as there is no legal back-up for the negotiable instruments under the IT Act. In order to promote electronic transaction in the banking and financial sector, it is essential to provide an appropriate legal structure for safeguarding the use of such instrument, enhancing their credibility, promoting their extensive use and improving their efficiency. The Committee has recommended, inter alia, for amendment of relevant provisions of NI Act to grant legal sanction for presenting the electronic image of a truncated cheque and making the payment as per the apparent tenor of the image of the paper cheque. A new provision may be incorporated in the NI Act, defining the word "electronic cheque".

The Standing Committee recently appointed to review the recommendations of the Working Group while carrying out the amendments to the NI Act have approved the recommendations made by the Deshpande Committee to amend the relevant provisions of the NI Act suitably, to incorporate electronic based cheque and the process of cheque truncation. This will meet the requirements of the mercantile community to strengthen the e-commerce by effectively providing legal framework for electronic cheque under the NI Act.

3.4 URBAN CO-OPERATIVE BANKS (MADHAV RAO COMMITTEE)

The urban co-operative banks have contributed significantly for the upliftment of lower income group of the urban and semi-urban population.

The deposit resources of UCBs rose from a meager some of Rs.153 crores at the end of financial year 1966-67 (UCBs were brought under purview of BR Act w.e.f. 1 March 1966) to Rs.50,544 crores at the end of 31 March 1999. Notwithstanding the phenomenal progress registered by UCBs, today they, are facing five major problems :

(i) dual control

(ii) inadequate legal framework to regulate UCBs compared to the powers RBI has been vested with to regulate commercial banks.

(iii) Increasing incidence of weakness

(iv) low level of professionalism

(v) apprehension above the credentials of promoters of some new UCBs.

The Reserve Bank of India has appointed a high power committee on "Urban Co-operative Banks under the chairmanship of Shri K.Madhav Rao, Ex-Chief Secretary, Govt. of Andhra Pradesh in the mid 1999. The Committee was assigned a task to review the performance of UCBs and suggest necessary measures to strengthen this sector. In respect of the issue of dual control the Committee recommended that the RBI should be the sole regulator for banking related functions. Accordingly, the Committee has made an attempt to list the banking related functions and cooperative functions.

Banking related functions which should be under the domain of RBI :

(a) issues relating to interest rates, loan policies, investments, prudential exposure norms, forms of financial statements, reserve requirements, appropriation of profit, etc.

(b) branch licencing area of operation

(c) Acquisition of assets incidental to carrying on banking functions

(d) policy regarding remission of debts

(e) Audit

(f) change of management and appointment of CEO

(g) Appointment of administrator.

Co-operative functions, which should be under the domain of Registrar of Co-operative Societies for concerned States -

(a) registration of co-operative societies

(b) approval and amendment to bye-laws

(c) election to Managing Committee

(d) protection of members' rights

(e) supersession of Managing Committee for violation on items (a) to (d) above.

The Committee further made necessary recommendations for amendments in State Cooperative Societies Act/Multi-State Co-operative Societies Act -

(a) RBI should not issue any new licence for establishment of urban co-operative bank, unless it is registered under a co-operative societies Act or Multi-State Co-operative Societies Act, 1984 which has incorporated the amendments on the above lines.

(b) RBI should not sanction licence for opening a branch to existing branch unless the bank is incorporated under a Co-operative Societies Act or Multi-State Co-operative Societies Act, 1984 which has been amended on the lines suggested above.

Action Taken

On the lines of the recommendations made by the Committee, the RBI has prepared a draft legislation titled "Urban Co-operative Banks Regulation Act, 2000" and forwarded the same to the Government for consideration. The main focus of the draft legislation is to establish a separate supervisory body for the regulation and supervision of the Urban Co-operative Banks.

The RBI has recently issued directions imposing norms for grant of licences to conduct banking business to the primary credit societies.

3.5 DEPOSIT INSURANCE CORPORATION BILL

The Narasimham Committee Report on the Banking Sector Reforms (1998), while focusing on the structural issues, observed:

> "Deposit insurance has increased public confidence in the banking system, promoted savings in bank deposits and has enabled banks to perform the intermediation function more effectively… Deposit insurance and the aversion to bank failures could create a moral hazard that distorts the incentives for banks and create competitive distortions…. The Committee is of the view that there is need for a reform of the deposit insurance scheme. In India, deposits are insured up to Rs. 1 lakh. There is no need to increase the amount further. There is, however, need to shift from the 'flat' rate premiums to 'risk based' or 'variable rate' premiums…." (paras 5.30 to 5.42).

In the background of the recommendations made by the Narasimham Committee the Reserve Bank of India has constituted on April 9, 1999, an Advisory Group and a Working Group on "Reforms in Deposit Insurance in India" under Shri Jagdish Capoor, Deputy Governor, to look into the issues raised by the Narasimham Committee. Shri Jagdish Capoor, Deputy Governor, has been appointed as Chairman of the Advisory Group and Dr.D.Ajit, Director, DEAP, RBI, was the convenor for the Working Group. The Working Group was given task to review the role of deposit insurance in financial sector and economic developments, including a review of the international experience with regard to deposit insurance and to propose changes in the existing system in regard to deposit coverage, institutions to be brought within the ambit of deposit insurance, regulatory system to be put in place in the case of each category of institutions accepting deposits from public as a prerequisite for extension of the deposit insurance, risk based premium and the parameters relevant to the assessment of the risk in regard to each category of

institution and the ownership and capital of the existing deposit insurance agency.

The major recommendations of the Committee are :

a) The Group recommended exclusion of CDs from the deposit insurance coverage.

b) Risk-based pricing of the deposit insurance premium is recommended in lie of the present flat rate system. The risk-based pricing of deposit insurance should be set high enough to cover the expected reimbursement that would be needed in the event of one or more bank failures and vary with the riskiness of the individual bank - with weak or poorly capitalised banks being forced to pay more. It would be desirable to base pricing of risk-based premium on the latest available CAMELS ratings. In the case of entities which do not have a reliable CAMELS ratings (like RRBs and the co-operative banks), one may have to opt for flat rate deposit insurance till the CAMELS data base becomes available.

c) The function of credit guarantee on loans may be withdrawn from the Corporation and DICGC renamed as "Deposit Insurance Corporation".

Action Taken

Pursuant to acceptance of some of the important recommendations made by Advisory Group and the Working Group, an outline of the Deposit Insurance Corporation Bill, 2000 (as prepared by the Legal Department, Reserve Bank of India) has been prepared and the same was forwarded on September 13, 2000 to the Ministry of Finance (Banking Division), Government of India, for their consideration and approval. Amongst others, the proposed Bill is to replace the existing DICGC Act, 1961 and includes enabling provisions to; levy risk based premium, increase the capital of the Corporation, reconstitution of the Board of Directors of the Corporation, exclude the function of Credit Guarantee by the Corporation, facility of a “Line of Credit” to the Corporation from the Reserve Bank and to provide for cancellation of registration of an insured bank in the event of deterioration in the financial health of the bank and also for cancellation of the licence to a deregistered bank.

3.6 DRAFT OF CREDIT INFORMATION BUREAUS REGULATION BILL, 2001

Availability of adequate and reliable information on the prospective borrower is vital for taking decisions in relation to sanctioning of credit. The Banking Commission (1972) under the chairmanship of Shri R.G.Saraiya, recommended setting up of a Credit Information Bureau as a statutory body, which would furnish adequate and reliable credit information to banks and other financial institutions. Considering the growth of financial sector and need for effective mechanism for mitigating credit risk by enhancing the quality of credit decisions, the Reserve Bank of India has constituted a Working Group on 30th October 1999, to explore the possibilities of setting up a Credit Information Bureau under the chairmanship of Shri N.H.Siddiqui.

The major recommendations of the Working Group are as under :

a) Pending legislative amendments, a beginning may be made for setting up a Credit Information Bureau which can operate initially by pulling the information related to suit

filed account and information on the transactions on which the constituent has given consent to the banks to disclose. Eventually, the Bureau can become a full-fledged world class bureau when the proposed legal framework is put in place to provide adequate protection to the Credit Information Bureau and credit institution as well.

b) As the legal provisions on disclosure of information enshrined in the various banking Acts would not permit sharing of information with the Bureau, amendments would be required in the following enactments :

   i) Section 44 of the SBI Act, 1955

   ii) Section 52 of the SBI (Subsidiary Banks) Act, 1959

   iii) Section 13 of the Banking Companies(Acquisition and Transfer of Undertaking) Acts, 1970 & 1980

Action taken

Pursuant to acceptance of recommendations of the Working Group, a draft of the proposed legislation titled "The Credit Information Bureaus Regulation Act, 2001" had been prepared by the Reserve Bank of India and the same has been forwarded to the Ministry of Finance (Banking Division), Government of India. Thereafter clarifications sought by the Banking Division have been discussed and explained by the officers of the Legal Department, DBOD and the Credit Information Bureau of India Ltd. (CIBIL), set up by the State Bank of India in association with the HDFC and Dun & Brad Street of USA in the meeting held in the Banking Division on 4 April 2001 and on 14 September 2001. The Banking Division is to take up the matter for enactment of proposed legislation.

The proposed legislation, inter alia, includes provisions relating to; incorporation, management, registration, functions and powers of a credit information bureaus, information privacy principles and reporting of credit information and stipulates provisions relating to the powers of the Government and the Reserve Bank of India in relation to grant of registration certificate, supervision and regulation of Credit Information Bureaus. The proposed legislation also includes provisions for; constituting “Dispute Resolution Committees” for resolution of dispute between Credit Information Bureaus or between Credit Information Bureau and Credit Institution or a dispute between an individual and a Credit Information Bureau or a Credit Institution, etc.

3.7 REVIEW OF REGULATORY AND SUPERVISORY ARRANGEMENTS

Technical advances have resulted in accelerated pace and complexities in financial products besides the manifold increase in volume and turnover. The Indian financial system is catching up fast with these developments in post-reform period. The regulatory regimes and supervisory systems in the changing environments faced new challenges in safeguarding the integrity, efficiency, soundness and stability of the financial system.

In the background of this, an informal group was constituted within the Reserve Bank by the

Deputy Governor Dr.Y.V.Reddy to examine the current regulatory and supervisory arrangements with a view to determining the existing gaps and overlaps. The Committee has submitted its report during October 2001. The observations of the Group amongst others, are as follows :

i) Within the RBI, the regulation and supervision of any segment of the financial sector should be integrated within one department. Such a purpose would be best served by having licensing, regulation, supervision and enforcement as the four broad divisional areas in each such department. Both regulation and supervision essentially use the same resources, have the same client group, data needs and provide essential feedback to each other. In other words, regulation yields direct influence on behaviour, whereas supervision provides information. The authorities can address this issue by developing, implementing and sanctioning non-compliance with norms of behaviour (regulation), by monitoring the norms (supervision) and by providing insurance (emergency liquidity support, depositor protection). Given the increasingly high levels of scarce skills required to carry out these tasks, it seems imperative to integrate both regulation and supervision under one broad umbrella.

ii) In the Monetary and Credit Policy of April 2001, it has been proposed that the supervision of the UCBs be entrusted to a separate apex body. This is largely in view of the large numbers of such cooperative banks with a large geographical spread, which makes high frequency and high quality supervision of this segment difficult.

3.8 PROPOSED AMENDMENTS TO RESERVE BANK OF INDIA ACT, 1934

While presenting the Budget for the year 2000-01, the Finance Minister noted that in the fast changing world of modern finance it has become necessary to accord greater operational flexibility to the Reserve Bank for conduct of monetary policy and regulation of the financial system and expressed his intention to bring to the proposals for amending the relevant legislation. As a follow up, the Reserve Bank, after a review of the existing legal framework supporting the formulation and implementation of monetary policy and Reserve Bank's operations in the financial markets, has proposed to Government certain amendments to the RBI Act.

As central banks need greater operational autonomy and independence in matters relating to monetary policy and use of various instruments to respond quickly to the rapid changes in the financial markets in the wake of the ever evolving financial innovations, the Bank has proposed to empower it with sufficient flexibility which cover various aspects, inter alia, provisions pertaining to CRR prescriptions in the reserve requirements viz., CRR under Section 42 of the RBI Act and SLR under Section 24 of the BR Act. The proposal is to remove statutorily prescribed limits to accord operational flexibility to Reserve Bank.

Further, in order to bring the wilful defaulter to the notice of the general public, the Reserve Bank has also proposed to amend Section 45E of the Act to enable it to publish the names of those borrowers who, in spite of their ability and capacity to repay the loans, refuse to honour their obligation to repay such loans or siphon away the funds borrowed from the banks and financial institutions or divert the funds for the purposes other than for which such loans are granted by the banks to such borrowers.

The statutory provisions regarding the authorised business of the Reserve Bank are being nationalised to enable it to conduct business and operations in the light of the emerging financial scenario, more particularly to deal with the financial institutions that have emerged in the recent past and also which may emerge in future. The changes proposed also include the freedom to the Union Government to appoint Reserve Bank or any other person for management of its public debts.

3.9 PROPOSED AMENDMENTS TO BANKING REGULATION ACT, 1949

The Narasimham Committee, in Banking Sector Reform in para 8.17 of its Report criticised the provisions of the Banking Regulation Act by saying that the Act is structured somewhat on the premises that the banking supervision is essentially a Government function and that the Bank's supervision is somewhat on the lines of the agent of the Central Government. The Committee had, therefore, recommended the review of the provisions contained in the Banking Regulation Act. A detailed exercise is undertaken by the Bank to review the provisions of the Banking Regulation Act and the proposals for amendment of the Act were made to the Central Government in October 2000. While reviewing the existing provisions of the Act, the rapid changes taken place in the financial sector were also taken into account and the appropriate changes have been suggested in the Act for the consideration of the Central Government. The main provisions included for amendment are revised capital requirement of the banking companies, provision for consolidated supervision of the foreign banks; as a part of prompt corrective action, introduction of a new provision for supercession of the Board of Directors of the banking company and of course, vesting of certain powers in the Reserve Bank which are presently exercisable by the Central Government. The proposals are pending with the Government.

3.10 New Legislation on Payment Systems

Legal Task Force of the National Payments Council made a presentation before the National Payments Council and made their recommendation for preparing new legislations for the payment systems regulation in India. The National Payments Council had given "in principle" approval to the proposal of the Working Group of the Legal Task Force and recommended to the Reserve Bank to proceed for its implementation. On the basis of the instructions of the National Payments Council and with the approval of the Committee of the Central Board of Director in its meeting held on 3 May 2001, M/s.Herbert Smith, London has been identified and appointed as International Consultant and Shri P.M.Bakshi has been identified and appointed as Indian draftsman for preparation of new draft Legislation on Payment Systems in India. The work on drafting the new legislation is in progress.

Technology Upgradation

To bring improvements in the payment and settlement system, some important measures taken by the Reserve Bank were announced in the annual policy statement of April 2001. To facilitate banks to effectively participate in the payment and settlement systems and to provide a road map of the various payment system projects, a draft Payment System Vision Document was prepared; based on the feedback received from banks and comments of the members of apex bodies such

as the National Payments Council, the Vision Document is being finalised. The other steps being taken up include the use of "imaging" of cheques as a precursor for cheque truncation, which would be facilitated by the recommendations of the Working Group on amendments to the Negotiable Instruments Act, 1881 and the introduction of internet banking service.

With a view to further improve the technology based infrastructure of banks and also enable them to effectively use the facilities offered by the Reserve Bank in the payment and settlement system, the following further measures are proposed

? The Indian Financial Network (INFINET) is already available for use by all banks and common inter-bank applications are being implemented on this network. Banks have to take necessary steps to further strengthen their infrastructure base in respect of standardisation, high levels of security and communication and networking to make full use of these resources.

? If the benefits of the common inter-bank applications have to be fully realised, it is essential that connectivity of computers located at different branches of banks is achieved early. To begin with, it should be the endeavor of banks to achieve the goal of connectivity of commercially important centres. This will facilitate connectivity to the INFINET for achieving inter-city, inter-bank message transfer in a network environment on a real time basis.

One of the systems provided by the Reserve Bank for quick, safe and secure movement of funds in an electronic mode is the Electronic Funds Transfer (FET). At present, the scheme is available for transfer of funds across about 8,500 branches of banks located at major commercial centres. It is essential that concerted efforts are taken by banks to popularise the usage of this scheme which would result in quick funds transfer for clients, lesser reconciliation problems at banks and improve systemic efficiency.

3.11 Proposed Government Securities Act,

The Public Debt Act was enacted in 1944 to consolidate the law relating to Government Securities and to provide for the management of the Public Debt of the Central Government as well as the State Governments by the Reserve Bank of India. The Act covers the securities created and issued by the Central and State Governments and provide for the issue, servicing and repayment of Government Securities. In the 56 years that have elapsed since the passing of the Public Debt Act, 1944, a number of developments, notably the deepening and broadening of the Government Securities market, have taken place. The volume of public debt has gone up, the character and composition of the Public Debt has undergone a perceptible change and new instruments of Public Debt to cater to specific target groups have been fashioned out. Concurrently, new techniques of issues and management are being tried out. The existing Act as remained insulated against these changes/development in the field. The customer service has tended to become a casualty in view of the archaic legal provisions and rigid practices flowing from it.

In view of the above, it has become necessary to introduce a new legislation with provisions enabling the Bank and Government to develop the Government Securities market, while

eliminating the rigidities, which have crept into system. The proposed Government Securities Act has been drafted taking into consideration the recommendations of a High Powered Committee appointed by the Bank with representatives from Finance Ministry, Law Ministry, State Governments and the Bank.

The proposed Act provides mainly for –

? Change of the name of the Act (from Public Debt Act to Government Securities Act) as the Act deals with only marketable Government Securities and not other public debt like PPF, NSS, etc.

? Making liabilities of transferors of Government Securities on par with that of transferors of negotiable instruments under Section 36 of the NI Act.

? Permitting trusts to hold Government Securities in the form of G.P. Notes (in addition to Government Securities in the form of stocks).

? Opening and maintenance of SGL Accounts (including Constituent SGL Account and Bond Ledger Account)

? Dematerialised holding of Government Securities in Bond Ledger Account

? Cognizance of offences relating to SGL Accounts

? Simplifying the provisions for dealing with claims of legal representatives of the deceased holders by making documents other than probate, succession certificate and letters of administration also acceptable.

? Raising the monetary limit for passing vesting orders by the Bank in respect of security held by or on behalf of minors and insane persons.

? Pledge, hypothecation and lien on Government securities without transfer of the securities

? Use of data in machine readable form, fax, computer prints, etc.

? Empowering the Bank to issue directions for the purpose of Act.

The Bill for the proposed new legislation is pending with the Government of India, Ministry of Finance, Deptt. of Economic Affairs, for initiating necessary action to introduce the Bill to the Parliament for its passing.

3.12 Nationalisation (Amendment) Bill, 2000

A Bill was introduced in the Parliament in December 2000 to amend the statutory provisions applicable to the nationalised banks. To implement the recommendations made by M.S. Verma Committee appointed by the Reserve Bank, the Bill provides, inter alia, for supercession of the

Board of Directors of the weak nationalised banks and constitution of Financial Restructuring Authority for putting back the weak nationalised banks and constitution of Financial Restructuring Authority for putting back the weak banks in good health. The authority so constituted can function for a maximum period of five years. Further, in accordance with the international practice of incorporation and consolidation of accounts of the subsidiaries, the Bill provides for incorporation of the accounts of its subsidiaries in the annual accounts of the nationalised banks. Further, while the mandatory provision for appointment of Reserve Bank nominee director on the Board of the nationalised banks is being withdrawn, the Reserve Bank will have the power to appoint additional directors on the Board of the nationalised banks. This will be similar to the powers available to the Reserve Bank over the banking companies under the BR Act. The Bill is likely to be passed by the Parliament in its next session.

3.13 FINANCIAL COMPANIES REGULATION BILL, 2000

The Financial Companies Regulation Bill, 2000 (pending before the Parliament) provides for a separate enactment in the place of Chapter III B and Chapter III C of the Reserve Bank of India Act, 1934 (as amended by the Reserve Bank of India (Amendment) Act, 1997) for consolidating and amending the law for regulation of financial companies and to prohibit acceptance of deposits by unincorporated bodies.

The Bill provides for the constitution of an Advisory Counsel by the Bank with a Deputy Governor as the Chairman and not exceeding three other members to advice the Bank on any matter under the Act. Further, there are provisions for registration of financial companies and the conditions thereof and the requirements for financial companies to be eligible to accept public deposits. Financial companies receiving public deposits will be required to maintain liquid assets not exceeding 25% as may be specified by the Bank and also to create a reserve fund of not less than 20% of the net profit every year. There shall be a first charge on these assets in favour of the depositors in the case of default in repayment of public deposits. The Bill also provides for nomination in the case of public deposits with financial companies. The Bank would have powers to call for information from financial institutions; to determine policy and give directions; to prohibit acceptance of deposits and alienation of assets in certain cases and also to appoint Special Officer to ensure compliance with the Bank's directions. The Bill further authorises the Bank to file petition for winding up of financial companies in certain cases.

Under the Bill, the Company Law Board and Recovery Officer appointed by the Board would redress the grievances of depositors in the case of default by the companies. The jurisdiction of Civil Courts for the purpose is barred.

The Bill prohibits acceptance of public deposits by unincorporated bodies and also provides for penalties for violation of its provisions. The Bill also repeals Chapters III B and III C of the Reserve Bank of India Act and also the provisions for penalties for violation thereof.

3.14 DIVESTMENT/TRANSFER OF OWNERSHIP OF SBI,NABARD AND NHB FROM RBI TO CENTRAL GOVERNMENT

The Committee on Banking Sector Reforms (Narasimham Committee II) in their report released in April 1998 has inter alia, recommended that the Reserve Bank of India as a regulator should

divest its holdings in banks and financial institutions. The Advisory Group on Banking Supervision under the Chairmanship of Shri M.S.Verma, former Chairman of SBI has also emphasised to do away with overlapping of the role of RBI as owner and as regulator/supervisor. In the discussion paper prepared by RBI on "Hamonising the Role and Operations of Development Financial Institutions and Bank" (January 1999), it is desired that the RBI should concentrate on its regulatory and supervisory functions and the ownership of financial institutions could be de-linked from RBI through transfer of such ownership to the Government.

RBI in its Monetary and Credit Policy for the year 2001-2002 announced its acceptance of recommendations of the Narasimham Committee II that the owner should not be a regulator and its intention to transfer the shares in SBI, NABARD and NHB to the Central Government. Consequently, a Working Group under the Chairmanship of Shri P.B.Mathur, Executive Director, has been constituted by Memorandum dated 28 May 2001 of Dy. Governor, Shri Y.V. Reddy to decide among others, the modalities of transfer of shares held by RBI in these institutions to the Central Government as well as legislative measures required consequent to transfer of such holdings. The Working Group has had several meetings and is in the process of finalising its report and submitting to the Bank. On the acceptance of the recommendation, various amendments would be promoted to the respective Acts (SBI Act, NABARD Act and NHB Act) governing these institutions (SBI, NABARD and NHB).

3.15 FOLLOW UP ACTION ON ANDYARUJINA COMMITTEE

In order to implement the recommendations of the Narasimham Committee on Banking Sector Reforms (April 1998), the Government of India had constituted an Expert Committee under the Chairmanship of Shri T.R. Andhyarujina. The Committee in its report submitted in February2000, inter alia, proposed a draft Securitisation Bill and changes in legal provisions relating to enforcement of security interest without the intervention of the court. In order to examine the report of the Andhyarujina Committee, the Central Government had constituted two Working Groups to consider the recommendations.

The First Working Group examined the recommendations made by the Andhyarujina Committee for draft legislation for facilitating securitisation transaction for banks and financial institutions. The Committee recommended to Central Government for enacting a law to facilitate securitisation of financial assets and regulating special purpose vehicle by a bank or financial institution. The securitisation transactions will be regulated by SEBI. All securitisation transactions will be required to be registered with the statutory Registrar and will constitute public notice of securitisation. The proposals are under consideration of the Central Government.

The other Group was entrusted with responsibility of suggesting legal framework for creation and enforcement of security interest by the banks and financial institutions. The Working Group submitted its proposal for enacting statutory provision for creation, registration and enforcement of security interest by the banks. The draft legislation was also put up to Reserve Bank of India's website on 3 August 2001. With this, while the Debt Recovery Tribunals will be the usual mechanism for recovery of the debts for unsecured loans, for secured loans, the proposed draft Bill confers the power on the banks and financial institutions to take over the securities from the borrowers and sell the same without the intervention of the court. The powers proposed are some what similar to the one enjoyed by the State Financial Corporations for recovery of their dues

under the State Financial Corporation Act, 1951.

3.16 SETTLEMENT Of NPAs

The Reserve Bank guideline is to ensure transparency and credibility of financial positions of banks. The Reserve Bank of India has advised all commercial banks that the broad framework for compromise or negotiated settlement of Non-performing Assets (NPAs) outlined July 1995 will continue to be in place.

The Reserve Bank had, in July 2000 circulated simplified, non-discretionary and non-discriminatory guidelines to provide a one-time impetus to reduction of the stock of chronic NPAs by recovery of dues relating to public sector banks. The guidelines covered accounts upto Rs.5 crore in all sectors including the small scale sector, but excluded cases of willful default, fraud or malfeasance. The settlement scheme laid out by these guidelines was operative till June 2001 and all applications received upto this date were to be processed by September 2001. Some representations had been received for further extension of the scheme.

3.17 COMPROMISE THROUGH LOK ADALATS

The Reserve Bank has advised all scheduled commercial banks and all India financial institutions that they can take up matters where outstandings are Rs.10 lakh and above with Lok Adalats organised by the Debt Recovery Tribunals/Debut Recovery Appellate Tribunals. The advice was issued to clarify the doubt raised by banks whether, in view of the limitation of ceiling of Rs.5 lakh for disposal by Lok Adalats, they should participate in the Lok Adalats convened by various DRTs/ DRATs for resolving cases involving Rs.10 lakh and above.

CHAPTER - IV

CONCLUSION

The laws of the land cover a wide spectrum. But the laws relating to economic activities are a critical part of the legal system. Economic policies have undergone changes all the time and laws must necessarily reflect them. Sometimes, policy changes are sharp and that is what happened in 1991. Laws must facilitate implementation of policy. The Indian experience with economic laws shows that draconian laws do not necessarily achieve their objective. They only drive the activities underground. The strength of a legal system depends on how quickly one responds to changing situations. As philosopher Whitehead said, 'the art of progress is to preserve order amid change and to promote change amid order' and in this task the legal system has a vital role to play.

The Indian Banking system has stood the tests of time and it has the inherent strength to adopt itself to the changing environment. What is needed is the proper direction coupled with motivation. The leadership must instill confidence in the ranks and they will then find their tasks much easier. Taking note of the reforms undertaken by India in recent times, it may be reiterated that the financial sector, in particular banking industry, would emerge as strong in the times to come.

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Men of few words are the best men.

— SHAKESPEARE, William, Henry, V, III, ii (40)

The violation of law is not in the moral and philosophic sense, a privilege that lies offered for sale with a given price tag, like an object in a supermarket, available to anyone who has the price and is willing to pay for it. It is not like the privilege of breaking crockery in a tent at the county fair for a quarter a shot. Respect for the law is not an obligation which is exhaused or obliterated by willingness to accept the penalty for breaking it.

— KENNAN, George F., "Rebels Without a Program, " The New York Times Magazine, January 21, 1968, p. 71

The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body, belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves.

— MAINE, Henry Summer, Ancient Law (New York : Hency Holt and Company, 1888), pp. 27-28

I care not how hard the case is — it may bristle with difficulties — if I feel I am on the right side; that cause I win.

— CHOATE, Rufus, Reminiscences of Rufus Choate (New York : Mason Bros., 1869), p. 116

Enforcement of Arbitral Awards - Problems and Perspective*

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Arbitration Award

Under the provisions of Arbitration and Conciliation Act, 1996, the Arbitral Tribunal shall make the Arbitral Award in writing, which shall be signed by the members of the Arbitral Tribunal. In arbitral proceedings, with more than one arbitrator, the signatures of the majority of all the members of the Arbitral Tribunal shall be sufficient so long as the reason for any omitted signature is stated. The arbitral award shall state the reasons upon which it is based, unless

(a) the parties have agreed that no reasons are to be given, or

(b) the award is an arbitral award on agreed terms under Section 30.

After the award is made, the arbitral award is required to be delivered to each party. The making of an arbitration award is a judicial act.[1] While making an award, the Arbitrator/s must make up his / their mind upon the matter referred to him/them and if there is more than one arbitrator, they should or the majority of them, where the decision is to be by the majority, act together and finally make up their minds by arriving at the decision which must be express in writing and signed.[2]

Challenge of the Arbitral Award

The new Act limits the number of occasions on which Courts could review arbitral proceedings and incorporated all judicial safeguards in Section 34 which empowers Courts to review the entire arbitral process. Section 34 enumerates the grounds on which the arbitration award can be set aside by the Court. Section 34 (2) Arbitration and Conciliation Act 1996 provides that an Arbitral Award may be set aside by the Court only if :

(a) the party making the application furnishes proof that -

(i) a party was under some incapacity or,

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with the dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to the arbitration

Provided that if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to the arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that -

(i) the subject matter of the dispute is not capable of settlement under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India

Explanation

Without prejudice to the generality of Sub-Clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India, if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75[3] or Section 81.[4]

From the above it is observed that the jurisdiction of the Courts to set side an arbitral award has been taken away tremendously. The award cannot be set aside except on one or more of the one ground specified in the section. The Court has no jurisdiction to set aside an award on any other ground. The award is not vitiated by any act of the arbitrator not amounting to corruption or misconduct. The onus to prove the ground for setting aside the award is on the party asserting it.

Grounds for setting aside an arbitration award

(i) Incapacity of the party :- An award can be set aside, if a party to an agreement was under some legal incapacity. An agreement with a party who is not capable of contracting like a person being minor is void and therefore such incapacitated person is neither bound by the agreement nor by the award. He can therefore make an application to the Court for setting aside an award on the ground of his incapacity.

(ii) Invalidity of agreement and award : An award can be set aside, if the arbitration agreement is not valid under the law, to which the parties are subjected to. The validity of the arbitration agreement should be tested in accordance with the law of contract for the time being in force. The arbitration clause is treated as an agreement independent of the other terms of contract and any decision on the validity of the agreement is not to affect the validity of the arbitration clause. Therefore an arbitration can go by virtue of the arbitration clause in spite of the fact that the contract containing the clause was null and void. An award delivered in such circumstance may be set asided under Section 34 (2)(a) of the Act. Further in addition to the requirement of law of contract, the arbitration agreement should also satisfy the requirement of the Act. In the first place the agreement between the parties should be about disputes in respect of defined legal relationship, whether contractual or not and secondly it should be in writing. The requirements of the Indian Contract Act have to be satisfied regarding the validity of the agreement viz. The agreement should be for consideration, between parties who are competent to contract with their free consent and for lawful object.

(iii) Absence of proper notice of appointment of Arbitrator or of Arbitral Proceedings or some other inability to present case

Absence of proper notice of appointment of Arbitrator : When the Arbitrator is appointed in terms of the agreement by one of the parties without the concurrence of the other or because of other's default, or by some designated person or institution, the other party should be properly informed about the appointment of Arbitrator. If the other party remains unaware about the appointment of Arbitrator or of Arbitral proceedings, the award can be set aside on that ground.

Absence of proper hearing to the party : The Arbitral Tribunal should proceed according to the principles of natural justice and if any party is not given proper hearing, the aggrieved party

can apply for setting aside the arbitral award. The procedure of arbitration proceedings is regulated by the Act or agreement and such procedure should not be contrary to the law. All the parties to the Arbitration proceedings are entitled to reasonable notice of the time and place of hearing and have an absolute right to be heard and present their evidence before the Tribunal. If any party is deprived of this right, the award may be set aside by the Court. Section 18 of the Arbitration and Conciliation Act,1996 provides that the party shall be treated with equality and each party should be given full opportunity to present his case. If the right of hearing is waived either expressly or impliedly, the arbitration proceedings and the award will be as valid and regular as though full opportunity has been given. Either the Arbitral Tribunal need not follow Court procedure or the Tribunal may adopt the procedure which may not result in unfairness between the parties. If a party fails to appear at an oral hearing without sufficient cause, the arbitrator may continue his proceedings and make the award on the evidence before him.[5]

The Arbitrator is also required to give notice for closing the proceedings and if he gives the award without giving notice to the parties to close the proceedings, the award may be set aside by the Court. The Court has set aside the award, where the arbitrator did not hear more witnesses and made award[6] and where the arbitrator did not give notice that he intended to proceed ex parte.[7]

(iv) Exercise of excess of jurisdiction : If the arbitrator deals with a dispute not contemplated by the submission to arbitration or not falling within the terms of the submission, the award is likely to be set aside. However, if the award is such that the decision on matters submitted to arbitration can be separated from those not submitted , then only that part of the award will be set aside which contains decisions on matters outside the jurisdiction of the arbitration submission. In Sudarshan Trading Company Vs. Government of Kerala,[8] the Supreme Court held that an award may be remitted or set aside on the ground that the Arbitrator in making it exceeded his jurisdiction and the evidence of matters not appearing on the face of it may be admitted to find out whether the jurisdiction has been exceeded. This is so because the nature of the challenge as to jurisdiction is such that it would have to be examined outside the award whatever might have been said about it by the Arbitrator in his award. Similarly, in Associated Engineering Vs. Government of Andhra Pradesh,[9] the Supreme Court observed that if it is apparent by merely looking at the contract that the umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award, the whole award is liable to be set aside, or if the excess portion is severable, it is liable to be modified to that extent.

(v) Composition of Arbitral Tribunal and its procedure : Where the composition of Arbitral Tribunal is not in accordance with the agreement of the parties, or the procedure agreed to by the parties was not followed, the award can be set aside. The composition of the arbitral tribunal has to be persons of qualifications agreed to by the parties and of persons who are impartial and independent. The issue can be raised before the Tribunal itself and even if the challenge is not successful, the award can be challenged for setting aside under this provision An award can also be challenged , if the mandatory procedure or the prescribed procedure or the agreed procedure was not followed by the Tribunal. Such a procedural lapse has been termed as misconduct of proceeding by the Arbitrator under the earlier Act. But now the word misconduct does not appear in the new Act either as a ground for setting aside or for challenging the Arbitrator. However, the word misconduct indirectly comes into picture through the provisions

of Sections 12 and 13 relating to challenging the arbitrator for termination of his mandate. If the arbitrator is not removed, the award can be challenged by raising this grounds subsequently. The word misconduct included lack of independence and impartiality on the part of the Arbitral Tribunal. The word misconduct has also not been included in the English Arbitration Act 1996. But Russel[10] has observed as follows :

> "The word does not appear in the Arbitration Act, 1996, but it is appropriate to comment briefly on what was meant by "misconduct" under the earlier legislation. It was nowhere defined in the former legislation, but it covered a wide range of errors on the part of the arbitrator. It ranged from a fundamental abuse of his position to what was often referred as "a technical misconduct" i.e. where the arbitrator made errors but not in a culpable way or so as to impugn his integrity. Where the misconduct was more serious in the sense that the arbitrator's integrity was impugned or the parties lost confidence in him , his removal or the setting aside of his award, rather than remitting the award to him, was considered more appropriate.
>
> Misconduct could arise in various circumstances. For example, the arbitrator may have failed to deal with all the issues in the award, or may have made an accidental error in the award, or failed to observe the principles of natural justice. He may also have misconducted himself by acting in excess of his jurisdiction by purporting to decide issues which were not within his terms of reference, or making an error of law in an award…"

Therefore, in view of the above it is clear that though misconduct has not been mentioned as the ground for challenging the award, the Court can set aside the award on this ground as Section 34(2) (v) of the Arbitration and Conciliation Act 1996 makes it a duty of the Arbitral Tribunal to follow either the agreed procedure or that prescribed by part I failing which the award may be set aside. The expression misconduct is of very wide import as on the one hand it does not necessarily bring or include misconduct of a fraudulent or improper character, it does include action on the part of the Arbitrator which is on the phase opposed to rational and reasonable principles that should govern the procedure.

(vi) Dispute not Arbitrable : If the subject matter is not capable of settlement by arbitration under the law for the time being in force, the award can be set aside. The matters falling under rent laws,[11] matter of seizure of machinery under a hire purchase agreement[12] and matters under Sections 24 and 52 of the Electricity Act 1910 have not been held to be arbitrable.

(vii) Arbitral Award in conflict with public policy of India : The principles of public policy is ex dolo malo non oritur actio . No Court of law will lend its aid to a man who founds his course of action upon an immoral or illegal act.[13] Public Policy has not been defined in the Act. The explanation to the Clause provides that an award is to be regarded in conflict with the Public Policy of India, if it was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

Enforcement of arbitral award

Subject to Chapter VIII of the Act , an arbitral award shall be final and binding on the parties and persons claiming under them respectively. Where the time for making an application to set aside

an arbitral award under Section 34 has expired, or such application having been made it has been refused, the award shall be enforced under the Code of Civil Procedure 1908 in the same manner as if it were the decree of a Court. The new Act provides that the award itself can be enforced like a Court decree. Under the old Act an award has to be filed in the Court for making it a rule of the Court. The objections from the parties were invited and where no objection was filed or was sustainable the Court was empowered to pass a judgement in terms of award and it was then converted into a decree for enforcement.

In terms of Section 9 of the Arbitration Conciliation Act, the Court is also empowered to take any interim measure for protection of the property in question for facilitating an effective enforcement of the award. In this connection, the Court has the power to take the following action on the application by a party before or during the arbitral proceeding or at any time after the making of the arbitral award.

(i) Appointment of a Guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure, of protection in respect of any of the following matters viz.

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

Court where the application for execution of the Arbitral Award has to be filed

Where with respect to an arbitration agreement, any application has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.[14] Under the new Act the jurisdiction of the Court to decide questions of validity, effect or existence of arbitration agreement or of competence and jurisdiction of arbitral tribunal and of procedure to conduct arbitration proceedings has been taken away and such jurisdiction vests in arbitration tribunal. Section 2 (1) (e) of the Act defines Court , which has jurisdiction to entertain the application relating to the arbitration matter. Court has been defined as under :

"Court means the principal Civil Court of original jurisdiction in a District, and includes the High Court in exercise of its Ordinary Original Civil Jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of the suit but does not include any civil Court of a grade inferior to such principal Civil Court or any Court of Small Causes. The definition of the Court in Section 2 (1) (e) of the Act determines the jurisdiction i.e. the test is which Court would have had jurisdiction, if it was a suit and not an application. That would be governed by the subject matter of the arbitration agreement of the award as the case may be i.e. by Sections 15 to 19 Civil Procedure Code (CPC). Therefore, the Court in which the arbitration award will be filed for execution will be decided by the provisions of Sections 15 to 19 of the CPC.

If the arbitration agreement provides that the Courts of any place alone shall have jurisdiction to decide any dispute arising out of the contract, the Court of that place only will have jurisdiction in the matter. However, the exclusive jurisdiction clause would be enforceable only when the underlying agreement is valid.[15] In Sabson (India) (P) Ltd. Vs. Neyveli Lignite Corporation Ltd,[16] the arbitration agreement provided that "the venue of arbitration shall be Madras". The arbitration was actually held at Madras and the award was also filed at Madras. But the notice inviting the tender provided that "the Civil Court having jurisdiction over Neyveli shall alone have exclusive jurisdiction in regard to all claims in respect of this contract of whatever nature ". When the award was filed in Madras, the party raised objection for filing award at Madras. The Court observed that "in view of the Arbitrator filing the award in this Court this original petition is ordered accordingly. However, the liberty is granted to Neyveli Lignite Corporation Ltd. to take appropriate action in contesting the award already filed in accordance with the Law" The Neyveli Lignite Corporation Ltd. filed an application before Cuddalore Civil Court agitating the jurisdiction of the Madras Court. The Madras High Court observed that the venue of arbitration depends on volition of the parties and their convenience. It is open to the parties to select a place far away from the place where the contract was executed because such a place would be easily accessible. If no cause of action has arisen in the place where the parties choose to hold arbitration proceedings, the Court within whose jurisdiction the arbitration proceedings are conducted will not be a competent Court for the purpose of the provisions of this Act. In view of the observations, the Court sustained the objections filed by the NLC and held that the Madras Court has no jurisdiction to entertain the award for making a rule of law.

Conclusion`

The recovery of the debts of Banks and Financial Institutions from the defaulters is a big task and the borrowers try to take advantage of procedural technicalities of the rules of the Court. As the recovery of the dues of the banks and financial institutions through the Courts was taking more time, the Debt Recovery Tribunals have been constituted under the special statute to overcome the problem of recovery of huge non-performing assets of the bank and financial institutions. Suggestions have also been made to empower the bank and financial institutions to take possession of securities and sell them for recovery of loan without the intervention of the court. For that purpose there is a need for drastic amendment in the Banking Companies (Acquisition and Transfer of Undertakings Act) 1970/1980, State Bank of India Act 1955, State Bank of India (Subsidiary Banks) Act, 1959 , Banking Regulation Act, 1949 etc. on the lines of State Financial Corporations Act. The proposed abolition of the Sick Industrial Companies Act

and formation of National Company Law Tribunal is a welcome measure for reducing the mounting NPAs of the Banks and Financial Institutions.

All these amendments will take some time. In the meantime, the DRTs are using the provisions of Legal Services Authorities Act for the purpose of Lok Adalats, holding of Lok Adalats, for the recovery of the banks and financial institutions may prove as an effective tool of arbitration for adjudication of the disputes between them and their borrowers through the medium of Lok Adalats. As observed earlier, the arbitration clause can also be incorporated in the loan document executed between the bank and the borrower. For the old and existing agreements, a supplementary agreement can be executed between the banks and the borrowers for referring the matter to arbitration for the existing debts. In this way the banks and financial institutions may be able to recover a portion of the huge backlog of NPAs through the arbitration proceedings. The experience of arbitration proceedings for the recovery of the dues of the banks and financial institutions needs to be watched with keen interest. The mode of arbitration has been very successful in adjudication of disputes relating to building and engineering contracts, where the dispute between the parties were of very technical nature. As the recovery of dues of the banks and financial institutions involve a number of technical and commercial actions, it is felt that the mode of arbitration proceedings will also be helpful to the banks and financial institutions in recovery of their dues from the defaulting borrowers.

* This paper was read by Shri G.R. Reddy, Legal Officer at the Seminar on New Challenges in Financial Sector Reforms – Role of Alternate Dispute Resolution (ADR) Practices at Hyderabad conducted by Andhra Pradesh Legal Services Pvt. Ltd.

1. Padmabati Paul vs. Pannalal Paul AIR 1959 Cal 156.
2. Badaria Ramakrisnamma vs. Vattikonda Lakshimbayamma AIR 1958 AP 497.
3. Section 75 relates to the confidentiality and provides that the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclose is necessary for purposes of implementation and enforcement.
4. Section 81 relates to admissibility of evidence in other proceedings. Section 81 provides that the parties shall not rely on or introduce as evidence in arbitral proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings –
   (a) views expressed or suggestions made by the othe party in respect of possible settlement of dispute;
   (b) admissions made by the other party in the course of the conciliation proceedings;
5. Section 25(c) Arbitration and Conciliation Act 1996.
6. Union of India vs. Sohan Singh Sethi (1996) 1 LR 504 (Delhi).
7. Gladwin vs. Chilcote (1841) 9 Dowl 550.
8. AIR 1989 Sc 890.
9. AIR 1992 SC 232.
10. Russel on arbitration 360, 21st edition (1997) by Sutton, Kendali and Gill.
11. Vinayak Balkrishna Samant vs. MTNL (1996) 2 Arb LR402 (BOM).
12. Escort Finance Ltd. vs. Solar Farmachem Ltd. (1996) 2 Arb. LR 414 (Delhi).
13. Per Lord Mansfield CJ in Holmon vs. Johnson.

14. Section 42 Arbitration and Conciliation Act 1996.
15. Loyal Textiles Mills Ltd. vs. Allenberg Cotton Company (1993) 2 Arb LR 6 Madras.
16. (1992) 2 Arb LR 508 Madras.

Is Bank Account 'Property' - an Analysis of The Powers of The Police to Seize Bank Accounts

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Introduction

Property and law are born together, and die together.

Before laws were made there was no property; take away laws, and property ceases.

- Bentham

Every legal system develops rules governing possession and holding of property. It also evolves rules with regard to protection that has to be afforded to property. To achieve these purposes law requires property to be given a proper meaning. The legislature has defined the word 'property' expressly in a few enactments and includes movable and immovable properties. Whenever the legislation is silent, the judiciary has filled in the gaps keeping in view the objectives and scheme of the Act. The judiciary, in the process of filling the gaps, has expanded the meaning of 'property' according to the needs and the changing times. The meaning of property has travelled from 'tangible' to 'intangible' because of the liberal interpretation adopted by the Judiciary to suit the change of times and needs of the society. The changing needs and technology has posed new problems and challenges to the lawmakers as well as the Judiciary.

The issue that arises in this context is whether a bank, account is "property" within the purview of section 102 read with sections 451 and 457 of the Criminal Procedure Code, 1973 in the absence of express mention by the legislators. In other words, should the word "seize" appearing in section 102 can be construed to actual taking of possession of the property or would it be interpreted to be deemed possession of the monies lying in the bank account when the account was seized by the police officer? A majority of the High Courts have taken divergent views on this point. The point of deference has come as some of the High Courts have taken the view that "the police officer has no authority to seize the bank account as it is not a property under section 102 of the Code" and monies lying in the account cannot be actually taken possession of to effect the 'seizure' in terms of the section.

The word 'property' under section 102 of the Criminal Procedure Code, 1973 as interpreted by the various High Courts led to conflict of opinions and nearly for five decades the people of India were left with no option but to toss the coin in air till the Supreme Court delivered its judgement in State of Maharashtra vs. Tapas D. Neogy[1]. In that case the apex court held that bank account of the accused or his relative is a 'property' within the meaning of section 102 of the Code and a police officer in the course of investigation can seize or prohibit the operation of

the said account of such assets have direct links with the commission of the offence which the police office is investigating into. In this limited study an effort has been made to examine and analyse the ratio of the judgement in Tapas D. Neogy's case expanding the meaning of 'property' in the context of the power of the police officer to seize bank account under section 102 of the Code.

Essentials of Section 102 of Criminal Procedure Code, 1973

Before examining the issue, it is appropriate and useful to quote the relevant legal provisions as under :

Section 102. Power of Police Officer to seize certain property :

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a police station, shall forthwith report the seizure to that officer.

(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.

Section 451. Order for custody and disposal of property pending trial in certain cases :

When any property is produced before any Criminal Court during any inquiry or trial, the court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of

Explanation :- For the purposes of this section, "property" includes –

(a) property of 'any kin' or document which is produced before the Court or which is in its custody,
(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence.

Section 457. Procedure by police upon seizure of property –

(1) Whenever the seizure of property by an police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order a he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the

possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) Under section 102 of the Code, a police officer should satisfy before he passes an order for seizure that (i) there must be a property, and (ii) the property must have been found under the circumstances causing suspicion of the commission of any offence. The Police Officer has to report the seizure to the Magistrate concerned, and if the property seized cannot be conveniently transported to the Court, the police officer may give custody thereof to any person on his executing a bond undertaking to produce the properties before the Court as and when required. Section 451 provides for disposal and custody of the property produced before any criminal Court during enquiry or trial. Section 457 provides that, whenever seizure of property by any police officer is reported to a Magistrate under section 102 and such property is no produced before a criminal court during enquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or delivery of such property to the person entitled to possession thereof.

Apparently a bank account could be brought within the meaning of the term 'property' under section 102 of the Code. However, the difficulty is, as pointed out by the Delhi High Court in Ms. Swaran Sabharwal's case[2] that " it is not quiet sure whether monies deposited in a bank account can be seized by means of a prohibitory order under the provisions of section 102 of the Code". On a careful reading of sections 102, 451 and 457, Criminal Procedure Code, 1973 together, it indicates that the word 'seize' used in S. 102, Criminal Procedure Code means "actual taking possession" in pursuance of a legal process. The word 'seize' is not defined in the Code. The ordinary dictionary and natural meaning of the work 'seize' is : 'to lay hold of suddenly or forcibly; to take hold of; to reach and grasp; to clutch; to take possession of by the legal authority'. Looking to the use of the words 'seize' and 'seizure' under sections 102, 451 and 457 of the Code, it appears the word 'seize' denotes 'taking of possession of any property' falling within the scope of the said Section. As the monies lying in the bank account cannot be taken "actual" possession in strict sense of the "seizure" under section 102 of the Code, various High Courts have taken divergent views on this point. Therefore, the question that arises is whether the bank account can be treated as a 'property' within the meaning of section 102 of the Code. In the following paras, views and reasons of various High Courts on this point has been discussed for more clarity.

3. Divergent views of the various High Courts

The Allahabad, Bombay, Karnataka, and Gauhati High Courts have taken the view that the police officer cannot issue prohibitory order under section 102 of the Cr. P.C. seizing the bank account and stalling the operation of the account by the account holder. Whereas the Madras and Punjab and Haryana High Courts have taken the contrary view and held that "the expression "property" would include the money in the bank account of the accused and there cannot be any fetter on the powers of the Police Officer in issuing prohibitory orders from operating the bank account of the accused, particularly, when the Police Officer reaches the conclusion that the amount in the bank is the outcome of commission of an offence by the accused. Different High Courts in the country have divergent views in this regard.

3.1 Bank account is not a 'property'

In the case of M/s. Purhanchai Road Service, Gauhati vs. The State[3], a learned single Judge of the Gauhati High Court examined the provisions of Section 102 of the Criminal Procedure Code and the validity of an order by a Police Officer, prohibiting the bank from paying amount to the accused from his account. The learned Judge came to the conclusion that the word 'seize' used in Section 102, Criminal Procedure Code means actual taking possession in pursuance of a legal process and, therefore, in exercise of the said power, a bank cannot be prohibited from paying amount out of the account of the accused to the accused nor can the accused be prohibited from taking away any property from the locker, as such an order would not be a 'seizure' within the meaning of Section 102 of the Criminal Procedure Code. The learned single Judge agreed with the view taken by Allahabad High Court in the case of Textile Traders Syndicate Ltd. Bulandshahr vs. The State of U.P.[4] The Allahabad High Court in the case held that "once money passes on from the accused to some other person or to the bank, money itself becomes unidentifiable and, therefore, there cannot be any question of seizure of the same by the Police Officer".

Karnataka High Court (1994)

In the case of M/s. Malnad Construction Co., Shimoga vs. State of Karnataka,[5] a learned single Judge of Karnataka High Court examined the provisions of Section 102 of the Criminal Procedure Code and relying upon the Gauhati High Court's decision, came to hold that 'seizure' in Section 102 would mean taking actual physical possession of the property and a prohibitory order to the banker of the accused not to operate the account is not contemplated under the Code and consequently, the police has no power to issue such order.

Thus the High Courts of Karnataka, Allhabad and Gauhati have taken the view that the provisions of Section 102 of the Criminal Procedure Code cannot be invoked by the Police Officer in course of investigation to issue any prohibitory order to the banker or the accused from operating the bank account. On a careful examination of the above judgements, it may be submitted that all the Courts above have taken the view that seizure means 'actual taking of possession' and since monies deposited in the bank account cannot be identifiable there cannot be any seizure of the account and therefore, under section 102 of the Code police officer cannot issue prohibitory order stopping the operation of the account.

3.2 Delhi High Court-Divergent views

In the case of Ms. Swaran Sabharwal vs. Commissioner of Police[6], reported in, a Division Bench of Delhi High Court examined the question whether bank account can be held to be 'property' within the meaning of Section 102 of the Cr. P.C. In the said case, proceeds realised by sale of official secrets were deposited by the accused in his wife's account. The Court in that case came to hold that it is not quite sure whether monies deposited in a bank account can be seized by means of a prohibitory order under the provisions of Section 102 but even assuming that a bank account is a 'property' within the meaning of Section 102 but even assuming that a bank account is a 'property' within the meaning of Section 102 of the Code of Criminal Procedure, it must be further satisfied that the property has been found under circumstances which create the suspicion of the commission of an offence. But in that case it is not the discovery of the property that has

created suspicion of commission of an offence but on the other hand the discovery of the bank account is a sequel to the discovery of commission of offence inasmuch as the police suspected that some of the proceeds realised by the sale of official secrets have been passed on to the bank account of the wife of the accused. Therefore, the Court was of the opinion provisions of Section 102 cannot be invoked.

However, the same Delhi High Court in P.K. Parmar vs. Union of India[7], considered the power of police officer under Section 102 of the Criminal Procedure Code, in connection with the fraudulent acquisition of properties and opening of fictitious bank accounts and withdrawal of huge amounts as subsidy from Government by producing bogus documents by the accused. The learned Judge took note of the earlier decision of Delhi High Court in Ms. Swaran Sabharwal vs. Commissioner of Police,[8] and analysed the provisions of Section 102 of the Criminal Procedure Code. During investigation in that case, the prosecution came to know that without actually manufacturing phosphate and fertilisers, the accused withdrew as much as Rs. 3.39 crores as subsidy from the Government of India by producing bogus documents. The Court ultimately came to the conclusion that the recovery of assets in the bank links *prima facie* with the commission of various offences with which they have been charged by the CBI and, therefore, the police officer could issue directions to various banks/financial institutions freezing the accounts of the accused. The learned Judge in the aforesaid case has really considered the amount of money which the accused is alleged to have swindled by producing bogus documents as property which prompted him to hold that the power under Section 102, Criminal Procedure Code can be exercised. It is submitted that the Hon'ble Delhi High Court has not gone into the concept of seizure in the present case but it had relief more on the second essential condition of section 102 of the Code that the property found must be linked to the commission of the offence.

3.3 Bank account is 'Property'

Madras High Court (1988)

In Bharat Overseas Bank vs. Minu Publication,[9] a learned single Judge of the Madras High Court considered the same question and came to the conclusion that the expression 'property' would include the money in the bank account of the accused and there cannot be any fetter on the powers of the police officer in issuing Prohibitory orders against operating the bank account of the accused when the police officer reaches the conclusion that the amount in the bank is the outcome of commission of an offence by the accused. **The Court considered the fact as to how in modern days, commission of white collar crimes and bank frauds are very much on the increase and banking facilities have been extended to the remotest rural areas and, therefore the expression 'property' may not be interpreted in a manner so as to exclude the money in a bank which in turn would have the effect of placing legal hurdles, in the process of investigation into the crimes.** According to the learned Judge, such literal interpretation of the expression 'property' could not have been the intent of the framers of the Criminal Procedure Code. The learned Judge elaborating the object behind investing the police with powers of seizure has observed[10].

> "It would now be useful to refer to the object behind investing the police with powers of seizure. Seizure and production in Court of any property, including those regarding which

> an offence appears to have been committed or which appears to have been used for the commission of any offence or any other property will have a two-fold effect. Production of the above property may be necessary as evidence of the commission of the crime. Seizure may also have to be necessary, in order to preserve the property, for the purpose of enabling the Court, to pass suitable orders under S. 452 of the Criminal Procedure Code at the conclusion of the trial. This order would include destruction of the property, confiscation of the property or delivery of the property to any person claiming to be entitled to possession thereto. It cannot be contended that the concept of restitution of property to the victim of a crime, is totally alien to the Criminal Procedure Code. No doubt, the primary object of prosecution is punitive. However, Criminal Procedure Code, does contain several provisions, which seek to re-imburse or compensate victims of crime, or bring about restoration of property or its restitution. As S. 452, Criminal Procedure Code, does contain several provisions, which seek to re-imburse or compensate victims of crime, or bring about restoration of property or its restitution. As S. 452, Criminal Procedure Code itself indicates, one of the modes of disposing of property at the conclusion of the trial, is ordering their return to the person entitled to possession thereto. Even interim custody of property under Ss. 451 and 457, Criminal Procedure Code, recognises the rights of the person entitled to the possession of the properties. An innocent purchaser for value is sought to be re-imbursed by S. 453, Criminal Procedure Code Restoration of immovable property under certain circumstances, is dealt with under S. 456, Criminal Procedure Code Even, monetary compensation to victims of crime or any bona fide purchaser of property, is provided for under S. 357, Criminal Procedure Code Wherein when a Court while convicting the accused imposes fine, the whole or any part of the fine, if recovered, may be ordered to be paid as compensation to any person, for any loss or injury, caused by the offence or to any bona fide purchaser of any property, after the property is restored to the possession of the person entitled thereto. This two fold object of investing the police with the powers of seizure, have to be borne in mind, while setting this legal issues.

This Judgement of the learned single Judge of the Madras High Court was followed in a later decision in the case of Bharat Overseas Bank vs. Mrs. Prema Ramalingam,[11] wherein the learned Judge agreeing with Padmini Jesudurai, J. in Bharat Overseas Bank's case came to hold that money in a bank account is 'property' within the meaning of Section 102 of the Criminal Procedure Code, which could be seized by a prohibitory order.

In the case of Dr. Gurcharan Singh vs. The State of Punjab,[12] a Division Bench of the Punjab & Haryana Court differing with the view taken by the Allahabad High Court in Textile Traders Syndicate Ltd., vs. The State of U.P.[13] came to hold that the bank account would be 'property' and as such would be capable of being seized under Section 102 of the Code of Criminal Procedure.

4. Supreme Court on Expanding the Meaning of 'Property' (1999)

The Hon'ble Supreme Court in State of Maharashtra vs. Tapas D. Neogy[14] has settled the unselled position of law on this point in 1999 nearly after four decades. In the year 1969 the Allhabad High Court has held that bank account is not a property under section 102 of Criminal Procedure Code. The brief facts of the case are that the CBI, ACB, Mumbai registered FIR

against the Tapas D. Neogy and others under sections 120B, 467, 468, 471 and 420 IPC and section 13(2) r/w section 13(1) (d) of the Prevention of Corruption Act, 1988. The accused was an Architect and Town Planner in the Deptt. of Town Planning of the Union Territory of Daman and Diu. He was charged with forgery of map and issuing false certificates indicating that the part of land in Diu fell within the industrial zone. On account of such act the land prices shot up by Rs. 100 to 110 per square meter to Rs. 800/- to Rs. 1600/- per square meter, and in the process, accused persons caused pecuniary advantage to be gained by the landowners. The investigating officer issued instructions to the Managers of different banks not to allow the accounts to be operated upon. The mother of the respondent then filed an application before the Additional Chief Metropolitan Magistrate under section 457 of Criminal Procedure Code to allow her to operate the bank account and for return of the documents and articles seized, claiming that they belonged to her. The Magistrate granted relief in respect of the locker in question but refused to allow the mother to operate the bank account. The matter was carried to the High Court which held that the bank account of an accused or any relation of the accused cannot be held to be "property" within the meaning of section 102 of Criminal Procedure Code and, therefore, the investigating officer had no powers either to seize the said bank account or to issue any order prohibiting the operation of the bank account. The State went in appeal to the Supreme Court.

The Hon'ble Supreme Court showing concern for the long and uncertain issue dragged on for decades by the various High Courts has observed

> "having considered the divergent views taken by different High Courts with regard to the power of seizure under Section 102 of the Code of Criminal Procedure, and whether the bank account can be held to be 'property' within the meaning of said Section 102(1), we see no justification to give any narrow interpretation to the provisions of the Criminal Procedure Code".

The Division Bench comprising of Hon'ble Judge Pattanaik and N. Santosh Hegde, JJ stressed for the need to expand the meaning of the 'property' in the light of the rampant growth in the corruption levels in the government offices. His Lordship Pattanaik J. speaking for himself and on behalf of Justice N. Santosh Hegde, observed.

> It is well known that corruption in public offices has become so rampant that it has become difficult to cope up with the same. Then again the time consumed by the Courts in concluding the trials is another factor which should be borne in mind in interpreting the provisions of Section 102 of the Criminal Procedure Code and the underlying object engrafted therein, inasmuch as if there can be no order of seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be the outcome of the illegal gratification, could be withdrawn by the accused and the Courts would be powerless to get the said money which has any direct link with the commission of the offence committed by the accused as a public officer. <u>We are, therefore, persuaded to take the view that the bank account of the accused or any of this relation is 'property' within the meaning of Section 102 of the Criminal Procedure Code</u> and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is

investigation into.

> The contrary view expressed by Karnataka, Gauhati and Allahabad High Courts, does not represent the correct law (emphasis is ours)

The meaning of the term property has been subjected to a sea change in the recent past. To encounter fraudulent activities many legislations have been brought into force by the legislature. For instance, Prevention of Corruption Act, 1988, prevention of Benami Transactions Act, 1988, FEMA etc. However, there is no much success for the legislators in prevention of while collar crimes. In this connection, it is submitted that the Supreme Court has focussed much on the objectives of the legislation rather than strict meanings of the phrases used in the Code while interpreting section 102. More so, the Supreme Court has relied on the objectives engrafted in Prevention of Corruption Act to interpret the ambiguous phrase under Section 102 of Criminal Procedure Code. It is submitted that Supreme Court could have clarified the meaning of "seizure" in the context of seizing monies lying in the bank account. Instead of theorizing the concept the Hon'ble Court placed reliance on objectives of the Prevention of Corruption Act to interpret meaning of property under section 102 of Criminal Procedure Code. This provides ample scope for the High Courts in future to distinguish the present case on the ground that the Police Officer cannot issue prohibitory orders under Section 102 of the Code, where the accused was not charged under Prevention of Corruption Act, therefore the Supreme Court's decision is not applicable to the cases where the accused is not a public servant. It is not out of place to recall the observations of the Justice Pattaniak wherein his Lordship said in categorical terms that

> The interpretation given by us in respect of the power of seizure under Section 102 of the Criminal Procedure Code is in accordance with the intention of the legislature engrafted in Section 16 of the Prevention of Corruption Act referred to above.

Further the Supreme Court has not dealt comprehensively on the issue raised by the Allahabad High Court, wherein the High Court has reached the opinion that the the word 'seizure' was used in section 550 in the sense above mentioned it is obvious that it could only mean the act of taking actual physical possession of the property capable of being so possessed." Explaining the reason why the bank amount cannot be seized the Court observed that the bank really became a debtor of the applicant to that extent. It was not necessary for it to keep any money always in hand in anticipation of any demand to be made by the applicant. When the applicant actually made a demand it could procure the necessary amount from anywhere and pay it to the applicant. In the circumstances it cannot be said that there was any 'property' with the bank of which actual physical possession could be taken. Section 550 does not appear to contemplate a police officer prohibiting the payment of a debt by a debtor to the accused person. It that can be done it may create unnecessary complications. For instance, if after stealing Rs. 1,000/- an accused person lends it on a mortgage or a bond to some one who borrows it for saving his property from being sold in execution of a decree. Can the police officer who is investigating the case of theft direct the debtor that he should not pay the money for the satisfaction of his decree and allow his property to be sold in execution of the decree? As long as the money is in the possession of the thief and capable of seizure it may be open to the police officer to seize it on the ground that it was or was suspected to be stolen property but once it passes into the hands of the debtor and the money becomes unidentifiable there can be no question of its being seized by the police officer.[15]

The Hon'ble Supreme Court could have clarified this point while deliver the decision instead of interpreting the phrases under section 102 of the Cr. P.C. in the backdrop of the Prevention of Corruption Act.[16]

In our view by applying the similar analogy where electric energy which is indefinite and unidentifiable in consumption but still controlled by a switch in a power station, monies deposited in a bank account of unidentifiable in specie of the accused but by seizing the bank account by actually taking into possession of the pass book the transaction of power of the holder to deal with the money can be stopped. Thus, by actually taking possession of holder to deal with the money can be stopped. Thus, by actually taking possession of pass book, without diluting the concept of 'seizure', bank account can be seized within the meaning of Section 102 of the Code.

5. Conclusion

Though there is a chapter in the Penal Code exclusively to deal with offences against property, the concept of property was left undefined probably in the hope that the judiciary would supply it with proper meaning and content in accordance with the needs of the time. In fact, an analysis of the case law produced by the judiciary would inevitably lead one to the conclusion that the judiciary has lived upto the expectations of the framers of the Code. Not only did courts give meaning to the concept but also by its flexible interpretation enclosed a large area of property interests within the fold of the concept of property.

1. (1999) 7 SCC 685.
2. 1998 Cri LJ 241.
3. 1991 Cri LJ 2798.
4. AIR 1960 All 405; 1960 Cri LJ 871.
5. 1994 Cri LJ 645.
6. 1998 Cri LJ 241.
7. 1992 Cri LJ 2499.
8. 1988 Cri LJ 241.
9. 1988 Mad LW (Cri) 106.
10. Supra at para 11. 11. 1991 Mad LW (Cri) 358.
11. 1991 Mad LW (Cri) 358.

12 (1978) 80 Punj LR 514.

13. AIR 1960 all 405; 1980 Cri LJ 871.
14. 1999 Cr. LJ 405.

15 AIR 1960 ALL 405 at para 13-16.

16 The Hon's Supreme Court while deciding the issue whether electric energy which is intangible is a movable property and can be constituted as 'goods' for the purpose of imposing sales tax. It was held that the term "movable property" when considered with reference to "goods" as defined for "the purpose of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of woos or a book, it cannot cease be moved or touched like, for instance, a piece of wood or a book, it cannot cease tothe movable property. It can be

transmitted, transferred, delivered, stored, possessed etc. in the same way as another movable property."

In Holmes's day, the churches as well as the courts attempted to control human conduct. The courts dealt with crimes that had been committed; the churches' role was preventive : They sought to strengthen a man's conscience so that he would not commit any. But with the decline of religion the law has moved to take over the preventive as well as the punishing function. A man must not only avoid the act that the crowd considers criminal; he must avoid the opportunity, or even the appearance of the opportunity; to commit such an act. Without a conscience it is only logical to assume that he will succumb to temptations. Society, therefore, now tries to legislate an end to temptation.

— AUCHINCLOSS, Louis S., " When Interests Conflict, "The New York Times, May 22, 1978, p. A21, cols. 1 and 2

Effect of Repealing and Amending Acts

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1. The Repealing and Amending Act,2002 has repealed a large number of statutes including the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1989, which had inserted, inter alia Chapter XVII[1] (Sections 138 to 142)in the Negotiable Instruments Act, 1881 dealing with penalty for bouncing of cheques. Section 4 of the Repealing and Amending Act has a saving clause[2] which provides that the repeal by this Act of any enactment shall not affect any other enactment. In this context, this article examines the effect of repealing statutes on the amendments carried out by the repealed Acts in other enactments.

2. Object of Repealing and Amending Acts

The Legislature enacts Repealing and Amending Acts from time to time in order to repeal enactments which have ceased to be in force or have become obsolete or the retention whereof as separate Acts is unnecessary. The principal object of such Acts is to "excise dead matter, prune off superfluities and reject clearly inconsistent enactments"[3]. Repealing and Amending Act may thus be regarded as a "legislative scavenger".

3. Effect of repeal

At common law, the effect of repealing a statute is to obliterate it as completely as if it had never been passed. However, transactions that have been completed, rights that have been acquired and penalties that have been imposed while a statute is in force, are not (in the absence of an express provision to the contrary) affected by the mere fact of the statute having ceased to be in force. The dicta in Surtes v. Ellison[4] and Ray v. Goodwin[5] is that where an Act of Parliament is repealed the effect of the repeal is that it is to be taken as if the statute had never been enacted, except as to transactions begun or prosecuted while it was an existing law. Repeal connotes

abrogation or obliteration of a statute by another. Repeal is not a mere matter of form but one of substance, depending upon the intention of the Legislature. If the intention indicated expressly or by necessary implication in the subsequent statute was to abrogate or wipe off the former enactment wholly or in part, then it would be a case of total or protanto repeal. If the intention was merely to modify the former enactment by engrafting an exception or by superadding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to repeal[6].

4. Application of General Clauses Act

Section 6 of the General Clauses Act, 1897 saves the rights and liabilities which have accrued under the repealed provisions. There may also be special savings in Special Acts dealing with the effect of repeal[7]. Section 6 does not save the provisions of the repealed Act as such. When an Act is repealed, it must be considered as if it had never existed, except with reference to such parts as are saved by the repealing statute[8]. The case of the repeal of the amending Act directly falls within the four corners of S.6A[9] of the General Clauses Act.

5. Repeal of the amending Act

Section 6A of the General Clauses Act reads as under:

> "6A. **Repeal of Act making textual amendment in Act or Regulation -** Where any Central Act or Regulation made after the commencement of this Act repeals any enactment by which the text of any Central Act or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal".

In the class of cases contemplated by Section 6A, the function of the incorporating legislation is taken almost wholly as the function of effecting the incorporation and when that function is accomplished, the legislation dies as it were, a natural death which is formally effected by its repeal[10] Textual amendments become a part of the amended Act, and the repeal of the amending Act does not affect the textual amendments which are so incorporated in the principal Act[11].

6. Impact of the 2001 Act

In conclusion, the repeal of a statute does not repeal such portions of the statute as have been already incorporated into another statute. The Act directing incorporation may be repealed, but the incorporated section or sections still operate in the former Act[12]. Section 4 of the Repealing and Amending Act, 2001 read with Section 6A of the General Clauses Act makes it clear that the repealing of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 shall not affect the continuance of Chapter XVII of the Negotiable Instruments Act, 1881.

Referemces :

1. This Chapter was inserted in the Negotiable Instruments Act to enhance the acceptability of cheques in

settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer.

2. "Section 4. **Savings -** The repeal by this Act of any enactment shall not affect any other enactment in which the repealed enactment has been applied, incorporated or referred to; and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or an release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing; nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognized or derived by, in or from any enactment hereby repealed;nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force".

3. AIR 1975 SC 155 (158)

4. Surtes v. Ellison (1829)9 B C 750, 752)

5. Ray v. Goodwin (31 RR 500)

6. ndia Tobacco Co., Ltd., v. Commercial Tax Officer, AIR 1975 SC 155.

7. AIR 1958 Bom.507 (at p.509).

8. AIR 1986 SC 1011.

9. AIR 1960 SC 89 (91, 92).

10. AIR 1962 SC 316 (334)

11. AIR 1960 Punj 375 (376, 377)

12. AIR 1951 Cal.97 (99)

I see neither bravery nor sacrifice in destroing life or property for offience or defence
-Mahatma Gandhi

JUDGEMENTS SECTION

Recent Judgements Relevant to Bankers

Joseph Raj
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I. Union of India & Another vs. Delhi High Court Bar Association & Others – Civil Appeal No.4679 of 1995 – JT 2002 (3) SC 131; (2002) 4 SCC 275

Principle

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is a valid piece of

legislation and not violative of Article 14 of the Constitution of India.

Facts

For speedy recovery of the non-performing assets due to the Banks and Financial Institutions, the Parliament enacted the said Act which was preceded by an ordinance. The Act inter-alia, provides the procedures for the establishment of Tribunals and Appellate Tribunals. The Tribunals have been given jurisdiction, powers and authority to entertain and decide applications from the Banks and financial institutions for recovery of their non-performing assets. The procedure required to be followed is also provided in the Act.

The constitutional validity of the said Act was challenged before the Delhi High Court on the ground that the Act is unreasonable and violative of Article 14 of the Constitution of India and the same is beyond the legislative competence of the Parliament.

The High Court of Delhi (in Delhi High Court Bar Association and Another Vs Union of India and Others, AIR 1995 Delhi 323) held that the impugned Act was unconstitutional as it erodes the independence of judiciary and was irrational, discriminatory, unreasonable, arbitrary and was hit by Article 14 of the Constitution of India. Against the said Judgement this appeal was preferred. During the pendency of this appeal Guwahati High Court was also required to consider the validity of the Act and came to the conculsuion that the Act had violated the basic features of the Constitution of India and was void.

Observations of the Supreme Court

The Supreme Court interalia observed that Entry 45 of List 1 would cover the types of legislation now enacted, which relates to "Banking". Banking Operations would interalia include accepting of loans and deposits, granting of loans and recovery of the debts due to the bank. Recovery of dues is an essential function of any banking institution. In exercise of its legislative power relating to banking, the Parliament can provide the mechanism by which monies due to the banks and financial Institutions can be recovered. The preamble of the Act provides "for expeditious adjudication and recovery of debts, due to bank's and financial institutions and for matters connected therewith or incidental thereto". This would squarely fall within the ambit of entry 45 of list I. The term "Banking" in entry 45 of List I would mean legislation regarding all aspects of banking including ancillary or subsidiary matters relating to banking. Setting up of Tribunals for recovery of non-performing assets would clearly fall under the said entry. During the pendency of the appeal the Act has been amended and whatever lacunae or infirmities existed have been removed by the Amending Act and with the framing of more Rules.

Decision

The Recovery of Debts Due to Banks and Financial Institutions Act 1993 is a valid piece of legislation and is not violative of Article 14 of the Constitution of India. All writ petitions or Appeals filed challenging the validity of the Act or some provisions of the Act are dismissed.

II. Decision of the National Consumer Disputes Redressal Commission - Reserve Bank of

India vs. T. A. Abraham - Revision Petition No. 839 of 2001 in Appeal No.845 of 1999 of the State Commission, Kerala

Principle

Mere asking for a service does not amount to rendition of service and consequently there could be no question of rendition of service. Delay in sanctioning loan cannot amount to deficiency in rendering of service.

Facts of the case

On 26th Sept. 1990 the respondent had made an application to the petitioner Bank to know whether he is eligible to avail of housing loan from the Bank under the provisions of the RBI Employees' Housing Loans Rules, 1960. In terms of the provisions of the Bank's Housing Loan Rules, 1960 the employee of the Bank is eligible for the loan if either the employee or any member of his family is not having any residential accommodation at the place where the employee intends to acquire the residential accommodation. As his wife is having a house in her name, the respondent was advised that he will be eligible to housing loan after he disposes of the house owned by his wife and production of documentary evidence for having sold the house and using the sale proceeds to the new property proposed to be acquired by him. However, the Housing Loan Rules, 1960 have been revised comprehensively and substituted by a new set of Rules to be called RBI Employees' Housing Loan Rules, 1995. In terms of the new Rules the employees of the Bank are eligible for loan though any member of the family is having residential accommodation at the place where the employee intends to acquire the residential accommodation. Accordingly, the Bank had advised the respondent that his request for sanction of housing loan would be considered on merits under the revised Rules if he applies for loan. Thereafter, on 16th April 1998 the respondent had submitted the application for loan to acquire a residential plot of land and the eligible amount sanctioned was disbursed to him in June 1998. The Bank had taken hardly two months time for legal scrutiny of the documents submitted by the Respondent and sanctioning/disbursing the loan to him.

The Respondent had thereafter, filed a writ petition under Article 226 of the Constitution of India before the High Court of Kerala to issue a writ of mandamus or any other appropriate writ, direction or order directing the Bank to assess the loss sustained by him by way of income tax deduction in case the Respondent would have been granted loan for the purchase of house at the time of permission granted by the Bank, which was dismissed by the Court vide order dated 15th July 1997. The Respondent had then filed a consumer complaint before the District Consumer Disputes Redressal Forum, Thiruvananthapuram to get Rs.1 lakhs from the Bank as compensation for delay in sanctioning the loan and pecuniary loss and hardship caused to him which was also dismissed by the Forum on the ground that the complainant was not a consumer as defined in the Consumer Protection Act, 1986.

Against the said order, the respondent had filed an appeal before the Kerala State Consumer Disputes Redressal Forum to set aside the order passed by the District Forum and to get compensation. The State Commission vide its order dated 7th November 2001 held that the appellant is a consumer under section 2(1)(o) read with section 2(1)(b) of the Consumer

Protection Act, 1986 and set aside the order passed by the District Forum and remanded it the matter to the District Forum for considering it on merits.

Against the order passed by the State Commission the Bank had filed the revision petition before the National Consumer Disputes Redressal Commission on the following grounds :-

(a) The State Commission had acted erroneously and exercised its powers illegally and in material irregularity.

(b) The State Commission had erred in holding that the respondent is a Consumer under section 2(1)(o) and 2(1)(d)(ii) of the Consumer Protection Act.

(c) The State Commission had erred in holding that availing of housing loan by an employee from the employer is within the meaning of section 2(1)(o) of the Consumer Protection Act as the said definition defines service to include the provisions of facilities in connection with banking, financing etc. and also states that 'service' means service of any description which is made available to potential users. As far as the grant of housing loans by the employer to the employees are concerned, the employer is not rendering any service to the potential users. The employer is providing a facility limited to its employees as a benevolent employer and not by way of rendering any services to the potential uses.

(d) The State Commission has failed to appreciate the order passed by the National Commission in Virendra Prasad & Others vs. RBI (1991 CPR 661 NC) wherein it was held that discharge of statutory functions by the Reserve Bank of India under FERA cannot be said to be amounting to rendering of any banking service as there is no element of hiring of service.

(e) The State commission has filed to appreciate that the Respondent is not the consumer as defined in section 2(1)(d) of the Act as the respondent is an employee of the petitioner. The respondent was granted the loan subject to the terms and conditions of the RBI Employees' Housing Loan Rules, 1995. The petitioner Bank acts as a banker to the Government and the banks only and not to its employees and therefore, the petitioner does not fall under section 2(1)(o) of the Consumer Protection Act.

(f) The definition of service contained in 2(1)(o) of the Consumer Protection Act clearly shows that only those services fall within the purview of the Act which are made available to potential users. So far the grant of housing loan by the petitioner to its employees are concerned the petitioner is not rendering any service to the potential users. The petitioner is only providing a facility confined to its employees as a benevolent employer and not by way of rendering any service to the potential uses. These benefits is granted by the petitioner to its employee in view of the employer-employee relationship and such relationship does not in any way render an employee as a consumer of the Bank as defined in section 2(1)(o) read with the section 2(1)(d) of the Act.

Observations of the National Commission

District Forum had rightly dismissed the complaint as not maintainable as mere application for

getting loan could not give rise to consumer dispute. Mere asking for a service does not amount to rendition of service and consequently there is no question of rendition of service. The State Commission had reversed the findings and remanded the case back to the District Forum for fresh consideration after giving opportunity to both the parties to appear. Delay in sanctioning loan cannot amount to deficiency in rendering of service. The decision of the State Commission cannot be sustained.

Decision

The National Commission set aside the decision of the State Commission and the decision of District Forum dismissing the complaint is upheld.

III. Syndicate Bank vs. Chamundi Industries and Others Writ Petition No. 22505 of 1998 – AIR 2002 Kar 56

Principle

Debt Recovery Tribunals have power to decide claims based on different courses of action. Single application for recovery of debt due under two transactions is maintainable.

Facts

1st Respondent in a Partnership Firm and Respondent Nos. 2 & 3 are its partners. The Bank had sanctioned a loan of Rs. 2,45,000/- on 12th July 1982 and also overdraft facility upto the limit of Rs. 1,00,000/- on 25th February 1995. The Respondents had executed the required documents in favour of the Bank. As the Respondents were irregular in making payments, the Bank had filed an application for recovery of Rs. 12,90,934/- with cost and interest. It was argued on behalf of the Respondents that the application is liable to be dismissed for want of jurisdiction of the Tribunal as the bank had unjustly combined two distinct loans with a view to avoid recourse to the normal Courts of law. However, the Respondents had admitted the transactions. The tribunal is of the view that one transaction relates to a loan and another relates to over draft facility, which are covered with independent documents unconnected with each other and therefore the application filed by the Bank for recovery of amount due under the above mentioned transactions are based on more than on single cause of action in single application is not maintainable in terms of Rule 10 of the Debts Recovery Tribunal (Procedure) Rules, 1993. The application was dismissed accordingly. Aggrieved by the order of the Tribunal the Appellant has filed this writ petition.

Observations of the Court

The consequences of filing an application seeking for relief or reliefs based on more than single cause of action is not provided under the Rules. However, order VII Rule 10 of CPC provides for return of the plaint if the court has no jurisdiction to entertain the suit. But under the Rules, where an application is filed seeking relief based on more than single cause of action no consequences are provided. Therefore, in the absence of providing consequences in case the application is filed on more than a single cause of action the Rules is directory and not

mandatory. Further Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act does not prohibit of filing an application by the Bank seeking relief or reliefs based on causes of action. However, Rule 10 of the Debt Recovery Tribunal (Procedure) Rules prohibits seeking relief or reliefs based on more than single cause of action. If the Rules are in consistent with the provisions of the Act, provisions of the Act prevails over the Rules. Therefore to the extent of in consistency Section 19 of the Act prevails over the Rules. Under Section 19 of the Act, the Tribunal has the power to adjudicate the application filed by the Bank and also the set off and counter claim pleaded by the debtor which are based on the cause of action pleaded by the Bank. Hence, the Tribunal has the power to adjudicate on the causes of action pleaded by the Bank and the debtors on one application filed by the bank.

Decision

The order passed by the Tribunal is set aside and the matter is remitted to the Tribunal to decide on merits.

IV. Suganthi Suresh Kumar vs. Jagdeeshan – Criminal Appeal Nos.65 and 66 of 2002, JT 2002(1) SC 220

Principle

Sentence for the offence should be of such nature as to give proper effect of the object of the legislation.

Facts

The Respondent was found guilty by the Magistrate's Court under Section 138 of the Negotiable Instrument Act, 1881 for the offence of issuing two sets of cheques for a sum totalling Rs.4,40,000/, which were dishonoured by the drawee bank. The trial court convicted him of the aforesaid offence but sentenced him only to undergo imprisonment till rising of the Court and Pay a fine of Rs.5000/- in both cases. The Appellant preferred two revisions before the High Court on the premise that the sentence was grossly inadequate. However, the High Court declined to interfere with the sentence passed by the Magistrate Court and dismissed both the revisions. Hence, this appeal.

Observations of the Court

The total amount of Rs.4,50,000/- representing the two sets of cheques had not been paid during the pendency of the cases before the Magistrate Court or revision before the High Court or appeal before the Supreme Court. If the amount had been paid, there would have been justification for imposing a flee-bite sentence as had been chosen by the trial court. The sentence for the offence under Section 138 of the Negotiable Instruments Act should be of such a nature as to give proper effect to the object of the legislation. The very object of enactment of provisions like Section 138 of the Act would stand defeated if the sentence of this nature is passed by the trial court. The civil suit and attachment of all properties of the respondent is not a ground for lessening the gravity of the offence or to impose a minor sentence.

Decision

The Court set-aside the sentence passed by the Magistrate Court and remitted the case to the Magistrate Court for passing appropriate sentence after hearing both sides.

V. M/s. M.M.T.C. Ltd. And another vs. M/s. Medchl Chemicals and Pharma (P) Ltd., and Anr. Criminal Appeal Nos. 1173 and 1174 of 2001 AIR 2002 SC 182

Principle

The complaint under Section 138 of the Negotiable Instruments Act, 1881 signed and presented by the person, who is neither an authorised agent nor a person empowered under the Articles of Association or Resolution of the Board of a company to do so is not a ground to quash the complaint. It is not necessary to allege specifically in the complaint that there was a subsisting liability. If the cheque is dishonoured by reason that the payment of the cheque has been stopped by the drawer, it is maintainable under Section 138 of the Negotiable Instruments Act, 1881.

Facts

Two cheques issued by the first Respondent in favour of the Appellant were returned with the endorsement "Payment stopped by drawer" when presented for payment. As the amounts of the cheque were not paid, the Appellants had lodged two complaints before the Magistrate Court through one Shri Laxman Goel, the Manager of the Regional Office of the Appellant company. The Respondents filed a petition before the High Court for quashing the complaints on the grounds, among others, that Shri Laxman Goel is not competant to file complaints on behalf of the company. By the impugned order of the High Court, both the complaints had been quashed and held that the complaints filed by Shri Laxman Goel is not maintainable as he is not an authorised person to file the complaint. Complaint under Section 138 of the Negotiable Instruments Act, could only be filed by a person who is duly authorised to file. Authorisation must be on the date when the complaint is filed and a subsequent authorisation does not validate the complaint. Hence, taking cognizance of a complaint filed by a person who is not authorised to file the same is legally not acceptable. Aggrieved by the order and judgement of the High Court, the Appellants have filed this appeal.

Observations of the Court

Section 142 of the Negotiable Instruments Act, 1881 provides that a complaint under Section 138 can be made by the payee or the holder in due course of the said cheque. This criteria is satisfied as the complaint has been filed in the name and on behalf of the Appellant Company. By virtue of Section 139 of the Negotiable Instruments Act, the Court has to draw a presumption that the holder of the cheque received the cheque for discharge of a debt or liability until the contrary is proved. Hence, it is not necessary to allege specifically in the complaint that there was a subsisting liability. The burden of proving the same rests on the Respondents. It is the burden of the accused to show that the 'stop payment' instructions were not issued because of insufficiency or paucity of funds. If the accused shows that there was a sufficient funds in his

account at the time of presentation of the cheque for encashment and that the stop payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of the cheque for encashment, then Section 138 of the Negotiable Instruments Act would not be attracted.

Decision

Impugned order of the High Court is set aside. The Magistrate Court was directed to proceed with the complaints in accordance with the law.

VI. Veera Exports vs. Kalavathy AIR 2002 SC 38

Principle

A cheque can be made valid by alteration of dates. Alteration in the date would give fresh life for another six months. It is always open to a drawer to voluntarily re-validate a negotiable instrument, including cheque.

Facts

The Respondent had issued 8 cheques to the Appellants for a sum totalling Rs. 4 lakhs. The cheques were dishonoured when presented for payment. The fact of dishonour was brought to the notice of the Respondent. The Respondent had changed the date of the cheques from 1995 to 1996. The cheques were again dishonoured when presented for payment. The Appellant had filed a complaint under Section 138 of the Negotiable Instruments Act. The Respondent filed a petition before the High Court of Madras to quash the complaint filed by the Appellant. The Respondent took a stand among others that she had been forced to change the dates against her will. By an impugned order dated 24th November 2000 the High Court had quashed the complaint and held that in law, a cheque which has become invalid because of the expiry of the stipulated period could not be made valid by alteration of dates. Aggrieved by the said order the Appellant had filed the present appeal.

Observations of the Court

There is no provision in the Negotiable Instruments Act or in any other law which stipulates that a drawer of a negotiable instrument cannot revalidate it. It is always open to a drawer to voluntarily re-validate a negotiable instrument, including a cheque. Whether the alteration in the date was not made voluntarily was a question of fact, which will have to be established on evidence during trial. The High Court could not have quashed the complaint merely on the basis of an assertion of the Respondent that she had been forced to change the dates against her will.

Decision

The order passed by the High Court is set-aside. The petition filed by the Respondent is dismissed. The trial court can proceed with the complaint in accordance with the law.

VII. In the High Court of Karnataka – Writ Petition No.7357 of 1993 – Shri A.M. Sugunasundaram vs. Syndicate Bank, 2002-I-LLJ 131 (HC)

Failure/refusal to supply preliminary enquiry report to the delinquent officer for cross examination of the Investigating Officer would constitute denial of reasonable opportunity. The right to cross examine the management witness is a valuable right of the delinquent officer and that right cannot be effectively exercised without the assistance of relevant documents and if those documents are not supplied, that would be an infraction of the Rules of Natural Justice.

VIII. In the High Court of Kerala O.P.No.1771 of 1993 Philipose Vs State Bank of Hyderabad, 2002 – I – LLJ 148(HC)

Facts

The Petitioner had retired from the services of the 1st Respondent after completing 40 years of service on attaining the age of superannuation on 7th May 1981. However, considering his efficiency he was given 5 years extension and retired finally on 31st May 1986. A charge sheet raising various allegations was issued to him just before the extended date of retirement. He gave explanation. However, the Respondent had issued a fresh charge sheet on 3rd June 1986 i.e. after the retirement. He gave explanation to that charge also. No enquiry or proceedings were conducted. The retirement dues were given as per the directions of the Court in OP No.2687 of 1987 filed by the ex-employee. Thereafter the enquiry proceedings were started. After considering the evidence, the enquiry officer came to the conclusion that the petitioner was not guilty on any of the charges alleged against him. The petitioner was given a letter dated 27th July 1991 forwarding the enquiry proceedings by the disciplinary authority and advised to submit representation if any within 15 days from the date of receipt of the letter. However, it was not mentioned in the letter that the disciplinary authority was not agreeing with the findings of the Enquiry Officer on any of the points. No orders were passed by the disciplinary authority and no retirement benefits were paid by the Respondent even after two years of the said letter. Hence, the petitioner has filed this original petition.

Observations of the Court

The disciplinary authority has passed orders on 14th September 1993 disagreeing with the findings of the Enquiry Officer on certain minor charges and imposed retrospective punishment of compulsory retirement w.e.f. the actual date of retirement. The Court held that retrospective dismissal or retirement cannot be passed as the petitioner had completed the full years of service and again another 5 years of extended service because of his efficiency and he had completed the extended period also. The Court also relied on the judgement of the Supreme Court in Jeevaratnam Vs State of Madras (AIR 1966 SC 951 : 1967 –I-LLJ –391) wherein it was held that if a retrospective dismissal order is passed it is severable and it will act only prospectively. Therefore, retrospective compulsory retirement will not be justified considering the facts of the case. The order dated 14th September 1993 cannot be substained as the disciplinary authority has not accepted the Enquiry Officer's report and took a different view without complying with the principles of Natural Justice. The disciplinary authority can differ from the finding of the enquiry officer provided points of difference are put to the petitioner and only after receiving explanation

to the show-cause notice issued to the employee, the disciplinary authority can pass orders. Here no show cause notice has been issued. Hence, the Bank had violated the Principles of Natural Justice.

Decision

Petition is allowed with cost of Rs.10,000/-. The petitioner is entitled to get 12% interest for the arrears of DCRG as well as arrears of pension from the respective due date till its payment.

IX. Syndicate Bank vs. Pamidi Somaiah (Decd) and Others (2002) 108 Comp cas 12(HC)

Principle

The surety is only a guarantor for the dues of principal debtor and in case of any default on the part of the principal debtor, the surety has to make good the loss. If any omission on the part of the creditor in bringing the legal representatives of the principal debtor on record in the event of the death of the principal debtor, the surety's right under Section 140 of the Indian Contract Act 1872, to proceed against the principal debtor will not exist. Once the debt against the principal debtor stood discharged as a result of the omission of the creditor, the creditor cannot proceed against the Surety.

Facts

Syndicate Bank had filed a suit against the principal debtor and Surety impleading them as Defendant No(s) 1 & 2 for recovery. During the pendency of the suit the principal debtor died and no legal representatives had been brought on record by the creditor Bank. However, the suit was decreed against the surety. In the execution petition filed by the decree holder/Bank, the Surety against whom the decree was passed took objection that the decree is not executable against him as the creditor/Bank had not impleaded the legal heirs of the principal debtor in the suit after the death of the principal debtor. The executing Court accepted the contention and dismissed the suit. Hence, the present revision petition.

Observations of the Court

The liability of the Surety is always to make good the loss caused as a result of the default committed by the principal debtor to the creditor. If the surety discharges the liability of the principal debtor to the creditor he can have a right to proceed against the principal debtor. In the present case as a result of the omission on the part of the creditor in bringing the legal representatives of the principal debtor on record after the death of the principal debtor, the surety is denied such right. Hence, it would not be proper to hold that the surety is still liable to the creditor even after the discharge of the principal debtor, due to the omission of the creditor. The Court did not accept the contention of the petitioner that the executing Court cannot go beyond the decree. Once the suit is abated against the principal debtor it is equally abated/ dismissed against the surety also. Hence the decree passed against the surety even after discharging the principal debtor from liability is illegal and unenforceable. Hence the petitioner is not entitled to proceed against the surety and the decree passed by the trial Court is not executable.

Decision

The Revision Petition was dismissed.

..... a few minutes' observation of the parteis in the courtroom is more informing than reams of cold record.

— JACKSON, Robert H., dissenting in
Asheraft v. Tennessee, 322 U.S. 143, 171 [1944]

If a court, Federal or state, renders an unpopular opinion, displeasing to the public or to the applicable legislative body, the mere intimation of curtailed jurisdiction in the area ruled upon is most threatening to a cout which must be objective and dispassionate.

The bandied concept that jurisdiction shall remain so long as a 'correct' view emerges is not only intimidating to a court but shocking and frightening to every fair-minded person.

One cannot help but wonder if a shift in the personnel of a court after withdrawal of authority would induce a return of that authority.

— COOKE, Lawrence H., Remarks at Mid-Year
Graduation Ceremonies of New York Law School, February 7, 1982

Judgements of The Madras High Court Relevant to Bankers

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I. N. Krishnaswamy vs. The Chairman, State Bank of India, Central Office, Bombay and another (Madras Law Journal 1999 I 131)

Facts

The petitioner filed a writ petition seeking to quash the proceedings of the S.B.I. in which the petitioner was punished by reduction in basic pay by one stage. According to the petitioner he was called upon to explain with reference to his lapse as mentioned in the letter dated 9-1-1991 of the S.B.I.'s Trruchi branch and in reply he had sent a letter to the S.B.I. on 15-2-1991. While the same was pending, on 6-11-1991 the petitioner sent a letter requesting the Chief General Manager of S.B.I. to accept his voluntary retirement from service and to treat the same as three months' notice, from the date of the said letter. It is the contention of the petitioner that since the period of three months was over in February 1992, and no order passed by the S.B.I. rejecting his request, he has already retired even in February 1992 and so the disciplinary proceedings cannot be initiated against him. Therefore he has challenged the impugned order on the basis that the same is illegal and without jurisdiction.

Issue

The question to be decided by the Madras High Court was whether the petitioner had retired voluntarily from service as claimed by him pursuant to the notice dated 6-11-1991.

Observations

The learned senior counsel appearing for the petitioner relied on the fourth proviso to Rule 19 of the S.B.I. Officers' Service Rules, which reads as follows :

> "Provided further that an officer who has completed 20 years' service or 20 years' pensionable service, as the case may be, may be permitted by the competent authority to retire from the Bank's service, subject to his giving three months' notice in writing or pay in lieu thereof unless this requirement is wholly or partly waived by it".

The learned counsel submitted that before the expiry of the said period of three months, no letter, rejecting the petitioner's request was received from the respondent and so the retirement, on expiry of the three months, period, from the date of the said notice, is automatic.

The Court observed that it is clear that since Rule is contemplated for such permission, unless such permission is granted, it cannot be said that the employee has retired from service automatically. In this case, admittedly, the S.B.I. has not accepted, in the order dated 2-5-1992, the application filed by the petitioner seeking permission to retire voluntarily. The Court relied upon the decision of the Apex Court in Power Finance Corporation Ltd. vs. P.K. Bhatia (1997 4 SCC 280) in which it was held that it is now settled legal position that unless the employee is relieved of the duty after acceptance of the offer of voluntary retirement or resignation, jural relationship of the employee and employer does not come to an end.

The Court further observed that the argument advanced on behalf of the petitioner that he is not an employee of S.B.I. on the date of passing of the order and so the impugned order has to be set aside, cannot be sustained. Since the permission as sought for by the petitioner was refuse, in the order of the S.B.I. dated 2-5-1992, it has to be construed that the petitioner has been continuing as an employee of the S.B.I.

Decision

The Court dismissed the writ petition and also rejected the claim of the petitioner for terminal benefits.

II. Lakshman Balaraman vs. Punjab National Bank, Mount Road Branch, Madras (Madras Law Journal, 1999, I, 482)

Facts

PNB had sanctioned a term loan and cash credit facilities to the first defendant company in December 1985. As per the request of the first defendant company the PNB had again sanctioned

in October 1986 additional loan in the nature of cash credit pledge, Inland letter of credit and import letter of credit. Since the first defendant had violated the terms and conditions of the loans, the Punjab National Bank (PNB) had filed a Suit on the Original Side of the High Court against the defendants for recovery of more than Rs. 21 lakhs and interest at quarterly rests. When the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 came into force, the Suit was transferred before the Debts Recovery Tribunal.

After the case was transferred to the Tribunal, third defendant filed an Application contending that the transfer application was not maintainable before the tribunal and therefore, the matter has to be sent back to the High Court. The reason stated was that the loan was granted under two transactions and the same constitutes two different causes of action. Under Rule 10 of the Debt Recovery Tribunal (Procedure) Rules, 1993, an application must be confined to one cause of action, and if so made, the claim will be under Rs. 10 lakhs only and, therefore, the tribunal has no jurisdiction. Only for the purpose of getting jurisdiction of the tribunal, both the causes of action have been combined and a demand is made for more than Rs. 21 lakhs. Hence, it is contended that the Suit cannot be tried by the debt recovery tribunal. According to the PNB, in short, even though the loan was under two transactions, the intention was to treat the same as one cause of action. Further, the guarantee deeds are the same and so long as there is only one security, the causes of action cannot be split upon. Therefore, the tribunal has got jurisdiction to dispose of the case.

By the impugned order, the tribunal held that the transfer application is maintainable and dismissed the I.A. The same is challenged in this writ petition under Article 227 of the Constitution.

Issue

Whether the transfer application filed before the debt recovery tribunal is maintainable.

Observations

The Court observed that the important section that has to be taken into consideration is, Section 31 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, which reads thus :

> "31. Transfer of pending cases:
>
> (1) Every suit or other proceeding pending before any court immediately before the date of establishment of a tribunal under this Act, being a suit or proceeding the cause of action whereon it is based is such that it would have been, if it had arisen after such establishment, within the jurisdiction of such Tribunal shall stand transferred on the date to such tribunal."

The Court observed that the purpose of the enactment is to provide for the establishment of tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions. Accordingly the debt recovery tribunals were established by the Central Government. The Court referred to a decision of the Karnataka High Court in Smt. Gerty Suvarna vs. Union of India & others, (I.L.R. 1998 Kar. 1151) in which similar question came for

consideration. In that case the learned single Judge observed that there can be several reliefs based on a single cause of action and a single relief based on several causes of action. The bank's application before the tribunal was based on more than a single cause of action. The Judge considered the question, namely, whether the application violates Rule 10 of the Debt Recovery Tribunal (Procedure) Rules, 1993. It was observed that the second part of Rule 10, permits reliefs, based on more than one cause of action being claimed in an application, provided they are so connected that seeking of one requires seeking of the other, either as on necessity or on account of a statutory mandate. Therefore, an application to recover the amounts due under two or more accounts is not barred by Rule 10, where the amounts we are covered by two or more mortgages of the same immovable property.

The Court also referred to the decision in M/s. Jay Jee Service Station, Bangalore and another vs. Syndicate Bank and another (1998 4 Karn. L.J.5). In this case the learned Judge observed as follows :

> "The two transactions even though apparently independent may have an intrinsic co-relation with each other for one may be granted for the success of the other. In any such situation just because two sets of documents have been executed or two transactions have taken place at two different points of time may not by itself give rise to two causes of action. When viewed in the wider perspective, such transactions may constitute one single cause of action capable of being brought before the Tribunal in a single action for recovery of the debt claimed."

The Court observed that in view of the said decision, in which the correct interpretation of the section is given, the application before the tribunal cannot be rejected. The petitioner wanted loan facility from the bank for the purpose of an industry. When the first loan was availed, it was found to be not sufficient. Additional loan was sought for only for the purpose of fulfilment of the earlier claim. This case could be treated only on the basis of a single cause of action. The securities are the same, and the facilities were availed under a single deed of guarantee.

Decision

The Court held that Rule 10 is not violated since the case comes under an exception, and again it comes within the jurisdiction of the tribunal. The contention of learned counsel for the petitioner cannot be sustained. The civil revision petition is dismissed.

III. Union Bank of India, Tirunelveli Junction vs. Muthiah (Madras Law Journal, 1999 I 679)

Facts

The Union Bank of India (tenant) is the revision petitioner. The landlord had filed a rent control petition for fixation of fair rent. He wanted the Chairman of the Union Bank of India to be examined as witness on his side to decide the issue rightly. By the impugned order, the lower court allowed the application, which is now challenged in the revision petition.

Issue

Whether the application of the landlord for summoning the opposite party as witness is maintainable.

Observations

The Court observed that the procedure adopted by the lower court is per se illegal since it has been repeatedly held in various decisions that the practice of summoning opposite party as witness have to be deprecated, and the same will result to embarrass the judicial investigation.

In Shatrugan Das vs. Shak Das (AIR 1938 P.C. 59) it was held that the practice of calling the defendant as a witness to give evidence on behalf of the plaintiff is condemnable and in such a case the plaintiff must be treated as a person who puts the defendant forward as a witness of truth.

In Mallangowda vs. Gavisiddangowda (AIR 1959 Mys. 194) the Mysore High Court held that the practice of calling the opposite party as witness should not be countenanced as it is not in the interest of justice.

The Kerala High Court also had an occasion to consider the same position which is reported in Muhammad Kunju vs. Shahabudeen (1969 K.L.T. 170). It was held that "the practice of party causing his opponent to be summoned as a witness has to be disapproved. As a matter of right a party cannot have them opposite party examined as a witness".

In Gadamal vs. Bhulloo Ram (AIR 1951 J&K.5) it was held thus :

> "It is a still more objectionable practice to cite opposite side as one's own witness. This places the examination and cross-examination of such a witness in wrong hands, necessitates the criticism of the evidence by the side which has called it and this embarrasses fair trial and causes obstruction of justice."

Decision

The Court held that from the above settled legal position, it is clear that the impugned order cannot be sustained and that the lower court exceeded its jurisdiction in allowing the application. The impugned order was set aside and the civil revision petition was allowed.

IV. C.V. Raman vs. State Bank of India represented by its Deputy Managing Director (Personnel and Systems) Central Office, Bombay and another (MLJ 1999 1 708)

Facts

The petitioner was working as Branch Manager in SBI. In that capacity an allegation was made against him stating that he was favouring certain persons in the matter of grant of loan. The Regional Manager of the Bank issued a memo to the petitioner calling for his explanation on the

said allegation which was based on the alleged complaint received from the members of the public. The petitioner submitted his explanation. The Bank issued charge-sheet to him. The enquiry officer was appointed and he submitted his report. On the basis of the said report the disciplinary authority came to the conclusion of removal of the petitioner from service. By order dated 22-21989 the second respondent agreeing with the conclusion of the disciplinary authority, imposed punishment on the petitioner for removal from service. Aggrieved by the said order, the petitioner preferred an appeal before the first respondent. The first respondent rejected the appeal by his proceedings dated 19-3-1990. The said order of rejection is impugned in this writ petition.

The learned counsel for the petitioner argued that the allegation has no basis, principles of natural justice have been violated and statement of witness were not produced during the course of domestic enquiry. The counsel also argued that the appellate authority has not properly considered the appeal while confirming the punishment of removal from service. According to the counsel, the provisions of Rule 51(2) of the SBI (Supervising Staff) Service Rules were not followed by the appellate authority who has not assigned any reasons in the order especially on the question of punishment.

Issue

The question to be decided by the Court was whether the appellate authority has considered the appeal as laid down under the provisions of Rule 51(2) of the State Bank of India (Supervising Staff) Service Rules.

Observations

Rule 51 (2) of the SBI Service Rules provides as follows :

> "The authority whose order is appealed against shall forward the appeal together with its comments and records of the case to the appellate authority. The appellate authority shall consider whether the findings are justified and/or whether the penalty is excessive or inadequate and pass appropriate orders. The appellate authority may pass an order confirming, enhancing, reducing or setting aside the penalty or remitting the case to the authority which imposed the penalty or to any other authority with such direction as it deems fit in the circumstances of the case."

The counsel for the petitioner pointed out that there was no proper consideration of the appeal as laid down by the Supreme Court in Ram Chander vs. Union of India and others (AIR 1986 SC 1173). The Apex Court in the said judgement has laid down the law that the word 'consider', in the context in which it appears in Rule 22 (2) of the Railway Servants (Discipline and Appeal) Rules, 1968, must mean an objective consideration by the Railway Board after due application of mind which implies the giving of reasons for its decision.

The Court observed that the appellate authority should conform to the Regulations and relied upon the interpretation of the word 'to consider' by the Apex Court in the above cited judgement. The Court was of the view that the appellate authority did not consider the gravity of the punishment with reference to the facts and circumstances of the case and that the appellate

authority has failed in its duty in considering whether the punishment of removal is proper under the particular circumstances of the case. The appellate authority did not consider the material on record in the light of Regulation 51(2) and did not consider whether the evidence recorded was sufficient for imposing the penalty.

Decision

The Court held that there was no proper application of mind by the appellate authority while considering the appeal preferred by the petitioner and the impugned order is vitiated on this ground. The writ petition was allowed.

V. Pukhrajmal Sugarmal Lunkad, Proprietor, Lunkad Finance, hereinafter, represented by Power Agent, Sri Uttamchand Galada vs. State Bank of Mysore & another

Facts

The second defendant approached the plaintiff for advancement of loan of Rs. 10 lakhs for their business. The first defendant, Madras branch of State Bank of Mysore (SBM) agreed to provide Bank guarantee for repayment of the sum of Rs. 10 lakhs with interest on behalf of the second defendant. Accordingly, a Bank guarantee was executed by the first defendant in favour of the plaintiff for a period of one year. The Bank guarantee can be invoked by the plaintiff within the stipulated time if the second defendant failed to pay the loan advanced.

Since the second defendant failed to pay the amount due to the plaintiff, the plaintiff called upon the first defendant, invoking the Bank guarantee, to pay the amount due to the plaintiff from the second defendant. The first defendant sent a letter to the plaintiff stating that the concerned officer of the SBM had issued the Bank guarantee at the instance of the second defendant without bringing the same into accounts or books maintained by the first defendant and without the approval of the controlling authority and that, therefore, the first defendant cannot be made liable on the basis of the Bank guarantee, which was said to have been fraudulently brought about. The plaintiff has filed this Civil Suit No. 260/1988 for recovery of the amount due by the second defendant, from the defendant jointly and severally. The first defendant, SBM resisted the suit claim, among others, on the ground that the alleged Bank guarantee is an outcome of fraud practiced by the Manager of the first defendant, plaintiff and the second defendant in collusion with one another. Therefore, according to the first defendant, the alleged Bank guarantee is wholly void and inoperative.

Issues

The main issues for consideration by the Court were whether the first defendant is liable to pay the amount claimed in the Suit and whether the first defendant is not liable for the Suit claim.

Observations

On the basis of the oral and documentary evidence, the Court held that the plaintiff has advanced a loan of Rs. 10 lakhs with interest to the second defendant on the strength of the Bank guarantee

issued by the first defendant on behalf of the second defendant for a sum of Rs. 10 lakhs in favour of the plaintiff. The Court observed that there is absolutely no proof on the side of the first defendant that there was collusion between the parties for the alleged concocting of the Bank guarantee with a view to defraud the first defendant, SBM and therefore, such allegation made by the first defendant cannot be sustained.

The Court referred to and relied upon the following decisions :-

a) United Commercial Bank vs. Hanuman Synthetics Ltd. and others (1987 61 C.C. 245).

b) United Commercial Bank vs. Bank of India and others (1982 52 C.C. 186).

c) UP Co-operative Federation Ltd. vs. Singh Consultants & Engineers Ltd. (1989 65 C.C. 283).

d) State Trading Corporation of India Ltd. vs. Jainsons Clothing Corporation (AIR 1994 S.C. 2778).

e) Hindustan Steel Works Construction Ltd. vs. G.S. Atwal & Company (Engineers) P. Ltd. (1996 85 C.C. 270).

The Court observed that the principles laid down in the cases cited above, would lead to infer that normally the Court should not interfere with the Bank guarantee given by the Banks in favour of the parties, unless fraud is pleaded and established by material evidence. Since the Court has held that the first defendant has failed to establish the alleged collusion or fraud between the parties, the Court was of the view that the first defendant cannot claim that the Bank guarantee is not valid and binding on the first defendant and that, therefore, not liable to the Suit claim.

Decision

The Court held that the first defendant, SBM is also liable to the Suit claim along with the second defendant jointly and severally and the plaintiff is entitled to a decree as prayed for and the Suit is decreed with costs.

VI. The Canara Bank Officer's Association (Regd.) represented by its Vice-President, Madras vs. Canara Bank represented by Asst. General Manager, P.P. & A Section, G. Wing, H.O. Bangalore (MLJ 1999 3 240)

Facts

The petitioner has challenged Clauses 4 & 5 of the Circular dated 25-4-1989 bearing No. 138/89. The Clauses 4 & 5 imposes certain conditions on the eligibility for allotment of quarters to officers of Canara Bank in Middle Management Grade Scale II and above and officers in Junior Management Grade Scale I. In terms of Clause 4 no officer shall be eligible to be provided with quarters by the Bank at a centre/station where he/ she has a house in his/her own name or in the name of his/her spouse or a dependent child. In terms of Clause 5 if any officer has a house

outside the Municipal Corporation, the Bank shall not take such house on lease and provide for self occupation. Such officers will be eligible for only HRA.

The contention of the petitioners is that the refusal of the facility of the Bank quarters, holding them to be ineligible for the same, merely because they owned their own house in the same centre where they were working, would be arbitrary and discriminatory and Clauses 4 & 5, which authorises the Bank to take such steps, are invalid being contrary to Article 14 of the Constitution. It is further pointed out that the provision is also impracticable as the house owned by the concerned officer may not be commensurate to his own needs or to his entitlement, considering his status and seniority as a Bank officer.

The respondent - Bank opposed the petition on various grounds. It is pointed out that the Circular is on account of the clear instructions by the Central Government, which instructions were binding on the Bank. The respondent then points out that the Board's resolution issuing these instructions is exact replica of the said instructions of the Central Government. The Bank pleads that the service regulation, more particularly Regulation No. 25 very specifically provides that no officers of the Bank shall be entitled as of right to have a quarter and it is merely a facility given by the Bank.

Issue

Whether the challenge of unreasonableness and arbitrariness to the said provisions of the Circular is in any way justified.

Observations

The Court referred to the provisions of Clause 25 of the Service Regulations and observed that, it is clear that basically, there is no entitlement or right in favour of any Bank officer for a residential accommodation and it is merely a facility given by the Bank. The question for consideration was whether the Bank has discriminated, as it has refused to give the quarters to such officers, who own their houses/flats in the same city where they served.

The Court pointed out that their is a clear distinction made between the officers who owned their own flats and the officers who did not own any such houses. In the case of officers who owned houses, there is an advantage to them that they would have the benefit in letting out their flats or utilising it for their now benefits. Such officers, who were declared ineligble, could all the same claim the House Rent Allowance. The Court was of the view that if the management was in favour of those officers who did not have any house and declared the house owners/officers ineligible for allotment of quarters, it cannot be said that there is anything arbitrary and/or discrimatory in this attitude.

The Court observed that in order to raise a contention that it was not within the power of the Central Government to issue the guidelines and in pursuance of such guidelines, no resolution could be passed by the Bank's Board, it is imperative that the Central Government was impleaded as a party to this writ petition and secondly, the validity of the Board resolution was itself challenged. Both these aspects are conspicuously absent in the petition.

The Court observed that in the Bank the percentages of HRA have been revised and the maximum limit of HRA payable has been removed. The HRA is given as of right, while allotment of quarters is only by eligibility and by way of a facility. There can be no comparison between those two concepts.

Decision

The Court held that the writ petition has absolutely no merits and dismissed the same and ordered costs of Rs. 5000/- to be paid to the respondent.

VII. M.N. Pavithran vs. Central Bank of India, Zonal Office represented by Asst. General Manager and another (MLJ 1999 3 301)

Facts

The petitioners an officer in the respondent Bank was issued a charge-sheet by the Bank on various charges including that of misconduct. The enquiry officer after holding the enquiry submitted his report in which the petitioner was found guilty of five charges out of 12 charges. But the disciplinary authority took a different view and found the petitioner guilty of charges, 3, 5, 6, 9, 10, 11 and 12. The disciplinary authority imposed the punishment of dismissal on the petitioner without notice in terms of Regulation 4 of C.B.I. Officer Employees (Discipline and Appeal) Regulations, 1976. The said orders are impugned in the writ petition. The petitioner has prayed for quashing of the said orders and to direct the respondents to reinstate the petitioner and pay all the monetary benefits.

Issue

Whether the disciplinary authority has violated the principles of natural justice.

Observations

The main ground of attack made on behalf of the petitioner was that the disciplinary authority, who disagreed with the findings of the enquiry officer, ought to have given an opportunity to the petitioner calling for his explanation and issued the show cause notice. Hence it is argued by the counsel for the petitioner that the disciplinary authority has violated the principles of natural justice and on this ground alone, the impugned orders are liable to be quashed.

The counsel for the petitioner relief upon the decision of the Apex Court in Punjab National Bank and others vs. Kunj Behari Misra and another (1998 2 L.L.J. 809) in which it was held that when the disciplinary authority disagrees with the findings of the enquiry authority, there is a need to follow the principles of natural justice by giving opportunity of hearing. The Apex court has further held that the delinquent officer has to be given opportunity to file representation before the final decision of imposing penalty is taken. The Court referred to another decision of the Apex Court in Railway Board vs. Niranjan Singy (AIR 1969 SC 966) in which it was held that the disciplinary authority is not bound by the conclusion reached by the enquiry committee.

The Court was of the view that in the present case the respondents have not given an opportunity tot he delinquent to represent his case before the disciplinary authority who disagreed with the findings of the enquiry officer. The petitioner did not have an opportunity to persuade the disciplinary authority to accept favourable conclusion of the enquiry officer. Hence, under the circumstances the Court held that the disciplinary authority has violated the principles of natural justice, following the decision of the Apex Court in Punjab National Bank's case.

Decision

The impugned orders were quashed and a direction was issued to the respondents to release the retirement benefits to the petitioner. The writ petition was allowed.

The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases. We do not dispute that general right. "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." American Bank & Trust Co. v. Federal Bank, 256 U.S. 350, 358. The right claimed by the publisher is neither absolute nor exempt from regulation.

— BURTON, Harold H., Lorain Journal v. United States, 342 U.S. 143, 155 (1951)

LEGISLATION SECTION

The Prevention of Terrorism Act, 2002

ACT NO. 15 OF 2002*

An Act to make provisions for the prevention of, and for dealing with, terrorist activities and for matters connected therewith. BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:-

CHAPTER I

Preliminary

1. **Short title, application, commencement, duration and savings.-**

(1) This Act may be called the Prevention of Terrorism Act, 2002.

(2) It extends to the whole of India.

(3) Every person shall be liable to punishment under this Act for every act or omission contrary to the provisions thereof, of which he is held guilty in India.

(4) Any person who commits an offence beyond India which is punishable under this Act shall be dealt with according to the provisions of this Act in the same manner as if such act had been committed in India.

(5) The provisions of this Act apply also to-

(a) citizens of India outside India;

(b) persons in the service of the Government, wherever they may be; and

(c) persons on ships and aircrafts, registered in India, wherever they may be.

(6) Save as otherwise provided in respect of entries at serial numbers 24 and 25 of the Schedule

(a) the previous operation of, or anything duly done or suffered under this Act, or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under this Act, or

(c) any penalty, forfeiture or punishment incurred in respect of any offence under this Act, or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and, any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired.

2. **Definitions.-** (1) In this Act, unless the context otherwise requires,-

(a) "Code" means the Code of Criminal Procedure, 1973 (2 of 1974);

(b) "Designated Authority" shall mean such officer of the Central Government not below the rank of Joint Secretary to the Government, or such officer of the State Government not below the rank of Secretary to the Government, as the case may be, as may be specified by the Central Government or, as the case may be, the State Government, by a notification published in the Official Gazette;

(c) "proceeds of terrorism" shall mean all kinds of properties which have been derived or obtained from commission of any terrorist act or have been acquired through funds traceable to a terrorist act, and shall include cash irrespective of person in whose name such proceeds are standing or in whose possession they are found;

(d) "property" means property and assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and deeds and instruments evidencing title to, or interest in, such property or assets and includes bank account

(e) "Public Prosecutor" means a Public Prosecutor or an Additional Public Prosecutor or a Special Public Prosecutor appointed under section 28 and includes any person acting under the directions of the Public Prosecutor;

(f) "Special Court" means a Special Court constituted under section 23;

(g) "terrorist act" has the meaning assigned to it in sub-section (1) of section 3, and the expression "terrorist" shall be construed accordingly;

(h) "State Government", in relation to a Union territory, means the Administrator thereof;

(i) words and expressions used but not defined in this Act and defined in the Code shall have the meanings respectively assigned to them in the Code.

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

CHAPTER II

Punishment for, and Measures for Dealing with, Terrorist Activities

3. Punishment for terrorist acts.

(1) Whoeve

(a) with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act;

(b) is or continues to be a member of an association declared unlawful under the Unlawful Activities (Prevention) Act, 1967 (37 of 1967), or voluntarily does an act aiding or promoting in any manner the objects of such association and in either case is in possession of any unlicensed firearms, ammunition, explosive or other instrument or substance capable of causing mass destruction and commits any act resulting in loss of human life or grievous injury to any person or causes significant damage to any property, commits a terrorist act.

Explanation.- For the purposes of this sub-section, “a terrorist act” shall include the act of raising funds intended for the purpose of terrorism.

(2) Whoever commits a terrorist act, shall,-

(a) if such act has resulted in the death of any person, be punishable with death or imprisonment

for life and shall also be liable to fine;

(b) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(4) Whoever voluntarily harbours or conceals, or attempts to harbour or conceal any person knowing that such person is a terrorist shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine:

Provided that this sub-section shall not apply to any case in which the harbour or concealment is by the husband or wife of the offender.

(5) Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist acts, shall be punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.

Explanation.- For the purposes of this subsection, "terrorist organisation" means an organisation which is concerned with or involved in terrorism.

(6) Whoever knowingly holds any property derived or obtained from commission of any terrorist act or has been acquired through the terrorist funds shall be punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.

(7) Whoever threatens any person who is a witness or any other person in whom such witness may be interested, with violence, or wrongfully restrains or confines the witness, or any other person in whom the witness may be interested, or does any other unlawful act with the said intent, shall be punishable with imprisonment which may extend to three years and fine.

4. **Possession of certain unauthorized arms, etc.-** Where any person is in unauthorised possession of any-

(a) arms or ammunition specified in columns (2) and (3) of Category I or Category III (a) of Schedule I to the Arms Rules, 1962, in a notified area,

(b) bombs, dynamite or hazardous explosive substances or other lethal weapons capable of mass destruction or biological or chemical substances of warfare in any area, whether notified or not, he shall be guilty of terrorist act notwithstanding anything contained in any other law for the time being in force, and be punishable with imprisonment for a term which may extend to imprisonment for life or with fine which may extend to rupees ten lakh or with both.

Explanation.-In this section, "notified area" means such area as the State Government may, by notification in the Official Gazette, specify.

5. **Enhanced penalties.**

(1) If any person with intent to aid any terrorist contravenes any provision of, or any rule made under the Explosives Act, 1884 (4 of 1884), the Explosive Substances Act, 1908 (6 of 1908), the Inflammable Substances Act, 1952 (20 of 1952) or the Arms Act, 1959 (54 of 1959), he shall, notwithstanding anything contained in any of the aforesaid Acts or the rules made thereunder, be punishable with imprisonment for a term which may extend to imprisonment for life and shall also be liable to fine.

(2) For the purposes of this section, any person who attempts to contravene or abets, or does any act preparatory to the contravention of any provision of any law, rule or order, shall be deemed to have contravened that provision, and the provisions of sub-section (1) shall, in relation to such person, have effect subject to the modification that the reference to "imprisonment for life" shall be construed as a reference to "imprisonment for ten years".

6 **Holding of proceeds of terrorism illegal.-**

(1) No person shall hold or be in possession of any proceeds of terrorism.

(2) Proceeds of terrorism, whether held by a terrorist or by any other person and whether or not such person is prosecuted or convicted under this Act, shall be liable to be forfeited to the Central Government or the State Government, as the case may be, in the manner provided under this Chapter.

7. **Powers of investigating officers and appeal against order of Designated Authority.-**

(1) If an officer (not below the rank of Superintendent of Police) investigating an offence committed under this Act, has reason to believe that any property in relation to which an investigation is being conducted, represents proceeds of terrorism, he shall, with the prior approval in writing of the Director General of the Police of the State in which such property is situated, make an order seizing such property and where it is not practicable to seize such property, make an order of attachment directing that such property shall not be transferred or otherwise dealt with except with the prior permission of the officer making such order, or of the Designated Authority before whom the properties seized or attached are produced and a copy of such order shall be served on the person concerned.

(2) For the removal of doubts, it is hereby provided that where an organisation is declared as a terrorist organisation under this Act and the investigating officer has reason to believe that any person has custody of any property which is being used or intended to be used for the purpose of such terrorist organisation, he may, by an order in writing, seize or attach such property.

(3) The investigating officer shall duly inform the Designated Authority within forty-eight hours of the seizure or attachment of such property.

(4) It shall be open to the Designated Authority before whom the seized or attached properties are produced either to confirm or revoke the order of attachment so issued:

Provided that an opportunity of making a representation by the person whose property is being attached shall be given.

(5) In the case of immovable property attached by the investigating officer, it shall be deemed to have been produced before the Designated Authority, when the investigating officer notifies his report and places it at the disposal of the Designated Authority.

(6) The investigating officer may seize and detain any cash to which this Chapter applies if he has reasonable grounds for suspecting that-

(a) it is intended to be used for the purposes of terrorism;

(b) it forms the whole or part of the resources of an organisation declared as terrorist organisation under this Act:

Provided that the cash seized under this sub-section by the investigating officer shall be released not later than the period of forty-eight hours beginning with the time when it is seized unless the matter involving the cash is before the Designated Authority and such Authority passes an order allowing its retention beyond forty-eight hours.

Explanation.-For the purposes of this sub-section, "cash" means-

(a) coins and notes in any currency;

(b) postal orders;

(c) traveller's cheques;

(d) banker's drafts; and

(e) such other monetary instruments as the Central Government or, as the case may be, the State Government may specify by an order made in writing.

(7) Any person aggrieved by an order made by the Designated Authority may prefer an appeal to the Special Court and the Special Court may either confirm the order of attachment of property or seizure so made or revoke such order and release the property.

(8). **Forfeiture of proceeds of terrorism.-** Where any property is seized or attached on the ground that it constitutes proceeds of terrorism and the Special Court is satisfied in this regard under sub-section (7) of section 7, it may order forfeiture of such property, whether or not the person from whose possession it is seized or attached, is prosecuted in a Special Court for an offence under this Act.

9. **Issue of show cause notice before forfeiture of proceeds of terrorism.-**

(1) No order forfeiting any proceeds of terrorism shall be made under section 8 unless the person holding or in possession of such proceeds is given a notice in writing informing him of the grounds on which it is proposed to forfeit the proceeds of terrorism and such person is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of forfeiture an is also given a reasonable opportunity of being heard in the matter.

(2) No order of forfeiture shall be made under sub-section (1) if such person establishes that he is a bona fide transferee of such proceeds for value without knowing that they represent proceeds of terrorism.

(3) It shall be competent for the Special Court to make an order in respect of property seized or attached,-

(a) directing it to be sold if it is a perishable property and the provisions of section 459 of the Code shall, as nearly as may be practicable, apply to the net proceeds of such sale;

(b) nominating any officer of the Central or State Government, in the case of any other property, to perform the function of the Administrator of such property subject to such conditions as may be specified by the Special Court.

10. **Appeal.-**

(1) Any person aggrieved by an order of forfeiture under section 8 may, within one month from the date of the receipt of such order, appeal to the High Court within whose jurisdiction, the Special Court, who passed the order appealed against, is situated.

(2) Where an order under section 8 is modified or annulled by the High Court or where in a prosecution instituted for the contravention of the provisions of this Act, the person against whom an order of forfeiture has been made under section 8 is acquitted, such property shall be returned to him and in either case if it is not possible for any reason to return the forfeited property, such person shall be paid the price therefor as if the property had been sold to the Central Government with reasonable interest calculated from the day of seizure of the property and such price shall be determined in the manner prescribed.

11. **Order of forfeiture not to interfere with other punishments.-** The order of forfeiture made under this Act by the Special Court, shall not prevent the infliction of any other punishment to which the person affected thereby is liable under this Act.

12. **Claims by third party.-**

(1) Where any claim is preferred, or any objection is made to the seizure of any property under section 7 on the ground that such property is not liable to seizure, the Designated Authority before whom such property is produced shall proceed to investigate the claim or objection:

Provided that no such investigation shall be made where the Designated Authority considers that the claim or objection is designed to cause unnecessary delay.

(2) In case claimant or objector establishes that the property specified in the notice issued under section 9 is not liable to be forfeited under the Act, the said notice shall be withdrawn or modified accordingly.

13. **Powers of Designated Authority.-** The Designated Authority, acting under the provisions of this Act, shall have all the powers of a civil court required for making a full and fair enquiry into the matter before it.

14 **Obligation to furnish information.-**

(1) Notwithstanding anything contained in any other law, the officer investigating any offence under this Act, with prior approval in writing of an officer not below the rank of a Superintendent of Police, may require any officer or authority of the Central Government or a State Government or a local authority or a bank, or a company, or a firm or any other institution, establishment, organisation or any individual to furnish information in their possession in relation to such offence, on points or matters,where the investigating officer has reason to believe that such information will be useful for, or relevant to, the purposes of this Act.

(2) Failure to furnish the information called for under sub-section (1)or deliberately furnishing false information shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(3) Notwithstanding anything contained in the Code, the offence under sub-section (1) shall be tried as a summary case and the procedure prescribed in Chapter XXI of the said Code [except sub-section (2) of section 262] shall be applicable thereto.

15. **Certain transfers to be null and void.**-Where, after the issue of an order under section 7 or issue of a notice under section 9, any property referred to in the said order or notice is transferred by any mode whatsoever, such transfer shall, for the purpose of the proceedings under this Act, be ignored and if such property is subsequently forfeited, the transfer of such property shall be deemed to be null and void.

16. **Forfeiture of property of certain persons.-**

(1) Where any person is accused of any offence under this Act, it shall be open to the Special Court trying him to pass an order that all or any of the properties, movable or immovable or both belonging to him, shall, during the period of such trial, be attached, if not already attached under this Act.

(2) Where a person has been convicted of any offence punishable under this Act, the Special Court may, in addition to awarding any punishment, by order in writing, declare that any property, movable or immovable or both, belonging to the accused and specified in the order,

shall stand forfeited to the Central Government or the State Government, as the case may be, free from all encumbrances.

17. **Company to transfer shares to Government.-** Where any shares in a company stand forfeited to the Central Government or the State Government, as the case may be, under this Act, then, the company shall, on receipt of the order of the Special Court, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or the articles of association of the company, forthwith register the Central Government or the State Government, as the case may be, as the transferee of such shares.

CHAPTER III
Terrorist Organisations

18. **Declaration of an organization as a terrorist organization.-** (1) For the purposes of this Act, an organisation is a terrorist organisation if-

(a) it is listed in the Schedule, or

(b) it operates under the same name as an organisation listed in that Schedule.

(2) The Central Government may by order, in the Official Gazette,-

(a) add an organisation to the Schedule;

(b) remove an organisation from that Schedule;

(c) amend that Schedule in some other way.

(3) The Central Government may exercise its power under clause(a) of sub-section (2) in respect of an organisation only if it believes that it is involved in terrorism.

(4) For the purposes of sub-section (3), an organisation shall be deemed to be involved in terrorism if it-

(a) commits or participates in acts of terrorism,

(b) prepares for terrorism,

(c) promotes or encourages terrorism, or

(d) is otherwise involved in terrorism.

19. **Denotification of a terrorist organization.-**

(1) An application may be made to the Central Government for the exercise of its power under clause (b) of sub-section (2) of section 18 to remove an organisation from the

Schedule.

(2) An application may be made by-

(a) the organisation, or

(b) any person affected by inclusion of the organisation in the Schedule as a terrorist organisation.

(3) The Central Government may make rules to prescribe the procedure for admission and disposal of an application made under this section.

(4) Where an application under sub-section (1) has been refused, the applicant may apply for a review to the Review Committee constituted by the Central Government under sub-section (1) of section 60 within one month from the date of receipt of the order by the applicant.

(5) The Review Committee may allow an application for review against refusal to remove an organisation from the Schedule, if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.

(6) Where the Review Committee allows review under sub-section (5) by or in respect of an organisation, it may make an order under this sub-section.

(7) Where an order is made under sub-section (6), the Central Government shall, as soon as the certified copy of the order is received by it, make an order removing the organisation from the list in the Schedule.

20. **Offence relating to membership of a terrorist organization.-**

(1) A person commits an offence if he belongs or professes to belong to a terrorist organisation:

Provided that this sub-section shall not apply where the person charged is able to prove-

(a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and

(b) that he has not taken part in the activities of the organisation at any time during its inclusion in the Schedule as a terrorist organisation.

(2) A person guilty of an offence under this section shall be liable, on conviction, to imprisonment for a term not exceeding ten years or with fine or with both.

21. **Offence relating to support given to a terrorist organization.-**

(1) A person commits an offence if-

(a) he invites support for a terrorist organisation, and

(b) the support is not, or is not restricted to, the provision of money or other property within the meaning of section 22.

(2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is-

(a) to support a terrorist organisation, or

(b) to further the activities of a terrorist organisation, or

(c) to be addressed by a person who belongs or professes to belong to a terrorist organisation.

(3) A person commits an offence if he addresses a meeting for the purpose of encouraging support for a terrorist organisation or to further its activities.

(4) A person guilty of an offence under this section shall be liable on conviction, to imprisonment for a term not exceeding ten years or with fine or with both.

Explanation.- For the purposes of this section, the expression "meeting" means a meeting of three or more persons whether or not the public are admitted.

22. **Fund raising for a terrorist organization to be an offence.-**

(1) A person commits an offence if he-

(a) invites another to provide money or other property, and

(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.

(2) A person commits an offence if he-

(a) receives money or other property, and

(b) intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.

(3) A person commits an offence if he-

(a) provides money or other property, and

(b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

(4) In this section, a reference to the provision of money or other property is a reference to its being given, lent or otherwise made available, whether or not for consideration.

(5) A person guilty of an offence under this section shall be liable on conviction, to imprisonment for a term not exceeding fourteen years or with fine or with both.

CHAPTER IV

Special Courts

23. **Special Courts.-**

(1) The Central Government or a State Government may, by notification in the Official Gazette, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

(2) Where a notification constituting a Special Court for any area or areas or for any case or class or group of cases is issued by the Central Government under sub-section (1), and a notification constituting a Special Court for the same area or areas for the same case or class or group of cases has also been issued by the State Government under that sub-section, the Special Court constituted by the Central Government, whether the notification constituting such Court is issued before or after the issue of the notification constituting the Special Court by the State Government, shall have, and the Special Court constituted by the State Government shall not have, jurisdiction to try any offence committed in that area or areas or, as the case may be, th case or class or group of cases and all cases pending before any Special Court constituted by the State Government shall stand transferred to the Special Court constituted by the Central Government.

(3) Where any question arises as to the jurisdiction of any Special Court, it shall be referred to the Central Government whose decision in the matter shall be final.

(4) A Special Court shall be presided over by a judge to be appointed by the Central Government or, as the case may be, the State Government, with the concurrence of the Chief Justice of the High Court.

(5) The Central Government or, as the case may be, the State Government may also appoint, with the concurrence of the Chief Justice of the High Court, additional judges to exercise jurisdiction of a Special Court.

(To be continued)

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V. Raghavendra Prasad
Legal Officer

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the basic principles underlying the WTO, a brief historical perspective on its emergence and a succinct account of various agreements concluded by its member

Allthough under our existing selection sysytem many lawyer of great intellectual capacity and unueestioned integrity have ascended the bench, there is a firm conviction among many at the Bar that they were not produced by our current election system but despite it.

-HERSHMAN, Mendes, review of the Politics of the Bench and The Bar by Richard Watson and Rondal Downing in "The Lawyer's Bookshelf, " New York Law Journal, July 3, 1969, p.4, col. 7

BOOK REVIEW

Bank Frauds Including Computer Crimes & Credit Cards Crimes Prevention and Detection

by Dr. B.R. Sharma

D.V.Sekhar
Asstt. Legal Adviser

Bank frauds are on the increase and effective defence against this scourge is knowledge about them. The losses and sticky loans in India run into thousands of crores of rupees. There are still unsettled accounts relating to unmatched entries. Many banks hide most of the frauds for which the banks are yet unprepared to make them public. The graph of the fraud money is rising steeply. Bank frauds concern all citizens. However, the prima donna in the drama is the banker. He opens the purse. He is often the target and at times the tool. Occasionally, he is the victim of the temptations. Other contributory factors are incompetence, lethargy, negligence, connivance and ignorance. Bank frauds have become a big business today. It is becoming bigger every day. The real defence against bank frauds is knowledge about them. The banker must know their nature, their modus operandi, their detection and their prevention.

BANK FRAUDS: DETECTION AND PREVENTION, edited by Dr.B.R.Sharma presents an analysis of Bank frauds including computer and credit cards crimes and its prevention and detection. The book under review has been published by Universal Law Publishing Co. Private Ltd., C-FF-1A, Ansal's Dilkhush Industiral Estate, G.T.Kamal Road, Delhi-110 033. The author of the book has stated in the preface that the information contained in the book have been collected from all available sources, laboratory files, police diaries, court cases, published literature, scattered in news papers, magazines, journals, and other publications.

The contents of the book are divided into 21 Chapters. In Chapter 1, the author has discussed the meaning and nature of fraud. Fraud has not been defined in the Indian Penal Code directly. However, Sections dealing with cheating (Section 415 to 420), concealment (Section 421 to 424), forgery (Section 463 to 477A), counterfeiting (Section 489A to 489E), misappropriation (Section 403, 404) and breach of trust (Section 405 to 409) cover the same adequately. The word

'Fraud has been defined in law in the Indian Contract Act, Section 17. In short, fraud is dishonesty leading to loss to someone. The author has discussed the Banker's role in preventing various Bank frauds.

In Chapter 2, the author has discussed 'The Bunko Banker'. Bank frauds are the failures of the bankers. They are mainly due to either their negligence or due to their dishonesty. Ignorance about the tactics of frauds or of the rules is also responsible for the same to a limited extent. Loopholes in the banking system are also exploited both by the bunko banker and the cheat at large. There are case studies in this chapter, giving glimpse of the variety of bank frauds. There is a discussion on branding the Bunko in this chapter. The bunko banker has a distinct personality. He can be identified in most of the cases without difficulty. The targets of the bunko banker should be identified and hardened. The targets should be so managed that the bunko banker is unable to penetrate them and defraud the bank. A list of areas to be identified along with preventive measures to be taken has also been stated in the chapter.

In Chapter 3, the author has discussed about forged signatures, which come across by the bankers. The author has also discussed some variety of forged signatures. The forger copies from a model signature. If he is to succeed in his undertaking, he has to make a close copy to the model as possible. He, therefore, carefully follows the outline of the model signature. He has to go not only letter by letter but stroke so that slats, curvatures, heights and widths all correspond to the original model.

Material alterations are discussed in Chapter 4. Material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty. The methods of alterations of cheques, drafts, receipts and other fiduciary documents are comparatively simple. They do not require skill and patience. Material alterations ordinarily are not done by professional forgers. The forgeries are, therefore often crude and permit identification in most of the cases. The author has discussed the Bankers role in detecting the bank frauds and the instruments that are required for the bankers to detect the frauds.

In Chapter 5, the author has dealt with forged currency notes. The author has described the various essential features of the Genuine currency notes. Some model currency notes highlighting the important features of the notes are also find place in this chapter. If forgery of currency notes could be done successfully then it could, on the one hand, make the forgers a millionaire overnight and on the other, it could destroy a nation's economy. All nations therefore, try to make forgery-proof currency notes. But still the forgery of currency notes is highly luring. It is, therefore, an ever-ending recurring headache. Banker's role in detecting the forged currency notes has also been discussed in this chapter.

Chapter 6 deals with the Counterfeits of cheques, travellers cheques, bank drafts etc. Forging cheques, unauthorised printing of traveller cheques and banker's drafts has been increasing in recent times. It is becoming a serious source of trouble to the banking business as in many cases forged cheques, counterfeit cheques and drafts have been encashed. The author has specified some typical cases of counterfeit of currency notes. The author has given special emphasis in this chapter on cheque & traveler cheque fraud and its prevention.

In Chapter 7, the author has discussed the topic of Credit Card Frauds. The sub topics viz., what is credit card, how can one distinguish the fake from the genuine, how can it be made safe against the depredations of the defrauder are also discussed in this chapter. There is a discussion on Bankers role in prevention of the credit card frauds in this chapter.

In Chapter 8, the author has emphasized the need to use the cheque writer and type-writers. Possibilities of frauds in cheque writers & typewriters, nature of frauds, Banker's role in detection of such frauds, identification of machines used for cheque writing/ typing etc., are also discussed in this chapter.

In Chapter 9, the author has discussed about the fingerprints. The author has also highlighted the advantages and disadvantages of fingerprints. Bankers in India come across fingerprints fairly frequently. There are large number of illiterate persons in our country. There is increasing emphasis to develop banking service among the illiterate persons who do not know how to sign their names. Such persons use fingerprints instead of signatures to operate their accounts. The banker should, therefore, know how to identify fingerprints.

In Chapter 10, the author has specified the use of seals and stamps in the various instruments used in the banking transactions. The nature of frauds in using the seals and the role of the bankers in preventing such frauds are also discussed in this chapter.

The use of counterfeit coins and its importance thereof are discussed in Chapter 11. The author has emphasized the nature of fraud that might be possible in using the coins and the banker's role in detecting the same.

In Chapter 12, the author has discussed the topic on Bank Robberies. Robberies in general and bank robberies in particular are heinous crimes. They are highly demoralizing and attract wide adverse publicity. Robberies and decoits are grave crimes. Bank robberies may be of two types viz., ambush robberies and premises robberies. The author has also discussed the banker's role in handling the robberies and has highlighted the systematic approach to the problems of robberies.

In Chapter 13, the author has discussed the Computer Frauds in Banks. Transactions worth trillions of rupees are being carried out globally every month, through computers. When so much money is being handled through computers, it is no surprise that the computer con-artist has come around and is making money in a big way. Computer depredations have, by some, been classified as Computer Frauds and Computer Crimes. The author has highlighted the impediments and the difficulties that are occurred in the investigation of the Computer crimes. The various types of the computer crimes are also find place in this chapter. The author has identified class of persons who are involved in the computer crimes. The laws & legislation that are existing to tackle the computer crimes and some clues for preventing the computer crimes are also find place in the book.

In Chapter 14, the author has discussed about the Prima Facie Case in respect of the bank frauds. The author has suggested the procedures and the precautions that are required to be taken by the bank immediately after the bank comes to know about the frauds.

In Chapter 15, there is a discussion on the Departmental Processing. The author has discussed about the various powers and procedures of the vigilance department of the banks, Central Vigilance Commission (CVC), Reserve Bank of India, Vigilance Division of the Ministry of Finance etc.

In Chapter 16, the author has discussed about the Police Investigations. The topics relating to the various police agencies that are required to be contacted by the banks in case of frauds.

The chapter contains the investigation procedures also.

In Chapter 17, the author has discussed about the Departmental Inquiries and the procedure that are required to be followed while conducting departmental inquiries in the banks.

Chapter 18 deals with the Punitive Actions that are required to be taken in case of bank frauds. The principles of natural justice have not been defined in law, and rightly so. They are free from rigid restrictions. They are adaptable to changing times, traditions and moods of the people. The author has discussed the principles of natural justice that are required to be followed in the cases relating to the bank frauds.

In Chapter 19, the author has identified the important bank documents that are required to be protected with proper care and caution. The author has suggested some techniques of protections of the said bank documents.

The relevant laws that deal with the bank frauds have been identified in Chapter 20. The chapter contains the important sections in the Indian Penal Code, Criminal Procedure Code, Indian Evidence Act, Reserve Bank of India Act, Reserve Bank of India (Note Refund Rules), Negotiable instruments Act.

The Chapter 21 contains various case laws relating the bank fraud cases. The case law has been arranged topic wise for the convenience of readers.The book also contains a Subject Index at the end. The book is a multi-professional monograph, written in non-technical language, addressed to all those who are concerned with and have to deal with bank frauds: Administrators, Bankers, Investigators, Experts, Counsels, Judges and even the public who suffer from the initial blues. It is priced Rs. 315/-.

The right to be let alone is indeed the beginning of all freedom.

— DOUGLAS, William O., in Public Utilities Comm'n. v. Pollak, 343 U.S. 451, 467 (1952)

But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

— JACKSON, Robert J., West Va. state Bd. of Educ. v. Barnette , 319 U.S. 624, 642 (1943)

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. The limits set to property by other puboic interests present themselves as a branch of what is called the police power of the State.

— HOLMES, Olover Wendell, in Hudson water Co. v. McCarter , 209 U.S. 349, 355 (1908)

LD NEWS

Foreign Visits

Shri N.V. Deshpande, Principal Legal Adviser and Shri M.A. Batki, Legal Adviser attended a Seminar on Legal & Regulatory Aspects of Financial Stability at BIS in Basel Switzerland from 18th January to 25th January 2002.

Shri N.V. Deshpande, Principal Legal Adviser presented a paper at the seminar on Legal and Regulatory Framework for Financial Sector Reforms held at Lusaka, Zambia.

Congrats !

Shri K.D. Zacharias, Joint Legal Adviser (GradeE) has been selected and empanelled for the post of Legal Adviser (Grade-F).

Seminar/Lecture/Training

Shri S.R. Kolarkar, Legal Adviser attended the conference on "Mumbai an International Financial Centre-The Way Forward," organised by the Confederation of Indian Industry.

Shri K.D. Zacharias, Joint Legal Adviser participated in the panel discussion in a seminar on Accounting Standards and Documentation for Derivatives at the Banker's Training College, Mumbai (BTC). Shri Zacharias also spoke to the participants of the Programme on Bond Portfolio Management on Legal Aspects of Debt Markets at the BTC.

Shri P.S. Bindra, Joint Legal Adviser spoke to the participants on I.T. Act, Online Contract, Online Banking, Online Security Trading in a seminar on "Cyber Laws" conducted by the Institute of Company Secretaries of India-Centre for Corporate Research & Training, CBD, Belapur.

Shri D.N. Tripathi, Joint Legal Adviser attended a program on Communication, Effective Leadership and Management Styles for Senior Officers of RBI conducted by CAB Pune.

Shri P.S. Bindra, Joint Legal Adviser addressed the In-charges of Computerised Departments of the Bank regarding Legal System Governing Usage of I.T. in 6th program for In-charges of Computerised Departments organised by Reserve Bank of India Staff College, Chennai.

Welcome

Smt. Indu John, Clerk/CNE-II reported to this department on 14-1-2002.

Goodbye !

Shri Rakesh Joshi, Clerk/CNE11 was relieved from this department on 14-1-2002 and transferred to cash department.

Study Circle

Shri Shabbir Wakharia, partner of M/s. Wakharia & Wakhari & CO, Solicitors and Advocates, Mumbai delivered a talk on "Time Factor in Litigation in U.K., U.S.A and India and Role of Law Firms in Globalisation" on 15 February 2002.

MAIL BAG

Dear Shri Deshpande,

I could read the July-September 2001 issue of "RBI LEGAL NEWS AND VIEWS" after my return from abroad in the last week of January. I am writing this letter just to convey to you that I was greatly impressed by the depth and width of your paper titled "A Critical Evaluation of Legal Reforms Mitigating Banking Crisis". It is very comprehensive and shows insights in the intricacies of banking business. I am very sure that the contents will add great value to the readers' knowledge base. Please accept my heartiest congratulations! I am looking forward to read the concluding part in the next issue.

With warm personal regards,

Yours sincerely,

(P.B. Kulkarni)

We have also received letters from M/s. Fouzy P.K., Yogesh N. Chande, Brijesh Kumar Mishra, G.K. Manjunath, D.K. Vasal, Ashok Rajdan, Vidyadhar Anaskar, T.S. Rayalu, P.V.S. Reddy, K. Jogeshwar Rao, Maruti Arvind Golikrishnan, Chandra Sekhar, Madhur Chakravedi, Desh Deepak, M.N. Singhi, Ravindran Nair, Hemlata, Shankar Narayan, Asmi Varma, M. Sreedar, R.N. S.P. Achanta, S.M. Kulkarni, Dinesh Shanbaug, Rajeev Kaushik, B.V. Prakash, M.S. Rao, Irshad Hussain, Rajeev Deval, K.H. Sharma, K. Anand and Meera Bashikar.

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

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

Dated: March 2002

N.V. Deshpande
Signature of Publisher