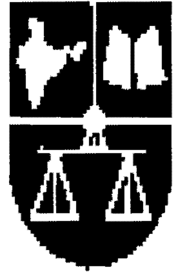

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY
BANGALORE, 560072

DEBTS RECOVERY TRIBUNAL – AN ANALYSIS

DISSERTATION SUBMITTED TO THE UNIVERSITY IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE DEGREE OF LL.M

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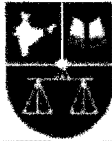

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CERTIFICATE

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DECLARATION

I hereby declare that the work in the project is outcome of the research conducted by me under the academic and supervision of Dr. O. V. Nandimath at National Law School of India University, Bangalore as part of the academic program. The complete report of this study is being produced in this document.

I hereby declare that this work is original except for such help taken from such authorities as has been referred to at the appropriate places for which necessary acknowledgments have been made. The contents of this project are not plagiarized.

I further declare that this work has not been published or submitted earlier in any organisation for any purpose

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Place: Bangalore
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TABLE OF STATUES

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Administrative Tribunals Act, 1985.

Arbitration Act, 1975.

Banking Companies (Acquisition and Transport of Undertakings) Act, 1976.

Civil Procedure Code 1908.

Companies (Court) Rules, 1959.

Companies Act, 1956.

Company Secretaries Act, 1980.

Constitution of India.

Consumer Protection Act, 1986.

Costs and Works Accountants Act, 1959.

Courts and Enforcement Act, 2007.

Debt Recovery Tribunal (Procedure) Rules 1993.

Evidence Act 1872 .

Foreign Exchange Management Act, 1999.

Income Tax act 1961.

Industrial Disputes Act, 1947.

Industrial Reconstruction Bank of India Act, 1984.

Recovery of Debts to Banks and Financial Institutions Act, 1993.

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Sick Industrial Companies (Special Provisions) Act, 1985.

The Debts Recovery Appellate Tribunal (Financial and Administrative Power) Rules, 1997.

The Debts Recovery Appellate Tribunal (Procedure) Rules, 1994.

The Debts Recovery Tribunal (Financial and Administrative Power) Rules, 1997.

The Securities and Exchange Board of India Act, 1992, (15 of 1992).

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Removal of Difficulties) Order, 2004.

The Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003.

The Security Interest (Enforcement) Rules, 2002.

Workmen's Compensation Act 1923.

LIST OF CASES

Allahabad Bank, Calcutta v. Radhakrishna Maity 2000 (1) M.L.J. 52 (S.C.).

Anamika v. Debts Recovery Tribunal [2001]104CompCas401(Kar).

Arun Kumar Chamaria v. Corporation Bank (2001) 2 CALLT 63 HC.

Bank of India v. Ramniklal Kapadia [1997]89CompCas534(Guj).

Bihar State Financial Corpn. v. Recovery Officer, DRT II(2007)BC400, [2007(1)JCR10(Jhr)].

Cofex Exports Ltd. v. Canara Bank AIR 1997 Del 355.

Cosmopolitan Trading Corpn v. Engg. Sales Corporation [2003]133TAXMAN52(Raj).

Delhi High Court Bar Association v. Union of India AIR 1995 Del. 323.

Devi Trading Corpn. v. Oriental Bank of Commerce [1999]95CompCas490(MP), 1996(0)MPLJ155.

E. Satish Kumar v. Vijaya Bank, Coimbatore, AIR 2004 Mad 306, 2003 116 CompCas 549 Mad.

Greater Bombay Cooperative Bank Ltd. v. M/S United Yarn Tex Pvt. Ltd. & Ors AIR 2007 SC 1584.

I.C.I.C.I. Ltd. v. Vanjinad Leathers Ltd. AIR 1997 Ker. 273.

Industrial Credit and investment Corpn. V. Sruzivas Agencies (1996) 4 SCC 165.

Industrial Credit and Investment Corporation of India Ltd. v. Grapco Industries Ltd. (1999) 4 SCC 710.

Industrial Credit and Investment Corporation of India Ltd. v. Paras Ompuri Synthetics Ltd. 1999(4)BomCR7.

Industrial Credit and Investment Corporation of India v. Pathera Brothers Forgings and Stampings Ltd. [2000] 114 Comp Cas 204.

Industrial Finance Corp. Ltd. v. M/s. Agra Construciton Co. Ltd. AIR 1947 Del 143.

Industrial Finance Corporation of India Ltd. u. M/s. Allied International Products Ltd. AIR 1947 Del 143.

J.U. Mansukhani & Co. and Another v. Presiding Officers & Others AIR 2000 Del 103.

Karnataka State Financial Corp. v. M/s. Sun Canning IP) Ltd. AIR 1998 Kant 151.

Kartar Singh v. Auto Tension Ltd. 1997VAD(Delhi)535.

Kishore Rungta v. Punjab National Bank 2001 (3) BomCR 730.

Kishorilal Loomba v. DRT, Jabalpur 2001 (2) MPHT 139.

M/s. Jay Jee Service Station, Bangalore v. M/s. Syndicate Bank AIR 1998 Kant. 249.

M/s. Phoneix Impex v. State of Rajasthan AIR 1998 Raj 100.

M/s. Pratap Ch. Dey v. Allahabad Bank AIR 1997 Cal 96.
M/s. Shoes East Ltd. v. Allahabad Bank AIR 1997 Del 325.
Mahadeo v. Kalloo 73 Ind Cas 494.

Malpani Marbles and Granites P. Ltd. v. Allahabad Bank.

Mardia Chemical v. Union of India AIR 2004 SC 2371.

Ms. Kirti Overseas v. Debt Recovery Appellate Tribunal, Allahabad 2002(1)AWC176.

Mudit Entertainment Industries Pvt. Ltd. v. Banaras State Bank Ltd 2000 (2) AWC 1008.

Navdeep Theatre (P) Ltd. v. Union of India 2001 103 CompCas 290 P H.

Punjab National Bank v. O.C. Krishnan AIR 2001 SC 3208.

Raghvendra Anant Rai Mehta v. Union of India 1997 bank j. 581 (bom).

Re: Remanika Silks (P) Ltd. (In Liquidation) 30.2002(1)COMP LJ 191(KERALA).

Risk capital & technology finance corp. Ltd. U. Harnath singh bapna AIR 1997 Del 239.

S. Ravichandra v. Debts Recovery Tribunal ILR1998KAR1951, 1998(5)KarLJ162.

Sharat Chander Khandelwal v. Central Bank of India III(2004)BC215.

Shyamlal v. State of Uttar Pradesh AIR 1954 SC 369.

Sita Ram Singhania v. Bank of Tokyo- Mitsubishi Ltd (1999) 4 SCC 382.

Spectrum Electronics v. State Bank of India [1999]97CompCas451(Cal).

State Bank of Bikaner and Jaipur v. Kukar Sons RLW2003(3)Raj1698.

State Bank of Hyderabad v. Pennar Paterson Ltd [2003] 114 Comp Cas 66.

State Bank of India v Vijay Kr Tayal AIR 1997 Del 170.

State Bank of India v. Sarathi Engineering Enterprises 1997 (4) ALT 392.

State Bank of India v. Union Bank of India.

Sushil kumar jaiswal v. Bank of india AIR 1996 Cal 323.

Syndicate Bank v. Chamundi Industries AIR 2002 Kant 56.

Tata Iron & Steel Co. Ltd. v. Presiding Officer 1966 AIR SC 288.

The Bank of Tokyo-Mitsubishi Ltd. v. Chembra Estates AIR 2001 Bom 170.

The Singareni Collieries Co. Ltd. v. State Bank of Hyderabad 1966 SCR (2) 190.

Unified Agro Industries (I) Ltd. v. Debts Recovery Tribunal, New Delhi AIR2000Delhi394, 2000(56)DRJ307.

Venkateswara Textiles Traders & Printers v. Canara Bankal AIR 1997 Del 170.

Chapter 1: INTRODUCTION

Debt Recovery Tribunals have been created under Recovery of Debts to Banks and Financial Institutions Act, 1993 for expeditious adjudication and recovery of debts due to banks and financial institutions. This Act has been on the statute book since June, 1993. However it may be noted that the legislative frame work, as also the working of the Tribunals under the Act are not free from criticism.

Taking deposits from customers and then giving out loans constitute a major part of the operations in the banking industry. With this arise various problems too, one of them being the nonpayment of debt. Although the banks always want to have good relations with the customers, there are various circumstances where they have to resort to legal actions. This is in excess of the various means of correspondence with the borrowers, persuasions and compromises. When these attempts fail, it becomes necessary for the banks to resort to legal steps for recovery of their bad debts.

Traditionally, for such eventualities, the banks used to file civil suits for the recovery of any amount that had become overdue, but for the reason that the civil courts are generally overloaded with backlogs and that the delay that result in the civil courts make the overdue, rise to huge figures because of addition of overdue interest (which is against the interests of the borrowers), there was a view expressed at various forums that there is a need of a new method to deal with the problem.

Thus, to help Banks recover over debts, various Committees were formed to study this aspect and suggest remedial measures. These Committees made various observations and ultimately,

the Tiwari Committee[1] recommended setting up of a Special Tribunals which could further the recovery process. This was followed up by the Narasiham Committee report [2] on the financial system and this Committee observed that it is in full agreement with the recommendations made by the Tiwari Committee and made strong recommendations to the Government that a special legislation be introduced forthwith. The Committee considered that a proper judicial frame work needed to be established in order that the Banks and other financial institutions were able to enforce the claims against their borrower clients.

In this backdrop, the Government of India passed "Recovery Of Debts Due To Banks And Financial Institutions Act, 1993" for the establishment of Tribunals in order to expeditiously adjudicate and recover debts due to 'Banks' and Financial Institutions' as also other matters connected therewith or incidental thereto. This Act came into force on the 24th June, 1993.

The provision of this act does not apply in case where debt due to bank or financial institution is less than 10 lacs. Hence it is specified by the Government of India that the Debt Recovery Tribunals will entertain applications where the amount due to any Bank or Financial Institution or Consortium of Banks or Financial Institutions is Rs.10lacs or more.

After the enactment of this legislation, the procedures for the Tribunal mentioned therein were provided under the 'Debt Recovery Tribunal (Procedure) Rules 1993'. These Tribunals have been established at various centers in India. The Debt Recovery Tribunal are located across the country. Some cities have more than one Debt Recovery Tribunal located therein.

[1] Tiwari committee report of 1981 was set up to examine the legal and other problems faced by the banks and financial institutions.
[2] Narasimham Committee report on the financial system, 1991 - A committee appointed by the Government of India in August 1991, to examine all aspects of the financial system, in terms of its structure, organization functions and procedures. The committee was headed by M. Narasimham, former Governor, Reserve Bank of India (RBI).

New Delhi and Mumbai have three Debt Recovery Tribunal. Chennai and Kolkata have two Debt Recovery Tribunal each. One Debt Recovery Tribunal each has been constituted at Ahmdabad, Allahabad, Arungabad, Bangalore, Chandigrah, Coimbatore, Cuttack, Ernakulam, Guwahati, Hydrabad, Jabalpur, Jaipur, Lucknow, Nagpur, Patna, Pune, Ranchi and Vishakapatnam.

It is to be noted that the Act has not taken away the powers of the Supreme Court of India and the High Courts under Articles 226 and 227 of the Constitution of India, and only provides for 'transferring' the cases from the civil courts to the tribunal where the overdue is of Rs. 10 lacs and above.

Chapter 2: RESEARCH METHODOLOGY

2.1 SCOPE

The scope of the research work is limited to the study of working of Debt recovery tribunal, how far these tribunals have been successful in the changed economic scenario. The researcher examines, with the help of cases whether the tribunals(DRT) have been of help to the banking and financial institutions as intended before setting for recovery of debts and non performing assets.

2.2. GENERAL METHOD OF ANALYSIS

The researcher has made use of an analytical and descriptive style of writing. Researcher also thinks that there is ample scope for further research in this area.

2.3. SOURCES OF DATA

To accomplish the aforesaid objective Researcher has relied heavily on the secondary (data collection from books, commentaries, judicial pronouncements and websites etc) including few primary sources.

2.4 OBJECTIVES OF THE STUDY

The purpose of this project is to ascertain the functioning of the DRT(Debt Recovery Tribunal) , procedure adopted for expeditious adjudication of claims of Banks and Financial Institutions, various issues relating to Debt recovery Tribunals so constituted under the provisions of the RDDB Act of 1993 and the changes that have come up after the passing of Securitisation Act of 2002.

2.5 RESEARCH QUESTIONS

The author has formulated the following research questions to be looked into and have tried to find answers for them.

- How do banks and financial institutions proceed to recover their dues under RDDB Act, 1993 and SARFESAI Act of 2002?
- What the various jurisdictional issue under the Debts recovery tribunal?
- Is Recovery of debts due to banks and financial institutions act, 1993 sufficient for the recovery of loans and ever growing Nonperforming assets (NPA)?
- Is Debts Recovery Tribunal achieving their goals of expeditious recovery of the debts due to the banks and financial institutions?
- Is Debt recovery tribunals functioning properly and does the role of Debts recovery tribunal changed after the SARFESAI Act 2002?
- What are the intricacies involved in Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and various issue regarding the provisions of the Act?

2.6 MODE OF CITATION

The researcher has followed a uniform mode of citation throughout this project.

Chapter 3: Recovery Of Debts Due To Banks And Financial Institutions Act, 1993

3.1. BACKDROP

The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the Act) is almost a decade old. As with any legislation breaking new ground, the Act has been challenged in various fora including the High Courts for its summary nature, the ousting of the jurisdiction of the Civil Courts, the provisions which allow borrowers to proceed against the bank or financial institution in the Debt Recovery Tribunals (DRT) and of course the latest challenge to the constitutional validity of the Act. Whatever may be, the Act of 1993 was a welcome step taken by the legislature in ensuring speedy recovery of bank dues. Civil courts had come to the conclusion after decades of reviewing case law, that in almost all cases the suit instituted by banks and financial institutions, there is hardly any defence and that the delay in disposal of the cases in the court is not due to the fault of the banks or financial institutions[3]. The rationale behind the Act is contained in the Tiwari Committee[4] Report.

They suggested three modes to recover such dues, one of which was to set up quasi judicial bodies to deal exclusively with the recovery process of the financial sector. The Committee on financial system chaired by Shri Narasimham in its report to the Ministry of Finance, Government of India in November 1991, endorsed the views of the Tiwari Committee for setting up special legislation and special tribunals to expedite the recovery process in the

[3] AIR 1995 Bom 268

[4] Tiwari committee report stated that *"The civil courts are burdened with diverse types of cases. Recovery of dues due to banks and financial institutions is not given any priority by the civil courts. The banks and financial institutions like any other litigants have to go through a process of pursuing the cases for recovery through civil courts for unduly long periods."*

financial sector. Thus came the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

3.2. OVERVIEW OF THE ACT

3.5.1 SALIENT FEATURES

The Act inter alia provides for establishment of Tribunals and Appellate Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and it has no application to State Level Financial Institutions.[5] The Act has an overriding effect but the provisions of the Act shall be in addition to and not in derogation of some acts.

- The Industrial Financial Corporation Act, 1948(15 of 1948);
- The State Financial Corporations Act,1951(63 of 1951);
- The Unit Trust of India Act, 1963(52 of 1963);
- The Industrial Reconstruction Bank of India Act, 1984(62 of 1984); and
- The Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986).

The Act constitutes Debts Recovery Tribunal for recovery of debts due to Banks and Financial Institutions and also sets up Debts Recovery Appellate Tribunals to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under this Act. Section 19 makes provision for filling of an application before the tribunal for debts recoverable under

[5] Several financial institutions have been set up at the State level which supplement the financial assistance provided by the all India institutions. They act as a catalyst for promotion of investment and industrial development in the respective States. They broadly consist of 'State financial corporations' and 'State industrial development corporations'. Few example of state level financial institutions Andhra Pradesh State Financial Corporation (APSFC), Himachal Pradesh Financial Corporation (HPFC),Madhya Pradesh Financial Corporation (MPFC),North Eastern Development Finance Corporation (NEDFI),Rajasthan Finance Corporation (RFC),Tamil Nadu Industrial Investment Corporation Limited, Uttar Pradesh Financial Corporation (UPFC), Delhi Financial Corporation (DFC),Gujarat State Financial Corporation (GSFC), The Economic Development Corporation of Goa (EDC), Haryana Financial Corporation (HFC),Jammu & Kashmir State Financial Corporation (JKSFC),Karnataka State Financial Corporation (KSFC),Kerala Financial Corporation (KFC),Maharashtra State Financial Corporation (MSFC),Orissa State Financial Corporation (OSFC), Punjab Financial Corporation (PFC), West Bengal Financial Corporation (WBFC),

this Act. Section 20 lays down procedure to be adopted for filling of an appeal before the Debt Recovery Appellate Tribunals against the order passed by the Debt Recovery Tribunals. Section 21 makes it mandatory to deposit atleast 75% of the amount of debt so due with the Appellate Tribunal , but the Appellate Tribunal is empowered to waive or reduce the amount to be deposited for reasons to be recorded in writing. Section 25 empowers the Recovery Officer while recovering the amount of debt to either attach and sale the movable or immovable property of the defendant or arrest the defendant and put in civil prison. Section 31 makes provision for transfer of pending cases instituted for recovery of debts before any Courts or any other authority except that of the Supreme Court and High Court exercising jurisdiction under Arts. 226 and 227 of the Constitution in relation to the matters specified in Sec. 17 of the Act.

3.5.2 SCOPE AND APPLICATION OF THE ACT

A few features of significance need to be noted –

a) The Debts Recovery Tribunal is a tribunal and not a Court.

b) The proceedings before it are initiated on an application and hence are not suits.

c) Only bank or financial institutions has the locus standi to invoke the jurisdiction of the Tribunal.

d) The Tribunal does not pass the decree. It issues a certificate to the recovery officer for the recovery of the amount of debt specified therein.

e) Its procedure is not prescribed or detailed ; the principles of natural justice alone have to be followed.

f) The procedure is summary in nature.

g) Ordinarily the Tribunal dispose of the matter within a period of six months merely between the date of the application and decision thereon.

h) The definition of debt shows that the jurisdiction of the Tribunal is attracted on the allegation of debt being due made in the application and is not dependent on its being so found.

i) The Act was preceded by an ordinance promulgated on 26-4-1993, which has been repealed by the DRT Act.

3.3. GENERAL PROVISIONS OF THE ACT

3.3.1. DEFINITIONS CLAUSE

Sec. 2 of the said Act defines the terms used in the various sections of the Act. Some of them are reproduced below:

a) **'Appellate Tribunal'** means an Appellate Tribunal established under sub-section (1) of section 8.

b) **' Application'** means an application made to Tribunal under section 19;

In the case of **Andhra Steels Corporation Ltd. v. Bank of Baroda**[6]**,** the High Court held that a winding up application under S.433, of Companies Act is not an application for obtaining decision for recovery of debts due to banks and financial institution and therefore can not be filed before the Tribunal constituted under the RDDB Act, 1993.

(c) **'Bank'** means –

(i) a banking company ;

(ii) a corresponding new bank;

(iii) State Bank of India;

(iv) a subsidiary bank; or

[6] AIR 1995 Cal 367

(v) a Regional Rural Bank.

Are the Co-operative Banks within the ambit of 1993 Act?

It was held by Hon'ble Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd. v. M/S United Yarn Tex Pvt. Ltd. & Ors** [7] that "Co-operative banks" established under the Maharashtra Co-operative Societies Act, 1960; the Andhra Pradesh Co-operative Societies Act, 1964; and the Multi-State Co-operative Societies Act, 2002 transacting the business of banking, do not fall within the meaning of "banking company" as defined in Section 5(c) of the Banking Regulation Act, 1949. Therefore, the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 by invoking the Doctrine of Incorporation are not applicable to the recovery of dues by the co-operatives from their members. The field of co-operative societies cannot be said to have been covered by the Central Legislation by reference to Entry 45, List I[8] of the Seventh Schedule of the Constitution. Cooperative Banks constituted under the Co-operative Societies Acts enacted by the respective States would be covered by co-operative societies by Entry 32 of List II[9] of Seventh Schedule of the Constitution.

(b) **'banking company'** shall have the meaning assigned to it in clause (c) of section 5 of Banking Regulation Act, 1949(10 of 1949). Section 5(c) of the Act of 1949 defines Banking Company as any company which transacts the business of banking in India.

[7] AIR 2007 SC 1584

[8] Entry 45 list I is Banking.

[9] Entry 32 List II is Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

(c) **'debt'** means any liability (inclusive of interest) which is claimed as due from any person by a bank or financial institution or by a consortium of banks or financial institutions during the course of their business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on , and legally recoverable on, the date of the application;

Does the term 'debt' as given here include its widest possible meaning?

It was held by the Delhi High Court in **J.U. Mansukhani & Co. and Another v. Presiding Officers & Others**[10] , the use of expression 'any liability' or 'any person' and otherwise throughout the Section shows that the legislative intent to provide the word 'debt' with widest possible meaning. So issuance of Bank Drafts is clearly the business activity of the Bank.

(d) **'financial institution'** means –

(i) a public financial institution within the meaning of section 4A of the Companies Act , 1956 (1 of 1956);

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

(iii) such other institution as the Central Government may , having regard to its business activity and the area of its business activity and the area of its operation in India by notification , specify.

[10] AIR 2000 Del 103

3.3.2. Establishment of Tribunal and Appellate Tribunal

*a) **Establishment of Tribunal and matters related thereto.***

Section 3(1) of the Act provides that the Central Government shall establish one or more Tribunals to be known as the Debts Recovery Tribunal, by notification, to exercise the jurisdiction, powers and authority conferred on such Tribunal by or under this act. While Section 3(2) lays that the Central Government shall also specify the areas over which the Tribunal shall exercise the jurisdiction for entertaining and deciding the applications filed before it. In **Mudit Entertainment Industries Pvt. Ltd. v. Banaras State Bank Ltd.**[11], it was held that Power to establish Tribunal under the Act is not traceable to Art. 323- B but to Art. 245 r/w Entries III-A and 46 of List III of VII Schedule of the Constitution. The Tribunal has been set up as a special forum by way of special forum by special remedy. Though it might be desirable, it could not be possible to set up such special forum in villages of every town or region , Government may consider these aspects and arrange sittings for Tribunal at various places.

Section 4(1) of the Act lays provision for the Composition of Tribunal. It provides that a Tribunal shall consist of one person only (herein referred to as the Presiding Officer) to be appointed by notification, by the Central Government. It means that a Tribunal shall consist of one-person only known as Presiding Officer to be appointed by the Central Government by Notification. The Central Government may authorise the Presiding Officer of one Tribunal to discharge also the functions of the Presiding Officer of another Tribunal. Section5 lays down Qualifications for appointment as Presiding Officer. It speaks that a person shall not be qualified for the appointment as the Presiding Officer of a Tribunal unless he is, or has been,

[11] 2000 (2) AWC 1008

or is qualified to be a, District Judge. Section 6 says that the Presiding Officer of the Tribunal shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty- two years, whichever falls earlier. While section 7 speaks about the Staff of the Tribunal, it says that Central Government shall provide with one or more Recovery Officers and such other officers and employees as the said government may think fit. The Recovery Officers and other officers and employees of a Tribunal shall discharge their functions under the general superintendence of the Presiding Officer and the salaries and allowances and other conditions of service of the Recovery Officers and other officers and employees of a Tribunal shall be such as may be prescribed.

So far there are a total of five DRATs having jurisdiction over 32 DRTs located at various places covering all the States/UTs in the country (except J&K in respect of the RDDB Act, 1993).

b) Establishment of Appellate Tribunal and matters connected thereto.

Section 8 deals with the establishment of Appellate Tribunal. The Central Government shall, by notification, establish one or more appellate tribunals known as the Debt Recovery Appellate Tribunal to exercise the jurisdiction, powers and authority conferred on such tribunal by or under this Act. The Central Government shall also specify in the Notification the Tribunals in relation to which the Appellate Tribunal may exercise jurisdiction. Sub-Section (3) of Section 8 lays new provision inserted by the Amendment Act 2000. As provided by the sub-section the Central Government may authorise the Chairperson of an Appellate Tribunal to discharge also the functions of the Chairperson of other Appellate Tribunal. Section 9 lays provision for Composition of Appellate Tribunal and says an Appellate Tribunal shall consist of one person only (hereinafter referred to as the Chairperson

of the Appellate Tribunal) to be appointed , by notification , by the Central Government. Section 10 speaks of Qualifications for appointment as Chairperson of the Appellate Tribunal. It says that a person shall be qualified for appointment as a Chairperson only if he

- is or has been or is qualified to be , a Judge of a High Court,
- has been a member of the Indian Legal Service and has held a post in Grade 1 of that Service for atleast three years,
- has held office as presiding officer of a Tribunal for at least three years.

As per Section11 the Chairperson of an Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty- five years, whichever is earlier. Section 12 provides for the staff of the Appellate Tribunal. It says that so far as may be possible (except those relating to Recovery Officer) the provision of Section 7 as discussed earlier shall , so far as may be , apply to an Appellate Tribunal as they apply to a Tribunal. Section 13 provides for the salary and allowances and other terms and conditions of service of Presiding Officers and the Chairperson of an Appellate Tribunal. The salary and allowances payable to and the other terms and conditions of service (including pension , gratuity and other retirement benefits) of , the Presiding Officer of a Tribunal or the Chairperson of an Appellate Tribunal shall be such as may be prescribed. Provided that neither the salary and the allowances nor the other terms and conditions of service of the Presiding Officer of a Tribunal or the Chairperson of an Appellate Tribunal shall be varied to his disadvantage after appointment. It was held in **Raghvendra Anant Rai Mehta v. Union of India** [12], the travelling facilities /conditions of the Chairperson of the Appellate Tribunal are at par with the condition of the High Court Judges. In respect of travelling allowances, the Chairpersons are entitled to HOR facilities.

[12] 1997 bank j. 581 (bom)

3.3.3. RESIGNATION AND REMOVAL OF PRESIDING OFFICER AND CHAIRPERSON

Section 15 of the Act deals with resignation and removal of the Presiding Officers of a Tribunal or Chairperson of an Appellate Tribunal. It states that the Presiding Officer of a Tribunal or the Chairperson of a Tribunal may, by notice in writing under his hand addressed to the Central Government, resign his office. Provided that the Presiding Officer of a Tribunal or Chairperson of an Appellate Tribunal shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever comes earliest. Sub-Section (2) of Section 15 lays deals with the removal of the Presiding Officer or Chairperson. It states that that Presiding Officer or Chairperson shall not be removed from his office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after inquiry,-

- in the case of Presiding Officer of a Tribunal, made by a Judge of a High Court;
- in the case of Chairperson of an Appellate Tribunal, made by a Judge of the Supreme Court.

In the enquiry the Presiding Officer of a Tribunal or the Chairperson of an Appellate Tribunal shall be informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The Central Government may, by rules, regulate the procedure for investigation of misbehaviour or incapacity of the Presiding Officer of a Tribunal or the Chairperson of an Appellate Tribunal. The Hon'ble Supreme Court in

Shyamlal v. State of Uttar Pradesh[13] held that removal is termination of service which doesn't disqualify from future employment whereas dismissal is removal which disqualifies from future employment.

3.3.4. ORDERS CONSTITUTING TRIBUNAL OR AN APPELLATE TRIBUNAL TO BE FINAL AND NOT TO INVALIDATE ITS PROCEEDINGS

Section 16 of the Act lays provision that no order of the Central Government appointing any person as the Presiding Officer of a Tribunal or Chairperson of an Appellate Tribunal shall be called in question in any manner and no act or proceeding before a Tribunal or an Appellate Tribunal shall be called in question in any manner on the ground merely of any defect in the constitution of a Tribunal or an Appellate Tribunal.

The Hon'ble Supreme Court in the case of **Sita Ram Singhania v. Bank of Tokyo-Mitsubishi Ltd.**[14] held that there is no reason why the High Courts in matters filed by the defendants in suits instituted by the banks before the Debts Recovery Tribunal should more or less as a matter of course grant stay of proceeding before the tribunals. The very purpose of setting up the tribunals will be lost by granting stay merely because there is challenge to the notification constituting the tribunal.

3.3.5. JURISDICTION, POWERS AND AUTHORITY OF TRIBUNALS

Section 17 deals with the jurisdiction, powers and authority of Tribunals. It states that Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of

[13] AIR 1954 SC 369
[14] (1999) 4 SCC 382

debts due to such banks and financial institutions. While sub-section 2 of the said section states that the Appellate Tribunal shall exercise on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made by a Tribunal under this Act. Section 17A deals with the power of Chairperson of Appellate Tribunal. Sub-Section(1) of Section 17A states that the Chairperson of an Appellate Tribunal shall exercise general power of superintendence and control over the Tribunals under his jurisdiction including the power of appraising the work and recording the annual confidential reports of Presiding Officers. Sub-Section (2) of Section 17A states that the Chairperson of an Appellate Tribunal having jurisdiction over the Tribunals may, on the application of any of the parties or on his own motion after notice to the parties and after hearing them , transfer any case from one Tribunal for disposal to any other Tribunal. Section 18 of the Act lays provision on Bar of Jurisdiction on any other courts for trying any matters over which the exclusive jurisdiction is vested on the Tribunal and Appellate Tribunal. It states that on and from appointed day, no court or other authority shall have , or entitled to exercise , any jurisdiction , powers or authority (except the Supreme Court , and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17.

To clearly understand the Jurisdiction, Powers and Authority of Tribunals some matters are necessary to be discussed herein:

a) Jurisdiction of Tribunal:

Jurisdiction means the authority which a court has to decide matters that are litigated before it or to take cognisance if matters presented in a formal way of its decision. The question whether a Tribunal has jurisdiction or not at this stage will have to be decided on the basis of

the allegations made in the original application filled before it under Section 19(1) of the Act. Jurisdiction is viewed from two perspective, (i) Pecuniary Jurisdiction and (ii) Territorial Jurisdiction. Pecuniary jurisdiction refers to the amount of claims that can be entertained by the Tribunal. While territorial jurisdiction refers to the local extent or area over which the particular court can and does exercise the right when ascertained. Therefore the term jurisdiction means the authority or power act in a matter and not authority or power to do an act in a particular manner.

(i) Pecuniary Jurisdiction - For claims of ten lakh rupees or more, exclusive jurisdiction has been conferred on the Tribunal. For amounts less than ten lakh rupees , the ordinary civil courts have jurisdiction. In order to ensure that the Tribunals are not flooded with the cases where the amount involved is not very large, the Act provided that it is only where the recovery of money is more than ten lacs rupees that the Tribunal will have jurisdiction to entertain the application under section 19 of the Act.

(ii) Territorial Jurisdiction – An application can be filled by the bank before the Tribunal within whose jurisdiction the cause of action arose either in whole or in part. Therefore the territorial jurisdiction of the DRT can be said to entertain with those matters where cause of action has wholly or in part aroused within its jurisdiction. It was held by Hon'ble Allahabad High Court in L.C.L. Jewellery Ltd. v. Bank of Baroda., for a foreign currency term loan for import of plant and machinery and for allied purposes, the entire process of documentation was done at Lucknow, the property hypothecated to secure the loan was also located at Lucknow and the order for sanction of loan was also made at Lucknow. It was held that a part of the cause of action had arisen at Lucknow. The agreement also didn't exclude Lucknow jurisdiction. Therefore Lucknow Court had jurisdiction to

entertain the matter. Similarly it was decided by Hon'ble Gujarat High Court in the case of **Bank of India v. Ramniklal Kapadia**[15] that DRT has no jurisdiction in the matters of misappropriation of the amount of bank. In the instant case the amount of bank was misappropriated by the employee of the bank. Further it was stated that Misappropriation of the amount of the bank was by its employee and recovery thereof by way of suit can never be construed as a 'debt'.

b) Conflict of Jurisdiction

Section 17 of the Act vests power in the Tribunal to entertain and decide applications from the bank and financial institutions for recovery of debts due to such banks and financial institutions for recovery of debts due to such banks and financial institutions. Thus, when the bank has the cause of action to proceed for recovery of debts, the exclusive jurisdiction to entertain such application lies with the Tribunal. On the other Section 19 of the Act vests power in Tribunal to pass interim orders either by way of injunction or stay against the defendant to debar him from transferring or alienating or otherwise dealing with, or disposing of, any property and assets belonging to him without the prior permission of the Tribunal. In **State Bank of India v. Sarathi Engineering Enterprises**[16], it was held that if the bank has the right to approach the Tribunal for the recovery of its debts and the Tribunal has got powers to pass interim orders, it cannot be thought that there can be parallel injunction proceedings against the bank in another Forum so as to frustrate the proceedings before the Tribunal. But, until such orders have been passed by the Tribunal, Civil Court jurisdiction would not be ousted in the matter of grant of injunction.

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[15] [1997]89CompCas534(Guj),
[16] 1997 (4) ALT 392

c) Complete code for adjudication of matters

The Act was enacted with the object of providing for the establishment of Tribunals for expeditious adjudication and recovery of debts due to Banks and Financial institutions. It is apparent from the provisions of Sections 17 and 18 of the 1993 Act that the jurisdiction and powers of the Tribunal have been confined to recovery of debts due to banks and financial institutions. Consequently, it was held in **Spectrum Electronics v. State Bank of India**[17], even if a counter-claim is made by the opposite party and the same is upheld in the favour of opposite party by the Tribunal, it cannot pass a decree pursuant thereto. But at the same time, however, the Act creates a complete Code for adjudication of matters referred to in Section 17 and provides for the procedure in respect thereof. The saving of High Court's powers under Article 227 of the Constitution under Section 18 doesn't entitle the High Court to lift the bar as imposed under the provisions and vest a Civil Court with jurisdiction to try a matter which falls within the jurisdiction of the Tribunal.

d) High Court power to confer jurisdiction

Ordinarily High Court doesn't confer jurisdiction on the Civil courts with the matters related to the purpose of enacting the RDDB Act, 1993. However, in certain cases it could do so. The position was quite clearly explained by their Lordships in **Tata Iron & Steel Co. Ltd. v. Presiding Officer**[18], DRT, whereby it was stated that Section18 of the 1993 Act which bars jurisdiction of Civil courts and other courts, exempts High Courts in exercise of powers under Articles 226 and 227 of the Constitution. In exceptional cases, the High Courts can entertain petitions under these Articles against DRT orders even if there is an alternative remedy. The exceptional cases are where an order passed by the Tribunal is without jurisdiction or arbitrary or against principles of natural justice. The presiding officer in this case failed to

[17] [1999]97CompCas451(Cal)
[18] 1966 AIR SC 288

determine the question as to whether certain defendants could be treated as certified debtors. Who had taken loan from the bank wasn't discussed. There was also no discussion the points whether the loan was joint or several and what was the agreement as to interest. The Presiding Officer allowed the claim against two defendants just only because they failed to appear. The order stated no reasons. The court, therefore, regarded it as an arbitrary order which couldn't be upheld.

3.3.6. APPLICATION OF LIMITATION ACT, 1963 TO DRT

By virtue of S.24 of the DRT Act, 1993, Limitation Act has been made applicable to DRT. Hence, limitation is applicable to recovery certificate issued under RDDB Act. But it was necessary to give opportunity to bank to apply for the condonation of delay. The limitation period for filling an application under Section 19 of the Limitation Act, 1963 is three years. Every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence [Section 3 of Limitation Act, 1963]. Unfortunately, the section doesn't highlight the time of commencement. By regular practice it appears to be safe to consider the date appearing on the documents related to the alleged debt as the date of commencement of limitation. But the time taken for obtaining certified copies is to be excluded. The power to condone the delay even after the issue of recovery certificate vests in Presiding Officer and not in the Recovery Officer. Firstly he has to see while issuing the certificate whether the interest is duly calculated in terms of decree or not. Secondly, the Presiding Officer has to see that whether the debt under the decree was subsisting or legally recoverable. Section 5 of Limitation Act, 1963 lays that any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the

appeal or making the application within such period. So it means that any applicant or appellant can file an application before the Tribunal that he has sufficient reasons for not preferring the appeal or the application within such time as may be granted. The following information will help in understanding the role of Limitation Laws as far as RDDB Act, 1993 is concerned.

i. Loan transaction secured by mortgage.

Any loan transaction secured by mortgage, the Original Application could be filed for recovery of loan within 12 years period. In **Malpani Marbles and Granites P. Ltd. v. Allahabad Bank**[19] it was held that from the date on which the last instalment was due, OA could be filled for recovery of loan within 12 years. The defendant made the last payment towards the loan on 26-2-1993, OA was filed in 1995. It was held to be filed within time and not barred.

ii. Condonation of delay for filing appeal [Section 20(4)]

In **State Bank of Bikaner and Jaipur v. Kukar Sons**[20], it was held that the ground which was pleaded in appeal was different from the reasons that were taken at the time of the argument which don't convince the DRAT to allow condonation of delay for filling appeal. No condonation could be allowed if party approaching the Tribunal is not showing conduct bona fide.

iii. Inordinate delay not condoned

In **State Bank of India v. Union Bank of India**, it was held that the Court must be satisfied that there was due diligence on the part of the appellant and he was not guilty

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[20] RLW2003(3)Raj1698

of negligence in filling appeal. There must be some tangible proof for sufficient cause for condoning delay. A cause of delay which could have been avoided by exercise of due care and caution cannot be regarded as a sufficient cause.

iv. ***Procedure on application of condonation***

If the applicant or appellant files an application under section 5 of Limitation Act, it becomes the duty of the Tribunal or Appellate Tribunal to allow the application and decide it after giving opportunity to both the sides to present their positions. The application couldn't be straightaway rejected. If the respondent wish to raise the question of limitation he has to raise the question at the time of filling written statement.

3.3.7. MISCELLANEOUS PROVISIONS OF THE ACT

a) Transfer of the pending cases:

In order to give full vigour to the legislative intention of promulgating the Act, Section 31 requires that every or other proceeding pending before any court at the time of establishment of a Tribunal, shall stand transferred to the Tribunal. However, suits where an appeal is pending before a court will be exempt from such transfer. With a view to preventing delay in disposal of such suits , the section rules that the Tribunal shall not commence the trial of transferred suits *de novo* (from the beginning), but conduct proceedings from the stage at which the transferred suit had stood at the time of transfer or from any earlier stage as the Tribunal may deem fit. Sub-Section (2) of section 31 states that where any suit or other proceedings stands transferred from any court to a Tribunal under sub-section (1), -

(i) the court shall, as soon as may be after such transfer, forward the records of such suit or other proceedings to the Tribunal; and

(ii) the Tribunal may, on receipt of such records, proceed to deal with such suit or other proceedings, so far as may be, in same manner as in the case of an application made under section19 from the stage which was reached before such transfer or from any earlier stage as the Tribunal may deem fit.

b) Power of Tribunal to issue certificate of recovery in case of decree or order:

With a object to avoid further delay in execution of decree, a new Section31A was inserted into the Act in year 2000, which allows the holder of a decree issued by the court prior to the establishment of the Tribunal, but which has not yet been executed, to cause the Tribunal to pass an order for recovery thereon without reviewing the decree. It provides

(i) Where a decree or order was passed by any court before the commencement of the Recovery of Debts due to Banks and Financial Institutions (Amendment) Act, 2000 and has not yet been executed, then, the decree-holder may apply to the Tribunal to pass an order for recovery of the amount.

(ii) (ii) On receipt of any application under sub-section (1), the Tribunal may issue a certificate of recovery to a Recovery officer. (iii) On receipt of a certificate under sub-section (1), the Recovery Officer shall proceed to recover the amount as if it was a certificate in respect of a debt recoverable under this Act. In the case of **Bank of India v. Shri Satya Corpn.**, it was held that Scrutiny of decree by DRT at the execution stage doesn't amount to DRT sitting in appeal over the civil court decree. Validity of a decree can be challenged on the limited ground of fraud or nullity.

c) Protection of action taken in good faith:

Section 33 lays that no suit, prosecution or other legal proceedings are to lie against the Central Government or against the Presiding Officer or Chairperson or Recovery Officer in respect of anything done or intended to be done under the Act, or rules or an order made under them.

d) Overriding effect of the Act:

Sub-section(1) of Section 34 of the Act provides that save as provided in sub-section(2), the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for time being force or in any instrument having effect by virtue of any law other than this Act. Sub-section (2) says that Act or Rules made it shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948, the State Financial Corporation Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank Of India Act, 1984, the Sick Industrial Companies (Special Provisions) Act,1985 and the Small Industrial Development Bank Of India Act,1989.

e) Power to remove difficulties:

Section 35 states that the Central Government has been empowered to make any such provisions by publication in the Official Gazette as may become necessary or expedient for removing any difficulty which may arise in giving effect to the provisions of the Act. Such order is not to be inconsistent with the provisions of the Act. No such order is to be made after expiry of three years from enforcement date of the Act. Every such order has to be laid before each House of Parliament as soon as may be possible.

f) Power to make rules:

Section 36 lays that the Central Government may by notification make rules to carry out the provisions of this Act. Such rules may *inter-alia* include:

(i) the salaries and allowances and other terms of conditions of service of the Chairpersons, the Presiding Officers, Recovery Officers and other officers and employees of the Tribunal and the Appellate Tribunal under sections 7,12 and 13 of the Act.

(ii) the procedure for investigation of misbehaviour or incapacity of the Chairpersons or Appellate Tribunals and Presiding Officers of the Tribunals under sub-section (3) of section 15.

(iii) the form in which an application may be made under section 19 , the documents and other evidence by which such application shall be accompanied and the fees payable in respect of the filling of such application.

(iv) the form in which an appeal may be filled before the Appellate Tribunal under section 20 and the fees payable in respect of such appeal.

(v) any other matter which may be required to be made or may be prescribed.

Sub-section (3) inserted by the amendment Act of 2000 lays that every notification issued under sub-section (4) of section 1 , section 3 and section 8 and every rule made by the Central Government under this Act, shall be laid ,as soon as possible after it is made , before each house of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session, or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or rule or both Houses agree that the notification or rule should not be issued or made , the notification or rule thereafter have the effect only in such modified form or be of no effect , as the case may be ; so , however,

that any such modification or annulment shall be without prejudice to the validity of anything previously done under that notification or rule.

Chapter 4: ISSUES RELATING TO DEBT RECOVERY TRIBUNALS

The Researcher would like to discuss certain important issues by utilizing certain case laws in this section.

4.1. ISSUE 1: WHETHER THE ACT IS CONSTITUTIONAL?

The first issue that ought to be looked into is the constitutionality of the Act. This question was raised in **Delhi High Court Bar Association v. Union of India**[21]. It was contended by the petitioners that the Act was unreasonable and was violative of Article 14 [22]of the Constitution of India and also that the Parliament was not legislatively competent to enact such a law. The learned Delhi High Court opined that the Civil Courts which are directly under the control and superintendence of the High Court trying bank suits, the suits of the creditor and debtor relationship, have been deprived of their jurisdiction and the jurisdiction conferred on a tribunal constituted under the Act which is against the theme of the Constitution and independence of judiciary which, is a basic feature of the Constitution. Thus the Act erodes independence of judiciary. It is a case where jurisdiction of a Civil Court has been truncated and it has been deprived of existing jurisdiction. It is a different matter if in a law enacted by Parliament jurisdiction is conferred on the Civil Court, but when the existing jurisdiction is taken away and conferred on a Tribunal having only trappings of a Court, it certainly affects the independence of the judiciary. One cannot visualize a situation where a

[21] AIR 1995 Del. 323.

[22] The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Court is continuously deprived of its ordinary jurisdiction and the same is conferred on the Tribunals under the control of the executive. The Act is unconstitutional as it erodes the independence of judiciary and is irrational, discriminatory, unreasonable, arbitrary and hit by Articles 14 and Article 50[23] of the Constitution of India. The Delhi High Court had also held that since section 17[24] of the Act did not have a provision for a counter claim as provided under the provisions of the Code of Civil Procedure, 1908 and, therefore, the Act is irrational and arbitrary and violative of Article 14.

While deciding the appeal preferred in the abovementioned case the Supreme Court has opined as follows:

> "The manner in which a dispute is to be adjudicated upon is decided by the procedural laws which are enacted from time to time. It is because of the enactment of Civil Procedure Code that normally all disputes between the parties of a civil nature would be adjudicated upon by the civil courts. There is no absolute right in anyone to demand that his dispute is to be adjudicated upon only by a civil court. The decision of the Delhi High Court proceeds on the assumption that there is such a right. It is by reason of the provisions of CPC that the civil courts had the right, prior to the enactment of the Debts Recovery Act, to decide the suits for recovery filed by the banks and financial institutions. This forum, namely, that of a civil court, now stands replaced by a Banking Tribunal in respect of the debts due to the bank. When in the Constitution Articles 323-A[25] and 323-B[26] contemplate establishment of a Tribunal

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[23] The State shall take steps to separate the judiciary from the executive in the public services of the State.

[24] Section 17 of recovery of debt due to bank and financial institutions states about Jurisdiction, powers and authority of Tribunals.

[25] **323A.** (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. (2) A law made under clause (1) may— (*a*) provide for the establishment of an administrative

and that does not erode the independence of the judiciary. There is no reason to presume that the Banking Tribunals and the Appellate Tribunals so constituted would not be independent, or that justice would be denied to the defendants or that the independence of the judiciary would stand eroded."

"Such Tribunals, whether they pertain to income tax or sales tax or excise or customs or administration, have now become an essential part of the judicial system in this country. Such specialized institutions may not strictly come within the concept of the judiciary. as envisaged by Article 50, but it cannot be presumed that such Tribunals are not an effective part of the justice delivery system, like courts of law. It will be

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tribunal for the Union and a separate administrative tribunal for each State or for two or more States; (*b*) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;(*c*) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals; (*d*) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1); (*e*) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment; (*f*) repeal or amend any order made by the President under clause (3) of article 371D; (*g*) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals. (3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

[26] **323B.** (1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws. (2) The matters referred to in clause (1) are the following, namely:— (*a*) levy, assessment, collection and enforcement of any tax; (*b*) foreign exchange, import and export across customs frontiers; (*c*) industrial and labour disputes; (*d*) land reforms by way of acquisition by the State of any estate as defined in article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way; (*e*) ceiling on urban property; (*f*) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in article 329 and article 329A; (*g*) production, procurement, supply and distribution of food-stuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods; [1][(*h*) rent, its regulation and control and tenancy issues including the right, title and interest of landlords and tenants;] [2][(*i*)] offences against laws with respect to any of the matters specified in sub-clauses (*a*) to [3][(*h*)] and fees in respect of any of those matters; [2][(*j*)] any matter incidental to any of the matters specified in sub-clauses (*a*) to [4][(*i*)]. (3) A law made under clause (1) may— (*a*) provide for the establishment of a hierarchy of tribunals; (*b*) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals; (*c*) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals; (*d*) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to all or any of the matters falling within the jurisdiction of the said tribunals; (*e*) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment.

seen that for a person to be appointed as a Presiding Officer of a Tribunal, he should be one who is qualified to be a District Judge and, in case of appointment of the Presiding Officer of the Appellate Tribunal, he is, or has been, qualified to be a Judge of the High Court or has been a member of the Indian Legal Service who has held a post in Grade I for at least three years or has held office as the Presiding Officer of a Tribunal for at least three years. Persons who are so appointed Presiding Officers of the Tribunal or of the Appellate Tribunal would be well versed in the law to be able to decide cases independently and judiciously. It has to be borne in mind that the decision of the Appellate Tribunal is not final, in the sense that the same can be subjected to judicial review by the High Court under Articles 226[27] and 227[28] of the Constitution.[29]"

Thus, the Supreme Court has held the Act to be constitutional as the act is not discriminatory towards the defendants any more as the amended Act makes provision for Counter claim, set-off etc. and also that the independence of the judiciary has not been eroded as the decision of the Appellate Tribunal is not final, in the sense that the same can be subjected to judicial review by the High Court under Articles 226 and 227 of the Constitution.

4.2. ISSUE 2: WHETHER THE TRIBUNAL CONSTITUTES A COURT?

One of the preliminary questions that arise relates to the nature of the Tribunals under the Act. In **Cofex Exports Ltd. v. Canara Bank**[30] it was held by the Delhi High Court that the Debt Recover Tribunal is a Tribunal and not a Court. The proceedings before it are initiated

[27] Power of High Courts to issue certain writs
[28] Power of superintendence over all courts by the High Court
[29] **Union of India v. Delhi High Court Bar Association**, (2002) 4 SCC 275.
[30] AIR 1997 Del 355

on an application and hence are not suits. Only a bank or a financial institution has the locus to invoke the jurisdiction of the Tribunal. The Tribunal does not pass a decree. It issues a certificate to the recovery officer for recovery of the amount of debt specified therein. Its procedure is neither prescribed nor detailed: the principles of natural justice alone have to be followed. The procedure is summary. Ordinarily the Tribunal shall spend a term of six months merely between the date of the application and decision thereon.

Thus, the Learned Court has clearly delineated the differences between a Civil Court and the Tribunal under the Act. Some of the distinctions pointed out are as follows:

1. A matter before the Tribunal is not a suit as it is initiated by an application and not a plaint.
2. The Tribunal does not pass a decree, it only issues a recovery certificate.
3. The procedure of the Tribunal is summary in nature and it is supposed to be in conformity with the principles of natural justice.

4.3. ISSUE 3: WHETHER THE JURISDICTION OF HIGH COURT IS BARRED IN CASE OF ALTERNATIVE REMEDY?

4.3.1. M/S. PRATAP CH. DEY V. ALLAHABAD BANK[31]

In this particular case, an order was passed by Tribunal constituted under Recovery of Debts due to Banks and Financial Institutions Act, 1993; it was held that, the writ petition against such order was not liable to be dismissed on ground of alternative remedy of appeal under Act. Section 18 of the Act clearly exempts the bar of jurisdiction in the case of High Courts while exercising power under Arts. 226 or 227 of the Constitution. Therefore, it can be safely

[31] AIR 1997 Cal 96.

said that even if an appeal lies against an order of the Debt Recovery Tribunal under the Act itself in an appropriate case, the High Court still retains its jurisdiction to entertain a petition either under Articles 226 or 227 of the Constitution which is moved against an order of the Bank Recovery Tribunal.

Moreover, considering the object and scheme of the Act and the relevant provisions of the Act it cannot be held that any order that would be passed by the tribunal would be appealable under Section 20 of the Act. The provision for appeal shall be applicable only in case a final order is passed by the tribunal.

The purpose of the Act for which it has been enacted would he totally frustrated and the entire system shall become unworkable as a litigant either a bank or a loanee who has to approach the appellate tribunal by filing an appeal against any simple interlocutory order of the tribunal which shall Involve not only huge expenses but also considerable period of time and the delay in disposal of the appeals shall defeat the purpose of the Act, which has been enacted for the purpose of speedy disposal of the petitions under Section 19 of the Act and to recover dues of the Banks at an early date. In the instant case, the orders challenged in applications under Article 227 of the Constitution related to the orders passed by the Tribunal directing the jurisdictional point to be decided at the time of final disposal of the proceedings under Section 19 of the Act. Even if an appeal lies against any order passed by the tribunal the High Court in the exercise of its extra-ordinary jurisdiction under Article 226 or 227 of the Constitution can pass necessary orders or set aside any order passed by the Tribunal which is not final in nature if such orders were passed in relation to the matters specified in Section 17 of the Act.

4.3.2. SUSHIL KUMAR JAISWAL V. BANK OF INDIA[32]

Section 21 of the Act provides for deposit of 75% of the amount in order to file an appeal. In this case the High Court held that in order to by-pass abovementioned section the petitioners did not approach the Appellate Tribunal on time. The Learned Court opined that no doubt Section 18 of the Act provides the power of the High Court or for that matter the Apex Court regarding exercise of jurisdiction under Art. 227 of the Constitution of India, but that provision has not been made for purpose of avoiding another provision which affords wider relief to the petitioners. Thus the petitioners in the present case have attempted the power to convert the power under Art. 227 of the Constitution of India for the exercise of the power under Section 20 of the Act. Thus, in the present case the petitioners had purposefully by-passed the alternative remedy available under the Act. However, the Court also ruled that the alternative remedy shall not operate as a bar always but in certain cases alternative remedy shall operate as a bar. In light of these two cases it can be deduced that the High Court can exercise its power under Art. 227 of the Constitution of India provided the petitioners are not using the power of superintendence of the High Court in order to by-pass the provision of the Act, i.e., depositing 75% of the amount.

4.4. ISSUE 4: WHETHER THE APPELLATE TRIBUNAL CAN ENTERTAIN APPEALS AGAINST INTERLOCUTORY ORDERS OF THE TRIBUNAL?

4.4.1. M/S. SHOES EAST LTD. V. ALLAHABAD BANK[33]

The question that arose in this case was whether the Appellate Tribunal can entertain appeals against interlocutory orders or not. The Learned Court opined that the object of Section 20[34]

[32] AIR 1996 Cal 323
[33] AIR 1997 Del 325
[34] Section 20 - Appeal to the Appellate Tribunal

is to give a right of appeal to a party aggrieved by some order, which affects his right to liability. It is significant that sub-section (2) of Section 7 empowers the Appellate Tribunal to entertain appeals against "any order' made or deemed to have been made by the Tribunal under the act. Section 20 gives a right of appeal to a party aggrieved by "an order" made or deemed to have been made by the Tribunal under the Act. In the context of Sections 17(2) and 20(1), the words "any order", or "an order" of the Tribunal made under the Act, include every order of the Tribunal made under the Act, which affects the rights or liabilities of the parties. Even an interlocutory order passed under section 19(6) of the act and is subject to appeal under Section 20(1) provided it affects some right or liability of any party. Thus, the impugned order of the Tribunal refusing to stay the proceedings is subject to appeal under Section 20(1) of the Appellate Tribunal.

The Court reiterated the opinion of the Calcutta High Court in the Sushil Kumar's Case[35] that the Act provides an adequate and efficacious remedy for obtaining relief in respect of any improper order passed by the Debt Recovery Tribunal. The remedy provided under Article 227 of the Constitution is not intended to supersede the modes of obtaining relief before the Appellate Courts or Tribunals.

4.5. ISSUE 5: WHETHER THE RULES FRAMED ARE APPLICABLE TO THE CASES TRANSFERRED FROM CIVIL COURTS?

4.5.1. M/s. Jay Jee Service Station, Bangalore v. M/s. Syndicate Bank[36]

[35] AIR 1996 Cal 323
[36] AIR 1998 Kant. 249

The High Court of Karnataka in this case has ruled that rules do not operate retrospectively. They provide the procedure that the applicant is required to follow while filing applications after the Tribunals are established. The Rules do not make any provision as regards the form, or the contents of the plaints/suits that get transferred to the Tribunal in terms of S.31. It is therefore safe to assume that all such suits are free from any procedural or other requirements such as the forms prescribed for the applications, the filing of the documents with the same, or even the filing of the reply and other documents by the respondents, if such reply and documents stood already filed before the Civil Court concerned.

In other words the procedural rules will have no application to what is not instituted for the first time before the Tribunal and what is received from the competent civil Court in terms of S.31, such transferred suits would then constitute a class by themselves to which requirements of the form of the applications otherwise prescribed by the procedure rules would have no application.

4.6. ISSUE 6: ISSUES RELATING TO THE TRIBUNAL'S JURISDICTION TO ENTERTAIN CROSS-SUIT, COUNTER-CLAIM OR SET-OFF

One of the most contentious issues as regards the Act is whether the Tribunal can entertain Cross-Suit, Counter-Claim or Set-Off. This issue has been addressed extensively in various case laws.

4.6.1. COFEX EXPORTS LTD. V. CANARA BANK[37]

One of the cases which deals extensively with this issue is Cofex Exports Ltd. v. Canara Bank.[38] The Learned High Court has discussed in great length the various aspects of the issue at hand. A defendant has a right to defend himself by raising all possible pleas permitted by law. The nature of the several pleas which ean he taken by a defendant faced with a suit for recovery of a debt broadly be ciae-ifie1 as payment, adjustment, set off and counter claim.

1. A payment is the satisfaction or extinguishments of a debt prior to the filing of the written statement.

2. An adjustment contemplates existence of mutual demands between the same parties in the same capacity. The broad distinction between a payment and an adjustment is that in an act of payment one party deals with the other, while in an adjustment it is an act of the party himself prior to the filing of the written statement though the benefit of both is claimed by raising a plea in the written statement. A plea of adjustment is to be distinguished from plea of set off or counter-claim. Adjustment like payment is relatable to a period anterior to the date of such plea being set out before the Court. A plea in the nature of payment, adjustment and the like can be raised in defense as of right. The plea if upheld has the effect of mitigating or wiping out the plaintiffs claim on the date of the suit itself. The plea is not a claim made by the defendant. A counter-claim or a plea of set off is a claim made by defendant. It does not extinguish the plaintiffs claim; it exonerates the defendant from honouring plaintiffs claim though upheld. Such plea if raised shall be gone into by the Court, if permitted by law applicable to the Court and would have the effect of a decree in favour of the defendant taking away plaintiffs right to realize such amount as has been upheld in favour of the defendant.

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[37] AIR 1997 Delhi 355

[38] Id.

3. A set-off or a counter-claim cannot be entertained by a Debt Recovery Tribunal. A Debt Recovery Tribunal is a tribunal and not a Court. It is a creature of statute vested with a special jurisdiction to try only applications by bank or financial institutions to recover any debt from any person. It does not exercise any common law jurisdiction. It is only a bank or a financial institution or a consortium of the two which can enter the Tribunal for enforcement of its claim for recovery. Anyone other than those cannot be entertained invoking jurisdiction of the Tribunal for enforcement of its claim as a claimant. What cannot be done directly can also not be allowed to be done indirectly. If claim by a person other than bank or financial institution is not entertain able before Tribunal it does not become entertain able merely because it is set out in the written statement or preferred by way of set-off or counter-claim. The principle of convenience and the mechanic of litigation before Tribunal (as set out in the Act) - both exclude set-off or counter-claim being placed before the Tribunal. If set-off, counter claims and cross suits were allowed to be raised before the Tribunal the very object behind its creation will be lost.

The Learned Court further went on to state that, nobody has a right to have his claim being tried by a particular forum. There is nothing wrong if the claims and cross claims whether by way of set-off or by way of counter-claim allegedly existing between a person and a bank or financial institution are 'left to be enforced before two different fora-before Debt Recovery Tribunal by bank or financial institution and before Civil Court by any person other than the two.

Thus, a Civil Court while transferring a suit to the Tribunal for the purpose of being heard as an application under Section 31 [39]of the DRT Act shall transfer the suit but shall not transfer a counter-claim, cross-claim or a cross-suit not even a plea of set off. Before transferring a suit filed by a bank or a financial institution to the Tribunal, the Civil Court shall direct the defendant to take steps for separating the plea of set off and counter-claim from the written statement.

On that being done the plea shall be registered as a suit filed by the defendant, designating the defendant as plaintiff and the bank or financial institution as the defendant. A cross suit presents no difficulty in spite of the suit having been transferred to the Tribunal a cross suit would remain pending before the Civil Court for the very obvious reason that law does not contemplate a cross suit being transferred to Tribunal.

Thus, a suit the subject matter whereof lies within the jurisdictional competence of the Tribunal cannot be refused to be transferred by a Civil Court to the Tribunal merely because a cross suit or a counter-claim has been filed or preferred before the Civil Court. A cross suit or cross claim or a plea in the nature of set-off cannot be transferred to the Tribunal along with the suit with which it is associated and which is liable to be transferred to the Tribunal. A plea of set-off raised in a suit filed by a bank or financial institution cannot be tried by Tribunal nor would it enable the Suit being retained by Civil Court before it if the subject matter of suit lies within the jurisdiction competence of tribunal otherwise.

4.6.2. VENKATESWARA TEXTILES TRADERS & PRINTERS V. CANARA BANKAL[40]

[39] Section 31 - Transfer of pending cases
[40] AIR 1997 Del 170.

In contrast to the Delhi High Court judgment in the abovementioned case it has been held by the Andhra Pradesh High Court that all the pending suits or applications including execution applications, in respect of which the Tribunal has got jurisdiction, shall stand transferred to the Tribunal. The plea, that pending claim petitions the suits or execution petitions cannot be transferred to the Tribunal, would not be tenable. The Tribunals having constituted under the Act for expeditious adjudication and recovery of debts due to the banks and for all the matters connected therewith, all the suits or other proceedings filed by the bank or pending in the Civil Courts come within the jurisdiction of the Tribunals and the Tribunals have got exclusive jurisdiction to try the same. The claim application could also be decided by the Tribunal as if it is any other proceeding. Since the Act has got overriding effect, the procedure contemplated under the CPC to decide claim petition filed for need not be followed by the Tribunal. As per S.31 (2) (b) of the Act, the Tribunal shall have to proceed to deal with Such suits or other Proceedings in the same manner as an application under S. 19 of the Act from the stage at which it was transferred.

Thus the Tribunal is competent to decide all the applications including cross Suit or cross claim petitions since the Tribunals are established as a substitute to the Civil Courts to try the suits filed by the bank and all the applications arising out of the same. Thus the pendency of claim petition is not a hurdle, at all, for the transfer of suits or execution petitions and hence where the Proceedings before Civil Court for recovery of debt by bank stood transferred to the tribunal, all the applications including the claim petitions could be decided by the tribunal.

4.6.3. STATE BANK OF INDIA V VIJAY KR TAYAL[41]

[41] AIR 1997 Del 170

In this case the Learned Delhi High Court has classified the issue at hand as follows and has discussed it in an extensive fashion:

i. The first category of cases wherein adjusted is claimed or set-off is claimed. The net effect would be to either wipe of or reduce the plaintiffs claim. The plea being pure and simple in defence, subject to the conditions for invoking the claim for adjustment and set off namely the amount being an ascertained amount being legally recoverable and the parties filling in the same character in the claim for set off as that of in the plaintiffs suit being satisfied, are liable to be considered in the suit itself. In these cases, no relief independently of the claim if suit is being claimed. The defendant's claim in suit by way of set off or adjustment is confined either to wipe out or reducing the plaintiffs claim in the suit. The above class of suits wherein claims for adjustment and set off are made would be liable to be transferred to the Debt Recovery Tribunal for trial.

ii. The second and third class of suits are where either a counter claim is filed on which Court fee is paid or a cross suit is instituted claiming damages for alleged breach. The counter claims or cross suits may be in respect of same or a different cause of action accruing to the defendant the Banks or Financial Institutions. The counter claim is registered as a separate suit. In the view of the Court the Debt Recovery Tribunal which has the jurisdiction to entertain only claims from Banks and Financial Institutions will not have the jurisdiction to entertain a cross suit or counter claim that may be founded either on the same or a separate cause of action and/or the amount of which may even be in excess of the claim in the suit. This is because the DRT has no jurisdiction to pass any decree or order for recovery against the Bank or Financial Institution.

iii. Regarding the third category, i.e., cases where defendants have filed cross suits or separate suits for claiming damages and seeking declaration and injunction against the Banks. The injunctions could well be against sale of hypothecated assets or property and the declaration may be sought challenging the notice for recall of loan or damages for the alleged failure of the Bank or Financial Institution to perform their obligations. The above suits could have been consolidated with suit instituted by the Bank or Financial Institutions for recovery, for an expeditious trial. The suits instituted by the Banks and Financial Institutions are liable to be transferred to the DRT, while the suits instituted by the defendants either for declaration, injunction or damages are liable to be delinked and tried by Civil Courts.

4.6.4. RISK CAPITAL & TECHNOLOGY FINANCE CORP. LTD. U. HARNATH SINGH BAPNA[42]

The Delhi High Court in a later judgment, delivered by Justice Anil Dev Singh, has given a very wide interpretation as regards whether the Tribunal can entertain cross-suit, counter - claim or set-off.

The Learned Judge has opined that, Section 31 opens with the words "every suit or other proceeding pending". As would be seen the words "other proceeding" is preceded by the word "suit" and in between the two expressions, the word "or" occurs. The section not only talks of the suit but also of "other proceeding". The term proceeding is of a very wide connotation. The object of the Act was to take out matters relating to recovery of debts due to the banks and financial institutions from the jurisdiction of the Courts and to provide for their adjudication by Special Tribunals so that they could be realized without delay. This being the

[42] AIR 1997 Del 239

philosophy behind the Act, the word "proceeding" has to be given an interpretation, which is capable of embracing any adjudication or a legal step in a matter relating to and connected with the recovery of debt due to the financial institutions.

Thus, after going through the relevant case laws it can be concluded that in order to achieve the desired objective of the Act, i.e., expeditious recovery of the debt incurred by the Banks and Financial Institutions, it would be necessary for a DRT to entertain cross-suit, counter-claim or set-off whether in case of a suit transferred by the Civil Court or in case of a new application. Otherwise the whole exercise of setting up of DRT would prove to be futile as people would approach the Civil Courts and thereby prolonging the process of recovery of debts.

4.7. ISSUE 7: JURISDICTION OF THE TRIBUNAL IN CASE OF WINDING UP

S.34 (1) of the Act provides that it shall all override all other laws in force in the country. S.34 (2) of the Act is the savings clause. It mentions five legislations which does not include the Companies Act, implying that in case of conflict between the two, the former shall prevail over the latter. S.446 (1) of the Companies Act contains winding up provisions, which contains a non-obstante clause stating that no law shall interfere with winding up procedure. S. 446(2) states that the Court which is winding up a company shall have exclusive jurisdiction to entertain any claim against the company irrespective of any other law for the time being in force. S.529A of the Companies Act provides for priority payment of dues to workmen and secured creditors. Thus if the DRT Act overrides S. 529A of the Companies Act then a Bank. to whom a company in the process of winding up owes dues, will get preference over all other secured creditors and employees. thereby, making the provisions of

S.529A redundant. This leads to a very inequitable situation whereby the debts due to a bank are recovered before the workmen are allowed to recover the money they have toiled for.[43]

4.7.1. I.C.I.C.I. LTD. V. VANJINAD LEATHERS LTD.[44]

In this particular case the Kerala High Court opined that the 1993 Act' is a special law to deal with the applications by the banks and financial institutions for recovery of debts. Companies Act, 1956 is also a special law. Section 446 of the Companies Act 1956 which contains a non-obstinate clause is also a provision to exclude all other law with regard to pending suits in which company in liquidation is a party. The 1993 Act, is also a special law enacted by the Parliament itself. So, when that later special law was enacted, the Parliament would have certainly in mind the provisions in the earlier special law namely the Companies Act, 1956. Thus, it was not withstanding the special provision contained in the Companies Act, 1956, that Section 34 had been enacted in '1993 Act'. Therefore, the latter special law will prevail over the former. Necessarily, the Company Court will not have jurisdiction with regard to suits or applications pending on or after the appointed day' as per the '1993 Act'. Thus, exercise of power by the Company Court under Section 446 of the Companies Act, 1956 is excluded by Section 34 of the 1993 Act. Where IDBI and I.C.I.C.I. had filed suit for recovery of loan advanced to the company after the appointed day under 1993 Act and proceedings for winding up of the debtor company were started only subsequently, the Company Court could not exercise powers under S.446 of Companies Act as regards the suit. Thus neither leave under S.446 (1) of Companies Act was necessary to continue the suit nor the suit could be transferred by Company Court under S. 446 (2) of Companies Act.

4.7.2. INDUSTRIAL CREDIT AND INVESTMENT CORPN. V. SRUZIVAS AGENCIES[45]

[43] Reddy, Vinay, "Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and Companies Act, 1956: Some anomalies", [2000] 23 SCL 33.
[44] AIR 1997 Ker. 273

The Supreme Court in this case has held that the interest of the secured creditor, who has taken recourse to an independent proceeding to realize his debt, has to be protected; but this cannot be done at the cost of other secured creditors. To preserve the integrity of one secured creditor, another secured creditor cannot be discredited - his integrity has to be of equal concern. It may, however, be that in a particular case the secured creditor who has approached the civil Court happens to be one who has lent a huge amount, or be one who is the main secured creditor. In such a situation, on approach being made by such creditor, company Court would duly take note of this fact and should like to grant leave required by sub-section (1) of Section 446; and by the same token refuse to transfer the proceeding to this Court.

The Supreme Court however clarifies, that in all cases where the proceedings have been initiated by the main secured creditor, the company Court would grant leave. The discretion to be exercise in this regard has to depend on the facts and circumstances of each case. But, if the position be that the secured creditor who had approached the civil Court is one amongst many similar creditors, it may be that the company Court feels that to take care of the interest of other secured creditors, either the relief of leave does not deserve to be granted or that the proceeding is required to be transferred to it for disposal. Sections 529 and 529-A of the Act do contain provisions insofar as the priority of secured creditor's claim is concerned. Of course, the company court would not transfer the proceeding to it merely because of its convenience ignoring the difficulties which may have to be faced by the secured creditor, who may be at a place far away from the seat of the company Court. The needs to protect the company from unnecessary litigation and costs have, however, to be borne in mind by the

[45] (1996) 4 SCC 165

company Court. The company Court would also bear in mind the rationale behind the enactment of Recovery of Debts due to the Banks and Financial Institutions Act, 1993.

Resolution of the Conflict

This ambiguity regarding jurisdiction of the DRT has been cleared by Section 19(19) of the Amended Act of 2000, which in essence provides that where a certificate is issued against a company registered under the Companies Act, 1956, the Tribunal may order the proceeds of such company to be distributed among its secured creditors in accordance with the provisions of Section 529A of the Companies Act, and to pay the surplus, if any, to the company. This provision read with Section 34 of the Act, now makes it clear that even when the company has been ordered to be wound up, the DRT has exclusive jurisdiction to try the matter.[46]

4.8. ISSUE 8: ISSUES RELATING TO THE DEBT RECOVERY TRIBUNAL ACT AND THE INDUSTRIAL FINANCE CORPORATION ACT AND THE STATE FINANCIAL CORPORATION ACT

4.8.1. INDUSTRIAL FINANCE CORP. LTD. V. M/S. AGRA CONSTRUCITON CO. LTD.[47]

In this case the question that arose was whether the Act derogates the I.F.C. Act. It was held that Section 18[48] of the Debt Recovery Act does not bar the jurisdiction of this Court with regard to a petition under Section 30 of the IFC Act because these proceedings are neither a suit nor in the nature of a suit, therefore, not barred either on account of Section 17 or Section 18 of the Debt Recovery Act. Hence the question of transfer under S.31 of the Debt Recovery

[46] Vivek Kumar Jha and Nishant Kumar Singh, Functional analysis of the Recovery of Debts Due to Banks and Financial Institutions (Amendment) Act, 2000: Need for further reform, [20001 28 SCL 55.
[47] AIR 1947 Del 143
[48] Section 18: Bar of Jurisdiction.

Act does not arise. Since I am of the view that an application under S.30 of the IFC Act is not a suit, therefore, there cannot be any question of investigation into the claims. Hence the application under S.30 of the IFC Act is maintainable despite of the coming into force of the Debt Recovery Act. Even otherwise these proceedings are saved by the legislature itself by inserting Sec.34 of the Debt Recovery Act which in no uncertain words has said that the proceedings under Sec.30 of the IFC Act are not derogatory to Debt Recovery Act.

4.8.2. INDUSTRIAL FINANCE CORPORATION OF INDIA LTD. U. M/S. ALLIED INTERNATIONAL PRODUCTS LTD.[49]

A similar question was raised in this case and it was held that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 neither limits the scope nor impairs the utility and force of the Industrial Finance Corporation Act, 1948. Section 30 of the Industrial Finance Corporation Act, 1948 confers on the Corporation special rights to enable it to recover its dues promptly and effectively, and without the necessity of resorting to long drawn litigation requiring adjudication by judicial authorities and which may harm the interest of the corporation, frustrate its rights, block its funds and make it difficult for it to freely invest money.

In short, thus, S.34 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 keeps intact the Industrial Finance Corporation Act, 1948 and in no way limits, hinders or impairs the play of its provisions. This being the position, the coming into force of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 has no effect on the tendency of the present proceedings.

[49] AIR 1947 Del 143

4.8.3. KARNATAKA STATE FINANCIAL CORP. V. M/S. SUN CANNING IP) LTD.[50]

In this case the same question was raised as regards State Financial Corporations. The Karnataka High Court has held that the saving clause under Section 34(2) of the Recovery of Debts due to Banks and Financial Corporation Act makes it clear that a provision is made in the Debt Recovery Act in addition to the provisions provided in the five acts mentioned therein. Therefore the jurisdiction vested in the authorities named in special statutes viz, the Industrial Financial Corporation Act, 1948, the State Financial Corporation Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank of India Act, 1984 and the Sick Industrial Companies (Special Provisions) Act, 1985 can be invoked notwithstanding the jurisdiction vested in the Debt Recovery Tribunal under S.19 of the Act. Thus the petition filed under S.31 of the State Financial Corporation Act, 1951 before the District Judge is maintainable.

4.8.4. M/S. PHONEIX IMPEX V. STATE OF RAJASTHAN[51]

In this case the question that arose before the Rajasthan High Court was whether the Act was applicable in case of debt disputes between Co-operative Banks and its members. The Learned Court opined that since the definition of Banking Company (which is a company formed and registered under the Companies Act) does not include Co-operative Banks, it implies the legislature did not intend that the disputes between Co-operative Banks and its members should be decided by the Tribunal established under the Act.

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[50] AIR 1998 Kant 151
[51] AIR 1998 Raj 100

Chapter 5: PROCEDURE FOLLOWED BY THE TRIBUNAL

5.1. THE DEBTS RECOVERY TRIBUNAL (PROCEDURE) RULES, 1993

In this part some of the important provisions of the Debts Recovery Tribunal (Procedure) Rules, 1993 are laid down that is enacted by the Central Government in exercise of the powers conferred by sub-section (1) and (2) of section 36 of the RDDB & FIs Act, 1993. These rules will help in understanding the Procedure adopted by the Tribunal for filling of the Application, documents to be attached along with the Application and other procedure adopted by the Tribunal while disposing off the matters coming before it.

5.1.1. PROCEDURE FOR FILING OF APPLICATION

Section 4[52] of DRT (Procedure) Rules, 1993 gives the procedure for filing of the application.

5.1.2. PRESENTATION AND SCRUTINY OF APPLICATIONS

Section 5[53] of the said Rules mentions how the applications submitted to the Tribunal will be presented and scrutinised.

[52] (1) The application under section 19 or section 31A, or under section 30(1) of the Act may be presented as nearly as possible in Form-I, Form-II and Form-III respectively annexed to these rules by the applicant in person or by his agent or by a duly authorised legal practitioner to the Registrar of the Bench within whose jurisdiction his case falls or shall be sent by registered post addressed to the Registrar.
(2) An application sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar the day on which it was received in the office of the Registrar.
(3) The application under sub-rule (1) shall be presented in two sets in a paper book along with an empty file size envelope bearing full address of the defendants and where the number of defendant is more than one, then sufficient number of extra paper-books together with empty file size envelopes bearing full address of each of the respondents shall be furnished by the applicant.

5.1.3. REVIEW

Section 5A[54] lays the provision of Review.

5.1.4. PLACE OF FILING OF APPLICATION

Section 6[55] of the said Rules lays provision as to filing of the application.

5.1.5. CONTENTS OF THE APPLICATION

Section 8[56] lays down the provision for the contents of the application.

5.1.6. DOCUMENTS TO ACCOMPANY THE APPLICATION

Section 9[57] lays that what documents should accompany along with the application that may be filed under Section 19 or Section 31A of the Act.

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[53] (1) The Registrar, or, as the case may be, the officer authorised by him, shall endorse on every application the date on which it is presented or deemed to have been presented under Rule 4 and shall sign endorsement.
(2) If on scrutiny, the application is found to be in order, it shall be duly registered and given a serial number.
(3) If the application, on scrutiny, is found to be defective and the defect noticed is formal in nature, the Registrar may allow the party to rectify the same in his presence and if the said defect is not formal in nature, the Registrar, may allow the applicant such time to rectify the defect as he may deem fit.
(4) If the concerned applicant fails to rectify defect within the time allowed in sub-rule(3) the Registrar may by order and for reasons to be recorded in writing, decline to register the application.
(5) An appeal against the order of the Registrar under sub-rule (4) shall be made within 15 days of the making of such order to the Presiding Officer concerned in chamber whose decision thereon shall be final.
[54] (1) Any party considering itself aggrieved by an order made by the Tribunal on account of some mistake or error apparent on the face of the record desires to obtain a review of the order made against him, may apply for a review of the order to the Tribunal which had made the order.
(2) No application for review shall be made after the expiry of a period of sixty days from the date of the order and no such application shall be entertained unless it is accompanied by an affidavit verifying the application..
(3) Where it appears to the Tribunal that there is no sufficient ground for a review, it shall reject the application but where the Tribunal is of opinion that the application for review should be granted, shall grant the same:
PROVIDED that no such application shall be granted without previous notice to the opposite party to enable him to appear and to be heard in support of the order, a review of which is applied for.
[55] The application shall be filed by the applicant with the Registrar within whose jurisdiction--
(i) the applicant is functioning as a bank or financial institution, as the case may be, for the time being, or
(ii) the defendant, or each of the defendants where there are more than one, at the time of making application, actually or voluntarily resides, or carries on business, or personally works for gain, or
(iii) any of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain, or
(iv) the cause of action, wholly or in part, arises.
[56] (1) Every application filed under rule 4 shall set forth concisely under distinct heads, the grounds for such application and such grounds shall be numbered consecutively and shall be typed in double space on one side of the paper.
(2) It shall not be necessary to present separate applications to seek interim order of direction if in the original application the same is prayed for.

5.1.7. FILING OF REPLY AND OTHER DOCUMENTS BY THE DEFENDANT

Section 12[58] lays the manner in which the reply may be filed by the defendant.

5.1.8. POWERS AND FUNCTIONS OF THE REGISTRAR

Section 22[59] lays provision as to the Powers and functions of the Registrar.

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[57] (1) An application under section 19 or section 31-A shall be accompanied by a paper book containing,--
(i) a statement showing details of the debt due from a defendant and circumstances under which such debt has become due; and shall also disclose details of the case and decision in that case which is sought to be reviewed;
(ii) all documents relied upon by the applicant and those mentioned in the application;
(iii) details of the crossed demand draft or crossed Indian Postal Order representing the application fee;
(2) The documents referred to in sub-rule (1) shall be neatly typed in double space on one side of the paper, duly attested by a senior officer of the bank, or financial institution, as the case may be, and numbered accordingly.
(3) Where the parties to the suit or proceedings are being represented by an agent, documents authorising him to act as such agent shall also be appended to the application:
PROVIDED that where an application is filed by legal practitioner, it shall be accompanied by a duly executed Vakalatnama.
[58] (1) The defendant may file two complete sets containing the reply to the application along with documents in a paper book form with the registry within one month of the service of the notice of the filing of the application on him.
(2) The defendant shall also endorse one copy of the reply along with documents as mentioned in sub-rule (1) to the applicant.
(3) The Tribunal may, in its discretion on application by the respondent, allow the filing of reply referred to in sub-rule (1), after the expiry of the period referred to therein.
(4) If the defendant fails to file the reply under sub-rule (1) or on the date fixed for hearing of the application, the Tribunal may proceed forthwith to pass an order on the application as it thinks fit.
(5) Where a defendant makes an admission of the full or part of the amount of debt due to a bank or financial institution, the Tribunal shall order such defendant to pay the amount, to the extent of the admission, by the applicant within a period of one month from the date of such order failing which the Tribunal may issue a certificate in accordance with section 19 of the Act to the extent of amount of debt due admitted by the defendant.
(6) The Tribunal may at any time for sufficient reason order that any particular fact or facts shall be proved by affidavit, or that the affidavit of any witness shall be read at the hearing, on such conditions as the Tribunal thinks reasonable:
PROVIDED that after filing of the affidavits by the respective parties where it appears to the Tribunal that either the applicant or the defendant desires the production of a witness for cross examination and that such witness can be produced and it is necessary to do so, the Tribunal shall for sufficient reasons to be recorded, order the witness to be present for cross examination, and in the event of the witness not appearing for cross examination, then, the affidavit shall not be taken into evidence and further that no oral evidence other than that given in this proviso will be permitted.
(7) If the defendant denies his liability to pay the claim made by the applicant, the Tribunal may act upon the affidavit of the applicant who is acquainted with the facts of the case or who has on verification of the record sworn the affidavit in respect of the contents of application and the documents as evidence.
(8) Provisions contained in section 4 of the Banker's Books Evidence Act, 1891 (18 of 1891) shall apply to a certified copy of an entry in a banker's book furnished along with the application filed under sub-section (1) of section 19 by the applicant.
[59] (1) The Registrar shall have the custody of the records of the Tribunal and shall exercise such other functions as are assigned to him under these rules or by the Presiding Officer by a separate order in writing.
(2) The official seal shall be kept in the custody of the Registrar.
(3) Subject to any general or special direction by the Presiding Officer, the seal of the Tribunal shall not be affixed to any order, summons or other process save under the authority in writing from the Registrar.

5.1.9. ADDITIONAL POWERS AND DUTIES OF REGISTRAR

Lastly Section 23[60] may be looked upon as the Additional powers and duties that are conferred upon the Registrar.

5.2. THE DEBTS RECOVERY APPELLATE TRIBUNAL (PROCEDURE) RULES, 1994

Debts Recovery Appellate Tribunal (Procedure) Rules , 1994 relates to the Procedure of filling of Appeal, along with the Presentation and Scrutiny of memorandum of Appeal and some other important aspects related to the working of the Appellate Tribunal. Just like earlier, the rules are framed by the Central Government in exercise of its powers conferred by the RDDB & FIs Act, 1993.

5.2.1. PROCEDURE FOR FILING APPEALS

Section 5[61] lays the provision for the Procedure for filing of appeals.

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(4) The seal of the Tribunal shall not affixed to any certified copy issued by the Tribunal save under the authority in writing of the Registrar.

[60] In addition to the powers conferred elsewhere in these rules, the Registrar shall have the following powers and duties subject to any general or special order of the Presiding Officer, namely,--

(i) to receive all applications and other documents including transferred applications,

(ii) to decide all questions arising out of the scrutiny of the applications before they are registered;

(iii) to require any application presented to the Tribunal to be amended in accordance with the rules;

(iv) subject to the direction of the Presiding Officer, to fix date of hearing of the application or other proceedings and issue notice thereof;

(v) direct any formal amendment of records;

(vi) to order grant of copies of documents to parties to proceedings;

(vii) to grant leave to inspect other records of Tribunal;

(viii) dispose of all matters relying to the service of notices or other processes, application for the issue of fresh notices or for extending the time for or ordering a particular method of service on a defendant including a substituted service by publication of the notice by way of advertisements in the newspapers;

(ix) to requisition records from the custody or any court or other authority.

[61] (1) A memorandum of appeal shall be presented in the Form annexed to these rules by the Appellant either in person to the Registrar of the Appellate Tribunal within whose jurisdiction his case falls or shall be sent by registered post addressed to such Registrar.

(2) Where the appellant is a bank or a financial institution, a memorandum of appeal may be preferred, -

(i) by one or more legal practitioners authorised by such bank or financial institution or,

(ii) by any of the officers of such bank or financial institution to act as Presenting Officers; and every person so authorised may present the appeal before the Appellate Tribunal.

(3) Where the appellant is other than a bank or a financial institution, he may prefer an appeal in person or by his agent or by a duly authorised legal practitioner.

5.2.2. Presentation and Scrutiny of Memorandum of Appeal

Section 6[62] states the provision for the scrutiny of the memorandum of appeal presented to the Registrar and the procedure adopted thereof by him.

5.2.3. Deposit of Amount of Debt-Due

Section 9[63] lays provision for the deposit of amount of debt-due.

5.2.4. Documents to Accompany Memorandum of Appeal

Section 11[64] lays the documents that are to accompanied along with the memorandum of appeal.

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(4) An appeal sent by post under sub-rule (1) shall be deemed to have been presented to the Registrar on the day on which it is received in the office of the Registrar.

(5) The appeal under sub-rule (1) shall be presented in four sets in a paper book alongwith an empty file size envelope bearing full address of the respondent and where the number of respondents are more than one, then sufficient number of extra paper books together with empty file size envelopes bearing full addresses of each respondent shall be furnished by the appellant.

[62] (1) The Registrar shall endorse on every appeal the date on which it is presented under rule 5 or deemed to have been presented under that rule and shall sign endorsement.

(2) If, on scrutiny, the appeal is found to be in order, it shall be duly registered and given a serial number.

(3) If an appeal on scrutiny is found to be defective and the defect noticed is formal in nature, the Registrar may allow the appellant to rectify the same in his presence and if the said defect is not formal in nature, the Registrar, may allow the appellant such time to rectify the defect as he may deem fit.

(4) If the concerned appellant fails to rectify defect within the time allowed in sub-rule (3), the Registrar may by order and for reasons to be recorded in writing, decline to register such memorandum of appeal.

(5) An appeal against the order of the Registrar under sub-rule (4) shall be made within fifteen days of making of such order to the Presiding Officer concerned in his chamber, whose decision thereon shall be final.

[63] Where an appeal is preferred by a person referred to in section 21 of the Act, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five per cent of the amount of debt so due from him as determined by the Tribunal under section 19 of the Act, provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under section 21 of the Act.

[64] (1) Every memorandum of appeal shall be in triplicate and shall be accompanied with two copies (at least one of which shall be certified copy) of the order of the Presiding Officer of Debts Recovery Tribunal or order made by the Recovery Officer under section 30 of the Act, as the case may be, against which the appeal is filed.

(2) Where the parties to the appeal are being represented by an agent, documents authorising him to act as such agent shall also be appended to the appeal. Provided that where an appeal is filed by a legal practitioner, it shall be accompanied by a duly executed Vakalatnama.

(3) Where a bank or financial institution is being represented by any of its Officers to act as Presenting Officer before the Appellate Tribunal, the document authorising him to act as Presenting Officer shall be appended to the memorandum of appeal.

5.2.5. FILING OF REPLY TO THE APPEAL AND OTHER DOCUMENTS BY THE RESPONDENT

Section 14[65] lays filing of reply to the appeal and other documents by the respondent that are to be filed along with it.

5.2.6. WHO MAY BE JOINED AS A RESPONDENTS

Section 15[66] lays provision as to who may be joined as an respondents, it says that if appeal is filed by a person , other than the bank or financial institution, then the bank or financial institution who has to recover debts shall be joined as an respondent.

5.2.7. POWERS AND FUNCTIONS OF THE REGISTRAR OF APPELLATE TRIBUNAL

Section 25[67] speaks off the powers and functions that are conferred upon the Registrar of the Appellate Tribunal.

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[65] (1) The respondent may file four complete sets containing the reply to the appeal along with documents in a paper book form with the registry within one month of the service of the notice on him of the filing of the memorandum of appeal.
(2) The respondent shall also endorse one copy of the reply to the appeal along with documents as mentioned in sub-rule(1) to the appellant.
(3) The Appellate Tribunal may, in its discretion on application by the respondent, allow the filing of reply referred to in sub-rule (1), after the expiry of the period referred to therein.
[66] (1) In an appeal by a person other than bank or financial institution, the bank or financial institution who has to recover any debt from any person under section 19 of the Act, before the Tribunal against whose order the appeal has been preferred, shall be made the respondent to the appeal.
(2) In an appeal by the bank or a financial institution the other party shall be made the respondent to the appeal.
[67] (1) The Registrar shall have the custody of the records of the Appellate Tribunal and shall exercise such other functions as are assigned to him under these rules or by the Presiding Officer by a separate order in writing.
(2) The official seal shall be kept in the custody of the Registrar.
(3) Subject to any general or special direction by the Presiding Officer, the seal of the Appellate Tribunal shall not be affixed to any order, summons or other process, save under the authority in writing from the Registrar.
(4) The seal of the Appellate Tribunal shall not be affixed to any certified copy issued by the Tribunal save under the authority in writing of the Registrar.

Chapter 6: FUNCTIONING OF THE TRIBUNAL

6.1. APPLICATION TO THE DEBT RECOVERY TRIBUNAL

Section 19 of the RDDB & FIs. Act, 1993, lays provision for the filling of the application to the Debt Recovery Tribunal. The present section has been substituted for the older section 19 by the RDB (Amendment) Act, 2001. Section 19 of the Act as amended has introduced several changes specifically conferring powers relating to set-off, counter claims, attachment before judgment, appointment of receiver, inherent powers etc. Earlier section contained only 8 sub-sections while the present section comprises as many as 25 sub-sections.

The defects/lacunas argued in the case of **Union of India v. Delhi High Court Bar Association**[68] in the working of the Act have been attempted to be removed. Sub-section (1) corresponds to old sub-section, with no change. Sub-section (2), which provides for joining of other bank or financial institution having claim against the same respondent in the same application, is relatively a new provision. The purpose of addition of sub-section (2) is to avoid multiplicity of suits. Sub-section (3) reproduces sub-section (2) of the old section with no change. Sub-section (4) reproduces sub-section (3) of the old section with no change. Sub-section (5) is newly added; no such provision existed under the un-amended section. According to provision, the defendant shall at or before the first hearing or within such time as the Tribunal may permit present a written statement of his defence. Sub-sections (6) to (11), contains the various provisions related to the filing of Set-off and Counter- claims, this

[68] (2002) 4 SCC 275

is one of the important change. Sub-section (12) reproduces sub-section (6) of the old sub-section, almost verbatim with the addition of the new words "or attachment" in the new sub-section. Sub-sections (13) to (18) are new, making provisions for the attachment before judgment, appointment of receiver etc. Sub-section (19) is new provision.

This newly added provision lays down that where the certificate of recovery has been issued against the Company registered under the Companies Act 1956, the Tribunal can direct that the sale proceeds of the company may be distributed among its secured creditors in accordance with the provisions of the company may be distributed according to the provisions of Section 529-A of the Indian Companies Act 1956. Sub-section (20) corresponds to sub-section (6) of the old section with certain changes. The words 'or final' before the word 'order' are new. Further, the words " including the order for the payment of interest from the date on or before which the payment of the amount is found due to the date of the realisation or actual payment" after the word "order" are new , empowering the tribunal to award interest on the amount found due. Sub-section (21) corresponds to sub-section (5) of the old section with no change. Sub-section (22) reproduces sub-section (7) of the old section with no change. Sub-section (23) is a new provision, it relates to the authority of the Tribunal to send the copies of the certificate of recovery issued by it, if it is satisfied that the property is situated within the local limits of the jurisdiction of two or more Tribunals. Sub-section (24) corresponds to sub-section (8), with no material change, the provisions are the same. In the un-amended sub-section 24, the words used are "one hundred and eighty days". Sub-section (25), which vests the Tribunal with the inherent powers, is a new provision.

An endeavour is made here to discuss in detail the provisions of section 19.

6.1.1. APPLICATION FOR RECOVERY

Section 19(1) of the Act lays down that where a bank or financial institution has to recover any debt from any person it may make an application to the Tribunal within the local of whose jurisdiction:

(i) the defendant or each of the defendants where there are more than one at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or

(ii) any of the defendants, where there are more than one , at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or

(iii) the cause of action, wholly or in part, arises.

This provision of the section corresponds with Section 20 of Code of Civil Procedure, 1908. It was held in the case of **Industrial Credit and Investment Corporation of India Ltd. v. Grapco Industries Ltd.,**[69] that bank or a financial institution which files an application for recovery of debt is called the applicant under the Act and the person from whom debt is to be recovered is called the defendant. For all intent and purposes , an application is like a plaint in civil suit and applicant would be plaintiff and respondent a defendant. The details , which are required to be given in the application in substance conform to the requirements of a plaint under the Code of Civil Procedure.

6.1.2. IMPLEADMENT OF OTHER BANK/FINANCIAL INSTITUTIONS

Sub-section 19 (2) lays that where a bank or financial institution, which has to recover its debt from any person, has filed an application to the Tribunal under sub-section and against

[69] (1999) 4 SCC 710

the same person another bank or financial institution also has a claim to recover its debt, then the later bank or financial institution may join the applicant bank or financial institution at any stage of proceedings, before the final order is passed, by making the application to that Tribunal. Any other bank/ financial institution can be impleaded in the main application under Section 19(2) before a final order is passed in the case.

In the case of **Allahabad Bank v. Canara Bank,**[70] it was submitted that Section 19 (2) permits impleadment of other bank/financial institution at any time before the final order is passed. The final order is the order of adjudication under section 19 (1) as to whether the debt is due or not.

6.1.3. CONTENTS OF APPLICATION

Sub-section (3) lays that every application under sub-section (1) or sub-section (2) shall be in such form and accompanied by such documents or other evidence and by such fee as may be prescribed. Rule 9 of the Debts Recovery Tribunal (Procedure) Rules 1993, states that every application shall be accompanied by a paper-book containing, (i) statement showing details of the debt due from a defendant and the circumstances under which such debt has become due; (ii) all documents relied upon by the applicant and those mentioned in the application; (iii) details of the crossed demand draft or crossed Indian Postal Order representing the application fee; (iv) index of documents. Rule 10 of Debts Recovery Tribunal (Procedure) Rules 1993, permits reliefs based on more than one cause of action being claimed in one application, provided they are so connected that seeking of one relief requires relief of the either of necessity or on account of statutory mandate. Every application filed under the Act shall set forth concisely under distinct heads, the grounds for such application and such

[70] 2000 37 CLA 293

ground shall be numbered consecutively and shall be typed in double space on one side of the paper.

In the case of **Syndicate Bank v. Chamundi Industries**[71] , it was submitted that rule against plural remedies, that is seeking relief based on more than one cause of action in single application has to be construed as merely directory since it hasn't indicated the consequences of breach of rule by way of return or rejection of application and it would be open to the Tribunal to entertain the application for relief based on more than one cause of action.

6.1.4. SERVICE OF SUMMONS

Sub-section (4) lays down that on receipt of the application under sub-section (1) or sub-section (2), the Tribunal shall issue summons requiring defendants to show cause within thirty days of the service of summons as to why the relief prayed for shouldn't be granted.

In the case of **Shiva Murat Sharma v. Allahabad Bank,** it was held that the Debt Recovery Tribunal is not bound by the provisions of Code of Civil Procedure but should be guided by the principles of natural justice. However, the Tribunal cannot follow a procedure which is opposed to the principles of natural justice. The Tribunal at the first instance must issue summons on the defendant, because mere publication of summons in local newspapers cannot amount to "service of summons" unless it is established that the defendant was avoiding regular summons. Further no substituted service can be ordered unless there is allegation that the defendant was avoiding regular service of summons.

[71] AIR 2002 Kant 56

6.1.5. FILING OF WRITTEN STATEMENT

Sub-section (5) states that the defendant shall, at or before the first hearing or within such time as the Tribunal may permit, present a written statement of his defence. On summons being issued, the defendant has 30 days, as of right, to file his reply pursuant to the show cause notice and no condition can be imposed at least till the 30 days are over. The presiding officer can't proceed ex-parte on the ground of non- filling of written statement, unless given an opportunity to the appellant.

6.1.6. SET-OFF

Before 2000 Amendment there was no provision in the Act for filing of set-off by the defendant. After the coming of amendment, the lacuna has been removed and now sub-section (6) allows the defendant to claim set-off against applicant's demand certain sum of money legally recoverable by him from such an applicant at the first hearing but not afterwards, unless permitted by the Tribunal, by presenting written statement containing the particulars of the debt sought to be set-off. Sub-section (7) provides that the written statement shall have the same effect as a plaint in a cross-suit so as to provide the Tribunal to pass a final order in respect of both of the original claim and set-off. The above provisions of set-off are closely related to the Order8, Rule 6 of the Code of Civil Procedure, 1908.

6.1.7. COUNTER-CLAIMS

Sub-section (8) to sub-section (11) provides for the defendant's right to file counter-claims against the applicant. Sub-section (8) lays that a defendant in an application may, in addition to his right to claim set-off under sub-section (6), set up by way of counter-claim against the claim of the application; any right or claim in respect of cause of action accruing to the defendant against the applicant either before or after the filing of the application but before

the defendant has delivered his defence has expired, whether such counter-claim is in the nature of claim for damages or not. Sub-section (9) states that a counter-claim shall have the effect of cross-suit so as to enable the Tribunal to pass the final order on the same application in respect of both original claim and counter-claim. Sub-section (10) states that the applicant shall be at liberty to file written statement in answer to the counter-claim of the defendant within such time period as may be fixed by the Tribunal.

In **Arun Kumar Chamaria v. Corporation Bank,**[72] it was submitted that sub-section (8) to sub-section (11) of Section 19 after has enabled the Tribunal to entertain/ adjudicate the counter-claim. This new provision is an additional and /or supplemental not the substitutional. This is new provision in the Act empowering the Tribunal to decide and determine counter-claim even though the proceeding of bank or financial institutions is stayed, discontinued, or dismissed. **Mudit Entertainment Industries Pvt. Ltd. v. Baneras State Bank Ltd.,**[73] submitted that the Tribunal is not merely an executing authority to recover debts but is enjoined with a duty to decide debts by seeking into accurate cause shown by the debtor and such cause could include counter-claim and set-off by the debtor as put forth against claim of Bank. Having regard to cause as shown, Tribunal has to decide liability of debtor who if succeeds, Tribunal has to make necessary adjustments of such claims against debts claimed by the bank or financial institution. Tribunal cannot pass order to effect recovery from the bank in case counter-claim is of amount more than debts.

Sub-section (10) states that the applicant shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such time period as may be fixed by the Tribunal. Lastly sub-section (11) provides that if the applicant contends that the counter-

[72] (2001) 2 CALLT 63 HC
[73] 2000 (2) AWC 1008

claim thereby raised ought not to be disposed of by way of counter-claim but in an independent action, he may, at any time before the issues are framed in relation to the counter-claim, apply to the Tribunal for an order that such counter-claim may be exclude, and the Tribunal may, on hearing of such application, make such order as it thinks fit. In **Navdeep Theatre (P) Ltd. v. Union of India,**[74] A Division Bench of the Punjab & Haryana High Court has expressed the view that where the respondent files counter-claim, the Petitioner has the option either to seek the transfer of his counter-claim to the Tribunal or to have counter-claim decided by the Civil Court in accordance with the law as a separate and independent suit. If counter claim preferred is for more than the amount claimed by the bank, he cannot file the same before the Debts Recovery Tribunal. These provisions introduced by way of an amendment are *pari materiea* with the provisions contained in Order 8, Rule 6-A to 6-G of the Code of Civil Procedure, 1908.

6.1.8. AMENDMENT OF THE PLEADINGS

In the RDDB & FIs Act, there is no provision for the amendment of pleadings. However, sub-section (25) of Section 19 empowers the Tribunal to make such orders and give such direction, as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of the justice. Sub-section 1 of Section 22 lays down that the Tribunal shall not be bound by the procedure laid down in Code of Civil Procedure, however doesn't speak that the Tribunal shall not follow the provisions of the Court.

In **Pearl Intercontinental Ltd. v. State Bank of Indore,** it was submitted that the party to litigation may seek amendment of the pleadings at any stage of the trial. The riders are that the amendment should not change the nature of the case and the amendment in the plaint is

[74] 2001 103 CompCas 290 P H

not barred by time. So far as amendment to the written statement is concerned, even contradictory pleas in the alternative can be taken. The merits of such plea would of course be taken into consideration while deciding the case finally.

6.1.9. INJUNCTIONS OR STAY OR ATTACHMENT

As provided by Sub-section (12) the Tribunal may make an interim order(whether by way of injunction or stay or attachment) against the defendant to debar him from transferring, alienating or otherwise dealing with, or disposing of , any property and assets belonging to him without the permission of the Tribunal. The Tribunal has the jurisdiction and competence to pass interim orders as may be necessitated to prevent the abuse of its process or to secure the ends of justice.

Allahabad Bank, Calcutta v. Radhakrishna Maity[75]**,** submitted that the power of the Tribunal to pass the interim order is not confined to orders of stay or injunction as named in Sub-section (12). The Tribunal is vested with powers wider than those contemplated under Provisions of the Code of Civil Procedure, though it is required to pass its orders in conformity with principles of natural justice. **Industrial Credit and Investment Corporation of India Ltd. v. Grapco Industries Ltd.**[76]**,** submitted that an ex-parte order passed by the Tribunal should be granted for a short period and it should be a reasoned order and the Tribunal must put the applicant on terms while passing an ex-parte order, and in case that order is found to be not justified and causing harm to defendant, Tribunal must compensate the defendant.

[75] 2000 (1) M.L.J. 52 (S.C.)
[76] (1999) 4 SCC 710

Order 39 Rules 1 to 12 in Civil Procedure Code contain provisions on injunction, though the Tribunal is not bounded by the Code of Civil Procedure, but there is nothing in the Act to stop the Tribunal from following those provisions, as the Tribunal is guided by the principles of natural justice, and it can use those provisions in a particular case and can even go beyond that, but it should be to advance the cause of justice.

6.1.10. ATTACHMENT BEFORE JUDGMENT

The condition for grant of an order of attachment before judgment is laid down in sub-section (13) of Section 19. As provided by the sub-section 13, where, at any stage of the proceedings, the Tribunal is satisfied, by affidavit or otherwise, that the defendant with the intention to obstruct or delay or frustrate the execution of any order for the recovery of debt that may be passed against him,

(i) is about to dispose of the whole or any part of his property; or

(ii) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Tribunal; or

(iii) is likely to cause any damage or mischief to the property or affect its value by misuse or creating third party interest, the Tribunal may direct the defendant , within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Tribunal, when required, the said property or the value of the same , or such portion thereof as may be sufficient to satisfy the certificate for the recovery of debt , or to appear and show cause why he should not furnish security.

And where the defendant fails to show cause why he should not furnish security or fails to furnish the security required, within the time fixed by the Tribunal, the Tribunal may

order the attachment of the whole or such portion of the properties claimed by the applicant as the properties secured in his favour or otherwise owned by the defendant as appears sufficient to satisfy any certificate for the recovery of debt. Sub-section (14) lays that the applicant shall, unless the Tribunal otherwise directs, specify the property required to be attached and the estimated value thereof. The Tribunal may also in the order direct the conditional attachment of the whole or any portion of the property specified under sub-section (14) as provided by the sub-section (15). Further if an order of attachment is made without complying with the provisions of sub-section (13), such attachment shall be void. Lastly sub-section (17) lays that in case of disobedience of an order made by the Tribunal under sub-sections (12), (13) and (18) or breach of any of the terms on which the order was made, the Tribunal may order the properties of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil person for a term not exceeding three months, unless in the meantime the Tribunal directs his release. The provisions of these sub-sections are *pari materia* to Order 38, Rules 5 to 12 of the Civil Procedure Code, 1908.

In **Kartar Singh v. Auto Tension Ltd.**[77], it was submitted that when the plaintiff has made out a prima facie case on the merits, defendant should be directed to furnish security binding the disposal of suit. In **Cosmopolitan Trading Corpn v. Engg. Sales Corporation**[78], it was submitted that before exercising discretion under this rule , the Court should satisfy itself of the practical certainty of the plaintiff's success and of the existence of grave danger and of real fear that the dishonest defendant undoubtedly liable is trying to dispose of the property with dishonest intention.

[77] 1997VAD(Delhi)535
[78] [2003]133TAXMAN52(Raj

6.1.11. APPOINTMENT OF RECEIVER

Earlier there was no provision in the Act for the appointment of the receiver. After the 2000 Amendment, the law has changed and under the amended Section 19, by virtue of sub-section 18 thereof the Debts Recovery Tribunals have been empowered to appoint Receiver of any property whether before or after the grant of certificate for recovery of the debt.

The said sub-section lays that where it appears to the Tribunal to be just and convenient; the Tribunal may, by order-

(i) appoint a receiver of any property , whether before or after grant of certificate for recovery of debt;

(ii) remove any person from the possession or custody of the property;

(iii) commit the same to the possession, custody or management of the receiver;

(iv) confer upon the receiver all such powers, as to bringing and defending suits in the courts or filing and defending application before the Tribunal and for the realization, management , protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Tribunal think fit; and

(v) appoint a Commissioner for preparation of an inventory of the properties of the defendant or for the sale thereof.

In **Satheeshkumar v. Vijaya Bank,**[79] it was submitted that the provisions of s. 19 (18) of the Act is *pari materia* to Order 40, Rule 1 (d) CPC, such a power is to be exercised for just and convenient reasons. Order passed by the Tribunal appointing an Advocate Receiver without

[79] AIR 2004 Mad 306

considering the objection of the contesting respondent is not sustainable. In **The Bank of Tokyo-Mitsubishi Ltd. v. Chembra Estates,**[80] it was submitted that all receivers appointed by the High Court, either in pending suits or in execution of decrees, unless their tenure was expressly defined, would continue to be receivers till discharged by the Court. As a result of the coming into force of the RDB Act, 1993 and the establishment of the Debts Recovery Tribunal, the jurisdiction of the High Court as a Civil Court to entertain suits or any other proceedings, including proceedings in execution, in cases falling within the purview of Section 17, ceased from that date by reason of Section 18 of the RDB Act, 1993.

In **State Bank of Hyderabad v. Pennar Paterson Ltd.**[81], it was stated that the ancillary power of the Tribunal to appoint a commissioner for preparation of an inventory of the properties is in aid of the power of the Tribunal under Section 17, and the limited direction of the Tribunal to appoint an Advocate Commissioner and requiring the Commissioner to have an inventory of the properties, which direction the Tribunal possesses under section 19 (18) (e) of the Act, no prior permission of the Company Judge under section 446 is necessary. In fact, the official liquidator should have cooperated with the Commissioner in making an inventory of the properties of which continues to be in custody after being appointed as a provisional liquidator. The Provisional Liquidator appointed by the Company Court was directed to permit the Advocate Commissioner to have an inventory of the property.

In **Industrial Credit and Investment Corporation of India v. Pathera Brothers Forgings and Stampings Ltd.**[82], it was submitted that where a Court Receiver has been appointed by the High Court before the cut of date, the Court Receiver doesn't stand discharged automatically on and from the cut off date. Even in cases where the proceedings stand

[80] AIR 2001 Bom 170
[81] [2003] 114 Comp Cas 66
[82] [2000] 114 Comp Cas 204

transferred to the Tribunal, the properties shall continue to remain in custody either under the High Court or under the Tribunal. A fresh application will not become necessary seeking appointment of receiver, to the Tribunal. The deletion of the words "de novo" from section 31 itself indicates that no fresh application for appointment of a receiver is required to be made to the Tribunal. If the court has already appointed of a Receiver before the cut off date, the property shall continue to remain in custody till the suit is disposed of by the Tribunal. Proceedings before the Court Receiver are an on going process till the rights of the parties to the properties in the hands of the receiver are decided. Only a formal handing over of the properties by the Court Receiver to the Receiver of the Tribunal will follow and, therefore , there is no question of "de novo" proceedings being adopted for the appointment of the Court Receiver.

In **E. Satish Kumar v. Vijaya Bank, Coimbatore,**[83] it was held that Section19 (18) of the Act is in pari materia with O.40, Rule 1(d), CPC. The said power has to be exercised for just and convenient reasons. Hence an order of the Tribunal appointing an Advocate Receiver to take possession of the mortgaged property without considering the objections of the contesting party is not sustainable. The Presiding Officer while appointing a receiver should first take into consideration the objection of the contesting party.

6.1.12. DISTRIBUTION OF ASSETS OF A COMPANY AMONGST SECURED CREDITORS. (RATEABLE DISTRIBUTION)

Sub-section (19) has been inserted by the Amendment Act of 2000, to remove the difficulties that have arisen in the case of recovery of debts due to Banks and Financial Institutions from the Companies whose winding up proceedings are being carried on by the Company Court.

[83] AIR 2004 Mad 306, 2003 116 CompCas 549 Mad

What happens that in a winding up proceedings all the secured creditors are equally placed before the Company Court, whereas in the proceedings under the Debts Recovery Tribunal, the Bank or the Financial Institution has advantage of exclusively appropriating to extent of its decree proceeding from particular security? This difference no longer exists in view of sub-section (19) of Section (19), that provides, where a certificate of recovery is issued against a company registered under the Companies Act, 1956 the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors, in accordance with the provisions of Section 529 A of the Companies Act, 1956 and to pay the surplus, if any to the company.

In **Re: Remanika Silks (P) Ltd. (In Liquidation)**[84] it was submitted that even if the Debt Recovery Tribunal brings to sale the assets of the company under liquidation, it can't straightaway pay the proceeds to the applicant bank; but will have to give priority to the dues of the workmen and then only to decide on the question as to how the proceeds should be distributed among the various creditors including the applicant Bank.

For the sake of clarity, the principles as enunciated in the landmark decision of the Supreme Court in **Allahabad Bank v. Canara Bank**[85] are reproduced here as follows:

(i) Claim under Section 529 (1) Proviso (c) can arise only if secured creditor had stood outside winding up and realised amounts and if it is shown that out of amounts so realised privately by the secured creditor, some portion has been rateably taken away by the liquidator u/s 529 (1), Proviso (a) and (b) and it is only then that the secured creditor can claim that it is to be reimbursed at same level as a secured creditor with priority over realisation of other secured creditors lying in

[84] 30.2002(1)COMP LJ 191(KERALA)

the Tribunal. Where none of these conditions are satisfied, the secured creditors cannot belong to secured creditors covered by Section 529(1)(b) of Companies Act . Such secured creditors cannot rely on words in section 19(19) of the Act "to be distributed among its secured creditors" for claiming any amount lying in the Tribunal towards its security nor can claim priority as against other secured creditor.

(ii) Contention that Section 19(19) gives priority to all secured creditors to share in sale proceeds before the Tribunal or Recovery Officer cannot be accepted since words " secured creditors" are qualified by word "in accordance with provisions of Section 529-A". It becomes, therefore, necessary to identify above limited class of secured creditors who have priority over all other debts in accordance with Section 529-A of Companies Act.

(iii) Secured creditors falling under two categories, that is, those who go before Company Court and those who stand outside the winding up, priority of latter class of creditors under Section 529-A, Proviso (c) is confined to workmen's portion "as defined under 529(3) (c) of Companies Act and "workmen's portions" means amount which bears, to value of security, same portion which amount of workmen's dues bear to aggregate firstly of workmen's dues and secondly of debts due to all creditors as explained in illustration, under the said provisions, that is, workmen's portion will be pro-rata amount to be shared by secured creditors and priority of workmen's dues will be restricted to extent such pro-rata share. Words " so much of the debt due to such creditor as could be realised by him by virtue of foregoing provisions of proviso" mean amount taken away from private realisation of secured creditor by liquidator by way of enforcing charge of workmen's dues under Section 529(1) (c) 'rateably" against each secured creditor

and to that extent, that secured standing outside winding up and losing part of moneys otherwise by security, can come before the Tribunal to reimburse himself from out of other monies available in the Tribunal, claiming priority over all other creditors by virtue of Section 529-A(1)(b).

(iv) The secured creditor standing outside the winding up and whose claims are restricted to Section 529-A r/w clause (c) of Proviso to S.529(1) does not finally lose any part of his security because workmen's portion to take away from his security.

(v) Whatever the secured creditor loses towards workmen's portion out of his security can be claimed by him as secured amount with priority over such creditors of other realisation made by other creditors whose monies are lying in the Tribunal and his position wouldn't improve from that it originally was and his priority wouldn't extend to his entire unrealised sums which might be in excess of his security.

6.1.13. AWARD OF INTEREST

Sub-section (20) in Section 19 contains new provision for the award of interest by the Tribunal on the amount found due. It states that the Tribunal may, after giving the applicant and the defendant an opportunity of being heard, pass such interim or final order , including the order for payment of interest from the date on or before which payment of the amount is found due up to the date of realisation or actual payment, on the application as it thinks fit to meet the ends of justice.

In **Bank of India v. Golden Hardware Works Pvt. Ltd.**, it was submitted that the Court has discretion to grant lesser rate of interest for the period of *pendente lite* and future interest. The

Applicant Bank was allowed interest at a lesser rate than the contract rate from the date of the filling of the suit till the realisation of the amount.

6.1.14. INHERENT POWERS

Sub-section (25) contains express powers of the Tribunal to make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its portions or to secure some ends of justice. This provision corresponds to section 151 of the Code of Civil Procedure, which preserves the inherent powers of the Court. In **Mahadeo v. Kalloo**[86], it was submitted that the inherent power being very wide and incapable of definition, its limits should be carefully guarded. The power is intended to supplement the other provisions of the Code and not to evade or ignore them or to invent a new procedure according to individual sentiment.

6.1.15. MISCELLANEOUS

Section (21) lays that the Tribunal shall send a copy of every order passed by it to the applicant and the defendant. As provided by section (22) the Presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate. By section (23) the Tribunal is vested with the powers to send the copies of the certificate of recovery for execution to such other Tribunals, if it is satisfied that the property to be attached or recovered is situated within the local limits of such other Tribunal. Provided that in case where the Tribunal to whom the certificate of recovery is sent for execution finds that it has no jurisdiction to comply with the certificate of recovery, it shall return the same to the Tribunal which has issued it. The application made to the Tribunal under sub-section (1) or

[86] 73 Ind Cas 494

sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the application finally within one hundred and eighty days from the date of receipt of the application.

6.2. APPEAL TO THE APPELLATE TRIBUNAL

Section 20[87] of the Act deals with appeal to the Appellate Tribunal. Any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this act, may prefer an appeal to an appellate Tribunal having jurisdiction in the matter.

6.2.1. COMMENTS

It is clear that appeal is a creature of statute. Only if statute expressly lays the provision for filling appeal against the order or decision of the court, party has got right to approach the particular appellate court. As section 20 provides aggrieved party to appeal against any order made or deemed to be made by the Tribunal, therefore the party to the case has got remedy to appeal before the Appellate Tribunal. However any order passed by the Tribunal with the consent of both parties, shall not be appeal able. In **Punjab National Bank v. O.C.**

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[87] (1) Save as provided in subsection(2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate
Tribunal having jurisdiction in the matter.
(2) No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.
(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:
Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.
(4) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal.
(6) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

Krishnan,[88] it was held that the Act has been enacted with a view to provide a special procedure for recovery of debts due to banks and financial institutions. There is a hierarchy of appeal provided in the Act, namely, filling of an appeal under section 20 and this fast-trac procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filling a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions.

6.2.2. JURISDICTION

It was held in **Kishore Rungta v. Punjab National Bank,**[89] that on disposal of an appeal, the order passed by the Debts Recovery Tribunal merges into the appellate order passed by the Debts Recovery Appellate Tribunal. The order of the Debts Recovery Tribunal, if is sought to be challenged before the High Court, the writ petition has to be filed before the High Court exercising where the Debts Recovery Appellate Tribunal is situated.

6.2.3. DOCUMENTS TO ACCOMPANY MEMORANDUM OF APPEAL

Every memorandum of appeal shall be in triplicate and shall be accompanied with two copies (at least one of which shall be a certified copy) of the order of the Presiding Officer of Debts Recovery Tribunal or order made by the Recovery Officer under Section 30 of the Act, as the case may be, against which the appeal is filed. Where the parties to the appeal are being represented by an agent, documents authorising him to act as such agent shall also be appended to the appeal. Where a legal practitioner files an appeal, it shall be accompanied by

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[88] AIR 2001 SC 3208
[89] 2001 (3) BomCR 730

a duly executed vakalatnama. Where a bank or financial institution is being represented by any of its officers to act as Presenting Officer before the Appellate Tribunal, the document authorising him as Presenting Officer shall be appended to the memorandum of appeal.

6.2.4. PLURAL REMEDIES

A memorandum of appeal shall not seek relief or reliefs based on more than a single cause of action in one single memorandum of appeal unless the reliefs prayed for are consequential to one another. Under the rules framed under the Act, the appellant is to declare in memorandum of appeal that the matter appealed against is not pending before any Court of law or any other authority, or any other Tribunal. The fundamental principles of law preclude a party from pursuing two remedies in respect of the same matter simultaneously.

6.2.5. FEE PAYABLE ON MEMORANDUM OF APPEAL

According to Rule 8 of the Debts Recovery Appellate Tribunal (Procedure) Rules 1994, the amount of fee payable in respect of appeal under Section 20 shall be Rs. 12000/- where the amount of debt due is less than Rs. 10 lakhs; Rs. 20000/- where the amount of debt due is Rs. 10 lakhs or more but less than Rs. 30 lakhs and Rs. 30000/- where the amount due is Rs. 30 lakhs or more.

6.2.6. LIMITATION

Section 20(3) of the Act specifies that every appeal under Section 20(1) of the Act shall be filled within a period of 45 days from the date on which a copy of the order was made or deemed to have been made, by the Tribunal is received by him. The proviso to sub-section (3) provides that appeal can be entertained after the expiry of the period if there is sufficient cause for not filing it within the period. In **Unified Agro Industries (I) Ltd. v. Debts**

Recovery Tribunal, New Delhi[90], it was submitted that an appeal has to be preferred within 45 days. Appeal can be entertained even after expiry of the period of limitation provided the Tribunal is satisfied that there was sufficient cause for non-filling of the appeal within the prescribed time. What is sufficient cause depends upon the facts and circumstances of each case. However, the expression "sufficient cause" is to be interpreted liberally so as to advance the cause of justice.

6.2.7. DEPOSIT OF AMOUNT OF DEBT DUE, ON FILLING APPEAL

Section 21 of the Act deals with deposit of amount of debt due on filling appeal. It states that where an appeal is preferred by any person from whom the amount of debt is due to bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal seventy-five percent of the amount of debt so due from him as determined by the Tribunal under Section 19. Provided that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

In **Anamika v. Debts Recovery Tribunal,**[91] it was stated that after the case has been transferred from the Civil Court to the Tribunal, the proceedings as to filing of the appeal shall be governed by the provisions of the RDB Act; the judgment debtor cannot urge that the case continues to be governed by the provisions of the Code of Civil Procedure. The requirement as to deposit of 75% of the amount found due by the Tribunal shall apply. In **Unified Agro Industries (I) Ltd. v. Debt Recovery Tribunal, New Delhi**[92], it was submitted that an order /decree passed by the Debts Recovery Tribunal is appealable. It cannot be said that the appeal is not an adequate remedy or is onerous and not efficacious, as

[90] AIR2000Delhi394, 2000(56)DRJ307
[91] [2001]104CompCas401(Kar)
[92] Ibid

the appellant under S.21 is required to deposit 75% of the adjudged amount. The appellate authority while hearing the appeal will be entitled to pass such orders as it may deem fit on the merit of the case since the entire matter will be open before it.

6.3. PROCEDURE AND POWERS OF TRIBUNAL AND APPELLATE TRIBUNAL

Section 22[93] provides for procedure and powers of the Tribunal and the Appellate Tribunal.

6.3.1. TRIBUNALS EXERCISING POWERS OF THE CIVIL COURT

Section 22 (2), clause (a) to (h) enumerate the instances wherein the Tribunal and the Appellate Tribunal while discharging their functions under the Act, can exercise the same powers as are vested in a Civil Court under CPC while trying a suit. Full opportunity should be given to the parties to produce their evidence and state their case before the Court and court has to exercise discretion in favour of production of evidence.

6.3.2. JUDICIAL PROCEEDINGS

[93] (1) The Tribunal and the Appellate Tribunal shall not be bound the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.
(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:--
(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) requiring the discovery and production of documents;
(c) receiving evidence on affidavits;
(d) issuing commissions for the examination of witnesses or documents;
(e) reviewing its decisions;
(f) dismissing an application for default or deciding it ex parte;
(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;
(h) any other matter which may be prescribed.
(3) Any proceeding before the Tribunal or the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code (45 of 1860) and the Tribunal or the Appellate Tribunal shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

Section 23 (3) of the Act provides that any proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 and for the purposes of Section 196, I.P.C. and the Tribunal or the Appellate Tribunal shall be deemed to be a Civil Court for all purposes of Section 195 and Chapter XXVI of Cr. P. C. In **Devi Trading Corpn. v. Oriental Bank of Commerce**[94], it was submitted that there is specific provision under Section 19, sub-section (25) which clearly states that the Tribunal may make such order and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. The Tribunal therefore can direct the garnishee not to pay any amount to the defendant/ respondent until further orders.

In **The Singareni Collieries Co. Ltd. v. State Bank of Hyderabad**[95], it was held that the Debt Recovery Tribunal is constituted under the RDB Act in substitution of Civil Court, but without trappings of the Civil Court. Hence, it can pass any kind of order, final or interim order, to fulfil the objective of the Act without procedure ramifications, but at the same time being guided by the principles of natural justice. The Tribunal has power to pass garnishee order directing the garnishee to deposit certain amount with the applicant bank, pending proceedings of recovery of debts under the Act, though not specifically provided in S.19 (12).

6.3.3. TRIBUNAL AND APPELLATE TRIBUNAL GUIDED BY PRINCIPLES OF NATURAL JUSTICE

As laid down by section 22 Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice. The object underlying the rules of natural justice is to prevent

[94] [1999]95CompCas490(MP), 1996(0)MPLJ155

[95] 1966 SCR (2) 190

miscarriage of justice and secure fair play in action, it should be fair and reasonable, free from arbitrariness and discrimination. What is "natural justice"? The phrase is not capable of a static and precise definition. It cannot be imprisoned in the straightjacket of a cast-iron formula. As far as working of DRT and DRAT is concerned it implies that both of the parties shall be heard before passing any judgment which should include giving of notice to the defendant. Any proceedings taken without notice would violate natural justice.

In **S. Ravichandra v. Debts Recovery Tribunal**[96], it was submitted that when a Tribunal is required to follow its own procedure, being guided by the Principles of Natural Justice, then it doesn't have to follow lengthy procedure as envisaged by the CPC, as the purpose for setting up these Tribunals is expeditious adjudication of claims of banks and financial institutions.

Therefore this envisages, subject to any special provisions that may be contained in the Act, Rules, or Regulations, the following procedure:

(a) the applicant shall be permitted to file its application with the supporting documents;

(b) the copies of the application and documents shall be furnished to the defendant and the defendant shall be given an opportunity to file his statement of objections with supporting documents;

(c) the applicant may be permitted to file a copy, if the Tribunal feels that on facts, a reply is warranted;

(d) the Tribunal, shall frame issues or formulate the points in dispute for decision;

[96] ILR1998KAR1951, 1998(5)KarLJ162

(e) applicant shall be permitted to produce evidence (either oral or in the form of an affidavit) with an opportunity to the defendant to cross-examine the witnesses/deponents;

(f) the defendant shall be given an opportunity to produce his evidence (either oral or in form

of an affidavit) with an opportunity to the applicant to cross-examine the defendant's witnesses/deponents;

(g) opportunity to each party, if they so request, to call for documents from the other party by resorting to discovery/inspection;;

(h) an opportunity to both the parties to address or submit arguments (either oral or in written); and

(i) the Tribunal shall consider the pleadings, evidence and arguments and give its decision by assigning reasons.

6.3.4. SUMMONING OF WITNESSES FOR CROSS-EXAMINATION

Section 22 (2) (c) gives independent powers to the Tribunal to receive evidence on affidavit and such power is therefore not by way of exception to the general rule of taking evidence in open Court. In **Kishorilal Loomba v. DRT, Jabalpur,**[97] it was submitted that the Tribunal cannot be made to follow the time-consuming procedure available under the Code of Civil Procedure, 1908, which the legislature intended to avoid by enacting the Recovery of Debts due to Banks and Financial Institutions, 1993. Therefore, the normal procedure is to receive evidence by affidavits and it is only for reasons to be recorded that the Tribunal may summon the deponent for cross-examination.

[97] 2001 (2) MPHT 139

6.3.5. SUMMONING AND ENFORCING THE ATTENDANCE OF ANY PERSON AND EXAMINING HIM ON OATH

Section 22 of the Act provides that the Tribunal and the Appellate Tribunal shall, have the same powers as are vested in Civil Court under Code of Civil Procedure while trying a suit in respect of summoning and enforcing the attendance of any person and examining him on oath. Order 16 of CPC lays the similar provision for summoning and attendance of witnesses. When the Court sees the reason to believe that such evidence or production of material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be names therein; and a copy of such proclamation shall be fixed on the outer door or other conspicuous part of the house in which he ordinarily resides. In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under Rule 12 of Order 16 of CPC.

6.3.6. REQUIRING THE DISCOVERY AND PRODUCTION OF DOCUMENTS

Section 22 of the RDB Act provides that the Tribunal and the Appellate Tribunal shall have the same powers as are vested in Civil Court under the Code of Civil Procedure while trying a suit in respect of requiring the discovery and production of documents. Order 11 of the CPC contains the similar provision for discovery and production of documents. Any party may,

without filling any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if it is satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion be thought fit. Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs. Then Rule 14 of Order 11 states that it shall be lawful for the Court, at any time during pendency of any suit, to order the production by any party thereto, upon oath os such documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just. Then there is inspection of the documents which can be done by other party by giving notice to the party which has relied on that document. Then there is provision according to which whenever a party has given notice to the other party for the inspection of the document then the other party has to reply within a period of ten days by way of notice stating a time within three days from the delivery thereof at which documents or such of them as he doesn't objects to produce may be inspected.

6.3.7. RECEIVING EVIDENCE ON AFFIDAVITS

Section 22 of the Act provides that the Tribunal and the Appellate Tribunal shall have the same powers as are vested in Civil Court under the Code of Civil Procedure while trying a suit in respect of receiving evidence on affidavits. Order 19 of the Code of Civil Procedure lays down the provisions about receiving evidence on affidavits. Any Court may at any time

for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable. Where it appears to the Court that either party bona fide desires the production of a witness for cross-examination, or that such witness can be produced, an order shall not be made authorizing the evidence to such witness to be given by affidavit. Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent. Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

6.3.8. ISSUING COMMISSION FOR THE EXAMINATION OF WITNESSES OR DOCUMENTS

Section 22 of the RDB Act provides that the Tribunal and the Appellate Tribunal shall have the same powers as are vested in Civil Court under the Code of Civil Procedure while trying a suit in respect of issuing commission for the examination of witnesses or documents. Order 26 of the Code of Civil Procedure lays down the provisions about issuing commission for the examination of witnesses or documents. It says that any Court in any suit issue commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this code from attending the Court or who is from sickness or infirmity unable to attend it. But a commission for examination on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do. The Court may, for the purpose of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person, without calling the medical practitioner as a witness.

Rule 2 of the said Order states that an Order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined. Where under Rule 19 of Order XVI, a person cannot be ordered to attend a Court in person; a commission shall be issued for his examination if his evidence is considered necessary in the interests of justice. A commission for the examination of such person on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

Rule 4 of Order 26 states that such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint. The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

6.3.9. REVIEWING ITS DECISION

Section 22 of the RDB Act provides that the Tribunal and the Appellate Tribunal shall have the same powers as are vested in Civil Court under the Code of Civil Procedure while trying a suit in respect of reviewing its decision. Section 114 and Order 47 Rule 1 contain provision for review. Any person considering himself aggrieved by any decree or order from which an appeal is allowed, but from which no appeal has been preferred Or by a decree or order from which no appeal is allowed, or by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error

apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for review of judgment to the Court which passed the decree or made the order.

6.3.10. DISMISSING APPLICATION FOR DEFAULT OR DECIDING IT *EX PARTE*

Section 22 of the RDB Act provides that the Tribunal and the Appellate Tribunal shall have the same powers as are vested in the Civil Court under the Code of Civil Procedure while trying a suit in respect of dismissing application for default or deciding it ex parte. Order 9 of the CPC contains provision in this regard. Where neither party appears when the case is called for hearing, the Court makes an order that the case may be dismissed in default.

According to Rule 5 of Order 9, where, after summons have been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of seven days from the date of the return made to the Court by the Officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of the fresh summons, the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that:

(a) he has failed after using his best endeavours to discover the residence of the defendant, who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit. In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Rule 8 of Order 9 states that where the defendant appears and the plaintiff doesn't appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

6.3.11. SETTING ASIDE ANY ORDER OF DISMISSAL OR ANY ORDER PASSED BY IT *EX-PARTE*

Order 9 of the Code of Civil Procedure lays down the provisions about setting aside any order of dismissal of any application for default of any order passed by it ex parte. Where a suit is dismissed in default, the plaintiff may bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit. Where the suit is wholly or partly dismissed under Rule 8 of Order 9, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs order shall be made under this rule unless notice of the application has been served on the opposite party. However, Rule 13 of Order 13 states that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had insufficient time to appear and answer the plaintiff's claim.

In **Shiv Murat Sharma v. Allahabad Bank,** it was held that where there was no valid service of summons upon the defendant and the Tribunal acted against the principles of natural justice by directing the publication of summons in two local newspapers without even ascertaining whether the defendant at the relevant time was really residing in the city, the postal endorsement showed that the defendant/respondent was out of the town at the relevant point of time and there was no allegation that the defendant/respondent was avoiding the service, the application was allowed and the ex-parte decree was set aside.

In **Pioneer Associates v. Canara Bank**[98], it was held that where the loan was not denied by the respondent applicant, only objection was that the Bank had re-computed the interest from time to time resulting in heavy losses, in the interest of justice to give one more opportunity to the parties to have their case decided on merits, the restoration application was allowed on condition of deposit of one-fifth of the total suit claim.

6.4. MODES OF RECOVERY OF DEBTS

Section 25[99] of the Act lays down the modes of recovery of debts. **Section 26**[100] of the Act lays down the validity of certificate and amendment thereof. It was held in **R. Adavaiah v. Union of India,** that the Presiding Officer, under Section 26 of the Act has the powers to

[98] 2009(1)BomCR154

[99] the Recovery Officer shall, on receipt of the copy of the certificate under sub-section (7) of section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely:--
(a) attachment and sale of the movable or immovable property of the defendant;
(b) arrest of the defendant and his detention in prison;
(c) appointing a receiver for the management of the movable or immovable properties of the defendant.

[100] (1) It shall not be open to the defendant to dispute before the Recovery Officer the Correctness of the amount specified in the certificate, and no objection to the certificate on any other ground shall also be entertained by the Recovery Officer. (2) Notwithstanding the issue of a certificate to a Recovery Officer, the Presiding Officer shall have power to withdraw the certificate or correct any clerical or arithmetical mistake in the certificate by sending intimation to the Recovery Officer. (3) The Presiding Officer shall intimate to the Recovery Officer any order withdrawing or cancelling a certificate or any correction made by him under sub-section (2).

withdraw the certificate issued by him. But the powers are limited. They don't enlarge the scope of review as a fresh suit or appeal is being decided. If the order passed, by the Presiding Officer is set-aside in the appeal, withdrawal is contemplated. Further, in the case of settlement or adjustment inter se the parties after the decree is passed, certificate can be withdrawn.

Section 27[101] of the Act lays down the stay of proceedings under the certificate and amendment or withdrawal thereof. **Section 28** [102]of the Act provides for the other modes of

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[101] (1) Notwithstanding that a certificate has been issued to the Recovery Officer for the recovery of any amount, the Presiding Officer may grant time for the payment of the amount, and thereupon the Recovery Officer shall stay the proceedings until the expiry of the time so granted. (2) Where a certificate for the recovery of amount has been issued, the Presiding Officer shall keep the Recovery Officer informed of any amount paid or time granted for payment, subsequent to the issue of such certificate to the Recovery Officer. (3) Where the order giving rise to a demand of amount for recovery of debt has been modified in appeal and, as a consequence thereof the demand is reduced, the Presiding Officer shall stay the recovery of such part of the amount of the certificate as pertains to the said reduction for the period for which the appeal remains pending. (4) Where a certificate for the recovery of debt has been received by the Recovery Officer and subsequently the amount of the outstanding demands is reduced or enhanced as a result of an appeal, the Presiding Officer shall, when the order which was the subject-matter of such appeal has become final and conclusive, amend the certificate or withdraw it, as the case may be.

[102] (1) Where a certificate has been issued to the Recovery Officer under sub-section (7) of section 19, the Recovery Officer may, without prejudice to the modes of recovery specified in section 25, recover the amount of debt by any one or more of the modes provided under this section.

(2) If any amount is due from any person to the defendant, the Recovery Officer may require such person to deduct from the said amount, the amount of debt due from the defendant under this Act and such person shall comply with any such requisition and shall pay the sum so deducted to the credit of the Recovery Officer. Provided that nothing in this sub-section shall apply to any part of the amount exempt from attachment in execution of a decree of a civil court under section 60 of the Code of Civil Procedure, 1908 (5 of 1908).

(3) (i) The Recovery Officer may, at any time or from time to time, by notice in writing, require any person from whom money is due or may become due to the defendant or to any person who holds or may subsequently hold money for or on account of the defendant, to pay to the Recovery Officer either forthwith upon the money becoming due or being held or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount of debt due from the defendant or the whole of the money when it is equal to or less than that amount.

(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money for or on account of the defendant jointly with any other person and for the purposes of this subsection, the shares of the joint holders in such amount shall be presumed, until the contrary is proved, to be equal.

(iii) A copy of the notice shall be forwarded to the defendant at his last address known to the Recovery Officer and in the case of a joint account to all the joint holders at their last addresses known to the Recovery Officer.

(iv) Save as otherwise provided in this sub-section, every person to whom a notice is issued under the sub-section shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, bank, financial institution, or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced
for the purpose of any entry, endorsement or the like to be made before the payment is made notwithstanding any rule, practice or requirement to the contrary.

(v) Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.

recovery of debts. **Section 29**[103] **of the Act lays** application of certain provisions of Income-tax Act. **Lastly Section 30**[104] **of the Act** provides for appeal against the order of Recovery Officer.

6.4.1. RECOVERY APPLICATION

Section 25 of the Act lays down how the debt as adjudicated by the Tribunal or the Appellate Tribunal should be recovered. Upon the order passed by the Tribunal or the Appellate Tribunal, as the case may be, the Recovery Officer will effect attachment and sale of securities and or otherwise take custody of the defendant for detention in prison, or as either

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(vi) Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or the part thereof is not due to the defendant or that he does not hold any money for or on account of the defendant, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the Recovery Officer to the extent of his own liability to the defendant on the date of the notice, or to the extent of the defendant's liability for any sum due under this Act, whichever is less.
(vii) The Recovery Officer may, at any time or from time to time, amend or revoke any notice under this sub-section or extend the time for making any payment in pursuance of such notice.
(viii) The Recovery Officer shall grant a receipt for any amount paid in compliance with a notice issued under this sub-section, and the person so paying shall be fully discharged from his liability to the defendant to the extent of the amount so paid.
(ix) Any person discharging any liability to the defendant after the receipt of a notice under this sub-section shall be personally liable to the Recovery Officer to the extent of his own liability to the defendant so discharged or to the extent of the defendant's liability for any debt due under this Act, whichever is less.
(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the Recovery Officer, he shall be deemed to be a defendant in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realization of the amount as if it were a debt due from him, in the manner provided in sections 25, 26 and 27 and the notice shall have the same effect as an attachment of a debt by the Recovery Officer in exercise of his powers under section 25.
(4) The Recovery Officer may apply to the court in whose custody there is money belonging to the defendant for payment to him of the entire amount of such money, or if it is more than the amount of debt due an amount sufficient to discharge the amount of debt so due.
(4A) The Recovery Officer may, by order, at any stage of the execution of the certificate of recovery, require any person, and in case of a company, any of its officers against whom or which the certificate of recovery is issued, to declare on affidavit the particulars of his or its assets.
(5) The Recovery Officer may recover any amount of debt due from the defendant by distraint and sale of his movable property in the manner laid down in the Third Schedule to the Income-Tax Act, 1961 (43 of 1961).

[103] The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax. Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act.

[104] (1) notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.
(2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive).

an alternative or further course, appoint a receiver for management of securities in possession.

It was held in **Ms. Kirti Overseas v. Debt Recovery Appellate Tribunal, Allahabad**[105] that while section 25 provides for modes of recovery of debts either by attachment and sale or arrest or appointment of a Receiver, Section 28 provides for modes of recovery in addition to the ones specified in Section 25. A perusal of the aforesaid provisions cannot lead one to the conclusion that the same are arbitrary, unreasonable or without any guidelines. It is quite clear that in order to recover the debts, the Recovery Officer has to attach and sell the immovable property and that for protection and preservation of the same, he has the power to appoint a Receiver for the management thereof.

6.4.2. PRESIDING OFFICER NOT EXECUTING COURT

After the issue of the certificate, the Presiding Officer becomes *functus officio* to probe into the legality or validity of the decree. The Presiding Officer has the role and the powers to issue the necessary certificate which is forwarded to the Recovery Officer for execution. The Recovery Officer in that case becomes the Executing Court and not the Presiding Officer. Under Section 26 of the Act the correctness of the amount mentioned in the Certificate cannot be challenged before the Recovery Officer.

6.4.3. MODE OF ATTACHMENT OF IMMOVABLE PROPERTY

Where the property is immovable property, the attachment shall be made by an order prohibiting the defendant from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. The order shall also require the

[105] 2002(1)AWC176

defendant to appear before the Recovery Officer to take notice of the date for setting the terms of the proclamation of sale. The order shall be proclaimed at same place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Tribunal and also where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situated, and where the property is land situated in the village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.

6.4.4. ATTACHMENT OF MOVABLE PROPERTY OTHER THAN AGRICULTURAL PRODUCE

Where the property to be attached is movable property, other than agricultural produce in the possession of the defendant, the attachment shall be made by actual seizure and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates and shall be responsible for the due custody thereof, provided , however , that where the property seized is subject to speedy and natural decay or when the expenses of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

6.4.5. ATTACHMENT OF SHARES IN MOVABLES

Where the property to be attached consists of the share or interest of the defendant in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the defendant prohibiting him from transferring the share or interest or charging it in any way.

6.4.6. ATTACHMENT OF PARTNERSHIP PROPERTY

Property belonging to a partnership shall not be attached or sold in recovery proceedings other than a decree passed against the firm or against the partners in firm as such, and the Recovery Officer may make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree and may by the same or subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and enquiries and make an order for sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the applicant by such partner, or as the circumstances of the case may require. The other partner or partners shall be at liberty at any time to redeem the interest charged or, in case of sale being directed, to purchase the same.

6.4.7. Attachment of property in custody of Court or Public Officer

Where the property to be attached is in custody of any Court or Public Officer, the attachment shall be made by notice to such Court or Officer requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Tribunal or the Recovery Officer from whom such notice has been issued. However, where such property is in custody of a Court , any question of title or priority arising between the applicant and any other person, not being the defendant claiming to be interested in such property by virtue of any assignment , attachment or otherwise, shall be determined by such Court.

6.4.8. Attachment of the mortgaged property, objections to be settled

In Sharat Chander Khandelwal v. Central Bank of India[106] it was held that the Recovery Officer is to investigate claims of objectors and decide the same in accordance with the provisions contained in para 11 of the second schedule, Income -Tax Act, which are applicable to proceedings before the Recovery Officer under the 1993 Act. If on the date of attachment certificate the debtor was not in possession of it or the objectors were in possession of it in their own right and not on the behalf of the certificate debtor, the attachments were to be raised. The matter was remitted to the Recovery Officer for further enquiry or fresh disposal after identifying the mortgaged property.

6.4.9. PROPERTY TO BE CORRECTLY AND CLEARLY DESCRIBED AND IDENTIFIED:

The applicant had to correctly and clearly identify and describe the property sought to be attached in execution of the decree. **In Industrial Credit and Investment Corporation of India Ltd. v. Paras Ompuri Synthetics Ltd.**[107] it was held that the applicant were not in a position to identify the property as the description of the machinery set out in the schedule of notice of motion didn't tally with the description of the machinery set out in the relevant item of inventory prepared by the Court Receiver.

6.4.10. SALE OF PROPERTY

The officer conducting the recovery proceedings may by order that any property attached by him and liable to sale, or such portion thereof as may seem necessary to satisfy the amount due, shall be sold and the proceeds of such sale , or a sufficient portion thereof , shall be paid to the party entitled under the certificate of recovery to receive the same. In every case where the property has been attached and is sought to be sold, then, in order to find out as to which portion of the property would be sufficient to satisfy the amount of debt due, it is necessary to

[106] III(2004)BC215
[107] 1999(4)BomCR7

hear the debtor as also the creditor and then draw the proclamation of sale. On every sale of immovable property the purchaser shall pay immediately after such declaration twenty-five percent, on the amount of his purchase money to the Recovery Officer and in the event of any default of such deposit, the property shall forthwith be resold.

6.4.11. RECOVERY CERTIFICATE IS FORM OF DECREE

In Subhash Kumar Anand v. Punjab and Sind Bank, it was held that a recovery certificate is nothing but a form of a decree. When the Civil Court passed decree and specified the amount to be recovered, it was not necessary to have a recovery certificate to be issued again by the DRT. Where the execution proceedings were pending at the stage of auction and then transferred to DRT, it could be continued from that stage onwards. It was not necessary to seek issuance of a recovery certificate which is nothing but also a decree of the Civil Court.

6.4.12. RECOVERY FROM RECEIVER

If a Receiver is appointed in respect of the judgement-debtor, recovery can be affected against the Receiver for the period he remains a Receiver. If a Receiver is discharged before initiation of recovery proceedings, recovery can only be made from the debtor himself.

6.4.13. APPEAL AGAINST THE ORDER OF RECOVERY OFFICER

Prior to the amendment of 2000, any order passed by the Recovery Officer was deemed to be an order passed by the Tribunal which would have been appealable to the Appellate Tribunal but after amendment of the Section, the Order passed by the Recovery Officer is made appealable to the Tribunal, and a second appeal lies before the Appellate Tribunal. The amended section thus confers on the borrower the benefit of two appeals against the Order of the Recovery Officer.

In **Bihar State Financial Corpn. v. Recovery Officer, DRT[108],** it was held that where there is a statutory remedy of appeal provided under an Act , the High Court should be very slow in entertaining a writ petition. A challenge by such writ against the order of attachment of property passed by DRT was rejected. The writ petitioner should avail of the statutory remedy of appeal against order. The Court was not inclined to entertain the writ. There was an alternative efficacious remedy.

[108] II(2007)BC400, [2007(1)JCR10(Jhr)]

Chapter 7: THE SECURITISATION ACT, 2002- ADDING NEW DIMENSION TO THE DEBTS RECOVERY LAWS

In furtherance of financial reforms and extending the object of RDDBI Act, 1993, the Government has enacted "The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002". The SARFAESI Act, 2002 is to curtail the delay in the process of adjudication between the Banks and its borrowers. The question of recovery by the Banks and Financial Institutions will arise when the borrowers commit default in repaying the debt. When there is default, then, the Banks will categorize the account as "Non-performing Asset" in accordance with the norms prescribed by the Reserve Bank of India.

7.1. THE DIFFERENCES

The main differences between RDDBI Act, 1993 and SARFAESI Act, 2002 are as follows:

i. The RDDBI Act, 1993 enables the Bank to approach the Tribunals when the debt exceeds the prescribed limit.

ii. Under RDDBI Act, 1993, the Debt Recovery Tribunal will adjudicate the amount due and passes the final award.

iii. The SAFAESI Act, 2002 provides a procedure wherein the Bank or Public Financial Institution itself will adjudicate the debt. Only after adjudication by the Bank, the borrower is given right to prefer an appeal to the Tribunal under SARFAESI Act, 2002.

iv. The Banks or Financial Institutions can invoke the provisions of SAFAESI Act, 2002 only in respect of secured assets and not all.

7.2. PROCEDURE FOR ADJUDICATION

Under the SARFAESI Act, 2002, the Banks are given powers under section 13 to carry out the adjudication exercise. The procedure is as follows:

a. The Bank or Financial Institution gives a notice under section 13 (2) to the defaulting borrower whose account was categorized as "NPA".

b. The borrower who receives the notice under section 13 (2), can send his objections to the Bank's claim within the time limit.

c. The Bank shall consider the objections and however, it need not pass any order after considering the objections. This enables the Bank to correct itself if it is wrong in the process of adjudication. When the Bank feels that the objections are not tenable, then, the Bank can take possession of the secured asset by issuing a notice under section 13 (4). When it comes to taking possession of the property, there are two things like taking symbolic possession and taking actual possession.

d. Steps under section 13 (4), gives the borrower a right to file an appeal to the Debt Recovery Tribunal under section 17 and further appeal to the Debt Recovery Appeal Tribunal under section 18.

e. Not only the borrower, any person who is aggrieved by the action taken by the Bank under section 13 of the Act, can approach the Tribunal in accordance with the procedure.

f. Initially, the SARFAESI Act, 2002 mandates to deposit certain amount before filing an appeal. The SARFAESI Act, 2002 and its validity was under challenge before the Supreme Court and the Hon'ble Supreme Court has upheld the validity of the Act,

however, reduced the amount of deposit to be made before filing an Appeal under section 17.

g. The Bank will sell the secured asset if it is not prevented by any order by the Debt Recovery Tribunal or any competent court.

7.3. SCHEME OF THE ACT

The Securitisation Act contains 41 sections in 6 Chapters and a Schedule. Chapter 1 contains 2 sections dealing with the applicability of the Securitisation Act and definitions of various terms. Chapter 2 contains 10 sections providing for regulation of securitisation and reconstruction of financial assets of banks and financial institutions, setting up of securitisation and reconstruction companies and matters related thereto. Chapter 3 contains 9 sections providing for the enforcement of security interest and allied and incidental matters. Chapter 4 contains 7 sections providing for the establishment of a Central Registry, registration of securitisation, reconstruction and security interest transactions and matters related thereto. Chapter 5 contains 4 sections providing for offences, penalties, and punishments. Chapter 6 contains 10 sections providing for routine legal issues.

7.4. INCORPORATION & REGISTRATION OF SPECIAL PURPOSE COMPANIES

The Securitisation Act proposes to securitise and reconstruct the financial assets through two special purpose vehicles viz. 'Securitisation Company ('SCO')' and 'Reconstruction Company (RCO)'. SCO and RCO ought to be a company incorporated under the Companies Act, 1956 having securitisation and asset reconstruction respectively as main object.

The Securitisation Act requires compulsory registration of SCO and RCO under the Securitisation Act before commencing its business. Further a minimum financial stability requirement is also provided by requiring SCO and RCO to possess owned fund of Rs.2 crore or up to 15% of the total financial assets acquired or to be acquired. The RBI has the power to specify the rate of owned fund from time to time. Different rates can be prescribed for different classes of SCO and RCO.

7.5. ENFORCEMENT OF SECURITY INTEREST

Under the Act security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provision of this Act.[109] Section 13 (2)[110] deals with this.

Under section 69 of Transfer of Property Act, mortgagee can take possession of mortgaged property and sale the same without intervention of Court only in case of English mortgage4. In addition mortgagee can take possession of mortgaged property where there is a specific provision in mortgage deed and the mortgaged property is situated in towns of Kolkata, Chennai, or Mumbai. In other cases possession can be taken only with the intervention of

[109] Notwithstanding anything contained in section 69 or section 69(A) of the Transfer of Property Act, 1882

[110] Where any borrower, who is under a liability to a secured creditor under a security under a security agreement, makes any default in repayment of secured debt or any installment thereof , and his account in respect of such debt is classified by the secured creditor as non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor with in sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section(4)[110]. In case the borrower fails to discharge his liability in full within the period specified in sub-section(2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for releasing the secured asset. (b).take over the management of the assets of the borrower including the right to transfer by way of lease, assignment or sale for releasing the secured asset. (c). appoint any person to manager the secured assets the possession of which has been taken over by the secured creditor. (d). require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money any money is due or may become due to the borrower, to pay the secured creditor o much of the money as is sufficient to pay the secured debt.

court. Therefore till now Banks/Financial Institutions had to enforce their security through court. This was a very slow and time-consuming process.[111]

The Act deals with three aspects.

1. Enforcement of Security Interest by secured creditor (Banks/Financial Institutions)
2. Transfer of non- performing assets to Asset Reconstruction Company, which will then dispose of those assets and realise the proceeds.
3. To provide a legal framework for securitisation of assets.

7.6. ANALYSIS OF THE ACT IN THE LIGHT OF JUDICIAL PRONOUNCEMENTS

7.6.1. ARGUMENTS RAISED AGAINST THE ACT

i. The Act was not necessary as the Recovery of Debts Due to Banks and Financial Institutions Act 1993 already deals with the law concerning recovery of Debts due to banks.

ii. The Act did not provide "adequate and efficacious" mechanism of addressing the "objections" that the borrower has against the demand notice issued by the lender.

iii. The requirement that an appeal can be filed only after 75% of the claim raised in the notice is deposited is ultra vires of the Constitution. Also it was argued that certain provisions of the Act, such as the classification of a particular asset as an NPA depended on the "whim and fancies" of the financial institutions and hence against the principles of Natural Justice.

[111] There was also no provision in any of the present law in respect of hypothecation, though hypothecation is one of the major security interest taken by the Bank/Financial Institution. Keeping in mind the above factors among many other the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act was enacted with effect from 21.6. 2002.

iv. The enforcement of security interest is an issue governed according to the terms of the contract between two private parties and a public legislation cannot bestow certain powers in a one sided manner to all the Borrowers.

v. The provision for sale of the properties, without intervention of the court under section 13 of the Act is akin to the English mortgage and its effect on the scope of the bar of the jurisdiction of the civil court.

vi. Whether the provision under section 13 and 17(2) of the Act are unconstitutional on the basis of the parameters laid down in different decisions of the Supreme Court.

vii. Whether the principle of lender's liability has been absolutely ignored while enacting the Act and its effect.

viii. More than 50% of the projected NPA's are concentrated in the priority sector. They further showed that majority of the dues are against borrowers who have dues ranging from 25000 and Rs. 10lacs. Therefore a special legislation aimed primarily to recover dues from the industrial and corporate bodies does not address the NPA problem.

The Apex court while rejecting all these contentions in **Mardia Chemical v. Union of India** [112]acknowledged that NPAs due from industrial units is a serious issue. While the court accepted that the recovery of Debts due to Banks and Financial Institutions Act deals essentially with the same subject matter the court stated that it is widely accepted fact that the legislation has not been very successful in dealing with the problem of NPAs. The court observed

[112] AIR 2004 SC 2371

"It is to be noted that things in the concerned spheres are desired to move faster. In the present day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view it cannot be said that a step taken towards securitization of the debts and to evolve means for faster recovery of the NPA was not called for or that it was superimposition of undesired law since one legislation was already operating in the field namely the Recovery of Debts due to Bank and Financial Institutions Act."

The court further held that:

"NPAs problem is an important issue regarding the growth of the economy in general and the financial sector in particular, the fact that NPAs. Have reached to an alarming proportion was noted be several committees and institutions and dealing with financial sector."

Against this backdrop of rich literature the court rejected the contention that there was no rationale for the enactment of a special legislation to address the concerns of the growing NPAs in banks[113]. However the court also cautioned:

"But certainly what must be kept in mind is that law should not be in derogation of the rights which are guaranteed to the people under the constitution. The procedure should also be fair, reasonable and valid though it may vary looking to the different situations needed to be tackled and object sought to be achieved"

[113] The court also pointed out whether to draft a particular legislation or not is a matter of legislative policy and such a policy decision cannot be faulted with nor it is a matter of to be gone into by the courts to test the legitimacy of such a measure relating to financing policy.

7.7. ISSUES CONSIDERED BY THE APEX COURT IN DEALING WITH SARFAESI ACT

7.7.1. CONSTITUTIONALITY OF SECTION 13

In **Mardia chemicals v. Union of India**[114] court proceeded to consider the '*pivotal of the whole controversy*' namely section 13 of the Act. The petitioner contended that the sale of a secured asset for enforcement of secured interest is an exception to the common law principle. It was strongly argued by the petitioner that section 13 empowers the borrower with unchecked arbitrary power since "before any action is taken under section 13, there is no forum or adjudication mechanism to resolve any dispute which may arise in respect of the alleged dues or the NPA "

At the very outset the court observed that there is a need for modern enforcement laws and speedy enforcement laws and there has been shift in paradigm on the issue of enforcement laws which have increasingly becoming lender friendly. The court held:

> "In such a situation, there is a need for change in approach towards enforcement of the security interest law and the act cannot be held to be *ultra vires* merely because it allows the secured creditors to enforce their rights without the intervention of a judicial authority".

In the same breath however the Court pointed out that any law which does not give the other party to represent his case would be struck down of Art.14 of the Constitution. Particularly there must be some internal mechanism which provides safeguards for a borrower, before a secured asset is classified as NPA. The Supreme Court observed that such an internal mechanism must be included in the Act by mandating that the creditor must apply its mind to

[114] AIR 2004 SC 2371

the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objection raised in the reply to the notice.

In accordance with the observation of the Supreme Court section 13 (3A) of the Act was inserted by the 2004 Ordinance.

7.7.2. JURISDICTION OF CIVIL COURTS

The court noted that civil Courts can be approached in a limited number of cases. The court illustrated that one of such event where the civil Court will have jurisdiction could be invoked is where "the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages."

Another illustration of such an action could be cases where a notice has been served upon the guarantor and character of the guarantor itself is denied by the party on whom the notice is served.

7.7.3. DEPOSIT OF MONEY BEFORE "APPEAL"

As anticipated the provisions of section 17(2) came under attack before the constitutional courts. At the very outset the Court pointed out that the word 'appeal' has been inappropriate used in the statue. The secured creditor argued that the section was not an unreasonable condition because-

- The Act provides that the Tribunal can reduce or waive the amount based on the facts and circumstances of the case. Hence, the tribunal can use its discretion to reduce the deposit required in cases where the demand is unreasonable.
- The deposit is necessary requirement because the value of the secured asset which would be taken possession by the creditor may not be enough to cover the amount of loans advanced.

The Court rejected both the arguments and held that they are devoid of any merit. The Court held that the requirement of pre-depositing 75% of the money renders the remedy 'illusory'.

The court summarized the reasons for holding so under-

a. It is imposed while approaching the adjudicating authority of first instance, not in appeal,
b. There is no determination of the amount due as yet,
c. The secured assets or its, management with transferable interest is already taken over and under control of the secured creditor.
d. No special reason for double security in respect of an amount yet to be determined and settled
e. 75% of the amount claimed by no means would be a meager amount
f. It will leave the borrower in a position where it would not be possible for him to raise any fund to make deposit of 75% of the undetermined demand.

For the above reasons the Court held section 17(2) of the Act is "unreasonable, arbitrary and violative of Article 14 of the Constitution."

7.7.4. PUBLIC INTEREST V. PRIVATE INTEREST

One of the objections raised was that the enforcement of private contracts is an issue that ought to be governed by the contracts entered between the parties concerned and it is unfair and unreasonable on the part of the legislature to enact which puts "one party at an advantageous position over the other"

Rejecting the contention the Court pointed out that the NPA issue is a major bottleneck in the development of the economy hence it cannot be argued that the NPA problem is a private matter between the defaulters and the banks. The Court pointed out that it is an established principle of law that 'whatever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purpose, individual rights may have to give way.[115]

7.8. SIMULTANEOUS PROCEEDING

The position as to simultaneous proceedings before the DRTs under the RDB Act and under the securitization Act has apparently changed after the amending Act. Accordingly, three new provisos inserted below sec.19 (1) of the RDB Act as under:

> *"Provided that the Bank or financial institution may, with the permission of the Debt Recovery Tribunal, on an application made by it, withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004 for the purpose of taking action under the*

[115] The court relied on certain judgments on this issue namely **Dahya Lala v. Rasul Mohd. Abdul Rahim,** 1963 (3) SCR; **Swami Motor Transport Pvt. Ltd. V. Shri Sankraswamigal Mutt** and **Raval & Co. v. K.G. Ramachandran**, 1974 (1) SCC p424 etc.

securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002" if no such action had been taken earlier under the Act:

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

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

After enactment of the aforesaid mentioned provisions, it seemed that the intention of the parliament is to avoid simultaneous proceedings. Once again, it is necessary to note that the proceedings under the RDB Act are for recovery of the money due to the bank, while those under the SARFAESI are for enforcement of security interests.

In view of enactment of the above provisions, the general perception now seems to be that the lender will have to withdraw the application under the RDB Act to press in service the provisions of the SARFAESI Act.

7.9. FINAL COMMENT

In the light of the arguments advanced and authorities cited the present position cane be summarized as-

- Under sub-section (2) of section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceedings to take any of the measures as provided under sub-section (4) of section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditors, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be must be communicated to the borrower. The reasons so communicated shall be for the purpose of information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under section 17 of the Act, at that stage.
- Measures having been taken under sub-section (4) of section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal under section 17 of the Act before the Debt recovery Tribunal. • That the tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition at it may deem fit and proper to impose.
- The requirement of deposit of 75% of amount claimed before entertaining an appeal under section 17 because it is oppressive, onerous, and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it has been struck down.
- As discussed earlier it will be open to maintain a civil suit in a civil Court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to English mortgage enforceable without the intervention of the court.

CONCLUSION

The Delhi High Court had held that the Act is unconstitutional as it erodes the independence of judiciary and is irrational, discriminatory, unreasonable, arbitrary and hit by Articles 14 and 50 of the Constitution of India. The Delhi High Court had also held that since Section 17 of the Act did not have a provision for a counter claim as provided under the provisions of the Code of Civil Procedure and, therefore, the Act is irrational and arbitrary and violative of Article 14.

However, the Supreme Court in a recent judgment has held the Act to be constitutional as the Act is not discriminatory towards the defendants any more as the amended Act makes provision for counter claim, set-off etc. and also the that the independence of the judiciary has not been eroded is the decision of the Appellate Tribunal is not final, in the sense that the same can be subjected to judicial review by the High Court under Articles 226 and 227 of the Constitution.

It has been held by the Courts that the Tribunal is not a Court of law but only a Tribunal. The differences between a Civil Court and the Tribunal under the Act are pointed out as follows:

1. A matter before the Tribunal is not a suit as it is initiated by an application and riot a plaint.
2. The Tribunal does not pass a decree; it only issues a recovery certificate.
3. The procedure of the Tribunal is summary in nature and it is supposed to be in conformity with the principles of natural justice.

The High Court can exercise its power under Art. 227 of the Constitution of India provided the petitioners are not using the power of superintendence of the High Court in order to by-pass the provision of the Act, i.e., depositing 75% of the amount.

An interlocutory order passed under Section 19 (6) of the Act is an order passed under the Act and is subject to appeal under Section 20 (1) provided it affects some right or liability of any party.

All such suits are free from any procedural or other requirements such as the forms prescribed for the applications, the filing of the documents with the same, or even the filing of the reply and other documents by the respondents, if such reply and documents stood already filed before the Civil Court concerned.

In order to achieve the desired objective of the Act, i:e., expeditious recovery of the debt incurred by the Banks and Financial Institutions, it would be necessary for a DRT to entertain cross-suit, counter-claim or set-off whether in case of a suit transferred by the Civil Court or in case of a new application. Otherwise the whole exercise of setting up of DRT would prove to be futile as people would approach the Civil Courts and thereby prolonging the process of recovery of debts.

Section 19(19) of the amended Act of 2000, which in essence provides that where a certificate is issued against a company registered under the Companies Act, 1956, the Tribunal may order the proceeds of such company to be distributed among its secured creditors in accordance with the provisions of Section 529A of the Companies Act, and to pay the surplus, if any, to the company. This provision read with Section 34 of the Act, now

makes it clear that even when the company has been ordered to be wound up, the DRT has exclusive jurisdiction to try the matter.

The jurisdiction vested in the authorities named in special statutes viz., the Industrial Financial Corporation Act. 1948, the State Financial Corporation Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank of India Act, 1984 and the Sick Industrial Companies (Special Provisions) Act, 1985 can be invoked notwithstanding the jurisdiction vested in the Debt Recovery Tribunal under S. 19 of the Act.

BIBLIOGRAPHY

ARTICLES REFFERRED

- Can the debt recovery tribunal supersede the high courts order? Venkatavaradan, R. Company law Cases. Vol.102, No.01, 1st Oct, 2000. p.197-200.
- Santhanam, R., Jurisdiction of company court vis-vis debt recovery tribunal. Company Law Journal. Vol.04, No.01, Oct, 2000. p.1-5.
- Maitra, Neelanjan, Debt recovery tribunal - The Supreme Court removes ambiguities. Corporate Law Adviser. Vol.40, No.01-04, Jan-Feb, 2001. p.293-301.
- Kumar, Naresh, Liability of directors in proceedings before the debt recovery tribunal. Tax and Corporate Referencer. Vol.32, No.06, 25th July, 2004. p.150-158.
- Dhamankar, Vivek. and Jain, Sandeep, Concept of debt appearing in the recovery of debts due to banks and financial institutions act 1993. SEBI and Corporate Laws. Vol.55, No.03, 18th Oct, 2004. p.59-64.
- Singh, Kartikeya. Debt recovery tribunal - An overview. SEBI and Corporate Laws. Vol.71 No.02, 9th Oct, 2006. p.35-50.
- Venkatavaradan, R, Can the debt recovery tribunal supersede the high courts order. Company law Cases. Vol.102, No.01, 1st Oct, 2000. p.197-200.
- Pathak, Ashish, A new dimension to debts recovery laws : The securitisation ordinance. Supreme Court Cases. Vol.05, No.05&06, 7th Aug, 2002. p.17-25.
- Dhamankar, Vivek. and Jain, Sandeep Co-operative banks and debts recovery tribunal. SEBI and Corporate Laws. Vol.47, No.04, 27th Oct, 2003. p.167-170.
- Aich, Prosenjit and Parika Chaudhry, "Securitization: A way of the future", Indian Institute of Management, Calcutta.

- Balasubramanian, K., "Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- A Study", SEBI & Corporate Laws, June, 2003, p.198.
- Bharathan, Sri Krishna, "Securitization and Reconstruction of financial Assets and Enforcement of security Interest (Second) Ordinance, 2002- Material Issues", SEBI & Corporate Laws, Nov-Dec, 2002, p.190
- Editorial, "Only a Beginning", Economic & Political Weekly, December 7, 2002.
- George, Sarah, "Securitization: Mechanism and Risk Management", SEBI & Corporate Laws, July 1, 2002, p.162.
- Gopalkrishnan, Chairman, Reserve Bank of India, "Securitization in India: Next Steps", http://www.rbi.org.in/sec5/6168.pdf
- http://www.iciciresearchcentre.org/user/research/paper_9.asp?strPP=paper&theme=C corporate+Finance&themeID=9&level2ID=t9&level3ID=
- Iyer, Padmanabhan, "The Securitization and Reconstruction of Financial assets and Enforcement of Security Interest Act, 2002- An Overview of the Provisions", 23 July 2003, http://www.mondaq.com/article.asp?articleid=22031&shownav=0 . 25 January 2005.
- Kothari, Vinod, "Introduction on Securitization", www.vinodkothari.com/history.htm
- Kothari, Vinod, "Indian Securitization Market: A Scenario Analysis", www.vinodkothari..com/india_article_vinodkothari.htm
- Kumar, Yogesh, "Securitization – A Financial, Legal and Trading Perspective for Indian Markets", http://www.nse-india.com/content/press/mar2003b.pdf

- Nerurkar, A.V., "Securitization as a Source of Finance- Accounting Implications", SEBI & Corporate Laws, June, 2002, p.163.
- Sharma, Siddharth, "Securitisation Act: Controversy, Verdict and road Ahead", Economic & Political Weekly, September 4, 2004.
- Sridhar, V., "Securitization in India- Opportunities & Obstacles- A Discussion paper", www.vinodkothari.com/articles.htm
- Thakur, Jayant M, "Dictatorial Powers in the New Securitization Ordinance", SEBI & Corporate Laws, Nov-Dec, 2002, p.204.
- Umarji, M.R., Law & Practice relating to Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002, 3rd ed., Taxmann, N.Delhi, 2004.
- Venugopal, S., "Securitization Ordinance- An Overview", SEBI & Corporate Laws, December, 2002, p.190.
- Verma, Ashok Kumar, "Securitization: Future of Structured Financing for India Railways", www.irastimes.org/securitization2.pdf
- Reserve Bank of India. 1998. Report of the Working Group to Review the Functioning of Debts Recovery Tribunals. Mumbai: Legal Department.
- Reserve Bank of India. 1999. Some Aspects and Issues relating to NPAs in Commercial Banks. Reserve Bank of India Bulletin, July.

COMMITTEE REPORTS

- Committee on Financial System 1991; Tiwari Committee; Narsimhan Committee 1997;

- Expert Committee chaired by Mr.T.R.Andhyarujina. C.f: Umarji, M.R, Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002, 3rd Ed., Taxmann, New Delhi, pp.5-11.
- Narasimham Committee report on the financial system, 1991

BOOKS REFERRED

- Basic legal instruments on DRT and SRAFESI : Debt recovery tribunals securitsation and reconstruction of financial assets and enforcement of security interest, S V Joga Rao
- Law relating to debts recovery tribunals :Including securitisation and reconstruction financial assets and enforcement of security interst act, 2002, K Panduranga Rao
- DEBT recovery laws : Commentary on recovery debts due to banks & financial institutions
- amended in 2001, Srivastava
- Debt recovery laws Vol. II, Bhagabati Prosad Banerjee
- Debts and debtors, Charles malamoud
- Recovery of debts due to banks and financial institutions act, 1993, T Sunderajan
- The recovery of debts due to banks and financial institutions act, 1993, P S Narayana
- How to borrow from banks and financial institutions, T R Ramamurthy

WEBSITES REFFERRED

http://finmin.nic.in/

http://goidirectory.nic.in/

http://indiacode.nic.in/

http://judis.nic.in/supremecourt/chejudis.asp

http://drtcbe.tn.nic.in

www.rajyasabha.nic.in

www.zeenews.com

www.stromloader.com

www.expressindia.com

http://business.gov.in

http://www.rbi.org.in/home.aspx

http://fiuindia.gov.in/

http://www.cnbc.com/

http://www.drtsolutions.com/drtqueries.htm

http://drt1chennai.tn.nic.in/

http://www.bankdrt.org/

http://dipp.nic.in/