

DELHI HIGH COURT

Delhi High Court Bar Assn.

Vs.

Union of India, (Delhi)

CWP No. 3050 of 1994 and 3277 of 1994
(Wadhwa and Sharma, JJ.)

10.3.1995

JUDGMENT

Wadhwa, J.

1. The petitioners have challenged the constitutional validity of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'the Act') on the ground that the Act is unreasonable and is violative of Article 14 of the Constitution and that it is beyond the legislative competence of the Parliament to enact such a law. The petitioners have also challenged the appointment of the third respondent as the Debts Recovery Tribunal under Section 5 of the Act. The immediate cause for filing this petition under Article 226 of the Constitution was the notification dated 5th July, 1994 issued by the Central Government in the Ministry of Finance, Department of Economic Affairs, Banking Division, whereby, under Section 3 of the Act, Debts Recovery Tribunal, with the areas of jurisdiction as Delhi was established. It is alleged that the appointment of the third respondent is an exercise of fraud on the powers conferred on the Central Government under the Act.

2. This petition was filed on 22nd July, 1994 and when it came up for admission, notice was issued to the respondents to show cause as to why rule nisi not be issued, and at the same time the operation of the Act in its applicability to Union Territory of Delhi was stayed by passing the following order on 25th July, 1994:

"C.M. No. 5739/94: Notice for 4 August, 1994. Mr. Luthra submitted that the impugned Act, namely, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, is invalid. He says the Act is discriminatory in nature and that there is no provision for filing of counter-claims set off before the Tribunal constituted under the Act, and further that while the High Court tries

the suits of the value of Rs. 5 lakhs to Rs. 10 lakhs and the District Courts upto Rs. 5 lakhs, the Tribunal who is equivalent to the rank of the District Judge, will hear the suits of the value of over 10 lakhs and the Act nevertheless preserving the powers of the High Court under Articles 226 and 227 of the Constitution. It is further pointed out that the procedure prescribed under Section 19 of the Act defeats the vested rights of the defense which are available to the defendant in a regular civil suit and further that no reasonable nexus exists in classifying suits filed by the banks and financial institutions on the basis of pecuniary claims, conferring on one set of suits the right of defense available in common law and denying statutorily such rights in suits/proceedings which stand transferred to the Tribunal. We are *prima facie* of the view that the Act as enacted may, perhaps, be not valid. To us it appears that it will be appropriate to stay the operation of the Act at this stage as otherwise if we do not do that and the petitioners succeed ultimately, it will create a great deal of complications and ramifications will be much more, and in case the petitioners lose the things can be mended. Accordingly , we direct that there shall be stay of operation of this Act in its applicability to the Union Territory of Delhi. Dasti."

Thereafter, after answers to the show cause notices were filed. Rule D.B. was issued and liberty was given to the respondents to file further affidavits. A preliminary objection of the respondents was noted that the petitioners had no *locus standi* to file the petition.

3. On the question of reasonableness of the law as enacted, Mr. Lekhi, learned counsel for the petitioner, referred to the Statement of Objects and Reasons while presenting the Bill, which ultimately took the shape of the Act before the Parliament. Earlier, an Ordinance called "The Recovery of Debts Due to Banks and Financial Institutions Ordinance, 1993" was promulgated by the President of India on 24th June, 1993. The Act replaced that Ordinance. The Statement of Objects and Reasons may be reproduced:-

".... Banks and financial institutions at present experience considerable difficulties in recovering loans and enforcement of securities charged with them. The existing procedure for recovery of debts due to the banks and financial institutions has blocked a significant portion of that funds in unproductive assets, the value of which deteriorates with the passage of time. The Committee on the Financial Systems headed by Sri M. Narasimham has considered the setting up of the Special Tribunals with special powers for

adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms. An urgent need was, therefore, felt to work out a suitable mechanism through which the dues to the banks and financial institutions could be realized without delay. In 1981 a Committee under the Chairmanship of Shri T. Tiwari had examined the legal and other difficulties faced by banks and financial institutions and suggested remedial measures including changes in law. The Tiwari Committee had also suggested setting up of Special Tribunals for recovery of dues of the banks and financial institutions by following a summary procedure. The setting up of Special Tribunals will not only fulfill a long-felt need, but also will be an important step in the implementation of the Report of Narasimham Committee. Whereas on 30th September, 1990 more cases filed by the financial institutions were pending in various Courts, recovery of debts involved more than Rs. 5622 crores in dues of Public Sector Banks and about Rs. 39' crores of dues of the financial institutions. The locking up of such huge amount of public money in litigation prevents proper utilization and recycling of the funds for the development of the country.

2. The Bill seeks to provide for the establishment of Tribunals and Appellate Tribunals for expeditious adjudication and recovery of Debts due to banks and financial institutions. Notes on clauses explain in detail the provisions of the Bill."

4. Mr. Lekhi took us through both the Reports mentioned in Statement of Objects and Reasons being the Tiwari Committee Report and the Narasimham Committee Report. After going through the Tiwari Committee Report we agree with Mr. Lekhi that this committee was constituted to examine the legal and other difficulties faced by banks and financial institutions in rehabilitation of Sick Industrial Undertakings and to suggest remedial measures including changes in law and had nothing to do with recovery of debts due to the banks and financial institutions. The special Tribunals which the Tiwari Committee suggested were with regard to revival of the sick industrial undertakings, and the Bill which the Committee suggested was called "The Sick Industrial Undertakings (Revival) Bill, 1981". Therefore, to that extent the suggestion that the Tiwari Committee recommended creation of Tribunals for recovery of debts due to banks and financial institutions from debtors other than sick industrial undertakings, is not correct.

5. As far as the Narasimham Committee Report is concerned, it did recommend that the special Recovery Tribunals may also be constituted as statutory bodies with

special powers of summary trial and speedy recovery. It is submitted that terms of reference to this Committee did not specifically deal with question of dues to the banks and financial institutions, and that pendency of Court cases was not the basis of the recommendations made by the Narasimham Committee. Though there was no specific term of reference to the Narasimham Committee regarding recovery of dues to the banks and financial institutions, it could not be said that this question even incidentally would not arise of during the course of deliberations before the Committee and for it to recommend measures for recovery of the debts so due. In any case the Committee said that "these suggestions for legislative measures are not exhaustive. We would recommend that the legal implications with reference to each of our recommendations will need to be examined and detailed legislative steps identified by the Government in consultation with the Law Ministry." The criticism levied by the petitioners has been that in a matter like this, the Law Commission which has been constituted by the Government resolution should have been consulted and its report obtained for establishment of the Tribunals and their jurisdiction as envisaged by the Act. Reference was made to 120th Report of the Law Commission relating to the "Manpower Planning in Judiciary" and also to 115th Report on establishing 'Tax Courts' in the country. it was submitted that delay occurring in the suits in civil Courts could not be a ground for establishment of Tribunals inasmuch as the Law Commission reported that there was paucity of judges and that the total judge strength was grossly inadequate for India. This factor, it was submitted, was not taken into account while enacting the Act On the 115th Report of the Law Commission, the argument was that if the Commission could go into the whole gravamen of establishing tax courts it could certainly have gone into the question of establishing Tribunals for the recovery of debts due to the banks and financial institutions and found the causes for delay, and suggested remedial steps. It was submitted that there was no need to rush for this Act and thereby withdrawing the jurisdiction of civil Courts which existed for over hundred years. We, however, do not think this argument can have any bearing on the question of constitutional validity of the Act. As a matter of propriety the Central Government before going for the Act could have referred the matter to the Law Commission, but that merely because it did not do so would not in any way make the Act unconstitutional. So long as the Act falls within the competence of the Parliament it cannot be challenged on the ground that it was introduced in Parliament without first being subjected to necessary examination by the Law Commission. The Court cannot go into the motives of the legislature in enacting a law or into the question whether there was any necessity of making such a law or that

there was not much discussion in the legislature before passing the Act. The Court cannot refer to the debates in Parliament on the question that too little time was given for discussion before passing the Act. We have only to see if the law enacted by a legislature falls within its field of legislation and it is also not in breach of fundamental rights as contained in Part III of the Constitution or even against the Directive Principles of State Policy as detailed in part IV of the Constitution.

6. We may at this stage itself refer to some of the salient provisions of the Act to understand the challenge to its constitutional validity and then proceed to examine the rival contentions and determine whether the challenge posed by the petitioners could be sustained. As the preamble suggests, this is an Act to provide for the establishment of Tribunals and Appellate Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. The Act is deemed to have come into force on 24th June, 1993. It extends to whole of India except the State of Jammu & Kashmir. Sub-section (4) of Section 1 of the Act deals with the extent of its application and it is as under:-

"(4) The provisions of this Act shall not apply where the amount of debt due to any bank or financial institution or to consortium banks or financial institutions is less than ten lakhs rupees, or such other amount, being not less than one lakh rupees, as the Central Government may, by notification, specify."

7. Section 2 of the Act defines certain words used in the Act and some of these definitions are as under:-

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"(d) "bank" means -

(i) a banking company

(ii) a corresponding new bank

(iii) State Bank of India

(iv) Subsidiary bank; or

(v) a Regional Rural Bank;

(e) "Banking company" shall have the meaning assigned to it in clause (c) of Section 5 of the Banking Regulation Act, 1949 (10 of 1949).

(f) "Corresponding new bank" shall have the meaning assigned to it in clause (da) of Section 5 of the Banking Regulation Act, 1949 (10 of 1949);

(g) "debt" means any liability (inclusive of interest) which is alleged as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by

the bank or the financial institutions or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or whether payable under a decree or order of any civil court or otherwise and subsisting on, and legally recoverable on, the date of the application.

(h) "financial institution" means -

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

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

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(o) "Tribunal means the Tribunal established under sub-section (1) of Section 3."

Section 4A of the Companies Act, 1958, is as under:-

"4A. (1) Each of the financial institutions specified in this sub-section shall be regarded for the purposes of this Act, as a public financial institution, namely :-

(i) The Industrial Credit and Investment Corporation of India Limited, a company formed and registered under the Indian Companies Act, 1913 (7 of 1913);

(ii) The Industrial Finance Corporation of India, established under Section 3 of the Industrial Finance Corporation Act, 1948 .

(iii) The Industrial Development Bank of India, established under Section 3 of the Industrial Development Bank of India Act, 1964 (18 of 1964).

(iv) The Life Insurance Corporation of India, established under Section 3 of the Life Insurance Corporation Act, 1956 (31 of 1956).

(v) The Unit Trust of India, established under Section 3 of the Unit Trust of India Act, 1963 (52 of 1963).

(2) Subject to the provisions of sub-section (1), the Central Government may, by notification in the Official Gazette, specify such other institution as it may think fit to be a public financial institution:

Provided that no institution shall be so specified unless -

(i) it has been established or constituted by or under any Central Act, or

(ii) not less than fifty-one percent of the paid-up share capital of such institution is held or controlled by the Central Government."

9. Chapter II of the Act deals with establishment of Tribunal and Appellate Tribunal. Under Section 3, the Central Government by notification establish one or more Tribunals to be known as the Debts Recovery Tribunal, to exercise the jurisdiction,

powers and authority conferred on such Tribunal by or under this Act. The Central Government shall also specify the areas within which the Tribunal may exercise jurisdiction for entertaining and deciding the applications filed before it. Under Section 4, the Presiding Officer of the Tribunal is to be appointed by the Central Government. Under Section 5 a person shall not be qualified for appointment as the Presiding Officer of a Tribunal unless he is, or has been, or is qualified to be, a District Judge. Under Section 6, the Presiding Officer 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 years, whichever is earlier. Under Section 7, the Tribunal shall be provided with a Recovery Officer by the Central Government and such other officers and employees as the Central Government may think fit. The Recovery Officer and all the staff shall discharge that functions under the general superintendence of the Presiding Officer. Their salaries and allowances and other conditions of service shall be such as may be prescribed by the Central Government. Sections 8, 9 and 10 deal with establishment of Appellate Tribunal and composition of Appellate Tribunal and qualifications for the appointment as Presiding Officer of the Appellate Tribunal under Section 11, the term of a Presiding Officer of an Appellate Tribunal is five years, or until he attains the age of sixty-two years, whichever is earlier.

10. Section 12 deals with the staff of the Appellate Tribunal, and provisions of Section 7 apply to the Appellate Tribunal in the same manner as applicable to the Tribunal, though references to include Recovery Officer is deemed to have been omitted. Section 13 deals with salary and allowances and other terms and conditions of service of the presiding officers. It says that 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 an Appellate Tribunal, shall be such as may be prescribed but that these shall not be varied to their disadvantage after their appointment. Section 14 provides for filling up of vacancies. In case any vacancy occurs, the Central Government is to appoint another person in accordance with the provisions of the Act. Section 14 provides the resignation and removal of the Presiding Officer of a Tribunal or an Appellate Tribunal. A Presiding Officer may resign from his office by notice in writing addressed to the Central Government, but unless he is permitted by the Central Government to relinquish his office sooner, he shall continue to hold the office until the expiry of three months from the date of receipt of the notice, or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office whichever is the earliest. A Presiding Officer shall also not be removed except by an order made by the Central Government

on the ground of proved misbehavior or incapacity after inquiry in the case of Presiding Officer of a Tribunal, made by a Judge of a High Court, and in the case of Presiding Officer of The Appellate Tribunal, made by a Judge of the Supreme Court. The Central Government may prescribe rules to regulate the procedure for the investigation.

11. Under Section 16, the orders constituting the Tribunal or an Appellate Tribunal shall not be called in question in any manner, and no act or proceedings 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.

12. Then comes Chapter III dealing with jurisdiction, powers and authority of Tribunals. Sections 17 and 18 under this Chapter may be reproduced as under:-

"17. Jurisdiction, powers and authority of Tribunals.- (1) A 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 debts due to such banks and financial institutions.

(2) An 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."

"18. Bar of jurisdiction.- On and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Article 226 and 227 of the Constitution) in relation to the matters specified in Section 17."

13. Chapter IV prescribes procedure of Tribunals. An application by a bank or financial institution is to be filed in the form prescribed. It shall bear such fee as may be prescribed. No fee is, however, payable where the cases are transferred to Tribunals on the coming into force of this Act from various Courts. The Tribunal shall on receipt of the application issue summons requiring the defendants to show cause within thirty days of the service of summons as to why relief prayed for should not be granted. Then the Tribunal may, after giving the bank or the financial institution and the defendant an opportunity of being heard, pass such orders on the applications as it thinks fit to meet the ends of justice. The Tribunal is also authorized to make an interim order 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 prior permission of the Tribunal. If any debt is found due to the bank or the financial institution, the Presiding Officer shall issue a certificate under his signature on the basis of the order, to the Recovery Officer for recovery of the amount of debt specified in the certificate. Then, the Tribunal is required to dispose of the application for recovery of debt as expeditiously as possible and Endeavour shall be made to decide the application finally within a period of six months from the date of receipt of the application.

14. Section 20 provides for appeal to the Appellate Tribunal. The relevant part of this Section says that, any person aggrieved by an order made, or deemed to have been made, by a Tribunal, may prefer an appeal to the Appellate Tribunal. The appeal shall be filed within a certain period from the date on which a copy of the order of the Tribunal is received by him, and shall be in such form and accompanied by such fee as may be prescribed. After hearing the parties the Tribunal may pass such order thereon as it thinks fit confirming, modifying or setting aside the order appealed against. The appeal is also to be heard expeditiously and Endeavour should be made to decide the appeal finally within a period of six months from the date of receipt of the appeal.

15. Under Section 21, where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal 75% of the amount of debt so due from him as determined by the Tribunal. The Appellate Tribunal may, however, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this Section.

16. Section 22 provides for procedure and powers of the Tribunal and Appellate Tribunal. They are not bound by the procedure made by the Civil Procedure Code but shall be guided by the principles of natural justice, and subject to the provisions of the Act and the Rules shall have powers to regulate their own procedure including the plea at which they shall have their sittings.

17. Section 24 provides that provisions of the Limitation Act, 1963, shall, as far as may be, apply to an application made to a Tribunal.

18. Then, Chapter V deals with recovery of debt determined by Tribunal, and Section 25 falling under this chapter prescribes modes of recovery of debts which are (1) attachment and sale of the movables or immovable property of the defendant, (2) arrest of the defendant and his detention in prison; and (3) appointing a receiver for

the management of the movable or immovable properties of the defendant.

19. Section 26 bars the defendant to raise any dispute before the Recovery Officer about the correctness of the amounts specified in the certificate and bars the Recovery Officer to entertain any such objection. The Tribunal has, however, power to withdraw the certificate or correct any clerical or arithmetical mistake in the certificate.

20. Under Section 27, the Tribunal has power to stay recovery of any amount and grant time for payment of the amount and in that case the Recovery Officer has to stay the proceedings. Sub-section (3) and (4) of Section 27 provide as under:-

"(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 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."

21. Section 28 provides for the modes of recovery which are without prejudice to the modes specified in Section 25.

22. Section 29 provides for application of the provisions of Second and Third Schedule of the Income Tax Act, 1961, and the Income-tax (Certificate Proceedings) Rules, 1962. For the word "assessee" the word "defendant" is to be substituted.

23. Then under Section 30, orders of the Recovery Officer are deemed to be the orders of the Tribunal and subject to appeal to the Appellate Tribunal.

24. Under Section 31, every suit or other proceedings before any Court immediately before the date of establishment of a Tribunal shall stand transferred on that date to such Tribunal. This should not, however, apply to any appeal pending in any Court. Sub-section (2) of Section 31 is as under :

"(2) Where any suit or other proceedings stands transferred from any Court to Tribunal under sub-section (1) -

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

(b) the Tribunal may on receipt of such records, proceed to deal with such suit or other proceeding, as far as may be, in the same manner as in the case of an application made under Section 19 from the stage which was reached before such transfer or from any earlier stage or de-novo as the Tribunal may deem fit."

Under Section 31 aforesaid, while every suit or other proceeding pending before any Court shall stand transferred to the Tribunal, no appeal pending before any Court shall, however, be deemed to have been transferred to the Appellate Tribunal established under the Act. The Act, however, does not provide if the provisions of Section 21 of the Act would also be applicable to the suit or other proceedings transferred to the Tribunal under Section 31 of the Act. Though the right of appeal is statutory right, but it is vested right when suit or proceeding was instituted in the Court though there is no such condition regarding deposit of the amount of the debt if held to be due on filing the appeal by the judgment debtor.

25. Under Section 34, the Act is to have over-riding effect, and is as under:

"34. Act to have over-riding effect -

(1) Save as otherwise provided in sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 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)."

26. Section 35 gives power to the Central Government to remove difficulties and under Section 36, the Central Government can make rules to carry out the provisions of the Act.

27. Rules have been framed called "Debt Recovery Tribunal (Procedure) Rules 1993". These rules only provide procedure for filing of application, its presentation and scrutiny, fee payable on application, the contents of the application and the documents which are to accompany the application. They also provide for filing of reply and documents by the respondent, the date and place of hearing, sittings of the Tribunal, etc., and the powers and duties of the Registrar. There is no provision in these Rules

for the respondent to file counter-claim, or claim set-off.

28. Clause (c) of Section 5 of the Banking Regulation Act, 1949, defines "banking company". It means any company which transacts the business of banking in India. There is an explanation to this clause which is as under :-

"Explanation :- Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause."

Clause (b) defines "banking". Under this clause, "banking" means the accepting, for the purpose of lending or investment, of deposits of money from the public repayable on demand or otherwise, and withdraw able by cheque, draft, order or otherwise. Under Section 6 of the Banking Regulation Act, in addition to the business of banking, a banking company may engage in any one or more of the following forms of business:

"(a) the borrowing, raising or taking up of money, the lending or advancing of money either upon or without security, the drawing, making, accepting, discounting buying selling collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments, and securities whether transferable or negotiable or not, the granting and issuing of letters of credit, traveler's cheques and circular notes, the buying, selling and dealing in bullion and the buying and selling of foreign exchange including foreign bank notes, the acquiring, holding issuing on commission underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds obligations, securities and investments of all kinds the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances, the receiving of all kinds of bonds, scrips or valuables on deposits or for safe custody or otherwise, the providing of safe deposit vaults, the collecting and transmitting of money and securities;

(b) acting as agents for any Government or local authority or any other person or persons; the carrying on of agency business of any description including the clearing and forwarding of goods, giving of receipts and discharges and otherwise acting as an attorney on behalf of customers, but excluding the business of a managing agent or secretary and treasurer of a company;

- (c) Contracting for public and private loans and negotiating and issuing the same;
- (d) that effecting, insuring, guaranteeing, underwriting, participating in managing and carrying out of any issue, public or private, or State, Municipal or other loans or of shares, stocks debentures, or debenture stock of any company, corporation or association and the ending of money for the purpose of any such issue;
- (e) carrying on and transacting every kind of guarantee and indemnity business;
- (f) managing, selling and realizing any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;
- (g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;
- (h) Undertaking and executing trusts;
- (i) Undertaking the administration of estates as executor, trustee or otherwise;
- (j) establishing and supporting or aiding in the establishment and support of associations, institutions, funds, trusts and conveniences calculated to benefit employees or ex-employees of the company or the dependents or connections of such persons; granting pensions and allowances and making payments towards insurance, subscribing to or guaranteeing moneys for charitable or benevolent objects or for any exhibition or for any public, general or useful object;
- (k) the acquisition, construction, maintenance and alteration of any building or works necessary or convenient for the purposes of the company;
- (l) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;
- (m) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this sub-section;
- (n) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;
- (o) Any other form of business which the Central Government may, by notification in the Official Gazette, specify as a form of business in which it is lawful for a banking company to engage."

29. Examination of provisions of the Act would show that while a bank can file an application for recovery of the debt due to it, if the respondent has any claim against the bank he must necessarily go to the civil Court. There is no provision under the Act or the Rules for a person to raise any counter-claim. It cannot be said that counter-claim can be raised as a part of natural justice. Perhaps not. Mr. Chandrasekharan, learned Additional Solicitor General, said that counter-claim or any other defense raised will bar the claim of the bank. Admittedly, therefore, counter-claim, if valid, cannot be decreed by the Tribunal and the claimant per force has to go to the civil Court, and by that time he may be faced with the law of limitation. Tribunal cannot invent a new procedure to adjudicate upon the counter-claim merely for the purpose of defense on the ground that such a procedure is contemplated by the principles of natural justice.

30. A banking company not only does the business of banking, but carries on businesses of varied nature as mentioned in sub-section (1) of Section 6 of the Banking Regulation Act. As an example, it may do the business of investment meaning thereby it may perform financial services which are manifold like arranging mergers, new issues, trading and managing assets of its clients and the like. A debt, therefore, could be due to a bank not only on account of the business of banking but also due to other forms of business in which banking companies may engage. With such a varied nature of business in which a banking company may engage, rights and obligations are bound to arise, which are diverse, opposite, distinct, varied, reciprocal, different to the bank and the party having dealings with the bank. The remedies to enforce those rights and obligations have to be reciprocal, particularly when cause of action is the same. To enforce its rights a banking company can proceed under the Act, but not the party who necessarily would have to go to a civil Court. That party cannot even claim set off, adjustment or counter-claim in the proceedings initiated by the bank under the Act. Concepts of set off and counter-claim are well understood and legally recognized rights under the Civil Procedure Code (see Rule 6 of Order 8 for set off, and Rules 6A to 6G, 7 and 8 of Order 7 for counter claim. There is no provision in the Act for set off or counter-claim. Mr. Chandrasekharan, learned Additional Solicitor General, said that rules which will be framed under the Act would provide for such contingencies. It is difficult to accept such a submission as the rules cannot be outside the Act. The Act has created an anomalous situation which makes it irrational and arbitrary. If the claim for recovery of debt of a bank is dismissed by the Tribunal it cannot decree the claim of the party who, as stated above, will have to go only to civil Court. To illustrate, a bank has purchased a documentary bill amounting

to Rs. 'X' from the first defendant against an advance of an amount less than 'X' made to him which amount is to carry interest at a particular rate per annum. The bill concerns the consignment of lubricated oil sent by the first defendant at Delhi to its customer defendant No. 2 at Lucknow through the third defendant, a transporter. The bill is not honoured by the second defendant when presented for the first time. There is a great deal of correspondence between the bank, the first and second defendants, and ultimately the bank instructs the third defendant, the transporter, to re-book the consignment to Delhi. The third defendant informs the bank that the goods are lying undelivered at its U.P. Border office, and the third defendant makes a claim against the bank for Rs. 'Y' on account of transportation charges, demurrage/storage charges. The transporter also raises its counter-claim against defendants 1 and 2. Various defences are raised by defendants 1 and 2 denying their liability to the bank, issues are framed, evidence led and after examination of the whole case the Court comes to the conclusion that defendants 1 and 2 denying their liability to the bank, issues are framed, evidence led and after examination of the whole case the Court comes to the conclusion that defendants 1 and 2 are not liable, and that the claim of the third defendant, the transporter, is justified against the bank. The Court will in that case decree the counter-claim in favor of the transporter and against the bank. If such a suit on an application by the bank is tried before the Tribunal, the bank may lose the case on various defences raised by the defendants but the Tribunal would not be able to decree the counter-claim of the transporter.

31. In CWP No. 3277/94, which has also been heard along with CWP No. 3050/94 filed by the Delhi High Court Bar Association, the petitioner has said that he had, in the course of its business activities, accounts and dealings in various banks in a normal routine manner. He filed a suit (Suit No. 1017/86) in the Delhi High Court in its original jurisdiction against the Indian Overseas Bank for various reliefs including grant of decree of an account and for a sum of Rs. 10,000/- as compensation for breach of contract. The Indian Overseas Bank is a nationalized bank, a public sector bank. The petitioner says that the suit has been filed by him in relation to his dealings with the said bank. He detailed in the suit as to how his claim was made against the Indian Overseas Bank. He said that the Indian Overseas Bank though had no cause of action, yet by way of retaliation, it filed a suit, after two years of the suit of the petitioner which is also pending in Delhi High Court (Suit No. 841/88). The claim of the bank against the petitioner was for over Rs. 15 lakhs. The High Court passed orders for both the suits to be taken together for deciding real controversy between the parties. It is stated that both suits are linked with each other. now under the Act while

the suit of the bank would be tried by the Tribunal, the petitioner would have his suit tried in Delhi High Court. This, the petitioner says and rightly so, is illegal, arbitrary and against the procedure of law and justice.

32. The question of applicability of the Act was briefly referred to us while issuing the interim order. Under the Delhi High Court Act, the Delhi High Court has in the Union Territory of Delhi ordinarily original civil jurisdiction in every suit the value of which exceeds rupees five lakhs. Under the Punjab Courts Act, as applicable to Delhi and as amended, suit is upto the value of rupees one lakh can be tried by a Civil Judge, and between rupees one lakh to rupees five lakhs by the District Judge. The Debts Recovery Tribunal has been established under Section 3 of the Act, having areas of jurisdiction as Delhi. Under Section 5, a person shall not be qualified for appointment as the Debts Recovery Tribunal unless he is, or has been, or is qualified to be, a District Judge. Under Section 18 of the Act, no Court or other authority shall have, or be 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. Under Section 17, the Debts Recovery Tribunal shall exercise the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions which, as per sub-section (4) of Section 1, could only be of the amount rupees ten lakhs and above. Thus, the Delhi High Court though having supervisory jurisdiction and jurisdiction under Article 227, and also jurisdiction under Article 226 of the Constitution to issue writs, orders or directions to the Debts Recovery Tribunal can try suits only between the value of rupees five to rupees ten lakhs, and above that the suits can be tried only by an authority which is of the rank of the District Judge. Then the District Judge can try suits between the value of rupees one lakh and rupees five lakhs whereas a Tribunal of equal rank can try suits of the value of rupees ten lakhs and above. We cannot read down sub-section (4) of Section 1 to mean that the Debts Recovery Tribunal will be competent to try suits only between the value of rupees one lakh and rupees five lakhs. The Act is bad in so far as it places the Tribunal on a higher pedestal than the High Court and is thus, unconstitutional. It lowers the authority in the High Court vis-a-vis the tribunal which is impermissible as it is against the scheme of the Constitution. It is not that the Debts Recovery Tribunal is some specialized body having special knowledge and expertise to try suits of the nature contemplated by the Act.

33. A great deal of argument was addressed that no Tribunal could be established

outside Part XIVA of the Constitution containing Articles 323-A and 323-B. Mr. Lekhi, learned counsel for the petitioners, contended that since the Tribunal constituted under the Act does not fall under Article 323-A or Article 323-B, is established is unconstitutional, and the whole Act is void. Article 323-A deals with the establishment of Administrative Tribunals and is not relevant for our purpose. Article 323-B provides for establishment of tribunals for other matters and we may reproduce this Article as under:-

"323-B. Tribunals for other matters.

(1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of all 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 matter 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 31-A 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 329-A;

(g) production, procurement, supply and distribution of foodstuffs (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;

(h) rents, its regulation and control and tenancy issues including the right, title and interest of landlords and tenants;

(i) offences against laws with respect to any of the matters specified in sub-clauses (a) to (h) and fees in respect of any of those matters;

(j) any matter incidental to any of the matters specified in sub-clauses (a) to (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 powers to punish for contempt) and authority which may be exercised by each of 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;
 - (f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature 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.
- (4) 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.

Explanation.- In this article, "appropriate Legislature" in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance with the provisions of Part XI."

34. It was submitted that Part XIVA which dealt with the establishment of tribunals did not empower the Parliament with powers to establish a Tribunal outside the provisions of Article 323-A and 323-B. It was submitted that it was an admitted case that the Tribunal under the Act did not fall under either of the two Articles. This argument was made with reference to Article 245 of the Constitution which is as under:-

"(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have an extra-territorial operation."

35. Reference was also made to list I (Union List) II (State List) and III (Concurrent List) of Seventh Schedule to the Constitution. It was submitted that one of these lists uses the word "Tribunal" and in view of the provisions of Article 15, 123A and 323-B the residuary Entry 97 in List I could not be made use of, and Parliament was not competent to establish tribunals outside Articles 323-A and 323-B. With reference to

Entry 95 in List which provides for "jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List; Admiralty jurisdiction it was submitted that the Parliament could legislate with reference to jurisdiction and powers of all Courts with respect to any of the matters in List I which also contains banking and insurance as Entries 45 and 47 respectively, and that though financial institutions were not specifically mentioned in any of the entries in List I, what could be covered under entry 97. The argument was that no tribunal could be constituted, therefore, with reference to any matter in List and the present Act, which constituted tribunals, was void. Then the submission was that the Constitution contemplates four tier system of Courts, i.e., (1) the Supreme Court (Articles 124-144), (2) High Court of a State (Articles 224-231), (3) district, and (4) subordinate Courts (Articles 233-237). It was submitted that, constitution of Tribunals does not fit under the scheme of the Constitution.

36. Entry 11-A in List III (Concurrent List) was inserted by the Constitution forty-second Amendment Act, 1976, and it is as under :-

"11-A. Administration of justice, constitution and organisation of all Courts, except the Supreme Court and High Courts."

Before this Constitution (Amendment) Act, this entry was in List II-State List (entry No. 3) which had been deleted from there.

37. Argument of Mr. Lekhi was two-fold (1) that this Entry 11-A in concurrent list or residuary Entry 97 in List-1 does not confer any power on the Parliament to constitute a tribunal outside Part XIVA of the Constitution, and (2) the administration of justice cannot be administered by tribunal. Mr. Lekhi referred to the Constitution (Seventy-fifth Amendment) Act, 1993 which received the assent of the President on February 5, 1994 which amended Article 323-B to insert sub-clause (h) in clause (2) which we have already mentioned while reproducing Article 323-B above. His argument was, that in case it was intended to constitute a tribunal for the purpose of recovery of debt due to the banks and financial institutions, Article 323-B should have accordingly been amended as it was done by introducing sub-clause (h) relating to rent, etc. This not having been done, the Act constituting a tribunal for recovery of debt due to the bank or financial institution was void. Reference is also drawn to an article delivered by Chief Justice of India A.M. Ahmadi (inaugural address at the Silver Jubilee Function of the Income Tax Appellate Tribunal Bar Association of Ahmadabad) and published in Judgment Today 1994(2) Judgments Today - Journal 1 on Tribunal-Justice - pros and Cons. It may be advantageous to have some excerpts from that

article:

"Since the calendars of the law Courts are clogged, the implied promise to resolve disputes within a reasonable time is becoming a teasing illusion. It is, therefore, natural that all concerned must look for a remedy. Since the problem touches all areas requiring adjudication through a State offered mechanism, an overall view is called for. It was, therefore, thought that the need to ensure early decision-making could be achieved by decentralisation of litigation and with that objective in mind Articles 323A and 323B were inserted in the Constitution by the 42nd Amendment Act, 1976. These two Articles are in Part XIVA entitled "Tribunals".

3. Article 323A empowers Parliament to provide by law for the adjudication of trial by administrative Tribunals of disputes and complains with respect to recruitment and conditions of service of public servants belonging to the Union or the State or any local or other authority. The Administrative Tribunal established under this provision would exercise exclusive jurisdiction, except the jurisdiction of the Supreme Court under Article 36. Thus the jurisdiction of all other Courts including the High Courts stands ousted on the establishment of an Administrative Tribunal under this provision. Article 323B empowers the appropriate legislature to enact a law providing for adjudication or trial of disputes, complaints or offences with respect to all or any of the nine matters specified in clause (2) which, inter alia, includes matters relating to levy, assessment, collection and enforcement of any tax. The expression 'appropriate Legislature', in relation to any matter, means Parliament or State Legislature competent to make laws with respect to such matters in accordance with Part XI. The law enacted under this provision may provide for the establishment of a hierarchy of Tribunals and excludes the jurisdiction of all Courts except the Supreme Court under Article 136 of the Constitution. Under Entry 82 in List of the VII Schedule, Parliament is empowered to make a law in relation to taxes on income other than agricultural income whereas under entry 95 of the same list, Parliament can enact a law relating to jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters set out in the said list. The provisions of both these Articles 323A and 323B shall have effect notwithstanding anything in any other provision of the Constitution or in any other law for the time being in force. Both the Articles leave it to the Legislature to provide for the procedure to be followed by the Tribunals established under the said provisions. While the jurisdiction of all Courts, which

would include the High Courts can be ousted, Parliament can provide for an appeal to the apex Court under Article 136 of the Constitution. It is, therefore, manifest that the objective of Articles 323A and 323B of the Constitution is to invest purely judicial functions hitherto exercised by the Courts, including High Courts, to Tribunals established by the law made under either of the two provisions.

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5. Under our Constitution the judiciary at all levels enjoys complete independence from the executive as well as the Legislature Article 50 provides for the separation of judiciary from the executive. Complete separation has been achieved except perhaps in certain north-eastern pockets. The same cannot be said of Tribunals constituted under laws enacted under Articles 323A or 323B of the Constitution, the changes introduced in the law pursuant to the constitution Court directive notwithstanding. The Tribunals established and constituted under similar provisions remain within the administrative control of the executive once the selection and appointment of the Chairman, Vice-Chairman and Members is made. The people's confidence which the Courts enjoy because of total independence from the executive is naturally not enjoyed to the same degree by Tribunals so constituted because of lack of complete independence. Clearly the bureaucracy has two obvious advantages in expanding Tribunal justice, viz. (i) it acquires control over fields where it had none and (ii) new avenues for appointing its retiring members become available. But the members so appointed do not have a sufficiently long tenure to gather expertise and the litigants, therefore, do not benefit because by the time expertise is gained the time to leave opens. Short tenures do not bring about involvement which is so vital to the strength of any institution."

38. The Chief Justice also referred to the idea of setting up a National Tax Court Tribunal having jurisdiction throughout the country which according to him had been making the rounds since some time past and then said :-

"However our experience with Tribunals, other than ITAT is none too happy if you go by the pendency on the Central Administrative Tribunal (over 40,000 cases) and CEGAT in regard to which we were constrained to comment rather strongly in *R.K. Jain v. The* ¹ That decision brought to fore the malfunctioning of the CEGAT which constrained us to recommend that the Law Commission undertake an intensive and extensive study of various Tribunals functioning in the country. That exercise is on. Before a final decision on the setting of an All

India Tribunal for Direct Taxes is taken, the report of the Law Commission should be awaited."

He concluded by saying:-

"While we all are and should be concerned about the mounting arrears, the remedy may not be to divest the High Courts of work which is essentially judicial in character and convert the Supreme Court into a virtual first appellate Court and clog its dockets with petty disputes. This has the effect of diluting both the institution. In the name of decentralization of litigation the High Courts are also slowly being deprived of causes which can be rightly described as wholly judicial, thereby diminishing its importance and depriving the public of a wholly independent adjudicatory machinery. While the enthusiasm of the bureaucracy to nibble at the judicial cake is understandable, the members of the profession must ensure that the dignity and status of judicial institutions unlike Tribunals which are statutory at best and hence the nature of work that the former does must not be dilute and must not in any case be of less important than transferred to Tribunals. Similarly, the Supreme Court must not be reduced to a first appellate Court. If the Supreme Court is also flooded with work of the nature of first appeals brought against Tribunals' orders it will also get diluted in importance and consequently our democratic polity will suffer."

39. Mr. Chandrasekharan submitted that there is always a presumption about the constitutional validity of an Act and that Articles 323-A and 323-B did not create a bar on establishment of Tribunals and there could not be any bar by implication. His arguments proceeded thus. Articles 323-A and 323-B did not curtail the powers of the Parliament and these two Articles covered cases where jurisdiction of the High Court was taken away. Entry 11-A in List III of Seventh Schedule to the Constitution, when it uses the terminology "Administration of Justice", it cannot necessarily confine only to the Court. Administration of justice can be done by a tribunal constituted under an Act passed by Legislature. There is nothing in List II (State List) of Seventh Schedule to the Constitution which precludes the Parliament from enacting the Act in question. Even if Entry 11-A of the Concurrent List is not there, there is no conflict with any entry in List II. Part XIV-A of the Constitution containing articles 323A and 323B was inserted by the Constitution (42nd Amendment) Act, 1976, and no doubt heading of Part XIV-A is Tribunal but apart from the two Articles under Part XIV-A, the Parliament has power to constitute Tribunals. There are provisions both in List I or List III of the 7th Schedule to the Constitution which permits Parliament to make laws to establish Tribunals. Articles 323A and 323B are intended to cover certain tribunals

mentioned therein. But there can be Tribunals like the present one outside these Articles. There cannot be any implied limitation, or bar on the legislative power of the Parliament. The power of Parliament is all pervasive and there has to be an express bar. Article 323-B covers cases where the Constitution confers discretion on the Parliament to legislate providing for excluding the jurisdiction of all Courts excluding the High Court except the jurisdiction of the Supreme Court (sub-clause (d) of clause (3) of Article 323-B). Where the Constitution does not want Parliament to exercise any such discretion, Parliament can make laws which will not exclude the jurisdiction of the High Court. In the present case, the jurisdiction of the High Court under Article 226 and 227 has been kept intact. List II of the 7th Schedule has not been violated. Entries exist in List I and List III which make the impugned Act valid.

40. Reference was made to decision of the Supreme Court in *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar and Others*,² It was submitted that there is always a presumption of the constitutionality of the legislation. In *Union of India v. Harbhajan Singh Dhillon*,³ the Court examined the extent of residuary power of Parliament to legislate under entry 97 of List I and said that the three Lists demarcated legislative field between Parliament and State and did not confer any power. Then reference was also made to another decision of the Supreme Court in *State of Karnataka v. Union of India and Another*,⁴ to show that Parliament's power under Entry 97 which is residuary entry in List I is all pervasive. It was again asserted that the Constitution unless specifically bars power of the Parliament is all pervasive and there cannot be any bar by implication or any implied prohibition. It was stated that under Article 245 the words "subject to the provisions of this Constitution" did not refer to Part XIV-A but only to the distribution under Article 247 of Lists I, II and III.

Summarising his arguments, Mr. Chandrasekharan said :-

- (1) Under Article 248 read with List I Entry 97, Parliament is empowered to make any law.
- (2) There cannot be any implied bar.
- (3) Articles 323-A and 323-B had necessarily to be enacted to take away the entire power of the High Court respecting matters mentioned therein.
- (4) Entry 11-A of List III relating to administration of justice did not confine merely to Courts.

41. Reference was made to decision of the Supreme Court in *State of T.N. v. G.N. Venkataswamy and Others*⁶ to show that the ratio of that decision would be that the impugned Act was covered under Entry 11-A of List III. To reinforce the argument

that provisions of Articles 323-A and 323-B to create a Tribunal, it is not a bar on Parliament to create a Tribunal in other categories, reference was made to another decision of the Supreme Court in the *Prabhani Transport Cooperative Society Ltd. v. The Regional Transport Authority, Aurangabad and Others*,⁶

42. In *State of Tamil Nadu v. G.N. Venkataswamy and Others* (supra), challenge was to the validity of Section 52-A in the Tamil Nadu Revenue Recovery Act, 187/64, which Section was inserted by the Amending Act of 1972, Section 52-A provided as under :-

"52-A. Recovery of sums due to the Tamil Nadu Agro-Industries Corporation and Other Corporations, etc.- Without prejudice to any other mode of recovery which is being taken or may be taken, all loans granted and all advances made to any person -

- (i) by the Tamil Nadu Agro-Industries Corporation Ltd., Madras, or
- (ii) by such other Corporation (the shares of which have been contributed, underwritten or guaranteed by the State Government, as may be notified in this behalf by the State Government in the Tamil Nadu Government Gazette, or
- (iii) from out of the Amalgamated Tamil Nadu shares of the Post-War Services Reconstruction Fund and the Special Fund for Reconstruction and Rehabilitation of Ex-servicemen, together with interest on such loans and advances, and all sums due to the Corporations mentioned in clauses (i) and (ii) may be recovered in the same manner as arrears of land revenue under the provisions of this Act."

Challenge to the validity of Section was on two counts : (1) lack of legislative competence in the Legislative Assembly, and (2) that the Section was violative of Article 14 of the Constitution. Before the Supreme Court, however, the parties confined their arguments only to the question of legislative competence. The Court referred to Entry 11-A in List III of the Seventh Schedule of the Constitution and said that the plain language of the entry gave very wide powers to the State Legislature to enact laws relating to "administration of justice" and "constitution and organization of all Courts. Reference was made to a Constitutional Bench decision of the Supreme Court in *State of Bombay v. Narothamdas Jethabai*,⁷ which interpreted Entries 1 and 2 List II of the Government of India Act, 1935, which entries were in the following terms :-

- "1. The administration of justice, constitution and organization of all Courts except the Federal Court ...

2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List..."

In the case of *Narothamdas* the question before the Court was if the Legislature of the State of Bombay had jurisdiction to create an additional civil Court for greater Bombay having jurisdiction to try, receive and dispose of all suits and other proceedings of a civil nature not exceeding a certain value. The Court said that Provincial Legislature could invest the Courts constituted by it with power and jurisdiction to try every cause of matter that could be dealt with by a Court of civil or criminal jurisdiction, and that the expression administration of justice must necessarily include the power to try suits and proceedings of civil as well as criminal nature, irrespective of who the parties to the suit or proceedings or what its subject-matter might be and that that power must necessarily include the power of defining, enlarging, altering, amending and diminishing the jurisdiction of the Courts and defining their jurisdiction territorially and pecuniarily. The Court, therefore, held as under:-

"It is no doubt true that with the coming into force of Entry 11-A List III it is no more the exclusive power of the State Legislature to legislate under the said entry but "administration of justice" and "constitution and organization of all Courts" are the subjects on which the State Legislature can legislate. These expressions have been authoritatively interpreted by this Court in *Narothamdas* case (*supra*). It is, therefore, settled that under Entry 11-A the State legislature has the power to make laws thereby enlarging or reducing the powers of the Courts. The State Legislature can create new Courts, reorganize the existing Courts, provide jurisdiction to the said Courts and also take away the existing jurisdiction if it so desires. We, therefore, see no reason why a State Legislature cannot confer additional jurisdiction on existing revenue Courts to recover any public dues as arrears of land revenue."

There cannot be any doubt that the Collector under the revenue law of a State is a revenue Court. It is in that context, therefore, the Court held that power of a revenue Court by inserting Section 52-A for recovery of sums due to Tamil Nadu Agro-Industries Corporation Limited, etc. could be enhanced and that the Section was valid under Entry 11-A, List II, Schedule 7 to the Constitution. The Court also referred to Entry 30 of List III Seventh Schedule to the Conditions which is in the following terms:

"Moneylending and moneylenders relief of agricultural indebtedness".

Then the Court held as under:-

"There is no doubt that Section 52-A of the Act has been brought on the Statute book with a view to expedite recovery of the loan advanced by the Corporations. The Legislation is directly related to Entry 30 List II. We, therefore, hold that Section 52-A of the Act is constitutionally valid and the Tamil Nadu Legislature had legislative competence to enact the same."

43. In *Associated Cement Companies Ltd. v. P.N. Sharma and Another* ⁸ the principal point of law which arose before the Court was if the State of Punjab exercising its appellate jurisdiction under the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952, was a Tribunal within the meaning of Article 136 of the Constitution. The Court held that to be so and observed that the expression "Tribunal" as used in Article 136 did not mean the same things as "Court" but included, within its ambit, all adjudicating bodies, provided they otherwise were constituted by the State and were invested with judicial as distinguished from purely administrative or executive functions. Reference in that context was made to decisions *The Bharat Bank Ltd. v. The Employees of the Bharat Bank Ltd. Delhi*, and *the Bharat Bank Employees' Union, Delhi*, ⁹ and *Durga Shankar Mehta v. Raghuraj Singh and Others*, ¹⁰ The Court observed as under :-

"The expression "Court" in the context denotes a tribunal constituted by the State as a part of the ordinary hierarchy of Courts which are invested with the State's inherent judicial powers. A sovereign State discharges legislative, executive and judicial functions and can legitimately claim corresponding powers which are described as legislative, executive and judicial powers. Under our Constitution, the judicial functions and powers of the State are primarily conferred on the ordinary Courts which have been constituted under its relevant provisions. The constitution recognizes a hierarchy of Courts to their adjudication are normally entrusted all disputes between citizens and citizens as well as between the citizens and the State. These Courts can be described as ordinary Courts of civil judicature. They are governed by their prescribed rules of procedure and they deal with questions of fact and law raised before them by adopting a process which is described as judicial process. The powers which these Courts exercise are judicial powers, the functions they discharge are judicial functions and the decisions they reach and pronounce are judicial decisions"

and then also :

"Judicial functions and judicial powers are one of the essential attributes of a sovereign State, and on consideration of policy, the State transfers its judicial functions and powers to the Courts established by the Constitution; but that does not affect the competence of the State, by appropriate measures, to transfer a part of its judicial powers and functions to tribunals by entrusting to them the task of adjudicating upon special matters and disputes between parties. It is really not possible or even expedient to attempt to describe exhaustively the features which are common to the tribunals and the Courts, and features which are distinct and separate. The basic and fundamental feature which is common to both the Courts and the tribunals is that they discharge judicial functions and exercise judicial powers which inherently vest in a sovereign State."

44. We are of the opinion Mr. Chandrasekharan is right in his submission that Article 323-A or 323-B is no bar in constituting a tribunal outside those two Articles. Article 323-B applies where the Constitution gives discretion to the Parliament to legislate a matter excluding the jurisdiction even of the High Court. Parliament has jurisdiction to create tribunals in matters outside clause (2) of Article 323-B. It cannot be said that tribunals cannot administer justice and that they fall outside the term "administration of justice" as contained in Entry 11-A of the concurrent List. In *Kedarnath Gupta v. Nagindra Narayan Sinha and Others*,¹¹ the expression "administration of justice" came up for consideration. It was contended before the Court that none of the entries in the three lists of Seventh Schedule to the Constitution cover the subject-matter of a tribunal like that of a House Controller. The Court (Rangaswamy, J.) observed as under:

"It is manifest that in item 3 of the State Legislation List the governing phrase is "Administration of justice" which is a conception of the most general nature, the following words namely, "constitution and organization of all Courts except the Supreme Court and High Courts", are not words of limitation but are words of explanation or illustration. These words do not in any way control or limit the scope of the general phrase "Administration of justice" preceding them by which the whole matter of administration of justice in a modern State is included. The modern conception of a planned State requires that Government should take a more positive part in the control of economy and in the provision of social welfare. A great mass of judicial function has, therefore, been entrusted by the Legislature to departments of Government or administrative tribunals. Such tribunals have to decide matters between contending parties and give decisions which seriously affected the rights of subjects.

I think that the expression "Administration of justice" in item 3 is wide enough to include in it not merely administration of justice through Courts properly so called, but "administrative justice" that is justice through the machinery of administrative tribunals. In my opinion, item 3 of the State List is sufficient to give express powers to the State Legislature to create and determine the powers and jurisdiction of the office of the House Controller, which is in the nature of a quasi-judicial Tribunal."

We agree with these observations. Entry 11-A in Concurrent list has to be given a wide import.

45. In *Synthetics and Chemicals Ltd. etc. v. State of U.P. and Others*,¹² the seven judge bench of the Supreme Court said that a Constitution must not be construed in any narrow or pedantic sense and that construction which is most beneficial to the widest possible amplitude of its power, must be adopted. We, therefore, reject the argument of the petitioner that Tribunal under the Act could not have been established outside the matters mentioned in Article 323-B of the Constitution.

46. Independence of judiciary is the basic feature of the Constitution. It was asserted by the petitioners that the Act erodes independence of judiciary and is invalid. In the appointment of Presiding Officers of the Tribunal and Appellate Tribunal there is no role of the High Court. The High Court also does not exercise any judicial control under Article 235 of the Constitution though the Tribunal had been conferred powers of civil Court. Mr. Arvind Kumar, learned counsel for the petitioner in CWP No. 3277/94, said that all this was anti-thesis of the independence of judiciary which was the basic structure of the Constitution. He said there was no purpose in enacting this law, as Order 37 of the Civil Procedure Code provides for summary procedure in suits upon bills of exchange, hundees and promissory notes and also where the plaintiff has only to recover a debt with or without interest arising out of a written contract. He also objected to the condition of pre-deposit for filing an appeal when no guidelines had been laid and said it was left to the arbitrary discretion of the Appellate Tribunal. Article 50 of the Constitution in Part IV (Directive Principles of State Policy) provides for separation of judiciary from the executive in the public services of the State. The Act is in violation of Article 50, Law cannot be enacted contrary to the Directive Principles of State Policy. In *The U.P. State Electricity Board and Another v. Hari Shankar Jain and Others*,¹³ the Supreme Court was referring to Articles 42 and 43 of the Constitution falling under Part IV relating to 'Directive Principles of State Policy'. These two Articles relate to the provisions for just and human conditions of work and

maternity leave and a living wage, etc. for workers. The Court said : {These (Articles 42 and 43) are among the "Directive Principles of State Policy". The mandate of Article 37 of the Constitution is that while the Directive Principles of State Policy shall not be enforceable by any Court, the principles are 'nevertheless fundamental in the governance of the country' and 'it shall be the duty of the State to apply these principles in making laws'. Addressed to Courts, what the injunction means is that while Courts are not free to direct the making of legislation, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. This command of the Constitution must be ever present in the minds of judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of State Policy. Constitution of the Tribunal in the present case is a step back war and against the mandate of the constitution. Parliament can legislate in terms of the Directive Principle, but cannot legislate in derogation of those principles. As noted above, High Court has no role to play in the appointment of the Presiding Officer of either of the Tribunal or the Appellate Tribunal. The appointment is done by the Central Government. In the present case, respondent No. 3 is a member of the Indian Legal Service under the Centre. Government Principal banking transactions in the country are done by the public sector banks which are controlled by the Central Government. Financial institutions are also incorporated under Acts of Parliament or State Legislature and are again under the control of the Central/State Government. Indirectly, thus, it will be the Central Government which will be main litigant before the Tribunal and the lis is sought to be decided by a Presiding Officer under the control of the Central Government. The provisions of the Act do not show that the Presiding Officer can be independent person. Respondents cannot have faith in such a Tribunal that it will dispense justice. There is no provision for transfer of a case from one Tribunal to another. Though Section 15 provides for removal of the Presiding Officer after enquiry is made by a Judge of the High Court or the Supreme Court, as the case may be, but it will be left to the Central Government to initiate any enquiry against any Presiding Officer. For all intent and purposes the Presiding Officers of the Tribunal or the Appellate Tribunal would appear to be the employees of the Central Government and under its jurisdiction.

47. As noted above independence of judiciary is one of the basic tenants and a fundamental requirement of our Constitution. Any inroad into independence of judiciary is frowned upon by the Courts. The constitution of a Tribunal under the Act is a negation of the principles of independence of judiciary. As the provisions of the

Act show, the Tribunal and the Appellate Tribunal are fully within the control of the Central Government and before whom the principal litigant would be the Central Government itself. The provisions of the Act as such, no sitting Judge would rather like to be the Presiding Officer of the Tribunal or the Appellate Tribunal. This would leave a free field for the Central Government to appoint retired Judges without having any recourse to the High Court. Apprehension was expressed during course of arguments that Presiding Officer chosen by the Central Government would remain entirely under the thumb and control of the Central Government. Reference was made to Section 16 of the Act which provides that no order of the Central Government appointing any person as the Presiding Officer of a Tribunal or 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, 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.

48. Stringent provisions exist for recovery of the debt, if found due. A bare reading of the Act would show that its provisions are wholly loaded in favor of the banks and financial institutions as if the debt to be recovered is a tax. The Act would appear to be a more like the Custom Act and the Central Excise & Salt Act where there are provisions for adjudication and appeal and recovery of the tax found due. Provisions of the Income Tax Act, 1961, and the Income-tax (Certificate Proceedings) Rules, 1962, for recovery of the debt found due already stand incorporated in the Act. Under Section 18 of the Act, jurisdiction of all Courts is barred in relation to matters specified in Section 17. This, however, does not apply to the Supreme Court or the High Court exercising jurisdiction under Article 226 and 227 of the Constitution. It was wholly unnecessary to provide Section 18 saving the jurisdiction of the High Court under Article 226 and 227 of the Constitution of the Constitution as the Act is not on any of the matters specified in Article 323-B of the Constitution. That jurisdiction of a High Court is saved under Article 226 and 227 of the Constitution, is no substitute for trial of the suit for recovery of debt in the High Court, or the High Court hearing appeal in such matter from the subordinate Court. Again as noted above, under the provisions of the Act, the Tribunal cannot adjudicate upon the claim or set off, adjustment or counter-claim made by the respondent. Assume a case where counter-claim or adjustment is proved and the amounts become due to the respondent, and in that case the Tribunal cannot give a judgment in favor of the respondent. According to Mr. Chandrasekharan, learned Additional Solicitor General, the claim of

adjustment and set off or counter-claim would be good as a defense to knock down the claim of the bank. But then to what effect ? If the Tribunal cannot award the counter-claim or other amounts found due to the respondent, it certainly cannot adjudicate upon that, which would mean that all such defences would be barred. Similarly, on analogy, if the respondent as a plaintiff files this suit in the civil Court claiming any amount from the bank, the bank in that case may also not be in a position to raise the plea of adjustment, set off or counter-claim on account of any debt due to it from the plaintiff. We have also not been able to understand the dichotomy that cases of the value of Rs. 10 lakh and above can be tried only by the Tribunal and those less than that amount by the subordinate judiciary (in Delhi the suit of the value of over Rs. 5 lakhs and less than Rs. 10 lakhs can be filed only in the Delhi High Court, and that between Rs. 1 lakh and Rs. 5 lakhs before the District Judge). The Presiding Officer of the Tribunal can at best be of the rank of the District Judge. Then, the 'rules of natural justice' are no substitute for the procedure prescribed under the Civil Procedure Code.

49. In *Jolly George Varghese and Another v. The Bank of Cochin*, the appeal was by judgment-debtors whose personal freedom was in peril because of a Court warrant for arrest and detention in the civil prison on account of non-payment of an amount found due to the respondent bank. The question was if such deprivation of liberty illegal ? In this context, the Supreme Court examined the provisions of Order 21 of Rule 37 and Section 51 of the Civil Procedure Code as well as Article 21 of the Constitution and Article 11 of the International Covenant on Civil and Political Rights. Section 51 of the Code grants power to the Court to enforce execution of the decree, and one of the modes is by arrest and detention in prison. Order 21 Rule 37 of the Code provides for the procedure to show cause against detention in prison. Article 21 of the Constitution guarantees protection of life and personal liberty, and Article 11 of the International Covenant on Civil and Political Rights, as quoted in the judgment, reads as under :-

"No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."

The Court said the Covenant banned imprisonment merely for not discharging the decree debt, and unless there be some other vice or mens rea apart from failure to foot the decree, international law frowns on holding the debtor's person in civil prison as hostage by the Court. In this case the Court remanded the matter back directing the executing Court to readjudicate on the means of the judgment-debtors, but said that the question might squarely arise some day as to whether the proviso to Section 51

read with Order 21 Rule 37 of the Code was in excess of the constitutional mandate as contained in Article 21 and bad in part. In the present case, not only nationalized banks but other banks have also to proceed under the Act for recovery of their debts and the provisions regarding recovery of debts determined by the Tribunal would also apply to all the banks. The provisions of the Act for recovery of the debt found due may perhaps run counter to the observations of the Supreme Court in Jolly George Varghese's case (supra).

50. Civil Courts which are directly under the control and superintendence of the High Court trying bank suits, the suits of creditor and debtor relationship, have been deprived of their jurisdiction and the jurisdiction conferred on a Tribunal which is against the theme of the Constitution and independence of Judiciary which, as noted above, is a basic feature in the Constitution. It is rightly said that 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 judiciary. We cannot visualize a situation where a Court is continuously deprived of its ordinary jurisdiction and the same is conferred on the tribunals under the control of the executive. Since the Act erodes the independence of judiciary, it is unconstitutional and is void.

51. The petitioners have also challenged the appointment of the third respondent on the ground that he does not fulfill the qualifications as provided in Section 5 of the Act for being appointed as Presiding Officer of the Tribunal inasmuch as he neither was, nor had been, nor was qualified to be District Judge. It is admitted case that the third respondent was neither, nor had been a District Judge. The only question that arises for consideration is if he is qualified to be a District Judge. We are concerned with the appointment of the third respondent so far as Delhi is concerned as under Section 3 of the Act, Debts Recovery Tribunal has been constituted for areas of jurisdiction as Delhi. The relevant provisions to see if the third respondent fulfills the qualifications would be Article 233 of the Constitution, the Punjab Courts Act as applicable to Delhi, and the Delhi Higher Judicial Service Rules, 1970 framed under Article 309 of the Constitution and all other powers enabling the Lt. Governor in this behalf and after consultation with the High Court of Delhi. The relevant rules would be rules 5 and 7 which are as under:-

". METHOD OF RECRUITMENT -

(1) The recruitment of persons to the service from the Delhi Judicial Service shall be made by the Administration in consultation with the High Court.

(2) In regard to the persons not already in the Delhi Judicial Service, appointed to Service shall be made by the Administrator on the recommendation of the High Court."

"7. REGULAR RECRUITMENT: - Recruitment after the initial recruitment shall be made

(a) by promotion on the basis of selection from members of the Delhi Judicial Service, who have completed not less than 10 years of service in the Delhi Judicial Service;

(b) by direct recruitment from the Bar :

Provided that not more than 1/3rd of the posts in the Service shall be by direct recruits:

Provided further that where a member of the Delhi Judicial Service is considered for such appointment under clause (a) all persons senior to him in the Service shall also be considered, irrespective of the fact whether or not they fulfill the requirements as to the minimum of 10 years service.

Explanation: For calculating the period of 10 years of service for the purpose of clause (a) with respect to officer appointed to the Delhi Judicial Service at the time of its initial constitution, service rendered by them in the cadre to which they belonged at the time of the initial recruitment to that service which was counted for determining the seniority under rule 11 of the Delhi Judicial Service Rules, shall also be counted."

Article 233 of the Constitution is as under:-

"(1) Appointments of persons to be, and the posting and promotion of, District Judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a District Judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

52. Leaving aside the Delhi Higher Judicial Service Rules for the time being, under clause (2) of Article 233 of the Constitution, a person shall only be eligible to be appointed as District Judge (1) if he has been for not less than seven years as advocate, and (2) is recommended by the High Court for appointment. It is only then that the State Government can appoint such a person as a District Judge. Section 20 of

the Punjab Courts Act provides that the Central Government shall appoint as many District Judges as it thinks necessary, and shall post one such person to each district as District Judge of that district. The Proviso to Section is not relevant. Under Section 21, Additional Judge can also be appointed who exercises the same powers as the District Judge when any work is assigned to him.

53. The third respondent has stated that challenge to his appointment as Presiding Officer of the Tribunal is within the jurisdiction of the Central Administrative Tribunal constituted under the Administrative Tribunals Act, 1985, and not this Court. He further submits that he was enrolled as an advocate in the Madhya Pradesh High Court (Gwalior bench) on 7th February, 1972 and was practicing there till he joined as a Prosecutor in Delhi. He, however, does not say as to when he joined as a Prosecutor and whether he got any endorsement made in the register of the Bar Council of the State indicating that he was no longer a practicing advocate. He says that during the period of his practice he was engaged by several parties in civil litigation and that he was also a Standing Counsel for Agricultural Produce Marketing Committee, Dabra, Gwalior, from 1 January 1975 till he was appointed as Prosecutor, Delhi. Also, that he has vast experience and that he is well versed in civil laws. Respondent No. 3 further states as under:-

"I submit that, pursuant to my appointment in Grade IV of the Indian Legal Service and my subsequent selection to Grade II in 1990 and promotion to Grade I in 1994, i.e. Joint Secretary and Legal Adviser to the Government of India, Ministry of Law & Justice, I have been advising various departments and Ministries of the Central Government in matters concerning Civil and Criminal Laws. These departments and Ministries include the Directorate General of Supplies and Disposal, Ministry of Urban Development, Ministry of Labour and several other departments. During this period, I have also functioned as Member Emigration Appellate Committee, Ministry of Labour in which capacity I was disposing of appeals filed under the Emigration Act in a quasi judicial capacity. I have also functioned as Central Government under Section 19A of the Employees Provident Fund and Misc. Provisions Act, 1952 which is the final authority in the country in respect of disputes arising under the Act in matters referred to under the said Section. I was again acting in a quasi judicial capacity while functioning as the Central Government."

Respondent No. 3 has further stated that he appears in cases involving civil laws and banking laws during the period he was practising in the Gwalior Bench of the Madhya

Pradesh High Court and the district Courts. However, no particulars of any one case have been stated.

54. Respondents 1 and 2 have also filed the supplementary affidavit justifying the validity of the appointment of the third respondent.

55. Mr. Chandrasekharan said that the Act was applicable to whole of India and the Parliament had only to see Article 223 of the Constitution to find out that the qualifications fixed for Tribunal fulfilled that for District Judge as provided under the Constitution. He said that "qualified" to be appointed, would be something as "eligible" to be appointed. He referred in detail to the affidavit filed by the third respondent as well as the counter-affidavit of the Union of India. It was submitted that the mere fact that the third respondent was a public prosecutor could not and did not mean that he thereby ceased to be an advocate. Reference in this connection was made to a decision of the Punjab & Haryana High Court in *Mukhtiar Singh Ex-Sarpanch v. State of Punjab etc.*,¹⁵ In this case the appointment of Mr. B.S. Nehra was challenged as District & Sessions Judge. This was on the ground that he did not fulfill the qualification for appointment to the post of District Judge under Article 233 of the Constitution inasmuch he had not been "for not less than seven years an advocate or a pleader", Mr. Nehra was a pleader from July 1953 and was enrolled as an advocate of the Punjab High Court in October, 1958. After coming into force of the Advocates Act, 1961, Mr. Nehra was issued a certificate by the Bar Council of Punjab of his enrolment as an advocate under Section 22 of that Act on March 2, 1964. He was appointed by the State Government as Assistant District Attorney on February 20, 1961. The appointment envisaged that Mr. Nehra would be a Government Pleader within the meaning of sub-section (7) of Section 2 of the Civil Procedure Code and Public Prosecutor under the Criminal Procedure Code. Then Mr. Nehra was selected by the High Court and was appointed as District Judge on April 1, 1975. The Bar Council of India in exercise of its power under Section 49 of the Advocates Act framed rules and rule 49 provided that an advocate shall not be a full-time salaried employee of any person, Government firm, Corporation, or concern so long as he continued to practice. However, there was a proviso which had been added to the rule which excluded its applicability to Law Officers of Central or State Government or Public Corporation or Body constituted by a statute which entitled the person to be enrolled as an advocate under rule 49. The Court held that Mr. Nehra fulfilled the qualification under Article 233 inasmuch as the period during which he was serving as Assistant District Attorney or District Attorney he was a Government pleader and a

Public Prosecutor, and in that capacity he was required to act or plead in Courts on behalf of the Government, and that period during which he continued in service as such he would be deemed to be a practising advocate. Mr. Chandrasekharan also drew our attention to a decision of the Calcutta High Court in *Subir Chowdhury v. Union of India*,¹⁶ where it had been held that separate meaning could not be attributed to the word 'Advocate' under Article 233(2) of the Constitution on the one hand and Article 124(3)(b) and Article 217(2)(b) had no significance in any event after the coming into force of the Advocates Act, 1961, as by virtue of Section 10 of that Act there were now only two classes of persons entitled to practice namely 'Senior Advocate and other Advocates'. Mr. Chandrasekharan, thus, said that public prosecutor was also an advocate for the purpose of Article 233(2) of the Constitution and, therefore, qualified to be appointed as a District Judge. Inasmuch as he continued to be on the rolls of the Bar Council with which he had been registered. He said mere fact that an advocate for any period was appointed as a public prosecutor did not detract in any manner from his status as an advocate. He, therefore, said that the third respondent was at the time of his appointment as the Presiding Officer of the Tribunal qualified to be appointed as a District Judge under Article 233(2) of the Constitution. Mr. Chandrasekharan said that the appointment of the third respondent as Presiding Officer of the Tribunal should not be examined with reference to the qualifications for appointment of District Judge in Delhi. Otherwise, he said that if a Tribunal exercises jurisdiction over Delhi, Haryana and Rajasthan, then he may not be qualified to be appointed as a Presiding Officer for Delhi and there may be different rules for appointment of District Judge for Haryana and Rajasthan. This, he said, would result in anomaly and make the Act unworkable. As an argument what Mr. Chandrasekharan said may be good, but there we are concerned with the interpretation and application of law. In *Oma Shankar Sharma and Another v. Delhi Administration and Another*,¹⁷ this Court interpreted relevant rules for appointment to Delhi Higher Judicial Service which required seven years at the Bar, i.e., a candidate should be a practicing lawyer. In this case the question that was raised before this Court was whether the petitioners who had taken full-time employment as public prosecutor were eligible for appointment to Delhi Higher Judicial Service. The Court after examining the provisions of the Advocates Act, the Rules framed there under, and Articles 233, 309 and 311 of the Constitution and the Delhi Higher Judicial Service Rules came to the conclusion that the public prosecutors were not eligible for appointment as District Judges in Delhi. That the third respondent belonged to Indian Legal Service and had also seven years standing as an advocate before he joined that service is of no relevance as far as Delhi is

concerned as he will not qualify to be appointed to the Delhi Higher Judicial Service, and thus, to the post of District Judge. We may in this connection also refer to Article 76 of the Constitution for appointment of Attorney General and Article 165 for appointment of Advocate General of a State. A person can be appointed Attorney General for India if he is qualified to be appointed as a Judge of the Supreme Court, and for post of an Advocate General a person is to be qualified to be appointed a Judge of High Court. Qualification for a Supreme Court Judge are prescribed in Article 124 and that of a High Court in Article 217. Then under clause (3) of Article 124, a person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of India and (a) has been for at least five years a Judge of a High Court or of two or more such Courts in succession; or (c) is, in the opinion of the President, a distinguished jurist. Under clause (2) of Article 217, a person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and (a) has for at least ten years held a judicial office in the territory of India; or (b) has for at least ten years been an advocate of a High Court or of two or more such Courts in succession. Then under clause (1) of Article 217, every Judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. It will be, thus, seen that there are different procedures for appointment of the Attorney General and the Advocate General on the one hand, and that of the District Judge under Article 233 of the Constitution. Under this Article, appointing authority of the District Judge is the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State and then the Governor can appoint only such person who has been for not less than seven years Advocate or a pleader and is recommended by the High Court for appointment. Thus, a person to be qualified for appointment as a District Judge not only have been seven years as an advocate, but he should also have recommendation of the High Court for his appointment. Mr. Chandrasekharan said that the qualification which Article 233 prescribes for appointment of a person as District Judge is only that he should not have less than seven years as an advocate, and that recommendation of the High Court was not a part of the qualification. We, however, do not think that such an interpretation would be correct. The appointment of a person to be a District Judge and the posting and promotion of District Judge in any State is made by the Governor of the State in consultation with the High Court exercising jurisdiction in that State. Clause (2) of Article 233 uses the words "service of the Union or of the State" and these have been interpreted to mean judicial service.

In *Chandra Mohan v. State of Uttar Pradesh and Others* (supra), the Court was considering the question of the scope of the field of recruitment to the cadre of District Judges under Article 233 of the Constitution. The U.P. Higher Judicial Service Rules provide for recruitment of District Judges and the question was if these contravene clauses (1) and (2) of Article 233. Rule 14 provided for direct recruitment. It said that applications for direct recruitment shall be called for by the Court and shall be made in the prescribed form and the applications to be accompanied with certain certificates. Then under rule 15, Selection Committee, which consisted of two judges of the High Court and the Judicial Secretary to the Government, was to scrutinize the applications received by the Court and after interviewing them to recommend suitable candidates for appointment to the Higher Judicial Service to the Governor through the Court. Then under rule 19, the Governor has to make appointments to the service. The Court noted that it was clear from the Rules that the High Court was practically reduced to the position of a transmitting authority of the lists of suitable candidates for appointment prepared by the Selection Committee and that the only discretion left to the High Court was to refuse to recommend for appointment all or some of the persons included in the lists sent to it by the Selection Committee, and that the High Court could not scrutinize the other applications which were screened by the Selection Committee and also could not recommend for appointment persons not found in the lists. The Court said that under clause (2) of Article 233 the Governor could only appoint advocates recommended by the High Court to the said service, but under the Rules the High Court could either endorse the recommendations of the Committee or create a deadlock, and that, therefore, the relevant rules clearly contravened the constitutional mandate of Article 21 of the Constitution and was, therefore, illegal. It would, thus, be clear that for a person who is not in judicial service of the Union or the State, for the High Court to recommend he should have been for not less than seven years an advocate or a pleader. That is the qualification for High Court to recommend, but he cannot be appointed to the Higher Judicial Service unless, under clause (2) of Article 233, he has been for not less than seven years an advocate and is recommended by the High Court for appointment. In that context, therefore, the recommendation of the High Court is also a qualification for a person to be appointed to the post of the District Judge. A candidate having been an advocate for seven years or more cannot be appointed to the Higher Judicial Service. To this qualification has to be added the other qualification i.e., the recommendation of the High Court. Thus, under clause (2), when a person is not already in judicial service he can be appointed a District Judge only if he fulfills the two conditions mentioned above. As far as Delhi

is concerned, the third respondent is not qualified to be appointed as District Judge. He is not and has not been a District Judge. Therefore, the order appointing him as Presiding Officer of the Tribunal is bad and is set aside.

56. Then it was argued by the petitioners that financial institutions constituted under various enactment had been empowered to choose any procedure either under this Act or under the respective Act or under the ordinary law of the land without there being any guidelines. We have not been shown any provisions in any of the five public financial institutions (Section 4-A of the Companies Act, 1956) where any different procedure for recovery of dues has been provided in the Acts establishing them. In *Northern India Caterers Private Ltd. and Another v. State of Punjab and Another*,¹⁸ the Supreme Court found that the State had two remedies open to it. One was under the ordinary law and the other was a drastic and "more prejudicial remedy" under the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1959, and consequently Section 5 of the Act which empowered the Estate Officer to make an order of eviction was held to violate Article 14 of the Constitution. This decision of the Supreme Court was referred to in *Hari Singh and Others v. The Military Estate Officer and Another*,¹⁹ when the Court was examining the provisions of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, which has Section 15 providing barring of jurisdiction of Courts in respect of eviction of any person who is in unauthorized occupation of any public premises. The Court, therefore, said that the vice of Article 14 which was found by the Court in the decision of Northern India Caters Private Ltd. (supra) no longer appeared in the 1971 Act. However, in *Magani Lal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay and Others*,²⁰ the Supreme Court overruled its decision in Northern India Caters Private Limited (supra). After referring to its earlier decisions, the Court examined the arguments based on the availability of two procedures, one more onerous and harsher than the other, and, therefore, discriminatory. The Court summarized as under :-

"Where a statute providing for a more drastic procedure different from the ordinary procedure covers the whole field covered by the ordinary procedure, as in Anwar Ali Sarkar's case 1951 SCR 284 and Suraj Mall Mohta's case, (1955) 1 SCR 448 without any guidelines as to the class of cases in which either procedure is to be resorted to, the statute will be hit by Article 14. Even there, as mentioned in Suraj Mall Mohta's case, a provision for appeal may cure the defect. Further, in such cases if from the preamble and surrounding circumstances, as well as the provisions of the statute themselves explained and

amplified by affidavits, necessary guidelines could be inferred as in Saurashtra Case, 1952 SCR 435 and Jyoti Parshad's case (1962) 2 SCR 125 the statute will not be hit by Article 14. Then again where the statute itself covers only a class of cases as in Haldar's case, (1960) 2 SCR 648 and Bajoria's case, 1954 SCR 30 the statute will not be bad. The fact that in such cases the executive will choose which cases are to be tried under the special procedure will not affect the validity of the statute. Therefore, the contention that the mere availability of two procedure will vitiate one of them, that is the special procedure, is not supported by reason of authority."

57. Thus, the argument of the petitioners that two procedures have been prescribed for recovery of their dues, one under the Act and the other under the various Acts constituting the public financial institutions, cannot be held to be valid.

58. As noted in the beginning of the judgment, the respondents have questioned the *locus standi* of the petitioners in CWP No. 3050/95 to file this petition. We are of the view that there cannot be a better body than a Bar Association for upholding the independence of the judiciary. We record our appreciation of the Delhi High Court Bar Association in bringing up this petition.

59. Thus, we hold that though tribunal could be constituted by Parliament not falling with Articles 323-A and 323-B of the Constitution, and that the expression "administration of justice" as appearing in Entry 11-A of List III of Seventh Schedule to the Constitution would include tribunals as well administering justice; the Act called "The Recovery of Debts Due to Banks and Financial Institutions Act, 1993" is unconstitutional as it erodes the independence of judiciary and is irrational, discriminatory, unreasonable, arbitrary and is hit by article 14 of the Constitution, and that respondent No. 3 does not fulfill the qualification to be appointed as Presiding Officer of the Tribunal. The notification dated 5 July, 1994 issued under Section 3 of the Act, constituting Debts Recovery Tribunal with the areas of jurisdiction as Delhi, is quashed.

60. It was suggested to us that we could mould the relief and give direction to the Central Government to amend the Act and/or frame Rules in accordance with the mandate of the Constitution and then uphold the validity of the Act, but we do not think we should adopt such a course as it is not concern of the Court to suggest modalities.

61. Having held the Act to be unconstitutional, it becomes necessary for us to give

directions as to the applications pending before the Debts Recovery Tribunal. A list of cases pending before the Debts Recovery Tribunal established under the notification dated 5 July, 1994 was filed before us in these proceedings. All these cases shall stand transferred to the original side of this Court and shall be deemed to have been instituted on the dates these were filed before the Debts Recovery Tribunal. The applicants, who would now become plaintiffs, would pay Court fee within four weeks from the date of transfer and shall be entitled to refund of the fee already paid in terms of sub-rule (2) of rule 7 of the Debt Recovery Tribunal (Procedure) Rules, 1993.

62. In the circumstances, there will be no order as to costs. Rule is made absolute.

Petition allowed.

Cases Referred.

1. UOI, 1993 65 ELT 305 (SC).
2. AIR 1958 Supreme Court 538.
3. AIR 1972 Supreme Court 1961,
4. (1977) 4 SCC 608,
5. (1994) 5 SCC 314,
6. (1960) 3 SCR 177.
7. AIR 1951 Supreme Court 69,
8. AIR 1865 Supreme Court 1595,
9. AIR 1950 Supreme Court 188
10. AIR 1954 Supreme Court 520.
11. AIR 1954 Patna 97 (DB),
12. AIR 1990 Supreme Court 1927,
13. AIR 1979 Supreme Court 65,
14. AIR 1980 Supreme Court 470,
15. 1989 (Vol. II) PLR 194 (DB).

16. AIR 1984 Calcutta 7,
17. 1988(14) D.R.J. 293 (D.B.),
18. AIR 1967 Supreme Court 1581,
19. (1972) 2 SCC 239,
20. AIR 1974 Supreme Court 2009