**KARNATAKA HIGH COURT**

D.K. Abdul Khader

Vs.

Union of India

W.P. Nos. 36354 to 36357 of 1999

(Hari Nath Tilhari, J.)

15.02.2001

**ORDER**

**Hari Nath Tilhari, J.**

1. By these petitions, the petitioners have sought for grant of following reliefs in their favor, in the circumstances of the case. The reliefs read as under :-

> (a) declare that the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Rules framed thereunder are void by reason of being violative of the Constitution of India and beyond the Legislative Competence of the Parliament;
> (b) the Debt Recovery Tribunal for Karnataka and Andhra Pradesh established at Bangalore City as being void;
> (c) the scheme of the Act as unreasonable and unfair and violative of Articles 14 and 21 of the Constitution of India. And by issue of writs of Mandamus, Certiorari and other appropriate writs, orders and directions;
> (d) direct the respondents 1 and 2 not to give effect to the Act;
> (e) quash the Notification vide Annexure-A dated 30-11-94 constituting the Debt Recovery Tribunal for Karnataka and Andhra Pradesh at Bangalore City vide Annexure-A and also the order dated 29-1-1999 passed by the Debt Recovery Tribunal, Krishi Bhavan, Bangalore, in O.A. No. 942/97 vide Annexure-B; and
> (f) grant such other or further relief or reliefs as this Hon'ble Court may deems fit in the circumstance of the case.

2. The facts of the case in the nut-shell are that, the respondent No. 3-Bank had obtained a decree namely decree dated 20-4-1993 passed in Original Suit No. 36/90 by the Principal Civil Judge, Mangalore, Dakshina Kannada, for a sum of Rs. 13, 25,008-54 ps. with interest at the rate of 18.5% p.a. The respondent-Bank moved an application namely application under Section 19 of

the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 i.e., Act No. 51/1993 before the Debt Recovery Tribunal at Bangalore impleaded herin as respondent No. 4. This application was moved on 14-10-1997. According to the petitioners' case, under the provisions of Section 3/4 of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 which came into effect on 24-6-1993, the Debt Recovery Tribunal of the States of Karnataka and Andhra Pradesh was established at Bangalore vide notification No. F. No. 19(1473) dated 30-11-1994. On application being moved under Section 19 before the Tribunal, the Tribunal has been pleased to issue notice to the petitioner and thereafter had been pleased to pass the order allowing the application and directed issuance of recovery certificate as per terms of the judgment and decree dated 20-4-1993 passed in O.S. No. 36/90. That according to the petitioners, the impugned order was passed against the petitioners without petitioners' being given any opportunity to controvert the case set up by the applicant-Bank i.e., respondent No. 3. The petitioners have filed these petitions challenging the vires of the Recovery of Debts Dues to Bank and Financial Institutions Act, 1993, the Rules framed thereunder as well as establishment of the Debt Recovery Tribunal for the States of Karnataka and Andhra Pradesh at Bangalore. No doubt, the petitioner has also challenged the order impugned namely order dated 29-11-1999 passed by the Tribunal on the ground that the Debt Recovery Tribunal has not given any opportunity to the petitioners either lead the evidence or to produce the documents. The petitioners have asserted that the petitioners should have been given an opportunity of hearing. It has also been alleged that the Act itself is *ultra vires* and so the order passed by the Debt Recovery Tribunal is without jurisdiction and the Debt Recovery Tribunal could not pass the order impugned. This plea has been taken in addition to the ground that the order was passed without giving an opportunity of hearing. If there would not have been any challenge to the vires and constitutionality of the Constitution of the Debt Recovery Tribunal and the provisions of the Act, then definitely the alternative relief of appeal to the Debt Recovery Appellate Tribunal would have been an alternative remedy available to the petitioners and this Court could and would have directed the petitioners to avail that remedy. But as the petition involves the question of vires of the Act itself and the Appellate Tribunal cannot be expected to go into the question of vires of the Act whereunder the Recovery Tribunal or the Appellate Tribunal is constituted, this Court has to hear the case on merits and to question of vires of the Act and constitutionality of Constitution or establishment of the Tribunal.

3. I have heard the learned counsel for the petitioner, Sri. B. G. Sreedharan assisted by Sri. Shivaram, learned counsel for the petitioners, on the question of, firstly, the vires of the Act No. 51 of 1993 (Recovery of Debts Due to Banks and Financial Institutions Act, 1993, its rules and provisions and of Constitution of the Debt Recovery Tribunal. I have also heard the learned Central Government Standing Counsel Sri N. Devadas who has represented before this Court the respondents 1, 2 and 4. I have also heard Sri. A. Mahabaleshwara Bhatt who has appeared on behalf of the respondent No. 3.

4. The petitioner, it may be mentioned, has come up and sought dispensation of service of notice

on respondent Nos. 5 and 6 which have already been allowed vide Court's order dated 8-11-2000 and 22-1-2001.

5. The following contentions have been raised on behalf of the petitioners.
It had been contended that the Parliament had no legislative competence to enact the Recovery of Debts Due to the Banks and Financial Institutions Act, 1993 (hereinafter referred to as Act No. 51 of 1993) and to make or enact provisions for Constitution of Debt Recovery Tribunals or Debt Recovery Appellate Tribunals under the Act and Rules and the provisions relating thereto are *ultra vires* of the Constitution. The learned counsel for the petitioners elaborating his contentions submitted that Article 323-A and Article 323-B of the Constitution, no doubt, confers power on the Parliament and the Legislature to enact and to provide for constitution and establishment of Tribunals by law as provided thereunder. The learned counsel contended that Article 323-A provides that the Parliament may provide for determination and adjudication of disputes relating to public services between the employees and the State and Union of India and it may constitute Tribunals for the purpose of determination and adjudication of disputes in service matters relating to Union of India and also relating to the services relating to the State. The learned counsel for the petitioner contended that the Article 323-A is confined in its scope to Constitution of Tribunals for adjudication, determination and trial of disputes and complaints in regard to or with respect to matters of employment i.e., services, public services of Union and State employees only. The enactment or the law which has been enacted by the Parliament for constitution or establishment of the Tribunals namely the Debt Recovery Tribunal or Debt Recovery Appellate Tribunal as established by Act No. 51/93 is not provided for or covered by Article 323-A of the Constitution. The learned counsel further contended that Article 323-B of the Constitution no doubt confers power on the Parliament as well as on the State Legislature i.e., on Appropriate Legislature to enact the law for and provide by the law for trial, determination and adjudication of disputes and complaints relating to specified matters by Tribunals and the Debt Recovery Tribunals constituted under the Act No. 51/1993 is not the one covered by Article 323-B as well. The learned counsel contended that Article 323-B enumerates the subject-matters with reference to which or for trial and adjudication of complaints and disputes in respect whereof the appropriate Legislature can provide for the Tribunal. The learned counsel contended that those matters are very specific, and specified and described under Article 323-B(2). The learned counsel contended that the Debt Recovery Tribunal constituted or the Debt Recovery Appellate Tribunal constituted under the provisions of the Act No. 51/1993 do not come under the purview of either Article 323-A or Article 323-B. The learned counsel for the petitioners further contended that when these Tribunals are not covered by any of these two articles and the parliament has no power to enact the Act No. 51/1993 and to provide for Tribunals thereunder. The learned counsel further contended that the legislative power of the Parliament and the State is provided in defined and described by Articles 245, 246, 247 and 248 and this power which has been conferred under Article 245 to 248 etc., is subject to the control by other provisions of the Constitution which may include Article 323-A or 323-B as well as is subject to the provisions of Article 37, 39-A and Article 50. The learned counsel contended that when power to constitute

Tribunals has been circumscribed by subjects in respect of which only the Tribunals can be constituted vide Article 323-A and 323-B, the power cannot be traced and cannot be taken to be there in either of the legislatures either under Article 248 or even under Entry 97 of List I nor can this constitution of Tribunals be covered by Entry 11-A of the Concurrent List of Seventh Schedule or any other entries of the Three List of Seventh Schedule. The learned counsel contended that subject-matter of Tribunals being provided under special provision with limitation being provided therein as to subjects specified will by necessary implications be deemed to exclude the general. The special subject of Tribunals having been covered by Article 323-A and 323-B, the intention appears to be that the Tribunals of no other nature can be constituted either by the Parliament or by the State Legislature nor can the power be traced elsewhere. The petitioner's counsel further contended that separation of executive and judiciary, and independence of judiciary is the basic structure of the Constitution. The Act like the present one, which have a tendency of bringing the judicial institutions or quasi-judicial institutions under the complete control of executive have the effect of marring and adversely effecting the judiciary and its independence, are not permissible to be enacted, and an Act to the extent of its being in breach or in violation of the doctrine of independence of judiciary and provisions of Article 37 and 50 of the Constitution, illegal, null, void and *ultra vires* of the Constitution. That the learned counsel for the petitioners in this connection invited the attention of the Court to the provisions of Sections 4, 7, 8, 9, 10, 15(2)(3) and 16 of the Act and to the provisions of Rules 3 and 5 of the Debt Recovery Tribunal (Procedure for Appointment as Presiding Officer of Tribunal Rules 1998, and to the provisions of Rules 3 and 5 of the Recovery of Appellate Tribunal (Procedure for Appointment of Presiding Officer of Appellate Tribunal) Rules 1998 and contended, it reveals that the Tribunals are so constituted as to interfere with an intention to mar and adversely effect the judicial independence and to keep them under the thumb or complete control of executive and these provisions run in abrogation of Article 37 and 50.

6. The petitioners' counsel further urged that under the Act No. 51 of 1993 and its rule, there is no right conferred to defendant to file or set up counter claim nor there is any provision for adjudication thereof as per Section 19 of the Act.

7. The learned counsel further challenged the provisions of the Act as hit by Article 14 of the Constitution as according to the learned counsel the defendants or debtors in case not covered by Act will have full trial and opportunity of hearing and to set up counter claim and get adjudication thereof but those cases which may be covered by the Act are going to be subjected to harsher treatment and will not be allowed to prosecute their case or defense with procedure and law applicable to matters tried by the Civil Courts. The learned counsel also invited the attention to Section 26 of the Act and urged that under normal procedure objection can be taken on pleas as to correctness and legality of execution case or amount sought to be realized by way of execution of decree but Section 26 of the present Act debars the judgment-debtor defendant from challenging the correctness of amount specified in the certificates as well as from challenging the validity of the certificate on any other ground even if it be a substantial one. As

such runs counter to and in abrogation concept of 'justice' mentioned in the preamble are *ultra vires* of the Constitution.

8. On behalf of the respondents, Sri. Devadas, learned standing counsel for the Central Government advanced the leading arguments on this aspect of the matter and whose arguments were followed and adopted by the other counsels appearing for respondent No. 4. Shri Devadas, learned standing counsel urged that even if, without conceding, the Act No. 51/1993 may not be covered by Article 323-A or 323-B, it cannot be said that the Act suffers from lack of legislative competence. Sri. Devadas in this connection invited the attention of the Court and placed reliance on Article 246 to 248 of the Constitution and the Entry 11-A of the Concurrent List as well as Entry 97 of the Union List of the Seventh Schedule. The learned standing counsel for the Central Government submitted that expression "administration of justice" is a term of wider connotation and under that head it was open to the Legislature or it is open to the Legislature and the Parliament, as it is contained in the Concurrent List, to enact the law constituting the Tribunals with respect to respective subjects coming under the concurrent List. The State could enact the law even providing for Tribunals with respect to subjects covered under State List or Concurrent List and the Parliament could establish the Tribunal under the central law with respect to subjects mentioned in the Union List or covered by the Concurrent List. The learned standing counsel Sri. Devadas further contended that recovery of loans advanced by the Bank and public institutions is a subject which is covered by Entry 43 and 45 of List I of Seventh Schedule. He submitted that the banking business consists of making advance loans, taking deposits and then in money matters disputes may arise, the question of their recovery may arise, that is ancillary to Banking and so when power is there to enact the laws relating to financial Corporations, the transactions, the trading corporations or the Bank and the disputes arising in course thereof and adjudication thereof being ancillary to the main business or item of 'Banking', the constitution of the Debt Recovery Tribunal and the Act No. 51 of 1993 may be covered by Entry 43 and 45. The learned standing counsel Sri. Devadas urged it may be covered even by Entry 95 of List I i.e., Union List whereunder the Parliament or the Legislature can exclude the jurisdiction of the Civil Court meaning thereby that it can confer the excluded jurisdiction to Tribunal or special Court created by law made by it. The learned standing counsel further contended that in any case, the Legislation in question may be covered under residuary provisions namely Articles 248 and Entry 97 of Union List of Seventh Schedule of the Constitution.

9. The learned standing counsel Sri. Devadas further contended that Article 323-A and 323-B do not have the effect of curtailing the residuary powers of the Parliament or the State Legislature to make the law constituting the Tribunals with respect to the subject matter covered by respective Lists of Seventh Schedule for determination and adjudication of disputes arising under those subjects because there is nothing in Article 323-A, 323-B of the Constitution expressly or by implication curtailing the said power to legislate.

10. Sri. Devadas further urged that these Tribunals have become the necessity and requirement of

the day to reduce the burden of cases from the Courts especially the High Courts, as well as it has become the necessity of the day for expeditious disposal of the matters. The learned counsel contended that the object of the Act *per se* reveals that it had been enacted with an object to provide a cheaper and expeditious remedy to the Banks and Financial Corporation for recovery of huge sums involved and blocked in litigations with debtors resulting in the blocking of the social welfare scheme for the benefit of poor, and the development work. Therefore it can be said to have been enacted with the object to fulfill the obligations under Articles 39 and 39A of the Constitution as well. Shri Devadas, learned standing counsel, further urged that the Debt Recovery Tribunals is to be one man Tribunal and is to consist of one person called Presiding Officer thereof and the only person qualified to be appointed is one who is a sitting or retired District Judge or one who is qualified to be appointed as a District Judge only and there is no question of intermingling of executive with judiciary either directly or indirectly in the Constitution of Debt Recovery Tribunal. The learned standing counsel further submitted that so far Debt Recovery Appellate Tribunal is concerned a perusal of Sections 8, 9, 10 of the Act reveals that there is no such thing which may said to result in the intermingling of executive with judiciary as the appellate Tribunal is also to consist of one person (Chairperson/Presiding Officer thereof) and no person can be appointed to be Chairperson or Presiding Officer thereof unless he fulfills the requirements or qualifications mentioned therein i.e., unless he is either a sitting or retired High Court Judge or he is qualified to be appointed as a High Court Judge, or unless he is or has been a Member, Indian Legal Service and has held a post in Grade I of the service for at least three years or unless he has held the office of Presiding Officer of Debt Recovery Tribunal for at least three years, so these provisions are not hit by Article 50 of the Constitution and further Article 50 is part of Chapter IV providing for Directive Principles of State Policy and those provisions are unenforceable and cannot and ought not to be taken note in judging the vires of the provisions of the Act and further as regards selection of Presiding Officers of Tribunal or appellate Tribunal, the selection committee, it is provided, is to consist of the Chief Justice of India or his nominee Judge of Supreme Court, as nominated by Hon'ble Chief Justice of India who is to be the Chairman of Committee and so there is complete protection against any executive fiat or control and in addition thereto the Law Secretary is there. The learned standing counsel invited my attention to Section 19 of the Act as amended by Ordinance No. 1 of 2000 and urged now there is provision whereunder it has been provided that defendant in such proceeding can set up counter claim and the Debt Recovery Tribunal has been empowered to decide it and if necessary can grant relief in regard thereof, as such in changed circumstances the arguments of petitioners' counsel based on original Section 19 may be rejected.

11. The learned counsel contended that so far as opportunity is concerned, whether proper notice had been served or not, whether the order had been passed without notice to the petitioners, these questions can well be agitated by the petitioners by way of an appeal to the Appellate Tribunal and alternative remedy of appeal before the Appellate Tribunal is available. Therefore this Court need not go into these questions. He submitted that the provisions of the Act cannot be said to be *ultra vires* and the learned counsels for both the parties have taken me through the provisions of

the Act.

12. I have applied my mind to the contentions raised by the learned counsels for the parties and the first question to be considered is, whether the Act is *intra vires* or *ultra vires* of the Constitution ? Whether the Legislature had competence to enact the Act No. 51 of 1993 i.e., Recovery of Debt Due to Banks and Financial Institution Act ?

13. It is one of the well settled principles of law that an enactment or provision of an enactment enacted by the Legislature or the Parliament starts with the basic presumption of constitutional validity in its favor. Every enactment is to be presumed *prima facie* to be constitutional, *intra vires* and the burden is initially on the petitioner or party challenging its constitutionality or vires to establish and show that it suffers from unconstitutionality and that it is *ultra vires* of constitution or it suffers from lack of power to enact the Act or it comes in conflict with the provisions of the Constitution. Before I proceed further, it will be appropriate to make reference to relevant provisions of the Constitution as well as the scheme of the Act No. 51 of 1993 its Rules and its provision (relevant provision).

14. The Recovery of Debts Due to Banks and Financial Institutions Act (Act No. 51 of 1993) as per preamble thereof has been enacted to provide for establishment of Tribunals for expeditious adjudication and recovery of debts due to Banks and Financial Institutions and for matters connected therewith or incidental thereto. That as per statement of objects and reasons it has been indicated that as Banks and Financial Institutions experienced considerable difficulties in the recovery of loans and enforcement of securities charged with them under the normally existing procedure for recovery of debts due to Banks and Financial Institutions and further as the significant portion of their funds is blocked in unproductive assets and keeping in view Sri. M. Narsimhan Committee and Shri S. Tiwari Committee report, suggesting setting up of a Special Tribunal for recovery of due of Banks and Financial Institutions with special powers following summary procedure in the matter of adjudication of disputes arising, the Act has been enacted by the Parliament. Under this Act, in addition to the provisions of the Act, rules such as the Debt Recovery Tribunal (Procedure) Rules 1993, the Debt Recovery Appellate Tribunal (Procedure) Rules 1994, the Debt Recovery Tribunal (Procedure for Appointment as Presiding Officer of Tribunal) Rules 1998 and the Debt Recovery Appellate Tribunal (Procedure for Appointment as Presiding Officer of the Appellate Tribunal) Rules 1998 have been framed. The relevant rules will be referred hereinafter as necessary.

15. Chapter I of the Act is preliminary chapter which provides for title of the Act, its extent, commencement and application. Under it, it extends to whole of India except the State of Jammu and Kashmir and it has been provided that it is to be deemed to have come into force on June 24, 1993. Sub-section (4) of Section 1 provides and reads as under :-

> "Section 1(4). The provision of this Act shall not apply where the amount of debt due to

any bank or financial institution or to a consortium banks or financial institution is less than ten lakh rupees or such other amount, being not less than one lakh rupees, as the Central Government may by notification specify."

Section 2 is the definition clause defining the various expressions used in the Act and provides that "Unless context otherwise requires", those expressions used in the Act as defined in the Act shall be taken to mean as defined. Chapter II of the Act bears title establishment of Tribunal and Appellate Tribunal. Section 3 of the Act provides for the establishment of Debt Recovery Tribunal by the Central Government, that by notification to be issued by it, the Central Government shall establish one or more Debt Recovery Tribunals which shall exercise the jurisdiction, powers and authority conferred on such Tribunals. It further provides that by the same notification the Central Government is required to define the territorial jurisdiction of each Tribunal. That Section 4 provides for composition of Tribunal and it provides that the Debt Recovery Tribunal shall consist of one member i.e., Presiding Officer thereof to be appointed by the Central Government vide sub-section (1) of Section 4. Section 5 of the Act provides for the qualification of the person to be appointed to be the Presiding Officer of Recovery Tribunal and it provides that no person shall be qualified to be appointed as the Presiding Officer of the Tribunal unless he is, or has been or is qualified to be a District Judge. Section 6 deals with the term of office of the Presiding Officer of the Tribunal. Section 7 of the Act deals with and provides for the staff of the Tribunal, terms of service etc., and provides that it shall consist of a Recovery Officer and other staff to be appointed by the Central Government. It is not clear from Section 7 nor does it provides for qualification of a person to be Recovery Officer. The Sections 8, 9 and 10 of the Act deal and provide for establishment of Debt Recovery Appellate Tribunal, it composition as well provide and specify the requisite qualifications for one being qualified to be appointed the Presiding Officer (Chairperson) of the Appellate Tribunal and Section 11 provides for the term of office of Chairperson/Presiding Officer of Appellate Tribunal to be five years or until he attains the age of sixty five years whichever is earlier.

Section 12 of the Act provides for the staff of Appellate Tribunal and provides that provision of Section 7 shall as far as possible will apply. It further provides that there shall not be any Recovery Officer. Section 13 deals with salary, allowances, other terms and conditions of service of Presiding Officer of Tribunal and Appellate Tribunal and provides the same are to be prescribed under and by rules to be framed. Section 14 deals with filling up of vacancies occurring for any reason other than temporary absence, in the offices of Presiding Officer of Tribunal or Chairperson/Presiding Officer of Appellate Tribunal and provides it shall be filled by appointed to be made by the Central Government. Section 15 deals with resignation and removal of Presiding Officer of the Tribunal and that of removal or resignation of Chairperson/Presiding Officer of Appellate Tribunal. It provides that the Presiding Officers can resign 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 till the expiration of three months period from the date of receipt of notice or until some one is duly appointed as his successor and such successor enters into the office or until the expiration of his term of office

whichever is earlier. It further provides that the Presiding Officer of the Tribunal or the Chairperson/Presiding Officer of Appellate Tribunal shall not be removed except by an order passed or made by the Central Government on the ground of proved misbehavior or incapacity, after an enquiry made in that regard in case of Presiding Officer of the Tribunal by a Judge of High Court and in case of the Chairperson/Presiding Officer of Appellate Tribunal by a Judge of Supreme Court. The Rules regarding and regulating the procedure for such an enquiry or investigation are to be made by the Central Government. Section 16 of the Act provides that the orders appointing a person to be the Presiding Officer of Tribunal or the Chairperson/Presiding Officer of Appellate Tribunal shall not be open to be called in question in any manner before any Court nor shall any act of Tribunal or Appellate Tribunal be open to challenge on the ground of any defect in or of Constitution of the Tribunal or Appellate Tribunal.

Chapter III of the Act deals with and provides for jurisdiction, power and authority of the Tribunals i.e., Recovery Tribunal and Appellate Tribunal vide Section 17 therein, while Section 18 creates a bar against the exercise of jurisdiction of Court, (except the Supreme Court, and High Court under Articles 226, 227 of the Constitution) in relation to matters specified under Section 17 of the Act i.e. matter in regard to which jurisdiction, power and authority is exercisable by the Tribunal. Chapter IV of the Act provides for procedure before Tribunals. Section 19 of the Act has now been amended by Section 9 of the President's Ordinance No. 1 of 2000 and new Section 19 has been substituted by the Section 9 of Ordinance which reads as under :-

> "Section 9 of the Ordinance. For Section 19 of the principal Act, the following section shall be substituted, namely.
> Application to the Tribunal.
>
> 19. (1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction –
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> (a) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or
> (b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or
> (c) the cause of action, wholly or in part, arise.
> (2) Where an bank or a financial institution, which has to recover its debt from any person, has filed an application to the Tribunal under sub-section (1) and against the same person another bank or financial institution also has a claim to recover its debt, then, the later bank or financial institution may join the applicant bank or financial institution at any stage of the proceedings, before the final order is passed, by making an application to that Tribunal.

(3) Every application under sub-section (1) or sub-section (2) shall be in such form and accompanied by such documents or other evidence and by such fee as may be prescribed;

Provided that the fee may be prescribed having regard to the amount of debt to be recovered :

Provided further that nothing contained in this sub-section relating to fee shall apply to cases transferred to be Tribunal under sub-section (1) of Section 31.

(4) On receipt of the application under sub-section (1) or sub-section (2), the Tribunal shall issue summons requiring the defendant to show cause within thirty days of the service of summons as to why the relief prayed for should not be granted.

(5) The defendant shall, at or before the first hearing or within such time as the Tribunal may permit, present a written statement of his defence.

(6) Where the defendant claims to set-off against the applicant's demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debt sought to be set-off.

(7) The written statement shall have the same effect as a plaint in a cross- suit so as to enable the Tribunal to pass a final order in respect both of the original claim and of the set-off.

(8) A defendant in an application may, in addition to his right of pleading a set-off under sub-section (6), set up, by way of counter-claim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant either before or after the filing of the application but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.

(9) A counter-claim under sub-section (8) shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.

(10) The applicant shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Tribunal.

(11) Where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent action, the applicant may, at any time before issues are settled in relation to the counter-claim, apply to the Tribunal for an order that such counter-claim may be excluded, and the Tribunal may, on the hearing of such application, make such order as it thinks fit.

(12) The Tribunal may make an interim order (whether by way of injunction or stay or attachment) against the defendant to debar him from transferring, alienating or otherwise dealing with, or disposing of, any property and asserts belonging to him without the prior permission of the Tribunal.

(13)(A) Where, at any stage of the proceedings, the Tribunal is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay or frustrate the execution of

any order for the recovery of debt that may be passed against him. -
(i) is about to dispose of the whole or any part of his property; or
(ii) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Tribunal; or
(iii) is likely to cause any damage or mischief to the property or affect its value by misuse or creating third party interest, the Tribunal may direct the defendant, within a time to be fixed by it, either to furnish security, in such sums as may be specified in the order, to produce and place at the disposal of the Tribunal, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the certificate for the recovery of debt, or to appear and show cause why he should not furnish security.
(B) Where the defendant fails to show cause why he should not furnish security or fails to furnish the security required, within the time fixed by the Tribunal, the Tribunal may order the attachment of the whole or such portion of the properties claimed by the applicant as the properties secured in his favor or otherwise owned by the defendant as appears sufficient to satisfy any certificate for the recovery of debt.
(14) The applicant shall, unless the Tribunal otherwise directs, specify the property required to be attached and the estimated value thereof.
(15) The Tribunal may also in the order direct the conditional attachment of the whole or any portion of the property specified under sub-section (14).
(16) If an order of attachment is made without complying with the provisions of sub-section (13), such attachment shall be void.
(17) In the case of disobedience of an order made by the Tribunal under sub- sections (12), (13) and (18) or breach of any of the terms on which the order was made, the Tribunal may order the properties of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Tribunal directs his release.
(18) Where it appears to the Tribunal to be just and convenient, the Tribunal may, by order -
(a) appoint a receiver of any property, whether before or after grant of certificate for recovery of debt;
(b) remove any person from the possession or custody of the property;
(c) commit the same to the possession, custody or management of the receiver;
(d) confer upon the receiver all such powers, as to bringing and defending suits in the Courts or filing and defending applications before the Tribunal and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Tribunal thinks fit; and
(e) appoint a Commissioner for preparation of an inventory of the properties of the defendant or for the sale thereof.
(19) Where a certificate of recovery is issued against a company registered under the

Companies Act, 1956, the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of Section 529-A of the Companies Act, 1956 and to pay the surplus, if any, to the Company.

(20) The Tribunal may, after giving the applicant and the defendant an opportunity of being heard, pass such interim or final order, including the order for payment of interest from the date on or before which payment of the amount is found due up to the date of realization or actual payment, on the application as it thinks fit to meet the ends of justice.

(21) The Tribunal shall send a copy of every order passed by it to the applicant and the defendant.

(22) the Presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.

(23) Where the Tribunal, which has issued a certificate of recovery, is satisfied that the property is situated within the local limits of the jurisdiction of two or more Tribunals, it may send the copies of the certificate of recovery for execution to such other Tribunals where the property is situated;

Provided that in a case where the Tribunal to which the certificate of recovery is sent for execution finds that it has no jurisdiction to comply with the certificate of recovery, it shall return the same to the Tribunal which has issued it.

(24) The application made to the Tribunal under sub-section (1) or sub-section (2) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the application finally within one hundred and eighty days from the date of receipt of the application.

(25) The Tribunal may make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."

Sections 20 and 21 of the Act provide for an appeal from the order of the Tribunal to Appellate Tribunal and provides that the appeal has to be filed by party aggrieved within forty five days from the date of receipt of the copy of order of Tribunal by him. It further provides that the appellate Tribunal may entertain the appeal even if it is time barred provided sufficient cause for not filing the appeal within time prescribed is established and shown to its (Appellate Tribunal's) satisfaction. It provides for appeal being disposed of after giving opportunities of hearing to the parties concerned and that appeal shall be disposed of expeditiously as far as possible and within six months from the date of receipt thereof. Section 21 of the Act provides that if appeal is to be filed by a defendant, in case before the Tribunal i.e. by a person on whom amount of debt is due, then such appeal shall not be entertained at his instance unless he deposits with Appellate Tribunal 75% (Seventy Five per cent) of amount, found and determined by Tribunal, to be due on him. Proviso to this section no doubt confer power on the Appellate Tribunal, for reasons to be recorded by it, to waive the condition of deposit or reduce the amount to be deposited under Section 21. Section 22 of the Act provides that the Tribunal and Appellate Tribunal are not

bound by the procedure prescribed by Civil Procedure Code. It provides that they shall be guided by principles of natural justice, and subject to the provision of the Act or Rules the Tribunal and Appellate Tribunal shall have power to regulate their own procedure including the place or places at which they shall have hearing. Sub-section (2) of Section 22 specifies matters and subjects in relation to which only while discharging their functions, the Tribunal shall exercise powers, as are vested in the Civil Court under Civil Procedure Code while trying the suit. These are referred in clause 'a' to 'h' of Section 22(2). Sub-section (3) of Section 22 provides that for the limited purposes of Section 196 of the Indian Penal Code the proceedings before the Tribunal or Appellate Tribunal are to be deemed to be 'judicial proceedings' within the meaning of Sections 193 and 228 of Indian Penal Code. It further provides that only for all the purposes of Section 195 and Chapter XXVI of Criminal Procedure Code only the Tribunal and Appellate Tribunal shall be deemed to be a Civil Court. Section 23 of the Act makes the provisions for legal representation of Banks etc., by themselves by Presenting Officers who may be lawyers i.e., legal practitioners, and for defendants to appear either in person or he may authorize one or more lawyer, or its officer to present its case before the Tribunal or Appellate Tribunal. Section 24 makes the provision of the Limitation Act applicable to an application under Section 19 made to Tribunal to the extent it is possible to apply 'as far as may be'. Chapter V of the Act makes provisions for the recovery of Debts as determined by the Tribunal and Section 25 prescribes the modes of recovery of debt which are namely,

(a) attachment and sale of the movable or immovable property of the defendant;
(b) arrest of the defendant and his detention in prison;
(c) appointing the receiver for the management of the movable or immovable properties of the defendant.

Section 26 of the Act declares and provides that it shall not be open to the defendant to dispute the correctness of amount specified in the certificate before the Recovery Officer, nor shall he be entitled to raise any objection to said certificate on any other ground challenging the certificate before the Recovery Officer. The Tribunal has however been given power to withdraw the certificate or to correct any clerical or arithmetical mistake in certificate.

Section 27 makes provision for stay of proceedings under certificate as well as for amendment or withdrawal of certificate and this power has been conferred on the Presiding Officer of the Tribunal. Section 28, without prejudice to the modes of recovery specified in Section 25, empowers the Recovery Officer to recover the amount of debt by any one or more of the modes provided under Section 28 of the Act.

Section 29 provides for application of the provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961) and the Income-tax (Certificate Proceedings) Rules, 1962 to the extent possible and apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under the Act instead of to the income-tax.

Section 30 very clearly provides that, notwithstanding anything contained in Section 29, an order made for recovery by the Recovery Officer in exercise of his powers under Sections 25 to 28

shall be deemed to have been made by the Tribunal and an appeal against such order shall lie to the Appellate Tribunal. Chapter VI contains miscellaneous provisions.

Section 31 provides for transfer of pending cases to the Tribunal in respect of which jurisdiction can be exercised by the Tribunal from the Civil Court to the Tribunal and further provides that provisions of sub-section (1) of Section 31 shall not apply to appeals pending before any Civil Court.

Section 32 of the Act provides and declares the Presiding Officer, the Recovery Officer and employees of a Tribunal and an Appellate Tribunal shall be deemed to be public servants for the purpose of Section 21 of the Indian Penal Code.

Section 33 of the Act provides for protection of action taken by the Central Government or by the Presiding Officer of a Tribunal or a Chairperson of the Appellate Tribunal or by Recovery Officer for anything done in good faith or intended to be done in pursuance of the Act or rules or order made there under. Section 34 of the Act gives an overriding effect to the provisions of the Act with an extent and subject to what is provided under sub-section (2) of Section 34. It reads as under :-

> "Section 34. Act to have overriding effect :-
> (1) Save as 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 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984) and the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986)."

Section 35 of the Act confers power on the Central Government to remove the difficulties arising in giving effect to the provisions of the Act and to pass such orders by being published by notifications and to make such provisions which are not to be inconsistent with the provisions of the Act, but appear to the Government to be necessary and expedient for removing the difficulty. The proviso to Section 35 very clearly provides that such order shall not be made after the expiry of three years' period from the date of commencement of the Act.
Section 36 confers power on the Central Government to frame rules to carry out the provisions of the Act and sub-section (2) very clearly provides that without prejudice to the generality of sub-section (1), such rules may provide for all or any of the matters mentioned in sub-section (2) and provides the procedure for those rules being laid before each House of Parliament in the manner specified in sub-section (3). Section 37 is the repealing and saving clause and thereby the Ordinance No. 25/93 has been repealed. But as per sub-section (2) of Section 37,

notwithstanding such repeal, anything done or action taken under ordinance, it has been provided, shall be deemed to have been done or taken under the corresponding provisions of the Act.

16. It will also be proper at this juncture to make reference to rules particularly to the Rules of 1998 namely Debt Recovery Tribunal (Procedure for Appointment as Presiding Officer of the Tribunal) Rules, 1998 and the Debt Recovery Appellate Tribunal (Procedure for Appointment as Presiding Officer of the Appellate Tribunal) Rules, 1998.

17. The provisions of the Debt Recovery Tribunal (Procedure for Appointment as Presiding Officer of the Tribunal) Rules, 1998 have to be quoted hereinafter.
Rule 1 deals with the title and commencement in both the Rules.
Rule 2 is a definition clause in both set of Rules.
Rule 3 is material. Rule 3 dealing with the appointment of the Presiding Officer of the Tribunal, reads as under :-

> "Rule 3. Method of appointment under sub-section (1) of Section 4 of the Act.-
> (1) For the purpose of appointment to the post of a Presiding Officer, there shall be a Selection Committee consisting of-
> (i) the Chief Justice of India or a Judge of the Supreme Court of India as nominated by the Chief Justice of India;
> (ii) the Secretary to the Government of India in the Ministry of Finance (Department of Economic Affairs);
> (iii) the Secretary to the Government of India in the Ministry of Law and Justice;
> (iv) the Governor of the Reserve Bank or the Deputy Governor of the Reserve Bank nominated by the Governor of the Reserve Bank;
> (v) Special Additional Secretary to the Government of India in the Ministry of Finance, Department of Economic Affairs (Banking Division), or an off-icer not below the rank of Joint Secretary in the Banking Division nominated by the Special Additional Secretary in the Banking Division.
> (2) The Chief Justice of India or the Judge of the Supreme Court shall be the Chairman of the Selection Committee.
> (3) Any three members of the Committee including the Chairman shall form a quorum for meeting of the Committee.
> (4) The Selection Committee may devise its own procedure for selecting a candidate for appointment as Presiding Officer.
> (5) The Selection Committee shall recommend persons for appointment as Presiding Officer from amongst the persons on the list of candidates prepared by the Ministry of Finance after inviting applications therefor by advertisement.
> (6) The Central Government shall on the basis of the recommendations of the Selection Committee make a list of persons selected for appointment as Presiding Officer and the

said list shall be valid for a period of two years. The appointment of a Presiding Officer shall be made from the list so prepared."

Rule 4 deals with the medical fitness.

Rule 5 of the Rules gives primacy and control in relation to question of interpretation of the rules, to the decision of the Government. Rule 5 reads as under :-

"Rule 5. Interpretation. -
If any question arises relating to the interpretation of these rules the same shall be referred to the Central Government for its decision."

18. Similarly, Rule 1 of the Debt Recovery Appellate Tribunal (Procedure for Appointment as Presiding Officer of the Appellate Tribunal) Rules, 1998, deals with short title and commencement while Rule 2 is the definition clause. Rule 3 of the Rules deals with the method of appointment of the Presiding Officer of Appellate Tribunal. It reads as under :-

"Rule 3. Method of appointment under Section 9 of the Act.
(1) For the purpose of appointment to the post of a Presiding Officer, there shall be a Selection Committee consisting of-
(i) the Chief Justice of India or a Judge of the Supreme Court of India as nominated by the Chief Justice of India;
(ii) the Secretary to the Government of India in the Ministry of Finance (Department of Economic Affairs);
(iii) the Secretary to the Government of India in the Ministry of Law and Justice;
(iv) the Governor of the Reserve Bank or the Deputy Governor of the Reserve Bank nominated by the Governor of the Reserve Bank;
(v) a Special Additional Secretary to the Government of India in the the Ministry of Finance, Department of Economic Affairs (Banking Division) or an officer not below the rank of Joint Secretary in the Banking Division nominated by the Special Additional Secretary in the Banking Division.
(2) The Chief Justice of India or the Judge of the Supreme Court shall be the Chairman of the Selection Committee.
(3) Any three members of the Committee including the Chairman shall form a quorum for meeting of the Committee.
(4) The Selection Committee may devise its own procedure for selecting a candidate for appointment as Presiding Officer.
(5) The Selection Committee shall recommend persons for appointment as Presiding Officer from amongst the persons on the list of candidates prepared by the Ministry of Finance after inviting applications therefor by advertisement.
(6) The Central Government shall on the basis of the recommendations of the Selection Committee make a list of persons selected for appointment as Presiding Officer and the

said list shall be valid for a period of two years. The appointment of a Presiding Officer shall be made from the list so prepared."

Rule 4 deals with medical fitness.
Rule 5 thereof reads as under :-

"Rule 5. Interpretation. -
If any question arises relating to the interpretation of these rules the same shall be referred to the Central Government for its decision."

19. A perusal of the scheme of the provisions relating to appointment of the Tribunal or the Appellate Tribunal or appointment of the Presiding Officer/Chairperson of the Appellate Tribunal appear to give the dominant position or primacy to the members of executive in the matter of appointment of the Presiding Officer of the Tribunal or of Chairperson/Presiding Officer of the Appellate Tribunal. It may further be mentioned that there is no provision either in the Act or in the Rules prescribing the qualifications for a person being appointed to be a Recovery Officer though he has been conferred wide powers under Section 28 of the Act. It is not the requirement under the Rules that he may be a judicial officer. But he has been conferred power to pass orders as indicated in Section 28. This matter may be discussed later on in detail when necessary.,

20. It will also be appropriate, before proceeding further, to take into consideration and to refer to the relevant provisions of the Constitution which are being referred now.
Article 323A of the Constitution reads as under :-

"Article 323-A. Administrative Tribunals.
(1) Parliament may, by law, provide for the adjudication or trial by administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.
(2) A law made under clause (1) may -
(a) provide for the establishment of an administrative Tribunal for the Union and a separate administrative Tribunal for each State or for two or more States;
(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said Tribunals;
(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said Tribunals;
(d) exclude the jurisdiction of all Courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);

(e) provide for the transfer to each such administrative Tribunal of any cases pending before any Court or other authority immediately before the establishment of such Tribunal as would have been within the jurisdiction of such Tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;
(f) repeal or amend any order made by the President under clause (3) of Article 371D;
(g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such Tribunals.
(3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force."

This Article appears to confer the power on the Parliament exclusively, that it may, by law, provide for adjudication and trial by administrative Tribunals of disputes and complaints regarding recruitment and conditions of service of persons appointed to the public service of the Union. It further confers power on the Parliament to constitute administrative Tribunals for the States or for the Union Territories or other authorities or corporations for trial and adjudication of disputes relating to recruitment of service and conditions of public service in connection with the State or of local authority or any other authority under their control within the territory of India. Clause (2) defines and provides, what may be provided by the law that may be made by the Parliament the subject covered by and under Article 323-A, Clause (1). Article 323-B provides for provisions being made by an appropriate legislature for trial and adjudication of disputes, complaints or offences in respect of all or any of the matters that have been specified by Clause (2) of Article 323-B with respect to which such legislature has power to make laws in the context of the subjects referred to in clause (2) of Article 323-B. It appears appropriate that Article 323-B be quoted as hereinafter.

"Article 323-B. Tribunals for other matters.
(1) The appropriate Legislature may, by law, provide for the adjudication or trial by Tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws.
(2) The matters referred to in clause (1) are the following, namely :-
(a) levy, assessment, collection and enforcement of any tax;
(b) foreign exchange, import and export across customs frontiers;
(c) industrial and labor disputes;
(d) land reforms by way of acquisition by the State of any estate as defined in Article 31-A 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 of 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 food-stuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;

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

(i) any matter incidental to any of the matters specified in sub-clauses (a) to (h).

(3) A law made under clause (1) may -

(a) provide for the establishment of a hierarchy of Tribunals;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said Tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said Tribunals;

(d) exclude the jurisdiction of all Courts except the jurisdiction of the Supreme Court under Article 136 with respect to all or any of the matters falling within the jurisdiction of the said Tribunals;

(e) provide for the transfer to each such Tribunal of any cases pending before any Court or any other authority immediately before the establishment of such Tribunal as would have been within the jurisdiction of such Tribunal, if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(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 causes 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."

The explanation to Article 323-B defines the expression "appropriate Legislature" to mean Parliament in relation to matters and also it means State Legislature, as the case may be, keeping in view the competence of the State Legislature or the Parliament to make law in the light of provisions of Articles 245/246 and the Lists to Seventh Schedule, if the subject referred to in clause (2) of Article 323 comes and appear to be covered by any of the entries of their respective list. It is to be taken note of that the power that had been conferred under either of these articles is exercisable, in case of Article 323-A, by the Parliament by the law to be made by it and in respect of matters referred to in Article 323-B, clause (2), by the appropriate Legislature i.e. either the Parliament or by the State Legislature, as the case may be, by enacting the law or by

making the law. These two provisions confer legislative power on the Parliament or the State Legislature, as the case may be, to enact the law under its legislative power or competence to enact the law. The list of the subjects given in Article 323-B, as also fairly conceded by the learned standing counsel as well, does not include in itself the question relating to disputes about the recovery of debts due to the Bank or Financial Corporation or public corporation.

21. Therefore, so far as the first contention of the petitioners' counsel is concerned that the enactment namely Act No. 51/1993 i.e., Recovery of Debts Due to Bank and Financial Institutions Act, 1993, which provides for constitution of Debt Recovery Tribunals or Debt Recovery Appellate Tribunals cannot be said to have been enacted under and in exercise of powers conferred under these two articles. The legislative power of the Parliament and the State is, no doubt, conferred thereon by the provisions of Article 245 onwards, but the subject matter of establishment of Tribunals for the purpose indicated in Article 323-A or 323-B only indicates the subject matters in respect of which the Parliament or the State Legislature, as the case may be, can enact the law. These provisions *per se* may be said to certain extent to be analogous or nearer to what may be called as entries in the list. The entries are contained in the List I or List II or List III these entries by themselves do not confer the power to legislate. These entries defines the field and the subjects on which the legislation can be made by the Parliament or the State Legislature, as the case may be, under and in exercise of powers under Article 245 read with Article 246 or Article 248. This being itself clear from the language of Articles 323-A and 323-B and matters or subjects mentioned in clause (2) of Article 323-B that the subject-matter of Act No. 51/1993 is not covered by either of the two articles. The next question to be considered is, whether it can be said to have been enacted by the Parliament in exercise of its legislative power under any other provision. Reliance has been placed on Articles 245, 246, 247 and 248 of the Constitution on behalf of the respondents. Article 245 provides for extent of law made by the Parliament or by the State Legislature. Article 245 reads as under :-

> "Article 245. Extent of laws made by Parliament and by the Legislatures of States.
> (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 extra-territorial operation."

Article 246 is also relevant for the purpose and it reads as under :-

> "Article 246. - Subject-matter of laws made by Parliament and by the Legislatures of States.
> (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Union List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in the Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

Article 247 further confers power on the Parliament and it provides that the Parliament may by law provide for the establishment of any additional Courts for the better administration of laws made by Parliament or of any existing laws with respect to a matter enumerated in the Union List. Article 248 of the Constitution defines the residuary legislative powers. It reads as under :-

"Article 248. Residuary powers of legislation.

(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

22. A conjoint reading of these articles *per se* reveals that power of the Parliament as well as of State Legislature, as indicated by these articles, is 'subject to the provision of the Constitution', and any law made by the Parliament or by the State Legislature, if it is in conflict with or in violation of any of the provisions of the Constitution, then to that extent, it may be held to be *ultra vires* or void. This question had come up for consideration about the legislative power and the constitution's amendment power in the context of Articles 368 before Their Lordships of the Supreme Court in the case of His *Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala, reported in*[1], as to

[1] AIR 1973 SC 1461

whether power of amendment of Constitution is a legislative power covered by Article 245 or it is a constitutional power distinct from the legislative power and in that context while dealing with the Golak Nath's case where it had been held to be legislative power and disagreeing with the view expressed in Golak Nath's case, Their Lordships held that the power to amend the constitution is a constitutional power under Article 368 and not legislative power and in that connection certain observations have been made in the judgment of the Hon'ble Judges constituting the Bench. Hon'ble Mr. Justice S. M. Sikri, the then Chief Justice, observes in paragraph 409 at page 1552 as under :-

"Similarly, the insertion of the words "in exercise of its constituent power" only serves to

exclude Article 248 and Entry 97, List I and emphasize that it is not ordinary legislative power that Parliament is exercising under Article 368 but legislative power of amending the Constitution."

Dealing with the question, what is the extent of constitutional power and also dealing with the question of extent of legislative power, it had been observed in paragraph No. 849 as under :-

"The opening words of Article 245 which deals with legislative power indicate that any law made under Article 246(1) read with List I of the Seventh Schedule is subject to the limitations on legislative power imposed by all the Articles in the Constitution. These limitations cannot be altered or amended in exercise of legislative power, if the power of amendment is said to be located in the Residuary Entry 97 in List I."

Similarly in paragraph No. 1238 of the same judgment it has been laid down and observed as under :-

"Moreover the actual wording of Article 245 which along with Articles 246 to 248 comes under the topic "Distribution of legislative powers" is important. Article 245 provides that Parliament may make laws for the whole or any part of India and the legislature of a State may make laws for the whole or any part of the State. Thus Article 245 confers the power to make laws on Parliament and the Legislatures of the State for the within the territory allocated to them. Having conferred the power, Articles 246 to 248 distribute the subject-matters of legislation in respect of which the Parliament and the State Legislatures have power to make the laws referred to in Article 245. But there is an important limitation on this power in the governing words with which Article 245 commences. It is that the power was subject to the provisions of the Constitution thereby lifting the Constitution above the 'laws'. That would mean that the Parliament and the State Legislatures may, indeed, make laws in respect of the areas and subject matters indicated, but the exercise must be 'subject to the provisions of the Constitution' which means that the power to make laws does not extend to making a law which contravenes or is inconsistent with any provision of the Constitution which is the Supreme Law of the land."

Their Lordships further laid down that a law made which is in contravention of, or which is inconsistent with the provisions of the Constitution would be impermissible and invalid under the governing words "subject to the provisions of this Constitution" in Article 245.
Again in paragraph No. 1361, Their Lordships observed as under :-

"It is no doubt true that Article 248 read with Item 97 of List I has a wide scope, but in spite of the width of its scope, it, cannot, in my opinion, include the power to amend the Constitution. The power to legislate contained in Article 245, 246 or 248 is subject to the provisions of the Constitution."

In paragraph No. 1586, pointing out the distinction between constitutional law and ordinary law, it has been observed as under :-

> "The vital distinction between constitutional law and ordinary law in a rigid Constitution lies in the criterion of the validity of the ordinary law. An ordinary law, when questioned, must be justified by reference to the higher law embodied in the Constitution, but in the case of a Constitution, its validity is, generally speaking, inherent and lies within itself."

In paragraph No. 1605, again emphasizing the difference between constitutional power of amendment of Constitution and the power of legislation the significance of the expression "subject to the provisions of this Constitution" has been indicated, and it will be appropriate to quote the following observations which were made in the context of Article 368 and Article 245.

> "Article 368 which is a constituent power. As I indicated, even if there was an entry for amending the Constitution in List I of the Seventh Schedule, that would not have enabled the Parliament to make any amendment of the Constitution because the opening words of Article 245 'subject to the provisions of this Constitution' would have presented an insuperable bar to amend any provision of the Constitution by the exercise of legislative power under the Constitution."

In paragraph No. 1886, Hon'ble Mr. Justice Dwivedi in Keshavananda's case observes as under :-

> "As the topic of amending the Constitution was foreseen by them, it could not have been put in the residuary power. Article 245(1) confers power on Parliament 'subject to the provisions of this Constitution.' Articles 246 and 248 are subject to Article 245. Accordingly, a law made under Article 248 and Entry 97 of List I cannot be inconsistent with any provision of the Constitution."

23. Thus a perusal of the decision of their Lordships of the Supreme Court Keshavanand a Bharathi's case as quoted above, clearly explains that the scope of the legislative powers that had been conferred either on the Parliament or on the State Legislature are subject to other provisions of the Constitution and any law made in contravention of any of the provisions of the Constitution to the extent it is in conflict may be void and unenforceable. No doubt, what to say of ordinary law, the Keshavananda Bharathi's case has also laid it down that even a constitutional amendment made in exercise of Article 368, that power cannot be exercised to so alter the Constitution as to affect the basic structure and basic feature of the Constitution which have been defined by Their Lordships of the Supreme Court as under. Hon'ble Mr. S. M. Sikri, the then Chief Justice, in paragraph No. 302, observes as under :-

> "The true position is that every provision of the Constitution can be amended provided in

the result the basic foundation and structure of the Constitution remains the same. The basic structure may be said to consist of the following features :

(1) Supremacy of the Constitution;

(2) Republican and Democratic forms of Government;

(3) Secular character of the Constitution;

(4) Separation of powers between the legislature, the executive and the judiciary;

(5) Federal character of the Constitution."

24. When under the constituent power of amendment the power cannot be exercised to amend the Constitution so as to affect the basic structure of the Constitution, this can be said with utmost force that by exercise of ordinary legislative power, no enactment can be made which may be said to run either in breach of the Constitution or which may affect the basic structure adversely. No law can be made which affects the basic structure of the Constitution nor can a law be made which may be said to be running in breach of or in contrary to the law under the provisions of the Constitution.

25. Keeping these principles in view the question has to be examined, whether this Act could be enacted in exercise of legislative powers ?

26. The legislative power, as mentioned earlier in brief, whether of the Parliament or of the State Legislature, is subject to other provisions of the Constitution, and the law made by the Parliament are made to operate throughout the territory of India while the laws made by the State Legislature may be operative and effective with reference to the State or part of the State.

27. The learned standing counsel laid much emphasis on Entry 11-A of List III of the VII Schedule i.e., the Concurrent List and also laid emphasis on Entry 95 of the Union List and contended that under Entry 11-A, the Parliament could enact the law creating or establishing the Tribunal in question and Act No. 51 of 1993. Entry 11-A of the Concurrent List reads and provides as under :-

"11-A. Administration of Justice; constitution and organization of all Courts, except the Supreme Court and the High Courts."

This Entry 11-A had been inserted in List III by the Constitution (42nd Amendment) Act, 1976, with effect from 3-11-1977. Earlier to that, there was Entry 3 in the State List and prior to its amendment, Entry 3 read as "administration of justice, constitution of and organization of all Courts, except the Supreme Court and High Court, officers and servants of the High Court, procedure in rent and revenue Courts, fees taken in all Courts except the Supreme Court". By an amendment introduced by 42nd Amendment, the expression of "administration of justice; constitution and organization of all Courts, except the Supreme Court and the High Courts" were deleted from Entry 3 of the State List and was introduced in List 3 of Seventh Schedule i.e.,

Concurrent List as Entry 11-A. The question is as to whether under this entry the Tribunals could be created or law could be enacted to establish the Tribunals. In the case of *R.M. Seshadri v. Second Addl. Income-tax Officer, Salaries Circle*[2], the question did arise before the Division Bench of Madras High Court in the context of the Income Tax Appellate Tribunal as to whether central legislature had power to levy Court fee as condition for preferring the appeal to the Appellate Tribunal under Section 33(3) of the Income-tax Act, by virtue of item No. 54 read with item No. 59 of list 1 of Schedule VII of the Government of India Act and whether for that purpose the Income Tax Appellate Tribunal could be taken to be a Court and the Division Bench observed as under (Para 6) :-

> "A definition of Court is to be found in Strout's Judicial Dictionary in which it is stated that "a Court is a place where justice is judiciary administered". The difficulty at the present juncture is created on account of the establishments of Administrative Tribunals which are vested with jurisdiction to decide certain matters matters of a quasi judicial nature. It is often a very difficult task to draw the line and distinguish a Court from an Administrative Tribunal exercising quasi judicial functions. Merely because the Administrative Tribunals have the trappings of a Court, they are not Courts in the sense of exercising judicial power (vide Halsbury's Laws of England, 2nd Edn. p. 535 and - (1931) AC. 275 at p. 297 (H)(1) A Tribunal is not necessarily a Court in the strict sense because it gives a final decision, (2) nor because it hears witnesses on oath, (3) nor because two or more contending parties appear before it, between whom it has to decide, (4) nor because it gives decisions which affect the rights of subjects, (6) nor because there is an appeal to a Court, (6) nor because it is a body to which a matter is referred by another body - 1931 AC 275 (H)."

Their Lordships further observed in paragraph 9 as under :-

> "9. This decision does not help the petitioner for it establishes that unless judicial power is vested, a Tribunal does not become a judicial Tribunal or Court, and that by the mere fact that a Tribunal is clothed with some of the judicial functions it does not attain the status of a Court. The decisions of Courts are arrived at usually by the application of objective standards which are fixed, i.e. in accordance with the principles of procedure and the mode of taking evidence in the manner laid down by the Evidence Act. No fixed standards are laid down in the case of administrative authorities and very often they are not bound to observe the judicial procedure, though on the principles of natural justice they must conform to a certain extent to the forms of judicial procedure. It is very often a difficult question to decide whether an administrative Tribunal or authority is acting quasi judicially or merely discharging its functions in its administrative capacity.
> 19. Whatever may be the precise definition of a Court it is not difficult to reach the conclusion that the Income-tax Appellate Tribunal as constituted under the Income-tax Act is not a "Court" ".

28. The provisions of the Constitution under Article 227 as well as Articles 323A and 323

[2] AIR 1954 Mad 806

B of the Constitution when are taken into consideration they clearly reveal that framers of the Constitution have taken the tribunals as distinct from the Court and maintained that there is distinction between the institutions known as tribunals and the Court. No doubt, the tribunals may have trapping of the Court but that distinction as separate institutions has been conceived and maintained in the Constitution. In the case of *State of A.P. v. K. Mohanlal*[3], Their Lordships held that the special Court consisting of sitting High Court judge, two retired District Judges and two revenue members to be the administrative tribunals. Therefore the expression 'Court' which is used in Entry 11A of the concurrent list cannot be said to include the tribunals. The expression administration of justice, no doubt, is a term of wider connotation, but it gets shadow and color from the use of the expression 'constitution of the Courts and organization of Courts' in the context of the administration of justice. Had the expression "administration of justice" included in itself "constitution and organization of tribunals", there would not have been any necessity for the Parliament to add Articles 323-A and 323-B in the Constitution, and Enty 11-A of Schedule III would have covered the question of constitution and organization of tribunals under the head of administration of justice, or the expression 'Court' could have been included the tribunal in itself then there would have been no need for the Parliament to introduce and add Articles 323-A and 323-B in the Constitution. No interpretation should be adopted which may render a provision otiose. Therefore, I am of the opinion that Entry 11-A cannot be deemed to include the subject matter of the Constitution and establishment of tribunals under Entry 11-A of 3rd List i.e. the concurrent list. Article 323-B when provides powers for the establishment of tribunals by law made in exercise of the legislative power and specifies the subject matters in relation to which the appropriate Legislature (i.e. the Parliament or the State Legislature as the case may be), may enact the law and by enactment may provide for the determination of disputes by tribunals in respect of those categories of matters as specified in clause (2) of Article 323-B of the Constitution. That Article 323-B would be rendered superfluous or would rendered otiose if it is taken the power to establish or create tribunals is exercisable under either Entry 11-A of Schedule III or under Entry 97 of List 1 i.e. the Union list. It is well settled principle of law of interpretation that an interpretation which may render a provision superfluous or otiose should be avoided.

29. Thus considered, by necessary implication, Article 323-B of the Constitution, when it confers power to provide for adjudication and trial by the tribunals of disputes etc. with respect to the matters specified in Clause (2) and then those matters are specified, it means the power can be exercised with respect to the constitution of the tribunal in respect of those specified matters only and not otherwise. The residuary power is also subject to the other provisions of the Constitution, then such power cannot be exercised to render Article 323-A or 323-B otiose or nugatory. The provisions of Articles 323-A and 323-B in particular specify all the matters in relation to which the tribunals can be constituted by the Parliament or the appropriate Legislature. It thus

circumscribes the scope of exercise of legislative power to legislate or enact law constituting the Tribunals. The exercise of residuary power cannot be had to render the provisions of Articles 323-A and 323-B illusory and otiose. This is the necessary implication that follows from the reading of Articles 323-A and 323-B as well as by the use of the expression 'subject to the provisions of this Constitution' used in Article 245. It is well setted principles of law that when the power has been given to do certain things and the law specifies the subject-

[3](1998)(5) SCC 468

matter in regard to which power may be exercised, then it cannot be exercised with respect of the matters not covered thereunder. I mean to say that when under Article 323-B it has been provided that appropriate Legislature may make the provision for the determination of the disputes etc., with respect to the subjects specified therein by the instrumentality of the tribunal, then the necessary implication follows with regard to no other subject matter that power can be exercised. Further, when power to Legislate is subject to the provisions of Article 323-B, then any law enacted creating the tribunal with respect to the matters other than the matters specified in Article 323-B may be said to run counter to and in conflict with Article 323- B. Any other interpretation may render the provisions of Article 323-B as otiose and superfluous. No such interpretation is to be adopted. No doubt, Article 39-A of the Constitution under the directive principles of the State policy provides and mandates the State that it shall secure that the operation of legal system promotes justice on the basis of equal opportunity and in particular to provide free legal aid by suitable legislation, or schemes or any other way to ensure that opportunities of securing justice are not denied to any citizen by reason of economic or other disability, but the present Act 51 of 1993 does fall within purview or the framework of Article 39-A.

30. The powers no doubt have been there to constitute special or additional courts under Article 247 of the Constitution for cheaper and easier justice being imparted to the weaker sections of the society and to protect them from being deprived of the opportunity of securing justice simply on the ground of economic and other disability. But the Legislature or Parliament had to act within the framework of its legislative powers under Article 247 of the Constitution. As mentioned earlier, the Parliament has been conferred with the power to establish the additional courts for the better administration of Laws made by the Parliament, or any existing laws with respect to the matter enumerated in the Union list, But that power is the power to establish additional courts and not Tribunals and the Act i.e., Act No. 51 of 1993 clearly declares the legislative intent and does create Tribunals not Court, neither Article 247 nor residuary Article can be applied to save its provisions.

31. The learned Standing Counsel in support of his contention that Arts 323-A and 323-B of the Constitution cannot be taken to create bar against constitution of Tribunal outside the two above noted Articles and that the Tribunal could be established by law under Entry 11-A of Concurrent List "Administration of Justice" as Tribunal, according to him, administers justice as well, made reference to the observation made in para 44 by the Delhi High Court in the case of *Delhi High Court Bar Association v. Union of India reported in*[4] and to the decision of Allahabad High Court in the case of *Mudit Entertainment Industries Private Limited, Allahabad v. Banaras State Bank*

*Ltd., Allahabad reported in*[5]

32. In the case of Mudit Entertainment Industries case, Allahabad High Court, at page 183, observed and laid down as under :-

> "(i) True it is that the Parliament could not take resort to Article 323-B to establish Tribunal on the subject other than those mentioned therein in absence of suitable amendment.
> (ii) The Parliament, however, was not prevented to exercise power under Article

[4] AIR 1995 Del 323(341)
[5] AIR 2000 All 181

> 245 read with Entry 46 coupled with 11A, of III List of VII Schedule to establish Tribunal, as provided under the Act 1993."

33. That as regards the 1st proposition referred to above, as laid down by Allahabad High Court, there cannot be any dispute or dispute or difference and I, with all due respects to the Hon'ble Judges of Allahabad High Court do agree with the 1st proposition. But so far as proportion No. (ii) is concerned, with all due respects to them, I beg to differ for reasons on the basis of which I have held that there is no legislative competence either in Parliament or State Legislature to establish any Tribunal on subject outside Article 323-A and Article 323-B and specially in view of language of Article 245 of the Constitution which uses the expression "subject to the provisions of this Constitution" and its interpretation given by the Hon'ble Supreme Court in Keshavananda Bharati's case, to which attention of the Judges of Allahabad High Court was not invited.

34. For the very same reasons, I am, with all due respects to Hon'ble Judges of Delhi High Court, unable to agree and follow the view expressed in para 44 of Delhi High Court Bar Association's case reported in AIR 1995 Delhi 323 (341) to the effect the Tribunal under the Act would have been established outside the matters mentioned in Article 323-B, under and within the framework of Entry 11A of Concurrent List to VII Schedule. The attention of the Hon'ble Judge of Delhi High Court also does not appear to have been invited to expression "subject to the provision of this Constitution" as has been with the Allahabad High Court, nor was invited to the decision of Supreme Court in Keshavananda Bharati's case reported in AIR 1973 Supreme Court 1461 and in S.S. Bola's case, AIR 1997 Supreme Court 3127.

35. That, as mentioned earlier, the legislative or law making power of the Parliament and State Legislature under Articles 245, 246, 248 of the Constitution is "subject to the provisions of the Constitution" as per Article 245 as per the said expression used in Article 245 and as interpreted by Hon'ble Supreme Court in Keshavananda Bharati's case reported in AIR 1973 Supreme Court 1461 and in ***S****.S. Bola v. B.D. Sardana reported in*[6]

In S.S. Bola's case, Their Lordships observed and lay it down in para 89 as under :-

> "The Legislature derives its authority measured by the Constituion, and they do not within the constitutional parameters, nothing more and nothing less. The competence of legislature, though flows from Articles 245, 246 and related Articles and legislative heads are derived from relevant Entries in respective Lists of the Seventh Schedule to the Constitution as their fountain source of power, it is subject to the other provisions of the Constitution. i.e., judicial review. So the constitutionality of the legislative and executive acts should be tested on the anvil of constitutionalism and the ingrained principles."

36. Thus considered, I am of the considered view that the Debt Recovery Tribunal and the Debt Recovery Appellate Tribunal could not be established under Act of 1993 by the Parliament or State Legislature and the provisions of the Act i.e., Sections 3, 4, 5, 6, 8, 9, 10, 11, 15, 16 of the Act 51 of 1993 and the Rules of Procedure for appointment of

[6] AIR 1997 SC 3127 (para 89 at page 3168)

Presiding Officer of Tribunal as of Chairperson/Presiding Officer of Appellate Tribunal suffer complete lack or want of legislative competence and as such, are *ultra vires* of Constitution and power.

37. That there is another important aspect and fact of this matter and problem :
The independence of Judiciary, the separation of powers of Legislature, Executive and Judiciary form and are one of the basic features of the Constitution. Article 50 of the Constitution, as such, as it ordains or mandates for separation of Judiciary and Executive forms part of the basic structure of the Constitution namely separation of powers of Executive, Legislature and Judiciary. Article 50 of the Constitution very cleary provides that the State shall take steps to separate the judiciary from the executive in the public service of the State. This is the mandate of Constitutional law. No doubt, as provided by Article 37 the provisions contained in Part IV are not enforceable by any Court of Law, but the principles, laid down therein 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." The directive principles may not be enforceable by a Court of law, but the mandate is that it is the duty of the State to apply those prnciples in making laws. Article 245 further provides that the legislative power shall be subject to the other provisions of the Constitution. If law is enacted by any of the Legislature/Parliament and that runs counter to or in abrogation of or comes in conflict with these principles viz., in particular such as Article 50 such law being in abrogation of or in conflcit with the provisions of Constitution can be said to be illegal, null and void, *ultra vires* and unenforceable. That Article 37, as mentioned earlier, mandates that "though provisions contained in Chapter IV may not be enforceable by issuance of writ nevertheless those provisions are fundamental to the governance of the country and they put an obligation that it shall be the duty of the State to apply these principles in making the law. When this is the mandate to the State to apply those principles in enacting the law, definitely and law made in abrogation of or in confilict with or in breach of the provisions of Chapter IV, may

be said to be in breach of the mandate of Article 37, and may be held to have been made beyond the scope of legislative power. In the matter of administration of justice and the judicial functioning, in order to maintain the high standards of independence of judiciary free from any executive control or free from executive interference, mandate under Article 50, is that State shall take steps to separate Judiciary from Executive in the public service of the State. What positive steps may be taken is a different matter, but any steps or any legislation having a negative approach, and if it results in giving an opportunity or occasion to the executive to have control over and to interfere or intermingle with Judiciary in the matter of exercise of judicial powers and functioning, and in the matters of administration of justice, such a law may be held to be void, as if the same has tendency to and do adversely affect the basic structure of Constitution, namely, the independence of Judiciary and the basic structure of separation of Judiciary from Executive. This view appears to have been taken by the Division Bench of the Delhi High Court in the case of the *Delhi High Court Bar Association v. Union of India*[7], it may be stated that the Delhi High Court has declared the Debt Recovery Act to be *ultra vires* as it its opinion and view, the provisions of the Act have the tendency of operating in a negative manner, or resulting in negation in the principles of independent judiciary. It will be appropriate at this juncture to quote the following observations of the Division Bench's decision of Delhi High Court in Paragraphs 46 and 47 and at para 50, where their

[7] AIR 1995 Del 323

Lordships observed as follows :

> "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 the 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 a civil Court, Mr. Arvind Kumar, learned counsel for the petitioner in C.W.P. No. 3277/94, said that all this was an antithesis 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 of a written contract. He also said that the provisions of the Act were also against Order 34 of the Act which deals with suits relating to mortgages of immovable property. 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 ***U.P. State Electricity Board v. Hari Shanker Jain, AIR 1979 Supreme Court 65***, 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 humane 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 Direcive Principles of State Policy. This command of the Constitution must be ever present in the minds of Judges when interepreting 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 backward and against the mandate of the Constitution. Parliament can legislative in terms of the Directive Principles, 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 Central Government. Principal banking transactions in 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 Govrnment. Indirectly, thus, it will be the Central Government which will be main litigant before the Tribunal and the list 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 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 intents and purposes of the Presiding Officers of the Tribunal or the Appellate Tribunal would appear to be the employees of the Central Government and under its jursdiction.

47. As noted above, independence of judiciary is one of the basic tenets 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 judicary. 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 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 on the ground merely of any defect in the Constitution of Tribunal or an Appellate Tribunal.
>
> 50. Civil Courts which are directly under the control and superintendence of the High Court trying bank suits, the suits of credit or 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 of 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 visualise 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 voild."

I find myself to be in full agreement with the above observations of Delhi High Court.

38. A perusal of Sections 4, 5, 10(b) and 15 and 16 of the Act and Rules 3 and 5 of the Rules relating to procedure for Appointment of Presiding Officer of Tribunal and Chairperson or Presiding Officer of Appellate Tribunal 1998 and the constitution of Selection Committee thereunder reveal clearly that there is an attempt to give complete control to executive over these Tribunals in the matter and the Executive has been given greater and effective control over the matter of appointment of the Presiding Officer of the Tribunal and the Chairperson of the Appellate Tribunal. Nothing is indicated in either Section 8 or Section 10 or the rules, that the appointment of the Presiding Officer of the Tribunal or Appellate Tribunal shall be made in consultation with the High Court or Supreme Court in case of appointment of Presiding Officer as Recovery Trinbunal, or Supreme/Apex Court, i.e., Supreme Court, i.e. in the matter of Chairperson/Presiding Officer of Appellate Tribunal. No doubt by Ordinance No. 1 of 2000, which has been brought to my notice, Section 17A, has been added to the Act which provides that, Chairperson of the Appellate Tribunal shall have general power of superintendence and control over Tribunals under his jurisdiction including power of appraising, the work and regarding annual confidential reports of the Presiding Officer of the Recovery Tribunal and power has been conferred on the Chairperson of the Appellate Tribunal to transfer a case from one Tribunal to the other Tribunal and the area of his jurisdiction..Section 16, provides that, no order of the Central Government appointing a person, as Presiding Officer of the Tribunal, or Appellate Tribunal, shall be called in question, in any manner, this further is indicative of

Executive Control.. Section 15(3) also indicates, that in case where, the Presiding Officer of the Tribunal or Appellate Tribunal has to be removed on charges of incapacity and misbehavior which may be leveled against him the power to regulate the procedure and investigation has to be regulated by Central Government and Central Government may make rules thereof. Thus, these provisions of the Act and Rules 3 and 5 of Rules of 1998 referred to above *per se* reveal the excessive Executive control over the Tribunal and its member, which may have tendency of mark the independence, of judiciary and affect the basic structure. No doubt, under the Constitution, members of judiciary, namely, Distirict Judge and sub-ordinate Judiciary, they have been put under the Supervisory and Administrative control of the High Court, only orders of major punishments of dismissal, removal or reduction in rank may be passed by the Governor, but that also on the recommendation of the High Court. But under this Act 51 of 1993, the Tribunals have been placed under the control of Executive i.e. the Central Government.

39. In view of the above, I find it just and proper to follow the view expressed by the Delhi High on this aspect in Delhi High Court Bar Association case referred to above and I hold that the Act is in abrogation to basic structure doctrine of independence of judiciary as well as violative of Articles 37 and 50 of the Constitution and as such as *ultra vires* of the provisions of the Constitution.

40. The learned counsel for the petitioner has further contended, that there is no power on the Tribunal to entertain the counter claim and the defendant has not been given right to file the counter-affidavit, that might have been so prior to amendment of Section 19 of the Act by Ordinance 1 of 2000 as contended by the learned Counsel for the petitioner, as under the original provision of Section 19 of the Act there is/has been no specific provision either conferring right to claim set off or plead a counter claim nor there has been a provision authorizing the Tribunal to adjudicate the issue or to grant any relief with reference to counter claim. Now under the Ordinance No. 1 of 2000, Section 19 of the Act, has been amended and the provision has been made providing for filing of the counter claim and adjudication thereof, it will be appropriate, at this juncture to refer to amended sub-sections (6) and (9) of Section 19 as amended by Section 9 of Ordinance 1 of 2000, which Ordinance says, in Section 19 of the Principal Act, following section shall be substituted:

> "Section 9 of the Ordinance No. 1. For Section 19 of the Principal Act, the following section shall be substituted.
>
> Section 19(6). Where the defendant claims to set off against the applicants demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debt sought to be set off.
>
> Section 19(9). -
>
> A counter claim under sub-section (8) shall have the same effect as a cross- suit so as to enable the Tribunal to pass a final order on the same application, both on the original

claim and on the counter-claim."

Sub-sections (6) to (9) of Section 19, as amended, furnish complete answer to the grievance made by the petitioner, and as such, the contention, that Act is bad for not making provision for set off or counter-claims and adjudication thereof is devoid of substance.

41. Learned Counsel for the petitioners raised a further contention, that the claims of the value of more than Rs. 10 lakhs, have been made cognizable by the Tribunal, which has been given authority and jurisdiction to deal/decide with the matter in a harsh manner and by way of affidavits and summary proceedings, with no right to cross-examine while with respect to claims below Rs. 10 lakhs, the defendants in that case, may have full and proper adjudication, detailed trial and opportunity of hearing. Learned Counsel contended, that the classification of cases as above based on valuation is irrational and it has no nexus with Article 39A and as such is discriminatory and hit by Article 14 of the Constitution.

42. No doubt, classification can be made by the legislature, the reason given by the legislature, is that the Tribunal has been preferred and constituted for expeditious disposal of claims by the Bank, where as huge sums of money stand blocked dumped in unproductive assets due to lengthy legal process of adjudication under normal course of litigation. In my opinion, the classification could be made, because country requires money and, if huge amounts are dumped in lengthy litigations that, may adversely affected the economy of the country and this could furnish rational basis for above classification of cases requiring expeditious trial and decision.

43. That classification on the basis of valuation has been followed even under Civil Courts' Act constituting various grade of Civil Courts' within pecuniary jurisdiction and Courts under Civil Procedure Code and Civil Courts Act have been classified as amongst the Civil Judges' Junior Division and Civil Judges Senior Division, the District Judges and the like on the basis of valuation it has been provided suits of what valuation is entertain able and triable by each of such courts. Earlier in some High Courts, original suits of the value of more than 5 lakhs were entertain able by the High Courts and even that is so as regards the Delhi High Court so that the matter may not linger for long and thereby possibility of expeditious decision, thereof could be provide a basis for classification.

44. In this view of the matter in my opinion, this can be said to be a valid classification, if it is found that enactment of the Act was and had been within the scope of power of Legislature or Parliament to so provide had it legislative competence to enact Act.

45. When I so observe, I find support for my above view from the decision of the Division Bench of the Allahabad High Court in the case of *M.E. Industries v. The Banaras State Bank Ltd*[8]*.,* in Paragraph 13, their Lordships considered this aspect and laid down the law, as under :

"13. Next, contention of the petitioners is that sub-section (4) of Section 1, of the Act of

1993 refers to the debt, which is not less than ten Lac. There is no basis for fixing particular amount. Intendment of the Legislative is to provide speedy remedy of recovery, then even the debts less than 10 Lac could also be included. Debtor of amount less than 10 Lac, in a civil proceeding can claim a decree of counter-claim against the Bank. However, the Debtor of more than 10 Lac is deprived of the same before the Tribunal. Provisions are therefore arbitrary and discriminatory. This challenge on behalf of the debtors-petitioners is totally unsustainable.

The Act 1993 has been introduced as seen from the statement to provide speedy remedy for recovery of debts, since there has been considerable difficulties experienced therefor. The Legislature, therefore, in its wisdom though it expedient to confine this special remedy for recovery of debts of more than ten Lac. For lesser amount the Bank and Financial Institutions can avail normal remedy of Civil Court. The demarcation. Thus, made could not be termed to be arbitrary. Besides this, said provisions further authorize the Central Government to specify such other amount, which shall, not be less than one lakh rupees. Having regard to the contingency debts less than ten Lac can also be included within the purview of the Tribunal."

46. Thus considered I am of the view that this above contention of the petitioners' Counsel is without substance and is as such rejected.

47. That on a consideration of the provisions of the Act in totality as the said provisions so interwoven and dependent of each other that it is not possible to separate illegal or *ultra vires* part of the Act from other so Entire Act No. 51 has to be and is held to be *ultra vires* of the Constitution as mentioned above.

48. As regards the contention on the merits of the order of the Recovery Tribunal, there is no need to express any opinion, as if I would have held the Act to be *intra vires*, I would have directed the petitioner to file appeal, but as mentioned earlier.

49. I find that and hold Act No. 51 of 1993, is *ultra vires* being one enacted beyond the scope of legislative power of the Parliament under Articles 245, 246 or 248, as well as it does beyond the scope of Article 323-A, 323-B which circumscribes the scope of Legislature on the subject relating to adjudication of matters by Tribunal referred to in Article 323-A and Article 323-B, I may make it clear that so far as service matters are
concerned, Article 323-A, has conferred the power on the Parliament exclusively to enact

[8] AIR 2000 All 181

or legislate, but so far as matters or disputes arising in matters other than service matters are concerned in respect thereof, the power has been conferred under Article 323-B of both Parliament as well as State Legislature, but only in respect of those specified matters, and that legislative power is further controlled as mentioned earlier by other Articles of the Constitution. The present Act, in my opinion as mentioned earlier is *ultra vires*, firstly on account of lack or

want of legislative competence of the Parliament for being enacted, and further it is *ultra vires* also, for the reason, that it has tendency of conferring executive control and keeping the Tribunals under the thumb of executive which is to be directly involved in dispute before Tribunal. It runs counter to the basic principles of the Constitution namely indepdence of Judiciary as well as being in derogation to the mandate of law, as contained in Article 37 read with Article 50 of the Constitution.

50. It is no doubt true that under Article 246 read with Entry 11-A of Third List of VII Schedule or under Article 247 of the Constitution additional Courts or Special Courts can be constituted, but not the Tribunals which are distinct from institution of courts referred to in Entry 11-A of Concurrent List or Article 247 as per scheme of the Constitution.

In view of the above, the writ petition petitions are allowed and it is held, that the order passed by the Tribunal is illegal, null and void as the Tribunal concerned is the creation of and under an Act i.e. Act No. 51/93 which is and has been held to be *ultra vires* of the Constitution. Therefore, that order impugned is null, void and it is hereby quashed. It is kept open to the Bank to proceed with the execution, no doubt, of the decree passed by the Civil Court in the suit by the process provided under the Civil Procedure Code.

Further, having held the Act to be unconstitutional and *ultra vires*, it becomes necessary to direct and observe, and is directed that cases pending before the Tribunals, subject to any interim order granted or being granted shall stand transferred to competent Principal Civil Courts (having territorial jurisdictions) and would be deemed to have been instituted before the said original competent Court on the date the same had been instituted by the Tribunals constituted under the Act and to proceed with from the stage of the transfer. This last directions shall not be operative for a period of eight weeks from the date of this order i.e., today.

Petition allowed.