SBI LAW EXPRESS

CHENNAI CIRCLE

FIRST ISSUE -JUNE 2023

LAW DEPARTMENT
LHO CHENNAI

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AN INITIATIVE OF LAW DEPARTMENT LHO CHENNAI

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SBI LAW EXPRESS

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SPECIAL MESSAGE FROM Mr. ANANT T. THORAT HEAD (LEGAL) & CGM, CORPORATE CENTRE, MUMBAI

It is with immense happiness and joy that I am penning down the preface for the first edition of SBI Law Express, an initiative by Law Department, Chennai Circle. This journal is a compilation of articles by Law Officers of the Circle, delving into different receptacles of law, appealing to the banking domain and is an earnest effort in providing a better insight to various nuances of law useful to Bankers in general.

The main objective of the magazine is to enlighten the employees of the Bank with legal concepts, nomenclatures, jargons and latest developments in banking laws, most of which are generally esoteric in its nature and complex to the understanding of the layman.

The articles featured in the journal explores into various contemporary and novel issues in banking realm including cybercrimes, delinquency in electronic payments, future of Insolvency and Bankruptcy Code, Scope of Judicial Review in Departmental Proceedings etc.

In this accomplishment, I would like to express my wholehearted appreciation to the entire team of Law Officers for their concerted efforts in bringing out this law journal. It is my sincere hope that this venture of the Law Department, LHO Chennai would realize its objective of advancing the legal awareness and acumen of the employees in the Bank.

Anant T. Thorat
Head (Legal) & CGM
Corporate Centre, Mumbai

FROM CGM'S DESK

SBI Law Express features a collection of well researched articles and court rulings touching upon constantly evolving events and having a solid bearing on banking law and general business. The literary part is handled in a simple and perceivable manner, so much so that it panders to the members of legal community and field functionaries in everyday banking alike without any distinction. The articles cover a wide range of topics that might immensely help the personnel in understanding the legal complexities.

We, as a nation, have gone through some tough and unprecedented ordeals with the foray and spread of Covid-19 virus, leading to drastic changes in the socio-economic landscape of the country. However, we did embrace the change and with much effort picked up the pieces and have had our economy and life back on its feet.

Change is the law of the nature. Nothing remains static and therefore we should always strive for the best and adapt ourselves to the changing times, technology and needs of the changing society. With the socio-economic changes, technological advancements and looming challenges, the Law and legal issues faced by the Banks have also evolved and no longer conventional.

Therefore, educating employees on the law is highly imperative so as to enable them to efficiently fulfil their responsibilities in day-to-day business and also to brace them up for future challenges. I sincerely hope that the readers will find this journal beneficial in day-to day activities.

Ravi Ranjan
Chief General Manager
LHO, Chennai

GENERAL MANAGERS – CHENNAI CIRCLE

SHRI. DEBASISH MISHRA
GENERAL MANAGER (NW-1)

SHRI. GOVIND NARAYAN GOYAL
GENERAL MANAGER (NW-2)

SHRI. NIRAJ KUMAR PANDA
GENERAL MANAGER (NW-3)

The success of an organization can be always traced back to the way it is managed as it is the management which steers the activities of an organization towards its goals. We, the Chennai Circle is strongly driven by the able guidance, strategy and superintendence of our General Managers for all 3 networks within the Circle.

It is always a matter of pride to note the achievements and highlights of the Chennai Circle. Our vibrant Circle has achieved many feats and laurels in the year that had just passed by, also crossing ₹ 3.50 Trillion Business mark and placing the Circle at ₹ 3.67 Trillion as of March'23. Key Highlights of the achievements of our Circle are:

- Pan India No. 1 Circle in terms of Total Advances (₹ 1.59 Trillion)
- Pan India No. 1 in SME advances at ₹30,239 Cr. Growth by ₹ 5,627 Cr. in FY'23.
- Circle has crossed 60K Cr. in REHBU, only the third Circle to do so.
- One of the 3 Circles in the country to report operating profit at ₹1,833 Cr.
- Reduction of NPA limits in Mar '23 by ₹342 Cr. in a year (gross NPA at ₹ 2080 Cr.)

The Law Department, Chennai Circle binds itself to extend the best of its legal support and guidance at the beck and call of the Management at all times.

CDO'S MESSAGE

I hold immense pride and joy in launching the 1st issue of SBI LAW EXPRESS, a creative effort of our Law Department, Chennai Circle. The first edition of the journal places a singular emphasis on legal provisions and latest legal developments relatable to the banking industry.

Considering the diverse nature and sprawling territory of subjects in banking law, the articles in this issue are handpicked to impart an insight into most conventional as well as novel topics of law. The Journal deals with various banking laws and concepts which serves a better understanding to the field functionaries of the Bank in their daily business.

As the sentinels of business at ground level the field functionaries of the Bank must be updated with the legal knowledge in their daily dealings with customers and any slip-up in their decisions/measures due to ignorance of law and/or extant Bank guidelines would impact the business as well as the reputation of the Bank. This brings the scenario when publications like this proves to be helpful to the operating functionaries in the Bank.

While I hope that this Journal will go a long way in nourishing the legal acumen and aptitude of our employees, moving forward it will aptly equip them with a strong base for handling complex legal issues that they might encounter in the day-to day business. We are also eager to be at the receiving end of reviews and feedbacks about the first issue of this journal.

Alok Kumar Chaturvedi
DGM & Circle Development Officer
LHO, Chennai

EDITOR'S NOTE

Yes, we have finally made it through. Words cannot explain my pleasure and contentment in the rollout of first edition of SBI LAW EXPRESS, a modest and inspiring endeavour of the law officers in Law Department, Chennai Circle. As we usher in a new year with new hopes and aspirations, this issue of SBI LAW EXPRESS carries interesting compilations of legal wisdom to keep you updated on the subject.

We have curated the articles keeping in mind the employees of the Bank and with the expectation of enriching their know-how in different aspects of banking law and related concepts.

As the saying goes, Teamwork Makes the Dream Work, I would take this space to appreciate the sincere and keen contributions from all the law officers in Chennai Circle towards making this journal into a reality. In this venture we have had the advantage of hearing from Shri. Alok Kumar Chaturvedi, Deputy General Manager & CDO of our LHO, Chennai Circle, his suggestions, comments, and constructive criticisms; many of which have been taken into due regard in the making of this journal.

With deep sense of gratitude, the Law Department, Chennai Circle promises to march ahead with new vigor, greater passion and profound quest for giving the best to its readers.

P. Annadurai
Assistant General Manager (Law)
LHO, Chennai

SECTION 25 OF THE PAYMENTS AND SETTLEMENT SYSTEMS ACT, 2007 – A SUCCOUR IN THE E-PAYMENT ERA

ARUN V KUMAR
DEPUTY MANAGER(LAW)
LHO CHENNAI

The Payments and Settlements Systems Act, 2007 is the Act which provides for regulation of payments systems in India and protection for 'Settlement' service.

Section 2(1)(i) of the Act defines a payment system as one which enables payment to be effected between a payer and beneficiary, involving clearing, payment or settlement service. It includes a system enabling credit card operations, debit card operations, money transfer operations etc.

The term 'settlement' might not sound familiar in the normal banking parlance, although having a significant role in the banking business. Settlement means the settlement of payment instructions and in terms of banking business includes settlement of standing instructions/e-mandate given by customer/borrower of the Bank to allow a specific amount to be debited from the account automatically.

In simplest of terms, Section 25 of PSS Act envisage the remedy available to the Bank when the customer/borrower violates the standing instruction given by them towards a payment obligation. The term 'payer' as used in the section relates to customer/borrower and 'beneficiary' relates to Bank.

Section 25 of the PSS Act

Section 25 of the Payment and Settlements Act, 2007 states that if an electronic transfer of funds cannot be completed due to insufficiency of fund or if the amount to be executed exceeds the payer's credit limit, then the payer is liable to be either imprisoned for 2 years or a fine equal to twice the amount of the electronic funds transfer, or both. An act of dishonour of electronic transfer of funds is an offence. The following are the ingredients to constitute an offence under Section 25:

a. Initiating an electronic fund transfer to pay any amount of money to discharge another person of any debt or liability by paying wholly or in part;

b. Initiating an electronic funds transfer not in accordance with relevant procedural guidelines issued by the system provider;

c. When a demand is made by the beneficiary for payment by issuing a notice in writing to the person initiating the electronic funds' transfer within 30 days of the receipt of notice by them from the bank concerned regarding the dishonour of the electronic funds' transfer; and further, when the beneficiary does not receive the payment by the person initiating the payment within 15 days of the receipt of the said notice.

A defaulter may be criminally prosecuted in such circumstances, subject to following the steps outlined in the PSS Act, 2007. To avoid the dishonour of electronic payment instructions, this Section was established.

Section 25 of PSS Act R/W Section 138 of Negotiable Instruments Act

It is important to note that Section 25(5) is similar in terms of application to Chapter XVII of the Negotiable Instruments Act 1881 (NI Act). Section 138 of NI Act expressly lays up rules for the punishment of dishonoured cheques. Cheques and electronic payments dishonoured in violation of either of these Sections are punishable by imprisonment, or fine, or both. The primary distinction between these two statutory provisions is that, in case of Section 25 of PSS Act, the dishonour, which is the subject matter of the offence, is of an electronic funds transfer as opposed to a presented cheque in Section 138 of NI Act.

Section 25 of PSS Act as a useful tool for recovery of money

The legislature has granted Section 25 of the PSS Act the authority to preserve and protect legitimate drawers who (due to neglect or any other reason) has failed to fulfil the obligations under electronic fund transfer. Section 25(1)(b) read with Section 25(1)(c) provides that the payee must intimate the payer through written notice and if the payer fails to make payment within 15 days from the date of receipt of said notice is liable to criminal prosecution. This provision imposes a stringent requirement on the person initiating the payment that if they do not comply with his obligation, they will be committing an offence and will be penalized. This affords precaution for the person initiating the payment and offers protection to the beneficiary. Protecting the interests of the beneficiary in making sure the payer would fulfil their obligations becomes critical as we move away from conventional banking channels and shift towards more technologically advanced alternatives.

Where to file a complaint under Section 25 of PSS Act ?

The incidents of dishonour of electronic fund transfer in banking business is commonplace, for instance, dishonour of electronic fund transfer initiated for adjustment of loan EMIs from an account on basis of e-mandate given by the borrower.

In such an event, as stipulated by Section 25, the Bank (beneficiary) has to send a legal notice to the borrower concerned demanding for payment of dishonoured amount within 30 days from the date of such dishonour. The borrower is expected to make payment of the dishonoured sum of money within 15 days of the receipt of legal notice of the Bank, failing which the Bank is statutorily empowered to file a complaint before the Metropolitan Magistrate/Judicial Magistrate Court against said dishonour implicating the borrower as accused.

Metropolitan Magistrate/Judicial Magistrate, as the case may be, shall scrutinize the complaint, and if the complaint is accompanied by affidavit, and documents, if any, are found to be in order, take cognizance of the complaint and direct issuance of summons, thus setting upon the criminal proceedings in motion.

Conclusion

The criminalization of electronic fund transfer ensures the prompt payment of any debt that the payer/borrower owes the payee/Bank. Section 25 of the PSS Act contains that strict provision when it comes to dishonour of electronic fund transfers. Section 25 clearly stipulates that before making a complaint under the Act, the payee/Bank must intimate the payer/borrower through a written notice seeking the payment of the dishonoured money, failing which the payer/borrower would be criminally prosecuted. Thus Section 25 of the PSS Act is both a precaution and protection hence making it an excellent, carefully thought- out mechanism for recovery of money.

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Where is the International Court of Justice Located?

Ans: The Peace Palace
The Hague (Netherlands)

POSITIVE PAY SYSTEM FOR CHEQUE TRUNCATION SYSTEM – A CRITICAL ANALYSIS

ARAVIND NAGARAJAN KUMAR
MANAGER (LAW)
AO TRICHY

INTRODUCTION

The Reserve Bank of India (RBI) with an intent to further augment customer safety in cheque payments and reduce instances of fraud occurring on account of tampering of cheque leaves vide its Circular DPSS.CO.RPPD. No. 309/04.07.005/2020-21 dated 25/09/2020, announced the introduction of Positive Pay System (PPS) for Cheque Truncation System (CTS) and directed its implementation w.e.f January 01, 2021. The concept of PPS involves a process of reconfirming key details of large value cheques. Under this process, the issuer of the cheque submits electronically, through channels like SMS, mobile app, internet banking, ATM, etc., certain minimum details of that cheque (like date, name of the beneficiary / payee, amount, etc.) to the drawee bank, details of which are cross checked with the presented cheque by CTS. Any discrepancy is flagged by CTS to the drawee bank and presenting bank, who would take redressal measures. Further, National Payments Corporation of India (NPCI) was also tasked with the responsibility to develop such PPS facility and make it available to participant banks and banks, in turn, were directed to enable such facility for all account holders issuing cheques for amounts of ₹50,000 and above. While availing of such PPS facility was left to the discretion of the account holders, the Banks were mandated under the said Circular to consider making the PPS facility mandatory in respect of cheques for amounts of ₹5,00,000 and above.

Further under the said Circular, Banks were also mandated to implement similar arrangements for cheques cleared/collected outside CTS as well and were also advised to create adequate awareness among their customers on features of PPS through SMS alerts, display in branches, ATMs as well as

through their website and internet banking.
It was also clarified in the said Circular that such directives are being issued by RBI under Section 10 (2) read with Section 18 of Payment and Settlement Systems Act, 2007 (Act 51 of 2007)

ANALYSIS

The introduction of such Positive Pay System and issuance of such directives thereof by RBI, appears to have led to more conundrums and interesting questions as regards effective implementation of such system, in view of the provisions of Sec. 31 and Sec. 138 of the Negotiable Instruments Act, 1881. Section 31 of the Negotiable Instruments Act, 1881(NI Act), deals with the liability of the drawee of a cheque and reads as below.

"31. Liability of drawee of cheque.—The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and , in default of such payment, must compensate the drawer for any loss or damage caused by such default."

Section 31 of the NI Act places unequivocal obligations on a banker to honour the cheques and pay the amounts, conferring corresponding right on the customer or depositor to recover compensation or damages, in the event of any breach of the obligation by the banker. The Hon'ble Supreme Court in the case of Canara Bank vs Canara Sales Corporation & Ors , had held that 'There is always an element of trust between the bank and its customer. The bank's business depends upon this trust. Whenever a cheque purporting to be by a customer is presented before a bank it carries a mandate to the bank to pay'. Accordingly, any violation of such mandate of law shall expose the drawee bank to claims for damages or compensation as contemplated under Section 31 of the NI Act for the loss suffered by the drawer (monetary loss suffered by the drawer as well as reputational loss).

Although, the aforesaid PPS directives have been issued by RBI under the powers conferred to it under Section 10 (2) read with Section 18 of Payment and Settlement Systems Act, 2007 (Act 51 of 2007) and Sec. 32 of the Payment and Settlement Systems Act, 2007, a conundrum still remains as to its overriding powers vis-à-vis the statutory obligation cast on a banker under Sec. 31 of the NI Act, particularly since RBI has directed Banks to consider making the PPS facility mandatory in respect of cheques for amounts of ₹5,00,000 and above.

1987 AIR 1603

Therefore, the resultant position which emerges is that Banks would indeed be unable to unilaterally make such PPS facility mandatory for its customers in respect of cheques for amounts of ₹5,00,000 and above and have to only leave the adoption of such PPS facility to the discretion of the Customers, though Banks have been mandated by RBI to consider making the PPS facility mandatory qua cheques for amounts of ₹5,00,000 and above.

The next important conundrum which arises out of such directives is even in an instance where such PPS facility has been voluntarily adopted by a Customer and a cheque drawn by him/her is returned by a Bank/Drawee for want of PPS instructions i.e reconfirmation of the cheque details by the drawer, whether such return would tantamount to "dishonour of cheque" in terms of Section 138 of the Negotiable Instruments Act, 1881, although sufficient funds are held in the drawer's account. The Answer in this regard appears to be affirmative, since the Hon'ble Supreme Court have time and again (i) in NEPC Micon Ltd.v. Magma Leasing Ltd (ii) Laxmi Dyechem v. State of Gujarat & Ors has held that the two contingencies envisaged under Sec. 138 of the NI Act ought to be interpreted strictly or literally and had held that the expression "amount of money is insufficient" appearing in Section 138 of the Negotiable Instruments Act, 1881 is 'genus' of which all other reasons of dishonour, for instance, "account closed", "payment stopped", "refer to the drawer" and the like are only the 'species'. Similarly, reasons such as "signature mismatch", "illegible signature", "image not found" are also species of the genus and hence, liable to action under Section 138 of the Negotiable Instruments Act. Therefore, the Hon'ble Court in such cases have duly taken note of situations and contingencies arising out of deliberate acts of omission or commission on the part of the drawers of the cheques which would inevitably result in the dishonour of the cheques issued by them.

Ergo, the resultant position emerges that if a customer though registers for PPS facility, but subsequently fails to provide details as required under the PPS facility or cannot be contacted in terms of the PPS facility or his/her actions are, in any other way, in violation of the PPS facility which the customer has voluntarily agreed to, having regard to the legislative intent behind Sec. 138 of the NI Act, such return of his/her cheque would definitely attract the offence under Sec. 138 of the NI Act.

(1999) 4 SCC 253
(2012) 13 SCC 375

CONCLUSION

The Positive Pay System and its directives thereof, although issued with an intent to further augment customer safety in cheque payments and reduce instances of fraud occurring on account of tampering of cheque leaves, may in turn create more problems for customers who voluntarily adopts such facility without properly understanding its intricacies, especially senior citizens, who aren't tech savvy or who have not adopted online banking channels either due to security concerns or due to unfamiliarity with electronic transaction methods. Hitherto, even a customer who had voluntarily adopted such facility, but subsequently fails to reconfirm the details of his/her cheque due to any unavoidable/force majeure situations like, Medical incapacity, Travel, Network problems etc, could still end up attracting an offence under Sec. 138 of the N.I Act. Therefore, the RBI ought to address these concerns.

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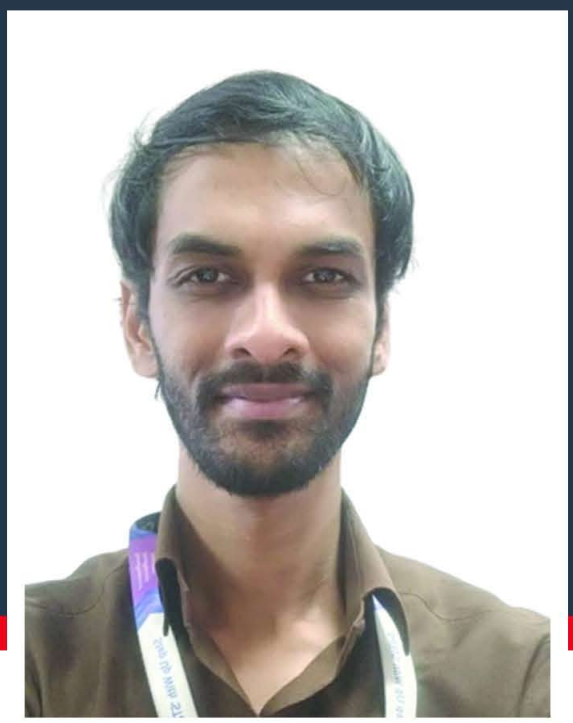
The Indian Constitution is the Largest in the World

With 448 articles divided into 25 parts, 12 schedules, and 105 amendments (till date), the Indian Constitution is the longest written constitution in the history of any sovereign state.



CYBERCRIME & BANKING

VIJAYA BHARAT V
DEPUTY MANAGER (LAW)
LHO CHENNAI

WHAT IS CYBERCRIME ?

Cybercrime is any criminal activity that involves a computer, networked device or a network. The term "Cybercrime" may be interpreted legally through some court decisions in India; nevertheless, no act or statute defines it.

CYBERCRIME IN BANKING

Since its inception cybercrime has been a menace and is considered to be one of the most pervasive crime that has a severe negative socio-economic consequence in the contemporary world. Every facet of modern life is influenced by technology, whereby technology has permeated every wake of an individual's life, making it easier for cybercriminals to perform their vile crimes.

Cybercrimes encompass a wide range of profit-driven criminal malefactions and misdeeds, including hacking, ransomware attacks, email & internet fraud, attempts to steal credit card and personal banking information.

Even though some cybercrimes aim to damage their victims, the vast majority are perpetrated for financial gain. Financial gain being the predominant motto backing commission of cybercrime, majority attack attempts have been observed targeting firms and businesses that handle significant amounts of money on a regular basis, such as Banks and other financial organisations, by taking advantage of lacunas in their IT security systems.

Global macroeconomic and geopolitical events have created a challenging and thought-provoking position for the banking sector. The banking sector is being obliged to examine its current procedures in order to better analyse and reduce risks. The spread of mobile networks and the advancement of information and technology (IT) have both led to the expansion of financial services to the general public. However, technological innovation and advancement has increased the potential of being a target of cyberattacks

while also making banking services more accessible and affordable.

The cyberattack on Cosmos Bank in Pune was one such incident of cybercrime in India which shook the entire nation to its core. The hackers breached into the Bank's ATM server and stole the information of several debit card holder causing monetary loss of ₹94.42 crore.

Although the technology which provides for better worldwide connectivity has expanded in recent decades serving millions of consumers, it goes without saying that the varied technologically driven tools have evidenced drawbacks, laying perfect foundation for certain cybercrimes to thrive, with the banking transactions being more susceptible to the attacks of cybercrime through various modes as discussed hereunder.

TYPES OF CYBERCRIME IN BANKING

ATM Malware: This is an intriguing piece of malware that was found in Banks and other financial institutions and is designed to withdraw money from ATMs. Cybercriminals have created and put into use malware that allows users to withdraw money directly from ATMs without having their debit cards compromised. The ATM software gives the miscreants the ability to determine how much money is in each cassette and control the machine to disburse it.

- Tyupkin Malware: Tyupkin is a piece of Malware that allows cyber criminals to empty cash machines via direct manipulation.

- Account-centric Cybercrime: These frauds, which are among the most prevalent, focus on stealing and hacking private information such an account number, password, one-time password, etc.

- Smishing: Smishing is a sort of fraud that employs text messages sent to mobile devices to entice victims into dialling a fake phone number, going to a fake website, or downloading harmful software.

- SOVA: SOVA is a malware distributed via smishing attacks like most of the Android banking Trojans that targets banking apps to steal personal information. This malware captures the credentials when users log into their net-banking apps and access bank accounts. Once installed, it is impossible to uninstall.

- Pharming: Pharming is a scam that cybercriminals use to install malicious code on personal computers or servers. Pharming attacks use malicious code that modifies IP address information to trick users into visiting bogus websites without their knowledge or permission. Users are requested to provide

personal information after being forwarded to these bogus websites, which is afterwards exploited to commit identity theft or financial fraud.

- Phishing: Phishing is a technique used to fool the victim into clicking on malicious links, which subsequently causes malware to be installed and freezes the machine. To obtain user information, such as login credentials, etc., phishing is frequently utilised.

- Identity Theft: When a data breach happens, hackers sell customer information to be used to obtain credit information without the customer's knowledge or agreement in order to borrow money and commit purchase offences.

- Vishing: Vishing is a type of cybercrime where the criminals attempt to obtain one's personal information over the phone, including Customer ID, Net Banking password, ATM PIN, OTP, Card expiration date, CVV, etc.

- Keylogging: Keylogging is a dishonest method that hackers use to follow the press of keys to on your computer keyboard and steal your personal information. The thieves get access to credit card numbers, usernames, passwords, and other financial data.

CYBERCRIME LEGISLATION IN INDIA

The Information Technology Act of 2000 was created by the Government to combat the threat posed by cybercriminals. Indian cyber law is governed by the Information Technology Act (IT Act), 2000. The IT Act is a comprehensive piece of legislation that deals with e-commerce, e-banking, and other aspects of technology. The primary objective of the Act is to give e-Commerce reliable legal protection by making it simpler for businesses to register real-time data with the Government. However, a number of changes were made as cyber attackers got more cunning and humans developed a propensity to exploit technology. The cyber legislation in India also specifies penalties and fines for cybercrime.

The Indian Penal Code has also been revised to include offences committed via the internet or other electronic media, including fraud, forgery, theft, and other related offences. All contemporary communication devices are now included in the IT Act's extended scope. Harsh punishments and fines imposed contemplating deterrence, with an objective to safeguard the e-governance, e-banking, and e-commerce sectors are highlighted in the IT Act and IPC.

Sections 43 and 66 of the IT Act penalise a person who commits data theft, transmits a virus into a system, hacks, destroys data, or denies an

authorised person access to the network with up to three years in jail or a fine of Rs. five lacs, or both. Simultaneously, data theft is penalised under Sections 378 and 424 of the IPC, with maximum sentences of three years in jail or a fine, or both, and two years in prison or a fine, or both. Denying access to an authorised user or causing damage to a computer system is punishable under Section 426 of the IPC by imprisonment for up to three months, a fine, or both.

ENDNOTE

Everyday various cybercrime incidents are being reported, evidencing increased pace of people's reliance on technology and proportionally the occurrence of cybercrime with the advancement of Technology. Steps needs to be taken at grassroot level, thereby imposing self-imposed duty on oneself to be wary, thereby safeguarding one's own banking environment. Although it requires the collaborative efforts of Governments, Internet or network providers, intermediaries like Banks and shopping sites, to control cybercrime, the most important role is that of the individual consumers who needs to be aware of every possible transaction susceptible to cybercrime and keep oneself safe from cyberattacks while also reaping benefits of the technological advancement.

BE WARY BE SAFE.

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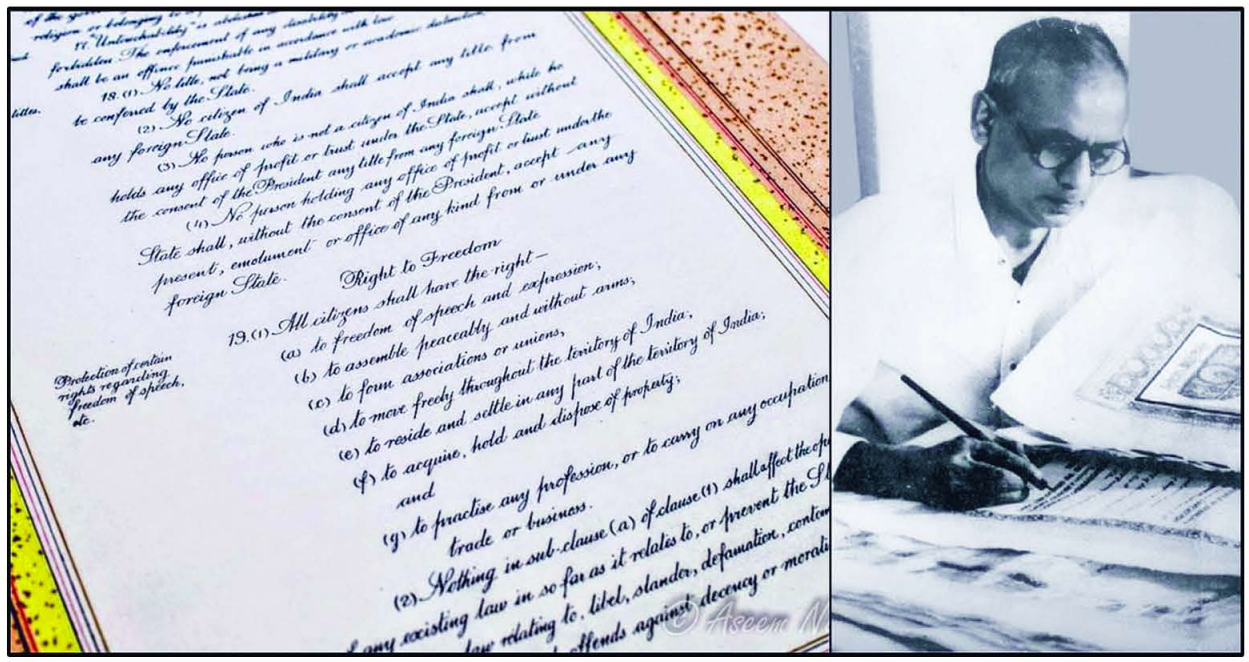
Who hand-wrote the Indian Constitution ?

Ans: Shri. Prem Behari Narain Raizada



WILL JUDICIAL INTERVENTIONS CAUSE ROADBLOCK FOR THE INSOLVENCY AND BANKRUPTCY CODE ? A QUICK RETROSPECTION INTO RECENT JUDGEMENT OF SUPREME COURT OF INDIA

MAHESH CHANDRAN R
ASSISTANT GENERAL MANAGER(LAW)
AO MADURAI

In spite of its existence for nearly six years Insolvency and Bankruptcy Code, 2016 (IBC) is still struggling to prove its effectiveness and accosmplish the legislative objectives, especially to conclude the resolution of insolvency and bankruptcy process in the envisaged timelines. Judicial interventions were always one of the contributing factors preventing the IBC from achieving its goal. For instance, indiscriminate and liberal extension of bounden timeframes through judicial orders.

In this excerpt we may briefly consider the impact of the recent judgment of the Hon'ble Supreme Court of India, which may not only cast drastic and detrimental effect on the financial creditors in general and the Banks in particular, but also raise serious questions about the very legislative purpose of IBC.

In Vidarbha Industries Power Ltd V. Axis Bank Ltd [(2022) 8 SCC 352] Hon'ble Supreme Court held that the National Company Law Tribunal (NCLT) has the discretion to admit or reject a valid initiation of the insolvency process by a financial creditor (FC) under Section 7 of the Insolvency and Bankruptcy Code (IBC).

Going by the literal interpretation of the words "may" and "shall" used in Section 7 (5) (a) compared with words used in Section 9 (5) (a) the Hon'ble Court concluded that it is only discretionally, whereby disrupted the well settled position of law that as per Section 7(5)(a) of the IBC it was a mandatory obligation on the Adjudicating Authority (AA) to admit an application of the Financial Creditor, under Section 7(2), once it was found that a Corporate Debtor had committed default in repayment of its dues to the Financial Creditor. Taking a paradigm shift, the Apex Court concluded that NCLT was required to apply its mind to relevant factors including the feasibility of initiation of corporate insolvency resolution process (CIRP).

On a whim the judgement nullified the consistent position that the AA can only check for compliance and adherence to the legal framework and should not interfere in the commercial wisdom of the creditors in the resolution process.

In other words, the said judgement has instilled uncertainties on admission of applications filed by the financial creditors by creating an unnecessary precedent by which even if the NCLT is satisfied that a financial debt exists and that the corporate debtor has defaulted, still it may refuse to admit the application for resolution if the corporate debtor resists the admission on any grounds.

It needs no elaboration that the corporate debtors are likely to misuse this precedent to the fullest and up to the hilt in order to resist admission of application filed by the financial creditors.

No doubt the said judgment shall create a far-reaching cascading effect since it may open a flood gate of litigations initiated by the Corporate Debtors, consequently delaying the admission of CIRP by the AA considerably. The scope of CIRP in various cases could also be extinguished at the very nascent stage whereby increasing the risk of deterioration of value of assets of the Corporate Debtor in reality will be a stark disadvantage to the financial creditors.

Unless the legal position held in the instant judgement is reversed or the IBC is amended suitably so as to provide specific and clear grounds on which an application for corporate insolvency against a corporate debtor should be admitted, the future of IBC as an effective tool for recovery will be at stake.

In State Tax Officer V. Rainbow Papers Ltd Hon'ble Supreme Court of India created a paradigm shift and held that statutory creditors who are granted a charge over the assets of a debtor company by virtue of a statute would also be considered secured creditors.

Hon'ble Supreme Court reversed the Order of National Company Law Appellate Tribunal (NCLAT) holding that the Government cannot claim first charge over the property of the Corporate Debtor, as Section 48 of the Gujarat Value Added Tax (GVAT) Act, 2003, which provides for first charge on the property of a dealer in respect of any amount payable by the dealer on account of tax, interest, penalty etc, cannot prevail over Section 53 of the IBC.

Going purely by the literal interpretation of the provisions Hon'ble Apex Court has held that Section 48 of the GVAT Act is not contrary to or inconsistent with Section 53 or any other provisions of the IBC. While concluding so Hon'ble court took a blind eye to the legislative intention of the IBC to reckon the debts owed to a secured creditor, which would also include the State under the GVAT Act, are to rank equally with other specified debts including debts on account of workman's dues for a period of 24 months preceding the liquidation commencement date, under Section 53(1)(b)(ii).

The court also stretched the issue to an unnecessary extent that any resolution plan that waives off such secured statutory dues altogether, would be bound to be rejected by the National Company Law Tribunal as resolution plans must necessarily contemplate the "dissipation of a debtor company's dues in a phased manner with uniform proportional reduction". The effect of the said judgement is that the financial creditors/banks cannot secure their own dues at the cost of statutory dues, or any other dues.

The said judgment has given a double blow to the IBC. Firstly, it undermined the fact that the definition of secured creditors under the IBC is restricted to creditors who are granted security as part of a "transaction". Secondly the fact that IBC being a special legislation does not place any requirement that all creditors, regardless of their position, would be paid out under a resolution plan, was totally ignored. The said decision is totally in contrast to the very object of the IBC.

In all probabilities the judgement may open a flood gate of claims as made by various government and statutory organisations challenging the resolution plans, even the approved resolution plans. No doubt, this may throw a spanner in the works of CIRP mechanism.

The said judgement also undermined the key policy principles enshrined in the provisions of the IBC that it abolishes the preference due to crown debts or government dues and expressly subordinates crown debts to financial debts, both secured and unsecured, and dues to employees and workmen. At this juncture it is pertinent to note that the recommendations of the Bankruptcy Law Reform Committee, which paved way for the IBC specifically placed on record the intention "to keep the right of the Central and State Government in the distribution waterfall in liquidation at a priority below the unsecured financial creditors in addition to all kinds of secured creditors." The conclusions made by the Committee that the subordination of crown debts would lead to greater economic growth and better revenues for the exchequer has been rebuffed by the said judgement.

Though this write up tries to point out the flip side of the pessimistic developments happened at the altar of the highest court in the country, the author is very optimistic that the views taken by the Apex Court in the above referred judgements will be upturned in near future.

Perhaps the future of IBC may hinge on such hope.

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SECURED CREDITORS DUES RANK SUPERIOR TO DUES OF CENTRAL GOVERNMENT/STATE GOVERNMENT/ OTHER LOCAL AUTHORITIES-POST AMENDMENT TO SARFAESI ACT AND RDB ACT

AARAMYA J S
MANAGER(LAW)
AO SALEM

SARFAESI Act or Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is an important enactment which regulates securitization and reconstruction of financial assets and enforcement of security interest. SARFAESI Act was formulated with intent to empower banks to recover Non-Performing Assets without the intervention of court. The Act allows banks and financial institutions to recover their dues exceeding one lakh rupees by proceeding against secured assets of the borrower/guarantor without the intervention of the court/tribunals.

Recovery of Debts Due to Banks & Financial Institutions Act renamed as Recovery of Debts and Bankruptcy Act (RDB Act), 1993 provides for establishment of Tribunals and Appellate Tribunals for adjudication and recovery of debts due to banks and financial institutions (where debts involved is Rs.20 Lakhs or more), insolvency resolution and bankruptcy of individuals and partnership firms and matters connected therewith.

Section 35 of the SARFAESI Act and Section 34(1) of the RDB Act gives overriding effect to the provisions of the said Acts, if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. Though such an overriding effect was given there had been always a conflict between Secured creditors who have initiated debt recovery proceedings under RDB Act or the SARFAESI Act and the State with respect to priority of debts due to them. Though Banks contended priority over the State's charge upholding non obstante clause contained under SARFAESI Act and RDB Act, Hon'ble Supreme Court and High Courts in several decisions had observed that statutory first charge created in favour of the State

shall have primacy over the right of the bank to recover its dues as there was no provision in either of the enactments by which first charge has been created in favour of banks, financial institutions or secured creditors and that the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitization Act give overriding effect to its provisions, only if there is anything inconsistent contained in any other law.

The Supreme Court in Central Bank of India v. State of Kerala after detailed analysis of the SARFAESI Act and DRT Act and the conflicting State Government revenue legislations providing for creation of first charge in favour of the State, laid down that the State Government revenue legislations providing for recovery of dues as arrears of land and the SARFAESI Act and DRT Act have different domains of operation and there is no overlap or conflict in the application of the laws and hence if there is any right over property created by Statute, it would prevail over the rights of the secured creditors.The decision also held that RDBFI Act and SARFAESI Act do not contain provisions giving priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations because Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the State and also that if Parliament intended to give such priority then provisions similar to those contained in the referred State/Central legislations would have been incorporated in the RDBFI Act and the SARFAESI Act and that the.

As above stated, prior to the amendment of SARFAESI Act and RDB Act, the position of law was that if State/Central law provides for priority to statutory dues that shall prevail over secured debts of the banks.

AMENDMENT TO SARFAESI ACT AND THE RECOVERY OF DEBTS AND BANKRUPTCY ACT, 1993.

Substantive amendments were made in the SARFAESI Act and RDB Act through Enforcement of Security Interest &Recovery of Debts Laws and Miscellaneous Provisions (Amendment Act), 2016 which upholds the right of the secured creditors and settled the position under law with respect to priority of secured creditors to recover its dues.

The two provisions which are vital in claiming priority of charges by the secured creditors are as follows:

Section 26E (Chapter IV-A) of the SARFAESI Act-Priority to Secured Creditors (with effect from 24.01.2020)

Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

Explanation-For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that code.

Section 31 B of the Recovery of Debts and Bankruptcy Act, 1993-Priority to Secured Creditors (with effect from 01.09.2016)

Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.

Explanation-For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code.

The express language of Section 26E of the SARFAESI Act and Section 31B of the Recovery of Debts and Bankruptcy Act, 1993 is sufficient to counteract the paramount charge created by State/Central Laws. The object of the amendment to the SARFAESI Act as well as RDB Act is the same i.e. to give priority to secured creditors in repayment of debts. However one pre-condition as per Section 26 E of the SARFAESI Act is registration of Security Interest with Central Registry.

As per Section 26 D of the SARFAESI Act (Inserted by Amendment Act, 2016) no secured creditor shall be entitled to exercise the rights of enforcement of securities unless the security interest created in its favour by the borrower has been registered with the Central Registry. Moreover Section 26 C of SARFAESI Act declares that a secured creditor who has registered the security interest or other creditor, who has registered the attachment order in its favour, shall have priority of claims over subsequent security interest created recovery of its dues against

over the property in question. i.e. if the tax authorities register attachment orders prior to registration of security interest by a secured creditor, the tax authorities shall have the priority on the basis of sequence of registration. Thus, registration of Security Interest with CERSAI is a mandatory pre-condition to enable the Secured Creditors to claim its priority.

POST AMENDMENT ACT, 2016

Subsequent to the amendment, the aforesaid provisions had been analysed in detail by Hon'ble High Court of Bombay in Jalgaon Janta Sahakari Bank Ltd. Vs. Joint Commissioner of Sales Tax. In this case the Hon'ble High Court of Bombay had dealt with various questions of law relating to priority of charge, upon insertion of Chapter IV-A in the SARFAESI Act and Section 31-B in the RDB Act.

The Court noted that both RDB Act and SARFAESI Act provides that the dues of a secured creditor will take precedence over debts and revenues, taxes, cesses and other rates payable not only to State Government and local authority but also to the Central Government. Thus, the rights of the first charge holders accorded by several state legislations would be subordinate to the right of the secured creditor. The Court also held that Section 26 D and 26E of the SARFAESI Act, read together, in effect provide a special manner in which a secured creditor may enforce its security interest in supersession of others, without the intervention of courts. That special manner, interalia, includes a prior CERSAI registration. It is also observed that unless the security interest is registered, neither can the borrower seek enforcement invoking the provisions of Chapter III of the SARFAESI Act nor does the question of priority in payment would arise without such registration. High Court has also held that being pre-2016 Amendment Act decision, Supreme Court's dictum in Central Bank of India is no longer relevant to hold that the secured creditors would not have first charge or priority in the matter of recovery of their dues.

Several decisions of other High Courts also more or less took the consistent view that introduction of Section 31 B of RDB Act and 26-E of the SARFAESI Act by 2016 Amending Act has crystalised the priority of charge in favour of secured creditors.

Conclusion

The object and reasons of the Amendment Act, 2016 reveals that the amendments to the SARFAESI Act as well the RDB Act was the same i.e to give priority to secured creditors in repayment of debts. By virtue of Section 26 E of the SARFAESI Act and Section 31B of the Recovery of Debts and Bankruptcy Act, the rights of secured creditors are given priority in

government dues payable to Central Government or State Government or Local Authority protecting the interest of banking sectors or financial institutions. The aforesaid sections are even introduced with 'notwithstanding' clause.

A priority in payment over all other dues is accorded to a secured creditor in enforcement of Security Interest, if it has a CERSAI registration, except in cases where proceedings are pending under the provisions of Insolvency and Bankruptcy Act, 2016. The pre-requisite of claiming benefit of Section 26 E of the SARFAESI Act is that the secured creditor has to register the security interest as provided under Chapter IV-A of the SARFAESI Act. Section 26 D also reveals that it has the effect of baring a secured creditor of its right of enforcement of security interest under SARFAESI Act in the absence of CERSAI registration.

The enabling provision in Section 26 E and disabling provision in Section 26 D, both begin with non-obstante clauses. The provisions of the SARFAESI Act envisages benefits to a secured creditor who is diligent and obtains CERSAI registration while deprives a secured creditor of even taking recourse of enforcement of security interest without requisite registration.

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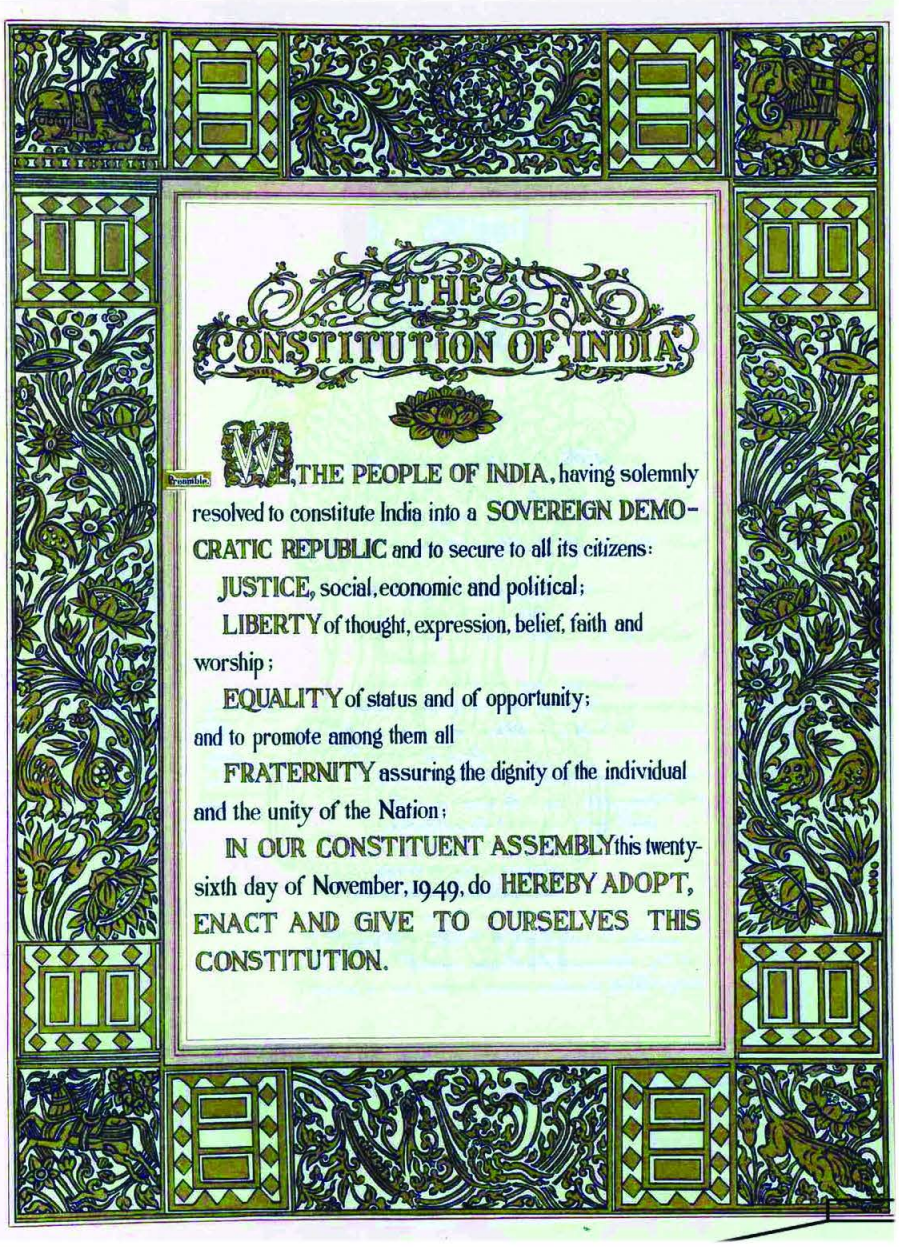
DO YOU KNOW?

The Parliament House Library maintains the original hand-written script of Indian Constitution in cases filled with helium gas for the purpose of preservation.

The Constitution of the Republic of India is available in 1,000 photolithographic reproductions.



SCOPE OF JUDICIAL REVIEW OF HIGH COURT UNDER ARTICLE 226 OF THE CONSTITUTION IN DEPARTMENTAL PROCEEDINGS

P. ANNADURAI
ASSISTANT GENERAL MANAGER(LAW)
LHO CHENNAI

The scope of judicial review by High Courts under Article 226 in departmental proceedings is very limited and High Court cannot assume the role of an Appellate Authority to review the evidences recorded in the Disciplinary Proceeding (DP) and arrive at an independent finding on the evidence. The Hon'ble Supreme Court in B.C. Chaturvedi vs. Union of India (UOI) and Ors. (1995 (6) SCC 749) analyzed the scope of such judicial review and held as follows:

"Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held that proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based

on no evidence. If the conclusion or finding be such as no reasonable person would have never reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case."

The above observation has been reiterated in many recent decisions of the Supreme Court which include Regional Manager, UCO Bank and Ors. vs. Krishna Kumar Bhardwaj (18.02.2022-SC):MANU/SC/0215 /2022; Regional Manager, UCO Bank and Ors. vs. Krishna Kumar Bhardwaj (18.02.2022-SC):MANU/SC/0215 /2022; and Union of India & others Vs. Subrata Nath (2022 SCC online 1617).

LEGAL MAXIMS

Audi alteram partem
- No person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

Actus non facit reum nisi mens sit rea.
- The act itself does not constitute guilt unless done with a guilty intent.

Ratio decidendi.
- Rationale of a particular judgment.

Obiter dictum.
- A passage in a judicial opinion which is not necessary for the decision of the case before the court.

Pendente lite.
- During the suit; while litigation continues.

Caveat emptor.
- Let the purchaser beware.

Prima facie.
- On the face of it.

Amicus curie.
- A friend of the court.

Donatio Mortis Causa.
- A gift in anticipation of death.

WORD SEARCH

R RAMYA
DEPUTY MANAGER(LAW)
CHENNAI NORTH

B	O	G	G	U	A	R	A	N	T	E	E	O	X	U	E	B	C
A	D	S	H	V	R	J	I	N	D	E	M	N	I	T	Y	K	O
N	A	G	R	E	E	M	E	N	T	K	M	H	V	D	F	N	N
K	X	C	O	N	F	I	D	E	N	T	I	A	L	I	T	Y	S
R	S	E	C	U	R	I	T	I	Z	A	T	I	O	N	M	D	U
U	K	Y	R	A	Z	M	O	P	G	T	C	H	E	Q	U	E	M
P	F	M	J	M	E	G	S	I	L	A	W	X	G	Y	F	P	E
T	L	X	C	O	N	T	R	A	C	T	V	U	Y	N	K	O	R
C	E	A	L	I	E	N	A	T	I	O	N	X	A	V	U	S	O
Y	I	P	A	Y	M	C	O	N	T	E	M	P	T	L	K	I	R
I	S	U	C	C	E	S	S	I	O	N	M	H	S	N	I	T	A
P	R	O	M	I	S	E	W	B	X	X	A	J	I	Y	O	B	J

1. Act of agreeing or of coming to a mutual arrangement is called _____.	2. The transfer of the ownership of property rights is called _____.
3. A legal process through which people or other entities who cannot repay debts to creditors may seek relief from some or all of their debts _____.	4. _____ is an instrument with an unconditional order, addressed to the Bank.
5. The state of keeping or being kept secret or private is called _____.	6. A _____ is a person who consumes a product or service.
7. An act of disobeying Court's order is called _____.	8. An agreement enforceable by law is called _____.
9. A _____ is a financial term that means money held at a Bank.	10. _____ is referred to pledge or agree to be responsible for another's debt or contractual performance if that other person does not pay or perform.
11. _____ means making compensation payments to one party by the other for the loss occurred.	12. A _____ is a rule made by an authority and that must be obeyed.
13. _____ is referred as Claim of intent to do something or refrain from doing something.	14. _____ is the process used to create asset-backed securities (ABS).
15. _____ is the orderly passage of power, assets, or other property from one entity to another.	

SOLUTIONS

1. AGREEMENT
2. ALIENATION
3. BANKRUPT
4. CHEQUE
5. CONFIDENTIALITY
6. CONSUMER
7. CONTEMPT
8. CONTRACT
9. DEPOSIT
10. GUARANTEE
11. INDEMNITY
12. LAW
13. PROMISE
14. SECURITIZATION
15. SUCCESSION

COURT ROOM HUMOUR

Courtroom Exchange chronicles those observations made by judges and lawyers in court that do not make it to official orders.

What, you are at the age for watching Chutti TV ? Madras High Court

The hearing in a PIL before the Madras High Court against sexual advertisements saw a lawyer inform the Court that such ads were also being broadcasted on the children's channel, Chutti TV.

The submission prompted Justice **N Kirubakaran** to comment, in a lighter vein,

"What, you are at the age for watching Chutti TV?" (loosely translated from Tamil)

"No milord, my son", the lawyer was prompt to respond

I have 12 balls and 40 runs. I'll try and be Hardik Pandya.
Senior Advocate Janak Dwarkadas

As the final hearings in the Tata sons v. Cyrus Mistry case carried on in the Supreme Court this evening, towards the fag end of the court's working hours Senior Advocate **Janak Dwarakdas** assured the Bench that he would try to keep his submissions within time.

"I have 12 balls and 40 runs. I'll try and be Hardik Pandya", the senior lawyer said, as he began his submissions for Mistry.

True to his promise, Dwarakdas concluded his submissions with enough time for Senior Advocate **Harish Salve** to commence his rejoinder submissions for TATA.

"Don't make 'Sathyanarayanan' into 'Sathyanarayana' and make him a Telugu man, he is a Tamil man."
Madras High Court

A lawyer's inadvertent slip of the tongue while pronouncing Justice M Sathyanarayanan's name during a hearing before another Bench sitting at Madurai prompted the Madras High Court to orally remark in a lighter vein,

"Don't make 'Sathyanarayanan' into 'Sathyanarayana' and make him a Telugu man, he is a Tamil man."

"I see him as an Indian", the lawyer quipped.

All the same, there are States, the High court responded, remarking further that "'N' makes a difference."

How will a writ of this Court work in Kenya ? You study and tell us.
Bombay High Court

The Bombay High Court Bench also had occasion to muse on the implications of Kenyan law today, when it was approached with a habeas corpus plea where a husband claimed that his wife had fled to Kenya with their minor child.

"How will a writ of this Court work in Kenya ? You study and tell us", the Court told the petitioner's counsel.

The Bench added,

"We don't want to discourage you, but you assist us on the law."

HIGH COURT OF JUDICATURE AT MADRAS

The High Court of Judicature at Madras is the highest court in the State of Tamil Nadu, which is one of the three High Courts in India that were established at the Presidency Towns (Madras, Bombay and Kolkata) by Letters Patent given by Her Majesty Queen Victoria on June 26, 1862. The three Presidency High Courts are still unique & distinguished in contemporary India, as constituted under a British Royal Charter. In addition to extra-ordinary original jurisdiction and special original jurisdiction, the Madras High Court possess appellate jurisdiction over the entire Courts in the State.

BENCH

The first appointed High Court Justices were Judges Holloway, Innes, and Morgan. Justice T. Muthuswamy Iyer served as the first Indian Judge at the High Court of Madras.

The High Court currently has 54 judges adjudicating upon civil, criminal, writ, testamentary, and admiralty jurisdiction, with Acting Chief Justice T. Raja at its helm.

The Regional bench of Madras High Court at Madurai has been operational since 2004. The Madurai Bench has territorial jurisdiction over 13 Districts. The Madurai Bench has the same jurisdiction as that of the Principal Bench in Chennai, with the exception of the original jurisdiction.

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1009605	VIJAYA BHARAT V	DEPUTY MANAGER (LAW)	LHO CHENNAI	7904501319
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6413439	G. POOVAZHAGI	CHIEF MANAGER (LAW)	CHENNAI SOUTH	8498061902
4568133	MAHESH CHANDRAN R	ASSISTANT GENERAL MANAGER (LAW)	MADURAI	9911343322
6796680	ARAVIND NAGARAJAN KUMAR	MANAGER (LAW)	TRICHY	9867124142
7655606	MARY SHYLAJA J	CHIEF MANAGER (LAW)	COIMBATORE	7738185213
7847734	AARAMYA J S	MANAGER (LAW)	SALEM	9449385230