

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 23.12.2009

+ **WP (C) 6531/2008**

COCHIN INTERNATIONAL AIRPORT LIMITED ... Petitioner

- Versus -

PRESIDING OFFICER , DRT AND OTHERS ... Respondents

Advocates who appeared in this case:-

For the Petitioner : Mr T.R. Andhyarujina, Sr Advocate with Mr I.S. Bakshi,
Mr S. Sukumara, Mr Anand Sukumar and Mr Showmik
Ghoshal and Mr Rajesh
For the Respondent No.2 : Mr Rajiv Nayyar, Sr Advocate with Mr Atul Sharma,
Mr Abhishek Aggarwal and Ms Usha Mahant
For the Respondent No.3 : Mr G. Prakash

CORAM:-

HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MS. JUSTICE VEENA BIRBAL

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J

1. The question that arises for consideration in this writ petition is:-

“Whether “debt”, as defined in Section 2(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as ‘the said Act’), would include a claim to share certificates ?

This question arises in the context of the maintainability of an application under Section 19 of the said Act before the Debts Recovery Tribunal (herein after referred to as 'DRT'), wherein the main relief sought by the respondent is the delivery / issuance of share certificates in respect of 5,20,00,000 shares at the face value of Rs 10 each and the benefits accrued on the shares. Briefly stated, the case of the petitioner is that such an application would not be maintainable under the said Act before the said tribunal for the simple reason that the relief of delivery / issuance of share certificates does not amount to recovery of any debt. The expression "debt" as defined in Section 2(g) of the said Act only refers to a liability inclusive of interest which is claimed as due from any person by a bank or a financial institution etc., during the course of any business activity undertaken by the bank or financial institution etc., under any law for the time being in force, in cash or otherwise, and which is legally recoverable on the date of the application. The contention of the petitioner is that the expression "in cash or otherwise" does not and cannot, by any stretch of imagination, include equity shares in a company. On the other hand, the stand of the respondent is that the word "otherwise" is wide enough to cover equity shares and, therefore, an application under Section 19 of the said Act was maintainable and, consequently, the finding of the DRT to that effect cannot be faulted.

2. The respondent had filed O.A. No.10/2006 on 21.04.2006 under Section 19 of the said Act wherein, it claimed, *inter alia*, the following reliefs:-

- a) To direct the defendant No.1 to deliver/issue share certificates of 520,00,000 shares of Rs. 10/- each (equivalent to 26% equity of the authorized capital of the defendant No.1 company) alongwith all other benefits accrued out of such shares since the said agreement for which the entire agreed consideration of Rs. 52 crores has been paid to the defendant No.1 company as on 31.12.2002 as per the Package Loan Agreement dated 07.03.2003;
- b) In alternative to pass a decree/certificate to the tune of Rs.780,00,00,000 (Rupees Seven Hundred and Eighty Crores Only) being the value of 520,00,000 shares (being 26% of the equity in defendant No.1) @ Rs.150/- as on 31.01.2006 plus dividend or any other right from the date of issue along with interest at the rate of SBI PLR with quarterly rest against the defendants;
- c) Pass a decree/certificate in favour of the applicant and against the defendant No.1 for an amount of Rs.2,28,64,566/- (Rupees Two Crores Twenty Eight Lakh Sixty Four Thousand Five Hundred and Sixty Six only) (being the balance amount plus interest and penal interest thereon till 28.02.2006) and interest thereon @ 11% p.a. with quarterly rests from 01.03.2006 till the date of payment and additional interest from 01.03.2006.”

3. Thereafter, the petitioner filed an application being IA No. 458/2006 in the said O.A. No.10/2006 before the DRT, wherein the petitioner took the pleas that: (a) the DRT at Delhi lacked territorial jurisdiction; (b) no cause of action had accrued to the respondent inasmuch as the entire loan amount stood paid on account of exercise of the right of foreclosure; and (c) the application under Section 19 of the said Act for delivery of shares was not maintainable inasmuch as the said relief did not amount to recovery of a debt as defined in Section 2(g) of the said Act. It was contended on the part of the petitioner that the respondent only had the right of recovery of the sum of Rs 175.07 crores as per the Package Loan Agreement of 07.03.2003 between the parties. Since the petitioner had tendered the entire balance due

on account of that loan transaction, the respondent had no subsisting right under the loan agreement.

4. The said application was dismissed by the DRT by its order dated 12.02.2008. All the contentions raised by the petitioner with regard to territorial jurisdiction, cause of action and maintainability were rejected. In this petition, the main ground urged before us is with regard to the scope and meaning of the word “debt” as defined in Section 2(g) of the said Act. In this regard, the DRT held as under:-

“17. The another ground taken by the defendant No.1 is that the amount claimed by the applicant FI does not fall within the definition of “debt” as provided in Section 2(g) of the RDDB 7 FI Act, 1993. In support of his contention, the Ld. Counsel has relied upon the judgment of Hon’ble Supreme Court in the matter of Allahabad Bank v. Canara Bank reported at (2000) 4 SCC 406.

18. I have also considered this submission advanced by the Ld. Counsel for defendant No.1 and also perused the provisions contained in Section 2(g) of the said Act. I have also gone through the citation relied upon by the Ld. Counsel for the defendants. Section 2(g) provides as under:-

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

19. From the bare perusal of this provision it is clear that any liability which is claimed as due from any person during the course of any business activity undertaken by it under any law for the time being in force, in cash or otherwise and subsisting, and legally recoverable on the date of the application, an

application for the recovery of the same is maintainable in Tribunal. In the present case from the perusal of the entire pleadings, it is clear that the financial assistance granted to the defendant amounts to “debt” as provided in the said provision and therefore, the application is maintainable.”

5. The said issue arises in the backdrop of the transactions between the two parties which got crystallised in what is known as the ‘Package Loan Agreement’ of 07.03.2003. The background of the Package Loan Agreement is that the petitioner had undertaken, *inter alia*, Scheme Nos. 12384 and 16144 for the establishment of the Cochin International Airport with financial assistance from the respondent. In respect of Scheme No.12384, the loan amount was Rs 98 crores and in respect of Scheme No.16144, the loan amount was Rs 31.18 crores. The two loan agreements were entered into on 29.03.1995 and 23.03.1999 respectively. Both the loans were guaranteed by the State Government of Kerala. The petitioner was not able to make the repayment of the principal, interest and additional interest as per the terms of the loan agreements executed for the said Scheme Nos. 12384 and 16144. As on 31.12.2002, a sum of Rs 175.07 crores was, admittedly, outstanding. With a view to amicably resolve the issue of repayment of the outstanding amount, a package was worked out and it was agreed that the outstanding amount of Rs 175.07 crores would be converted into a package loan. The petitioner and the respondent, therefore, agreed that the entire principal amount, interest, penal interest and additional interest representing the total amount due from the petitioner to the respondent be converted into a package loan for Rs 175.07 crores with interest at 11% per annum to be repaid from the quarter ending 31.03.2003

till 30.06.2011 in 34 quarterly installments. The said amount of Rs 175.07 crores was to be repaid as per the repayment schedule given in Annexure-I to the package loan agreement of 07.03.2003. The said Annexure-I reads as under:-

“Annexure-1

| Inst No | Repayment of Principal on or before | Amount (In Lakhs) |
|----------------|--|--------------------------|
| 1 | 31-Mar-03 | 7000.00 |
| 2 | 30-Jun-03 | 318.40 |
| 3 | 30-Sep-03 | 318.40 |
| 4 | 31-Dec-03 | 318.40 |
| 5 | 31-Mar -04 | 318.40 |
| 6 | 30-Jun-04 | 318.40 |
| 7 | 30-Sep-04 | 318.40 |
| 8 | 31-Dec-04 | 318.40 |
| 9 | 31-Mar-05 | 318.40 |
| 10 | 30-Jun-05 | 318.40 |
| 11 | 30-Sep-05 | 318.40 |
| 12 | 31-Dec-05 | 318.40 |
| 13 | 31-Mar-06 | 318.40 |
| 14 | 30-Jun-06 | 318.40 |
| 15 | 30-Sep-06 | 318.40 |
| 16 | 31-Dec-06 | 318.40 |
| 17 | 31-Mar-07 | 318.40 |
| 18 | 30-Jun-07 | 318.40 |
| 19 | 30-Sep-07 | 318.40 |
| 20 | 31-Dec-07 | 318.40 |
| 21 | 31-Mar-08 | 318.40 |
| 22 | 30-Jun-08 | 318.40 |
| 23 | 30-Sep-08 | 318.40 |
| 24 | 31-Dec-08 | 318.40 |
| 25 | 31-Mar-09 | 318.40 |
| 26 | 30-Jun-09 | 318.40 |
| 27 | 30-Sep-09 | 318.40 |
| 28 | 31-Dec-09 | 318.40 |
| 29 | 31-Mar-10 | 318.40 |
| 30 | 30-Jun-10 | 318.40 |
| 31 | 30-Sep-10 | 318.40 |
| 32 | 31-Dec-10 | 318.40 |
| 33 | 31-Mar-11 | 318.40 |
| 34 | 30-Jun-11 | 318.40 |
| | Total | 17507.00 |

6. Clause 1 of the Package Loan Agreement made it clear that the said package would be effective on payment of Rs 70 crores by 31.03.2003, being the first installment alongwith interest @ 11% from 01.01.2003. Clause 3 of the Package Loan Agreement, to the extent relevant, is reproduced hereinbelow:-

“3. The borrower shall submit approval of the Package Loan by Government of Kerala and fulfil the following conditions:

- i) The borrower / Government of Kerala shall agree to allot 26% of the equity of borrower to HUDCO on at par value.
- ii) The amount of Rs. 52 crores being 26% of equity on allotment and on approval of Govt. would be adjusted from the overall liability of the borrower first towards interest, if any, and balance towards principal.

xxxx xxxx xxxx xxxx”

7. After the execution of the Package Loan Agreement, the petitioner remitted a sum of Rs 120 crores to the respondent in March 2003 itself. According to the petitioner, a sum of Rs 52 crores was earmarked by it towards the proposed equity participation by HUDCO in the share capital of the petitioner in terms of clause 3 of the Package Loan Agreement. Consequently, according to the petitioner, as on March 2003 itself, only an amount of Rs 3.07 crores was outstanding towards the total dues of 175.07 crores and was chargeable to interest at 11% in terms of the said agreement. It has also been contended by the petitioner that the payment of a sum of Rs 120 crores in March, 2003 itself represented the payment of the first installment of Rs 70 crores as also the value of the next 16 quarterly

installments of Rs 3.184 crores each. In other words, by the payment of Rs 120 crores, in March, 2003 itself, the Package Loan of Rs 175.07 crores stood repaid upto the 17th installment, which, as per the repayment schedule, was payable by 31.03.2007. There is some controversy with regard to whether the equity participation contemplated in clause 3 of the Package Loan Agreement had the approval of the Government of Kerala or not. But, for the purposes of this writ petition, we need not go into that controversy. According to the petitioner, because HUDCO failed to comply with the statutory requirements with regard to obtaining requisite permissions and clearances from the Government / Governmental agencies, by a letter dated 16.09.2004, it informed HUDCO that the offer of the petitioner for conversion of part of the loan amount to the extent of Rs 52 crores into equity stood withdrawn. Consequently, the petitioner, tendered an amount of Rs 63,49,00,508/- to HUDCO in the following manner:-

- 1) Demand Draft No. 112472 dated 16.09.2004 for Rs 30,00,00,000/- drawn on the Union Bank of India, Service Branch, New Delhi;
- 2) Cheque No. 425111 dated 16.09.2004 for Rs 33,49,00,508/- drawn on Punjab National Bank.

The said amount of Rs 63,49,00,508/- was towards settlement of the outstanding loan with interest. HUDCO, however, declined to accept the same and returned the said draft and cheque by their letter dated 23.09.2004. According to the petitioner, on tendering the total amount of approximately Rs 63.49 crores by the petitioner on 16.09.2004, the entire liability of the petitioner vis-à-vis HUDCO stood discharged, though the petitioner had

ample time upto June 2011 to repay the entire outstanding loan in terms of the Package Loan Agreement. The same was repaid prior to the due dates in exercise of the petitioner's right to foreclose the loan in terms of clause 12 of the Package Loan Agreement which reads as under:-

“12. The Borrower will have a right to foreclose the loan and HUDCO may accept the same with prescribed prepayment charges.”

8. It is, thereafter, that HUDCO filed the petition under Section 19 of the said Act before the DRT claiming, *inter alia*, delivery / issuance of the share certificates in respect of 520,00,000 shares in the petitioner company. As mentioned above, the petitioner filed IA No. 458/2006 challenging the maintainability of such an application on the part of HUDCO. The said application came to be dismissed, as mentioned above, by the order dated 12.02.2008 passed by the DRT. During the pendency of the said application, the petitioner had deposited an amount of Rs 73,31,49,763/- through a Demand Draft bearing No. 383217 dated 23.06.2006 before the DRT representing the entire balance amount plus interest upto 27.06.2006.

9. Mr Andhyarujina, the learned senior counsel appearing on behalf of the petitioner, contended that the DRT had no jurisdiction to entertain the claim of HUDCO for delivery / issuance of share certificates and the impugned order has been passed upon a complete 'non-application' of the law. According to him, the Tribunal had jurisdiction only in respect of "recovery of debts" due to banks and financial institutions. The prayer made

before the Tribunal was one for specific performance by way of allotment and purchase of shares of the aggregated face value of Rs 52 crores. It was contended that even if it were assumed, without admitting of course, that the petitioner was under any liability to allot the said shares to HUDCO, the said liability is not one which is covered in the expression “in cash or otherwise” as appearing in Section 2(g) of the said Act. On the contrary, the reliefs claimed by HUDCO are typical reliefs which are claimed under Sections 3, 10 and 21 of the Specific Relief Act, 1963.

10. He also contended that the said Act was for recovery of “money” claims of the banks and financial institutions. Referring to the Statement of Objects and Reasons of the said Act, he submitted that the entire focus of the Act was on the difficulty being faced by banks and the financial institutions in recovering “loans and enforcement of securities charged with them”. He also referred to Section 1(4) of the said Act wherein jurisdiction of the Tribunal is in terms of debts fixed in monetary value. Sections 19(6), (7) and (8) also refer to set-off and counter-claims in money terms. Section 19(19) and (22) are provisions for issuance of certificates of recovery and clearly have reference to money payments. Section 19(20) refers to payment of interest “on the amount” found due. Section 21 refers to the deposit of the amount of debt, on filing an appeal. Chapter V, Sections 28(2) and (3) and Section 29 were also referred to in this context. According to Mr Andhyarujina, the entire scheme of the Act, as indicated by the aforesaid provisions, clearly shows that the “recovery of debt” bears reference to

money claims and enforcement of securities. There are no provisions in the said Act for ordering delivery of goods, articles and movables by way of specific performance.

11. It was then contended by Mr Andhyarujina that shares in a company are in the nature of goods as defined under Section 2(7) of the Sale of Goods Act, 1930. The word “debt” did not include any liability for delivery of goods. Therefore, the reliefs sought by HUDCO before the Tribunal for delivery / issuance of share certificates would be beyond the jurisdiction of the Tribunal which is only limited to adjudication upon matters concerning recovery of debts.

12. It was also contended on behalf of the petitioner that the word “otherwise” following the word “cash” as appearing in Section 2(g) of the said Act cannot enlarge the definition of debt to include the liability for delivery of shares, goods or anything *in specie*. It was further contended that the word “otherwise” must be read according to well-settled principles of construction of *noscitur a sociis* of which the *ejusdem generis* rule is an application, which clearly indicates that a word is recognized by the associated words and is to be judged by the ‘company’ it keeps.

13. It was contended that it is a legitimate rule of construction to construe words in an Act with reference to words having an immediate connection

with them and that when two or more words, which are susceptible of an analogous meaning, are coupled together, they are to be understood in their cognate sense. They take colour from each other. For all these propositions, the learned senior counsel placed reliance on:-

- (i) **Union of India v. Raman Foundry: 1974 (2) SCC 231;**
- (ii) **G.P. Singh on Principles of Statutory Interpretation 11th Edition (pages 471-475);**
- (iii) **Godfrey Phillips India Ltd and Another v. State of UP and Others: 2005 (2) SCC 515;**
- (iv) **Stockport Raggard, Industrial, and Reformatory Schools: (1898) 2 Ch. 687;**
- (v) **The Attorney General v. Seccombe: (1911) 2 KB 688;**
- (vi) **Allahabad Bank v. Canara Bank: 2000 (4) SCC 406.**

14. Mr Rajiv Nayyar, the learned senior counsel appearing on behalf of HUDCO, founded his arguments on three points. First of all, according to him, the present writ petition is not maintainable in view of the availability of an alternative remedy by way of an appeal under Section 20 of the said Act. Secondly, he submitted that the petitioner has changed the plea taken by it before the Tribunal as the plea now being taken before this court is entirely different. According to Mr Nayyar, the petitioner had founded its case on clause 12 of the Package Loan Agreement which gave the right of foreclosure to the petitioner. It was contended that, the petitioner took the plea before the Tribunal that inasmuch as it had exercised its right of

foreclosure and had tendered the balance amount of loan plus interest, there was no debt in the sense that there was no remaining liability and, therefore, HUDCO did not have any cause of action. According to Mr Nayyar, the plea was not that shares did not fall within the ambit of 'debt'. Thus, according to Mr Nayyar, the petitioner cannot be allowed to shift its stand and this court ought not to entertain this petition. Thirdly, and most importantly, it was the contention of Mr Nayyar that the Tribunal has correctly interpreted the provisions of Section 2(g) in the impugned order dated 12.02.2008, wherein the reliefs claimed by HUDCO in its petition under Section 19, which includes the relief of delivery / issuance of share certificates, was held to fall within the ambit of the definition of 'debt' and, therefore, to be within the jurisdiction of the Tribunal under the said Act.

15. Mr Nayyar submitted that the dispute that has arisen in the present case relates to the interpretation of the Package Loan Agreement and involves the determination of contractual obligations on the basis of facts which have to be established upon leading evidence and, therefore, cannot be determined in a writ petition. Apart from this, Mr Nayyar submitted, with reference to the decision of this court in **J.U. Mansukhani & Company and Another v. The Presiding Officer and Others: 1999 (V) AD Delhi 435** that the word 'debt' is to be given the widest possible meaning. He also referred to the decision in the case of **United Bank of India v. Debts Recovery Tribunal and Others: AIR 1999 SC 1381** to emphasise that the expression 'debt' has to be given the widest amplitude to mean any liability,

which is alleged as due from any person by any bank during the course of any business activity undertaken by the bank, either in cash or otherwise, whether secured or unsecured, whether payable under a decree or order of any court or otherwise, and which is legally recoverable on the date of the application. Mr Nayyar also placed reliance on the following decisions:-

- i) **State Bank of Bikaner & Jaipur v. M/s Ballabh Das & Co. and Others: 1999 (7) SCC 539;**
- ii) **United Bank of India v. Abhijit Tea Co. Pvt. Ltd. and Others: 2000 (7) SCC 357;**
- iii) **Union of India v. Delhi High Court Bar Association and Others: 2002 (4) SCC 275;** and
- iv) **Allahabad Bank v. Canara Bank and Another: 2000 (4) SCC 406.**

16. With regard to the circumstances, which led to the Package Loan Agreement, it was submitted by Mr Nayyar that the petitioner had agreed to allot shares equivalent to 26% of the paid up capital in lieu of Rs 52 crores due to HUDCO from the petitioner. The petitioner thereby got several concessions both in terms of the principal and interest because of the Package Loan Agreement which included the petitioner's commitment to allot the said shares to HUDCO. He submitted that the said allotment was no doubt subject to the approval of the Government. But, according to him, there was no time limit for taking permission from the Government. Mr Nayyar submitted that the expression "amount of debt due" appearing in Section 1(4) of the said Act is only for the purposes of quantification and

does not mean that 'shares' would not fall within the purview of the definition of 'debt' and, consequently, the said Act. He also submitted that rule of *ejusdem generis* cannot be applied to the expression "or otherwise" appearing in Section 2(g) because of the use of the expression "any liability", which, makes it a definition of a very wide amplitude and cannot be read restrictively. He referred to Sections 17 and 18 of the said Act to submit that for the recovery of debts due to banks and financial institutions, it is the Tribunal which has jurisdiction. According to Mr Nayyar, Rule 18 of the Debts Recovery Tribunal (Procedure) Rules, 1993 is couched in such language which makes it clear that the Tribunal has very wide powers and may even give directions for the delivery of shares. The language used in the said Rule 18 is that the Tribunal may make such orders to give such directions as may be necessary or expedient to give effect to its order or to prevent abuse of its process or to secure the ends of justice.

17. A reference was also made to Section 25 of the said Act which prescribes the modes of recovery of debts. The said provision enables the recovery officer to recover the amount of debt specified in the recovery certificate by several modes, including attachment and sale of movable or immovable property of the defendant. Thus, according to Mr Nayyar, the provisions of the Act give wide powers to the Tribunal in the matter of recovery of debts. The word 'debt' in itself has to be construed liberally and in its widest amplitude. Thus, the relief of delivery / issuance of share certificates in terms of the Package Loan Agreement would fall within the

meaning of recovery of debt and, therefore, the Tribunal would have jurisdiction in the matter. For all these reasons, Mr Nayyar submitted that the writ petition ought to be dismissed.

18. In rejoinder, the learned counsel for the petitioner reiterated his contentions referred to earlier. With regard to the availability of an alternative remedy of appeal under Section 20 of the said Act, it was contended by Mr Andhyarujina, on behalf of the petitioner, that whenever there is a controversy with regard to jurisdiction of a Tribunal, the availability of an alternative remedy does not come in the way of a High Court in exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India. He submitted that the basic point urged in the present petition is with regard to the jurisdiction of the Tribunal to entertain a petition in which the main relief sought is for the delivery / issuance of share certificates as against a crystallised and certain sum of money. According to him, the Tribunal had no jurisdiction to entertain the claim of HUDCO for delivery of shares. Thus, the issue before this court is the question of jurisdiction of the Tribunal and, therefore, the petitioner cannot be turned away from this court on the plea that there is an alternative remedy of appeal to the Debts Recovery Appellate Tribunal under Section 20 of the said Act. He placed reliance on *East India Commercial Company Ltd. and Another v. The Collector of Customs: 1962 SCR 338* and *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Others: 1998 (8) SCC 1.*

19. As regards the submission that there has been a change in the pleas taken by the petitioner before this court, the learned counsel for the petitioner drew our attention to the impugned order and specifically to paragraphs 17, 18 and 19, which have already been extracted above, to indicate that that was a substantial plea taken before the Tribunal and adjudicated upon by the Tribunal. Therefore, according to him, the submission with regard to change of stand on the part of the petitioner is not tenable.

20. The availability of an alternative remedy does not necessarily operate as bar to the remedy under Article 226 of the Constitution. It is only a rule of prudence. Normally, when an equally efficacious remedy exists, writ courts do ask litigants to pursue that remedy. But, there are many instances when the High Courts, in exercise of their extraordinary writ jurisdiction, grant relief to aggrieved persons despite the existence of alternative remedies. The alternative remedy may not be equally efficacious and at times the relief sought may not be within the powers of the appellate body. There are other instances but, no specific set of instances can be prescribed. In the present case, a jurisdictional issue has been raised and, therefore, there would be no impediment in this court entertaining and granting relief in this writ petition.

21. With regard to the plea that the petitioner changed its stand, we agree with Mr Andhyarujina that the substantive plea before the Debts Recovery Tribunal was that the HUDCO's claim was not one of recovery of a "debt"

as defined in section 2(g) of the said Act. This is evident from the elaborate discussion to be found in paragraphs 17, 18 and 19 of the impugned order. It is not as if this point is being urged before us for the first time. The point was raised before and determined by the Tribunal. The respondent's submissions on this aspect are clearly untenable.

22. Coming to the main plea, let us now examine the scheme of the relevant provisions of the said Act. The preamble of the said Act reads as under:-

“An Act to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto.”

It is apparent that the focus of the Act is on “recovery of debts due to banks and financial institutions”. Section 1(4) clearly limits the jurisdiction of the Tribunal to debts equal to the sum of Rs 10 lakhs and above or to such other amount not being less than Rs 1 lakh as the Central Government may, by notification, specify. The reference here is clearly to “amount of debt due” as quantified in money terms. Section 2 (g) defines “debt” to mean *any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or*

any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application.

23. In the present case, HUDCO is a financial institution. Thus, in the context of the present case, “debt” would mean “a liability inclusive of interest” which is claimed as due from the petitioner by HUDCO during the course of any business activity undertaken by HUDCO under any law for the time being in force, in cash or otherwise”, whether secured or unsecured or assigned or whether “payable” under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the ‘application’. The word “application” has been defined in Section 2(b) to mean an application made to a Tribunal under Section 19. Section 19 (1) stipulates that where a bank or financial institution has to recover any debt from any person, it may make an application to the Tribunal having jurisdiction as specified in the said provision. Sections 19 (6), (7), (8) and (9) speak of set-off and counter-claim which are both recoverable as ascertained sums of money. Section 19 (22) stipulates that 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. Under Section 21 of the said Act, it is stipulated that if an appeal is preferred by any person, against an order of the Tribunal before the Appellate Tribunal, then such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellate Tribunal 75% of the ‘amount’ of debt so

due from him as determined by the Tribunal under Section 19. Provided, however, that the Appellate Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section. It is apparent that this provision also entails the amount of debt as quantified in money terms.

24. Section 25 prescribes the modes of recovery of debts and reads as under:-

“25. Modes of recovery of debts. – The Recovery Officer shall, on receipt of the copy of the certificate under sub-section (7) of section 19, proceed to recover the amount of debt specified in the certificate by one or more of the following modes, namely: —

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

To recover the amount of debt specified in the recovery certificate, the recovery officer may also arrest the defendant and may appoint a receiver for management of the moveable or immovable properties. Other modes of recovery are specified in Section 28 of the said Act. Section 26, which stipulates that it shall not be open to the defendants to dispute before the Recovery Officer the correctness of the “amount specified” in the certificate, clearly, has reference to the debt in money terms. Section 27, which deals with the stay of proceedings under certificate and amendment or withdrawal thereof, also has reference to “recovery of any amount” and “payment of the amount”.

25. Section 29 incorporates the provisions of the Second and Third Schedules of the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962. The said provision reads as under:-

“29. Application of certain provisions of Income-tax Act. – 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 as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the income-tax:

Provided that any reference under the said provisions and the rules to the “assessee” shall be construed as a reference to the defendant under this Act.”

The Second Schedule to the Income-tax Act, 1961 prescribes the procedure of recovery of tax. By virtue of Section 29 of the said Act, the provisions of the Second Schedule have been incorporated in the said Act. Thus, the procedure for recovery of tax would be read as the procedure for recovery of the amount of debt due under the said Act. Rule 2 of the said Second Schedule requires the issuance of a notice. The Income-tax (Certificate Proceedings) Rules, 1962 and, in particular Rule 14 thereof, prescribes the form of notice of demand which is to be issued to the defaulter. The said Rule 14 reads as under:-

“14. Form of notice of demand. – The notice of demand under rule 2 of the principal rules shall be issued in Form No.I.T.C.P. 1 which shall be in Form No.57 of the Income-tax Rules, 1962 which may be so varied as the circumstances of each case may require.”

26. It may be pointed out that the reference to ‘principal rules’ means the rules contained in the Second Schedule to the Income-tax Act, 1961. The form prescribed under the said Rule 14 is Form No. I.T.C.P. 1, which is identical to Form No. 57 of the Income-tax Rules, 1962. Form No. I.T.C.P. 1 is as under:-

“Form No. I.T.C.P. 1

[See rule 2 of Second Schedule to the Income-tax Act, 1961]

Notice of Demand to the defaulter

Office of the TRO.....

Dated the

To

..... (GIR/PAN)

.....

1. *This is to certify that a sum of Rs. _____ has become due from you on _____ in the status of _____, details of which are given on the reverse.

Whereas a certificate bearing serial number _____ dated _____ had been forwarded by the Tax Recovery Officer, _____ (name of the place) for the recovery of the sum of Rs. _____ details of which are given on the reverse [and the said Tax Recovery Officer has sent a certified copy of the said certificate to the undersigned under sub-section (2) of section 223 of the Income-tax Act, 1961] specifying a sum of Rs. _____ which is to be recovered from you.

2. You are hereby directed to pay the above sum within 15 days of the receipt of this notice failing which the recovery shall be made in accordance with the provisions of section 222 to section 232 of the Income-tax Act, 1961 and the Second Schedule to the said Act and the rules made thereunder.

3. In addition to the sums aforesaid, you will also be liable for,—

- (a) such interest as is payable in accordance with sub-section (2) of section 220 of the said Act for the period commencing immediately after the issue of this notice,
- (b) all costs, charges, and expenses incurred in respect of the services of this notice and of warrants and other processes and all other proceedings taken for realising

the arrears.
(SEAL) Tax Recovery Officer
*Score out whichever paragraph is not applicable.”

27. It is this form, with necessary modifications, which is to be used for issuance of a notice of demand by the recovery officer under the said Act. Here also, we find that the demand specified is a sum of money and, there is no reference to delivery of any goods or property. We may also refer to Part V of the Income-tax (Certificate Proceedings) Rules, 1962 which deals with the delivery of property sold in execution of documents or endorsement of negotiable instrument or share in a corporation. Rule 36 specifically deals with the delivery of ‘moveable property’, ‘debts’ and ‘shares’. Rules 36(1), (2) (a) and (b) deal with situations when the property sold is moveable property. Rules 36 (3) (a) and (b) deal with the situation when the property sold is a ‘debt’. Rules 36 (4) (a) and (b) deal with the situation where the property sold is a ‘share’ in a corporation. A reading of the said provision makes it clear that the contemporaneous understanding of the legislature, when it enacted the said Act and in particular Section 29 thereof, by incorporating the provisions of the Income-tax Act and the said Income-tax (Certificate Proceedings) Rules, 1962, was that ‘debts’ were different from ‘shares’ as the two have been dealt with separately and understood to mean separate things.

28. Shares in a company do not constitute debts. A company has essentially two sources of funds. One, through borrowing and, the second, through share capital. Persons who contribute towards the share capital and

thereby acquire shares in a company are actually owners of the company to the extent of their shareholding. On the other hand, persons who lend money to a company are creditors and money owed to them are debts. These debts can be in the form of money loans or interest bearing debentures or other instruments of debt. But, one thing is clear and that is that shares are not part of the liabilities of a company and are not part of the total debt of the company. In fact, one of the most important financial analysis ratios is the debt/equity ratio. Financial institutions and banks, before they lend money to a company, examine inter alia the debt/equity ratio of that company. There are, at times, stipulations by competent statutory bodies such as the Securities Exchange Board of India (SEBI) which prescribe a maximum debt/equity ratio for companies. Generally, a debt/equity ratio of 2:1 is considered as the outer limit or extent of leverage that is permissible. What this means is that the total debts of the company cannot be more than twice its equity share capital. Or, to put it in plain words, the borrowings should not exceed twice the owners (shareholders) funds. This discussion also makes it clear that debt and equity are distinct and different.

29. In *Khoday Distilleries Ltd. v. CIT*:(2009) 1 SCC 256 [at page 261], the Supreme Court observed that “*a share is a chose-in-action. A chose-in-action implies existence of some person entitled to the rights in action in contradistinction from rights in possession.*” In *CWT v. Mahadeo Jalan & Mahabir Prasad Jalan*: (1973) 3 SCC 157, [at page 161], the Supreme Court held – “.. *Firstly, a share is not a sum of money but is an interest*

measured by a sum of money and made up of various rights contained in the articles of association. They are of different categories such as the equity shares, preference shares, fully paid-up shares or partly paid-up shares...".

Similarly, in an earlier case [*CIT v. Standard Vacuum Oil Co.: (1966) 2 SCR 367*], the Supreme Court had observed that – "A share is not a sum of money: it represents an interest measured by a sum of money and made up of diverse rights contained in the contract evidenced by the articles of association of the Company..".

30. On the other hand, a debenture represents a debt. In *Narendra Kumar Maheshwari v. Union of India: 1990 (Supp) SCC 440* [at page 503], the Supreme Court held:-

"A debenture has been defined to mean essentially as an acknowledgement of debt, with a commitment to repay the principal with interest (Palmer's *Company Law*, p. 672, 24th edn.). Reference, in this connection, may be made to *British India Steam Navigation Co. v. IRC*. A debenture may contain charge only on a part of the assets of the company (*Re Colonial Trusts Corporation*) or it may not contain any charge on any of its assets (See *Speyer Brothers v. IRC*; and *Lemon v. Austin Friars Investment Trust Ltd.* A debenture may, therefore, be secured or unsecured (Palmer's *Company Law*, p. 675, 24th edn.). An ordinary debenture has to be distinguished from a 'mortgage debenture' which necessarily creates a mortgage on the assets of a company (See Palmer's *Company Law*, p. 706). A compulsorily convertible debenture does not postulate any repayment of the principal. Therefore, it does not constitute a 'debenture' in its classic sense. Even a debenture, which is only convertible at option has been regarded as a 'hybrid' debenture by Palmer's *Company Law* (para 44.07 at page 676). In this connection, reference may be made to the "*Guidelines for the Protection of Debenture Holders*" issued on January 14, 1987 which have recognised the basic distinction between a convertible and a non-convertible debenture. It is apparent that these were issued for the

purpose of ensuring the serviceability and repayment of debentures on time. It has been asserted before us that the compulsorily convertible debentures in corporate practice was adopted in India some time after the year 1984. Wherever the concept of compulsorily convertible debentures is involved, the guidelines treat these as “equity”. This is clear from guideline IV(i) read with IV(iii) of the *Guidelines for Issue of Cumulative Convertible Preference Shares* and guidelines 8 and 11 of the *Employees Stock Option Guidelines*. These two sets of guidelines clearly indicate that any instrument which is compulsorily convertible into shares, is regarded as a “equity” and not as a loan or debt. Even a non-convertible debenture need not be always secured. In fact, modern tendency is to raise loan by unsecured stock, which does not create any charge on the assets of the company (*The Encyclopaedia of Forms and Precedents*, 4th edn. Vol. 6 para 17 at pages 1094, 1095 and para 22 at pages 1097-1098). Whenever, however, a security is created, it is invariably in the form of a floating charge (See *The Encyclopaedia of Forms and Precedents*, 4th edn. Vol. 6 para 25 at page 1099). It follows, therefore, that the secured debenture almost invariably contains a floating charge. In addition to the floating charge, debentures are frequently secured by trust deed also as had happened in the present case where specific property, land, etc. has been mortgaged to trustees.”

(underlining added)

31. Now, “goods” have been defined in the Sale of Goods Act, 1930 to mean “every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale”.

32. But, as held in *R.D. Goyal v. Reliance Industries Ltd.:(2003) 1 SCC 81* [at page 87], debentures, as ordinarily understood, would not come within the purview of the definition of goods “as it is simply an instrument of acknowledgement of debt by the company whereby it undertakes to pay

the amount covered by it and till then it undertakes further to pay interest thereon to the debenture-holders”. In **R.D.Goyal** (*supra*), it was further held:-

“Share” has been defined in Section 2(46) of the Companies Act to mean a share in the share capital of a company which in turn would mean that it would represent contribution of the shareholder towards the share capital of the company. On the other hand, a debenture is an instrument of debt executed by the company acknowledging its receipt to repay the same at a specified rate and also carrying an interest. It is in sum and substance a certificate of loan or a bond evidencing the fact that the company is liable to pay a specified amount with interest and although the money raised by the debentures becomes a part of the company’s capital structure yet it does not become a share capital. In any event, a debenture would not come within the purview of the definition of goods, inasmuch as, although the shares and stocks are included in the definition of goods but debentures are not.”

33. Thus it is clear that shares are included in the definition of goods in the Sale of goods Act, 1930 and are distinct from debentures, which are not goods but instruments of debt. Shares do not represent borrowings or loans or any liability, they represent the shareholders’ contribution towards the share capital. There is no creditor-debtor relationship between a shareholder and the company merely because of ownership of shares. On the other hand an ordinary debenture holder is a creditor of the company which had issued the debenture. The value of the debenture and the interest payable thereon is a liability of the company and is a debt owed to the debenture-holder. This distinction between a share and an ordinary debenture makes it clear that a share cannot fall within the ambit and scope of the definition of “debt” as given in section 2(g) of the said Act.

34. This analysis reveals that the word “debt” as defined in section 2(g) of the said Act and as used in the said Act has reference to a claim or liability in money terms whether in cash or otherwise. An example of a cash liability is a money loan simpliciter. And, an example of a liability which falls in the “otherwise” category, is an ordinary debenture or some other debt instrument. The liability has no reference to goods and, certainly not to shares.

35. We shall now examine the decisions relied upon by Mr Nayyar. The first decision relied upon by him was that of *Mansukhani (supra)*. In that decision of a Division Bench of this Court, it was observed that the use of the expressions ‘any liability’, ‘from any person’ and ‘otherwise’ in section 2(g) of the said Act indicate the legislative intent to provide the word “debt” with the widest possible meaning. However, the context of the observation must be kept in the forefront. In *Mansukhani (supra)*, it had been argued that the money held by the petitioners therein was in the nature of a trust and that they had not entered into any business activity with the bank. Consequently, it was urged that there was no legally recoverable debt. The Court held that issuance of the bank drafts was clearly the business activity of the bank. More importantly, the court, after noting the Supreme Court decision in *United Bank of India v. The Debts Recovery Tribunal: AIR 1999 SC 1381*, held:-

“The question whether the Tribunal has jurisdiction or not, at this stage, will have to be decided on the basis of the allegations made in the Original Application. In the said application, as noticed above there are allegations made on

the basis of which, in view of what has been held in Union Bank of India's case (*supra*) by the Supreme Court, there is no manner of doubt that the same is triable by the Tribunal”

36. It is obvious that the focus of the court in *Mansukhani* (*supra*) was entirely different. The issues which arose in that case pertained to disputed facts as to whether there was any business transaction between the petitioners therein and the bank; whether the money was held in trust by the petitioners therein; and whether the money was a legally recoverable debt? The petitioners therein, as would be apparent from paragraph 7 of the said decision, had specifically pleaded that the bank had not placed on record any document to demonstrate that the petitioners had entered into any business activity with them. It is in this context that the observations extracted above were made. The court felt that issuance of bank drafts was clearly the business activity of the bank and that on the basis of the allegations made in the Original Application, the same was triable. The position in the case at hand is entirely different. Here, the issue is whether HUDCO can seek delivery of shares claiming it to be an action for recovery of a “debt”? First of all, such a question did not arise in *Mansukhani* (*supra*) and, secondly, we are examining it in the light of the allegations made in HUDCO's Original Application itself. Thirdly, in *Mansukhani* (*supra*) the alleged “debt” was spelt out in money terms.

37. The next decision is that of the Supreme Court in *United Bank of India* (*supra*). It is true that the Supreme Court observed that “*there cannot be any dispute that the expression “debt” has to be given the widest*

amplitude to mean any liability which is alleged as due from any person by a bank during the course of any business activity undertaken by the bank either in cash or otherwise, whether secured or unsecured, whether payable under a decree or order of any court or otherwise and legally recoverable on the date of the application.” But, the “widest amplitude” must remain within the precincts of the definition. In ***United Bank of India*** (*supra*) the question arose as to whether the bank’s suit which stood transferred to the debts recovery tribunal on the coming into force of the said Act would qualify as an action for recovery of a “debt” under the said Act? On behalf of the respondents therein it was contended that the bank’s claim was one of damages and compensation and was, therefore, not an action for recovery of any “debt”. The Bank, however, took the plea that if the plaint were to be read as a whole it was essentially a suit for realisation of money due to a bank which had become due in the course of the business activity undertaken by the bank and, as such, it was an action for recovery of a debt under section 2(g) of the said Act. The Supreme Court concluded as under:-

“15. In the case in hand, there cannot be any dispute that the expression “debt” has to be given the widest amplitude to mean any liability which is alleged as due from any person by a bank during the course of any business activity undertaken by the bank either in cash or otherwise, whether secured or unsecured, whether payable under a decree or order of any court or otherwise and legally recoverable on the date of the application. In ascertaining the question whether any particular claim of any bank or financial institution would come within the purview of the tribunal created under the Act, it is imperative that the entire averments made by the plaintiff in the plaint be looked into and then find out whether notwithstanding the specially-created tribunal having been constituted, the averments are such that it is possible to hold that the jurisdiction of such a

tribunal is ousted. With the aforesaid principle in mind, on examining the averments made in the plaint, we have no hesitation to come to the conclusion that the claim in question made by the plaintiff is essentially one for recovery of a debt due to it from the defendants and, therefore, it is the Tribunal which has the exclusive jurisdiction to decide the dispute and not the ordinary civil court.”

(underlining added)

38. The case before the Supreme Court was entirely different to the present case. The focus of the Supreme Court appears to be on the material which is to be looked into to determine the question of jurisdiction of the tribunal. The Supreme Court held that the entire averments made by the plaintiff (claimant) in the plaint (Original Application) should be looked into, to answer the question. The Supreme Court then went on to examine the averments in the plaint and came to the conclusion that the claim of the bank was essentially one for recovery of a debt. The Supreme Court also made the general observation that the expression “debt” must be given the widest amplitude. What the Supreme Court did not say was that the net should be cast so wide that even things which did not fall within the meaning of “debt” as defined in section 2(g) of the said Act should be regarded as “debt”. We have, on the basis of the allegations contained in the original application, come to the conclusion that a claim seeking delivery of shares, even if the word “debt” is given the widest amplitude, cannot be regarded as a claim for recovery of a “debt” as contemplated in section 2(g) of the said Act. When the Supreme Court used the expression “widest amplitude”, in our humble opinion, it meant the widest amplitude possible within the four corners of section 2(g) and other provisions of the said Act. We have analysed the provisions of the said Act and the referential

provisions of the Income Tax Act, 1961 to conclude that even the “widest amplitude” meaning of “debt” does not extend to a liability to deliver shares in themselves and as distinct from an action for enforcing a security to recover a money claim.

39. In *State Bank of Bikaner and Jaipur (supra)* also, the fact situation was different. The claims in that case were for recoveries of the Bank’s dues of Rs 75,46,921/- and Rs 56,36,200/-. Two suits had been filed by the Bank before the District Judge at Jaipur. During the pendency of the said suits, the said Act came into force. After the Debts Recovery Tribunal was constituted at Jaipur, the bank made applications for transfer of the said suits to the Debts Recovery Tribunal. The court allowed the applications and directed transfer of the suits to the said Tribunal at Jaipur. The respondents before the Supreme Court, being aggrieved by the said orders of transfer preferred revision petitions before the Rajasthan High Court.

40. The said High Court allowed the revision petitions and set aside the orders passed by the District Court . The High Court took the view that the question whether the amounts claimed in the suits were legally recoverable or not was a question of fact and could be adjudicated only after recording evidence. It further held that whether the amounts claimed fell within the meaning of the term “debt” as defined by Section 2(g) of the said Act was also a question of fact and till those facts were decided by the Court the provisions of the said Act could not be said to have become applicable to the suits on and from the date on which the Tribunal at Jaipur was established.

41. The question which arose for the consideration of the Supreme Court was whether the amounts claimed by the Bank in the suits could be said to be “debts” due and recoverable by the Bank from the said respondents? The Supreme Court held:-

“8. The important words in the definition “alleged as due” have been overlooked by the High Court and, therefore, it has erroneously held that unless the amounts claimed by the Bank are determined or decided by a competent forum they cannot be said to be due and would not amount to “debt” under the Act. What was necessary for the High Court to consider was whether the Bank has alleged in the suits that the amounts are due to the Bank from the respondents, that the liability of the respondents has arisen during the course of their business activity, that the said liability is still subsisting and legally recoverable.”

(underlining added)

42. It is obvious that the Supreme Court’s attention was on the question as to whether only “determined” amounts fell within the definition of debt as given in section 2(g) of the said Act or whether even amounts which were alleged to be due were covered by the said definition. The Supreme Court held that the language of section 2(g) itself indicated that the word “debt” included not only amounts which had been determined as due but also amounts which were alleged to be due provided, of course, that the liability of the debtor had arisen during the course of his business activity and that the liability was subsisting and legally recoverable.

43. Thus, there is nothing in *State Bank of Bikaner and Jaipur (supra)* which would require us to take a view different from what we have taken. In passing we may also point out that the “debts” in the said decision were mere money claims and not claims to issuance/ delivery of equity shares as in the present case.

44. In *United Bank of India v. Abhijit Tea Co. (P) Ltd., (supra)*, another decision cited by Mr Nayyar, the Supreme Court did not even consider the definition of “debt” as given in section 2(g) of the said Act and, would therefore, be of no use to his arguments. Perhaps the only reason why this decision was referred to was because the Supreme Court regarded a suit for specific performance filed by the debtor therein to be akin to a counter claim and therefore directed its transfer, alongwith the Bank’s suit against the debtor, to the Debts Recovery Tribunal. But, this does not mean that a suit for specific performance *per se* would be action for recovery of a debt! It cannot be. The Supreme Court considered the question as to whether the said suit by the debtor Company (Suit No. 272 of 1985) was or was not a suit, in substance, in the nature of a “counter-claim” and if so, why could sub-sections (8) to (11) of Section 19 not apply and as to why it should not held that that suit also (in addition to the bank’s suit) fell within the purview of the said Act. The exact question, amongst others, framed by the Supreme Court was as under:-

“(4) Whether Suit No. 272 of 1985 filed by the debtor Company was, *in substance*, one in the nature of a “*counter-claim*” against the Bank and was one which also fell within the special Act by reason of Sections 19(8) to (11) of the

Act (as introduced by amending Act 1 of 2000) and if that be so, whether it could still be successfully pleaded by the respondent Company that the pendency of the Company's Suit No. 272 of 1985 was a ground for retention of the Bank's Suit No. 410 of 1985 on the original side of the High Court?"

The Court held:-

“41. In our view, the Company's Suit No. 272 of 1985 insofar claims a relief for specific performance, perpetual and mandatory injunctions, it is in substance in the nature of a counter-claim under sub-sections (8) to (10) of Section 19 and are in the nature of a counter-claim. The plea for deduction of damages is in the nature of a *set-off* falling within Sections 19(6) and (7). Both are equated to cross-suits. If a set-off or a counter-claim is to be equated to a cross-suit under Section 19, a fortiori there can be no difficulty in treating the cross-suit as one by way of set-off and counter-claim, and as proceedings which ought to be dealt with simultaneously with the main suit by the Bank. In fact, the Bank has not objected to such a course. Indeed, Section 19(11) says that if any particular counter-claim raised in Suit No. 272 of 1985 cannot be decided by the Tribunal while deciding the Bank's suit, the defendant may apply to the Tribunal for exclusion of such a counter-claim. But such a question does not arise in this case. In our view, in the context, the word “counter-claim” in Sections 19(8) to (11) which is equated to a cross-suit, includes a claim even if it is made in an independent suit filed earlier. An agreement not to charge interest, the specific performance of which is claimed is nothing but a plea that the Bank could not charge interest. A permanent injunction directing the Bank not to charge interest because of an alleged agreement in that behalf is likewise a plea that no interest is chargeable. So far as the plea for further financial assistance is concerned, it is also, broadly, in the nature of a “counter-claim”. All these fall under Sections 19(8) to (10). Again, the plea for deducting “damages” though raised in the suit is indeed broadly a plea of “set-off” falling under sub-sections (6) and (7) of Section 19.

42. Both the suits, the one by the Bank against the respondent (Suit No. 410 of 1985) and the other by the debtor against the Bank (Suit No. 272 of 1985) which raises claims or pleas in the nature of set-off or counter-claim are interconnected. The respondent's suit falls under sub-sections (6), (7) and (8) to (11) of Section 19, as stated

above. Our decision in regard to the real nature of Suit No. 272 of 1985 has become necessary in the context of a plea by the debtor Company that the Company's Suit No. 272 of 1985 is liable to be retained in the civil court and on account of the plea that the connected suit by the Bank Suit No. 410 of 1985 is also to be retained. Such a plea, as shown above, cannot be accepted. Thus, both the suits are suits falling within the Act."

45. It is clear that the said decision of the Supreme Court does not in any way come to the aid of the pleas advanced by Mr Nayyar.

46. In *Union of India v. Delhi High Court Bar Assn.,(supra)*, the challenge to the constitutional validity of the said Act on the ground that it was unreasonable and was violative of Article 14 of the Constitution and that the same was beyond the legislative competence of Parliament, arose for the consideration of the Supreme Court. The said act was held to be a valid piece of legislation. In this decision, also, there is no discussion with regard to the specific issue at hand ie., the meaning and scope of the word "debt" as defined in section 2(g) of the said Act.

47. The same is the case with the last decision [*Allahabad Bank v. Canara Bank (supra)*] referred to by Mr Nayyar. The points for consideration before the Supreme Court clearly show that context of the said decision was entirely different. The points for consideration as noted by the Supreme Court were as under:-

“(1) Whether in respect of proceedings under the RDB Act at the stage of *adjudication* for the money due to the banks or financial institutions and at the stage of *execution* for recovery of monies under the RDB Act, the Tribunal and the

Recovery Officers are conferred exclusive jurisdiction in their respective spheres?

(2) Whether for initiation of various proceedings by the banks and financial institutions under the RDB Act, leave of the Company Court is necessary under Section 537 *before* a winding-up order is passed against the company or before provisional liquidator is appointed under Section 446(1) and whether the Company Court can pass orders of stay of proceedings before the Tribunal, in exercise of powers under Section 442?

(3) Whether *after* a winding-up order is passed under Section 446(1) of the Companies Act or a provisional liquidator is appointed, whether the Company Court can stay proceedings under the RDB Act, transfer them to itself and also decide questions of *liability, execution and priority* under Section 446(2) and (3) read with Sections 529, 529-A and 530 etc. of the Companies Act or whether these questions are all within the exclusive jurisdiction of the Tribunal?

(4) Whether in case it is decided that the distribution of monies is to be done only by the Tribunal, the provisions of Section 73 CPC and sub-sections (1) and (2) of Section 529, Section 530 of the Companies Court also apply — apart from Section 529-A — to the proceedings before the Tribunal under the RDB Act?

(5) Whether in view of provisions in Sections 19(2) and 19(19) as introduced by Ordinance 1 of 2000, the Tribunal can permit the appellant Bank alone to appropriate the entire sale proceeds realised by the appellant except to the limited extent restricted by Section 529-A. Can the secured creditors like Canara Bank claim under Section 19(19) any part of the realisations made by the Recovery Officer and is there any difference between cases where the secured creditor opts to stand outside the winding up and where he goes before the Company Court?

(6) What is the relief to be granted on the facts of the case since the Recovery Officer has now sold some properties of the Company and the monies are lying partly in the Tribunal or partly in this Court?"

48. The aforesaid points do not arise in the present case. Moreover, the specific issue of section 2(g) was not in contention before the Supreme Court in that case.

49. So, while “debt” has to be considered in its widest amplitude, it cannot transcend the boundaries specified in section 2(g) itself. The said section describes “debt” as any “liability” etc.,. We have seen that shares cannot be considered as liabilities. Therefore, a claim to issuance of shares or delivery of shares cannot be regarded as an action seeking the recovery of a “debt” as defined in section 2(g) of the said Act.

50. Recapitulating the facts of the present case, we find that a sum of Rs 175.07 crores was admittedly due from the petitioner to HUDCO as on 31.12.2002. Part of this “debt” was re-worked and re-scheduled as a Package Loan by virtue of the Package Loan Agreement of 07.03.2003. The balance, a sum of Rs 52 crores was agreed to be converted into equity, representing 26% of the equity of the petitioner. Thus, if the agreement were to be worked through, “debt” to the extent of Rs 52 crores would stand converted into equity. It would, then, no longer remain “debt”. But, as the shares have not been issued/delivered, HUDCO filed the OA seeking, inter alia, the issuance/ delivery of the shares. HUDCO can either have a claim to the “debt” or to the shares, not to both. If they insist on maintaining their claim for shares then their claim would not be a claim for recovery of a “debt” but, would be one seeking performance of a contractual obligation. Their remedy would, therefore, lie elsewhere and, not before the Debts Recovery Tribunal.

51. As a result, the writ petition is allowed and impugned order dated 12.02.2008 is set aside. OA No.10/2006 [HUDCO v Cochin International

Airport ltd & Anr] pending before the Debts Recovery Tribunal is not maintainable. Liberty, however, is granted to HUDCO to pursue its remedy for alleged breach of contract / obligation before the appropriate forum in accordance with law. The parties are left to bear their respective costs.

BADAR DURREZ AHMED, J

December 23, 2009
HJ

VEENA BIRBAL, J