



BANKING LAWS COMMITTEE

(GOVERNMENT OF INDIA)



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REPORT ON REAL PROPERTY SECURITY LAW 1977



REPORT
ON
REAL
PROPERTY
SECURITY LAW

1977

BANKING LAWS COMMITTEE
(GOVERNMENT OF INDIA)

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BANKING LAWS COMMITTEE
(भारत सरकार)
(GOVERNMENT OF INDIA)

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Chairman's Office :
9, Victoria Crescent Road,
MADRAS-600 008
21st October, 1977

Dear Shri Patel.

Report on the Real Property Security Law

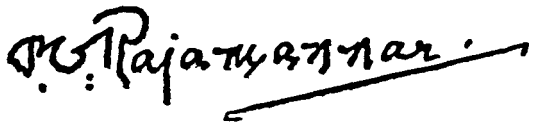
The Banking Laws Committee is happy to submit now the Report on its review of our Real Property Security Law. This Report reviews the real property security law in general (embodied mainly in our mortgage law) and the special law relating to the extension of rural credit by institutional agencies against both personal property and real property. The legal framework pertinent to investigation of title to real property and the scheme of our registration law have been reviewed having regard to their impact on the cost of credit, its expeditious flow and its timely availability. The Committee has suggested a simple title registration scheme as regards agricultural lands to strengthen adequately the basic objectives for the issue of farm title

passbooks to agriculturists. The development of a title registration scheme in urban areas comprised in the town planning schemes has also been suggested.

2. While the general law relating to real property security has been developed under a Central enactment when institutional lending was conspicuous by its absence, the special law relating to rural credit has developed under a multiplicity of State enactments, leading at times to inequitable results. While the Committee has suggested changes to our general law, as regards the special law it has favoured recourse to Article 252 of the Constitution so that there may be an expeditious and uniform legislation to catalyse extension of rural credit by institutional agencies.

With warm personal regards,

Yours sincerely,

A handwritten signature in black ink, reading "P. V. Rajamannar". The signature is written in a cursive style and is underlined with a single horizontal line.

(P. V. RAJAMANNAR)

HON'BLE SHRI H. M. PATEL,
FINANCE MINISTER,
GOVERNMENT OF INDIA,
North Block,
New Delhi.

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GENERAL LAW APPLICABLE

CHAPTER 1

INTRODUCTION TO THE REPORT

The Banking Laws Committee has been constituted by the Government of India¹ as a One-man Committee under the chairmanship of Dr. P. V. Rajamannar, retired Chief Justice of the High Court of Madras, to review:

- (1) Codification of commercial laws affecting banking.
- (2) Law relating to negotiable instruments and codification of practices and usages relating to indigenous negotiable instruments.
- (3) Laws relating to—
 - (a) bank deposits and collections ;
 - (b) documents of title to goods ;
 - (c) loans and advances generally with particular reference to banks and financial institutions ;
 - (d) guarantees issued by banks ; and
 - (e) letters of credit, unsecured advances and special provisions relating to recovery of loans.

GENESIS AND CONSTITUTION

1.1.2 On the matters under reference to the Banking Laws Committee, the several areas requiring review were earlier indicated by the Banking Commission (1972) and its Study Group which reviewed legislation affecting banking. Government of India facilitated this review by appointing the Chairman of that Study Group as the Chairman of the Banking Laws Committee and by arranging to spare for

¹By their Resolution No. F. 10(5)-BC/71, dated 24th November 1972.

the Committee the services of the Convener-Member of that Study Group, Shri R. Krishnan (Deputy Legal Adviser, Reserve Bank of India), who has been appointed as the Secretary to the Committee.

ORGANISATIONAL SET-UP

1.1.3 As desired by the Government of India the Reserve Bank of India has been assisting the Banking Laws Committee on the lines of its assistance to the Banking Commission. The Special Cell of the Reserve Bank, headed by the Secretary, has been providing the secretariat for the Banking Laws Committee.

REPORTS ON THE SUBJECTS

1.1.4 Having regard to the necessity in its review for an intensive study, the consideration of the experts' views, organisation of research, the collection, tabulation and analysis of the required material, and the processing of the views and suggestions, and the time these efforts necessarily consume, the Committee decided to submit to the Government separate reports on the several subjects comprised in its Terms of Reference. Pursuant to this decision, the Committee's Report on the Negotiable Instruments Law was submitted to the Government in 1975.¹

1.1.5 Now the Committee is submitting its separate Reports on the review of our Personal Property Security Law and our Real Property Security Law. The work relating to the review of these branches of laws has proceeded concurrently, since both these reviews are complementary to each other as they cover practically the whole gamut of the law relating to secured advances. In this Report, the Committee reviews our real property security law.

PRESENT POSITION—GENERAL LAW

1.1.6 Our real property security law is substantially covered by legislation. The law relating to obtaining of mortgages and charges is found in the provisions of the Transfer of Property Act, 1882, the provisions of the Registration Act, 1908, and the provisions of the Code of Civil Procedure, 1908. Our real property security law in general was developed by the framers when the economic background with reference to credit and security aspects was totally different from what it is today. Money lenders dominated the scene, and the production and purpose-oriented institutional credit was conspicuous by its absence. While the city merchants and other business interests

¹Banking Laws Committee's Report on Negotiable Instruments Law (PFD. 236 published by the Controller of Publications, Delhi 110 006).

could take care of themselves, special protection was considered necessary for the mofussil mortgagor-borrowers. Hence, the general law had been slanted towards the protection of mortgagors as a class. The admissibility of an unregistered mortgage and allowing the power of direct sale to the mortgagee were conceived as exceptions. With the emergence of institutional credit for production and purpose-oriented objectives, the economic background has vastly changed and appropriately the original legal framework has become inappropriate.

SPECIAL LAW RE. RURAL CREDIT

1.1.7 The recognition of such inappropriateness, though not expressly voiced, had been the major cause for the development of the special law relating to rural credit extended by institutional agencies, which were originally co-operative societies and to which group commercial banks and regional rural banks have also joined. This special law developed in the State enactments relating to co-operative societies has now been extended 'in many States *mutatis mutandis* with reference to the extension of rural credit by commercial banks and regional rural banks pursuant to the model law suggested by the Reserve Bank's Expert Group which considered the impact of the State enactments on the extension of agricultural credit by commercial banks. The multiplicity of the enactments, the dichotomy in the source of authority for the enforcing authorities and the resulting variations in the applicable situations always do not provide an equitable treatment to the different institutional agencies extending the same type of credit, short-term, medium-term and long-term, as the case may be, or to the agriculturists *inter-se* who may be having recourse to such credit from the different types of institutions. Apart from these, the structure of the special law relating to rural credit has not come in for a comprehensive review as regards the necessity or desirability of many of its restrictive features, of which some at least may now be viewed as totally unnecessary.

TITLE DETERMINATION

1.1.8 Whether we review the general law relating to real property security or the special law relating to extension of rural credit, there are the special problems of real property security in so far as they relate to the cost, time and labour involved in the investigation of title to the security, taking the proper documents, etc. Our Registration Act, 1908, has not undergone any change and substantially remains the same as originally developed in 1877. The Setalvad Law Commission reviewed the position in 1957 and suggested several desirable steps for strengthening the property register so that it can be made

as comprehensive as it could be. However, the position has remained as it was. Though the problems relating to investigation of title as regards security for industrial advances are no doubt acute, in the field of extension of rural credit to the millions of our agriculturists the urgency of the issue of title certificates to the farmers has already gained official and governmental recognition which has led to the measures for giving to the agriculturists farm title passbooks. Thus, an important branch of the real property security law is concerned with the proper legal framework necessary for issue of title certificates to farmers as regards agricultural lands and for expeditious investigation of title as regards non-agricultural lands.

STUDY GROUP'S QUESTIONNAIRE

1.1.9 The Banking Commission's Study Group which reviewed legislation affecting banking had issued a questionnaire (Annexure 1) which indicates the several areas in the field of our real property security law meriting a closer examination with a view to reduce as far as possible the cost, time and labour now required to be expended in investigating title and in obtaining security interests in real property, in reconciling claims as to priority with reference to such security interests and in the realisation of the dues by recourse to the security. The questionnaire was also sent to senior and middle level executives of banks and other financing institutions, law associations, representative bodies of industry, trade and commerce and concerned government authorities (Annexure 2). This Committee has had the benefit of the views and the replies given on the said questionnaire. Many commercial banks, term-lending institutions like the Industrial Finance Corporation of India, State Financial Corporations, state co-operative banks and land development banks, bankers and lawyers and others have given their views on the said questionnaire (Annexure 3).

1.1.10 Additional information was also required by the Committee on several matters of specific importance. Particular reference should be made to enquiries made by the Committee with reference to the extent of recourse to mortgage by deposit of title deeds by banks and other financing institutions, the replies to which were promptly furnished (Annexure 4) to the Committee.

PROJECT STUDY TO REVIEW CREDIT LAWS AFFECTING BANKING

1.1.11 The project study to review credit laws affecting banking, which was sponsored by the Banking Laws Committee with the assistance of the Reserve Bank of India and conducted by the Banking Laws Committee in association with the Indian Banks Association

and the National Institute of Bank Management, helped the Committee to ascertain the areas where at present considerable difficulties and delays are experienced with reference to obtaining real property as security, particularly by banks and other financing institutions. Shri R. Krishnan, Secretary to the Committee, Shri R. M. Halasyam, Legal Adviser to the Indian Banks Association, and Shri S. R. Bhise of the National Institute of Bank Management had discussions with several officials of banks and other experts as part of this project study and the assessment of the position given by them to the Committee has helped considerably the Committee's further work on the related matters.

BANKERS TRAINING COLLEGE SEMINAR

1.1.12 The Bankers Training College of the Reserve Bank, as part of its developmental activity, conducted a seminar in May-June 1974 which was attended by about 45 Chiefs (or their deputies) of the Legal and Advances Departments of Banks and other financial institutions and some chief executives of the institutions provided the forum for the representatives of these institutions to have detailed discussion on some selected issues and areas where there is necessity for simplification of our laws and procedures relating to extension of credit by banks and other financing institutions against real property security. At the request of the Bankers Training College, Shri R. Krishnan, Secretary to the Committee, was deputed to participate in the seminar. The discussions in the seminar and the several points raised thereat have helped to highlight the unsatisfactory state of the law dealing with investigation of title, the lengthy and cumbersome nature of the conveyancing documents, the difficulties faced with reference to the obtaining of mortgage by deposit of title deeds, the scope for standardisation and simplification of documents, the problems relating to recovery and realisation of dues, the special difficulties experienced while dealing with reconstruction of sick industrial units, etc.

OTHER DISCUSSIONS

1.1.13 The Committee has also had the benefit of discussions with individual experts, several leading bankers, banks' solicitors, the Sub-Registrar of Assurances, Bombay, the Additional Registrar of Companies, Bombay, and other governmental authorities. In particular, the Committee would like to mention the discussions with Shri C. H. Pardiwala of Messrs. Crawford Bayley & Co., Solicitors, Bombay, who has assisted in the Committee ascertaining the several problems now faced by banks and other financial institutions in obtaining security interest in real property.

FORMAT OF THE REPORT

1.1.14 In Chapter 2 of this Part we have analysed the economic background which had influenced the framers of the law while enacting our mortgage law incorporated in our Transfer of Property Act, 1882, and how with the vastly different changes in such background the present legal framework is not conducive to the extension of production and purpose-oriented credit by institutional agencies. In Chapter 1 of Part II we review the special law relating to rural credit secured against both personal property and real property developed to enable institutional agencies extending short-term, medium-term and long-term rural credit. In Chapter 2 of that Part we consider the special features of the security law with reference to the security interest in favour of a refinancing institution. In Chapter 1 of Part III we consider the legal framework related to the investigation of title to real property and in this background review the provisions of our registration law. In Chapter 2 of that Part we consider the schemes for the development of a title registration with reference to the extension of rural credit in the background of the several measures now taken to issue farm title passbooks, and the development of a title registration scheme relating to urban land in areas comprised under town planning schemes. Part IV contains the summary of our conclusions and recommendations.

ACKNOWLEDGEMENTS

1.1.15 In making this Report, the Committee would like to acknowledge the help and assistance it has received from the Departments of the Government of India, the State Governments, the Reserve Bank of India, the Agricultural Refinance and Development Corporation, the Indian Banks Association, the National Institute of Bank Management, the Law Commission of India, the Industrial Development Bank of India, the Industrial Finance Corporation of India, the State Financial Corporations and other financing institutions, the state co-operative banks, the state land development banks, the representative bodies of industry, trade, commerce and law and individual bankers, solicitors, and others who have spared their time and made useful suggestions for the consideration of the Committee.

1.1.16 The Committee would like to specially thank the Asiatic Library, Bombay, the University Libraries in Madras and Bombay, the Library of the Government Law College, Bombay, the U.S.I.S. and the British Council Libraries and the Librarian, Messrs. Crawford Bayley & Co., for their unstinted co-operation and ready assistance in providing the Committee with the material required from time to time for the research and studies conducted by the Committee.

1.1.17 The Committee would also like to thank the Project Study Team which conducted the project study for reviewing the credit laws affecting banking, comprising Shri R. Krishnan, Secretary to the Committee, Shri R. M. Halasyam, Legal Adviser, Indian Banks Association, and Shri S. R. Bhise of the National Institute of Bank Management.

1.1.18 The Committee would also like to place on record the considerable help derived from the report of the Committee on Agricultural Credit Procedures appointed by the Government of Andhra Pradesh (1966), the report of the RBI Working Group on the acceptance of equitable mortgages, etc. (1966), the report of the All-India Rural Credit Review Committee (1969), the report of the RBI Expert Group which reviewed the impact of State enactments on the commercial banks lending to agriculture (1971), the report of the RBI Study Team which went into the problems of overdues of co-operative credit institutions (1974), the report of the Committee on integration of Co-operative Credit Institutions (1976) and the report of its Working Group on Legal Matters and other reports of expert bodies which had considered the several aspects pertinent to a review of the real property security law relating to rural credit and generally.

1.1.19 The Chairman of the Committee would like to place on record his high appreciation for the excellent research and the in-depth studies organised and conducted by Shri R. Krishnan, Secretary to the Committee, who, with his rich background, vast knowledge and expertise in the review of our banking, credit and commercial laws, has attended very efficiently to all aspects of the work of the Committee, including the drafting of this Report.

1.1.20 In his work the Secretary has been ably assisted by the officials (Annexure 5) and the staff of the Reserve Bank's Special Cell who have worked hard and extended full co-operation to the Committee and ensured the success of its efforts. The officers of the Special Cell also participated in the project studies and the discussions with the experts, prepared relevant background papers and have otherwise assisted in the work of the Committee. The Committee also records its appreciation of the work performed by Shri N. K. Ramaswami, Private Secretary to the Chairman, and Shri V. Vembu, Personal Assistant.

CHAPTER 2

REAL PROPERTY SECURITY LAW—GENERAL INTRODUCTORY

The history of the development of our credit-security law governing real property security merits special mention as it is instructive. It helps us to realise how the law, enacted to meet the conditions that prevailed in our country a century ago, has become obsolete in vast areas consequent on the vital and important changes which have taken place since then in the assumptions that weighed with the framers of the law.

1.2.2 Unlike our present personal property security law, our real property security law is substantially covered by a statute. The general law governing real property security is found in the provisions of the Transfer of Property Act, 1882. This statute gives the general principles governing transfers of property—principles which are common to both transfer of moveables and transfer of immoveables. In addition, this statute sets out the provisions applicable to certain forms of transfers of immovable property, chief of them being transfer by way of security, called a mortgage. It also deals with charges on immovable property as security for the payment of money arising by act of parties or by operation of law.

1.2.3 In this chapter we will be concerned mainly with those provisions of the Transfer of Property Act which are relevant to mortgages and charges on immovable property. But, before going into the specific problems in our mortgage law, it is useful to mention, in brief, the historical developments which led to the enactment of the Transfer of Property Act, 1882.

TRANSFER OF PROPERTY ACT—HISTORICAL

1.2.4 The Transfer of Property Bill was originally framed by the first Law Commission in 1870. In that year it was sent by the Duke of Argyll, then Secretary of State for India, with instructions to take necessary steps for passing it into law. After some minor revision, the Bill was introduced into the Council of the Governor-General of India in 1877.

1.2.5 The Bill was then circulated to local Governments for publication and translation. In February 1878, the Select Committee, to which it was referred, presented a preliminary report wherein it was stated that the Select Committee was guided by three principles, namely, "first, that as little change as possible should be made in the existing law, whether established by the legislature or declared by judicial decisions; secondly, that no additions should be made to the law which were not either necessary or clearly expedient; and, thirdly, that interference with contracts fairly made and usages long established was, *prima facie*, undesirable."¹

1.2.6 In 1878 the Bill thus revised was republished and again circulated. After further comments, considerable changes were effected and ultimately the Bill was supported by the statement that "the assertion that the Bill would introduce a mass of new law into India must, therefore, be due to ignorance of the extent to which English law (under the name of justice, equity and good conscience) was actually administered to the Natives by the Anglo-Indian Courts. The function of the Bill, like that of all Indian Codes, was to strip English law of all that was local and historical, and to mould the residue into a shape in which it would be suitable to an Indian population, and could be easily administered by non-professional judges."² Again the Bill was circulated for the third time to local Governments and referred to the Second Law Commission in 1879. That Commission introduced the requirement as to a written and registered instrument in certain cases of sales, mortgages, leases, exchanges and gifts of immovable property.

OUR MORTGAGE LAW

1.2.7 Sir Rashbehary Ghose had long ago pointed out in his Tagore Law Lectures, how this branch of the law "is choked with dusty formulas which, though they may have been useful in former times, have long ceased to serve any rational purpose. And this is specially true of the (law of mortgage); for the relations of mortgagor and mortgagee still lie under the shadow of obsolete conceptions from which they have not been able even in the twentieth century to disentangle themselves."³

¹Abstract from the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1882, Vol. XXI, page 55.

²Abstract from the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1882, Vol. XXI, page 56.

³The Law of Mortgage in India by Sir Rashbehary Ghose and Bipinbehary Ghose, Thacker Spink & Co., Calcutta, (1922 edn.), Vol. I, page 5.

1.2.8 The chapter on mortgages is the most important part of the Transfer of Property Act. In order to appreciate the provisions of the chapter on mortgages, it is necessary to set out the state of affairs that prevailed when the Act was enacted.

POSITION PRIOR TO THE TRANSFER OF PROPERTY ACT

1.2.9 The position that prevailed in India prior to the enactment of the Transfer of Property Act as regards mortgages may be stated as reported in the Proceedings of the Council of the Governor-General of India:

“Mortgages were legislated for in Bengal as early as 1798, but, as the old Regulations gave a somewhat cumbrous and unsatisfactory procedure, and did not cover every class of mortgage, money-lenders had resorted to a simple mortgage-bond, consisting of a covenant to pay and a pledge of the property. This form of mortgage never having been legislated for, there was no protection to the debtor. The practice was for the creditor to get a money-decree, and sell up the mortgaged property without allowing any time for redemption. The sale being an ordinary execution-sale of the right, title and interest to the debtor, whatever it might be, it was usual, when the same property was pledged to different creditors in different mortgage-bonds, for each creditor to hold a separate sale and leave the purchasers to fight out in court the question of what they had bought under their respective sales. There being no machinery for bringing together into one suit the various incumbrancers on the property, endless confusion had been the result, and the decisions of the Courts upon the almost insoluble problems arising from this state of things had been numerous and contradictory. The result was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged, and the vast amount of gambling and speculative litigation fostered.”¹

1.2.10 In the above state of affairs, when the field was dominated by rapacious moneylenders and as banks and other financial institutions had not developed and even the few institutions then existing regarded lending against immovable property as opposed to traditional concepts relating to bank lending, the framers of the law realised the necessity for treating mortgagors as a class and as a weaker section of the society and considered that only in exceptional cases

¹Abstract from the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1882, Vol. XXI, page 76.

the mortgagee should be given the power of direct sale, though this power has all along been the chief feature of the law relating to mortgage in the U.K. The exception was recognised by the framers of the law when, in order to cater to the needs of the elite class which comprised of the merchants and traders in metropolitan cities, they applied the law relating to mortgage as then prevalent in the U.K. and called such a mortgage an *English mortgage*. While the English mortgagee was given the right of private sale without the intervention of court, this power was not allowed in the case of a simple mortgage.

1.2.11 The question of the validity of a power of sale in favour of a mortgagee in this country appears to have been, for the first time, raised before the late Sudder Dewanny Adalut of Calcutta in the year 1847. There the judges were unanimously of opinion that a sale by the mortgagee under his power would not pass a valid title to the purchaser. This decision was criticised. But, as observed by Sir Rashbehary Ghose, "the judgment of the court substantially rests upon the broad ground that it would be inexpedient to allow mortgagees in this country to exercise any such power. It is true that a power of sale has been found beneficial in England; but English mortgagors, as a class, are perfectly competent to take care of their own interests. In India, however, we have to deal with a very different order of men. The mass of mortgages in this country consists of mortgages of ancestral fields by ignorant peasants to a class of people not remarkable for their scrupulousness, and everyone with any experience of Indian litigation must admit the danger of arming our money-lenders with a power of sale without the intervention of a Court of Justice."¹

POWER OF SALE IN THE HANDS OF UNSCRUPULOUS MONEYLENDERS

1.2.12 In *Bhowani Charan Mitter vs. Joykissen Mitter*,² the court observed with reference to the power of sale: "This court has only to declare such a condition legal, and in the course of a short time not a mortgage-bond would be without it. The mortgagee would then sell the debtor's property to suit his own time, and in such manner and with such publicity and formalities as he thought proper. Fraud, it is to be feared, would frequently accompany the transfers, and the property fall into the hands of the mortgagee, or some of his connections even (as in this case it is alleged the purchaser is

¹The Law of Mortgage in India by Sir Rashbehary Ghose and Bipinbehary Ghose, Thacker Spink & Co., Calcutta, (1922 edn.), Vol. I, page 18.

²(1847) 7 S.D., 429.

the son-in-law of the mortgagee) at an inadequate price, leaving the lender at liberty still to pursue the borrower for the balance that may remain after the sale.”

1.2.13 Thus, in the situation that prevailed at the time of the consideration of the legislation on transfer of property, *inter alia*, by way of security, justifiable apprehension was expressed in extending to the mortgagee in India all the powers which a mortgagee in England was allowed. Particularly, this was felt with reference to giving to the mortgagee the power of sale without the intervention of the court.

1.2.14 No wonder, the original provision in the Bill conferring on the mortgagees the power to sell the security without the intervention of the court was vehemently opposed before the Select Committee. Mr. Evans “was strongly of opinion that these powers, which were practically unknown in the Mufassal of Bengal, could not be safely granted except where the property was situated in the Presidency-towns or the parties were Europeans.”¹

ORIGINAL SCHEME DID NOT PROVIDE FOR DIFFERENT FORMS OF MORTGAGES

1.2.15 As originally introduced, the chapter in the Bill dealing with mortgages of immovable property did not provide for different forms of mortgages with different rights. It provided the law as regards the rights and duties of mortgagors and mortgagees when the mortgage was with possession and when the mortgage was without possession. The difference in the types of mortgages based on the form, the status of the parties to the transaction and the place of creation of the mortgage are all subsequent additions.

PROVISION FOR DIFFERENT FORMS OF MORTGAGES

1.2.16 However, the recognition that mortgagees who were in the Presidency towns or who were Europeans should be distinguished from mortgagees in mofussil areas led to the enactment of the provisions for different forms of mortgages. Again, this distinction was based also on the credibility and the lending practices, on the one hand, of the city merchants or banks and, on the other, of the village moneylenders.

¹Abstract from the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1882, Vol. XXI, page 76.

1.2.17 Thus, a distinction was made in the original scheme as regards mortgages to which Europeans were parties, mortgages where the property was situated in the Presidency towns, and mortgages where the mortgagees were of native origin and mortgages where the property was situated in the mofussil. This distinction was based on the fact that in the mofussil it was the moneylenders with their unscrupulous methods, who were, by and large, the persons lending against mortgage of immovable property. On the other hand, it was presumed that, as regards mortgages of property situated in the Presidency towns and mortgages where Europeans were parties, the mortgagors might be fully competent to take care of their interests. Thus, at the time of the enactment of the Transfer of Property Act, the right of sale without the intervention of the court, which was considered as an important right of the mortgagee, was given only in respect of mortgages where the mortgagees were of a specified ethnic group or the property was situated in the Presidency towns.

SUCH A DISTINCTION IS NOW BASED ON OBSOLETE CONCEPTS

1.2.18 Evidently, the situation that prevailed at the time of the enactment of the Transfer of Property Act, 1882, justified the legislative action of the then Government of India in limiting the right of sale without the intervention of the court only to such class of mortgages. But this situation became totally out of context with subsequent developments.

1.2.19 Our economic conditions have vastly changed since the enactment of the Transfer of Property Act in 1882. The role of the unscrupulous moneylenders dominating in the field of credit is no longer valid. It is not the village moneylender who is primarily required to extend credit in the mofussil. With our reliance on the institutionalisation of credit, banks and other financing institutions are the major lenders of credit today. In their dealings with their mortgagors, it is anachronistic to assume that they will adopt the unscrupulous methods which are characteristic of unscrupulous moneylenders.

1.2.20 In fact, in extending credit, the necessity for suitable safeguards to banks and other financing institutions is now rightly stressed. It is understandable that the legal framework essentially conceived to deal with unscrupulous moneylenders is no longer appropriate to deal with credit given by banks and other financing institutions whose motivation is essentially not profit but socio-economic development. As the Finance Minister, Shri H. M. Patel, has pointed

out, while addressing the Seminar on Land Development Banks, banks today "are not merely moneylenders but powerful instruments of social change".¹

RIGHT OF FORECLOSURE

1.2.21 Again, under the original Bill it was proposed to do away with the right of foreclosure altogether and to give the mortgagee only the right to realise his dues by way of sale of the secured property. However, such a change was then considered as not justifying the amount of disturbance which would be created. On this decision, Sir Rashbehary Ghose long ago expressed the doubt "whether the slight disturbance which would have been created by such a law would have been too dear a price to pay for the elegance and simplicity which such a measure would have given us. At any rate the gain to the community would have been sufficient compensation for any possible disturbance."²

1.2.22 In fact this right of foreclosure was preserved only with reference to a particular form of mortgage, namely, mortgage by conditional sale. Now, this form of mortgage is a rarity and could be abolished.

REGISTERED VS. UNREGISTERED MORTGAGES

1.2.23 The other major feature of the law relating to mortgage which found statutory exposition in the Transfer of Property Act, 1882, relates to the principle which then found recognition that as a rule encumbrances on immovable property should be by registered documents. The limited exception that was recognised to this rule relates to the statutory sanction given to mortgage by deposit of title deeds.

UNREGISTERED MORTGAGE OR MORTGAGE BY DEPOSIT OF TITLE DEEDS

1.2.24 Over the course of years, mortgage by deposit of title deeds, far from being an exception of limited scope to the general rule of registered encumbrances on land, has gained much wider application

¹Valedictory address delivered on 17th August 1977 by the Finance Minister, Shri H. M. Patel, at the Seminar held in New Delhi under the auspices of the National Co-operative Land Development Banks Federation.

²The Law of Mortgage in India by Sir Rashbehary Ghose and Bipin-behary Ghose, Thacker Spink & Co., Calcutta, (1922 edn.), Vol. I, pages 32 and 33.

on account of the obvious advantage in the cost of creation of the encumbrance, though in other respects this form of mortgage ranks inferior to the status of registered mortgage, particularly the English mortgage, with reference to the rights and remedies available to the parties. Hence, we shall first consider the factors which originally weighed with the framers of the law while making a statutory provision for the creation of mortgage by deposit of title deeds in our country.

VIEWES OF THE LAW COMMISSION

1.2.25 The first Law Commission was not in favour of any statutory recognition being given to equitable mortgages. It was the second Law Commission of 1879 which decided by a majority to support the contrary view. The dissenting member of the second Law Commission had given his reasons which merit mention: "We concur with the late Law Commissioners in thinking that the mortgage by deposit of title deeds should not be recognised. It is now hardly known in the mofussil. It is opposed to the policy of our registration law; it leads to evasion of stamp duty; and it is at variance with the principle of making the system of transfer of immovable property as far as possible a system of public transfer. When the amount secured is Rs. 100 or upwards, it would also be inconsistent with our proposed rule requiring a written instrument."

SELECT COMMITTEE'S VIEWS ON REGISTRATION OF MORTGAGES

1.2.26 The report of the second Law Commission was communicated to the Select Committee. This Select Committee agreed with the Commission that as to mortgages, the requirement of registration would not only discourage fraud and facilitate investigations of title, but that it would also preclude difficult questions of priority. The majority of that Committee, however, thought that when the principal money secured was less than Rs. 100/-, the mortgage deed need not be registered, and the Bill was altered accordingly. It was recognised that mortgages by deposit of title deeds produced great confusion in the case of land in the mofussil, and frustrated the effects of registration.¹ Hence, it was urged that equitable mortgages should be abolished altogether or, at least, confined to land situate within a Presidency town. In fact, those, who opposed the retention of the concept of an unregistered mortgage, had expected "some day, when

¹Abstract from the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1882, Vol. XXI, page 76.

our registration-system was improved, to see a much greater change, and to see incumbered land sold under a statutory title, leaving all disputed questions to be fought out over the proceeds in court".¹

1.2.27 Again, even the Select Committee which accepted the second Law Commission's views on this matter was not unanimous. While stating that the majority of them were of the opinion that mortgages by deposit of title deeds should be valid when they were made in Calcutta, Madras, Bombay, Rangoon and Karachi, the Committee had recorded the reasons of the dissenter as under: "Here again Mr. Stokes dissents on the grounds (a) that such mortgages are opposed to the policy of registration law; (b) that they lead to evasion of stamp duty; (c) that they are at variance with the principle of making the system of transfer of immovable property, as far as possible, a system of public transfer; and (d) that, when the amount secured is Rs. 100/- or upwards, they would be inconsistent with the general rule in section 58 requiring a written instrument." Thus, it may be seen that on the same reasons the first Law Commission, the dissenter in the second Law Commission and the dissenter in the Select Committee had opposed the statutory recognition of an unregistered form of mortgage, that is, mortgage by deposit of title deeds.

RECOGNITION OF THE PRACTICE IN METROPOLITAN CENTRES AS AN EXCEPTION

1.2.28 However, the majority of the second Law Commission and of the Select Committee favoured the statutory recognition of mortgage by deposit of title deeds in Calcutta, Madras, Bombay, Rangoon and Karachi since "the practice of raising money on such securities has long been established in those towns, and any attempt to disturb it would cause much inconvenience."²

1.2.29 In other words, in a limited area, based on established practice, creation of mortgage by deposit of title deeds was allowed to continue in order not to cause inconvenience to the city merchants and traders. Though the power to notify other areas as eligible places where a mortgage by deposit of title deeds could be created was reserved, it was never visualised that this power would be so utilised as to enlarge the area of the exception to cover practically the whole of the country.

¹*Ibid.*

²Abstract from the Proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1882, *vide* Report of the Working Group constituted by the Reserve Bank of India on acceptance of equitable mortgages, etc. (1966), Chapter II, paragraph 8.

1.2.30 However, as subsequent developments have shown, in view of the inexpensive and at the same time instantaneous possibility of creating a mortgage by deposit of title deeds, there has been considerable pressure on Government from time to time to expand the areas in which mortgage by deposit of title deeds could be allowed to be created.

INDIAN CENTRAL BANKING ENQUIRY COMMITTEE

1.2.31 The Indian Central Banking Enquiry Committee (1931) recommended to Government the consideration of enlarging the list of places where such mortgages could be created, in order to reduce the cost of creation of security interests in immovable property. But this recommendation of that Committee was aimed to provide some expeditious relief in the cost of creation of charges on immovable property, pending the removal of, the legal impediments to ensure the availability of credit at reasonable rates.

1.2.32 In fact, one of the Provincial Banking Enquiry Committees (1929-30) had reported that "the use of land as basis of credit could be greatly facilitated by a radical and comprehensive revision of the Transfer of Property Act".¹ However, Government could not then bestow attention on the modernisation and simplification of the law relating to the creation of security interests in immovable property. Under the circumstances, the Central Banking Enquiry Committee and the subsequent committees have been laying stress on expeditious relief being given to borrowers by way of reducing the cost of creating security interests in immovable property and this, they hoped, would be achieved by enlarging the number of places notified as eligible places for creation of mortgage by deposit of title deeds.

1.2.33 From time to time, the State Governments have been notifying different places in the country wherein mortgages by deposit of title deeds could be created. From the information we were able to get, it is understood that, in several States, by subsequent notifications, even taluka headquarters are included now in the list of notified places where mortgage by deposit of title deeds can be created. This list is gradually getting further enlarged.

¹Burma Provincial Banking Enquiry Committee, Vol. III, paragraph 728, page 324.

DOCUMENTS MAY BE HANDED OVER EVEN OUTSIDE NOTIFIED AREA

1.2.34 Not merely that the deposit may cover property situate outside a notified area, it has to be read with the further liberal interpretation our courts have placed on the requirements as to the place of deposit. In *K. J. Nathan vs. Maruthi Rao*,¹ the Supreme Court held that where the documents intended to be deposited were received at Kumbakonam by the *creditor's* representative and then sent by registered post to the creditor at Madras, the ultimate place of deposit should be taken as falling within the notified area, i.e., Madras, and not at Kumbakonam, a non-notified area. In *Sulochana and others vs. The Pandyan Bank Ltd.* and another,² the Pandyan Bank branch at Kumbakonam (a non-notified area) received the documents and sent them to Madurai for ultimate deposit at its head office at Madurai, a notified area. Following the Supreme Court decision, the Madras High Court has held that "even if the procedure adopted by the bank was to receive the documents through their local branch at Kumbakonam and forward the same for the purpose of depositing in Madurai, a legally valid equitable mortgage could be created" and observed that "section 58(f) of the Act does not require that the debtor himself must in person produce the documents and deposit the same in any of the towns mentioned in that section. If the intention was to deposit the documents in the town mentioned in that section and the documents were forwarded either through the agent of the debtor or through the agent of the creditor, the ultimate deposit shall be deemed to have been made only in the town notified in that section and not in the place where the documents in fact were received for the purpose of deposit in the notified town." (*emphasis added*). Thus, even if the documents are received in a place outside a notified area, still the deposit can be shown in the books of the creditor as having been effected in a notified area.

ALL RESTRAINTS ONLY SUPERFICIAL

1.2.35 In view of the above, the restraints on the borrower's ability to create mortgage by deposit of title deeds are only superficial and have lost their significance. Thus, the property comprised in the mortgage by deposit of title deeds may be situate anywhere in the country and the handing over of the related documents may also be at any place, so long as the documentation is so drawn up as to read that the ultimate deposit of the documents is shown to be at a notified area.

¹A.I.R. 1965 S.C. 430.

²A.I.R. 1975 Madras 70.

EVEN SUPERFICIAL RESTRAINTS BEING ELIMINATED

1.2.36 The inclusion of all taluka headquarters in the list of places has no doubt enlarged the scope of the provision for creation of mortgage by deposit of title deeds, and this, together with the distinction drawn between the ultimate place of deposit and the place where documents are handed over to the creditor's representative (which may be in a non-notified area), has made even the superficial restraints on the creation of mortgage by deposit of title deeds as of no significance. This is evident when it is also considered with the fact that while only the place where the document could be deposited is required to be notified, the property in respect of which the security interest is created may be situate wholly outside the notified place.

NO RESTRAINTS ALSO *RE* CHARGES IN FAVOUR OF MONEYLENDERS

1.2.37 Again, the extended privilege regarding creation of mortgage by deposit of title deeds is available not only to banks and other financing institutions which may be expected to proceed in a reasonably commercial manner, but also to all other classes of money-lenders whose propensity for unscrupulous actions was recognised initially as warranting restrictions on the rights of a mofussil mortgagee.

POLICY NOT TO FAVOUR MONEYLENDERS

1.2.38 While enlarging the list of places where mortgage by deposit of title deeds could be created, the primary consideration with the State Governments has been to facilitate the extension of credit by banks and other financing institutions for productive purposes. It is not the intention that such extension should enure to the benefit of moneylenders as well.

BANKS' RECOURSE TO MORTGAGE BY DEPOSIT OF TITLE DEEDS

1.2.39 But to what extent has the extension of the eligible places really helped the banks and other financing institutions themselves to extend credit by mere recourse to the mortgage by deposit of title deeds? Here again, it is to be noted that banks and other financing institutions have to take into consideration not merely the saving in the cost and the time for the creation of the mortgage, which is obviously available to them by having recourse to mortgage by deposit of title deeds, but they have also to look to the expeditious means available to them for enforcement of the security. Unless, in the

event of default, the mortgagee-bank could easily realise its dues without protracted legal proceedings, the purpose of obtaining security would not be fully achieved.

1.2.40 While banks and other financing institutions could now have recourse to mortgage by deposit of title deeds and advance against the security interest in land, buildings and factories, they run into difficulties in proceeding against the security by having recourse to this form of mortgage. This is mainly due to the fact that while an English mortgagee is allowed to have a right of sale without the intervention of the court, this right is denied to a mortgagee claiming under deposit of title deeds.

REPORT OF THE RESERVE BANK OF INDIA WORKING GROUP

1.2.41 The Working Group of experts set up by the Reserve Bank of India to consider the acceptance of equitable mortgage by financial institutions, particularly the State Financial Corporations, had also felt that the non-availability of the right of sale without the intervention of the court is the chief drawback in obtaining mortgage by deposit of title deeds. This Group had observed that the remedy of a mortgagee under an equitable mortgage "is to file a suit for the sale of the mortgaged property, which means considerable delay and expenditure. This is the chief disadvantage of an equitable mortgage. A remedy by way of sale without the intervention of the Court is a cheap and expeditious remedy while a remedy by way of suit is not."¹

1.2.42 The Expert Group referred to above had stressed the value of the right of sale without the intervention of the court and of the right to appoint a receiver, even though the occasion for exercising such rights might not arise often. This Group had observed:

"The right of sale without the intervention of the Court and the right to appoint a receiver, even when they are not exercised, operate as a psychological advantage since the borrower cannot buttress his default by taking advantage of the delays in legal proceedings for enforcement of the security. In the case of an equitable mortgage the lending institution will have to file a suit for enforcing the security. The proceedings in a mortgage suit would require following elaborate procedures which are time-consuming, starting with the process of numbering the suit and the issue of summons to the defendant-borrower. If the

¹Report of the Working Group constituted by the Reserve Bank of India on acceptance of equitable mortgages, etc. (1966), Chapter IV, paragraph 14.

borrower is non-cooperative, he may avoid accepting service of summons and even if the summons is served, he may question the fact of equitable mortgage and raise a number of other objections. Even if the Court finds ultimately that an equitable mortgage was created, and overrules the other objections, the further step is only to pass a preliminary decree for sale in favour of the lending institution, with an option to the borrower to redeem the property by paying the mortgage-debt for which he will be given time of about six months. The matter will have to go to the Court again if the mortgagor does not redeem the property. All these procedures take at least two to three years. Thereafter the mortgagee will have to obtain a final decree for sale. Then alone can the property be brought to sale. The Court has to fix a reserve bid. The sale has to be advertised, again involving expenditure and delay. In case the price offered at the Court sale is less than the reserve bid, the matter has again to be referred to Court for fixing a fresh reserve bid. Each application for reducing the reserve bid and putting up the property for a fresh sale takes considerable time. Every time the property has to be re-advertised for sale. The borrower invariably tries to obstruct the Court sale by raising various objections such as that the prescribed procedures for sale have not been followed, that there have been irregularities in the sale etc. If the Court upholds the objections, fresh proceedings for the sale will have to be taken. That these procedures consume enormous time is well-known and there have been cases where Court sale has dragged on for even a decade. Further, the borrower has a right to prefer an appeal and if he exercises this right, the matter will be kept pending for a number of years as the appeal will not normally be expeditiously disposed of. In addition, the lending institution will have to initially incur heavy expenses by way of Court fees, solicitors and counsel fees, and other incidental expenses. No doubt, the lending institution can obtain a decree against the borrower for costs but this may cover only a fraction of the total expenses, as the decreed costs will invariably be very much less than the costs actually incurred.”¹

1.2.43 No wonder that in view of the several difficulties faced by banks and other financing institutions in proceeding against the security through court, this Expert Group was “unable to recommend the general acceptance by State Financial Corporations of equitable mortgages as security merely for the reason that the borrower is thereby saved from the burden of stamp duty and registration

¹Report of the Working Group constituted by the Reserve Bank of India on acceptance of equitable mortgages, etc., (1966), Chapter IV, paragraph 14.

charges"¹ (*emphasis added*). Thus, the main purpose of enlarging the area for acceptance of equitable mortgage by deposit of title deeds has not been really achieved.

SAVING IN STAMP DUTY AND REGISTRATION CHARGES. RE. MORTGAGE BY DEPOSIT OF TITLE DEEDS

1.2.44. As regards the saving in stamp duty which would have otherwise been incurred or expended if the mortgage had been created by an instrument in writing, the Working Group had also considered this aspect with reference to State Financial Corporations. Substantially the position would be the same with reference to other term-lending institutions. The Working Group had observed that "while the initial burden of the stamp duty and registration charges may be heavy in the case of loans of very large amounts, *if these charges are spread over the period of the loan, and the amount of the loan is taken into account, the burden will not be such as to be prohibitive. Another aspect of the matter is that according to the decision of the Supreme Court in the India Cement Company's case (A.I.R. 1966 Supreme Court 1053), such costs and charges are allowable deductions for purpose of income-tax. If the tax allowance in this regard is taken into account, the case against registered legal mortgages, as being costly, is considerably weakened.*"² (*emphasis added*).

1.2.45 Of course, the question of income-tax deduction would arise mainly in the case of industrial concerns and may not be relevant to cover advances to agricultural sector.

1.2.46 But with reference to agricultural advances, it is widely recognised and several expert committees have indicated that the agriculturists do not have in the majority of cases title deeds which will enable them to create mortgage by deposit of title deeds. Again, in the case of agricultural advances, co-operative credit societies, which purvey short-term and medium-term rural credit, generally obtain a declaratory charge which is provided for under the Co-operative Societies Acts, and they do not generally have recourse to the mortgage form for obtaining a security interest in the land. The land development banks which purvey long-term rural credit obtain their security interests by way of mortgage of land; but they do not have recourse to mortgage by deposit of title deeds. As co-operative credit societies, including land development banks, are exempt from pay-

¹Report of the Working Group constituted by the Reserve Bank of India on acceptance of equitable mortgages, etc., (1966) Chapter V, paragraph 20.

²Ibid. paragraph 19.

ment of stamp duty and registration charges, there is no definite advantage for such credit institutions having recourse to mortgage by deposit of title deeds while purveying rural credit.

1.2.47 The principle that commercial banks and rural banks catering to agricultural credit should have the same facilities and concessions as are now available to co-operative credit societies has now been recognised. The Expert Group, which was constituted by the Reserve Bank to consider the State enactments coming in the way of commercial banks giving credit to agriculture, has suggested a model law which would extend to all commercial banks such privileges and facilities. Some of the States have already enacted suitable legislation. In principle, almost all the other States have also accepted the necessity for such legislation.

1.2.48 Under the above circumstances, for co-operative credit institutions and commercial and rural banks extending credit to agriculture, recourse to mortgage by deposit of title deeds is not necessary. Nor does it really help the agriculturists since they do not have title deeds which they could deposit for creating such mortgages. It is true that as an administrative measure, State Governments have, in a limited scale attempted to issue passbooks to agriculturists, which will indicate the extent of holding and other details relating to the title of the agriculturists to the land. But these passbooks do not have the status of title deeds, which would qualify them as eligible documents by deposits of which a mortgage-in-trust can be created over the land.

1.2.49 Hence, with reference to advances to agricultural sector, the recourse to mortgage by deposit of title deeds as a mode of creating a security interests in the land in favour of the lending institution is neither necessary nor feasible in the context of institutional lenders extending credit to the agricultural sector.

CASE FOR REMISSION OF STAMP DUTY

1.2.50 The Working Group on acceptance of equitable mortgages, etc., had also occasion to consider the case for remission of stamp duty now payable on the creation of mortgages in favour of State Financial Corporations. The Working Group observed:

“The Financial Corporations are State aided and controlled institutions set up mainly with a view to assist the industrial development of the States. The ultimate responsibility for providing the necessary assistance to the industrial concerns will have to

be shared by the States themselves. In so far as from the borrowers' point of view a general claim has been made that the burden of stamp duty etc. operates as a damper, the proper course is for the State Governments to remit or reduce the stamp duty and registration charges under their respective laws in respect of mortgage deeds executed in favour of the State Financial Corporations. It is no doubt true that remission of duty may amount to some loss of revenue to the State, but we do not think that the amount involved, from the point of view of the State, will be large. At any rate, looking at the position from the point of view of loss of revenue will not be a very correct approach. It must be remembered that, in the final analysis, the industrial development of the State augments the revenues of the State and adds to its employment potentialities. This will far outweigh the loss of revenue that may arise by remission of stamp duty....."¹

1.251 As regards the State Financial Corporations, it has been pointed out that the State Governments in Punjab, Himachal Pradesh, Jammu & Kashmir and Delhi have taken the commendable action of reducing or remitting the stamp duty in respect of mortgage deeds executed in favour of the respective Financial Corporations to 0.75% in the case of Punjab, to nil in the case of Himachal Pradesh, to 0.15% subject to a maximum of Rs. 100 in the case of Jammu & Kashmir, and to 0.50% in the case of Delhi. The Working Group had also recommended that in its opinion "there is every justification for other States taking similar action".

1.252 As this Working Group had pointed out, "if, as is made out, the burden of stamp duty and registration charges operates as a hardship, that will also operate as a deterrent against the borrower going to the State Financial Corporations; the parties may accept finance from other institutions which are prepared to accept equitable mortgage as security. This would defeat the very object with which the Financial Corporations have been set up."¹

1.253 This Group had expressed that the case of remission of stamp duty, etc., in respect of mortgages executed in favour of State Financial Corporations or for that matter in favour of any credit institution for the development, extension or needs of any industry in the State is as strong as that in the case of co-operative societies, in

¹Report of the Working Group constituted by the Reserve Bank of India on acceptance of equitable mortgages, etc., (1966), Chapter V, paragraph 21.

respect of which the State Governments have granted remission on a number of documents. Hence, this Group had recommended that suitable action should be taken so as to obtain the necessary reduction or remission of stamp duty and registration charges on mortgages executed in favour of State Financial Corporations or in favour of any credit institution in respect of term loans for periods exceeding five years for the development, extension or needs of any industry in the States. This Group had felt that the minimum period of five years is a reasonable period for granting the reduction or remission.

POLICY OF THE REGISTRATION ACT

1.2.54 While the considerations relating to saving of stamp duty in the case of mortgage by deposit of title deeds are as stated above, from its very inception it has been recognised that enlargement of the scope of the equitable mortgages offends the policy of the Registration Act. It is not conducive to the development of a system of public transfers in land, which is very necessary to avoid benami and secret transactions. While the extension of the areas for the creation of equitable mortgages has not substantially helped banks and other financing institutions, it is reasonable to infer that this would have contributed to the enhancement of the power and the grip of the moneylender over his indigent borrowers.

LIMITED USE OF EQUITABLE MORTGAGE BY FINANCING INSTITUTIONS

1.2.55 Though the financing institutions, particularly term-lending institutions, do not rely on the equitable mortgage in view of its drawbacks in realising the security, the Working Group on acceptance of equitable mortgages, etc., had recommended, and the commercial banks are having, recourse to the obtaining of mortgage by deposit of title deeds, under special circumstances to help the borrowers, namely, in cases where the documentation regarding legal mortgage is likely to take considerable time and the borrower is in very urgent need of funds, for instance, to take delivery of machinery after paying the price.

1.2.56 However, some of the institutions have also pointed out before the Working Group that their experience in granting such interim advances against security of mortgage by deposit of title deeds and hypothecation of moveables was not very happy. In such cases, execution of legal mortgages was delayed over a year or more mainly due to lack of co-operation on the part of the borrowing concerns. Hence, some institutions are taking as security for interim disburse-

ment of loans bank guarantees or indemnity policies from insurance companies or personal guarantee of directors, coupled with hypothecation of moveables.

1.2.57 The Working Group had observed that the question of an interim loan can definitely be avoided if steps for preparation of documents were taken immediately after loan was sanctioned. The representatives of the State Financial Corporations on the Working Group were not in favour of such interim advances, as they felt that this would create difficulties if the borrower did not subsequently turn up to obtain the remaining portion of the loan and to execute the legal mortgage. Hence, this Working Group had recommended that if a State Financial Corporation was fully satisfied with the title of the borrower and his creditworthiness, the borrower is in very urgent need of an interim advance and the delay in granting the loan is due solely to documentation of the legal mortgage, the State Financial Corporation may consider granting an advance against equitable mortgage, provided the borrower is a public limited company and the interim advance does not exceed 50% of the loan sanctioned.

RECOURSE TO EQUITABLE MORTGAGE BY TERM-LENDING INSTITUTIONS UNDER CONSORTIUM ARRANGEMENTS

1.2.58 Another limited use to which the term-lending institutions have now recourse to mortgage by deposit of title deeds is with reference to consortium arrangements.

1.2.59 Though the Working Group constituted by the Reserve Bank to consider the acceptance of equitable mortgage by financial institutions was in favour of only a very limited recourse to this form of obtaining a security interest in immovable property, in view of the size of consortium loans granted by IDBI, IFCI, ICICI, LIC, UTI and commercial banks/State Financial Corporations, these institutions are relying on mortgage by deposit of title deeds to secure their charge. Under the procedure they follow in consortium loans, the term-lending institutions are taking several mortgages to secure the total accommodation and are trying to link-up all the mortgages and bring them to a *pari passu* status with the aid of an agreement termed an "*inter-se agreement*". The attempt here is to gain the advantages arising under the English mortgage with regard to the recovery of the advance and the advantages available with reference to mortgage by deposit of title deeds as regards the cost for the creation of the security interest. Under this arrangement, the institution advancing the lowest amount takes a mortgage in English form and the other institutions advancing larger amounts take a mortgage by deposit of title deeds to secure their respective advances.

1.2.60 Briefly the arrangement may be explained thus in the words of the IDBI: "In cases of joint financing by IDBI and any one or more of the following institutions namely IFCI, ICICI, UTI, LIC, SFCs and Banks, it is invariably our practice to accept equitable mortgage by deposit of title deeds as security for our assistance, while one of the other institutions secures its financial assistance (whether by way of loan or subscription to privately placed debentures) by a legal mortgage in English form or by a Debenture Trust Deed, as the case may be. An *inter-se* agreement is then entered into between IDBI and the other financial institution(s), to which the (borrowing) company normally subscribes as a confirming party, which *inter alia*, provides for ranking of all the charges *pari passu*. Further it provides for a default under the IDBI equitable mortgage being treated as a default under the English mortgage so that the latter mortgage could be enforced and proceeds shared by the mortgagees on prorata basis."

CONTROVERSIAL NATURE OF "INTER-SE AGREEMENT"

1.2.61 The nature of the document termed "*inter-se* agreement", under the above arrangement, is not free from doubt. Shri J. C. Shah, former Chief Justice of India, has also opined that under such an arrangement it is not advisable to make the borrowing company a party to the agreement. He has felt that the *inter-se* agreement may be considered as a mortgage deed when the borrowing company is made a party to it. May be, in some cases the borrowing company is not made a party to the *inter-se* agreement, but its consent to the terms of the agreement is independently obtained by exchange of letters. Even so, it is doubtful whether the letters and documents evidencing the whole transaction would not be so viewed as if the company is a party to the transaction. If the company is not made a party to the transaction, the efficacy of the *inter-se* agreement vis-a-vis the company is substantially undermined.

1.2.62 However, it is understood that in several cases the borrowing companies have been able to persuade the stamp authorities and get an adjudication that the *inter-se* agreement is liable to stamp duty only as an agreement, even though the document provided for the borrowing company being a party to it. For the particular transaction adjudicated upon, by reason of the provisions of the stamp law, the document in question cannot be further challenged on the ground that it is understamped. The adjudication would not also cure any defect in non-compliance with the requirement as to registration were the true nature of the document to be considered as pur-

¹IDBI letter IDBI. LD. No. 515/77, dated 5th March 1977 addressed to the Secretary, Banking Laws Committee.

porting to create or modify interests in immovable property. Moreover, such an adjudication, which may be based on an inadequate appraisal of the true nature of the document, is not of much significance for the regularity of the procedure followed by public financing institutions which should not encourage non-payment of stamp duty where it is otherwise considered due.

INTER-SE AGREEMENT MODIFIES THE MORTGAGE-INTEREST

1.2.63 With reference to consortium loan arrangements, the term-lending institution really regards the *inter-se* agreement as an instrument modifying the mortgage-interest earlier created in favour of the institution pursuant to the mortgage by deposit of title deeds. On this basis, particulars of the modification of the charge are filed in Form No. 14 with the Registrar of Companies with whom the particulars of the original mortgage by way of deposit of title deeds are already filed. Thus, even as per the tenor of the transaction and as reported by the parties to the arrangement, the *inter-se* agreement has to be regarded as a security agreement modifying the mortgage by way of deposit of title deeds.

LIMITED SCOPE FOR SUCH TAX-SAVING DEVICES

1.2.64 Apart from the above, such special arrangement for reducing the cost of credit is available only in the case of advances to big industrial concerns which qualify for availing themselves of consortium loans from multiple financing agencies. Small companies and small business people are not now in a position to avail themselves of the benefit of such arrangements from their lending institutions.

POSITION OF COMPANY-BORROWERS AND NON-COMPANY BORROWERS *VIS-A-VIS* MORTGAGE BY DEPOSIT OF TITLE DEEDS

1.2.65 The scheme of the Companies Act, 1956, provides for registration of a security interest in contrast to the scheme of the Registration Act, 1908, which deals with registration of documents. Hence, mortgages, by deposit of title deeds created by company-borrowers (which are not evidenced by documents) are registered under the Companies Act. Since registration constitutes notice of the charge in favour of the lending institution, there is considerable safety for the lending institutions extending credit to company-borrowers even against mortgage by deposit of title deeds. Thereby, company-borrowers are in a position to avail themselves of credit at a much reduced cost.

This facility is not available to non-company borrowers, since with reference to them there is now no registration machinery for recording security interests created against their assets, which are not evidenced by any formal documents. This is not conducive to the policy of an employment-oriented and rural-based economic development, which aims to encourage small business people, firms and proprietary concerns, which form the vast majority of the commercial and business community, to develop adequately.

SUMMING UP

1.2.66 In the result, we may sum up, as under, the general position as regards the law relating to mortgages:

- (1) Our general law relating to real property security was developed at a time when unscrupulous moneylenders were the main purveyors of credit. It is not surprising that this law has ceased to be appropriate when banks and other public financing institutions have taken up the responsibility of dispensing credit for productive and development purposes.
- (2) The right of private sale without the intervention of the court was rightly not allowed to be exercised by moneylenders who were by and large purveying credit when the Transfer of Property Act, 1882, was enacted; but, the continuance of this restriction with reference to banks and other public financing institutions affects adversely the flow of credit and encourages protracted and vexatious litigation which comes in the way of expeditious recovery of dues by such public financing institutions.
- (3) With reference to their advances to company-borrowers, banks and other financing institutions are preferring English mortgage now and this is essentially due to the advantage of having a right of sale without the intervention of the court and the right to appoint a receiver, even though the occasion for exercising such rights might not arise often.
- (4) The original position of permitting mortgage by deposit of title deeds in specified metropolitan cities and in selected places was conceived as an exception to the general rule that encumbrances on land should be created only by means of registered documents.
- (5) Enlargement of the list of places where such mortgages could be created by the several notifications to cover practically all small towns and taluka headquarters in many States has been done without regard to the fact that thereby the ex-

- ception has been elevated to the status of a general rule of an all-India application, and that, to say it in the words of the late Law Commissioners, "it is opposed to the policy of our registration law; it leads to evasion of stamp duty; and it is at variance with the principle of making the system of transfer of immovable property so far as possible a system of public transfer. It would also be inconsistent with our rule requiring a written instrument" for creating encumbrances over land.
- (6) Notwithstanding the fact that the aim of such large-scale extension of the area for the creation of mortgage by deposit of title deeds has been to benefit banks and other public financing institutions and their clientele, the institutions have not found this of any considerable advantage to them since, as against the reduction in the cost of creating the charge, they are faced with the chief disadvantage of such mortgage, namely, that for realising the security, it necessitates their filing a suit for the sale of the mortgaged property, which means considerable delay and expenditure.
- (7) Though in the form of obtaining mortgage by deposit of title deeds is implicit the saving in terms of stamp duty and registration charges otherwise payable when a registered document is obtained, as pointed out by the Working Group constituted by the Reserve Bank of India on acceptance of equitable mortgages, etc., "if these charges are spread over the period of the loan and the amount of the loan is taken into account, the burden will not be such as to be prohibitive. Another aspect of the matter is such costs and charges are allowable deductions for purpose of income-tax. If the tax allowance in this regard is taken into account, the case against registered legal mortgage, as being costly, is considerably weakened."
- (8) Enlargement of the list of notified places where mortgage by deposit of title deeds could be created has not really helped institutional credit to the agricultural sector. While commercial banks are being given in many States concessions and facilities available to co-operatives *inter alia* with reference to exemption of stamp duty and registration charges, the co-operative credit societies including land development banks are already exempted under local enactments from payment of such duties. Again, co-operative credit societies (and commercial banks on the strength of such extension) are in a position to obtain their statutory charge against land merely by a declaration made by the borrower. These factors, coupl-

ed with the fact that agriculturists do *not* have, by and large, title deeds to enable them to create mortgage by deposit of title deeds, show that institutional credit to the agricultural sector has not been helped by the enlargement of the list of places where mortgage by deposit of title deeds can be created.

- (9) Even as regards State Financial Corporations, the duty payable by them on registered mortgages executed in their favour has been considerably reduced in several States and there is a good case for such reduction in all the States with reference to stamp duty and registration charges payable on security interests in land created in favour of banks and development financing institutions.
- (10) On the other hand, the enlargement of the list of notified areas for creation of mortgage by deposit of title deeds may be helping only the generality of moneylenders and not the institutional lenders. This was evidently not the aim of such enlargement of the list of notified places.
- (11) However, mortgage by deposit of title deeds is now helping banks and other financing institutions to cover their advances for a temporary period, as collateral to the principal security for accommodation given against inventories for short-term credit, and in some special circumstances.
- (12) Mortgage by conditional sale is now a rarity and it is just that it is abolished.

1.2.67 Having regard to the above assessment, appropriate changes are necessary to the provisions dealing with mortgages in our Transfer of Property Act, 1882. It is not now feasible to eliminate totally the provisions for the creation of mortgages by deposit of title deeds, nor is it necessary. But, what is necessary is to have a distinction in our credit-security law as regards mortgages in favour of banks and other public financing institutions and mortgages in favour of other creditors. Such a distinction is already inbuilt in the scheme of the Transfer of Property Act, 1882, when the scheme of the statute makes distinctions as regards the exercise of the power of sale without the intervention of the court between mortgages in favour of Europeans (including Christians, etc.), on the one hand, and, on the other, mortgages in favour of natives (other than Christians, etc.), and mortgages with reference to property situate in specified places and property situate outside such places. It would considerably simplify matters if the power to obtain mortgage by deposit of title deeds is confined only to banks and certain notified financing institutions.

1.2.68 The difficulties felt in extending agricultural credit consequent on the inability of the agriculturists to produce proper title deeds are considered by us in the Chapter on Special Law Regarding Rural Credit. On the lines of the provisions found in local enactments (like the Co-operative Societies Acts which provide for registration of a mortgage in favour of a land development bank being recorded in Book No. 1 maintained by the Registrar of Assurances under the Registration Act, 1908, when he is advised of the same by post), similar provisions should be made for all types of mortgages created in favour of banks and certain notified financing institutions, including mortgage by way of deposit of title deeds, *being recorded in Book No. 1 ibid.*

POWER OF SALE *RE.* MORTGAGES IN FAVOUR OF BANKS

1.2.69 Again, *the power of sale* without the intervention of the court should be allowed to all banks and certain notified financing institutions and this should be available to them with reference to all types of advances *other than those made against the security of agricultural land* and should be available independent of the form of the mortgage in their favour.

PART II

**SPECIAL LAW REGARDING
RURAL CREDIT**

SPECIAL LAW REGARDING RURAL CREDIT

CHAPTER 1

RURAL CREDIT AGAINST PERSONAL PROPERTY AND REAL PROPERTY INTRODUCTORY

When institutional agencies were required to extend rural credit in our country, the provisions of the general law dealing with credit against the security of real property and personal property were found inadequate. Then it was found necessary that such institutional agencies should be clothed with special powers and privileges as regards their credit transactions. The special law dealing with rural credit against real property and personal property, the provisions of which we shall review in this chapter, is the product of such development.

2.1.2 In our review of the extent to which the several provisions of the special law are found beneficial in their actual working, we are also taking into consideration the assessments made by official committees which have gone into the requirements of rural credit, the performance of the institutional agencies in providing such credit and the extent to which the existing legal and administrative set up is conducive to the effective flow of such institutional credit. We have also taken into account the views of banks, governmental authorities and others, expressed separately and while replying to the relevant Parts of the questionnaire issued by the Banking Commission's Study Group which reviewed legislation affecting banking.

2.1.3 In this chapter we shall consider the broad framework of the special law, its salient features, the extent to which the provisions dealing with such features may require adaptations or modifications, and the coming into the sweep of this special law of commercial banks

(and of rural banks) consequent on their entry in the field of rural credit in recent years on a massive scale. In this review we also consider the need for further improvement and development of the special law, having regard to the objectives underlying the extension of rural credit.

CONSTITUTIONAL SET-UP

2.1.4 The main feature of this special law relating to credit-security in the field of rural credit is that this is found in several local State enactments and is generally not touched by Central legislation. This is because rural credit, which essentially deals with credit to agricultural sector including relief of agricultural indebtedness, and co-operative societies, which till recently were the main institutional agencies providing such credit, are both within the jurisdiction of the States under our Constitution. The position was also similar under the Government of India Act, 1935.

SHOULD THERE BE ANY CONSTITUTIONAL CHANGE ?

2.1.5 However, the fact whether this subject of rural credit should continue to remain within the States' purview is a point on which recently the Banking Commission (1972) has expressed its views. According to that Commission, from the point of view of ensuring a unified monetary and credit policy and uniformity of laws and regulations relating to credit supplying agencies, co-operative credit should be transferred to the Union List or the Concurrent List. In so far as it relates to the field of credit-security law we shall take up this question after considering the several special features of rural credit, as by then we would have taken note of the several problems to be tackled in this field and be in a position to form a view as to whether for effectively tackling such problems, any Constitutional change as suggested by the Banking Commission would be desirable or necessary.

NECESSITY FOR SPECIAL PUBLIC FINANCING INSTITUTIONS FOR EXTENDING RURAL CREDIT

2.1.6. Before going into the experience gained on the working of the provisions of the special credit-security law relating to rural credit, we shall refer briefly to the aims and objectives before the institutional credit agencies which are entrusted with the responsibility of extending rural credit. Such a reference is useful as this special law has been developed to enable the institutional agencies to fulfil their objectives. In the light of such objectives we shall consider the extent to which the provisions of this special law have helped in enabling

these institutional agencies fulfil their responsibility satisfactorily, and the changes, if any, that may have to be considered at this stage with reference to these provisions. The objectives of institutional agencies in the field of rural credit become evident when we notice the special features relating to rural credit in our country.

SPECIAL FEATURES OF RURAL CREDIT

2.1.7 Indian economy is essentially rural based and is largely sustained by agriculture rather than industry. Before the spread of the institutional credit agencies, and the position has not even now totally changed, the village moneylender had been having the grip over the small agriculturists, artisans, workers and others who form the vast majority of our rural population. The Indian cultivator was almost completely dependent on non-institutional credit agencies. As the Union Finance Minister, Shri H. M. Patel, pointed out while addressing the Seminar of the National Co-operative Land Development Banks Federation held in August 1977, "the problem of rural credit has troubled us for a long time. Even as long as a century ago the Deccan agricultural riots drew attention to the alienation of land to the money lenders; there was the unavoidable need for credit on the one hand, and there were the unsatisfactory terms on which it was available to farmers on the other." This was not healthy as credit provided by non-institutional agencies was not given on reasonable terms. "The rates of interest charged by the moneylenders were almost always very high. This often resulted not only in chronic indebtedness but sale of lands for repayment of debts. The legislation to regulate moneylending had many loopholes and was easily evaded. Moreover, non-institutional credit was not much concerned with the purpose for which the loan was utilised. *Only an institutional agency could normally be expected to stipulate about purpose and, to the extent practicable, supervise utilisation.*" (emphasis added). It was obvious that when scarce resources were not channelised mainly towards productive purposes, the scope for the development of the rural credit was not bright.

NECESSITY FOR INSTITUTIONAL AGENCIES

2.1.8 Thus it was recognised that, for rural economic development, and ultimately for the country's development, institutional lending agencies had to be adequately strengthened in order to enhance the status of the agriculturists and make agriculture a viable proposition.

¹Report of the All-India Rural Credit Review Committee (1969), page 24.

2.1.9 In order to strengthen the credit operations of institutional agencies, the special law relating to credit against land as security came to be developed in the several local State enactments. However, even after the necessity for developing institutional credit was recognised, for several decades during the pre-Independence era the role of institutional agencies (which were then mainly co-operative credit societies) was not significant when compared to the total volume of credit.

FINDINGS OF THE RURAL CREDIT SURVEY

2.1.10 When the Rural Credit Survey Committee (1954) made an assessment, non-institutional credit agencies accounted for the bulk of rural credit, that is, as much as 92.7% of the cultivators' borrowings. Of this, the credit provided by the professional moneylenders accounted for as much as 44.8% of the total. The borrowings of cultivators from co-operatives formed only 3.1% of the total borrowings from all agencies, though as between the different States the position varied. "..... co-operative credit tended to flow predominantly in favour of the large cultivators as compared with the medium and small cultivators, and, among large cultivators themselves, in favour of the big cultivators."¹

SCOPE OF THE SPECIAL LAW CONFINED TO INSTITUTIONAL CREDIT

2.1.11 The special law relating to rural credit is applied *only* with reference to rural credit provided by the specified institutional financing agencies. The provisions of such special law were originally developed with reference to co-operative credit societies which were the main purveyors of rural credit initially.

2.1.12 The institutional credit agencies are required to purvey rural credit in order that the same may be extended on reasonable terms and to ensure that the credit is purpose and production oriented. For the institutional agencies to extend credit on reasonable terms, there are two important factors. One relates to their available resources and the other relates to the optimum utilisation of such resources.

2.1.13 The Government of India, the Reserve Bank of India and the State Governments have been taking several steps regarding the allocation of funds to be channelised through the institutional agencies. But, for the optimum utilisation of resources, it is necessary to see that the

¹Report of the All-India Rural Credit Review Committee (1969), page 22.

required credit is made available expeditiously, that there is not much scope for diversion of credit for unapproved purposes, and that there are prompt repayment and recovery of dues. The consideration of the extent to which the present legal infrastructure is conducive for such optimum utilisation of the resources allocated towards the rural credit will also indicate in what respects the present legal infrastructure would require to be strengthened or changed.

ENTRY OF COMMERCIAL BANKS AND RURAL BANKS

2.1.14 While primarily the co-operative credit societies have been in the field for the past several decades as the institutional agencies (other than State Governments) for extending rural credit, their impact in several States was not adequate enough, as revealed by subsequent assessments, both in quantitative and in qualitative terms. Co-operative credit "had not reached many areas and large sections of cultivators. Even where it was available, it met only a small part of the cultivators' total requirements."¹

2.1.15 Since then, several structural reforms have been considered and implemented in the institutional set-up for providing rural credit. Commercial banks have been subsequently encouraged to come in a big way to supplement the already existing institutional agencies for purveying rural credit. Further assessments have indicated the need for more specialised institutions and in several areas of the country now regional rural banks have been set up under the Regional Rural Banks Act, 1976.

RESULTING POSITION

2.1.16 The resulting position as regards provision of rural credit has been summarised thus by the Union Finance Minister, Shri H. M. Patel:

"Since independence we have been tackling this problem but success has been meagre because of the magnitude of the rural credit problems, the peculiar characteristics of Indian agriculture and the deficiencies of the institutional structure for rural credit. When independence came institutional credit, viz. co-operatives accounted for less than 8 per cent of the requirements of rural credit. The rest was provided by moneylenders. Commercial banks hardly lent any money then to agriculture. Even after three decades of independence and continuous efforts to reorient the institutional credit structure towards a greater involvement in

¹Report of the All-India Rural Credit Review Committee (1969), page

rural credit the percentage is no higher than 35. This indicates two things; firstly the long way commercial banks and co-operative banks have to go in order to supplant the money lender; and secondly, the strength of the money lender derived from, among other things, his usefulness to the rural borrower.”¹

MAGNITUDE OF THE PROBLEM

2.1.17 Again, we would like to refer to the magnitude of the problem by giving an assessment thereof made recently by the Union Finance Minister, Shri H. M. Patel:

“The magnitude of the problem can be seen from the fact that it has been estimated that something like Rs. 15,000 crores of rural credit would be needed by 1985; and even at present the figure may be something like Rs. 10,000 crores. This can be compared with the credit of Rs. 16,000 crores to the commercial sector by banks at present. Reorientation of commercial bank credit to agriculture will create serious problems of adjustment which have to be carefully handled.

* * * * *

What is required is not merely making more funds available to the rural sector but a new approach to rural development which has credit as one of its major components.

The need to undertake rural development is an inescapable obligation. The bulk of the population lives in the countryside and derives its livelihood from agriculture. Available information shows that large numbers live below the poverty line and the incidence of unemployment and underemployment is substantial. Under these circumstances the development of agriculture itself and other rural occupations become imperative if the problems of poverty and unemployment are to be solved. The question we have then to answer will be how can credit contribute to this solution?

Irrigation, land improvement, better seed, fertilizer, pesticide, better cultural techniques, better marketing facilities are the well-known remedies to improve the productivity of our agriculture. The availability of credit can help the farmers in each of these areas

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¹Valedictory address by Shri H. M. Patel, Union Finance Minister, at the Seminar of the National Co-operative Land Development Banks Federation, held in New Delhi, on 17th August 1977.

..... there is such an urgent need to increase the credit resources available to the rural sector that all sources have to be tapped to the maximum extent.”¹

EXTENSION OF THE PROVISIONS OF THE SPECIAL LAW TO COMMERCIAL BANKS.

2.1.18 Since commercial banks have entered in a big way to cater to rural credit, the necessity was felt for extending to them powers and privileges similar to those enjoyed by co-operative credit societies all along, while they purvey rural credit. This necessity was voiced by a Study Group of the National Credit Council and the All-India Rural Credit Review Committee (1969). Pursuant thereto, the Reserve Bank set up “the Expert Group on State Enactments having a bearing on the Commercial Banks Lending to Agriculture”. That Group had drafted the Agricultural Credit Operations and Miscellaneous Provisions (Banks) Bill, 1970 (shortly, “the Model Law”).

MODEL LAW GOVERNING EXTENSION OF RURAL CREDIT BY COMMERCIAL BANKS

2.1.19 The proposals contained in the Model Law aim to place commercial banks in the same position as co-operative credit societies regarding the creation of security interest in the agriculturist-borrower’s personal and real property vis-a-vis the mode of creation, priorities, procedure for recovery, etc., though of course with some major variations to which we shall refer later.

IMPLEMENTATION OF THE PROPOSALS CONTAINED IN THE MODEL LAW

2.1.20 The Model Law, with State variations, has now become an Act in ten States and it is in the stage of Draft Bill in six more States. By reason of the definition of “the bank” in the Model Law comprising also institutions notified under section 51 of the Banking Regulation Act, 1949, the scope of the legislation would cover also the rural banks established under the Regional Rural Banks Act, 1976. Hereafter we are not distinguishing between commercial banks and rural banks as they both are governed by identical set of provisions of the Model Law.

¹Valedictory address by Shri H. M. Patel, Union Finance Minister, at the Seminar of the National Co-operative Land Development Banks Federation, held in New Delhi, on 17th August 1977.

RESULTING DICHOTOMY IN THE SOURCE OF AUTHORITY FOR THE SPECIAL LAW

2.1.21 Thus, the provisions of the special law are now to be found as regards co-operative credit societies in the State Co-operative Societies Acts, and as regards commercial banks and rural banks in the Model Law as adopted by the State legislatures. Thus, the source of authority is not the same for the application of such provisions as regards the institutional agencies involved in rural credit.

2.1.22 Our main concern should be the impact of the functioning of the institutional agencies on rural economy and the country's development. Having regard to historical reasons and the differences in their organisational set-up, there are bound to be some differences in the functioning of such institutional credit agencies. However, we may have to ensure that such differences are not so marked as to affect their functional role in the field of rural credit. In this perspective, after noticing the several particular features pertaining to the credit-security law applicable to rural credit, we shall take up later the desirability of developing a common statutory framework which would deal with credit-security questions arising in the field of rural credit irrespective of whether the institutional agency happens to be a co-operative credit society or a commercial bank or a regional rural bank.

RURAL CREDIT — ITS MAJOR CLASSIFICATION

2.1.23 Before going into the several features of the special credit-security law relating to rural credit, we shall refer briefly to the major classification of rural credit.

2.1.24 The Manual prepared by the Reserve Bank on Production-Oriented System of Lending for Agriculture (1972) has classified the credit needs of cultivators into the following three broad categories:

- “(a) *Crop loans* — mainly for financing current expenditure in connection with the raising of crops.
- (b) *Medium-term* — for meeting outlay relating to the replacement and maintenance of wasting assets and for capital investment designed to increase the output from land. Such loans are generally repayable within periods ranging from 3 to 5 years. They are sanctioned for such purposes as deepening of wells, sinking of new wells, installation of pumping plants, purchase of agricultural machinery or a pair of bullocks, etc.

- (c) *Long-term* — for capital investments in agriculture such as sinking of new wells, construction of tube-wells, land leveling, bunding, terracing, purchase of tractors, power tillers and other costly machinery including oil engines, electrical motors and pumpsets, purchase of land and acquisition of ownership rights in land, redemption of old debts, etc. Such loans are generally repayable over 5 to 15 years and in exceptional cases, in twenty years. The distinction between medium-term and long-term loans for capital investment is not so much on the basis of the purpose of the loan as the repaying capacity of the concerned borrowers. Thus, for the purchase of a pumpset, the loan sanctioned may be either medium-term or long-term depending upon the borrower's ability to repay it within five years, or more than five years but less than 15 years.”

INSTITUTIONS PROVIDING DIFFERENT TYPES OF CREDIT

2.1.25 About the institutional agencies to provide the aforesaid categories of production-oriented credit, the said Manual published by the Reserve Bank has said :

“The short-term and medium-term credit needs are at present met by the short-term co-operative credit structure consisting of the state co-operative bank at the apex level, central co-operative banks at the district level and primary agricultural credit societies covering a group of villages at the base. Long-term credit is dispensed by state/central land development banks through their branches or through primary land development banks at the district or taluka level. With the enforcement of social control over the commercial banks and particularly the nationalisation of the fourteen major Indian commercial banks, these banks are also expected to provide finance for agricultural purposes, with a view to bridging the credit gaps wherever they exist. Commercial banks can provide credit to cultivators either directly or indirectly, i.e., through the existing infrastructure of co-operative credit institutions, viz., the agricultural credit societies.”²

Subsequently, the regional rural banks have also entered the field to reduce the gap in the institutional set-up for the provision of rural credit.

¹Manual prepared by the Reserve Bank on Production-Oriented System of Lending for Agriculture (1972), page 1.

²*Ibid.*, pages 1-2.

2.1.26 While commercial banks may provide short-term credit which is mainly for the growing of crops as well as medium-term and long-term credit, amongst the co-operative agencies the primary credit societies have been providing short-term and medium-term credit and the land development banks have been attending to the provision of long-term credit.

EFFECT OF THE MOVES TOWARDS INTEGRATION OF CO-OPERATIVE SOCIETIES

2.1.27 The Committee set up by the Reserve Bank in September 1975 to consider the integration of co-operative credit institutions has recommended a merger at corresponding levels of the two systems of the tiers of the co-operative credit societies now extending rural credit, with the result that the requirements of the farmer for both short-term and long-term credit may be met by an integrated co-operative credit society. However, this recommendation of that Committee is not unanimous, and the representative of the National Co-operative Land Development Banks Federation has voiced the views of the Federation against such a merger and has advocated a multi-agency approach in the field of agricultural credit.

2.1.28 Now the lending policies and procedure followed by co-operative credit societies for extending short-term credit and the lending policies and procedure followed by land development banks for extending long-term credit are not the same. This is so whether the same institution gives or different institutions provide both types of credit. Evidently, in view of this, the Working Group of the Committee on integration of co-operative credit institutions, which went into the legal matters, has recommended the obtaining of separate charges from the borrowing member although upon the same land, one in respect of short-term loan and another in respect of long-term loan, even after the proposed integration.

2.1.29 The nature of the security should vary with reference to short-term credit and long-term credit requirements, and not with reference to the question whether the same institution provides or different institutions provide the requirements of short-term credit and long-term credit.

2.1.30 It is also necessary to consider the *inter-se* claims of an institution to priority essentially having regard to the nature of the credit extended, whether it is extending short-term credit or long-term credit. No doubt, an institution *actually* extending credit to any cultivator towards his short-term and long-term credit may qualify for

a claim in both capacities. But the fact that an institution is competent to extend both types of credit should not as such, without reference to the credit it has actually given, give the institution any right to claim priority. Hence, the nature of the considerations relevant to the furnishing of short-term credit and long-term credit will not vary in substance whether the same institution provides both types of credit or one attends to the short-term credit and the other takes care of long-term credit needs. Hence, also whether the same institution provides short-term credit and long-term credit to the cultivator or different institutions provide these types of credit, the requirements of short-term credit and long-term credit may have to be separately assessed.

SHORT-TERM CREDIT UNDER THE CROP LOAN SYSTEM

2.1.31 Short-term loans are given for meeting the credit requirements for raising current crops. The crop loan system has been evolved for the proper disbursement of short-term credit.

2.1.32 Several official committees have recognised that for providing short-term loans, the most suitable method of financing is the crop loan system. The Rural Credit Survey Committee (1954) recommended that "the provision of short-term credit should be based on the crop loan system so that the loans would be for productive purposes, their amounts would be based on estimated outlays on raising the crop, disbursement would be in kind to the maximum extent possible and recoveries would be effected from the sale proceeds of the crop raised. *This was expected to enable co-operative agricultural credit to reach large sections of cultivators and meet their credit needs to a larger extent than before.*"¹ (*emphasis added*). Subsequently, the Committee on Co-operative Credit (1963) chaired by Vaikunth L. Mehta has elaborated the emphasis of the Rural Credit Survey Committee on the adoption of the *crop loan system*.

2.1.33 The All-India Rural Credit Review Committee (1969) also has recommended that early steps should be taken to introduce the crop loan system in areas where this has not already been done and to implement it in all its aspects wherever it has been introduced partially. The said Committee has also recommended that the "scales of

¹Report of the All-India Rural Credit Review Committee (1969), pages 31-32.

finance under the crop loan system should, as a rule, be fixed separately for as small an area as possible, preferably a taluka, and, in particular, separate scales should be fixed for irrigated and non-irrigated areas."¹

SECURITY UNDER THE CROP LOAN SYSTEM

2.1.34 As the Banking Commission (1972) has pointed out, "under the crop loan system, though the loan is expected to be secured by the anticipated crop, in practice, security plays an important role even when the credit limit in each case is fixed on the basis of the scale of finance and acreage."²

IS THERE ANY NECESSITY FOR A CHARGE ON LAND RE. SHORT-TERM CREDIT ?

2.1.35 The question as to the need or necessity for a charge on land with reference to crop loans has to be considered having regard on the one hand to the vast rural population of cultivators who do not have an interest in land, and, on the other, the necessity for the legal infrastructure providing for an effective security interest in land for meeting long-term credit needs.

2.1.36 The Banking Commission (1972) has also pointed out that—

"Financing of small and subsistence farmers and oral-contract tenants has always been a problem for the co-operatives. It would be more so for commercial banks. Such farmers are numerous, their needs are not only for production, but also for consumption; they have low repaying capacity, and in most cases their marketable surplus is limited or negligible. They cannot offer adequate security either for developmental loans or for short-term loans. Where they are tenants, they can raise loans on the strength of a 'charge' created on their interest in land as tenants, where such provision exists; but where they are oral tenants they can execute neither a declaration nor a mortgage; often they find it difficult to furnish even sureties."³

CHARGE ON ANTICIPATED PRODUCE SHOULD NORMALLY SUFFICE

2.1.37 As observed by the Expert Group constituted by the Reserve Bank to consider the State Enactments having a bearing on Commer-

¹Report of the All-India Rural Credit Review Committee (1969), page 982.

²Report of the Banking Commission (1972), paragraph 9.18.

³Report of the Banking Commission (1972), paragraph 9.30.

cial Banks Lending to Agriculture (1970) (in short "the Expert Group"):

"In regard to provision of short-term loans, the most suitable method of financing is the crop loan system already adopted by co-operatives in practically all States. *Under this system, loans are generally granted on the basis of personal security with a charge on anticipated crops.* By virtue of its simplicity, the crop loan system facilitates a wider coverage of cultivators — a matter of strategic significance in a country where small farmers are numerically large and a sizeable proportion thereof have lands on lease on various terms and conditions. The repayment of such a loan should be expected normally out of the sale proceeds of the crop for which credit is provided, and therefore, such credit need not be denied to a cultivator who cannot provide land as security for the loan. This will be particularly so in the case of cultivators such as oral tenants and share-croppers who for one reason or the other do not have a recorded right in land. It should be sufficient if in such cases the cultivator is required to provide guarantors for the loan availed of by him."¹ (*emphasis added*).

CHARGE ON ANTICIPATED PRODUCE STRENGTHENED BY CROP-INSURANCE SCHEME

2.1.38 Production credit for raising current crops against a charge on the anticipated produce without any charge on the land would get a natural fillip and greater acceptability after the introduction of a crop insurance scheme. It is heartening to note that the Government is already seized of the question of developing an appropriate machinery for providing crop insurance.

2.1.39 The General Insurance Corporation of India has proposed that—

"crop insurance should be for a group of farmers operating in homogeneous agro-climatic area. Under the scheme, which is being processed by the Finance Ministry, the farmers eligible for bank loans would be covered. A separate Corporation to administer the scheme may also be created. The scheme envisaged deduction of the premium by the lending bank, whether it was the state co-operative bank or some other bank, so as to save administrative costs involved which otherwise would be very huge. Similarly, in the event of a claim the amount would be

¹Report of the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture, paragraph 2.17.

paid to the bank, which would be credited to the account of the farmer so that he would automatically be eligible for a fresh loan. There is also a proposal that the state government should share 25 per cent of the premium and the claims so that there was involvement on their part as well. The sum insured would be determined on the basis of the average of 10 years crop cutting results of the area. There was also a proposal for insuring for higher amounts where the payment of loans was based on the 'annavari system'. This scheme has been drawn up in the light of the working of the pilot scheme which was introduced in half a dozen states."¹

2.1.40 Thus, in the years to come, the giving of production credit by banks to farmers against a charge on anticipated produce would be greatly facilitated and the necessity for obtaining a charge on land would, to that extent, be further eliminated.

SHARE-CROPPER'S RIGHT TO CHARGE CROPS

2.1.41 The Expert Group has felt that it is necessary "to vest share-croppers with suitable rights to create a charge on the *crops* raised by them to the extent of their interest therein to secure financial assistance from a bank, notwithstanding the fact that they are not the owners of the land on and from which the crop is raised."² (*emphasis added*).

FACILITATING PROVISIONS IN THE PERSONAL PROPERTY SECURITY BILL

2.1.42 The Co-operative Societies Acts generally provide for a first charge on crops in favour of a credit society upon the agricultural produce of the borrowing member. The Model Law also contains an enabling provision which also operates to save the bank from the charge in favour of a co-operative credit society based on credit extended subsequently. We have already recommended in the statutory framework, suggested by us for regulating security interests in personal property, necessary provisions to deal with crop loans.

2.1.43 In our Report on Personal Property Security Law we have gone into the question of facilitating the creation of charges on crops, particularly current crops. Therein we have also considered giving a preferential position with reference to current crop loans given by

¹The Economic Times, Bombay, dated 14th September 1977.

²Report of the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture, paragraph 3.12.

banks. Under the provisions suggested by us, it is not necessary that the agriculturist, whether he is a share-cropper, tenant or a person cultivating the land on any other basis, should necessarily have an interest in the land which he is allowed, by law, to encumber. What is required is only that he should have a right to the crops and this he will be having with reference to the crops for the production of which he is responsible.

RECOGNITION OF PURCHASE-MONEY PRIORITY

2.1.44 In the statutory scheme suggested, we have gone into the necessity for recognising in favour of banks a purchase-money priority over the produce. There we have observed:

“The purchase money priority has to be recognised whether the credit is for a commercial purpose or is extended for an agricultural purpose. Having regard to the predominantly rural bias of our economy and the need to promote measures that would facilitate agricultural production, it is necessary that in our statutory scheme we should provide a priority for current crop loans by banks.”¹

PERFECTED STATUS FOR CURRENT CROP LOANS

2.1.45 We have also said that:

“Where a bank gives consideration to enable the agriculturist-borrower to produce current crops, there should be a preference in favour of such credit and the credit should have a first charge on the current crops. The credit may have to be extended before the crops come into existence by planting or otherwise. Thus, the perfected status for a bank’s advance for current crop may have to be provided for so long as other conditions to ensure that the advance is for production of current crops are satisfied.”²

SECURITY INTEREST BEFORE CROPS BECOME ‘GROWING CROPS’

2.1.46 We have further said that:

“Ordinarily, when a bank gives consideration to enable the debtor to produce the crops and that is given not more than three months before the crops become growing crops by planting or

¹Report of the Banking Laws Committee on Personal Property Security Law, paragraph 2-2-66.

²*Ibid.*, paragraph 2.2.67.

otherwise, the bank should have priority over any earlier perfected security interest, even though while giving the consideration the bank knew of the earlier security interest. The Central Government should be authorised to vary by rules the period of three months for the different areas of our country having regard to the nature of the crops, the seasonal and other local conditions.”¹

SIMPLIFIED REGISTRATION MACHINERY *RE.* CHARGE ON CROPS

2.1.47 We have also suggested a simplified machinery for registration of charges on crops in order that others may be put on notice of the credit given by a bank for producing current crops. Under the provisions recommended, the crop loan could be registered in Book No. 1 maintained by the sub-registrar of assurances by the bank sending to him by post the required particulars with suitable description of the land.

2.1.48 The provisions dealing with charges on current crops are part of the model Bill suggested by us and this gives also the necessary provisions to amend the Registration Act, 1908, to facilitate the expeditious and inexpensive registration of bank charges on crops.

NECESSITY FOR EXPEDITIOUS CONSIDERATION OF THE BILL

2.1.49 Expeditious consideration of the model Bill suggested by us for codifying transactions secured against personal property and which provides *inter alia* for—

- (i) recognition of purchase money priority in crops;
- (ii) perfected status to current crop loans by banks;
- (iii) security interest being protected before the crops become growing crops; and
- (iv) a simplified registration machinery regarding charges on crops,

will also help in solving the vexed question of agriculturists availing themselves of credit for short-term purposes under the crop loan system whether or not they have a chargeable interest in the land which they are cultivating.

¹Report of the Banking Law Committee on Personal Property Security Law, paragraph 2.2.68.

DIFFICULTIES EXPERIENCED RE. RECOVERY OF DUES FROM THE PRODUCE

2.1.50 Though, in the light of the existing provisions in the Co-operative Societies Acts, the provisions in the Model Law and our recommendations on the personal property security law, an institutional agency may extend without difficulty crop loans also to share-croppers and other cultivators not having chargeable interest in the land, the question of the institutional agency effectively recovering its dues from the sale proceeds of the crops has been found to be beset with difficulties.

LINKING CREDIT WITH MARKETING

2.1.51 It is in the above context that the question of linking credit with the marketing of the produce is being regarded as very important. This aspect has been stressed by various committees that have gone into the problems facing institutional agencies extending short-term rural credit. The All-India Rural Credit Review Committee (1969) has referred to the urgency of the problem as the steep increase in the volume of production credit supplied by co-operatives has come to be accompanied by mounting overdues.¹

MEASURES SUGGESTED BY GOVERNMENT OF INDIA

2.1.52 In 1962, the Government of India had suggested various measures for the effective linking of credit with marketing. *Inter alia*, the measures related to—

- (i) a primary credit society obtaining a suitable undertaking from its member while advancing production credit so that the member-borrower would sell his produce or at least a part of it sufficient to repay the loan only through the marketing/processing society to which the primary credit society is affiliated; such undertaking from the borrower also authorises the marketing/processing society to make deductions from the sale proceeds;
- (ii) proper defining of the responsibility of the marketing society to make the deduction and to pass on the amount to the credit society;
- (iii) the primary credit society furnishing to the marketing society, sometime before the harvesting of the crops, a demand list showing the names of its members and the amounts due from them;

¹Report of the All-India Rural Credit Review Committee (1969), page 916.

- (iv) the co-operative credit society keeping a watch over the progress of the harvest and ensuring that its members honour their undertakings regarding the marketing of their produce;
- (v) the marketing society which sells or advances a pledge loan against the produce, deducting the loan due to the credit society and paying to the member only the remaining amount; and
- (vi) the schedule for repayment of co-operative production loans being related to the period of the harvest as far as practicable.¹

2.1.53 The Reserve Bank also has stipulated that short-term, agricultural loans by primary agricultural credit societies and medium term loan instalments should be deducted from the pledge loans against agricultural produce given by marketing societies to members of agricultural credit societies and that such pledge loans may be advanced only to those growers who agree in writing to sell their produce through the marketing societies. Thus, an organic link is being forged between the co-operative credit purveying and the marketing institutions.

EXPERIENCE ON THE WORKING OF THIS LINK

2.1.54 However, the All-India Rural Credit Review Committee (1969) has commented that in practice the agriculturists' undertakings regarding the adjustment of their dues to the credit society from out of the sale proceeds of their produce due to them from, or the loan advanced to them by, the marketing society "are not taken seriously either by the members or by the societies and are very often not honoured. The actual progress made in effecting loan recoveries through marketing societies has, therefore, been rather limited, although the proportion of such recoveries to the total recoveries of the societies, that Committee has observed :

REASONS FOR THE LINK BECOMING INEFFECTIVE

2.1.55 Regarding the problems faced with reference to the recovery of co-operative dues from the sale of the produce by the marketing societies, that Committee has observed :

"Firstly, there were some cultivators who did not sell any crop whatsoever. This section of farmers could not be expected to

¹Report of the All-India Rural Credit Review Committee (1969), page 917.

²*Ibid.*, pages 918-919.

repay the loans from the sale proceeds of the crops, as their repayments had to come from the income from sources other than crops. Secondly, the study revealed that there was a large gap between the crops grown and sold. . . . Thirdly, marketing societies, as organized and working at present, proved to be ineffective for the purpose in question as they had been organized mostly in the regulated markets and *handled only the crops brought by the members to the market*. . . . The societies normally did not undertake any outright purchases and attempts made in that direction, if any, were irregular and negligible. In those areas, where there were more co-operative agencies than one dealing with the marketing of agricultural produce, some of which were processing societies, while others were single commodity societies, co-ordination for the recovery of the loans of the credit societies became an almost impossible task. It was also observed that the primary credit societies in general had been working as passive observers and had not actively participated in the development of co-operative marketing and the linking of credit with marketing."¹ (*emphasis added*).

IMPORTANCE OF STRENGTHENING THE 'LINK'

2.1.56 Having regard to the importance of rural credit in our economy and the need for promoting and stabilising the institutional arrangements for extending such credit, that Committee has observed that "the question of effecting recovery of co-operative dues through marketing societies out of sale proceeds of their members has assumed paramount importance in view of the expanding volume of production credit disbursed and the imperative need for effecting prompt recoveries."²

MEASURES FOR STRENGTHENING THE LINK

2.1.57 That Committee has considered that "it would be helpful if, as suggested by the Committee on Co-operative Marketing, primary credit societies are appointed as agents of the local marketing society for the collection or purchase of agricultural produce at the village level and, in the case of outright purchases, the marketing society provides advances to the village societies for making immediate payment to the growers."³ We consider that for successfully solving the problems relating to recovery of production credit, the efforts for linking such credit with marketing arrangements for the produce arising from the

¹Report of the All-India Rural Credit Review Committee (1969), page 922.

²*Ibid.*, page 923.

³*Ibid.*, page 924.

utilisation of such credit should be adequately strengthened. We also recommend that on similar lines commercial banks (at their branch level) may be appointed as agents of the local marketing societies for the collection or purchase of the agricultural produce from agricultural borrowers to whom the banks have extended crop loans.

COMPULSORY RECOVERY FROM SALE PROCEEDS

2.1.58 The Study Team appointed by the Reserve Bank of India in December 1972, which went into the problems of overdues of co-operative credit institutions, has considered the question of compulsory recovery of the co-operative dues from the sale proceeds of the produce.

2.1.59 As we noticed earlier, co-operative societies enactments generally provide for a first charge in respect of the dues of an agriculturist-borrower *inter alia* with reference to crops or other agricultural produce. No person shall transfer any property which is subject to such charge, except with the previous permission in writing of the co-operative society which holds the charge.¹ On the basis of these provisions, the Study Team has expressed that it is not open to the cultivator to sell the produce without the permission of the co-operative society holding the charge. However, it has observed that:

“In practice, however, the enabling provisions are not being enforced and the transfer of property subject to a first charge to the primary co-operative society, particularly agricultural produce, takes place unhindered and often without the knowledge of the concerned society. Despite certain difficulties in establishing the identity of the produce once it is removed either from the farm or the borrower’s possession it may be possible to ensure automatic recovery of the dues in case an arrangement is evolved by taking advantage for provisions of the co-operative law.”²

SUGGESTED OBLIGATIONS OF MANDIS/MARKET COMMITTEES

2.1.60 In the light of the above, the Study Team has suggested the adoption of a procedure whereby no cultivator may dispose of his crops in a mandi/regulated market without obtaining a “no dues” certificate from the credit society, which shall be checked by an authorised official of the mandi/market committee before allowing the sale of the produce. In cases where there are dues, the mandi/market committee is required to recover on the spot after the auction sale and remit to the society its dues. That Study Team has also felt that “the

¹Section 38 of the Rajasthan Co-operative Societies Act, 1965.

²Report of the Study Team on Overdues of Co-operative Credit Institutions (1974), page 174.

market committees should be under the statutory obligation of insisting upon the certificates and recover the dues out of the sale proceeds. The state governments should amend suitably the relative enactments, such as the Agricultural Produce Markets Acts, Co-operative Societies Acts, etc., and those governing the Commodity Marketing Corporations with severe penal provisions to deter evasion of the proposed discipline."¹ We strongly endorse the necessity for the statutory framework facilitating and enabling the recovery of dues of the co-operative credit society through the authorities constituted to regulate the mandi/regulated market. We also recommend that the scheme of such provisions should ensure also to the benefit of commercial banks extending production credit.

COMPULSORY RECOVERY THROUGH PROCUREMENT AGENCIES

2.1.61 The Study Team has also gone into the question of compulsory recovery of dues from procurement schemes operated on monopoly basis or otherwise by State or State aided agencies. The Study Team has recommended extension of the provisions relating to compulsory recovery of dues to cover also the produce of agriculturist-borrowers under the procurement schemes, for instance, the monopoly procurement of cotton undertaken in the State of Maharashtra in terms of the provisions of the Maharashtra Raw Cotton (Procurement, Processing and Marketing) Act, 1971.

SECTION 48A OF THE MAHARASHTRA CO-OPERATIVE SOCIETIES ACT

2.1.62 In 1972, the Maharashtra Co-operative Societies Act was amended whereby section 48A was introduced in that Act providing for deductions from sale price of certain agricultural produce to meet the dues of primary agricultural credit societies.

2.1.63 Commenting on the experience gained on the above provisions, the Study Team has observed :

"These provisions empowered grain trade authorities to recover co-operative dues at sale points. The Government of Maharashtra stipulated that 40 per cent of the sale proceeds should be recovered towards co-operative dues. Since default was sizeable also under long-term loans, it became necessary to ensure maximum recoveries of short-term, medium-term as well as long-term dues of the co-operatives through the levy-cum-procurement system in respect of foodgrains and pulses and the scheme of monopoly

¹Report of the Study Team on Overdues of Co-operative Credit Institutions (1974), page 176.

procurement of cotton as also through the cane price paid by co-operative sugar factories. An Ordinance was, therefore, promulgated on 17 October 1973 amending section 48A of the Maharashtra Co-operative Societies Act, to provide for deductions from sale price to meet the dues not only of primary agricultural credit societies in respect of short-term and medium-term loans but also of the land development banks in respect of instalments of long-term loans.”¹

2.1.64 The Study Team has recommended similar measures being taken in other States where agricultural commodities are subject to monopoly procurement and purchases of agricultural commodities effected by the Food Corporation of India, other commodity corporation, State Governments and the co-operatives. Such deduction, the Study Team has recommended, may extend upto 50 per cent of the value of the gross produce. Subsequently, by Ordinance No. VIII of 1977 dated 27th September 1977, the Government of Maharashtra has extended the scope of the responsibility of making deductions for co-operative dues also to *commission agents* and others. We agree that provisions on the lines made by the Government of Maharashtra to impose on the agency responsible for procuring agricultural commodities a statutory responsibility of making deductions from the sale price on account of dues payable by the agriculturist-borrowers to the co-operative credit societies, would considerably help to solve the problem of recovery of dues, and endorse the recommendation of the aforesaid Study Team for suitable statutory provisions in the Co-operative Societies Acts of other States as well. Similar statutory provisions should ensure also to the benefit of all public financing institutions extending rural credit, i.e., co-operative credit societies, commercial banks and rural banks.

RECOVERY THROUGH DISTRAINT AND SALE OF PRODUCE

2.1.65 In the event of default, a co-operative society has also the remedy of seeking to realise its dues by approaching the Registrar of Co-operative Societies who after enquiring into the matter may issue an award or certificate for the realisation of the dues by sale of the produce. The award or the certificate may be executed depending upon the applicable provisions, by the officers of the Co-operation Department and/or revenue authorities. The provisions of the Co-operative Societies Acts for recovering the dues from out of the produce of the agriculturist in this manner are fair and adequate.

¹Report of the Study Team on Overdues of Co-operative Credit Institutions (1974), pages 177-178.

2.1.66 However, the Model Law which now aims to give a similar position to commercial banks merely provides that "a bank may dis-train and sell through an official of the State Government, designated in this behalf by the State Government, the crop or other produce or other moveables charged to that bank to the extent of the agriculturist's interest therein and appropriate the proceeds of such sale towards all moneys due to the bank from that agriculturist". These provisions are very sketchy and are not adequate and fair to the agriculturist, especially when we have regard to the fact that the designated authority under the Model Law is usually an officer of the Co-operative Department. It is not appropriate that the Registrar of Co-operative Societies should function in too summary a manner while dealing with a claim by the commercial bank for recovery of its dues from out of the produce and be required to follow the judicial approach only with reference to a claim made before him in this regard by a co-operative credit society. The provisions applicable to commercial banks in this regard should be modified to be in line with the provisions now applied with reference to claims of co-operative credit societies.

EXEMPTION FROM ATTACHMENT AND SALE OF PRODUCE

DECLARATION AS REGARDS EXEMPTED PORTION OF THE PRODUCE

2.1.67 The Civil Procedure Code, 1908, exempts from attachment and sale such portion of agricultural produce, or of any class of agricultural produce, as may have been declared to be free from liability. The State Governments have been authorised to declare by general or special order the portion of the agricultural produce, or any class thereof, as may appear to the Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family.¹ These provisions are wide enough to cover agricultural produce which have been hypothecated.² In order that institutional credit may not suffer, and as institutional credit agencies may be expected to act not unconscionably, these provisions of the Code may be amended to exclude from its scope the institutional creditors, i.e., banks (commercial, co-operative and rural banks). The Government of India may consider promoting an amendment to the Civil Procedure Code for this purpose.

¹We are not aware of any declaration by the State Governments.

²Mulla's Code of Civil Procedure, 13th edn., Vol. 1, page 306.

ATTACHMENT OF STANDING CROPS

2.1.68 Subject to the above, Rules 44 and 45 of Order 21 of the Code of Civil Procedure provide for an attachment of crops while they are in a growing condition. With a view to prevent an injury to the crops and to secure to both parties the fullest value in the property attached, the Rules provide that where agricultural produce is attached, the court should make such arrangements for the custody thereof as it may deem sufficient and subject to such conditions as may be imposed by the court, the judgment-debtor is allowed to continue to perform all acts of husbandry and if he endeavours to defeat the attachment by neglecting the crops, the decree holder is allowed to intervene and protect his interests. While a judgment-debtor whose standing crops have been attached has a right to cut, gather and store the produce, he has no right to remove them, as they pass into the possession of the court by virtue of the attachment.

INSTITUTIONAL AGENCIES' RIGHT TO ENSURE AVAILABILITY OF PRODUCE

2.1.69 As rightly pointed out by the Working Group on Legal Matters set up by the Committee on Integration of Co-operative Credit Institutions, "disposal of the harvested crops or other agricultural produce and failure thereafter to pay the dues to the societies is a difficulty that has to be countered by effective supervision and check over the borrowing members." However, where experience shows that certain agriculturists are not prompt in making repayment of their dues from out of the sale proceeds of the produce, the co-operative credit society may seek to attach the standing crops and thus ensure that the produce when harvested is disposed of only under its supervision. For this purpose, the Registrar of Co-operative Societies should be empowered to attach the standing crops to enable the prompt recovery of the co-operative dues from the sale proceeds of the crops. Provisions on similar lines should also be made applicable to commercial banks to enable them seek similar recourse through the 'designated authority'.

CHARGE ON FIXTURES AND AGRICULTURAL MACHINERY

2.1.70 Fixtures like pumpsets, electric motors and oil engines are acquired by agriculturists from purchase money credit from institutional agencies which provide short-term or medium-term credit. With reference to fixtures, in our report on personal property security law we have referred to the several problems faced by financing institutions by reason of the fixture being regarded as part of the land. We

¹Committee on Integration of Co-operative Credit Institutions—Reports of the Study Groups and Notes, page 408

have also referred to two judgments of the Madras High Court deciding in one case that pumpset is an immovable property and hence not liable to attachment and sale pursuant to the procedure relevant for attachment and sale of movable assets, and in another case where pumpsets have been held not an immovable property.¹ The difficulties faced in fixture financing by reason of the archaic legal notions which are still applied with reference to such transactions will be avoided by the provisions we have suggested to deal with fixture as a personal property.

MODEL BILL FACILITATES FIXTURE FINANCE

2.1.71 In order to facilitate fixture financing, in the draft for legislation we have suggested in our report on personal property security law, we have recommended appropriate provisions for registration of security interests in fixtures by a simple, inexpensive and expeditious method which at the same time would put on notice all those who are dealing with the land. The legal problems with reference to fixture financing would be considerably reduced when those provisions come into force.

'AGRICULTURAL MACHINERY' — ARE THEY IMPLEMENTS OF HUSBANDRY?

2.1.72 But there are also some problems with reference to enforcement of a security interest in agricultural machinery in the view that it is sometimes possible to hold such machinery as "implements of husbandry necessary for an agriculturist to earn his livelihood".

CHARGE AGAINST AGRICULTURAL IMPLEMENTS

2.1.73 The statutory first charge which is conferred with reference to co-operative credit societies cover *inter alia* also the agricultural implements of the agriculturist-borrowers. Now, what are to be regarded as agricultural implements?

2.1.74 In reconciling the claims of an institutional lender seeking to recover his dues against agricultural implements pursuant to the statutory first charge arising by reason of the provisions in the Co-operative Societies Acts *inter alia* with reference to agricultural implements, we are confronted with the policy of the law to save from attachment and sale the essential implements of an agriculturist necessary for him to eke out his living. The Code of Civil Procedure, 1908, saves, with

¹1968 (2) M.L.J. 493 and 1968 (2) M.L.J. 596.

reference to an agriculturist, from attachment and sale “his implements of husbandry and such cattle and seedgrain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such.”¹

2.1.75 With the advancement in the technology of agriculture, the concept relating to implements necessary for an agriculturist to earn his livelihood as such agriculturist has been causing some difficulty in its interpretation. If institutional credit agencies are to be encouraged to provide purchase money credit against the security of tractors, pumpsets, etc., which are necessary for developing agriculture, it may have to be ensured that the purchase money security interests which the lending institutions may have against such agricultural machinery, etc., are not allowed to be defeated in the view that they are saved from attachment and sale under section 60 of the Code of Civil Procedure, 1908.

2.1.76 In *Udharam Delumal vs. Rozi Shambe*² it was held that the term ‘implements of husbandry’ should be interpreted in a fair and reasonable and even a generous spirit and not in a narrow manner. In this case, an engine or water-pump was held necessary for the agriculturist to irrigate and cultivate his fields and earn his livelihood as an agriculturist. Here the court held that the needs of progressive agriculture require that a broader meaning should be given to the expression ‘implements of husbandry’.

2.1.77 In *Dwarka Prasad vs. Municipal Board, Meerut*,³ the Allahabad High Court held that even a tractor used for large scale agricultural operations fell within the scope of the provisions of section 60 and hence was exempt from attachment and sale.

2.1.78 However, the Karnataka High Court⁴ has held that “only such implements as were ancillary and concomitant of the actual tilling of the soil and necessary to enable him to earn his livelihood” were exempt from attachment and sale under section 60. In this view, this High Court has regarded that the tractor was not exempt from attachment and sale.

2.1.79 What is overlooked in the context of section 60 of the Code of Civil Procedure is that we cannot develop progressive agriculture, and agriculturists cannot obtain tractors, if tractors or other costly

¹Section 60(1) (b) of the Code of Civil Procedure, 1908.

²A.I.R. 1939 Sind 96.

³A.I.R. 1958 Allahabad 561.

⁴P. A. Shive Gowda, vs. Syndicate Bank decided in November 1976.

agricultural implements are regarded as not subject to attachment and sale. Evidently, the conditions that prevailed in our country when the Code of Civil Procedure was enacted did not contemplate mechanised agricultural farms run by affluent agriculturists. Hence, the need for a statutory clarification of the position also becomes apparent when we consider the following observations of the learned judge of the Madras High Court :

“In these days when the advancement of agriculturist is uppermost in the minds of those responsible for the governance of the country, it would be difficult to express the view that an electric motor coupled with a pumpset cannot be said to be an implement of husbandry of an agriculturist.”¹

In view of this and the conflicting judicial decisions, the Study Team which went into the problem of overdues of co-operative credit institutions has recommended that “it would be necessary for the central and state governments to review the position in this regard and ensure that agricultural machinery and implements purchased out of the loans obtained from co-operative credit institutions are exempted from the definition of ‘implements of husbandry’ as such a step will ensure the necessary degree of security to the lending institutions.”²

2.1.80 It may have to be ensured that the purchase money security interests which the lending institutions may have against agricultural machinery, etc., are not allowed to be defeated in the view that they are saved from attachment and sale under section 60 of the Code of Civil Procedure, 1908. Hence, we consider that agricultural machinery required for large scale cultivating operations should not be regarded as implements of husbandry necessary for the agriculturist to earn his livelihood and hence not liable to attachment and sale. This may be clarified by an Explanation to section 60(1)(b) of the Code of Civil Procedure, 1908, on the following lines:

“*Explanation* : For the purposes of this sub-clause, the expression ‘implements of husbandry’ shall not cover agricultural machinery like tractors, pumpsets and other implements used in agriculture, which are either power-driven or whose value exceeds a sum of Rs. 2,500.”

We recommend that the Government of India may also consider promoting an Explanation to sub-clause (b) of sub-section (1) of section 60 of the Code of Civil Procedure, 1908, on the above lines.

¹Also cited in the Report of the Study Team on Overdues of Co-operative Credit Institutions (1974), page 180.

²*ibid.*

SHORT-TERM CREDIT AND CHARGE ON LAND

2.1.81 We have already indicated that a charge on land is not necessary for institutional agencies extending crop loans. A charge on anticipated produce should normally suffice. While expert bodies which have assessed the security considerations with reference to crop loans have agreed that a share-cropper, oral-tenant or any other cultivator not having a chargeable interest in land should not be denied the crop loan facility, with reference to a cultivator having a chargeable interest in land they have pointed out that it may be desirable that the lending institution obtains a charge on land. This is due to the recognition in such cases of the functional role of a security interest in land.

FUNCTIONAL ROLE OF SECURITY

2.1.82 As pointed out by the All-India Rural Credit Review Committee (1969) while considering commercial bank lending to agriculture, "whatever be the type of security insisted upon, it is not on its realization but on the supervision of the activity which is being financed that the bank has to rely for the recovery of the loan. Moreover, ... *the security of land has to be looked upon more as an assurance of the borrower continuing to be in farm business rather than as an asset which can be proceeded against at will, ...*, the nature of security required should be determined with reference, on the one hand, to the ability of the borrower to provide it without hardship and, on the other, to the protection which the creditor requires against default".¹ (*emphasis added*).

2.1.83 Thus, for short-term credit, which is also termed as production credit and which is essentially for growing crops, a security interest in land is not necessary. However, it is desirable wherever the cultivating borrower is in a position to provide such a security interest in land.

METHOD OF GETTING SECURITY INTEREST IN LAND REGARDING SHORT-TERM CREDIT

2.1.84 Security interest with reference to short-term credit is now obtained by co-operative credit societies generally by way of a declaratory charge created on the land of the borrower. The provisions of the Co-operative Societies Acts now do provide for this special

¹Report of the All-India Rural Credit Review Committee (1969), pages 603-604.

mode of creating a security interest and as the provisions of the general law relating to mortgage are as such inapplicable to such a declaratory charge, the statutes also specify the rules as to priority and the remedies of parties in the event of default. In addition, the Co-operative Societies Acts also provide a machinery for settling the disputed claims and recovering the dues. Similar provisions are now to be applied with reference to credit extended by commercial banks. The special features of the declaratory charge merit closer consideration.

2.1.85 But, before we consider the law regarding creation of security interest in land in favour of the lending institution by reason of the provisions of the declaratory charge, we will have to deal with the provisions found in the Co-operative Societies enactments of certain States for a statutory first charge without any deed or declaration for the dues of co-operative societies.

STATUTORY FIRST CHARGE WITHOUT DEED OR DECLARATION

2.1.86 At present in the Co-operative Societies Acts in force in the States of Assam, Orissa, Uttar Pradesh and West Bengal, provisions are found which confer on the lending co-operative credit society a first charge on the land of the borrower-member with reference to certain types of advances.

2.1.87 Now we shall consider in brief the desirability of providing a statutory charge in favour of a public financial institution without a machinery for recording such charges and without any necessity for the institution and the cultivating borrower entering into a security agreement formally by deed as in the case of a mortgage deed or without a formal declaration pursuant to the provisions in the Co-operative Societies Acts relating to the creation of a declaratory charge. The position as between the four States, where we have found such provisions, is not uniform.

(I) POSITION IN ORISSA

2.1.88 Section 34 of the Orissa Co-operative Societies Act, 1962, before its amendment in 1967, did not cover lands and that provision without such amendment was similar to the provisions found in all other State enactments relating to co-operative societies where a first charge is conferred with reference to co-operative dues, particularly, the agricultural produce. The Orissa Co-operative Societies (Amendment) Act, 1967, has inserted "lands" in the text of the provision, whereby, subject to the claim of government and amount recoverable-

as land revenue, any debt or outstanding demand owing to a society by any member or past or deceased member is first charge upon the lands belonging to such member, past member or forming part of the estate of such deceased member.

Scope is too wide

2.1.89 The effect of the amendment is sweeping. Here the first charge is not related to any purpose of the loan, as is found in the enactments in force in Assam, Uttar Pradesh and West Bengal. This provision is against the interest of the agriculturist. Since past or future debts of a member would qualify for this first preference, the ability of the agriculturist to deal with his lands even when he is not owing any dues to the society comes under a cloud since, if he becomes indebted to the society subsequent to his dealing with the land, the society may even then claim that its charge on the land shall have preference over the earlier transactions.

Constitutional validity

2.1.90 In so far as the provision in the Orissa Co-operative Societies Act is likely to defeat the security interests which may be already existing when the credit society makes its advance to the agriculturist, the provision may be regarded expropriatory and unconstitutional.

Not really beneficial

2.1.91 Apart from the legal validity of bringing within the scope of section 34 *ibid.*, the immovable property of an agriculturist-borrower, it is also not desirable that the security interest, which will have a superseding effect over other interests in the land, should be allowed to be created without any provision for registration of such security interest.

Better to have 'declaratory charge'

2.1.92 As we will see later, the machinery provided for creating a declaratory charge and the procedures for its registration are simple, expeditious and inexpensive. There should be no difficulty for co-operative societies following the same procedure as now prevailing in other States and obtaining a security interest by way of a declaratory charge. What is required is only a statutory provision in the Orissa Co-operative Societies Act on the lines found in other State enactments relating to co-operatives for a security interest being created in favour of such institutions by way of a declaratory charge and the consequential deletion of the reference to "lands" in section 34 of that Act. We recommend accordingly.

(II) CO-OPERATIVE SOCIETIES ENACTMENTS IN ASSAM, UTTAR PRADESH AND WEST BENGAL

2.1.93 In Assam, Uttar Pradesh and West Bengal, the statutory first charge with reference to dues owing to co-operative societies (without any deed or declaration therefor) is available with reference to loans given for the purposes as specified.

Eligible purposes for priority

2.1.94 Now with reference to following purposes the first charge in land is available to co-operative credit societies in certain States.

Purchase of land/building

2.1.95 In Assam, Uttar Pradesh and West Bengal, the first charge is available on the land of the borrower when the loan advanced relates to (i) its purchase or redemption¹ and (ii) the purchase of a building or building material or construction of any house, building or any portion thereof on the land.

Irrigation facilities, etc.

2.1.96 Additionally, in Uttar Pradesh, loans for the following purposes also have a statutory first charge against the land connected with such loan :

- (i) loan for irrigation facilities,
- (ii) loan for reclaiming or protecting land (including payment of rent or revenue payable) or for effecting improvement on land,
- (iii) loan for preparation of land for orchard or plantation,
- (iv) loan for making, repairing or purchasing farm house or shed for cattle, and
- (v) loan for making, maintaining, repairing or purchasing of a warehouse for storage of agricultural produce, or of a farm house or shed.

In all the above cases the first charge is conferred on the land or other immovable property to which the loan relates.

Loan for cattle, agricultural implements or machinery

2.1.97 In Uttar Pradesh there is also a statutory charge on *any land* of the borrower when the loan is for the purchase of cattle, agricultural implements or machinery.

¹In Assam it covers also loans for the improvement of the land.

Charge—how it should be conferred

2.1.98 It is no doubt necessary that co-operative credit given for the aforesaid desirable purposes of rural credit should be adequately secured. But when the provisions are made so sweeping that the security interests are created without recourse to any recording of such interests in any public office or independent of the merits of the claims of other institutions and agencies dealing with the land, the provisions really add to the agriculturist's difficulties in obtaining adequate rural credit as they have all potential for affecting his ability to borrow against or otherwise deal with the land.

Changes necessary in Assam, Uttar Pradesh and West Bengal Acts

2.1.99 In the above circumstances, we recommend that the provisions in the co-operative societies enactments of Assam, Uttar Pradesh and West Bengal (including any other State where such provisions may exist) may be suitably amended to take out of the scope of the provisions relating to the statutory first charge, the land or other immovable property of the cultivator or the borrowing member.

2.1.100 Consequentially, it is necessary to have adequate statutory provisions on necessary lines in States where there are no such provisions, i.e., for creation of a security interest in favour of the lending institution by means of a declaratory charge.

'DECLARATORY CHARGE' AND 'STATUTORY FIRST CHARGE' MAY NOT CO-EXIST

2.1.101 While such provisions are absent in Assam, Orissa and Uttar Pradesh, in West Bengal the provisions relating to declaratory charge have been introduced in the statute by the Bengal Co-operative Societies (Amendment) Act, 1965. Hence, in that State it will be sufficient if the scope of the provision conferring statutory first charge without any deed or declaration is confined to movable assets [by deleting sub-clauses (e) and (f) of sub-section (1) of section 47 of that Act].

SECURITY INTEREST IN LAND

2.1.102 Subject to the special provisions noticed with reference to the enactments relating to co-operative credit societies in certain States, which we have considered above, security interest in land in favour of institutional agencies which are co-operative banks is obtained either by recourse to the 'declaratory charge', or by obtaining a

'mortgage'. Under the Model Law, the scheme of declaratory charge is being extended in many respects to rural credit extended by commercial banks.

'DECLARATORY CHARGE' AND 'MORTGAGE'

2.1.103 For long-term credit, institutional agencies have been having recourse to the 'mortgage' form. The Working Group on Legal Matters appointed by the Committee on Integration of Co-operative Credit Institutions, has felt that "there may not be any special disadvantage if a charge is created in respect of long-term loans as in the case of short-term loans".¹ In this view, the Working Group has recommended that the integrated credit institutions should be enabled to grant long-term loans also against a charge created on the immovable properties of the borrower. When this is regarded with the fact that for rural credit by commercial banks (both short-term and long-term), Model Law aims to extend in substance the concept of the declaratory charge, the legal set-up relating to declaratory charge assumes great practical significance.

DECLARATORY CHARGE

2.1.104 We shall first consider the scheme of the declaratory charge as developed in the statutes covering extension of rural credit by co-operative banks and commercial banks. We shall now notice the genesis of the 'declaratory charge'.

GENESIS OF DECLARATORY CHARGE

2.1.105 In extending short-term rural credit, when a co-operative credit society may insist on a security interest in the land was first considered by the Agricultural Finance Sub-Committee (1945) appointed by the Government of India under the chairmanship of Prof. D. R. Gadgil. With reference to short-term credit provided by co-operative credit societies, that Committee had observed:

"A co-operative credit society is ordinarily expected to make advances against personal security. We, however, observe that in some Provinces loans on mortgage security are very common. We realise that credit societies have been led to adopt mortgage finance owing to a variety of circumstances and that this has in some cases prevented alienation of land to moneylenders. However, when the creditworthiness of members is assessed on the basis of the value of their immovable assets and mortgage secu-

¹Report of the Working Group on Legal Matters appointed by the Committee on Integration of Co-operative Credit Institutions, page 403.

ity is generally insisted upon for advances, there is likelihood of the benefits of the co-operative credit movement being denied to classes which have no alienable rights in land even if they are otherwise industrious and thrifty and capable of making a profitable use of credit. *Mortgage security may be justified where the amount of the loan is comparatively big and the period is long, say more than three years; but even in such cases the mortgage security should only be collateral.*"¹ (*emphasis added.*)

2.1.106 In the above view, the Agricultural Finance Sub-Committee (1945) recommended that "while credit societies should not ordinarily attempt mortgage finance they should be enabled to have a statutory charge on the crop for the seasonal finance given to buttress personal security".²

CONTINUITY OF MORTGAGE BONDS

2.1.107 The Agricultural Finance Sub-Committee (1945) had noticed that "in some parts of Madras (Tamil Nadu) members of co-operative societies are allowed cash credit on mortgage of unencumbered landed property up to 50% of its value on '*continuity mortgage bonds*' so that they can draw on it as and when they require", and had suggested that "the system might be profitably looked into and adopted wherever conditions permit".³ (*emphasis added.*)

VIEWS OF AGRICULTURAL CREDIT ORGANIZATION COMMITTEE

2.1.108 The Agricultural Credit Organization Committee (1947) appointed by the Government of erstwhile Bombay Presidency under the chairmanship of Sir Manilal B. Nanavati, had also referred to the recommendations of the Agricultural Finance Sub-Committee *inter alia* with reference to co-operative credit societies having a statutory charge on the crops as additional security and the system of "continuity mortgage bonds" which had been developed in some areas of the erstwhile Madras Presidency. About the latter, the Nanavati Committee had observed : "We understand that the system of continuity mortgage bond is already in vogue in some parts of this (erstwhile Bombay) province. It deserves to be extended to the whole of the province."⁴

¹Report of the Agricultural Finance Sub-Committee (1945), 1965 Reprint, pages 61-62.

²ibid., page 62.

³Report of the Agricultural Finance Sub-Committee (1945), 1965 Reprint, page 62.

⁴Report of the Agricultural Credit Organization Committee (1947), page 20.

AUTOMATIC CHARGE ON SPECIFIED PORTION OF BORROWER'S PROPERTY

2.1.109 Developing that idea further, the Agricultural Credit Organization Committee had recommended :

“In our opinion, *an automatic charge on a specified portion of the property of a borrowing member should be created by law, with a view to render it inalienable so long as the member is in debt. This would safeguard the interest of the society and would also benefit the member, as it would prevent the alienation of his property in favour of other creditors. It would facilitate his transactions with the society which can sanction cash credit, taking into consideration the value of the member's property, which has been rendered inalienable.*”¹ (*emphasis added*).

AMENDMENTS TO CO-OPERATIVE SOCIETIES ACTS

2.1.110 Pursuant to the above recommendations, the Bombay Co-operative Societies Act was amended to give a statutory first charge on the cultivator's produce, and a charge on his land on the strength of a statutory declaration the cultivator-borrower is required to make. Similar provisions have now been made in practically all the Co-operative Societies Acts except in the enactments in force in Assam, Orissa and Uttar Pradesh.

PARALLEL SCHEME FOR THE MORTGAGE LAW UNDER THE TRANSFER OF PROPERTY ACT

2.1.111 In substance, the provisions relating to the statutory charge by way of a declaration amount to a parallel scheme of law providing for a simple, expeditious and inexpensive system of creation of security interests, the reconciliation of priority claims and the rights and remedies available to the parties to this arrangement.

PREVAILING CONDITIONS WHEN ORIGINAL SCHEME WAS DEVELOPED

2.1.112 This scheme was developed at a time when institutional lending to agriculture had not developed on a massive scale as it is now channelised. The agriculturists were then under the grip of moneylenders and hence any restriction on an agriculturist's right to deal with his land was considered as indirectly a conferment of a benefit on him in so far as it precluded him from losing his interest

¹Report of the Agricultural Credit Organization Committee (1947), page 22.

in the land. Over the course of years, consequent on the development of the institutional financing agencies, the place of the money-lenders in our economy has become less important.

DECLARATORY CHARGE UNDER THE CONSTITUTIONAL PROVISIONS

2.1.113 Again, the original scheme was developed without reference to the Constitutional provisions. Subsequent State enactments have merely reproduced substantially the original scheme. The totality of the provisions affecting a statutory charge created in favour of a co-operative credit society by means of a declaration (which is being extended to cover rural credit that may be given by commercial banks) may have to be now viewed having regard to the vast changes that have taken place in the rural landscape of our country and in the light of our Constitution, the extent to which the scheme helps the institutional lending agencies and the fairness of its provisions.

GENERAL ADVANTAGES OF 'DECLARATORY CHARGE' SCHEME

2.1.114 The All-India Rural Credit Review Committee (1969) has recommended that wherever possible, for extending short-term credit, the co-operative society may take advantage of the declaratory charge on the land of the agriculturist, if it can be secured, as it ensures the continuing interest of the borrowing cultivator in agriculture and his connection with a particular piece of land either as tenant or as owner. However, that Committee has also cautioned against the insistence on charge on land being carried to a point at which the co-operative loan is denied to a cultivator, such as an oral lessee, who is engaged in production but has no identifiable interest in land in respect of which a charge can be created. Thus, in addition to obtaining a security interest in the produce, for extending short-term credit co-operative credit societies are encouraged to obtain a declaratory charge on the land of the borrower in cases where the agriculturist is owner or tenant having a chargeable interest in the land.

SAVING IN COST IN THE CREATION OF SECURITY INTEREST

2.1.115 Since the charge is created by declaration and arises by operation of law, the agriculturists availing themselves of credit do have the facility of offering their interests in the land as security without incurring stamp duty and registration charges which may otherwise be payable if a mortgage deed is to be obtained. Institutional

agencies extending short-term credit to agriculturists under the set-up of the declaratory charge have recourse to this simple form of obtaining a charge by declaration.

DECLARATORY CHARGE SUPERIOR TO MORTGAGE BY DEPOSIT OF TITLE DEEDS

2.1.116 The method of obtaining a security interest in the land of the agriculturist by means of a declaratory charge under the provisions of the Co-operative Societies Acts has certain positive advantages. As already stated, the agriculturist is saved from the expenditure which may have to be incurred for paying stamp duty and registration charges. This also cures the difficulty experienced in creating mortgage by deposit of title deeds by agriculturists who do not have title deeds. This also cures the defect as regards rural credit being extended in the form of mortgage by deposit of title deeds where there are no recording arrangements.

ALL-INDIA RURAL CREDIT REVIEW COMMITTEE RE. DECLARATORY CHARGE

2.1.117 The All-India Rural Credit Review Committee has also emphasised the advantages of taking a declaratory charge as security for extending short-term credit, and the desirability of insisting on such a charge from the agriculturists. That Committee has said:

“As security for short-term credit, then, personal surety buttressed by statutory charge should suffice. It may be mentioned in this connection that provision for the creation of a charge on land already obtains in Co-operative Societies Acts of eleven states. The creation of such charge is in fact obligatory under several of them. Even so, the practice of obtaining a charge has been in vogue only in Gujarat, Madhya Pradesh, Maharashtra and Rajasthan and in some areas of Mysore. In other states, the provision is not being utilized, mostly because satisfactory administrative arrangements have not been made for the registration of the charge. ... in the absence of this restriction, it may become easier for a cultivator who is indebted to the co-operative to borrow from a commercial bank without letting the latter know that he has already borrowed from the co-operative. On the other hand, if the charge on land exists, the advantage will be that the commercial bank can ascertain both from the co-operative and with reference to government records whether a cultivator

seeking a loan from it has already borrowed from the co-operative against that land by creating a charge in favour of the co-operative.”¹

Hence, that Committee endorsed the view that “in keeping with the current practice, wherever possible, the co-operative may obtain a declaration in its favour by the borrowing cultivator on his identifiable rights or interest (whether as owner or tenant) in the land cultivated by him”¹.

SPECIAL FEATURES DISTINGUISHING DECLARATORY CHARGE FROM MORTGAGE UNDER THE TRANSFER OF PROPERTY ACT

2.1.118 In several essential respects the scheme of the declaratory charge now differs from the general law of our country for obtaining security interests in immovable property which is now found in the provisions relating to mortgages and charges in the Transfer of Property Act, 1882.

2.1.119 Such special features of the declaratory charge scheme may be considered with reference to the following aspects:

- (i) obligatory nature of the charge,
- (ii) property that could be made subject to a declaratory charge,
- (iii) restraints on the borrower's right of alienating his interest in the charged land,
- (iv) declaratory charge securing future advances,
- (v) statutory priority for dues secured by declaratory charge,
- (vi) special arrangements for recording the declaratory charge,
- (vii) special provisions for recovery of the amount due under the declaratory charge, and
- (viii) assignability of security interest under the declaratory charge.

We shall now consider seriatim these features of the scheme relating to declaratory charge as developed in the Co-operative Societies Acts and the extent to which, pursuant to the provisions of the Model Law, they would apply to commercial banks giving rural credit.

¹Report of the All-India Rural Credit Review Committee (1969), page 487.

(I) OBLIGATORY NATURE OF THE CHARGE

2.1.120 The Co-operative Societies Acts do make it obligatory for a member of a credit society, if he makes an application for a loan to the society, to make a declaration in the form prescribed, if he owns any land or has interest in any land as tenant. Thus, agriculturists availing themselves of credit from co-operative credit societies are obliged to charge their land in favour of the societies when they wish to avail themselves of the loan from the societies.

Model Law only enables, does not compel

2.1.121 However, the provisions of the Model Law, which aim to extend to commercial banks the facility of obtaining a declaratory charge, leave it to the choice of parties. Thus, under the Model Law an agriculturist *may* make a declaratory charge on the lines of the form set out in the Schedule, whether he creates a charge on land or any other immovable property which he owns or in which he has an interest, to secure any financial assistance given to him by the commercial bank.

Unnecessarily restrictive obligation

2.1.122 The obligatory nature of the present provisions relating to declaratory charge when an agriculturist avails himself of a loan from a co-operative credit society is *unnecessarily restrictive*. Thus, an agriculturist residing in an area where credit is extended by co-operatives alone is discriminated vis-a-vis an agriculturist in another area whose agricultural credit needs are catered to by a commercial bank.

Freedom to parties

2.1.123. When the lending institution would be in a position to decide whether or not it should insist on a declaratory charge with reference to the land or any interest therein of the agriculturist-borrower, it is not necessary that in all cases the agriculturist-borrower should be obliged to charge his land to the co-operative credit society for meeting his short-term credit needs. On the lines of the provisions now being applied to commercial banks, an agriculturist-borrower from a co-operative credit society should be enabled to create a security interest in favour of the co-operative credit society by way of declaration; this need not be a compelling necessity in all cases, and the parties shall have the choice to decide differently having regard to the circumstances of the case.

(II) PROPERTY THAT COULD BE SUBJECT TO A DECLARATORY CHARGE

2.1.124 The main question here is whether the provisions relating to declaratory charge enable such charge being created only with reference to agricultural land or it may cover also other immovable property of the borrower. Here there is difference between the provisions applied to commercial bank credit and those applied to co-operative credit. Nor are the provisions relating to co-operative credit similar in all States.

Re. Co-operative credit

2.1.125 The Co-operative Societies Acts in some States as Maharashtra and Gujarat provide for the creation by the agriculturist by way of declaration a charge on any land or in which he has an interest as tenant. However, in some other States, as Andhra Pradesh and Tamil Nadu, the statute expressly permits the declaratory charge covering also "other immovable property" of the member-borrower.

2.1.126 Since the reference is to "any land" and not "any immovable property" and having regard to the difference in the terminology employed in the different States and the further reference to "interest in any land as tenant", it may be viewed that the statute dealing with co-operative credit in States like Maharashtra enables such declaratory charge being created only with reference to agricultural lands or interests therein.

Unnecessary restraint on share-croppers availing themselves of credit

2.1.127 This comes in the way of extension of credit to the cultivator who may be an oral lessee, share-cropper or a person having no capacity to offer the agricultural land as security but who may be having other immovable property which he could offer to secure the credit. The All-India Rural Credit Review Committee (1969) has also recommended that the agricultural credit society should not be precluded from accepting any other security if it is found more convenient.

No such difficulty re. rural credit by commercial banks

2.1.128 The Model Law, which, with reference to rural credit by commercial banks, enables the creation of a declaratory charge, provides no room for such difficulty since the charge can cover "land or any other immovable property". Such a difficulty is not present in respect of co-operative credit in States like Andhra Pradesh and Tamil Nadu where the Co-operative Societies Acts specifically require the declaration to cover also "other immovable property".

Mortgage by deposit of title deeds unnecessary re. rural credit

2.1.129 Extending the scope of the provision relating to declaratory charge to cover also "other immovable property" would also dispense with the necessity of the co-operative credit society having any recourse to mortgage by deposit of title deeds (equitable mortgage) in order to obtain a charge on other immovable property. The interest of the lending institution is better secured and the agriculturist not having title deeds or living in a place not notified as an eligible place for creating equitable mortgage is also not handicapped if the provision relating to creation of declaratory charge would specifically cover also "other immovable property".

2.1.130 Hence, we recommend that in those States where the provisions of the Co-operative Societies Acts do not now specifically provide for a declaratory charge being created with reference to the "other immovable property" of the member-borrower, the position may be made clear on the lines of the provisions now found in the statutes in force in Andhra Pradesh and Tamil Nadu.¹

(III) RESTRAINTS ON THE BORROWER'S RIGHT OF ALIENATING HIS INTEREST IN THE CHARGED LAND

2.1.131 With reference to a security interest created to secure rural credit by way of a declaratory charge on the immovable property, the question is whether it is necessary to restrain the borrower's right to deal with the land without affecting the security interest in favour of the lending institution.

Subsequent dealings do not affect declaratory charge

2.1.132 As we will presently see, the declaratory charge secures the cultivator's dues to the lending institution not only with reference to the loans and advances given at the time of the creation of the charge but also with reference to subsequent advances. Again, there are provisions for recording the security interest of the lending institution with reference to the immovable property (and we are recommending necessary provisions for strengthening the registration requirements). Under the circumstances, any person who deals with the immovable property charged to the lending institution may do so only with actual or constructive notice of such charge and his claim or interest may rank only subordinate to that of the institution which has obtained the declaratory charge. Moreover, being a statutory charge now it

¹Vide section 48 of the Maharashtra Co-operative Societies Act, 1960, and section 33 of the Madras Co-operative Societies Act, 1961.

is enforceable without even the necessity to show that any person who claims through any subsequent dealing of the agriculturist has notice of the charge in favour of the lending institution.

Why both, a first charge and a subsequent restraint ?

2.1.133 Again, with reference to the land secured under such charge in favour of the credit institution, the present provisions of the Co-operative Societies Acts give a first charge in favour of the co-operative credit society for such dues subject only to revenue payable on the land and such other government dues. Even if this rule of priority is modified (as it may require to be) with reference to the claims of term financing institutions and those of commercial banks extending such credit, this adequately strengthens the secured claim of the co-operative credit society. Hence, there appears to be no special reason why the liberty of the cultivator to further encumber the land should be totally curbed.

Original idea behind subsequent restraint

2.1.134 Moreover, the provision relating to the restraint on subsequent alienation was considered necessary at a time when moneylenders were having the predominant role in extending rural credit. The Agricultural Credit Organization Committee (1947), which conceived the idea of rural credit to agriculturist being secured by "an automatic charge" that may be created by law "on a specified portion of the property of a borrowing member", had felt that the land covered by the charge should be rendered inalienable so long as the member is in debt in the view that "this would safeguard the interest of the society and would also benefit the member, as it would prevent the alienation of his property in favour of other creditors".¹ As already stated, such restraint is not necessary to safeguard the interest of the co-operative credit society. Also, regarding the safeguarding of the agriculturist from his "other creditors", who then were not institutional agencies but village moneylenders with their own doubtful reputation, the position has changed.

2.1.135 Thus, the situation envisaged by the Agricultural Credit Organization Committee (1947) is no longer valid in the context of the massive effort of the public financing institutions which have been actively spurred in the direction of rural credit and development by the commitment of the Government's policy to strengthen employment-oriented rural economic development.

¹Report of the Agricultural Credit Organization Committee (1947), Chapter V, paragraph 14.

Relaxation of restraint suggested by the Expert Group

2.1.136 The Expert Group which went into commercial banks lending to agriculture has also recommended that "the restriction on alienation of land subject to a charge in favour of a co-operative *should be relaxed* so as to permit subsequent alienation thereof for securing supplementary credit from another institutional credit agency".¹ (emphasis added).

Restraint on alienation under the Constitution

2.1.137 The present provisions found in the Co-operative Societies Acts were evidently conceived without reference to the Constitutional provisions. As pointed out earlier, while the interest of the lending institution is adequately safeguarded, it is not reasonable or equitable to clamp a total embargo on the cultivator-borrower's rights to deal with his interest or the "equity" which he has on the land. The complete fetter on the rights of a member-borrower of a co-operative society to deal with his land in any way without the consent of the credit society may be considered as unreasonably restrictive in as much as, as we saw earlier, such a restriction is neither necessary nor related to the need to protect the interest of the lending institution. Such a restriction would be considered obnoxious under the general law. If this is to find a place in the special law, there should be compelling circumstances. No such circumstances exist.

2.1.138 In the light of the foregoing, we consider that the provisions in many co-operative societies enactments prohibiting the member-borrower from creating any further encumbrance on the land and annulling the effect of any encumbrances that he may create are unnecessary to protect the interest of the lending institution, unreasonably discriminatory and are inequitable. Hence, the Co-operative Societies Acts may be suitably modified to make this position clear.

Conferment by special law of rights of alienation

2.1.139 Having considered the restraints under the special law on an agriculturist exercising his rights of alienation, which otherwise he would undoubtedly have, we shall pass on to that feature of the special law which purports to confer on certain cultivators or class of cultivators a right to alienate or encumber the land independent of the question whether or not he has an alienable interest in the land.

¹Report of the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture, 1971, paragraph 7.4(iv).

Need to distinguish between agrarian reforms and security considerations

2.1.140 We are not going into the policy considerations underlying agrarian reforms. Such considerations would, no doubt, be paramount. But here we are discussing merely the necessity for conferment of right of alienation of land on some class of cultivators in order to enable them to obtain rural credit.

Co-operative credit law has no such features

2.1.141 The Co-operative Societies Acts now do not purport to confer any such rights of alienation of land on persons who do not have these rights. It is only the Model Law which aims to extend to rural credit given by commercial banks the provisions of the special credit-security law, which was all along confined to co-operatives, that purports to confer such alienation rights on persons who may not otherwise have such rights. The co-operative credit law has successfully solved the question of securing production credit given to agriculturists not having alienable interests in land, by providing for a first charge on his interest in the produce. We have also considered the questions relating to recovery of credit secured against growing crops.

Report of the Expert Group

2.1.142 The Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture has also recommended that "State Government should be empowered by legislation to vest any class or classes of agriculturists, whose rights of alienation of land are wholly or partly restricted or who do not have such rights at present, with the right to create a charge or mortgage on their lands as will enable them to secure finance from commercial banks".¹ Accordingly, clause 4 of the Model Law suggested by the Expert Group would enable the State Government to vest by notification on "any class or classes of agriculturists not having rights of alienation in land or any interest therein, with rights of alienation including the right to create a charge or mortgage on such land or interest in favour of a bank for the purpose of obtaining financial assistance from that bank without any restrictions, or subject to such restrictions as may be specified in the notification".²

¹Report of the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture, Paragraph 3.13.

²Clause 4 of the Model Law suggested by the Expert Group.

Constitutional validity of the provision

2.1.143 As a Note to that provision the Expert Group has observed :
 "It would be desirable to avoid the constitutional validity of this clause being questioned on grounds of excessive delegation. Towards this end, the State Government may specify in this clause the classes of agriculturists by reference to their names obtaining in the State or to the relevant legislation by which agriculturists may have acquired interest in the land."

Thus, the Expert Group has desired that the Legislature itself should incorporate in the law the class or classes of agriculturists who do not have rights of alienation in the land now and who should be conferred such rights. This does not seem to have been done in many States which have adopted the Model Law. Certain States like Haryana, Maharashtra and Orissa have also not adopted this provision.

2.1.144 The class or classes of the agriculturists who should be conferred such rights should be decided by the State Government having regard to its policy relating to agrarian reforms. The legislation conferring such rights may also have to be protected from any challenge as offending the provisions relating to Fundamental Rights of the Constitution by inclusion in the Ninth Schedule to the Constitution of India. Unless warranted on account of the State Government's policy relating to agrarian reforms, it is not necessary to confer rights of alienation on land with reference to any class of agriculturists, *which may have the effect of annulling the rights of other persons in the land including ownership rights*. However, as regards tribal lands and lands belonging to the Bhoodan allottees, conferment of such rights may be valid as it will not affect other vested interests in land.

(IV) DECLARATORY CHARGE SECURING FUTURE ADVANCES

2.1.145 The declaratory charge also covers "future advances". While the statute in force in Tamil Nadu merely provides for the charge covering "future loans, if any, that may be made to him, from time to time, by the society", the statute in force in Maharashtra specifies that the charge with reference to such future advances is "subject to such *maximum* as may be determined by the society". With reference to rural credit by commercial banks, the Model Law also provides for securing future advances but without the necessity for the indication of a maximum limit.

Section 79 of the Transfer of Property Act, 1882

2.1.146 Here we may refer to section 79 of the Transfer of Property Act, 1882, which provides the general rule as regards the extent to which a future advance could be secured under a mortgage. Section 79 *ibid* provides that where a mortgage secures future advances, a subsequent mortgage of the same property is postponed to the prior mortgage provided the prior mortgage "expresses the maximum to be secured thereby". This is a salutary provision and with reference to the personal property security law also we have retained the principle underlying this provision in the draft Bill suggested by us. There is no compelling reason why the special law relating to rural credit dealing with advances by public financing institutions also should not conform to this rule.

2.1.147 If, at any time, the amount originally stipulated as the "maximum" is considered as inadequate and further amounts are required to be advanced by the lending institution, then, a further declaration may be obtained and registered; but, if there has been an intervening encumbrance, there is no justification for affecting the priority of such encumbrance.

2.1.148 Hence, we recommend that the provisions relating to the creation of a declaratory charge covering future advances in favour of co-operative credit societies (in States where this is not so) and commercial banks should be suitably amended to be in line with section 79 of the Transfer of Property Act, 1882.

(V) STATUTORY PRIORITY FOR DUES SECURED BY DECLARATORY CHARGE

2.1.149 The question of the rules as to priority that should govern a security interest created in favour of a credit society or a commercial bank extending rural credit by way of declaratory charge may be considered with reference to:—

- (a) a pre-existing registered charge on the immovable property in favour of any person,
- (b) a subsequent security interest that may be validly created in favour of a term-lending institution to secure a long-term credit given for the development of the land,
- (c) Government dues like arrears of land revenue and other dues recoverable as if they are arrears of land revenue, and
- (d) the reconciliation of the priority of a credit society *vis-a-vis* that of a commercial bank.

We shall consider now these priority questions with reference to the declaratory charge.

(a) *Declaratory charge vs. Pre-existing registered charge*

2.1.150 While in States like Andhra Pradesh and Karnataka a declaratory charge in favour of a co-operative credit society is subject to a prior registered charge or mortgage, in the co-operative law of many other States and in the Model Law suggested to cover rural credit by commercial banks the relevant provision respectively provides for a first charge in favour of the co-operative credit society or the commercial bank in respect of its dues and this is so *irrespective* of whether there is a prior registered charge or mortgage on the property covered by the declaratory charge. Between the credit society and the commercial bank, the provisions preserve the *inter-se* priority on the basis of the well-established rule of priority, namely, *qui prior est tempore, potior est jure*.

Adverse effect on prior registered interests

2.1.151 Where the charge in favour of the institutional agency will supersede the claims of a prior registered secured party, this is likely to seriously undermine the capacity of the agriculturist to deal with his property.

Adverse effect on agriculturist's means

2.1.152 When subsequent credit from a lending institution affects earlier registered charge, then even under proper circumstances, say, for personal or family requirements, with reference to a purpose for which institutional agencies may *not* extend credit, the borrower is seriously handicapped in meeting his financial requirements.

Adverse effect on the value of the agricultural property

2.1.153 The factor that a registered interest is likely to be defeated by the agriculturist availing himself of subsequent institutional credit has its adverse consequence on the value of the agricultural holding since, unlike other immovable property, the agriculturist's liberty to deal with his holding is substantially impaired. Non-institutional agencies may not be agreeable even in an emergency to rely on a charge or mortgage over the agricultural land as security for any financial assistance to the agriculturist (for his personal or family needs or to meet the educational requirements of his children, purposes for which institutional credit may not be adequately extended). Thus, the provision not only affects the usefulness of the property in his hands but also adds to the existing several restrictions on the agriculturist's capacity to deal with his property.

Contrary to section 48 of the Transfer of Property Act 1882

2.1.154 Section 48 of the Transfer of Property Act, 1882, states the rule under the general law that priorities as between security interests should normally rank in the order of their creation. However, the provision providing for a declaratory charge superseding also the interest of a prior registered charge offends the principle of section 48 of the Transfer of Property Act, which is salutary.

Constitutionality of the provision

2.1.155 The provision in the special law conferring on the lending institution the right of first charge irrespective of a prior registered charge may also be considered as not in conformity with the provisions of the Constitution in so far as it aims to defeat the earlier registered security interests, apart from the fact that there is no particular reason or advantage for the declaratory charge superseding also earlier registered security interests.

No such infirmity in co-operative credit law of some States

2.1.156 In Andhra Pradesh and Karnataka, the Co-operative Societies Acts do not go to the extent of adversely affecting prior registered encumbrances. This is also a factor to show that for the extension of rural credit, such a provision is *not* a necessity.

2.1.157 Hence, in line with the provisions now found in States like Andhra Pradesh and Karnataka, the provision in the Co-operative Societies Acts of other States and the legislation based on the Model Law may have to be so modified as to provide that prior registered security interests in the agriculturist's immovable property are not affected by the declaratory charge created in favour of the institutional agency providing rural credit.

(b) Term-lending institutions and development loans

2.1.158 While co-operative credit societies purvey short-term and some medium-term credit for their member-borrowers, long-term credit for developmental purpose is extended by land development banks. The agriculturist requires both short-term credit to meet his seasonal agricultural operations for raising current crops and long-term credit for his agricultural developmental needs. As we discussed earlier, land as a security is not an essential requisite for extending short-term credit, though it is considered desirable to have such security wherever it is available.

Land as security essential for long-term credit

2.1.159 However, having regard to the long-term nature of the credit extended by land development banks, the spread of the repayment schedule for such credit, and the direct benefit which may result in the enhancement of the value of the land by reason of the utilisation of such credit, land as security is almost a necessity for extending long-term credit. The All-India Rural Credit Review Committee (1969) has also indicated that with reference to long-term credit land development banks cannot do without landed security.¹

Logic of the preference re. term-lending institutions

2.1.160 Thus, while a charge on land is not essential but only a desirable collateral for the primary credit agency's extension of short-term credit to the agriculturist, in the context of long-term credit a security interest in land becomes necessary. Hence, an institution extending long-term credit has a greater claim for obtaining its charge on the land of the borrowing-agriculturist than an institution extending short-term credit.

Co-operative credit law—Maharashtra and Gujarat

2.1.161 Realising the necessity for providing an adequate security interest in favour of the land development banks which provide long-term credit now to the agriculturists, the provisions in the Co-operative Societies Acts in Maharashtra and Gujarat do provide for a preference to the claims of a land development bank in respect of its dues *vis-a-vis* the co-operative credit society's claim against the property under the declaratory charge. In these States, the preference is with reference to "all claims of the Land Development Bank in respect of its dues."²

No priority recognised in certain States

2.1.162 However, in many States, the relevant provisions are not so clear. For instance, in Tamil Nadu, with reference to a mortgage executed in favour of a land development bank, the statute provides that such a mortgage has priority over any claim of the government arising from a loan under the Land Improvement Loans Act, 1883, granted after the execution of the mortgage. From the land which has derived the benefit under the Land Improvement Loans Act, 1883, the loan is recoverable under that Act as if the amount were arrears of land revenue due in respect of that land. The effect of

¹Report of the All-India Rural Credit Review Committee (1969), page 780.

²Section 48(f) of the Maharashtra Co-operative Societies Act, 1960.

this provision is only to save the security interest in favour of the land development bank from being affected by the charge (arising by reason of the fact that regarded as land revenue it is a charge on the land) in respect of the land improvement loan granted under the 1883 Act. While the position is stated with reference to loans under the Land Improvement Loans Act, the position *vis-a-vis* the security interest arising under the declaratory charge is not spelt out.

Present position under co-operative credit law

2.1.163 The declaratory charge in favour of the co-operative credit society may be earlier or subsequent to the mortgage in favour of the land development bank. By reason of the provisions which give a first charge on the land regarding the dues recoverable under the declaratory charge, even a declaratory charge created subsequently in favour of a co-operative credit society may be considered as ranking in preference to the claim of a land development bank.

Recommendation of the All-India Rural Credit Review Committee (1969)

2.1.164 The All-India Rural Credit Review Committee (1969) has also gone into this question and has recommended the following with reference to declaratory charge in favour of co-operative credit societies:

“... we are anxious that the ability of the cultivator to raise a long-term loan for which mortgage of land is usually required should not be prejudiced by the creation of a charge in favour of the co-operative which has made a short-term loan. This can be ensured if it is provided, as has been done in the Maharashtra Co-operative Societies Act, that this charge is subordinate to any claim of a land development bank against the mortgage of the same land. We recommend that a provision be made on these lines in the Co-operative Societies Acts of other states also.”¹

2.1.165 Having regard to the considerations relevant to short-term credit and long-term credit, it is necessary that institutional credit extended by way of long-term credit shall, in relation to the land secured, be ranking in preference to institutional credit extended by way of short-term credit. Hence, it is necessary, in those States where the position is not already made clear, to amend the Co-operative Societies Acts to specifically provide that the charge (arising by way of mortgage or otherwise) on the immovable property

¹Report of the All-India Rural Credit Review Committee (1969), page 484.

in favour of the land development bank shall rank in preference to the declaratory charge created in favour of a co-operative credit society.

Preference subject to concurrence

2.1.166 Should this preference be subject to the concurrence of the short-term credit lending institution where there is a declaratory charge already created? As per the provisions in force in Maharashtra, Gujarat, Rajasthan and Kerala, it does not appear to be so. The declaratory charge is subject to the claims of the land development bank whether the claim arises by reason of any credit extended prior or subsequent to the charge. However, it is reasonable to provide that where there is already a declaratory charge, the preferential claim of the land development bank will arise only in cases where the charge in favour of the land development bank has been created with the concurrence of the co-operative credit society. The Model Law suggested by the Expert Group also provides a similar rule with reference to the declaratory charge sought to be provided to commercial banks with reference to their advances to agriculturists.¹

2.1.167 Hence, while providing for a priority for the security interest in the land for the mortgage that may be created in favour of a land development bank which may be providing long-term credit, the law may be made clear to provide that such a preference arises as regards the amounts subsequently advanced when the charge in favour of the land development bank extending long-term credit has been created with the concurrence of the co-operative credit society.

(c) Amounts recoverable as arrears of land revenue

2.1.168 Here we shall refer to the types of credit that may be extended to the agriculturists for the development of the land by the government, claims of government like land revenue and claims recoverable as if they are arrears of land revenue.

Arrears of land revenue

2.1.169 Land revenue is always a first charge (this position is also made clear in the Land Revenue Codes of States)² on the land and an institution extending credit cannot hope to have any claim which will rank in preference to the arrears of land revenue recoverable *against the land in respect of which such arrears are due*. Hence, institutional credit agencies cannot hope to have a security interest

¹Clause 8(2) of the Model Law.

²For instance, please see section 137 of the Madhya Pradesh Revenue Code, 1959

in the land which will rank in preference to the claims of the State as regards land revenue recoverable from the land.

Loans under the Land Improvement Loans Act, 1883

2.1.170 We have earlier referred to loans under the Land Improvement Loans Act, 1883, which are specifically mentioned in the Co-operative Societies Acts as regards the priority for the mortgages executed in favour of the land development banks. A loan under the Land Improvement Loans Act, 1883, is recoverable as arrears of land revenue due *in respect of that land* for the benefit of which the loan has been granted.¹ So regarded, these amounts are entitled to priority as first charge on the land under the provisions of the Land Revenue Code.

2.1.171 Hence, loans granted under the Land Improvement Loans Act, 1883, are entitled to priority over the dues owing to institutional lending agencies in so far as such loans are sought to be recovered from the land for the benefit of which the loans have been granted, unless the statute limits it² or otherwise provides.

Views of the Expert Group

2.1.172 While considering the priority for charges in favour of government, the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture has expressed that "the importance of taccavi loans both in absolute and relative terms has declined considerably in recent years and the Government's role as a direct agricultural credit agency is gradually narrowing down".³ In this view, the Expert Group has felt that the "commercial banks need not harbour any fear in regard to the prior claims of Government in the recovery of loans granted by them".⁴ At the same time, that Group has recommended that commercial banks may be accorded the same treatment as co-operatives in the matter of priority in recovery of loans *vis-a-vis* government loans.

2.1.173 We endorse the views of the Expert Group and consider that there should be parity of treatment for all institutional lending agencies as regards priority in recovery of loans *vis-a-vis* government loans.

¹Section 7(1) (c) of the Land Improvement Loans Act, 1883.

²Please see section 120 of the Maharashtra Co-operative Societies Act, 1960.

³Paragraph 4.14 of the Report.

⁴*ibid.*

2.1.174 However, there is one aspect in co-operative law with reference to government's claims to priority under the Land Improvement Loans Act, 1883, meriting mention. This relates to the difference in the treatment given to short-term credit and long-term credit *vis-a-vis* such dues of the government, when the short-term credit is covered by the declaratory charge and the long-term credit by a mortgage.

Government's priority vis-a-vis short-term credit and long-term credit

2.1.175 With reference to mortgages executed in favour of land development banks, the Co-operative Societies Acts usually provide that such mortgages are not subject to "any claim of the Government arising from a loan granted after the execution of the mortgage under the Land Improvement Loans Act, 1883, or the Agriculturist Loans Act, 1884, or any other law for the time being in force". But *vis-a-vis* the declaratory charge the position of such claims of the government is not clear. Since the declaratory charge confers a first charge subject only to the claims specified in the provision, the position *vis-a-vis* government's claims under the Land Improvement Loans Act, 1883, may also have to be made clear since, as we saw earlier, the loan under the 1883 Act also qualifies for a first charge on the land.

2.1.176 Since such claims of the government are for land improvement purposes and are recoverable as arrears of land revenue due on the land, the declaratory charge may be clarified as subject to such government claims.

Other amounts recoverable as if they are arrears of land revenue

2.1.177 Other amounts recoverable as if they are arrears of land revenue are not as such secured against the land subject to the declaratory charge. As pointed out in *State Bank of Indore vs. Regional Provident Fund Commissioner, Indore and others*,¹ the Madhya Pradesh High Court has observed that "the manner prescribed for the recovery of the amount as an arrear of land revenue does not convert the amount into an arrear of land revenue; nor does it create any charge on any property of the employer for the payment of the amount". In view of this, merely because an amount is recoverable as arrears of land revenue, it shall not rank in preference to the amount due under the declaratory charge.

¹A.I.R. 1965 Madhya Pradesh 40 (V 52 C 13).

Institutional credit recoverable as arrears of land revenue

2.1.178 In Maharashtra, Gujarat and certain other States, the relevant statutes specifically provide that the dues recoverable under a declaratory charge in favour of a co-operative society are subject *inter alia* to "all claims of the Government in respect of land revenue or any money recoverable as land revenue ... and to the charge (if any) created under an award made under the Bombay Agricultural Debtors Relief Act, 1947 or any corresponding law for the time being in force in any part of the State".¹

2.1.179 In the case of land revenue or money recoverable as land revenue, the rule as to subordination applies whether the dues arose prior or subsequent to the creation of the declaratory charge in favour of the co-operative society. As we saw earlier, the first charge on land is confined to amounts due from the land as arrears of land revenue and does not extend to other amounts recoverable as if they are arrears of land revenue. Nowadays the machinery for recovery of land revenue is utilised for recovering several dues (including the dues of commercial and co-operative banks). Hence, to subordinate the dues recoverable under the declaratory charge to all dues which may be recovered as arrears of land revenue will be defeating the objects underlying the provisions providing for the declaratory charge. Hence, we recommend that the dues recoverable under the declaratory charge should not be subordinated to dues other than arrears of land revenue and government loans under the Land Improvement Loans Act, 1883, merely for the reason that these dues are recoverable as if they are arrears of land revenue.

Charges under Bombay Agricultural Debtors Relief Act, 1947 (or any comparable statute in Maharashtra or elsewhere)

2.1.180 The awards passed under the Agricultural Debtors Relief Acts which are charged on the land are generally registered with the Registrars of Assurances. While it is reasonable to provide for the subordination of the declaratory charge in respect of amount already secured and registered pursuant to an award under the Debt Relief Act, it will be prejudicially affecting the interests of the lending institution if the declaratory charge is considered also as subordinate to any award that may be registered subsequent to the creation of the declaratory charge. The applicable provisions in the co-operative societies enactments are not clear on this point. It is necessary to clarify this aspect.

¹Section 48(f) of the Maharashtra Co-operative Societies Act, 1960.

(d) *Priority for the dues of co-operatives and commercial banks*

2.1.181 As commercial banks also are now required to meet the credit needs of the agriculturists, the All-India Rural Credit Review Committee (1969) has considered the question of extending to the commercial banks a position similar to that available to co-operative credit societies. On this aspect, that Committee has said that the "governing consideration should be whether a particular facility is essential for the satisfactory functioning of the commercial bank as an institutional agency providing rural credit".¹

Inter-se the general rule shall apply

2.1.182 The Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture has recommended that, as between a charge created in favour of a co-operative credit society and an encumbrance in favour of a commercial bank, priority should be determined as per the general principle adumbrated in the Transfer of Property Act, 1882, that is to say, priority should depend on the order of time of the creation of the security interests. The Model Law suggested contains a suitable provision for this purpose.

2.1.183 As regards institutions extending short-term credit, it is but fair that the rule as to priority is based on the general principle and is related to the date of creation of the charge. Hence, as between a commercial bank and a co-operative credit society extending short-term credit, the priority as regards their security interests in the land or any interest therein should be determined as per the order of the creation of such charges in point of time.

Preference to interest securing long-term credit

2.1.184 As we have earlier considered, an institutional agency extending long-term credit requires to a greater extent a security interest in the land than an institutional agency extending only short-term credit. In the case of co-operatives, while primary credit societies generally extend short-term credit, the land development banks provide the long-term requirements of the cultivators. Hence it is that the Co-operative Societies Acts of many States provide the preference to the security interest in favour of the land development banks. Earlier we have recommended a specific provision in this regard in the Co-operative Societies Acts of those States where this position is not sufficiently made clear. On the same basis, when a commercial bank extends only a short-term credit and the land development bank provides a long-term credit in a particular area, it

¹Report of the All-India Rural Credit Review Committee (1969), page 621.

is but just that the security interest in favour of the land development bank is given priority with reference to its long-term credit. The State legislation should make this position clear.

(VI) SPECIAL ARRANGEMENTS FOR RECORDING THE DECLARATORY CHARGE

2.1.185 In the following chapter we are discussing the value of a proper registration machinery functioning under a statutory basis both from the point of view of expediting investigation of title to land and also for facilitating creation of encumbrances on, and transfers of, immovable property. Now it is enough to say that without a proper recording device which will put on notice the interest in the land of the lending institution, others including institutions and individuals dealing with the property will be put to hardship. Even institutional credit agencies may have no means of verifying (barring the statement of the borrower) whether or not there is a charge in favour of a co-operative credit society or a commercial bank.

Present position under Co-operative Societies Acts

2.1.186 The Co-operative Societies Acts of the different States now do provide for the recording of a declaratory charge created by the cultivating borrower in favour of a co-operative credit society. The All-India Rural Credit Review Committee (1969) has considered this question and observed: "A good deal, however, depends upon adequate administrative arrangements being available for the recording of this charge with the appropriate government authority. In fact, we observe that, in several states, these arrangements are not satisfactory and hence the provision for the creation of charge has not assumed significance in practical terms".¹ That Committee has also recommended that "satisfactory arrangements should be made for recording the charge on land created in favour of co-operatives".²

Value of the recording with village authorities

2.1.187 The present arrangements in States where there are provisions for recording a declaratory charge in favour of a co-operative credit society fall broadly under two classifications. First, in many States the arrangements are purely administrative in the sense that such recording is required or done in the village revenue records which are maintained by the village authorities. Such recording is neither

¹Report of the All-India Rural Credit Review Committee (1969), pages 486-487.

²*ibid.*, page 487.

a matter of statutory obligation nor is it of much significance while considering whether such recording would amount to constructive notice of the charge to institutions and others who may be dealing with the property. There are also now no adequate arrangements for inspection of the records containing the relevant entries relating to the declaratory charge nor is the obtaining of copies of such entries by cultivators and others facilitated.

Recording with the Registrars of Assurances

2.1.188 The second method is a more satisfactory one and this is provided for in the Co-operative Societies Acts of Andhra Pradesh and Tamil Nadu. Here, the provisions require the *compulsory* registration of the declaratory charge with the sub-registrars of assurances. Non-registration voids the validity of the charge. As a consequence, obtaining copies of entries is no problem. The principle of constructive notice applies, and institutions and individuals dealing with the property are put on notice of the charge.

Recording provided re. commercial bank credit

2.1.189 The Model Law, suggested by the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture with reference to declaratory charges created in favour of commercial banks, also requires that the sub-registrar of assurances *should* be informed by a bank about the charge by registered post acknowledgement due, with a copy of the document creating such charge, duly certified by an employee of the bank authorised in this behalf. The sub-registrar is required to record in a register maintained by him in this regard the fact of receipt of the copy of such declaration.

Registration should be the essential feature

2.1.190 When the sub-registrar of assurances is required to record the declaratory charge created in favour of co-operatives and commercial banks, we will be creating a satisfactory legal framework for the registration of all declaratory charges in favour of both these types of institutional agencies. Other institutional agencies and others would have constructive notice of the charges created in favour of the co-operative credit societies and commercial banks. This will also, as we shall elaborate in the following chapter, significantly help to transform gradually the registration system with reference to land in our country from a document registration system to a title registration scheme. The declaratory charges would be having a sounder basis in their operation. Even under the general law, the status of a declaratory charge will not in any conceivable circumstance be

considered less than the rights flowing under a mortgage. Having regard to all these beneficial circumstances, it is necessary that the declaratory charges created in favour of co-operatives and commercial banks should be required to be recorded with the sub-registrar of assurances within whose territorial jurisdiction the lands are situate.

2.1.191 Under the above circumstances, it is obvious that for satisfactory arrangements for registration of declaratory charge, it is absolutely necessary that on the lines of the provisions now found in the Co-operative Societies Acts of Andhra Pradesh and Tamil Nadu the declaratory charge should, in all other States, be required to be registered with the sub-registrar of assurances. Registration should be an essential feature for the validity of the charge and should not be merely optional. The provisions relating to registration of such charge by an intimation thereof containing the prescribed particulars and authenticated and verified in the manner required should be sufficient for the sub-registrar to make an entry in Book No. 1 maintained by him with reference to the land. Such a notification of the charge to the sub-registrar may be effected by registered post acknowledgement due. This is a very essential provision for making the declaratory charge more meaningful and efficacious.

Union may legislate

2.1.192 Since the subject comes under the Concurrent List of the Seventh Schedule to the Constitution, the implementation of the above recommendation could be considerably facilitated by the Union making the necessary amendments to the Registration Act, 1908, thereby bringing into force the relevant provisions throughout the country. This will also prove to be an expeditious method for implementing this desirable reform in the recording of charges in favour of public financing institutions, as individual enactments by the several States are likely to take an inordinately long time.

Value of the village level recording

2.1.193 In addition to a compulsory registration of the declaratory charge, wherever administrative arrangements are there for mentioning in the record of rights maintained by the village authorities such charges, such administrative arrangements may be continued as this will be an additional facility whereby at the village level (where there may not always be an office of the sub-registrar of assurances) sufficient information may be available which will readily provide the governmental agencies or others information relating to the encumbrances on the agricultural land.

(VII) SPECIAL PROVISIONS FOR RECOVERY OF THE AMOUNT DUE UNDER DECLARATORY CHARGE

Availability of special machinery for recovery of dues

2.1.194 The special law applicable to co-operative credit institutions and the legislation based on the Model Law provide a special machinery for the recovery by the lending institution of its overdues. Thus, a special machinery is available to co-operatives and commercial banks *inter-alia* for enforcing their security interests on the borrowers' immovable property and recovering their dues.

Aim for the special machinery

2.1.195 The primary aim of the special provisions and the special machinery is to avoid the necessity of public financing institutions getting involved in vexatious litigations that usually develop when the dues are to be recovered by instituting civil proceedings.

Scope of provisions re. co-operatives and commercial banks

2.1.196 While the provisions applicable for recovery of overdues by co-operative credit societies are fairly exhaustive though in the light of experience there is scope for improvement, the comparable provisions with reference to commercial banks now sought to be applied pursuant to legislation based on the Model Law are very vague and unsatisfactory.

Same function by same authorities but with difference in scope of authority

2.1.197 Again, while the State Governments are finding it convenient (as it is only to be expected) to name the authorities functioning under the Registrar of Co-operative Societies to function as the designated authorities under the legislation based on the Model Law to help recovering the dues of commercial banks in the field of rural credit, the authorities are now not entrusted with identical powers or privileges while they exercise the same function. This is so as the authority has to look to the provisions of the State enactment based on the Model Law while acting for the commercial banks, and it has to look to the provisions of the Co-operative Societies Act while acting for the co-operative credit societies.

Undesirable effect of the disparity in the applicable provisions

2.1.198 This disparity now in the applicable provisions and the differences in the scope and extent of authority availed by the same officials while acting for the commercial banks and while acting for

the co-operative credit societies are not conducive to the machinery functioning in an effective manner; nor is it in public interest as the cultivating borrower does not get the same opportunity of making adequate representations and explaining his position irrespective of his source of borrowing, that is, whether it is from a commercial bank or it is from a co-operative credit society. It is necessary that to the extent to which these differences are not related to the differences in the types of the organisational structure of the lending institutions, they require to be streamlined in order to ensure a cohesive action and effective functioning of all the authorities involved.

2.1.199 The machinery for recovering the dues of public financial institutions extending rural credit falls broadly under three categories, namely, (1) the registrars of co-operative societies, (2) the revenue authorities, and (3) the civil courts. The extent of the involvement of these three authorities in the recovery of the dues of public financial institutions is not the same.

Recovery of dues by invoking the machinery of the registrar of co-operative societies (designated authority)

2.1.200 The Co-operative Societies Acts of different States now do provide a self-contained forum for reconciling disputes, for the issue of enforceable awards or decrees on the basis of such settlement of disputes, and for the enforcement of such awards or decrees with the help usually of the revenue officials of the State Government.

2.1.201 The recovery procedure through the forum of the registrar of co-operative societies falls under two parts. First, the registrar hears the plaint of the co-operative credit society after giving an opportunity to the cultivating borrower who will be a member of the society. Secondly, after such hearing, he gives an enforceable award which has the force of a decree.

Re. co-operatives, the registrar functions as court with exclusive jurisdiction

2.1.202 The powers of the registrar while acting under the Co-operative Societies Acts with reference to co-operative credit societies may be summed up as follows in the words of the Study Team (1974) of the Reserve Bank which went into the problem of overdues of co-operative credit institutions:

“A claim by the society for any debt due from a member, whether such debt is admitted or not, is a dispute touching the business of the society and as such should be referred to the Registrar for decision. *No Civil or Revenue Court has jurisdiction to entertain*

any suit in respect of such dispute. The dispute may be decided by the Registrar himself or by an officer or arbitrator authorised by him in this behalf. Provision exists in some states for an appeal to a Co-operative Tribunal. The decision of the Registrar or of the Co-operative Tribunal, as the case may be, shall not be questioned in any court of law. The award which has the same effect as of a decree obtained in a civil court can be executed by the officers of the Co-operative Department or as in most states by the officers of the Revenue Department in the same manner as provided in the case of a civil court by the Code of Civil Procedure 1908. The Registrar is empowered to attach the property before award if he is satisfied that any member with the intent to default or delay execution is about to dispose of the property.”¹ (*emphasis added*).

Re. powers of the Registrar while acting for commercial banks

2.1.203 As already stated, it is only the Registrar or officers under him who are specified as the “designated authority” under the State enactments based on the Model Law. While acting as such, “the designated officer” with reference to commercial banks’ dues has the power to “make an order on any agriculturist or his heir or legal representative, directing the payment of any sum due to the bank on account of financial assistance availed of by the agriculturist, by the sale of any land or any interest therein upon which the payment of such money is charged or mortgaged”.² The pre-requisites for making such an order are only two, namely, (i) an application by the bank, and (ii) service of notice by the designated authority on the agriculturist, calling upon him to pay the amount due. These provisions are too summary and do not sufficiently protect the interests of the cultivating borrower. There is no reason why with reference to the recovery of commercial banks’ dues the Registrar (or other designated officer) should be required to follow a procedure different from the procedure adopted with reference to the plaint filed by co-operative credit societies for the recovery of their dues.

Without exclusive jurisdiction no effective function

2.1.204 Another aspect of the matter is that while the co-operative societies enactments provide for an *exclusion* of the jurisdiction of the civil courts with reference to the settlement of any claim by the co-operative credit society for recovery of its dues from a cultivating borrower (who will always be a member of the society), with reference

¹Report of the Study Team on Overdues of Co-operative Credit Institutions (1974), paragraph 6.15.

²Clause 13 of the Model Law.

to any claim on an agriculturist by the commercial bank for the recovery of its dues, there is no such ouster of jurisdiction of civil courts.

2.1.205 The provisions suggested for commercial banks would not be found in practice to be effective or expeditious since applications filed by the commercial banks before the designated authorities will always be subject to any proceedings that may be taken in the civil courts and it may not be very difficult for the borrower to raise a dispute about the quantum of dues or other allied or connected matters or even the manner in which the authority proceeds, and get the proceedings stayed.

Two forums not conducive

2.1.206 In other words, laying open two forums to deal with claims by commercial banks on agriculturists may not be either conducive or necessary for the expeditious and effective settlement of such claims; nor will it be fair to the marginal farmers and agriculturists who may submit to the summary procedure of the designated authority, whereas a well-to-do agriculturist-farmer may easily stall the proceedings before the designated authority by initiating proceedings in civil courts.

2.1.207 Hence, it is necessary that the scope and extent of the authority of the administrative forums now available for settlement of claims by co-operative credit societies and by commercial banks relating to dues by agriculturists should be identical. It is also necessary that with reference to the claims of both types of credit purveyors there should be no recourse to civil courts of original jurisdiction.

Provision for appeal

2.1.208 With reference to an order of the Registrar of Co-operative Societies in dealing with a claim of a co-operative credit society against an agriculturist, there is a provision now for appeal to the co-operative tribunal. On points of law that may arise, there is also a scope for further reference to the High Court by way of revision. These remedies are not made available with reference to an order which the designated authority (who is again an officer in the Registrar's office) against an agriculturist-borrower of a commercial bank. It is desirable, if not necessary, to deal with agriculturist-borrowers as a class and give them the same treatment whether they avail themselves of rural credit from a co-operative credit society or a commercial bank. Hence, it is necessary that on the lines of the

provisions now found with reference to the recovery of dues of cultivating-borrowers of co-operative credit societies, remedies by way of appeal and revision (wherever applicable) should be provided also with reference to proceedings that may be instituted by commercial banks against their cultivating-borrowers.

Adoption of summary procedure by the Registrar

2.1.209 The summary procedure for recovery of a simple money claim is somewhat similar to the provisions of the Civil Procedure Code applicable in such cases. The summary procedure provided for the recovery of co-operative dues under the Maharashtra Co-operative Societies Act may be stated as under in the words of the Study Team of the Reserve Bank which went into the problem of over-dues of co-operative credit institutions:

“In terms of the ... provisions of the Maharashtra Co-operative Societies Act, an application made by a primary credit society for the recovery of arrears in respect of any loan advanced for the financing of crop or seasonal finance is treated by the Registrar as a simple money claim and such application is summarily disposed of by the grant of a certificate for the recovery of the amount as arrears. The certificate has the same effect as that of an award passed by the Registrar or the decree of a civil court. The claim of the society is not treated as a dispute but a simple money claim and, therefore, decided without resorting to the usual formalities connected with a dispute such as filing of arbitration, issue of notices, obtaining of award, etc.

It will thus be noted that these special provisions where the normal provisions are inadequate or infructuous enable the recovery of dues in a quicker manner firstly because the Registrar can issue an award or certificate of recovery merely on application or even on his own motion and such an award or certificate of recovery can be executed as one for the recovery of land revenue.”¹

That Study Team has recommended that similar provisions may be included in the co-operative laws of other States also, if such provisions do not exist at present. It has also recommended that applications of co-operative credit institutions for the recovery of arrears or instalments under medium-term loans for agricultural purposes should be, as in the case of crop loans, treated by the Registrar as *simple money claims* and disposed of by the grant of the

¹Report of the Study Team on Overdues of Co-operative Credit Institutions (1974), paragraphs 6.16 and 6.17.

certificates of recovery and for this purpose suitable provisions may be incorporated in the Co-operative Societies Acts. Adoption of the provisions relating to summary procedure, on the lines of the provisions now found in the Maharashtra Co-operative Societies Act, with suitable modifications, would facilitate the recovery of rural credit extended by commercial banks.

Registrar taking action suo motu

2.1.210 The Maharashtra Co-operative Societies Act, 1960, also empowers the Registrar to issue a certificate for the recovery even *on his own motion* with reference to a loan granted to a cultivating-borrower of a co-operative credit society for the raising of crops. The Study Team which went into the problem of overdues of co-operative credit institutions has reiterated the recommendation of the All-India Rural Credit Review Committee (1969) for a provision in all Co-operative Societies Acts enabling the central co-operative banks to initiate action on their own against any defaulter-member of any primary agricultural credit society when the latter is reluctant to do so. Such a provision already exists in the Co-operative Societies Acts of Andhra Pradesh, Haryana, Jammu and Kashmir, Punjab, Rajasthan, Uttar Pradesh and West Bengal. We endorse the recommendation of the Study Team and recommend such provisions in the Co-operative Societies Acts of the other States where such provisions are not found now.

Executing authorities

2.1.211 An award issued by the Registrar of Co-operative Societies for the recovery of moneys due to a co-operative credit society is capable of execution in the manner provided for in the law relating to recovery of land revenue.

Recovery through Collector

2.1.212 An application for the recovery may be made to the District Collector with a certificate signed by the Registrar of Co-operative Societies for initiating steps for recovering the dues in the manner provided for the recovery of land revenue.

Execution of orders for recovery of dues of commercial banks

2.1.213 The Model Law suggested by the Expert Group with reference to commercial banks' dues provides that the order of the designated authority "shall be deemed to be a decree of a civil court

and shall be executed in the same manner as a decree of such court"¹. It is judicially recognised in highest forums including the Privy Council that it is in the process of executing a decree through a civil court that major difficulties and protracted delays are faced.

Recovery of dues of commercial banks as if they are arrears of land revenue

2.1.214 Under the circumstances, there is no reason why the dues owing to commercial banks from agriculturists should in any way be differentiated from dues owing to co-operative credit societies by such persons. Recovery of dues through the machinery available for recovery of land revenue brings in help and assistance of the State revenue authorities in a big way and such assistance should be available both to co-operative credit societies and commercial banks while extending rural credit. It is illogical that such assistance is available when commercial banks extend such credit through co-operative credit societies and is not available to them when they extend such credit directly to the agriculturists. Hence, it is necessary that the award or decree of the designated authority given on an application by a commercial bank for recovery of its dues from an agriculturist should also be made enforceable in the same manner as provided for in the law relating to recovery of land revenue.

Execution of decree by the Co-operative Department staff

2.1.215 While the Co-operative Societies Acts in certain States, namely, Andhra Pradesh, Kerala, Madhya Pradesh, Karnataka, Tamil Nadu and Uttar Pradesh enable the staff of the Co-operation Department (officials functioning under the Registrars of Co-operative Societies) themselves executing the decrees without having to depend upon the revenue machinery, in other States, for the execution of the award, revenue officials of the district may have to be approached.

2.1.216 The All-India Rural Credit Review Committee (1969) has recommended that in addition to the revenue officials, the staff of the Co-operation Department may also be empowered to execute the decrees in all the States. Conditions may vary in the several areas of the State and hence, it is desirable that in addition to the revenue officials, the Registrar of Co-operative Societies should also be empowered to execute the decrees passed by him. Inasmuch as he has already been entrusted with the powers of civil court while considering the claims of co-operative credit societies, it is fitting that he is also conferred with the necessary powers for execution either

¹Clause 13(2) of the Model Law suggested by the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture.
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directly by himself or through the officials of the revenue department, depending upon the circumstances of each case. In line with the provisions we have earlier recommended, the position should be the same with reference to recovery of dues also owing to commercial banks by agriculturists.

Powers of execution to officers of lending institution

2.1.217 The Working Group on Legal Matters set up by the Committee on Integration of Co-operative Credit Institutions has suggested that the power of execution may also be given to the officers of the lending co-operative credit society and has said in support thereof that "since these are institutional lenders and as the powers of recovery are only of a ministerial nature, there should be no objection to implement this suggestion".¹ With respect, we are unable to agree that powers of execution can be considered as only of a ministerial nature. It would be contrary to accepted notions of justice and fairplay to confer on the officers of the lending institution powers of an executing court which, with reference to public financing institutions like co-operative credit societies, are now allowed to be exercised by officers exercising quasi-judicial functions, like the Registrar of Co-operative Societies and/or the Collector of the District.

Disposal of the charged property for the recovery of dues

2.1.218 With reference to realisation of the dues by sale of the charged property, the Study Team of the Reserve Bank which went into the problems of overdue of Co-operative Credit Institutions (1974) has observed :

"The short-term credit institutions generally lend crop loans against the charge created on the immovable properties. This statutory charge created by way of a declaration in the prescribed form should be adequate..... The question now arises whether the short-term credit institutions should resort to selling of the land subject to charge or mortgage for realization of their dues. Normally, for a short-term lending institution, the remedy should be to proceed against the standing crop or agricultural produce.

Because of laxity it may happen that co-operative credit societies find no movable properties such as agricultural produce or agricultural machinery, etc., available for attachment and have to necessarily resort to the realisation of dues by sale of land. The difficulties faced by the societies in this regard are many and varying. It has been represented to us that *one of the major*

¹Committee on Integration of Co-operative Credit Institutions, Report of the Study Groups and Notes (1976), page 407.

*difficulties in this respect is the lack of bidders whenever the lands are put to auction. Such a situation generally arises either due to fear of powerful interests or the affluent classes of cultivators in the villages or it might also happen in some cases due to lack of bidders with the requisite resources. In either case there is no choice for the society/central bank except to buy the land. Central financing agencies have mostly to bid the property in auction and acquire the same as a non-banking asset. Central banks which have acquired lands in realization of dues in the past have found it difficult either to sell the land or even to take possession and ensure any return therefrom."*¹

(emphasis added).

Thus, the main difficulty faced with reference to the disposal of the property charged in favour of a co-operative credit society which is extending short-term credit is not due to any inadequacy of the machinery or the legal provisions available for bringing the property to sale. The remedy of approaching the Registrar of Co-operative Societies available to co-operative credit societies is inexpensive.

Should the institutional agency have the right of direct sale on default?

2.1.219 Under the circumstances, the suggestion of the Working Group on Legal Matters set up by the Committee on Integration of Co-operative Credit Institutions for conferring the power of direct sale without the aid of the Registrar of Co-operative Societies (by having recourse to a special form of mortgage called "Gehan"), which has been endorsed by the Committee on Integration, will not really help to solve the practical problems experienced in the disposal of the land by public financing institutions like co-operative credit societies. *A fortiori*, the position will be the same with reference to commercial banks lending to agriculture.

2.1.220 In fact, the All-India Rural Credit Review Committee (1969) recognised that "the task of bringing lands of cultivators to sale" is not "a happy or easy one in the changing conditions of our villages".² While that Committee recognised the need for co-operatives being adequately equipped to face such contingency it laid more emphasis on the influence of the local leadership of the village co-operative and the central bank. Thus, by eliminating recourse to the Registrar of Co-operative Societies or the village revenue officials in disposing of the land, realisation of the dues is not going to be facilitated.

¹Report of the Study Team on Overdues of Co-operative Credit Institutions (1974), pages 179-181.

²Report of the All-India Rural Credit Review Committee (1969), page 526.

2.1.221 For realising real property security *under the general law* pursuant to the mortgage provisions of the Transfer of Property Act, 1882, one has to have recourse to the courts and the provisions of the Code of Civil Procedure, 1908. This necessarily brings in several costly, time-consuming and protracted steps. But, while trying to dispose of the property *under the special law* through the Registrar of Co-operative Societies or the designated authority (in the case of commercial banks), public financial institutions have been provided with a simple, inexpensive and not a very time-consuming procedure for the disposal of the charged land or any interest therein. Having regard also to the peculiar features of our agricultural land, like tenurial claims, claims of the State Government towards its revenue, etc., it is also not advisable, nor is it fair to the agriculturist, to confer on the public financial institutions, whether they are co-operative credit societies or commercial banks, the further right, in addition to the right to invoke the help and assistance of the Registrar of Co-operative Societies and the revenue authorities, of directly disposing the charged land by their own officials. Hence, unlike in the case of industrial advances by public term-lending agencies, with reference to rural credit by institutional agencies, giving to them the right of directly disposing of the agricultural land is neither necessary nor desirable.

Problem of lack of bidders

2.1.222 As the Study Team on Overdues of Co-operative Credit Institutions has pointed out, the major problem faced by public financial institutions in proceeding against the charged land is the lack of bidders who are in a position to offer a reasonable price for the property sought to be disposed of.

2.1.223 That Study Team has suggested the following solutions for meeting the situation :

“The *state government may themselves purchase* the lands in auction because with the authority at their command they would not only be in a position to take possession of lands but also be able to dispose them of by sale or on long-term lease. Alternatively, we would recommend the setting up of a *State Farming Corporation* in each state wholly owned by the state government and brought into existence by a separate state enactment. The Corporation should be vested with the necessary authority not only to purchase and acquire possession of the lands and other immovable properties brought to auction by the co-operatives for realization of their dues, but also to ensure the cultivation of such lands either by the staff engaged by them or by the allottees till such time it is in a position to dispose them of finally. The

Corporation need purchase the lands at the minimum price, i.e., at the price which is just adequate to clear the arrears due to the co-operative society and other expenses, etc., and that too only if there are no other bidders for higher amounts. The Corporation should also have full statutory authority either to lease out or dispose of the lands acquired, preference being shown to the defaulter himself. Alternatively, the lands may be disposed of in the same manner as the state governments *dispose of the surplus lands under their relevant land ceiling enactments*. In any case, the Corporation should at the earliest opportunity dispose of the lands so that its funds are not locked up unduly long. Such an independent and powerful Corporation fully backed by the state government can at any time step in and break the stalemate created by vested and powerful interests in the villages in preventing the sale of lands. It is only then that the fear of losing usufructuary rights in land will be built up in the minds of defaulters and *the security of land will have some value even from the point of view of the lending agency.*¹

(emphasis added).

State-owned Farming Corporation

2.1.224 In the said view, that Study Team has recommended the establishment of a State-owned Farming Corporation in each State which could serve as an important and effective agency in the realisation of overdue of co-operative credit institutions from wilful and recalcitrant defaulters. We strongly endorse the recommendation of the Study Team as this is very practical and in our view would prove to be the most effective way of solving the several problems now experienced in the case of disposal of the lands secured to institutional agencies extending rural credit.

Interim measures to facilitate disposal

2.1.225 While ultimately the effective way of solving the problems felt in the matter of the disposal of the agricultural lands would have to be by the intervention in each State of a State-owned Farming Corporation on the lines advocated by the Study Team on Overdues of Co-operative Credit Institutions, we also recommend as an interim measure the following to facilitate institutional agencies when they are forced to seek measures for disposal of the secured property :

- (a) Pending the formation of State-owned Farming Corporation in each State on the lines recommended by the Study Team on Overdues of Co-operative Credit Institutions, institutional

¹Report of the Study Team on Overdues of Co-operative Credit Institutions (1974), pages 181-182.

agencies, whether co-operative credit societies, commercial banks or rural banks, should be freely allowed to bid at any sale that may be held by the Registrar of Co-operative Societies or the District Collector (or the designated authority). Provisions now found in the co-operative laws or elsewhere which restrain the institutional agency from bidding for acquiring the lands secured to it should be suitably modified for this purpose.

- (b) Pending the formation of such State Farming Corporations, at the auction sale, if there are no bidders willing to pay any higher price, the State Governments may also help the institutional credit agencies extending rural credit, by acquiring the lands for the minimum price, i.e., the amount actually recoverable as arrears or overdues and then they may make arrangements for disposing of the acquired lands to agriculturists who may be willing to take the lands. A preference in this regard may be given to the defaulting agriculturist provided he pays the overdues within a specified time together with the costs and expenses which the State Government might have incurred.

(VIII) ASSIGNABILITY OF SECURITY INTEREST UNDER DECLARATORY CHARGE

2.1.226 The security interest arising under a declaratory charge in favour of a co-operative credit society (or a commercial bank under the legislation based on the Model Law) is created within a statutory framework which provides for the manner of creation of the security interest, the extent to which it operates and how it could be enforced. There is no specific provision (though there seems to be a necessity for the same) in this statutory framework providing for the lending institution being enabled to assign its security interest to secure any refinancing arrangement. In view of this, the lending institution's right to assign its security interest for obtaining refinance or otherwise merits special consideration.

2.1.227 Since the special law has no provisions dealing with assignability of security interest in favour of the lending institution, we are obliged to refer to the provisions of the general law for this purpose. Under section 100 of the Transfer of Property Act, 1882, a 'charge' on land does not *per se* create an interest in immovable property, though it is enforceable as a simple mortgage against persons having notice of the charge. This section covers both a charge arising by way of operation of law and one arising by act of parties. Under the circumstances, the declaratory charge may be considered only as a form of charge under the general law (though with the

additional benefits accruing to the secured party with reference to the manner of creation priorities and enforcement under the provisions of the special law) and in this view it may be regarded as conferring only an interest *ad rem* and not creating an interest *in rem*.

2.1.228 In the above view, which is quite a plausible one, the assignability of a declaratory charge for securing refinance or otherwise may have to be statutorily provided for. At present, the scheme relating to statutory charge found in the relevant provisions of the local law which governs the extension of credit by co-operative credit societies or the provision of rural credit by commercial banks, does not deal with this matter.

2.1.229 Hence, we recommend a specific provision in the Co-operative Societies Acts and the legislation which purports to extend the scheme of such declaratory charge to rural credit extended by commercial banks, to clarify that the charge in favour of the lending institution may be assigned (such assignment should in turn be capable of being registered with the sub-registrar of assurances in the manner provided for the registration of the declaratory charge) by the lending institution and the assignee shall be entitled to the same rights and privileges as the assignor had with reference to the charge.

MEDIUM-TERM CREDIT

2.1.230 As indicated in the Manual on Production-oriented System of Lending for Agriculture, medium-term credit to cultivators is given for meeting outlay relating to the replacement and maintenance of wasting assets and for capital investment designed to increase the output from land, such as the deepening of wells, sinking of new wells, installation of pumpsets, purchase of agricultural machinery or a pair of bullocks, etc. The term of the loan is not confined to one crop season. Though the repayment of the loan is expected from out of the sale proceeds of the produce, the loan cannot be liquidated from the produce of a particular year. It may have to be in instalments spread over a term of years, usually three to five years. Since repayment of such credit is spread over a number of years and in view of the long-term gains to the land benefiting from such assistance by the loan enhancing the income-yielding capacity of the land, a charge on the land will be usually necessary.

LAND CHARGE FOR A MEDIUM-TERM LOAN

2.1.231 Since the financial assistance would generally be availed of only by a person who has a chargeable interest in the land, it is reasonable to insist on a charge or a security interest in the land while extending medium-term credit.

STATUTORY FRAMEWORK

2.1.232 Co-operative credit societies extend both short-term and medium-term credit. The statutory framework provided for in the Co-operative Societies Acts for obtaining a declaratory charge is available to them. Based on the legislation following the Model Law recommended by the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture, commercial banks are also now in a position to avail themselves of such simple, inexpensive and expeditious method of obtaining a security interest in the land of the borrower. Hence, for extending the medium-term credit, the security considerations would be adequately met, if an interest in the land is acquired by recourse to the provisions of the declaratory charge. To this extent, the suggestions made earlier with reference to declaratory charge obtained for extending short-term credit would substantially cover also the extension of credit by a lending institution for furnishing medium-term credit.

SPECIAL PROVISIONS RE. CHARGE ON MOVABLE ASSETS

2.1.233 In addition to, or as an alternative (in appropriate cases) to, the obtaining of a security interest in the land, a first charge on the movable assets, like agricultural machinery or implements, for the purchase of which the medium-term credit is given, is also available to the lending institution. Here, the provisions in the Co-operative Societies Acts conferring on the lending institution a first charge *inter alia* on the *movable assets*, for the acquisition of which the credit facilities are given, are generally adequate and the lines on which they may require some modifications have earlier been indicated by us. The provisions suggested to the general law relating to personal property security, in our report on the said subject, dealing *inter alia* with questions, namely, the preference in favour of purchase money credit, registration of security interest in fixtures, the provision for preservation of a perfected security interest regarding finance given for the acquisition of the property (even before such acquisition), are all features which would supplement and strengthen the available framework for institutional agencies extending medium-term credit.

LONG-TERM CREDIT

2.1.234 With reference to long-term credit, as pointed out by the All-India Rural Credit Review Committee (1969), a security interest in the land is a must for the lending institution. For extending such long-term credit, long-term credit institutions giving rural credit have generally been following right from the beginning the practice of obtaining a mortgage. The statutory framework found under the

special local legislation of the States does not alter the general law relating to mortgages though some special provisions are made applicable to them.

LONG-TERM RURAL CREDIT BY LAND DEVELOPMENT BANKS

2.1.235 Long-term rural credit is mainly catered to by land development banks which are co-operative credit institutions governed by the framework of the co-operative credit law. While in some States like Tamil Nadu there are separate statutes governing the functioning of land development banks, in States like Maharashtra, the Co-operative Societies Act deals with all types of co-operative societies including land development banks.

SPECIAL PROVISIONS FOR LAND DEVELOPMENT BANKS

2.1.236 The land development banks, when they obtain a security interest for long-term credit by way of mortgage, are given some preferences now and such preferences may be summed up:

- (i) For obtaining a mortgage document, the transaction is generally exempt from the payment of stamp duty and registration charges—this considerably saves the cost of credit.
- (ii) Registration of a mortgage in favour of a land development bank is effected by a simple method whereby the bank merely sends to the sub-registrar of assurances, a copy of the document and the sub-registrar is required to make a record in Book No. 1 the particulars of the mortgage. This is deemed to be sufficient registration.
- (iii) Such mortgages are saved from being afflicted as regards priority by any subsequent loan granted by the Government under the Land Improvement Loans Act, 1883, or under the Agriculturist Loans Act, 1884.
- (iv) The machinery of the registrar of co-operative societies and the special procedures available for recovering the co-operative overdues, established under the Co-operative Societies Acts, are also available for enforcing the mortgage and disposing of the security when this becomes necessary.

RE. COMMERCIAL BANKS

2.1.237 The legislation, which is based on the recommendations of the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture, applies substantially to commercial

banks extending *all* types of rural credit, the same provisions as are applied to co-operatives with reference to the obtaining of security interest by them by way of a declaratory charge on land. We have already seen the relevant provisions as regards declaratory charge and our recommendations made earlier would apply with equal force as regards the provisions applicable to declaratory charge in so far as it covers long-term rural credit extended by commercial banks. But the point we want to be really considered is the appropriateness and the necessity of the declaratory charge form to the extension of long-term rural credit.

DIFFERENT SECURITY SCHEMES FOR SAME TYPE OF INSTITUTIONAL CREDIT

2.1.238 Thus, in practice while extending rural credit, commercial banks have recourse to the statutory framework providing for a declaratory charge and land development banks have recourse to mortgage financing. Naturally, the relevancy of institutional agencies having recourse to different forms of obtaining security interests while performing the same function merits consideration.

VIEWS OF THE WORKING GROUP

2.1.239 The Working Group on Legal Matters appointed by the Committee on Integration of Co-operative Credit Institutions set up by the Reserve Bank of India had perforce to go into the two different methods now employed by short-term credit and long-term credit lending institutions in the co-operative structure for advances against land. It had to consider this in the context of the suggestion to unify the organisational set-up with a view to form an integrated credit institution which may extend both short-term credit and long-term credit. Whether, with reference to short-term and long-term credit needs, such an integrated credit institution should follow the practice of obtaining a declaratory charge or have recourse to taking mortgage or have recourse to both had to be considered by the Working Group. In this context the Working Group has expressed its views on the merits of these two procedures now adopted.

MORTGAGE Vs. DECLARATORY CHARGE FOR LONG-TERM CREDIT

2.1.240 While studying the relative merits of the mortgage device employed by the land development banks and the device of the declaratory charge employed by the co-operative credit societies, the above Working Group has referred to the following advantages in having recourse to declaratory charge :

- (i) The form for obtaining declaratory charge is brief.
- (ii) The charge will be a continuing one covering future advances.
- (iii) The charge has special priority provisions.

2.1.241 The Working Group felt that, on the above aspects, the method of obtaining a security interest by way of mortgage is not so advantageous. It felt that—

- (i) the form of the mortgage deed is not so brief ;
- (ii) a separate deed is taken for each long-term loan, causing avoidable delay in disbursement of loan ; and
- (iii) the mortgage is not conferred any special priorities except that it will not be adversely afflicted by subsequent loans under the Land Improvement Loans Act, 1883, and the Agriculturists Loans Act, 1884.

Now we shall examine these points.

COST OF CREATION

2.1.242. The cost of creation of the security interest under both the procedures is substantially negligible. In the case of a declaratory charge there is no instrument which will attract stamp duty and registration charges. As regards the mortgage, though there is an instrument, the special provisions, that exempt from payment of stamp duty and registration charges instruments executed in favour of co-operative societies (commercial banks' lending to agriculture is also given exemption from payment of stamp duty payable on agricultural loans upto a certain limit), ensure that the cost factor is the same whether the device adopted is one of declaratory charge or that of mortgage.

REGISTRATION FORMALITIES

2.1.243 As regards registration of both a declaratory charge and a mortgage, the Co-operative Societies Acts of many States provide for the recording officer being furnished with the document containing the declaration or a copy of the mortgage deed, which may even be sent by post, and thereupon the charge or the mortgage is regarded as being duly registered. No doubt with reference to certain States the declaratory charge provisions now do not provide for registration with the registration authorities, a point on which we have already made our recommendations.¹

¹Paragraphs 2.1.188 to 2.1.191 *supra*.

BRIEF OR LENGTHY, IT IS STANDARD FORM

2.1.244 Now we shall look into the advantages that were noticed by the Working Group in taking a declaratory charge under the existing statutory provisions. As standard documents are taken for obtaining a mortgage as well as a declaratory charge (which are often printed), the fact that the form for obtaining declaratory charge is brief or that the mortgage document is a little more lengthy is not of significance from the point of view of time or labour involved in preparing the document.

COVERAGE OF FUTURE ADVANCES

2.1.245 As regards the scope for covering future advances under the declaratory charge device, it may be seen that the position is the same vis-a-vis a mortgage. As we have earlier pointed out, the Maharashtra Co-operative Societies Act, 1960, requires the indication of the maximum amount subject to which the future advances could be secured under a declaratory charge. The mortgage document may also provide for covering future advances provided a maximum amount is specified consistent with the provisions of section 79 of the Transfer of Property Act, 1882. Thus, merely for covering future advances it is not necessary to prefer the method of the declaratory charge.

POSITION RE. ASSIGNABILITY

2.1.246 However, the declaratory charge and the mortgage obtained by co-operatives substantially differ in the following aspects. While a security interest obtained by way of a declaratory charge may not be readily assignable for securing the refinance to the society, the mortgage form facilitates this—we have earlier recommended special provisions to rectify this defect now existing in the scheme for obtaining declaratory charge.

POSITION RE. PRIORITIES

2.1.247 The declaratory charge now enjoys certain priorities which are not available to the mortgage taken by land development banks. We shall now consider the rationale of the different priority provisions now applied with reference to declaratory charge and mortgage.

“FIRST CHARGE” UNDER DECLARATORY CHARGE—ITS SCOPE

2.1.248 For the present discussion, as a typical case, we shall first consider the position prevailing in Maharashtra. Here the declaratory charge amounts to a first charge subject to the claims of—

- (i) Government (for land revenue or any money recoverable as land revenue),
- (ii) land development banks, and
- (iii) charge under Bombay Agricultural Debtors Relief Act, 1947.

We have earlier mentioned that the security interest obtained by way of mortgage does not become a first charge and the special provisions now applicable only save the mortgage from being afflicted by subsequent loans granted under the Land Improvement Loans Act, 1883, and the Agriculturists Loans Act, 1884, which are recoverable as arrears of land revenue. But by reason of the specific preference to land development banks' dues *vis-a-vis* the amounts due under declaratory charge, *the land development banks do not suffer vis-a-vis the claims of the institution extending short-term credit.* Also with reference to commercial banks, this principle has been recognised in the Model Law suggested by the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture and the special legislation enacted pursuant thereto.

PRIORITY OF LONG-TERM CREDIT NOW STATUTORILY RECOGNISED

2.1.249 Thus, the question arises whether any additional rules as to priority merit formulation as regards institutions extending long-term credit. Since the principle that the interest of a long-term credit-provider shall rank in preference to the interest of an institution extending short-term credit is already recognised and legislation in some States has given effect to that, the priority rules are substantially fair as they are. Under the circumstances, though there are somewhat differing rules as to priority as regards declaratory charge and mortgage, within their scope they operate fairly and there is no special case for any substantial alteration in the present governing rules as to priority applicable to declaratory charge and mortgage.

PRACTICAL CONSIDERATIONS MAY REQUIRE SEPARATE SECURITY DOCUMENTS

2.1.250 The fact that separate mortgage deeds are taken to secure subsequent loans by land development banks may be due to the special features of long-term credit. Thus, while taking a declaratory

charge a co-operative credit society making an advance to the cultivator may reasonably assess the limit upto which credit may be required in subsequent years for seasonal agricultural operations and hence may be in a position to specify the extent to which the charge by way of declaration should cover future advances that may be a recurring feature of short-term credit. On the other hand, unlike in the case of short-term credit, per cultivator extension of long-term credit *is not such a recurring credit*. Long-term credit may have to be provided having regard to the special circumstances of each case. Thus, once a development loan is given for providing or improving the irrigational facilities of a land, subsequent credit for the same purpose to the same cultivator or against the same land may not be necessary. Thus it may be more convenient for land development banks to take separate mortgage documents to secure each long-term credit and for the same reason the recourse to a continuing security device may not be apt. In fact, this position is also impliedly recognised by the Working Group when it has suggested that for short-term credit and long-term credit, separate documents may be taken, though both types of credit may be extended by the *same* integrated co-operative credit society.

SPECIAL POSITION *RE*. LAND DEVELOPMENT BANK'S MORTGAGE

2.1.251 Additionally, the land development banks are given, under the co-operative Societies Acts, the right of disposal of the mortgaged property without the intervention of the court. In this connection, sections 133 to 136 of the Maharashtra Co-operative Societies Act, 1960, may be referred to. These provisions confer on the land development bank the following rights with reference to the sale of the mortgaged property :

- (i) The land development bank may sell the mortgaged property by public auction in the village where the property is situate or at the nearest place of public resort, without intervention of the court ;
- (ii) the bank is also permitted to purchase the property at such auction sale ;
- (iii) confirmation or cancellation of the sale by the land development bank with the approval of the registrar of co-operative societies;

- (iv) the disposal of the sale proceeds ;
- (v) the registration of the certificate of sale;
- (vi) the District Collector considering the claim of any tenant who may be in occupation of the land sold; and
- (vii) the sale not being affected due to procedural irregularities.

But it is also specified that before the land development bank exercises this power of sale of the mortgaged property, the Registrar of Co-operative Societies authorises the bank to exercise this power after hearing the objections, if any, of the mortgagor or mortgagors. In other words, the Co-operative Societies Act enables the Registrar, when proceedings are taken before him for recovery of dues by attachment and sale of the mortgaged property, to authorise the sale of the mortgaged property by the land development bank instead of the sale being effected by him, *after* hearing the objections of the mortgagors or the cultivators.

SCOPE OF THIS POWER OF SALE

2.1.252 The power of sale granted without the intervention of the court and provided for in the Maharashtra Co-operative Societies Act, 1960, is not the same as the power given to an English mortgagee to sell the mortgaged property without the intervention of the court in the circumstances provided for in section 69 of the Transfer of Property Act, 1882. We have earlier noticed that as regards agricultural lands, the main problem is the want of bidders who are in a position to offer a reasonable price. Again, agricultural lands are subject to *tenurial* and tenancy claims and disposal of the land cannot easily be effected by the lending institution without the aid or intervention of the Registrar of Co-operative Societies or the revenue officials who now constitute a special forum which could be approached by the lending institution for attachment and sale of the property. However, there should be no objection for the Registrar or the designated authority authorising the long-term credit-providing institution to exercise the power of sale without the intervention of the court after hearing the objections of the mortgagor and finding that it will be more convenient if this procedure is adopted. Having regard to the inbuilt safeguards that are now provided for in the relevant provisions of the Maharashtra Co-operative Societies Act, 1960, it is desirable that such provisions are incorporated in the enactments relating to land development banks in those States where such provisions do not find a place now.

NO NECESSITY FOR ANY SPECIAL MORTGAGE FORM

2.1.253 Since the land development banks are now conferred the right of sale of the mortgaged property without the intervention of the court subject to reasonable restrictions on the exercise of such power and subject to the authorisation and approval of the Registrar of Co-operative Societies, it may not be necessary to provide any other special form of mortgage (as suggested by the Working Group on Legal Matters and the Committee on Integration of Co-operative Credit Institutions) incorporating the features of English mortgage for dealing with agricultural lands. The features of English mortgage will not match with the prevailing conditions of our rural economy. The right of direct sale without the intervention of the court is to be exercised with circumspection, if at all it may be necessary, only with reference to an institution providing a long-term credit, having regard to the size of the loan, the period of redemption, and the purposes for which long-term credit is extended. However, our mortgage law need not be made more complicated by adding one more form when the need is to reduce disparities in the rights of parties only based on the form of the mortgage.

SPECIAL PROVISIONS *RE.* SALE TO EXTEND TO COMMERCIAL BANKS

2.1.254 However, it is necessary that similar provisions within the circumscribed limits as indicated above should be available also to commercial banks when they extend rural credit for long-term purposes. We recommended that the relevant legislation may be suitably modified to incorporate provisions on lines similar to the provisions now found in sections 133 to 136 of the Maharashtra Co-operative Societies Act, 1960.

NEED FOR COMPREHENSIVE LAW *RE.* SECURITY ASPECTS RELATING TO RURAL CREDIT

2.1.255 We have seen so far with reference to short-term credit, medium-term credit and long-term credit which are extended by co-operative credit societies, land development banks, commercial banks and rural banks, the salient features of the special law which has been developed under State enactments to facilitate the extension of rural credit by institutional agencies. We have now a multiplicity of State enactments. There are, as may be expected several variations of a major and minor nature in the enactments that now govern extension of rural credit by the institutions which provide such credit in the different States.

NATURE OF THE VARIATIONS

2.1.256 The variations now found, which are of both major and minor nature, in the different State enactments dealing with extension of rural credit by institutional agencies may be classified in the following groups :

- (i) the differences in the relevant provisions applicable to short-term and medium-term credit extended by co-operative credit societies in different States ;
- (ii) the differences in the provisions dealing with extension of long-term credit by land development banks of various States ;
- (iii) the differences now found in the applicable provisions of various States as regards extension of short-term, medium-term and long-term rural credit by commercial banks (including regional rural banks); and
- (iv) the differences found within a State in the treatment given to co-operative institutions and commercial banks in their extending—
 - (a) short-term credit and
 - (b) long-term credit.

BOTH THE ACTS AND THE VARIATIONS ARE NUMEROUS AND SUBSTANTIAL

2.1.257 The number of enactments over which the provisions of the special credit-security law dealing with rural credit are now found scattered are too numerous. Though the Government of India, the State Governments, the Reserve Bank of India and the Agricultural Refinance and Development Corporation have been bestowing considerable attention and have been taking special efforts to minimise the major discrepancies in the applicable statutes of different States in order to facilitate the smooth flow of rural credit by institutional agencies belonging to both categories, namely, co-operatives and commercial banks, the differences that have developed are very substantial and they are not conducive to the smooth extension of rural credit.

FEASIBILITY OF SPECIFIC AMENDMENTS TO THE NUMEROUS STATUTES

2.1.258 While this is the present picture, it has to be studied having regard to the fact that, in the light of the several recommendations we have earlier set out, almost all these statutes would require

necessary alterations, assuming our recommendations are accepted by the concerned Governments. It will become a massive effort and may not be very productive if steps are to be initiated with reference to the provisions now found in the State enactments in each State and as applied to the different institutional agencies and as a consequence thereto suggest suitable amendments to all the applicable statutes in every State. Though to a certain extent such steps may be unavoidable, the time and the effort that would be required and the co-ordination of the officials that is involved clearly indicate that by such an effort the changes required in the applicable laws cannot be effected within a reasonable time so that the extension of rural credit, which is vital for the country's economic development, may flow unhampered and under adequate and reasonable safeguards.

INDIVIDUAL AMENDMENTS DO NOT ENSURE CONTINUANCE OF DESIRABLE UNIFORMITY

2.1.259 We may also have to take into account that, even after putting in such a massive effort and bringing about the desirable uniformity in essential respects in all the applicable statutes governing extension of rural credit by institutional agencies, it may be necessary to keep a continuous watch over the changes that may be considered necessary in the statutes in the light of subsequent experience by the governments and the authorities at the Central and the State levels, who are responsible for giving direction for the flow and the extension of rural credit by institutional agencies.

AGRICULTURISTS SHOULD NOT BE UNDULY DISCRIMINATED

2.1.260 In the light of the above, it is obvious that in order that our statutory framework dealing with credit-security aspects concerning rural credit provides and continues to provide the necessary inbuilt safeguards for extension of rural credit by institutional agencies *and* in order that the agriculturists who may approach different institutional agencies in the different regions of our country are all given an equitable treatment and are not unduly or unreasonably discriminated, we consider it necessary that the special law dealing with credit-security aspects and concerning rural credit should be developed as a *comprehensive scheme which would apply alike both to co-operative credit agencies and commercial banks so long as they perform the same function, whether it be of extending short-term credit or of medium-term credit or of long-term credit.*

DEVELOPMENT OF A COMPREHENSIVE SCHEME IN STAGES

2.1.261 The development of a comprehensive statutory scheme that will deal with all credit-security aspects relating to extension of rural credit by institutional agencies may have to proceed *in stages*. These stages may relate to an interim plan and a long-term plan.

INTERIM PLAN

2.1.262 The interim plan for reforming the provisions of our special credit-security law dealing with rural credit may be initiated by the Reserve Bank of India in consultation with the Agricultural Refinance and Development Corporation.

- (i) As an interim expedient, the Reserve Bank of India and the Agricultural Refinance and Development Corporation may undertake a study covering all credit-security aspects and suggest the changes that may have to be made in the numerous enactments¹ in different States in the light of our recommendations.
- (ii) The Reserve Bank of India and the Agricultural Refinance and Development Corporation may then take up with the concerned State Governments, in consultation with the Government of India, the changes that may be necessary in the statutes applicable in each State.
- (iii) The State Governments may consider the changes suggested in the applicable statutes in their States keeping in view the need to avoid differences in the treatment of credit institutions performing the same function and the desirability of eliminating, to the extent possible, all serious bottle-necks in the flow of institutional rural credit and, at the same time, assuring to the agriculturists approaching either a co-operative credit society or a commercial bank an equitable treatment without any unreasonable discrimination.

INITIATION OF LONG-TERM PLAN

2.1.263 As part of a long-term plan, steps will have to be taken to bring within *one comprehensive statutory scheme* all credit-security aspects relating to extension of rural credit by institutional agencies. In developing the scheme, the following aspects will have to be taken into considerations :

- (i) The statutory form of declaration which will confer a security interest in favour of lending institutions covering also future advances up to a maximum that may be indicated in the declaration shall be available to all lending institutions, i.e.,

commercial banks, co-operative banks, rural banks and any other institution which is notified by the Government in this behalf.

- (ii) This statutory charge should cover only short-term credit and medium-term credit.
- (iii) This declaratory charge should be registered with the sub-registrar of assurances within whose territorial jurisdiction the real property is situate and for effecting such registration it should be sufficient if an attested copy of the declaration duly signed by the borrower is sent by the lending institution to the sub-registrar by registered post acknowledgment due.
- (iv) The declaratory charge should be subject only to the following claims:
 - (a) claims of government on account of arrears of land revenue due in respect of the land charged to the lending institution;
 - (b) registered encumbrances already existing on the land as on the date of the declaration of the charge; and
 - (c) subsequent security interest in the form of mortgage to secure long-term credit, executed by the borrower in favour of a lending institution (whether it is the same institution or a different institution, which is executed and registered with the concurrence of the institution extending the short-term credit.

Subsequent loans granted by government under the Land Improvement Loans Act, 1883, or the Agriculturists Loans Act, 1884, should not in any way affect the priority of the long-term lending institution.

- (v) The borrower should not be totally restrained from alienating or dealing with the charged land subject to the declaratory charge in favour of the lending institution; but the lending institution shall be at liberty, in the event of default, alienation or subsequent encumbrance which may be effected without its concurrence, to recall the loan and proceed to recover its dues from the property.
- (vi) Whenever it becomes necessary in the event of default, the lending institution (including a commercial bank or a rural bank) should be at liberty to approach the Registrar of Co-operative Societies who should assist in recovering the dues; it should follow procedures similar to those now adopted with

reference to the recovery of dues by co-operative credit institutions under the provisions of the Co-operative Societies Acts.

- (vii) The certificate of the Registrar of Co-operative Societies or his award shall be executed either by the Co-operation Department officials or by the revenue authorities against the property and the dues shall be recoverable as if they are arrears of land revenue.
- (viii) The lending institution shall be at liberty to bid at the auction sale and purchase the property, pending the setting up of State Farming Corporations on the lines recommended by the Study Team which considered the problems of overdues of co-operative credit institutions.
- (ix) It is not necessary for the credit-security law dealing with extension of rural credit by lending institutions to encroach upon the province of agrarian reforms. Whether or not cultivators who have no alienable right or chargeable interest in the land should be conferred such right, should be determined on considerations of State policy relating to agrarian reforms and it is not as such an essential necessity for enabling the lending institutions to extend rural credit, whether short-term or medium-term or long-term.
- (x) There should be a specific provision enabling the co-operative institution, in whose favour declaratory charges have been created, to raise refinance from apex agencies and from higher financing institutions like central and State co-operative banks and for such agencies charging further the security interests in the security interests so created in their favour to the Reserve Bank of India or the Agricultural Refinance and Development Corporation. (We are considering this aspect in greater detail in the next chapter.) *A fortiori*, commercial banks and rural banks extending short-term and medium-term credit should be permitted to assign their security interests in the property covered by the declaratory charge, for obtaining refinance from the Reserve Bank of India or the Agricultural Refinance and Development Corporation, as the case may be.
- (xi) For securing long-term credit, the institutions may have recourse to the mortgage form of security which shall be taken by deed and the registration of which shall be effected by sending a copy thereof to the concerned sub-registrar of assurances in the manner provided for now with reference to mortgages executed in favour of land development banks

under the Maharashtra Co-operative Societies Act, 1960. (The registration provisions should, in due course, synchronise with the title registration scheme, we are recommending to govern interests in agricultural land in the rural parts of our country.)

- (xii) To a limited extent, in the event of default by the borrower, the lending institution (whether it is a land development bank or a commercial bank or a rural bank extending such credit) may be empowered to sell, subject to the specific authorisation of the Registrar of Co-operative Societies in each case, the property, without the intervention of the court, by an auction sale held in the village in which the mortgaged property is situate or at the nearest public resort.
- (xiii) In addition to the above, the machinery of the Registrar of Co-operative Societies and the District Collector should be available to a long-term lending institution for realising its dues against the mortgaged property. The provisions applicable should be on the lines of the provisions now found in the Co-operative Societies Acts enabling a land development bank to proceed against the mortgaged property and recover its dues.
- (xiv) At any sale of the mortgaged property, which may be held either by the long-term credit institution or by the specified authorities, the institution bringing the property to sale shall be at liberty to bid and purchase the property. This provision should be available pending the formation of State Farming Corporations on the lines earlier mentioned.
- (xv) As between institutions extending short-term and medium-term credit and those extending long-term credit, the rules of priority should be determined as under :
 - (a) the claims of short-term and medium-term credit institutions should be subordinate to the claims of an institution providing long-term credit, so however that it shall be open to an institution providing to any specified cultivator both the short-term credit and the long-term credit needs to claim preference under both the capacities depending on the facts of the case ; and
 - (b) subject to the above, as between the lending institutions providing a short-term credit and long-term credit, priority should be determined in accordance with the general rule recognised under the provisions of section 48 of the Transfer of Property Act, 1882.

CONSEQUENTIAL CHANGES

2.1.264 As a consequence of developing such a comprehensive scheme for the special rural credit-security law of our country, some changes will have to be made in the State legislation on the following lines.

CO-OPERATIVE SOCIETIES ACTS TO BE PURGED OF CREDIT-SECURITY ASPECTS

2.1.265 The Co-operative Societies Acts may be purged of all the provisions relating to—

- (a) the creation of declaratory charge, its priority, its registration and its enforcement;
- (b) the provisions relating to land development banks containing special priorities in favour of such banks; and
- (c) the provisions relating to the creation of first charge on the assets of the borrowing member,

and any other provision in so far as such provision deals with credit-security aspects.

STATE LEGISLATION ON COMMERCIAL BANKS LENDING TO AGRICULTURE

2.1.266 The provisions of the State enactments now applicable to commercial banks and rural banks based on the Model Law should be replaced by a comprehensive statutory scheme we have outlined above.

EXPEDITIOUS METHOD FOR BRINGING INTO FORCE THE SPECIAL CREDIT-SECURITY LAW TO GOVERN RURAL CREDIT BY INSTITUTIONAL AGENCIES

2.1.267 For bringing expeditiously the comprehensive statutory scheme to cover all credit-security aspects relating to rural credit given by institutional agencies and for ensuring that these provisions are uniform throughout the country (which is very necessary for institutional agencies functioning effectively and for agriculturists availing themselves of credit without much cost and delay and without being unreasonably discriminated), the Reserve Bank of India may organise a project study after collecting the latest legislation applicable in all the States and the Study Team may be asked to prepare a model law which every State may enact. As annexure to this model law, the necessary amendments to be carried out in the State enactments may also be got drafted by the Study Team. Once this is done,

the Reserve Bank may take up with each State Government the desirability of the Government enacting a uniform legislation on the lines of such model law.

ARE CONSTITUTIONAL AMENDMENTS NECESSARY ?

2.1.268 Now we come to the recommendation of the Banking Commission suggesting that co-operative credit may be transferred to the Union List or the Concurrent List of the Constitution. The effective institutional channelisation of purpose and production oriented credit is feasible only when the credit-security law governing such transactions is effective, free from unnecessary constraints, is equitable and fair to the agriculturists, and similar provisions govern the extension of such credit in all the States. We have already gone into the several changes that may have to be brought about for such rationalisation of our legal infrastructure dealing with the credit-security aspects relating to rural credit. Not only that we should see that the laws are made uniform as early as they could be, it is also necessary to ensure that they are maintained in that form.

ALTERNATIVES

2.1.269 For this purpose, the following two alternatives may be considered:

- (i) Constitutional amendments to the relevant Schedules, which will have the effect of transferring co-operative credit to the Union List or the Concurrent List ; and
- (ii) invoking the provisions of Article 252 of the Constitution.

2.1.270 Since it is possible to bring about the necessary uniformity without a Constitutional amendment by recourse to Article 252 of the Constitution, we do not consider that there is any necessity for making Constitutional changes for this purpose. Again, continuous involvement of the States is absolutely necessary for rural development and for this, such a Constitutional amendment, which may have the effect of taking away partially at least the States' responsibility, is not desirable. However, the fact that an expert body like the Banking Commission has felt the necessity for suggesting a Constitutional change would also, we believe, go to impress on the States and the Union the necessity for their expeditious action to bring about a uniform pattern of legislation which would be rational, free from obscurity and be conducive to public interest and the larger economic development of our country.

RECURSE TO ARTICLE 252 OF THE CONSTITUTION

2.1.271 Hence, it will be highly convenient and conducive to uniformity if the Central Government were to legislate in respect of these subjects in one enactment pursuant to a specific authorisation that may be given to the Central Government in this regard by the State Legislatures under Article 252 of the Constitution.

2.1.272 For the above purpose, the States may consider passing an appropriate resolution under Article 252 of the Constitution to enable Central legislation. Having regard to the main purpose of the comprehensive scheme of legislation that is being suggested and the necessity for uniformity so that institutional credit agencies operating at all levels may be facilitated to work effectively in a conducive environment with adequate safeguards, we recommend to the State Governments to consider favourably the question of the States passing the resolution under Article 252 of the Constitution, empowering Parliament to legislate in this field.¹

¹Recently there was recourse to Article 252 for a similar purpose when on the strength of the resolution passed by the States, the Urban Land (Ceiling and Regulation) Act, 1976, was enacted by the Parliament.

CHAPTER 2

SECURITY ASPECTS REGARDING REFINANCE CREDIT

Since the granting of credit by way of refinance against security interest in immovable property is a matter of recent development, it is not surprising that the present framework of our credit-security law is not found adequate. It is in view of this that, both as regards industrial advances and as regards agricultural advances, recourse to special devices, such as a declaration of trust and "floating charge", has become necessary for securing refinance. Since, on the basis of a consensual arrangement, these devices are not having sufficient validity, the necessity has been felt for special statutory provisions to support such devices.¹ Hence, the present legal framework requires to be reviewed with reference to the scope for adequately securing the interests of institutions providing refinance against security interest in immovable property.

FIXED AND FLOATING CHARGE TO SECURE REFINANCE

2.2.2 Where the property charged is a specified immovable property, we have to consider the form in which the security has to be obtained to effectively safeguard the interests of the refinancing institution. Where the property offered to secure the interests of the refinancier is not related to any specified immovable property, but is a fluctuating one, then the security interest of the refinancing institution is in the nature of a "floating charge", a concept the application of which in the context of real property security lacks considerable clarity in law.

PRESENT INSTITUTIONAL PRACTICES

2.2.3 The present legal framework and the lines on which it may require modification may be considered with reference to the methods now adopted by the major institutions providing refinance *inter alia* against interests in immovable property. For illustrating the developing situations, we may refer to the methods employed by the

¹Third proviso to sub-section (4) of section 22 of the Agricultural Refinance and Development Corporation Act.

prime refinancing agencies as regards industrial advances and as regards rural credit. Thus, we may refer to the methods employed by the Industrial Development Bank of India (IDBI) while extending refinance to eligible institutions providing industrial advances and the methods employed by the Agricultural Refinance and Development Corporation (ARDC) while extending refinance to eligible institutions providing rural credit.

DECLARATION CLAUSE IN THE IDBI REFINANCE AGREEMENT

2.2.4 While taking an agreement from an eligible institution availing itself of refinance, the IDBI requires such financing institution to declare that "it holds the securities mentioned in the financing institution's application (including the properties particulars whereof are given in the security documents) as security for the said loan advance". The scope and effect of this declaration are not clear.

AMBIGUOUS EFFECT OF THE DECLARATION

2.2.5 If the declaration amounts to a declaration of trust (though the words "in trust" are not expressly stated), then the instrument may have to be stamped as a declaration of trust and may also require registration as required by the Trust Act. If, by reason of such declaration, a charge arises on any interest in immovable property, then the instrument may be liable to be stamped as a "mortgage". The instrument may have to be registered under the Registration Act. Registration may also be necessary of the charge against the assets of the financing institution (if it is a "company") under the Companies Act, 1956. If the declaration is regarded as a "floating charge", it may nevertheless fail for non-registration under the Registration Act, an aspect which we will consider while dealing with the special development debentures floated by the state land development banks (SLDBs). If the declaration does not qualify under any of the above categories, then no security interest really arises in favour of the refinancier, and the value of the declaration is open to question. Thus, the nature of the security interest arising under this declaration is far from satisfactory. On the other hand, this clause may adversely *affect* the construction of the instrument for the purpose of stamp duty, etc.

GENERAL LAW NOT ADEQUATE

2.2.6 Assuming that the declaration provides for a security interest, there are now no clear provisions which will govern the enforcement of the security interest by a refinancier. This is because the provisions

now found in the Transfer of Property Act dealing with mortgages and charges which set out the law relating to security interests in immovable property, are primarily concerned only with the *inter-se* rights and liabilities of the ultimate borrower and the financing institution.

SPECIAL PROVISIONS IN THE CO-OPERATIVE SOCIETIES ACTS

2.2.7 Though the position under the general law is not adequate, the provisions in the special law now found in the Co-operative Societies Acts enable the Registrar of Co-operative Societies to act to safeguard the interest of the refinancing credit institution, such as the ARDC, when circumstances so warrant. These provisions afford a useful analogy and also serve as a precedent for considering the lines on which the interests of public financing institutions could be safeguarded when they provide refinance credit secured against any interest in immovable property.

2.2.8 Hence, we recommend that on the lines of the provisions now found in the Co-operative Societies Acts, which enable the Registrar of Co-operative Societies to act to safeguard the interest of the refinancing credit institution like the debenture holders of the special development debentures issued by the SLDB, there should be a designated officer of the State Government empowered by law to safeguard the interest of the public financing institution providing industrial credit by way of refinance. We also recommend that for providing refinance *inter alia* against security interest in immovable property, institutions like the IDBI should be protected by a statutory provision on the lines of the provision¹ now found applicable with reference to the ARDC while that Corporation provides refinance facilities to eligible institutions.

REFINANCING OF RURAL CREDIT

2.2.9 It is in the context of extending long-term rural credit that recourse to interest in real property as security for refinancing arrangements becomes necessary. The ARDC now provides such refinance to eligible institutions which may be commercial banks (including rural banks), state co-operative banks and state land development banks. The relevant situations may be considered with reference to the applicable provisions now governing the arrangements for refinancing such eligible institutions.

¹Third proviso to sub-section (4) of section 22 of the ARDC Act.

“OTHER SECURITY”—WHEN NECESSARY

2.2.10 Refinance is given by the ARDC to eligible institutions against specific requests. Under the ARDC Act, as it stood before its amendment in 1973, where the security for the refinance was not fully and unconditionally covered by the guarantee of the government as to the repayment of principal and payment of interest, “other security” was required to be obtained from the eligible institution. An amendment in 1973 to section 22(4) of the ARDC Act now enables the Board of the ARDC, for reasons to be recorded by it in writing, to decide that “no such security or guarantee is necessary”. On such decision, the ARDC gets the benefit of the statutory trust clause, to which we shall refer later.

“OTHER SECURITY”—RE. COMMERCIAL BANKS

2.2.11 Prior to the amendment to the ARDC Act in 1973, where the eligible institution was a commercial bank, this took the form of sub-mortgage of the immovable properties mortgaged to the commercial bank by deposit of the relevant title deeds. The commercial banks experienced practical difficulties in providing security in this form to cover the ARDC loan and this really was the cause of the 1973 amendment we have referred to above.

“WAIVER” OF SECURITY FOR REFINANCE

2.2.12 After the 1973 amendment, the ARDC waives “on the merits of each case, security for refinance in respect of schemes of the State Bank of India and its subsidiaries, 14 nationalised banks, and any other licence scheduled commercial bank which are shareholders of the Corporation”.¹

SECURITY HELD IN TRUST

2.2.13 Even after such waiver, the banks concerned “continue to obtain security from their ultimate borrowers as per their rules of business and as indicated in the terms of the sanction”.² But the third proviso to the said sub-section (4) of section 22 of the ARDC Act provides that where such accommodation has been granted without obtaining guarantee or security, “all securities held, or which may be held, by such eligible institution, on account of any transaction in respect of which such accommodation has been granted by the Corporation, shall be held by such eligible institution in trust for the Corporation”.

¹Note on the Procedure for Drawal of Funds from ARDC by Member Banks, furnished by the ARDC for the use of the Banking Laws Committee.

²*ibid.*

ADVANTAGES OF THE STATUTORY TRUST CLAUSE

2.2.14 The advantage under the above statutory provision is that no formal charging is necessary of the security interest obtained by the eligible institution in favour of the ARDC. In effect, this arrangement secures to the ARDC *inter alia* the security interest obtained by the eligible institution from the ultimate borrower without the necessity for giving descriptions of the property secured in any formal document. The technicalities as regards documentation, registration, etc., which are integral parts of an arrangement to provide a security interest by a formal instrument are all dispensed with. This enables the ARDC's security interest to cover charges or mortgages in favour of the eligible institution, that may be created by the borrowers from time to time during the currency of the ARDC loan. Thus, over a floating security the ARDC obtains a benefit in the nature of a *fixed charge* by the interposition of the device of the trust concept which is statutorily provided for.

POSITION WHERE OBTAINING OF SECURITY IS NOT WAIVED BY ARDC

2.2.15 Where the ARDC does not waive the requirement as to security (or guarantee), it is necessary for the eligible institution availing itself of refinance to furnish security to the satisfaction of the ARDC.

EQUITABLE SUB-MORTGAGE BY COMMERCIAL BANKS

2.2.16 For obtaining any real property security interest from any commercial bank availing itself of refinance from the ARDC, the method adopted is one of obtaining "equitable sub-mortgage of the immovable properties equitably mortgaged" in favour of the commercial bank. For effecting such "equitable sub-mortgage of immovable properties equitably mortgaged" in favour of the bank, the authorised officer of the commercial banks is required to call at the office of the ARDC to deposit the title deeds which are later on returned to the commercial bank for safe custody on behalf of the ARDC. Both the original mortgage by deposit of title deeds and the sub-mortgage of the same by further deposit of the same title deeds are to be registered with the Registrar of Companies under section 125 of the Companies Act against the ultimate borrower (if it happens to be a company) and against the commercial bank (if it is a "company" under the Companies Act).

LEGAL POSITION RE. SUB-MORTGAGE BY WAY OF DEPOSIT OF TITLE DEEDS

2.2.17 As regards the validity and adequacy of the arrangements for creating an equitable sub-mortgage, there is room for, and there has been, a good amount of controversy. Legal opinions obtained by banks from eminent counsel have not helped to resolve the controversy. Evidently in view of these difficulties, it is understood that as a rule the ARDC now relies on the statutory trust which would arise in its favour once it decides to waive the requirement as to security. In other words, ironically, the ARDC is better secured when it decides to waive the security than when it decides to insist on the furnishing of a security interest in its favour under the general law.

ARDC'S REFINANCE TO STATE CO-OPERATIVE BANKS

2.2.18 The general agreement which the ARDC obtains from a state co-operative bank *inter alia*, provides that the financing institution (state co-operative banks)¹ shall ensure that the loan agreement obtained by the financing institution from each of its constituents is in consonance with the provisions of the general agreement and the terms of the sanction of the loan by the ARDC. In particular, such agreements with the constituents are to ensure that—

- (a) “the financing institution shall be at liberty to assign the debt and the benefit of the securities therefor..... as security for any refinance”;
- (b) the ultimate borrower shall not “create in any manner any charge, lien or other encumbrance on the security given..... in favour of any other party or person”;
- (c) in the event of a breach by the financing institution of any terms or conditions of refinance, the ARDC may recall the refinance and enforce the security; and
- (d) the ARDC may by itself or on behalf of the financing institution take “all steps to realise the security held by the financing institution, and in the event of its realising the security on behalf of the financing institution, to apply the same in repayment of the relative refinance”.

SECURITY FOR THE STATE CO-OPERATIVE BANK

2.2.19 Straightaway we may say that there is no clear security interest in land in favour of the state co-operative bank which extends credit through the tiers below and when the ultimate borrower avails himself of the credit under the present scheme relating to declaratory charge.

¹A similar agreement is taken also with reference to commercial banks.

DECLARATORY CHARGE AS SECURITY FOR TERM LOANS

2.2.20 We have earlier seen that wherever the statutory framework provides for the same, the charge in favour of the primary credit society is obtained by way of a *declaratory charge*. That such a declaratory charge has to serve as security for a term loan that may be extended through the primary credit society and/or the central co-operative bank is also seen from the Manual on Production-Oriented System of Lending for Agriculture brought out by the Reserve Bank, which states that "loans up to any extent may be advanced on the borrower creating a statutory charge on his land in favour of the society, if—

- (a) legal provision exists for the creation of such a charge on land,
- (b) administrative arrangements for registration and enforcement of the charge are adequate, and
- (c) the co-operative credit institutions consider such security as sufficient for loans of this size".¹

NO ASSIGNABLE SECURITY INTEREST

2.2.21 In so far as the declaratory charge serves as the basis for the term loan which is refinanced, the state co-operative bank's rights with reference to such declaratory charge are not explicit. The scheme relating to the declaratory charge now found in the Co-operative Societies Acts provides for the security interest in favour of the lending institution, which would ordinarily be a primary co-operative credit society. If the primary credit society is not taking adequate steps towards the realisation of the security, where the circumstances warrant such action the central co-operative bank and the Registrar of Co-operative Societies may step in towards the realisation of the debt due under the charge. But the state co-operative bank has no security interest available to it under the scheme providing for the creation of the declaratory charge. *A fortiori*, what it has not got, it cannot assign to the ARDC.

2.2.22 Thus, with reference to the ARDC obtaining a security interest in real property (either under the trust clause where it may decide to waive the security or independently thereof), the statutory provisions now available are clearly not adequate. The fact that the general agreement entered into between the ARDC and the state co-operative bank provides for the ARDC obtaining an assignment of

¹Manual on Production-Oriented System of Lending for Agriculture brought out by the Reserve Bank of India, pages 53-54.

the security interest available to the state co-operative bank does not adequately safeguard a situation where the term loan is provided to the state co-operative bank for development of any land and it is intended that the ARDC should have a security interest (either under the trust clause or otherwise) against the land for the development of which the loan by way of refinance is extended.

STATE CO-OPERATIVE BANK TO HAVE AN ASSIGNED SECURITY INTEREST

2.2.23 Earlier we have recommended a statutory provision to provide for the assignment of the security interest arising by way of declaratory charge. On the implementation of this recommendation, it would be possible for the primary credit society to assign its security interest in favour of the central co-operative bank and for the central co-operative bank in turn to assign the same to the state co-operative bank. Under such a situation, it may be competent for the state co-operative bank to contract with the ARDC to assign its security interest in favour of the ARDC. If, in such a case, the ARDC relies on the trust clause and waives the formal conveyance in its favour of any security document charging the security interest available to the state co-operative bank, then it can rely on the trust clause and would have substantially the same extent of safeguard as is available now to the ARDC with reference to security interests held in trust by commercial banks availing themselves of refinance from the ARDC.

NECESSITY FOR SECURITY INTEREST IN FAVOUR OF STATE CO-OPERATIVE BANK

2.2.24 Apart from the legal difficulties with reference to the creation of a security interest in agricultural land to secure refinancing arrangement pointed out above, the necessity for a state co-operative bank being enabled to take appropriate action to enforce the security wherever circumstances warrant may be clearly seen in the context of the efforts to reduce co-operative overdues. At present, the state co-operative bank is not in a position to intervene directly since the Co-operative Societies Acts generally provide only for the central co-operative bank (or the Registrar of Co-operative Societies) intervening if there is no prompt action by the primary credit society for enforcing the security to realise the dues. On the lines of the provisions now available to the central co-operative bank, the state co-operative bank also may be empowered to act either directly or through the central co-operative bank and this will provide an additional safeguard and may help considerably in reducing the

quantum of co-operative overdues, a problem which has been causing considerable concern to the Governments and the apex financing institutions.

ARDC'S REFINANCE TO STATE LAND DEVELOPMENT BANK

2.2.25 Now the refinancing facilities availed of by the state land development banks are provided by the ARDC "by way of subscriptions to the special development debentures floated by them. There are only two subscribers, namely the ARDC and the state government for these debentures, the quantum of subscription by ARDC varies between 75 and 90 per cent of floatation depending upon the type of schemes and the balance contributed by the concerned state government. The special development debentures are to be backed by effective mortgages and to be guaranteed by the state government as to the repayment of principal and payment of interest." We are now concerned with the security interest in favour of the debenture holder, namely, the ARDC/State Government consequent on such "mortgage banking" for the special development debentures issued by the SLDBs.

MODEL TRUST DEED

2.2.26 The model trust deed providing for the creation of the special development debentures *inter alia* provides that the debentures issued shall be secured by all the assets of the bank "including the mortgages transferred to the bank or deemed to have been transferred to the bank". The SLDB charges in favour of the trustee its properties "including all mortgages, title deeds, and equitable or other charges which it may hold from time to time as security".

CREATION OF FLOATING CHARGE

2.2.27 The charge so effected "shall rank as a floating charge and it shall in no way hinder or prevent the bank, subject to the condition of obtaining the consent in writing of the trustee, from selling, mortgaging, charging, leasing or otherwise disposing of or dealing with any of its assets, in the ordinary course of its business, and for the purpose of carrying on the same. The total amount due on the debentures already issued and outstanding together with that proposed to be issued shall not exceed the aggregate of the amounts due on the mortgages and the value of other assets transferred or deemed to have been transferred".

¹Note on the Procedure for Drawal of Funds from ARDC by Member Banks, furnished by the ARDC for the use of the Banking Laws Committee.

2.2.28 Thus, the ARDC obtains under the special development debentures through the trustee (who will be the Registrar of Co-operative Societies) a floating charge *inter alia* on the mortgages transferred or deemed to have been transferred to the SLDB, under the provisions of the applicable Co-operative Societies Act.

LEGAL BASIS FOR THE CONCEPT OF FLOATING CHARGE

2.2.29 The concept of floating charge as the device for creating a security interest has no statutory foundation in our country. However, a floating charge may be validly created on the assets of a company and this has come to be impliedly recognised by a series of judicial decisions of different courts. The Companies Act also provides *inter alia* for the registration of a floating charge with the Registrar of Companies and also contains a provision¹ which helps to decide as to how such a charge is to be dealt with in the event of the liquidation of the company.

DOUBTFUL VALIDITY *RE.* INTERESTS IN IMMOVABLE PROPERTY — GENERAL LAW

2.2.30 While the application of the concept of floating charge with reference to assets other than immovable property has not been disputed, its application to interests in immovable property has been a matter of serious doubt under the general law. In the case of the Imperial Bank vs. Bengal National Bank,² the Privy Council has stated that "it is unnecessary to discuss how such a floating charge obtains legal validity in India. It is sufficient in this case to say that its validity over assets *other than immovable property* is not disputed". (*emphasis added*)

FLOATING CHARGE CONCEPT *VIS-A-VIS* REGISTRATION ACT PROVISIONS

2.2.31 Our Registration Act, 1908, provides *inter alia* for the compulsory registration of any non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100/- and upwards, to or in immovable property. For this provision there is a saving clause which is applicable to any debenture issued by any such *Company*³

¹Section 534 of the Companies Act, 1956.

²A.I.R. 1931 P. C. 245.

³Joint stock company.

and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immoveable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures".¹ (*emphasis added*)

EFFECT OF SECTION 17 OF THE REGISTRATION ACT

2.2.32 The effect of the provisions found in section 17 of the Registration Act in so far as it affects a floating charge on immovable property has been considered in a number of judicial decisions. In *Imperial Bank vs. Bengal National Bank*,² the Privy Council acted upon an admission of counsel that a debenture purporting to create a charge on the immovable property of a company was required to be registered under the Registration Act. In fact, it was sought to be argued before the Privy Council that "the Registration Act did not apply to a floating charge for various reasons, as, for example, that it was *impossible* to comply with the provisions requiring particulars of specific property: that provisions in the Companies Act for the registration of charges took the place of the provisions in the Registration Act so far as they affected dispositions by companies". (*emphasis added*). Though these arguments were raised, the Privy Council refused to consider them because of the earlier admission made on behalf of the Imperial Bank.

2.2.33 The Calcutta High Court in *Roy & Bros. vs. Ramanath*,³ the Madras High Court in *State of Madras vs. Madras Electric Co.*,⁴ and the Allahabad High Court in *K. D. Bhargava vs. U.P. Oil Industries*,⁵ have held that a floating charge over the immovable assets of a company requires registration under section 17 of the Registration Act as regards immovable properties existing on the date of the creation of the debentures. The Allahabad High Court has also held that the registration requirement "not only embraces rights which become operative in the immediate present but also in future" and hence a floating charge cannot escape its clutches merely because "although it may come into existence in *presenti* its actual operation is postponed to a future date".⁶

¹Section 17(2)(iii) of the Registration Act, 1908.

²A.I.R. 1931 P.C. 245.

³A.I.R. 1945 Calcutta 37.

⁴A.I.R. 1957 Madras 167.

⁵A.I.R. 1962 Allahabad 101.

⁶Muñia on Indian Registration Act, 7th edn. (1968), page 79.

SIGNIFICANCE OF FLOATING CHARGE RE. IMMOVABLE PROPERTY

2.2.34 In the result, the concept of floating charge has lost much significance with reference to its utility to provide a security interest in immovable property. This is because, as was sought to be raised before the Privy Council, description of specified properties is not possible as the debentures generally aim to secure all present and future immovable property interests of the institution issuing the debentures. This is the position under the general law relating to a floating charge over interests in immovable property. The "floating charge" concept is now essentially applied under the general law with reference to the obtaining of security interest in a company's assets other than immovable property. Even here, it is now considered as of doubtful value.

"FLOATING CHARGE" RE. IMMOVABLE PROPERTY— SECURITY LAW

2.2.35 In our Report on Personal Property Security Law, we have suggested a statutory scheme which would cover also transactions purporting to create a floating charge. Under this scheme, the rights and obligations of parties to such a transaction would be as provided for under the suggested scheme for legislation. Thus, though termed a "floating charge", a security agreement takes effect as a document conferring a *security interest in present and after-acquired property* subject to the special rules provided for under the scheme to facilitate dealings with reference to the assets so covered and arising in the ordinary course of business. Thus, the floating charge concept takes shape under the scheme as a security interest with reference to existing and after-acquired property and will have a statutory basis.

"FLOATING CHARGE" RE. IMMOVABLE PROPERTY AMBIGUOUS

2.2.36 The concept of floating charge with reference to immovable property is more ambiguous. Firstly, there are no statutory provisions specifying clearly the rights and obligations of parties to such a security concept. Secondly, whether it confers a charge not amounting to an interest in immovable property, or in so far as it is backed by mortgages it should be considered as an interest in immovable property, is again a question posing considerable difficulty. Thirdly, when the concept is proposed to be replaced under a new statutory framework governing all security interests in personal property, its retention only with reference to interests in immovable property is apt to give room for considerable difficulties.

RE. IMMOVABLE PROPERTY NOW ONLY VERY LIMITED APPLICATION

2.2.37 At any rate, the "floating charge" concept does not seem to be really employed except with reference to debentures issued by land development banks in the different States by reason of the statutory provisions now found in the Co-operative Societies Acts.

PROVISIONS IN THE CO-OPERATIVE SOCIETIES ACTS

2.2.38 It is true that the Co-operative Societies Acts of the various States provide for the mortgages obtained by the primary land development banks to be transferred or deemed to be transferred in favour of the state land development banks. The State enactments also provide for the Registrar of Co-operative Societies acting as trustee and for a state land development bank charging its mortgage interests arising in present or in future in favour of the debenture trustee. But these provisions, in so far as their practical utility is concerned, would enable the Registrar of Co-operative Societies to safeguard the interests of debenture holders, whether the debentures are supposed to create a "floating charge" over the mortgages or the mortgages are considered to be held in trust for the ARDC in line with the position prevailing now with reference to commercial banks availing themselves of refinance from ARDC.

RE. "FLOATING CHARGE" CO-OPERATIVE SOCIETIES ACTS MAY NOT BE ADEQUATE

2.2.39 It is also doubtful whether a floating charge on the immovable property security interests of the state land development banks would be saved from the challenge of section 17 of the Registration Act. Though the subject of "co-operative societies" is in the State List, "registration" comes under the Concurrent List in the Seventh Schedule to the Constitution. Hence, the question may arise as to whether the provisions in the Co-operative Societies Acts alone are competent to provide for the creation of a floating charge on immovable property in disregard of the provisions of the Registration Act. However, it is not necessary to go into this aspect in great length since it is not necessary to apply the concept of floating charge with reference to the mortgages securing the extension of long-term rural credit through the land development banks. The statutory provision in the ARDC Act for an eligible institution holding the security interests in trust for the ARDC will cover in its scope accommodation given by the ARDC to any eligible institution including SLDB.

ENFORCEMENT OF THE "TRUST" CLAUSE

2.2.40 It may be sufficient if the agreement between the ARDC and the SLDB (which may be approved by the State Government) provides that the Registrar of Co-operative Societies shall be the ex-officio trustee to enforce the trust for the benefit of the ARDC if and when there is any default in the repayment of principal or payment of interest to the ARDC on the special development debentures.

PART III

EXAMINATION OF TITLE

EXAMINATION OF TITLE

CHAPTER 1

INVESTIGATION OF TITLE AND OUR REGISTRATION LAW

INTRODUCTORY

Unlike personal property where ascertainment of title poses no major problems, the major obstacles coming in the way now of expeditious creation of security interest in real property are the protracted, expensive and highly technical and professionalised steps required to be taken for investigation of title to the property. Hence, in the review of the law relating to advances against real property, our legal infrastructure relating to investigation of title has necessarily to be reviewed.

PRESENT SYSTEM UNSATISFACTORY

3.1.2 As regards investigation of title, we follow the system of private conveyancing which consists in examining the transactions affecting the property spread over several decades and trying to ascertain the title of a person. Both with reference to agricultural advances and industrial advances, the present legal infrastructure which entails such investigation is agreed on all hands to be highly unsatisfactory. This is all the more so when we consider the several developments in other countries, which have gone to simplify and expedite investigation of title. Before going to deal with the several issues relating to our present system of investigation of title, we shall refer to some of the views expressed recently by high-powered bodies and eminent personalities in the field of banking laws and practices, as this would help us appreciate the gravity of the problem.

REPORT OF THE STUDY GROUP OF THE NATIONAL CREDIT COUNCIL

3.1.3 At the meeting of the National Credit Council held on 24th July 1968, the then Vice-Chairman of the Council (Hon'ble Shri Morarji Desai) drew the attention of the Council to the need for adoption by commercial banks of an area-project approach in implementing schemes for extending credit to agriculture. For this purpose, the National Credit Council set up a Study Group to consider the area-project approach in implementing schemes for extending commercial bank credit to agriculture (including commercially viable projects in the rural electrification and minor irrigation). This Study Group of the National Credit Council has stressed the need for simplification of the procedure for registering documents, etc., and has commented that "the existing procedure for registering documents is time-consuming, cumbersome and expensive. Considerable time is lost in obtaining non-encumbrance certificates, alienation certificates, extracts from revenue records".¹

SUGGESTIONS RE. FARM TITLE PASS-BOOKS

3.1.4 The Study Group of the National Credit Council also considered a suggestion "that State Governments should consider the issue of 'Farm Title Pass Books' to individual cultivators wherein the relevant particulars of all the farm holdings of the concerned farmer should be detailed including encumbrances/charges on them and the extent thereof, etc. This Pass Book should be deemed as title deeds even for purposes of creation of equitable mortgage in favour of commercial banks".¹ While considering the basic structure of our registration scheme and the lines for rectifying its drawbacks and making the scheme more useful, we shall revert later to this important suggestion of the Study Group set up by the National Credit Council.

SPEECH OF SHRI T.A. PAI

3.1.5 Shri T. A. Pai, former Chairman of the Syndicate Bank Ltd. (who was later the Minister for Industries in the Central Cabinet), in his speech at the bank's annual general meeting, in the context of the setting up of the Banking Commission by the Government of India, stressed the need to make a specific study of various legislations in the country, which come in the way of proper development of banking. Dealing with advances against real property, he observed :

¹Report of the Study Group of the National Credit Council, paragraph 96.

²*ibid.*

"In a country where people, by convention are accustomed to investment on land and property, very often it is the only security that could be offered by the majority of the people, but the difficulty in accepting this security today is that it is not liquid, and could be subject to a lot of litigation in the matter of realisation. If the Transfer of Property Act is amended enabling the customer to borrow against the deposit of the title deeds, which could be auctioned off after a due notice just as shares or other securities, it may help the progress of banking considerably. Apart from this, a study is required in the documentation, standardisation, cost reduction and simplification of procedures which have been in vogue in this country for a long time without anybody looking into it to see whether they are necessary or whether they impede the smooth functioning of, banking services". (emphasis added)

Shri Pai's argument for assimilating the law regarding advances against real property to the law as regards advances against personal property, to the extent feasible, echoes the principle underlying the legislation in other countries, which assimilates, as far as possible, the law relating to registration of title as applied to movable assets like shares and scrips to registration of title to land. About the need for similar legislation in our country, we will be dealing in greater detail later.

BANKING COMMISSION'S STUDY GROUP

3.1.6 The Banking Commission, which had to review legislation affecting banking, had constituted a Study Group to deal effectively with this task. This Study Group, while dealing with advances against immovable assets, has observed:

"While making advances to the agricultural sector, banks may have to rely to a substantial extent on the security of the land. Obtaining a charge over land brings in its wake questions relating to the time and trouble involved in investigating title, the comparatively high cost involved in obtaining a charge over immovable vis-a-vis movable assets".¹

(emphasis added)

This Study Group has also pointed out:

"In the context of extending credit to the agricultural sector, it becomes necessary to ensure that lending institutions accept the charge against land without much difficulty. Considerable improvements have been made in the countries which follow the Torrens

¹Report of the Banking Commission's Study Group which reviewed legislation affecting banking, paragraph 8.33.

System of Title Registration. This facilitates the ascertainment of a person's title to land. The feasibility of adopting such a system in India has to be considered."¹

STUDY GROUP'S QUESTIONNAIRE

3.1.7 The questionnaire issued by the Study Group has also referred to the several problems faced in our country with reference to investigation of title, and posed for consideration, *inter alia*, the measures necessary to simplify the investigation for ascertaining encumbrances on land, registration of *lis pendens*, and the problems faced by the paucity of title deeds with reference to agricultural lands.

3.1.8 We have had the benefit of the replies to this questionnaire and we are taking up in this chapter the several points raised in the questionnaire and in the very useful replies thereto given by banks, other public financing institutions, etc.

REPORT OF THE BANKING COMMISSION

3.1.9 The Banking Commission has also dealt with the problems relating to investigation of title to land in the context of advances against real property. This Commission has recommended that —

“The facilities available for investigation of title in general, and the ascertainment of encumbrances on land, notice of *lis pendens*, etc., in particular, require examination. The system of registration of title deeds needs examination, and the question of issuing title deeds which would facilitate the ready ascertainment of the encumbrances on the land has to be considered.”²

SEMINAR FOR LEGAL OFFICERS OF BANKS AND OTHER FINANCIAL INSTITUTIONS

3.1.10 In May-June 1974, the Bankers Training College run by the Reserve Bank of India organised a seminar which was attended by the law officers and some chief executives of banks and other financial institutions. The discussions in the seminar had covered some aspects relating to problems faced by lending institutions as regards investigation of title.

¹Report of the Banking Commission's Study Group which reviewed legislation affecting banking, paragraph 8.34.

²Report of the Banking Commission (1972), paragraph 21.50.

3.1.11 Some of the points raised during the above seminar merit reference. The then Deputy Governor of the Reserve Bank, Shri R. K. Seshadri, who inaugurated the seminar, pointed out :

“As an under-developed country, which has to promote industrial growth, to diversify its legal concepts and instruments for this purpose, to take such of the attendant risks as may be necessarily involved in the process of development, and finally to break the tradition that banking is for the elite and the sophisticated urban middle classes or the affluent rich, we find that the British banking tradition is no longer adequate as an inspiration or example to follow.”

As we will see later, in the matter of the law relating to investigation of title, our legislative scheme has remained substantially the same as originally developed in 1877 and we have not even kept up our tradition of considering the developments in this field in Britain and applying the same to our country with appropriate adaptations, with the result that the system has become outmoded and anachronistic.

LANGUAGE OF CONVEYANCING

3.1.12 Under the above circumstances, it is no wonder that the then Deputy Governor of the Reserve Bank found that “the language of conveyancing still continues to be archaic, being loaded with verbiage and expressions, which are no longer appropriate and which might just be unintelligible or have the effect of frightening the contracting parties without achieving proportionately adequate results”.

WHY HAS CONVEYANCING LAW AND PRACTICE REMAINED ARCHAIC ?

3.1.13 On the other hand, Shri C. H. Pardiwala, a senior partner of Messrs. Crawford Bayley & Co., a leading firm of solicitors in Bombay, has tried to explain how our law relating to investigation of title and registration (which is the basis for the conveyancing practices in our country) has not even taken note of the several developments in the U.K., though originally our registration law was based on a system developed in the U.K., that is, a system of registration of deeds to facilitate what is called the common law system of conveyancing.¹ Being an experienced solicitor dealing with conveyancing for several decades on behalf of banks and other public

¹The common law or old system of title has been characterised as “hardly a ‘system’ at all. It is merely the obtaining and presentation of evidence of the chain of instruments and events constituting the title” (The Law of Real Property in New South Wales, Helmore, 2nd edn. 1966), The Law Book Co. Ltd., Australia, page 32.

financing institutions, Shri Pardiwala has, in a paper presented to the seminar, made several points as regards the state of our law governing investigation of title. In particular, he has made the following points :

- (1) "Unfortunately, in our country there is no standard period for the root of title and, therefore, the report (on title) should deal with all the documents relating to the property found registered at the land registry for a sufficiently long period and at least for the last forty years";
- (2) "Although our law of transfer of property was enacted in 1882, no attempt has yet been made to simplify and improve the law and practice of Conveyancing";
- (3) "There is no standard root of title, oral transfers are possible and permissible: there is no compulsory registration of title on death, inheritance or other devolution except by purchase";
- (4) "Furthermore, in the absence of an enactment similar to the English Conveyancing Act of 1881, the conveyancing precedents and forms used in India are extremely verbose, lengthy and full of synonyms";
- (5) "Registration formalities are dilatory and time-consuming. In a city like Bombay it takes about two years to get back a document duly registered. Besides, the indexing of registered documents even takes a very long time"; and
- (6) "In order to save heavy stamp duty and registration fee on mortgages in writing, more and more reliance is placed on equitable mortgages by simple deposit of title deeds. The law relating to equitable mortgages needs to be amplified."

As we shall see later, the points made by Shri Pardiwala have considerable force.

3.1.14 On the basis of the general purport of the discussions held in the seminar, on some of the points raised and referred to below it was found that there has been general agreement:

- (1) "Since we follow the English legal system, it is felt that by legislating on the lines of modern English statutes with suitable changes to suit our conditions, our conveyancing documents can be simplified and rendered more intelligible";
- (2) "More and more reliance is no placed on mortgages by simple deposit of title deeds because of the heavy stamp duty and registration fees payable on mortgages in writing";

- (3) "Registration formalities are dilatory and time-consuming. In bigger cities, it takes several years to get back the documents duly registered. Indexing of registered documents also takes a long time. The time involved in registration and indexing of documents needs to be curtailed, through administrative and other measures"; and
- (4) "Statutory provisions should be made to require all transactions relating to immovable property being reduced to writing".

ALL-INDIA RURAL CREDIT REVIEW COMMITTEE (1969)

3.1.15 The All-India Rural Credit Review Committee had occasion to refer to the handicaps experienced in commercial banks extending direct credit to farmers. Amongst other things, the Committee had noted the deterrent in the form of the requirement as to payment of stamp duty and registration charges and the necessity for proper maintenance of land records. It had observed :

"The proper maintenance of land records is an important prerequisite for ensuring the flow of institutional credit to agriculture. It is particularly in the areas coming under the zamindari or *inam* tenures that the position even in regard to settlement and preparation of records of rights is relatively unsatisfactory. Further even if the initial survey and settlement of land have taken place, subsequent changes, if any, in ownership as a result of sale or partition of land often fail to get promptly and correctly recorded in the basic village records. The pre-occupation of the revenue machinery in recent years with programmes of development seems to have resulted in the relative neglect of their basic responsibility in regard to these records."¹

AD-HOC PROCEDURE FOR SAFEGUARDING BANK LENDING AGAINST IMMOVABLE PROPERTY

3.1.16 Before going into the several measures necessary for toning up our present system of investigation of title to land, we may refer to the ad-hoc procedure found in some Co-operative Societies Acts applicable with reference to credit extended by land development banks.

3.1.17 The All-India Rural Credit Review Committee (1969) has referred to such provisions as found in the Maharashtra Co-operative Societies Act, 1960. Referring to these provisions, that Committee

¹Report of the All-India Rural Credit Review Committee (1969), page 619.

observed that for inducing banks "to adopt holder lending policies", these provisions help to cut down "substantially the delay involved in examining the title, verifying prior encumbrances and registering the mortgages".¹ In this connection that Committee has referred to sections 118, 120, 122, 125 and 138 of the provisions of the Act which provide *inter alia* for giving a public notice of any application for credit facilities from the land development bank, for tenants to create mortgages in favour of such bank and for protecting the bank in the event of transfer of land by sale, etc., for exemption from registration of the mortgage deed in favour of the land development bank and instead a simplified method of filing with the sub-registrar the particulars relating to the charge, for the binding nature on the other members of a H.U.F. when the mortgage in favour of the bank is executed by the manager of the H.U.F., and for the recovery by the collector of the dues of the bank as arrears of land revenue.

3.1.18 Following the recommendations of the Committee on Takavi Loans and Co-operative Credit (1962), similar provisions on the lines indicated above with reference to Maharashtra have now been incorporated in the Co-operative Societies Acts of other States as well, e.g., Andhra Pradesh, Jammu & Kashmir, Karnataka, Madhya Pradesh, Orissa and Rajasthan. The All-India Rural Credit Review Committee has recommended such legislation by all States with reference to land development banks' charges.

3.1.19 However, the procedure for separate investigation with reference to each application by a member for availing of loan from a land development bank is not conducive to expedition. Giving public notice with reference to each application, hearing objections and considering them on merit also land the land development banks involved in further litigation. For instance, when an objection is of a nature which cannot be satisfactorily decided except by a civil court, the proceedings are to be postponed until the question is so decided. Hence, notwithstanding the availability of the summary procedure with reference to loan applications to land development banks, recourse to this does not avoid the time lag that is proverbial with reference to investigation of title.

3.1.20 Again, the validity of the provision in section 118 *ibid* postponing the claim of any other person to the land, who could not for any reason make his objections in time, till the bank dues are paid in full by the loanee notwithstanding anything contained in the Co-operative Societies Act or any other law, is open to obvious Constitutional objections.

¹Report of the All-India Rural Credit Review Committee (1969), page 781.

3.1.21 Even if such ad-hoc procedure is adopted, it does not remove any cloud on title except to safeguard the security interest in favour of the lending institution. From that point of view, it does not really help the agriculturists very much in proving their title by reason of this enquiry.

NATURE OF THE PROBLEM

3.1.22 The foregoing indicates that our legal infra-structure with reference to the applicable provisions meant to help ascertainment of title to immovable property requires a comprehensive review. Commercial banks, public lending institutions, experienced solicitors, banks' legal advisers are all now finding the present procedure, which follows the common law system of investigating title over a period of years spread over several decades, as considerably retarding the expeditious flow of development financing and the cost of this procedure as considerably high. For a developing country like ours, it is necessary that we should have a legal infrastructure which would facilitate the expeditious and inexpensive ascertainment of legal title to land, which would help considerably the extension of development finance.

PRESENT LEGAL INFRASTRUCTURE

3.1.23 The present legal infrastructure with reference to investigation of title to land rests mainly on the provisions relating to registration of documents and encumbrances affecting interests in land. This is now found in the provisions of our Registration Act, 1908. The 1908 Act is only a codifying statute bringing into one legislative piece the 1877 Act together with the several subsequent amendments thereto.

3.1.24 In addition to the provisions of the Registration Act, 1908, there is also provision in the Companies Act, 1956 for registration of charges *inter alia* on immovable properties belonging to companies. But registration under the Companies Act is complementary and is not an alternative; it is a registration of the security interest whereas under the Registration Act, it is a registration of the instrument affecting the property.

LAW COMMISSION'S REPORTS ON OUR REGISTRATION ACT, 1908

3.1.25 The Law Commission of India has given two reports with reference to our Registration Act, 1908. The first report is of the year 1957. In this report, the Commission had not gone into the adequacy or otherwise of the basic scheme for registration as set out

in the Act and developed for our country with reference to the conditions that prevailed in 1877. The Law Commission had then considered the provisions of the Registration Act with reference to some decided cases which have brought to the fore some difficulties as regards some of the provisions of our registration law. In the light of its consideration, the Commission had then suggested a Bill to replace our Act. It substantially follows the present scheme as adumbrated in our 1908 statute. It may be mentioned here that the Law Commission's report on the Registration Act is also not a unanimous report and Dr. N. C. Sen Gupta, a member of the Commission, had recorded a minute of dissent wherein he had pleaded for registration by panchayats.¹

3.1.26 The suggestions contained in the Law Commission's report had been subsequently circulated to State Governments, High Courts and others. In the light of the comments received from such authorities, the Law Commission had prepared a subsequent report in the year 1967.

3.1.27 Hence, the broad basis of the scheme for registration as now statutorily provided for has not been so far gone into. In our consideration of the matter we have viewed, in broad perspective, our registration scheme as developed in the Registration Act, 1908, and, in the light of the views by the several authorities we have earlier referred to and on a comparative study of the working of the registration scheme in our country *vis-a-vis* the schemes in other countries like the U.K., Australia, Canada and the United States of America, we have gone into the question as to on what lines our registration scheme needs to be further strengthened with a view to eliminate, to the extent possible, the general drawbacks of our registration law, namely delay and excessive cost.

RECORD OF RIGHTS

3.1.28 At this stage we should also make a mention of the records maintained at the village level and in the municipal areas as regards holdings of immovable properties by agriculturists and others.

3.1.29 In the areas covered by ryotwari settlement, there has been survey and *settlement* which has clearly indicated the persons who were entitled to the property as on the date of the settlement. This

¹In the context of developing a title registration scheme for rural areas and in the light of the schemes for issuing to farmers farm title pass books, we are considering, in the chapter on "Registration of Title—Feasibility and Necessity", the subject of record of rights, maintained by village authorities, serving as title register and farm title pass book playing the role of a title certificate.

valuable record which would have been of great advantage in the investigation of title has, however, over the period of years, been allowed to become very much of lesser value. This is in view of the fact that subsequent developments as regards transfers, partitions, creation of leasehold rights, etc., with reference to the settled property have not been fully incorporated in the records maintained pursuant to the survey settlement.

SURVEY SETTLEMENT AND SUBSEQUENT DEVELOPMENTS

3.1.30 While the survey settlement is on a statutory basis and has formed the basic record for the maintenance of the records relating to immovable property covered by the survey, the attempt to keep the records up to date, by making appropriate references therein to subsequent developments in the title to the property, including encumbrances thereon with reference to lending by public lending institutions, has been made pursuant to administrative instructions. However, having regard to the considerable pressure on the work of village authorities maintaining these records, the village records based on the survey and settlement have not been brought up to date, as has been commented upon by the All-India Rural Credit Review Committee, 1969.

VALUE OF RECORD OF RIGHTS

3.1.31 The All-India Rural Credit Review Committee, the Expert Group which considered the State enactments coming in the way of commercial banks lending to agriculture and other official committees which have gone into the problems faced by lending institutions in the spread of rural credit and extending development finance have also been emphasising the value of proper maintenance of the record of rights by the village level and the municipal authorities. However, in view of the administrative basis of the instructions now governing the requirement as to entry, in such record, of transactions affecting the title to the property and the fact that there has been a vast backlog of transactions not entered in such records, the value of such records has become considerably affected.

URBAN AREAS COMPRISED IN TOWN PLANNING SCHEMES

3.1.32 Comparable to the record of rights developed as a result of survey settlement, we may also refer to the Town Planning schemes in the municipal areas whereunder there is also a determination of title based on the findings of the Town Planning scheme authorities.

3.1.33 In assessing the available machinery for recording interests in land and for facilitating ascertainment of title to immovable property, we are also taking into account, wherever we could, the utility of record of rights in rural areas and the Town Planning schemes in the urban areas.

LEGISLATIVE CHANGES NECESSARY IN OUR PRESENT SCHEME OF REGISTRATION LAW

3.1.34 In our review of the subject, we will have to consider the legal measures necessary to simplify, reform and rationalise our registration scheme in two parts. In this chapter we shall consider the changes necessary in the present scheme of our registration law. In the next chapter we shall concern ourselves with the development of a title registration scheme.

3.1.35 As part of the measures which are capable of *immediate* implementation in the present scheme of our registration law, we propose to consider the following aspects with a view to simplify and expedite the investigation of title to land :

- (1) Period-limitation for finding good root of title;
- (2) searches in the register;
- (3) need to reduce the time lag between execution and registration of registrable documents;
- (4) provision for registration of priority notice/caution;
- (5) provisions relating to constructive notice on registration;
- (6) provisions to make the register more complete *re.* charges on land;
- (7) priority from date of registration or date of execution ?;
- (8) registration procedures; and
- (9) basis for the levy of registration charges.

3.1.36 We shall now consider the aforesaid aspects relating to investigation of title with reference to which there is not much difficulty in making the changes that may be considered necessary with a view to expedite and simplify title investigation process.

(1) PERIOD-LIMITATION FOR FINDING GOOD ROOT OF TITLE

3.1.37 When we have only a scheme for registration of deeds, and documents are getting registered with reference to any property over a course of several years, the question arises as to the extent to

which knowledge could be presumed as regards the *contents* of the documents registered several decades ago and the possibility of any title to the land being affected by such old transactions.

3.1.38 As at present, a lending institution or its legal adviser may be unable to discover the persons mentioned in old registered documents and satisfy itself as to whether or not the claims of such persons have been extinguished. Where the amount of the advance and the value of the property offered as security are large, this requires a detailed examination to ensure that the person who is offering the property as security has a clear title thereto, and this is the cause of serious delay in the completion of the transaction.

3.1.39 No doubt, when considered in conjunction with the provisions of the law relating to limitation of actions, many old claims may be deemed to have been extinguished. But this is not adequate as all the circumstances under which a claim on title may be made cannot be eliminated merely by recourse to the law of limitation for maintaining an action. Solicitors and legal practitioners specialising in conveyancing are often faced with situations where it may not be definitely said, merely by invoking the provisions of the law of limitation, whether all the persons in whose favour transactions have been recorded with reference to the property are still having their claims or such claims could be considered as extinguished under the law of limitation.

Position in other countries

3.1.40 The problem of limiting the period for investigation for finding a good root of title has also been felt in the U.K. and Australia in areas not served by an effective system of registration of title and where the registration law provides only for the registration of deeds or encumbrances affecting the property. For dealing with such situations, the statutes of these countries provide for a limitation-period upto which only investigation of title need be carried out for tracing good root of title.

Position in the U.K.

3.1.41 As L. C. Mather has observed, in the U.K. with reference to investigation of title to land not covered by a scheme of registration of title, the "bulky parcel of deeds today may go back centuries, but it is sufficient if a good root title of *fifteen years can be traced*".¹ (emphasis added). Now this fifteen years' tracing of the root of

¹Securities Acceptable to the Lending Banker, L. C. Mather, 3rd (Revised) edn., (1973), Waterlow (London) Ltd., page 147.

title is based on a statutory provision (after the amendment to the U.K. Law of Property Act in 1969) which originally provided tracing for 60 years, which was later reduced to 30 years.

3.1.42 The limiting period for tracing a good root of title which was originally 60 years was reduced to 40 years by the Vendor and Purchaser Act, 1874.¹ Section 44 of the Law of Property Act, 1925, of the U.K., had originally provided that after the commencement of that Act, 30 years shall be substituted for 40 years as the *period of commencement of title* which a purchaser of land may require. This section further provides that a purchaser shall not be deemed to be or ever to have been affected with any notice of any matter or thing of which, if he had investigated the title or made enquiries in regard to matters prior to the period of commencement of title fixed by that Act, or by any other statute, or by any rule of law, he might have had notice, unless he actually makes such investigation or enquiries.

Position in Australia

3.1.43 In Australia also, the length of time over which a person may ordinarily be required to go to establish in his favour a good root of title has been reduced over the course of years. For instance, in New South Wales, for practical reasons, the length of time was originally limited to 60 years by the practice of conveyancers, and later by section 53(1) of the Conveyancing Act, 1919 the period was specified as 40 years and subsequently it was reduced to 30 years in 1930 by an amending legislation.²

Need for statutory provision in India for tracing a good root of title to land

3.1.44 We have earlier referred to the point made in the seminar of legal officers of banks as regards the difficulties experienced in India for want of a statutory provision specifying the period upto which title has to be traced to establish a good root of title. Now the limitation on the length of time for which title has to be traced is decided in our country with reference to the facts of each case and there is no general rule which could ordinarily be applied and could be relied on. This is not a satisfactory position. The law and practice relating to conveyancing will be considerably simplified and conveyancing can be effected more expeditiously if we have an

¹Halsbury's Statutes of England, 3rd edn. Vol. 27, pages 412-413.

²The Law of Real Property in New South Wales, Helmore, 2nd edn. (1966), The Law Book Co. Ltd., Australia, page 32.

appropriate statutory provision that will at least be applicable to the security interests in immovable property obtained by banks and notified public financing institutions.

3.1.45 Investigation of title would be considerably facilitated and banks and other institutional lending agencies would be able to extend credit with much more safety and deal with loan applications more expeditiously if the statute could indicate the period upto which normally a root of title may be required to be traced. For this purpose, we recommend that, on the analogy of the provisions in the Law of Property Act, 1925 read with the 1969 amendment of the U.K., a statutory provision providing that where a bank or other notified institution extends credit to a person after carrying out searches of the encumbrances and other charges revealed as a result of investigating title for a period of fifteen years, the interest of the bank or the lending institution shall not be affected by the claim of any other person whose claim would not have come to the notice of the bank during its investigation of the title for the said period of fifteen years. A provision on these lines is necessary in public interest and will considerably help development financing institutions which are required to extend credit for large sums.

Scope of statutory protection

3.1.46 However, this statutory protection which is specially to be conferred with reference to security interests in real property created in favour of banks and notified financing institutions should also provide the following safeguards to ensure that a person deriving the benefit of bank credit under such a charge is not allowed to repudiate the title or claim of any person on the land which was not disclosed to the bank by reason of the search being confined only to the period of fifteen years. For this purpose, it should be provided that the provision limiting the requirement as to search in the process of investigation of title with reference to security interests in favour of banks and other financing institutions for a period of fifteen years shall, however, not affect the claim of any person whose title or interest is not disclosed under such search. The statute shall also provide that without in any way affecting the security interest in favour of the bank or the lending institution, such a person's claim or interest should be capable of being enforced against the person who has availed himself of bank credit and against all persons claiming under him.

(2) SEARCHES IN THE REGISTER

3.1.47 An intending purchaser of land, including a mortgagee, may discover the existence of registrable encumbrance in relation to the property only by conducting a search. For a proper evaluation of the scope and usefulness of provisions relating to searches in India, it will be useful also to refer to comparable provisions in other countries like the U.K. and Australia. First we shall see the provisions now found in India.

Provisions relating to search in our country

3.1.48 It is not feasible to carry out expeditiously searches in our country. No doubt, the Registration Act of our country read with the Rules framed thereunder provides —

- (a) for any person searching the property register on payment of the prescribed fees — this provision is applicable to all the States; and
- (b) in some States¹ for any person applying to the sub-registrar and obtaining an “encumbrance certificate” which would indicate the encumbrances recorded in the property register (Book No. 1).

Having recourse to personal searches as a general rule is neither feasible nor to be commended, though the right to conduct a personal search is valuable and necessary. By and large, it will be necessary to rely on official search certificates issued by the registration authorities. Unfortunately, now there is no provision in all the States of our country for the issue of official search certificates.

Disclaimer as to responsibility

3.1.49 In our country even in those States where there is provision for the sub-registrar furnishing an encumbrance certificate, there is no official commitment as regards the non-existence of charges not listed in the certificate. Every encumbrance certificate, issued by the sub-registrar’s office is hedged with the cautious statement that “neither Government nor the Sub-Registrar issuing the Certificate guarantee

¹Registration Manuals Part II of Andhra Pradesh and Tamil Nadu provide for issue of encumbrance certificates by the sub-registrars of those States. In Maharashtra, there is now provision for such a certificate being given only with reference to any application by a land development bank for the issue of such a certificate [*vide* Order No. 356(i) of Part II of the Maharashtra Registration Manual (2nd edn.), page 153].

the accuracy or correctness of the contents of this certificate and will not be liable for any claim for damages in respect of any information contained therein".¹

Solicitor's insistence of personal search

3.1.50 It is because, in our country, there is no protection to a solicitor or legal practitioner dealing in conveyancing and relying on an encumbrance certificate issued by the registration authorities (in States where there is such provision) on the lines of the protection now available to solicitors in other countries like the U.K. and Australia (on the lines explained below), that there is a general reluctance on the part of such solicitors or legal practitioners to rely on the encumbrance certificates wherever such certificates could be obtained. Such a reluctance is understandable since they cannot certify title to property safely relying on a certificate which specifically provides that government does not undertake the accuracy of the entries in, or the correctness of, the official certificate furnished regarding the encumbrances noted in the register concerning the property.

Searches in the U.K.

3.1.51 In the U.K., any person may himself carry out a search or ask for an official search certificate being issued to him on the basis of an official search. The advantage of asking for an official search and obtaining an official certificate of search is that the official certificate of search—

- (a) is conclusive in favour of a purchaser or intending purchaser, and so frees him from any liability in respect of rights which it fails to disclose;
- (b) protects a solicitor or trustee who relies on it from liability for any error in the certificate; and
- (c) provides protection against encumbrances registered in the interval between search and completion. If a purchaser completes his transaction before the expiration of the fifteenth day after the date of the certificate (excluding days when the registry is not open to the public), he is not affected by any entry made after the date of the certificate and before completion, unless it is made pursuant to a priority notice entered on the register on or before the date of the certificate.

¹Certificate of Encumbrance on Property issued in Maharashtra to the land development bank, in the form given in Appendix XI, Part II of the Maharashtra Registration Manual (2nd edn.).

There is no need to apply for a search of each register separately; a single search is effective for all divisions of all registers.¹

Provision for expeditious search

3.1.52 In the U.K., "where the application for a search cannot reach the Registry by the morning mail and a reply is required on the same day, an expedited search will be made upon payment of an additional fee of 15p per search. In an emergency it is possible to telephone or telegraph for a search (confirming with an application on Form L.C. 11 by post) or to send a post request asking for a telephonic or telegraphic reply, all subject to additional but moderate cost".²

Searches in Australia

3.1.53 For stating the position in Australia, we may refer to the position in the State of New South Wales. Here, on receipt of the requisition from a person requiring a search, the Registrar-General makes a certificate of the result of the search and a copy is issued to the person requisitioning, the office copy being kept as evidence of the certificate. Where a purchaser on whose behalf an office copy is issued suffers loss by reason of an error in, or omission from, the certificate or office copy, he may recover compensation from the government. A solicitor obtaining an office copy certificate is *not* answerable in respect of loss arising from such error or omission. Any person obtaining the certificate and acting in a fiduciary capacity is similarly protected.³

Our provisions are inadequate

3.1.54 It is obvious that the provisions relating to searches in our country are totally inadequate to facilitate expeditious and inexpensive investigation of title to land or other immovable property. When compared with the provisions in this regard in other countries, it is evident that the provisions now in our country with reference to searches are at considerable variance as regards the extent to which they could go to satisfy the requirements of institutional lending agencies and others.

¹The Law of Real Property, Megarry and Wade, 4th edn. (1975), Stevens & Sons Ltd., page 1052.

²Securities Acceptable to the Lending Banker, L. C. Mather, 3rd (Revised) edn. (1973), Waterlow (London) Ltd., page 168.

³The Law of Real Property in New South Wales, Helmore, 2nd edn. (1966), page 514.

Furnishing of encumbrance certificates

3.1.55 Several banks, other financing institutions and experts who submitted memoranda to the Committee have all stressed that provision for furnishing encumbrance certificates should be made applicable to all the States of our country. In view of the above, we recommend that provision for furnishing encumbrance certificates may be extended to all the States. The State Governments may also go into the question of the charges now levied for furnishing encumbrance certificates and try to reduce them to the minimum possible having regard to the administrative work involved.

Expeditious issue of encumbrance certificates

3.1.56 State Governments may also consider furnishing all information as regards encumbrances found in the register as expeditiously as possible and in this respect a study may be undertaken of the extent to which facilities for an expeditious search could be extended, at least with reference to information required by banks and other financial institutions.

Accuracy of encumbrance certificates

3.1.57 As regards the accuracy or correctness of the encumbrance certificates, it has also been urged that the encumbrance certificates furnished should be more reliable. It is true that ordinarily all official acts are presumed to have been done regularly. With reference to *agricultural advances* and other allied types of rural credit, the encumbrance certificates furnished in the form in which they are now furnished may be adequate since the quantum of credit per cultivator is not likely to be high. However, in the case of *industrial advances*, where the mortgage is sought to be taken on land for constructing factories and installing machinery, the capital outlay may be huge and it is necessary in such circumstances for a full verification of the encumbrances. Such a verification is necessary because though the land may not have much value by itself, the land, together with the factory being constructed thereon, will have to be the security for heavy capital and long-term investments. Hence, the State Governments may consider issuing *special encumbrance certificates* where they can take additional precautions (if necessary by a second verification by an independent official) and issue the certificates without the present saving clause which acts as a deterrent for institutional lenders relying merely on encumbrance certificates with reference to such industrial advances.

(3) NEED TO REDUCE THE TIME LAG BETWEEN EXECUTION AND REGISTRATION OF REGISTRABLE DOCUMENTS

3.1.58 There is a gap between execution of a document providing for the creation of a security interest in land and the registration thereof. Under our Registration Act, a document executed may be presented for registration at any time within four months from the date of its execution. Courts have power to excuse the delay even thereafter in presenting the document for registration. It is true that a document executed affecting interest in land cannot be immediately registered for reasons such as that the place of the execution of the document and the place of registration may differ, that it may not also be convenient for all the concerned persons to admit the execution before the sub-registrar on the same day, etc.

Law Commission's recommendation

3.1.59 The Law Commission of India reporting on the Registration Act in the year 1957 had also gone into this question and had observed:

“We consider that the period of four months provided for presenting documents for registration should be reduced to one month. This will reduce the opportunities to bring *ante-dated* deeds into existence. It is also desirable that registration should be prompt.”¹

Comments on the Law Commission's recommendation

3.1.60 However, the comments received from some “State Governments, High Courts and other interested persons and bodies” on the above recommendation of the Law Commission, as classified by the Law Commission which considered them in its report of the year 1967, were on the following lines :

- (a) “One set of comments presses for the reduction of the existing limit of four months. Reduction, it is stated, will work considerable hardship, as one month's time is too short. Difficulties peculiar to hilly areas have also been emphasised in some of the comments”;
- (b) “Another set of comments suggests that the reduction should be to the extent of two months. It is also stated that agriculturists (who are concerned with many transfers) require time to collect the amount of consideration”;
- (c) “Still another set of comments suggests an increase of the limit to six months”.

¹Report of the Law Commission of India on the Registration Act, 1908, (1957), paragraph 49.

In view of the above comments, the Law Commission of India felt in 1967 that "the reasons for which the change was proposed are not unconvincing. However, having regard to the comments summarised above, it appears desirable to *retain* the existing period".¹

Need to protect lending institutions' interest re. intervening transactions

3.1.61 The present period of four months was provided for in 1877 when there was no advancement in the communication facilities and probably registration offices had not also spread out in the different parts of our country. Again, by reason of the time lag between execution and registration of a document, no serious prejudice to the parties was then contemplated since the contracting parties would be local residents dealing with local property and evidently having a mutual general knowledge of the affairs of each other. As a result, the interest of the lender or the purchaser being affected or defeated by reason of intervening creation of security interests in the *interregnum* was never a major problem in those days.

Desirability of alternative means

3.1.62 While there seems to be a case for reducing the time now allowed for registration of documents, in view of the comments given earlier on a similar proposal made by the Law Commission of India in 1957, we have to consider effective alternative means by which it may be ensured that—

- (a) a search of the register would disclose also mortgages or charges affecting the land which are in the process of being completed; and
- (b) the interests of banks and other lending institutions are protected during the period which may be necessary to present the document for registration and complete the registration formalities.

(4) *Provision for registration of priority notice/caution*

3.1.63 It is under the above circumstances that we have to consider the need for an appropriate provision which would provide for a record being maintained for an entry in the register as regards documents which are awaiting presentment for registration. The provisions in the U.K. which are applicable also to "unregistered land" merit our consideration.

¹Report of the Law Commission of India on the Registration Act, 1908, (1967), page 37.

Provision for priority notice in the U.K.

3.1.64 In the U.K. there is protection to cover the gap between the time when an instrument is executed and the time when it is registered. "Since it was physically impossible to register a land charge the instant after it had been created, there was at first a dangerous gap between the creation of a mortgage and its registration. Further, even if a search for prior encumbrances was made, the mortgagee could not be sure that no encumbrance had been registered between the time of his search and the completion of the mortgage. These difficulties have been met by the devices of the *priority notice and official search*".¹ [*emphasis added*]

3.1.65 Under the statutes applicable in the U.K., there is provision for a person, who proposes to obtain an interest in land, lodging with the registration authorities a priority notice at least 15 working days before the date of the charge, indicating the nature of the transaction and his claim that may be arising thereunder with reference to the land. If the charge is registered after lodging such priority notice, within 30 working days of the entry of the priority notice in the register, the registration will date back to the date of the charge.

3.1.66 Section 11 of the Land Charges Act, 1972, read with the other applicable rules and orders, provides for any person intending to make an application for the registration of any contemplated charge, instrument, or other matter in pursuance of that Act or any rule made thereunder, giving a priority notice in the prescribed form at least 15 days before the registration is to take effect, and where such a notice is given —

- (a) the notice is entered in the register to which the intended application when made will relate;
- (b) if the application is presented within 30 days thereafter and refers in the prescribed manner to the notice, the registration takes effect as if the registration had been made at the time when the charge, instrument, or matter was created, entered into, made or arose, and the date on which the registration so takes effect is deemed to be the date of registration.

The U.K. method is desirable

3.1.67 It is necessary to safeguard the persons dealing with the property from the possibility of their facing claims of persons in whose favour documents might have been executed but not registered,

¹The Law of Real Property, Megarry and Wade, 4th edn. (1975), Stevens & Sons Ltd., pages 974-975.

when they searched the official register or carried out investigation. For this purpose, the device adopted in the U.K. is salutary and merits adoption. Suitable legislative provisions have to be made in our registration law for this purpose.

Lodgement of priority notice

3.1.68 Our Registration Act should be amended to make it possible for a person obtaining a document securing an interest in immovable property to *lodge immediately with the sub-registrar a priority notice* in the prescribed form, on receipt of which the sub-registrar may make a provisional entry in the property register regarding the service of such notice. Provided the document is formally presented within the time allowed as per rules and is admitted before the sub-registrar in the manner now required, the priority for that document may relate back to the date of the lodgement of the priority notice. This would considerably eliminate the difficulties now felt by a person making a search in ascertaining the existence or otherwise of executed transactions awaiting registration and concerning the land. If the document is not presented for registration within the time allowed, the notice shall automatically lapse.

(5) PROVISIONS RELATING TO CONSTRUCTIVE NOTICE ON REGISTRATION

3.1.69 The effect of registration has to be clearly and unambiguously brought out so that intending purchasers and others obtaining an interest in land and hence required to investigate title to the land, may be aware of what they are supposed to know, by reason of the doctrine of constructive notice under the expression "a person is said to have notice". This is necessary as they have to ensure that they do not miss any statement or transaction comprised in the scope of the said expression. The present provision regarding the application of the doctrine of constructive notice with reference to registered transactions does not appear to be adequate.

Definition of constructive notice

3.1.70 In our country the doctrine of constructive notice as applied to registered transactions is stated in Explanation I to the definition of the expression "a person is said to have notice",¹ which applies to any transaction relating to immovable property which is "required by law to be and has been effected by a registered *instrument*". Hence, it may be seen that our definition as to the applicability of constructive notice on registration is related to the registration of an "*instrument*". In other words, it does not cover entries or copies of documents required by law to be filed in Book No. 1, when there

¹Section 3 of the Transfer of Property Act, 1882.

is no instrument providing for the creation of a security interest or other form of encumbrance on the land, or when there is such an instrument but *instead* of the instrument being registered, the special procedure of filing a copy of the instrument in Book No. 1 is being followed.

Differing views of the Law Commission

3.1.71 On the above aspect, we are referring later to the differing views expressed by the Law Commission of India chaired by Shri M. C. Setalvad and the Commission chaired by Shri J. L. Kapur.

Present position

3.1.72 Now, there are provisions in our Registration Act providing for an entry, or the filing of copies of certain instruments, relating to certain transactions in Book No. 1. However, the question is whether, when such entries of the concerned interests in land are made in Book No. 1, the doctrine of constructive notice would cover such transactions also so that persons acquiring the property, or any share or interest in it, may be deemed to have notice of the transaction.

(i) Section 89 of the Registration Act

3.1.73 Section 89 of the Registration Act now provides for copies of certain orders, certificates and instruments to be sent to the registering officers and for the registering officers filing them in Book No. 1. These orders and certificates relate to —

- (a) orders relating to loans under the Land Improvement Loans Act, 1883,
- (b) certificates of sale granted by courts relating to immovable property under the Code of Civil Procedure, 1908,
- (c) instruments of mortgage securing loans under the Agriculturists' Loans Act, 1884, and
- (d) certificates of sale issued to the purchaser of immovable property under a revenue sale.

With reference to the above, section 89 does not provide, as expressly provided for by sub-section (2) of section 90 *ibid* with reference to public maps, etc., that the orders, certificates, mortgage instruments, etc. are deemed to be registered for the purpose of some or any of the provisions of the Registration Act, 1908.

3.1.74 *Filing of other similar transactions in Book No. 1.*—Though the provision of the Registration Act, 1908, does not provide for entry, or filing copies of instruments in Book No. 1 regarding transactions affecting interest in land other than those specified in section 89, now the States' legislation provides for the filing in Book No. 1 of security interests in favour of banks and other public financial institutions in respect of certain kinds of transactions. We shall also refer to them at this stage.

(ii) *Position regarding mortgages in favour of land development banks*

3.1.75 Section 122 of the Maharashtra Co-operative Societies Act, 1960, provides that notwithstanding anything contained in the Registration Act, 1908, it shall *not be necessary* to register a mortgage or a lease executed in favour of a land development bank. However, a copy of the instrument, whereby property is mortgaged or leased, is required to be sent to the registering officer having jurisdiction in respect of the area where the property is wholly or partly situate. The registering officer is required to *file the copy* in Book No. 1 maintained under the Registration Act. There are similar provisions in the enactments applicable in other States with reference to land development banks which expressly save them from following the requirements as to presentment for registration with reference to mortgages executed in their favour.

(iii) *Provisions relating to registration of declaratory charge in favour of co-operative banks in States*

3.1.76 In Andhra Pradesh¹ and Tamil Nadu,² the declaration relating to the charge in favour of a co-operative credit society is sent by *registered post to be 'registered'* by the sub-registrar. Here, the charge on land is created by the statutory declaration and there is no 'instrument' as such. Nor is there any formal presentment of a document which can be admitted to registration. Hence, 'registration' can only be by means of *filing* the declaration in Book No. 1.

(iv) *Provisions now applied regarding commercial banks' advances to agriculture*

3.1.77 As regards declaratory charges or mortgages that are created in favour of commercial banks, the Model Law on which the States' legislation is based provides that a declaratory charge or a mortgage executed in favour of a bank by an agriculturist shall be deemed

¹Section 36 of the Andhra Pradesh Co-operative Societies Act, 1964.

²Section 33 of the Madras Co-operative Societies Act, 1961.

to be duly registered with effect from the date of the charge/mortgage, provided the bank has sent by registered post acknowledgement due to the sub-registrar concerned within the specified period, a copy of the document creating such charge/mortgage, duly certified¹ Evidently, these documents, which are not presented for registration in the normal manner, could be 'registered' only by filing the copies in Book No. 1.

Wider coverage of the property register

3.1.78 Thus, in addition to the transactions referred to in section 89, by reason of the other applicable provisions read with section 51(2) of the Registration Act, 1908, there are now a mass of transactions providing for creation of security interests with reference to which copies of the documents are filed, or entries relating thereto are made, in Book No. 1. All these transactions are not evidenced by "instruments".

3.1.79 Does the doctrine of constructive notice apply to transactions not evidenced by any registered instruments? If there is any doubt on this matter, the matter should be made clear, if necessary by a statutory amendment.

Lacuna pointed out by the Setalvad Law Commission

3.1.80 Considering the scope of the doctrine of notice, the Law Commission chaired by Shri M. C. Setalvad had earlier pointed out in its Sixth Report (1957) that there is lacuna in the scope of this doctrine as found "in the definition of notice under the Transfer of Property Act", which it felt is "probably due to an oversight".² That Commission observed that "the definition (of notice) does not make it clear whether documents sent to the registering officer under section 89 and filed by him in Book No. 1 would also have the effect of notice of such documents as affecting title".³

Amendment suggested by the Setalvad Commission

3.1.81 In the view the Setalvad Commission had taken, it suggested a special provision in our Registration Act to provide that "the filing of the copies received shall, for the purposes of this Act and of section 3 of the Transfer of Property Act, have the same effect as if the document had been registered under this Act."⁴

¹Clause 9(1) of the Model Bill.

²Sixth Report of the Law Commission of India (1957), paragraph 104.

³Clause 9(1) of the Model Bill.

⁴Clause 42(4) of the draft Bill prepared by the Law Commission of India (1957).

Views of the Kapur Law Commission

3.1.82 The recommendations of the Law Commission in its sixth report with reference to the Registration Act elicited comments from "the State Governments, High Courts and other interested persons and bodies". Then, the Law Commission chaired by Shri J. L. Kapur had submitted to the Government the thirtyfourth report of the Law Commission of India, giving its recommendations for the amendment of the Registration Act, 1908, also after taking into account the comments received. In that report, the Kapur Commission had considered the amendment suggested by the Setalvad Commission to cover what that Commission felt as a lacuna in the definition of "notice" in the Transfer of Property Act.

3.1.83 The Kapur Commission did not feel the need for any provision on the lines suggested by the Setalvad Commission and observed:

"Documents filed under existing section 89, are by virtue of section 51(2), filed in Book No. 1 and are referred to in section 51(2) as 'registered'. It is not, therefore, necessary to insert the proposed new provision. The doubt raised in the Sixth Report on the subject relates to a small area, namely, sale certificates."

In this view, the provision suggested earlier by the Setalvad Commission to widen the area covered by the existing definition of "notice" was not considered necessary by the Kapur Commission.

No objection in principle to the provision suggested

3.1.84 In the above context, the Kapur Commission had observed:

"One of the objects of registration is to bring into being a statutory record under official machinery of transactions of value, and the *filing* of copies should have the same legal consequences. On this reasoning, the proposed general provision equating such filing with registration, is amply supportable."

Thus, in principle, the Kapur Commission was also not against the provision suggested by the Setalvad Commission, though it had felt that it might not be necessary.

¹Report of the Law Commission of India (1967), page 88.

²*ibid.*, pages 87-88.

Our views

3.1.85 The necessity for a register which will indicate not merely documents which are registered in the formal sense in which they are required to be registered but also the creation of security interests in favour of banks and other financing institutions and others whether such interests are created by formal documents or not is obvious. It is in this context that we have to consider the effect of entries, or copies of instruments filed, in Book No. 1 maintained by the registration authorities.

3.1.86 Since, with reference to transactions coming into Book No. 1 by reason of section 89, there are no documents admitted to registration, mere reference in section 51(2) to such entries under section 89 as registered cannot bring into play Explanation I to the definition of "notice" in section 3 of the Transfer of Property Act. As we have earlier pointed out, our present definition of "notice" is confined to transactions relating to property evidenced by "registered instrument". "Instrument" is not defined in the Registration Act, but it is under the Stamp Act¹ as including "every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished, or recorded". With reference to this definition of "instrument" which may be apt also in the context of the provisions of the Registration Act, the Gujarat High Court has held in a recent case² that it "refers to a document which itself creates a right or liability or purports to create a right or liability. It cannot refer to a copy of any such instrument". Hence, we do not consider that the provisions suggested by the Setalvad Law Commission are unnecessary.

Registration and filing, both now covered

3.1.87 The definition of "notice" in the Transfer of Property Act has to be widened to cover the development of the new situation where our scheme of registration has now been imperceptibly enlarged to provide for two types of registration. While the basic scheme is, by and large, adapted mainly to the registration of instruments and admitting of such documents formally presented for registration, the substantial additions to the entries to be made in Book No. 1 or copies of instruments to be filed in Book No. 1 require that the position of such registration of transactions as opposed to registration of instruments should be fairly clear as regards their effect and the treatment to be given to them under the applicable provisions of both the Transfer of Property Act and the Registration Act.

¹Section 2(14) of the Stamp Act, 1899.

²The Chief Controlling Revenue Authority vs. The Nutan Mills Ltd. (Stamp Reference No. 2 of 1972 decided on 5th October 1976).

3.1.88 We are dealing later with the necessity for including, within the scope of the filing scheme of the Registration Act, registration also of other interests or claims on land in order to facilitate expeditious and in-expensive determination of title. In the said context, it is all the more necessary that the provisions of the Registration Act, which provide for filing in Book No. 1 (as contrasted with registration of documents admitted to registration), should not leave any scope for doubt as to the application of the doctrine of constructive notice with reference to such filed transactions.

Comparability with the Companies Act scheme

3.1.89 The filing provisions in the Registration Act, as regards transactions with reference to which either entries are made or the copies of the documents are filed in Book No. 1, may be contrasted with the provisions of the Companies Act, 1956, which provide for registration of a *security interest* in the assets of a company whether or not the creation of the interest is evidenced by a formal instrument.

3.1.90 In view of the above companies are able to avoid the payment of stamp duty and registration charges and thus avail themselves of credit at a cheaper rate and banks are able to rely, wherever they could, on a security interest in the assets of companies obtained by way of deposit of title deeds. From the point of view of making the register more useful, it is necessary that the Registration Act provisions with reference to *filing of particulars* regarding security interests in the assets of non-corporate borrowers are adequately strengthened.

Registration of encumbrances, a better scheme

3.1.91 In all countries, the scheme of registration of charges and encumbrances on land is found more beneficial than a scheme merely for registration of instruments which are formally presented and admitted to registration. In the U.K., the Land Charges Act, 1972, dealing with notice provisions, provides for registration of any instrument or *matter* which is required or authorised to be registered under that Act. In our country also, the Setalvad Law Commission had earlier referred to the necessity for making the register more comprehensive.

Amendment to the Registration Act necessary

3.1.92 Reference in section 51(2) of the Registration Act, 1908, also to section 89 may not also be adequate to regard the transactions relating to which copies are filed in Book No. 1 under section 89 as

registered. Hence, a clause may be added to section 89 of the Registration Act, 1908 (after enlarging its scope on the lines considered later), somewhat on the lines recommended by the Setalvad Commission providing that the filing of copies, or the making of entries, under the said section shall, for the purposes of the Registration Act, have the same effect as if the *transactions* had been registered under the Registration Act.

Effect of optional registration

3.1.93 While on the subject of constructive notice by means of registration, we should also refer to the effect of documents affecting title to land, which may be registered, though they are not falling within the description of documents required to be compulsorily registered. With reference to all such transactions, appropriate entries are made in Book No. 1, which is the property register maintained by the Sub-Registrars of Assurances. Notwithstanding such registration, a person is not affected with notice of the transaction since the scope of the doctrine of constructive notice with reference to registered instruments covers only instruments required to be compulsorily registered. Thus, a person who neglects to search the register cannot be foisted with notice of the transaction.¹ Since a search of the register is a requisite which all prudent persons acquiring title to the property may be expected to undertake, there is no valid reason as to why there should be premium in favour of negligent persons who do not choose, for their own motives, to undertake a search of the register before entering into any dealings concerning the land. Hence, we recommend that Explanation I to the definition of "notice" in section 3 of the Transfer of Property Act should be modified to cover also cases of registered instruments concerning the land, whether or not the instruments are required to be compulsorily registered.

Amendment to the Transfer of Property Act

3.1.94 Thus, section 3 of the Transfer of Property Act, which now deals only with the registration of instruments, also requires specific amendment to cover *all* registered instruments concerning land and also transactions with reference to which entries are made or copies of documents are filed in Book No. 1.

3.1.95 For the said purpose, Explanation I to the expression "a person is said to have notice" in section 3 of the Transfer of Property Act, 1882, may be amended as under :

¹Please see the decision in *Hiralal Agarwala vs. Bhagirathi Gore and others*, A.I.R. 1975, Cal. 445.

“*Explanation 1.*—Where any instrument or any transaction concerning immovable property is registered, whether or not the instrument or transaction is required by law to be registered, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument or transaction as from the date of such registration, or, where the property is not all situated in one sub-district or where the instrument has been registered under sub-section (2) of section 30 of the Registration Act, 1908, from the earliest date on which any memorandum of such instrument has been filed by the Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated :

Provided that —

- (1) the instrument or the transaction has been registered and its registration completed in the manner prescribed by the Registration Act, 1908, and Rules made thereunder,
- (2) the instrument or memorandum relating to the instrument has been duly entered in books kept under section 51 of that Act, and
- (3) the particulars regarding the transaction to which the instrument relates, or particulars of the transaction, as the case may be, have been correctly entered in the indices kept under section 55 of that Act.”

(6) PROVISIONS TO MAKE THE REGISTER MORE COMPLETE *re.* CHARGES ON LAND

3.1.96 We now take up the question of the provisions necessary to make the register, maintained in the offices of sub-registrars under the Registration Act, complete and more useful. The scope for it is considerable.

Inadequate utilisation of the register

3.1.97 We are not now able to derive the full value of the register maintained under the Registration Act property-wise in each sub-registry wherein substantial number of deeds and other instruments affecting title to immovable property are now registered. This is due to an inadequate utilisation of the register for all the purposes for which it could be usefully employed.

Consequent avoidable cost in investigation of title

3.1.98 As a consequence, the register remains under-utilised, and it results in the avoidable expending of time, effort and money to banks, other financial institutions and members of the public who are dealing with the immovable property, or are acquiring an interest therein, by way of purchase, creation of security interest or otherwise. While ascertaining information regarding the existence or otherwise of charges or encumbrances which are not now entered in the register but the existence of which the register could effectively indicate, the members of the public and the public financing institutions are put to efforts, expense and expending of time which are beyond any reasonable proportion. If the register is made to serve as the source of information regarding the existence or otherwise of such charges or encumbrances concerning the land, the additional time, effort and cost now required to be spent by all concerned may either be wholly eliminated or made practically negligible. It is unfortunate that we have not been able to realise, since the introduction of the register a century ago, the necessity for deriving from the register the maximum utility and avoid such unnecessary trouble, effort and expense. It is in public interest that the register is made to be as self-contained as possibly we could make it.

Law Commission's recommendations

3.1.99 The necessity for the register being as complete as possible was also felt by the Setalvad Law Commission when it considered our Registration Act, 1908. It is in this context that the Commission had observed :

“If it is further provided that copies of all documents affecting title have to be compulsorily sent to the Registrar under section 89, for being filed in Book 1, and that memoranda of such documents should also be entered in Book No. 1, the registry would afford a complete history of the title to every parcel of immovable property in the district and would enable a person to get definite information relating to it. If a search in the Registry is to be effective, *the register must be as complete as possible*”.¹
(*emphasis added*)

Special provisions suggested by the Setalvad Commission

3.1.100 With the above objective, the Law Commission of India had suggested in the year 1957 some special provisions in the Registration Act, which would have had the effect of substituting and enlarging the scope of the present section 89.

¹Sixth Report of the Law Commission of India (1957), paragraph 104.

3.1.101 The suggested provisions would have ensured that the register also indicates the existence or otherwise of matters affecting title to immovable property and arising either as a result of a decree or order passed by a public officer or due to the making or acceptance of an instrument or document by a public officer, which is of the following nature :

- (a) an order granting a loan or an instrument of collateral security granted under the Land Improvement Loans Act; or an order granting a loan under the Agriculturists' Loans Act or an instrument for securing repayment of the loan under that Act;
- (b) an instrument of partition made by a revenue officer;
- (c) an order under the Charitable Endowments Act, vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property;
- (d) a grant of immovable property by or on behalf of the government;
- (e) a decree or an order of a court, including a decree or order upholding the possession of a defendant under section 53A of the Transfer of Property Act;
- (f) a security bond executed in favour of a court or of a public officer in his official capacity;
- (g) a composition deed accepted by a court in insolvency proceedings; and
- (h) a certificate of sale granted to the purchaser of any property sold in public auction by a civil court or a revenue or other public officer in his official capacity.

The provisions suggested by the Law Commission also provided that every court ordering the admission of a plaint or a memorandum of appeal, in which an interest in or right or title to immovable property is in controversy, shall send, to every registering officer within whose jurisdiction any part or item of the property is situate, a copy of the plaint or memorandum of appeal, as the case may be, with such other particulars as may be prescribed.

3.1.102 On receipt of such copy of the decree, order, instrument, document, certificate, plaint or memorandum of appeal, as the case may be, every registering officer should, as per the suggested provisions, file the same in Book No. 1 and prepare a memorandum in the prescribed form. The provisions of the Act providing for the filing of such copies of memoranda in all sub-registries where the properties are located would have also applied to such memoranda.

Nature of additional information the register would have shown

3.1.103 In substance, the provisions suggested by the Setalvad Commission would have ensured that the register indicates also the existence or otherwise of transactions affecting title to immovable property which may arise out of —

- (a) security interests created in favour of government for loans given to develop immovable property under the Land Improvement Loans Act, 1883, and the Agriculturists' Loans Act, 1884;
- (b) grants, partition instruments made by government or revenue officials;
- (c) decrees and orders affecting rights in immovable property;
- (d) certificate of sale of immovable property in a public auction held by civil court, revenue or other public officer;
- (e) vesting orders affecting immovable property; and
- (f) *lis pendens*.

Before considering the necessity or desirability of making the register comprehensive with reference to the above matters and additional allied matters, we shall refer to the consideration bestowed on this matter by the Kapur Commission, which is set out in the thirty-fourth report of the Law Commission of India.

3.1.104 While considering the earlier proposal made by the Setalvad Commission, the Kapur Commission had observed :

“The object for which the Law Commission, in its earlier Report, proposed the changes was the beneficial one of making the registration law more useful by bringing these documents on the registration records under the proposed procedure. But the comments have pointed out the difficulties. We have to balance, on the one hand the benefit likely to result and, on the other hand, the inconvenience likely to be caused and the increase in work. Even the existing sketchy provisions are not promptly complied with, as would appear from one of the comments. In this state of affairs, to add to the burden on the courts and public officers is likely to mean the addition of a duty which will not be fulfilled in practice, and the provision might thus remain nugatory. The more specific objections are in relation to plaints and memorandum of appeal; but the difficulties apply even to decrees, because the number of decrees, etc. affecting immovable property which are being daily passed by courts must be considerably large. The

proposed changes in the existing section 89 will, therefore, have to be dropped.²¹

Administrative assessment

3.1.105 Evidently, the Kapur Commission was influenced in its decision to drop the very salutary provisions suggested by the Setalvad Commission to make the register more useful and purposive, by the comments which seemed to have pointed out the addition to administrative work that would likely be caused in implementing the proposals contained in the suggested provisions.

Ignoring of positive advantages

3.1.106 Unfortunately, administrative assessment has not properly evaluated the positive advantages for the economic development of our country at large that would accrue by the implementation of such proposals by way of the reduction in cost and the timely flow of credit.

Our present scheme is antiquated

3.1.107 No sufficient weight has been given to the fact that when compared with the registration systems in other countries, ours has remained stagnant ever since the same was devised and shaped by the statute of 1877. The 1908 statute is only a codifying one and has only restated the law which in substance has continued since 1877.

O & M methods should overcome any pressure on concerned administrative agencies

3.1.108 It is inevitable that improvement in organisational methods has to be devised in order that the existing registration machinery serves more efficiently the basic objective of an efficient system of registration. The value of the proposals made by the Setalvad Commission has evidently not been fully appreciated later. Those proposals have now greater significance in the context of the catalytic role envisaged for banks and other public financing institutions to increase the tempo of urban and rural economic development by adequately meeting the credit needs of the different sectors under a purpose-oriented allocation of credit.

3.1.109 Now we shall take up the transactions, particulars regarding which could be considered for filing in Book No. 1 maintained by the sub-registrars so that the register may become more meaningful and useful.

²¹Thirty-fourth Report of the Law Commission of India (1967), page 85.

(I) SPECIAL PROVISIONS RE. REGISTRATION OF SECURITY INTERESTS IN FAVOUR OF GOVERNMENT, BANKS AND OTHER PUBLIC FINANCING INSTITUTIONS

3.1.110 We have earlier referred to some of the provisions whereunder charges or mortgages created in favour of government, co-operative banks, land development banks and commercial banks are now allowed to be "registered" by following a special procedure which does not necessitate the formal presentment of any instrument or document in the manner ordinarily required for registration of documents under our Registration Act, 1908. We shall now consider the applicable registration provisions with reference to such governmental and bank charges.

(a) LOANS UNDER THE LAND IMPROVEMENT LOANS ACT, 1883

3.1.111 Dues in respect of loans granted under the Land Improvement Loans Act, 1883, are now treated under that statute as arrears of land revenue due in respect of the land for the development of which the loans have been granted. Hence, they are also a first charge on the land.¹ In view of this, any person acquiring an interest in the property without any knowledge of the existence of such a charge arising out of such development loan may be prejudicially affected if he is not put on notice thereof. Understandably, section 89(1) of the Registration Act now provides for the registering officer filing in Book No. 1 an order granting the loan under the Land Improvement Loans Act, 1883.

3.1.112 While no changes as such are necessary with reference to section 89(1) of the Registration Act, 1908, this provision serves to emphasize the logical necessity of registering in Book No. 1 similar charges arising out of the grant of loans for the development of the land by governmental authorities, banks or other public financing institutions.

(b) LOANS UNDER THE AGRICULTURISTS' LOANS ACT, 1884

3.1.113 Section 89(3) of the Registration Act, 1908, provides for a copy of an instrument of mortgage charging the immovable property of the borrower for a loan granted to him under the Agriculturists' Loans Act, 1884, being sent to the registering officer by the officer granting the loan. If the mortgage is not created by the instrument but created under the order signed both by the granting officer and

¹Vide A.I.R. 1965 Madhya Pradesh 40. Please see paragraph 2.1.170 of this report.

the cultivator under section 6 of the Agriculturists' Loans Act, a copy also of such order has to be filed in Book No. 1. Thus, it may be seen that the Registration Act provides now for filing in Book No. 1 copies of mortgage documents executed in favour of government. Now, in the Co-operative Societies Acts, the relevant provisions have extended the scope of such filing of copies with reference to mortgages executed in favour of land development banks.

3.1.114 We have earlier referred to the provisions in the Co-operative Societies Acts¹ which provide for a copy of the mortgage document being sent to the registering officer instead of going through the formal procedures as regards presentment of the deed, admission of its execution and other allied formalities.

(c) CO-OPERATIVE BANKS

3.1.115 While with reference to land development banks there are formal mortgage documents now obtained, as regards charges created in favour of co-operative credit societies, the security interest arises by means of a statutory declaration by a cultivator signing the prescribed form, a copy of which, as provided for in some States,² is sent for being "registered".

(d) DECLARATORY CHARGES IN FAVOUR OF CO-OPERATIVE BANKS

3.1.116 The Expert Group which went into the State enactments affecting commercial banks lending to agriculture has suggested a provision for agriculturists availing themselves of credit from commercial banks creating a security interest in their rights in the immovable property by means of a declaratory charge on the lines of the provisions now applied with reference to co-operative credit societies. While the declaratory charge in favour of co-operative credit societies is not, except in some States, registered with the concerned sub-registrar, the Model Law suggested by the Expert Group includes a provision to the effect that the declaratory charge in favour of a commercial bank may be registered by means of a copy of the document creating the declaratory charge being sent to the sub-registrar. The provision suggested would also cover mortgages executed by agriculturists in favour of commercial banks. The State legislation based on the Model Law has accordingly provided.³

¹For instance, section 122 of the Maharashtra Co-operative Societies Act, 1960.

²Andhra Pradesh and Tamil Nadu.

³Of the States which have enacted legislation based on the Model Law, only the Haryana State legislation does not appear to have this provision.

*“Registration” of the mortgage/declaration in favour of banks
securing rural credit*

3.1.117 The formalities which are normally required in respect of individual parties are not insisted in the case of transactions providing for security interests in favour of banks and other public financing institutions, evidently in view of the fact that when the mortgage document is executed in favour of a public financing institution like the land development bank the question of the genuineness of the document or of any doubt with reference to the passing of the consideration thereunder etc. will not ordinarily arise.

3.1.118 In all the above cases on receipt of the copy of the mortgage document in favour of the land development bank or of the form containing the statutory declaration made by the agriculturist how the registrar is to proceed in the matter is now provided for either in the Registration Act, 1908 or in Co-operative Societies Acts.

3.1.119 Evidently, the formal procedure for presentment of document, etc., cannot be applied in such cases. The possible method is only to file copies thereof or make appropriate entries in Book No. 1 with reference to the charges so created. For this purpose, section 89(3) of the Registration Act, 1908, has to be clarified to cover also the filing in Book No. 1 particulars of such charges in favour of both commercial and co-operative banks.

(e) ENTRY IN BOOK NO. 1 *re.* PARTICULARS OF MORTGAGE BY DEPOSIT OF TITLE DEEDS

3.1.120 Earlier in our review of the Real Property Security Law—General, we have pointed out that mortgage by deposit of title deeds should be allowed to be created *only* in favour of banks and notified public financing institutions. We have also therein recommended that there should be an entry in Book No. 1 of the mortgages so created in favour of banks and other lending institutions.

3.1.121 The feasibility of banks and other public financial institutions having recourse to mortgage by deposit of title deeds for agricultural purposes has also been pointed out by several committees commencing from the report of the Central Banking Enquiry Committee, 1931, though in the context of rural credit the scope for mortgage by deposit of title deed is not very much for reasons we have earlier explained. Pursuant to these recommendations there has been a gradual enlargement of the notified area which envelops substantially all taluka headquarters and towns in many States of our country.

3.1.122 Provision for entering in Book No. 1 particulars of mortgage by deposit of title deeds executed in favour of banks and other financial institutions would thus be of great benefit towards the extension of credit to the priority sectors both in urban and rural areas. Hence, we recommend that in section 89 a new sub-section may be added to provide for the sub-registrars being advised in a form prescribed, regarding particulars of mortgages created by way of deposit of title deeds in favour of banks and other financial institutions.

(II) GRANTS, PARTITION INSTRUMENTS, ETC., BY GOVERNMENT OR REVENUE OFFICIALS

3.1.123 In its sixth report the Law Commission of India had recommended the widening of the scope of section 89 of the Registration Act, 1908, to cover *inter alia* the filing in Book No. 1, or the entering of the particulars of partition instruments, grants, etc., made by government or revenue officials.¹ In order that the register may indicate, as far as may be, all material transactions affecting title to property, we recommend that the proposal for entering in Book No. 1 particulars of partition of land, grants of land, etc., made by government or revenue officials, may be accepted.

(III) DECREES AND ORDERS AFFECTING RIGHTS IN IMMOVABLE PROPERTY

3.1.124 With reference to the proposal for registering decrees and orders affecting rights in immovable property, there has been a good deal of discussion on this subject when the scheme of registration law was originally discussed in the Legislative Council. Though ultimately the proposal was dropped it is clear from the discussion that the value of entering in Book No. 1 also particulars of decrees and orders affecting immovable property was then clearly recognised. Actually, the ultimate reason which probably weighed with the legislature for dropping this proposal was not anything directly relevant now to the merits of the matter.

Mr. Stephen's reasons for non-registration

3.1.125 Mr. Stephen who had been associated with the drafting of the legislation had tried to explain, when there was a strong plea in the Legislative Council for providing for registration of decrees and orders of court affecting immovable property, the reason for not providing for this thus :

¹Clauses 42(1)(b) and 42(1)(d) of the draft for legislation suggested by the Law Commission of India in its sixth report.

“It did seem to him (Mr. Stephen) that a man who was accustomed to regard the Sarkar as the fountain of all power and authority, would find it difficult to understand why, when the Judge had given an order and written it upon stamped paper it was to be of no use unless he went to some other office and got it registered there by somebody else.”¹

Thus, it was then viewed that it might affect the dignity and respect for the courts if any orders or decrees were required to be registered before full effect was given to it.

3.1.126 Such considerations have no relevance in an independent country. Registration of decrees and orders affecting title to immovable property is required in order that people who may be subsequently dealing with the property have notice of the same and are not prejudicially affected by ignoring the existence of such decrees and orders.

Registration required in the U.K.

3.1.127 In the U.K., the Land Charges Act, 1972 (there was a corresponding provision in the Land Charges Act, 1925, which has been repealed by the 1972 Act) provides for the maintenance of a register of writs and orders affecting land, wherein any writ or order affecting land issued or made by any court for the purpose of enforcement of a judgment or recognisance, any order appointing a receiver or sequestrator of land, and any receiving order in bankruptcy made on or after 1st January 1926 are registered. The provision also goes to the extent of providing that unless the writ or order is for the time being registered as required by the provision, it is void against a purchaser of the land. These provisions have been of great beneficial use while investigating title to land. Evidently, no disrespect has been involved to the dignity of courts by such a provision having been in force in that country.

Earlier law in our country provided for registration

3.1.128 Even in our country, originally before the 1877 legislation, there was a compulsory requirement for registration of decrees and orders affecting land. Before the Legislative Council, arguing in favour of registration of all judgments of courts affecting immovable property, Mr. Chapman had urged :

¹Extract from the proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1871, page 335

“By the present law, the registration of these documents was compulsory, and the duty was imposed on the Court making the decree to send a memorandum of the substance of it to the Registrar. It was provided that the fees for registration were to be considered as costs, and paid in such way as the Local Government should direct.”¹

Paucity of funds

3.1.129 However, it was recognised that the provisions of the then law were not strictly adhered to and Mr. Chapman had fancied that the real cause for the same “had been the difficulty in obtaining, beforehand, the requisite funds”. Since he felt that, to have a perfect record of title to landed property, it was most advisable that such judgment should be registered, he suggested that the difficulty might be got over “either by credit being allowed, or by the Local Governments advancing the requisite funds, which would be repaid on the recovery of costs”.² If we take the view that copies of the decrees and orders of courts affecting land need only to be filed in Book No. 1 just like other transactions now filed under section 89, the necessity of special funds for registration of such decrees and orders of courts will not arise.

Lieutenant Governor's views

3.1.130 The value of having at one place a record which would reveal all the encumbrances or other transactions affecting title to land was also recognised by the then Lieutenant Governor who had observed in the Legislative Council that :

“he should look with extreme regret upon the abandonment of the attempt to bring together in one place and in one view all the burdens and incumbrances affecting any property. He thought it would introduce an element or great uncertainty, if a man who wished to ascertain what incumbrances there were upon any property, had first to proceed to the registry office to ascertain whether any deeds affecting that property existed, and then had to ascertain what kinds of decrees had been passed, it might be during many years back, in relation to that property. He did not understand that it was objected that the Courts would not obey the legislature ; but he thought that it was undesirable that the Courts in this country should have that extreme independence

¹Extract from the proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1871, page 327.

²*ibid.*, page 328.

which was affected by some of the superior Courts in England. He did not see why the Courts should not be required to send brief memoranda of their decrees to be registered; and if there was an insuperable difficulty in regard to such a course, he did not, as at present advised, see that it would be impossible to require the parties to a decree to register this brief memorandum themselves. Speaking as a Member of this Council who had not had an opportunity of going into the subject, he was inclined to vote in favour of the Hon'ble Mr. Chapman's amendment."

Why did legislature not insist on registration?

3.1.131 Then, why was the proposal for providing for registration of judgments affecting immovable property not carried out? This is best explained by what Mr. Stephen then observed :

"In the first place, it was a notorious fact, that the main object of the Bill was the prevention of fraud. An object which had been sometimes mixed up with that—namely, the object of procuring what English lawyers would call a complete registry of title—was *one of secondary importance*. Unless he was much misinformed, *the advantages of a complete title, in the form in which titles were required in England, were not known in India*. In England, if you wanted to buy a piece of land, you usually had to obtain a full history of all dealings with it for upwards of a generation, and this history was to be verified according to elaborate rules of evidence. That was by no means the case in this country. *A Native land-owner would probably not appreciate the benefits of English conveyancing*. In this country, when a man purchased land, he got a deed of sale, which might or might not be fraudulent and invalid, but he did not go into a history of the land as in England. The great object was the prevention of fraud in respect to sales of land. For that purpose an elaborate history of the land was not required. Now the facilities afforded for fraud by the non-registration of decrees of Court were not appreciable; for, on inspecting the records of the Court, you had evidence which could not be defeated that the Court did make such and such an order in respect to such land. The registration of decrees of Court was therefore considered necessary only in order to complete the history of the land. It was said that if you had registration of the decrees of Courts with regard to land you would secure a complete title. But even if you had such registration, could you be satisfied that you had

¹Extract from the proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1871, pages-329-330.

a complete history of all the transactions that ever took place in regard to that land? By no means. In order to get a complete title it would be necessary to register also all decrees and orders of the Revenue Courts made in respect to the land, and it would be necessary, further, to prevent conveyances of land by word of mouth. Unless all that was done it would be impossible to obtain a complete history of the land. Mr. Stephen was informed by some of the Judges of the High Court of the North-Western Provinces *that unwritten conveyances of land were common in those provinces*. Now, in a country so circumstanced, even if you wanted to have a complete registration of title, which was the only ground on which the registration of decrees could be considered necessary, you could not get it. All you wanted was to obtain the means of protection against fraud and that you would get by the registration of deeds affecting land. On that ground, therefore, the registration of decrees was not necessary.”¹
(emphasis added)

Now our scheme cannot be confined to such limited objectives

3.1.132 It may be readily seen, as envisaged by Mr. Stephen, that the limited objective of prevention of fraud with reference to certain compulsorily registrable documents has been the main objective of our registration law. This cannot now be regarded as the sole purpose of our registration scheme. While dealing with the creation of security interests in favour of banks, other public financing institutions and even other agencies, it cannot be said, having regard to the considerable value of urban property, that there is no necessity now for obtaining a full history of all the dealings in the land for a definitely long period in order to trace a good root of title. This is all the more so in the absence of a statutory provision (as now found in countries like the U.K. and Australia) indicating a ceiling which would ordinarily apply as regards tracing title over a length of period for establishing a good root of title. The assumption is also not now valid that people in our country do not appreciate the benefits of tracing title by the adoption of proper conveyancing practices. Even as regards agricultural and rural property in view of the multi-agency approach for lending to agriculture, in the context of term-lending requirement and in public interest, there is a great need for adequately strengthening our register by ensuring that a search in Book No. 1 would indicate, as far as may be, all charges and encumbrances on the land. It is in this context that we will have to consider the necessity of our registration law providing for the appropriate filing of decrees and orders of courts.

¹Extract from the proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1871, pages 333-334.

Present position

3.1.133 In the result, our Registration Act did not require registration of decrees or orders of courts affecting immovable property. On the other hand, it expressly provided that the provisions relating to compulsory registration of certain instruments affecting interests in land did not apply *inter alia* to “decrees and orders of Courts and awards”¹ The position continued to be so under the 1908 Act until in 1929 it was made clear that a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject matter to the suit or proceeding is not so saved. Then it was also provided that the decree or order of court or any award, the benefit of which is transferred or assigned by any non-testamentary instrument, also requires registration when the decree or order purports to affect an interest in immovable property of the value of over Rs. 100/-. The amendment in 1929 was to resolve a conflict of opinion whether or not an assignment of a mortgage decree for Rs. 100/- or upwards required registration.²

Setalvad Commission's recommendations

3.1.134 The Setalvad Commission had suggested certain changes in the provisions of our Registration Act relating to decrees and orders of courts affecting interests in immovable property. As regards non-testamentary instruments transferring or assigning any such decree or order of a court or award, it recommended exclusion of executable decrees and orders from the scope of section 17(1)(e).³ As regards assignment of award, the Setalvad Commission did not consider it necessary to be registered, since, under the provisions of the Arbitration Act, 1940, it amounts only to assignment of inchoate rights which could be enforced only by a decree of court passed in support of the award.⁴

3.1.135 Commenting on the present clause (vi) of section 17(2), the Setalvad Commission had observed that it—

“is a somewhat curious provision. It proceeds to create an exception to clauses (b) and (c) of sub-section (1) of the section in the case of certain *decrees or orders* of court, on the assumption that there is a provision requiring decrees or orders to be registered. But section 17(1)(b) and (c) refers only to non-testa-

¹Section 17(i) of the Indian Registration Act, 1877.

²Mulla on Indian Registration Act, 7th edn. (1968), Tripathi Private Ltd., page 76.

³Sixth Report of the Law Commission of India (1957), paragraph 32.

⁴*ibid.*, paragraph 33.

mentary instruments, and a decree or order cannot by any stretch of language be said to be a non-testamentary instrument. This clause was amended in 1929 to get rid of the effect of the decision in Hemantakumari's case¹ which laid down that where there is a compromise which is recorded and made a decree of the court, whether the property covered by the compromise relates to the subject-matter of the suit or is outside it, there is no need to register the compromise as it is exempted under section 17(2)(vi)."²
(*emphasis added*)

3.1.136 That Commission suggested the omission of clause (vi) of section 17(2) since it considered it "unnecessary to insist that a decree or order of a court relating to immovable property outside the suit should be registered and it would be sufficient ... if a copy of such decree or order is sent to the Sub-Registrar having jurisdiction under section 89 of the Act".³

Kapur Commission's views

3.1.137 The Kapur Law Commission, which considered the comments received on the Setalvad Law Commission's report, had expressed that the suggested changes regarding decrees and orders of courts relating to immovable property are linked with the proposal of the Setalvad Commission to extend the scope of existing section 89. Since the Kapur Commission was not then in favour of widening the scope of section 89, the related changes as regards registering decrees and orders of court relating to immovable property on the lines recommended by the Setalvad Commission were not considered necessary.⁴

Our views re. decrees and awards

3.1.138 In our view, the provision recommended by the Setalvad Commission with reference to decrees and orders of courts relating to immovable property merits implementation. To sum up the major reasons, registration of decrees and orders relating to immovable property under a simple procedure by providing for the filing of copies thereof in the relevant sub-registries where the properties are situate would obviate all difficulties earlier envisaged with reference to registration of such decrees and orders. It would also be inexpensive as

¹Hemantakumari vs. Midnapur Zemindary Co., 47 Cal. 485 (495-496) C.

²Sixth Report of the Law Commission of India (1957), paragraph 39.

³*Ibid.*, paragraph 39.

⁴Thirty-fourth Report of the Law Commission of India (1967), page 85.

the procedure relating to admitting a document for registration will not be applicable and personal presentment is dispensed with. Such a step will rationalise our registration scheme and make the register more useful. The measure would be in line with the provisions found in other countries also. Compared to the obvious advantages for such registration by means of filing, the possible increase of some administrative workload should not be a deterrent and when proper O & M methods are applied, the administrative pressure could be eased. Hence, we recommend that the scheme of section 89 of our Registration Act should be widened to cover also filing in Book No. 1 decrees and orders of court relating to immovable property.

3.1.139 We do not consider that awards relating to immovable property need not be required to be registered as such registration provides the means whereby without any trouble the register is made complete. Though an award relating to immovable property may *per se* create only inchoate rights, it is in a higher status than a mere pending action, about which we are dealing later. Hence, an award should also be included in the scope of the transactions affecting immovable property which are required to be filed or entered in Book No. 1.

(f) SALE CERTIFICATE ISSUED BY COURTS, BANKS AND OTHER FINANCING INSTITUTIONS *re.* SALE IN PUBLIC AUCTION

3.1.140. Sub-sections (2) and (4) of section 89 provide for a civil court, or a revenue-officer, as the case may be, sending a copy of a certificate issued with reference to any sale by public auction of immovable property, to the registering officer and for the registering officer filing the copy in Book No. 1. Corresponding to this provision, section 17(2)(xii) provides an exemption as regards such certificates of sale from the requirement as to registration of instruments. Thus, the filing provisions of our registration scheme *already* cover certificates of sale issued to auction purchasers regarding immovable property sold in public auction held by a civil court or a revenue officer. These provisions should cover also sale certificates issued by all public officers with reference to immovable property sold in public auction conducted by them.

Direct sale by commercial and co-operative banks

3.1.141 There are circumstances when commercial and co-operative banks, when they are authorised under the statute, may exercise the power of direct sale of the property charged to them.

Re. land development banks

3.1.142 There are statutory provisions now governing the sale of mortgaged property by land development banks pursuant to the exercise of the power vested in them to proceed against the property without the intervention of the court.

Maharashtra Act

3.1.143 Section 133 of the Maharashtra Co-operative Societies Act, 1960, enables the land development bank, notwithstanding anything contained in the Transfer of Property Act, 1882, to bring the mortgaged property to sale by public auction in the village in which the mortgaged property is situate or at the nearest place of public resort without the intervention of the court. The sale is to be confirmed by the State Land Development Bank with the approval of the Registrar of Co-operative Societies. After the confirmation of the sale, the land development bank grants a certificate to the purchaser in the prescribed form, certifying the property sold, the sale-price, the date of its sale, the name of the person who at the time of the sale is declared to be the purchaser, and the date on which the sale became absolute. The contents of such certificate are then required to be entered by the Sub-Registrar of Assurances "in his register relating to immovable property".¹

Need for similar provisions re. direct sale by all banks

3.1.144 There is need for clear-cut provisions with reference to all cases of auction sales of immovable property held by commercial and co-operative banks pursuant to the exercise by them of the right of private sale without the intervention of court. The purchaser in all such cases may be issued a certificate of sale and particulars of such certificate may be required to be furnished to the registering authorities in the prescribed form to be entered in Book No. 1 on the lines now provided for auctions conducted by land development banks.

(g) VESTING ORDERS AFFECTING IMMOVABLE PROPERTY

3.1.145 The Setalvad Law Commission wanted to provide for the filing of the required particulars of vesting orders affecting immovable property, though the provisions suggested related only to—

- (a) an order under the Charitable Endowments Act, 1890, vesting any property in a treasurer of charitable endowments or divesting any such treasurer of any property; and

¹Sections 133, 134 and 136(1) of the Maharashtra Co-operative Societies Act, 1960.

- (b) a composition deed accepted by a court in insolvency proceedings.

3.1.146 The logic of the suggested provisions would, with equal force, cover also all vesting orders issued in insolvency or bankruptcy proceedings where immovable property is comprised within the scope of the vesting order.

Position in other countries

3.1.147 Under the land Charges Act 1972 of the U.K., any order appointing a receiver or sequestrator of land or receiving order in bankruptcy made after 1925 is required to be registered and such registration remains effective for five years and renewable for a like term. Also an assignment of a debtor's property in favour of the general body of creditors and evidenced by a deed or arrangement whereby control over the debtor's property is given for the benefit of his creditors generally is required to be registered.

3.1.148 We consider that the provisions relating to filing in Book No. 1 should cover also vesting orders affecting immovable property, as otherwise the register will be silent on a very vital matter which affects radically the title to the immovable property as a result of the same having been vested in the Official Receiver/Assignee/Liquidator. The Official Receiver or Assignee or Liquidator may be statutorily obliged to furnish to the concerned Sub-Registrar of Assurances particulars of the immovable property comprised in the property of the insolvent so that the fact that the Receiver or the Assignee or the Liquidator is the person who has the legal custody of the property may be made clear to persons dealing with the immovable property.

(h) *Lis pendens*

3.1.149 The result of a pending judicial action relating to immovable property affects the parties to the suit and those claiming under them irrespective of any notice of such action to persons who may have acquired an interest in the immovable property from any of the parties to the suit or their legal representatives, but in ignorance of the pending action. The provision relating to *lis pendens* is found in section 52 of the Transfer of Property Act 1882. However, the position in Gujarat and Maharashtra is different in the sense that in those States the result of a *lis* binds such innocent parties only "if a notice of the pendency of such suit or proceeding is registered under section 18 of

the Indian Registration Act, 1908".¹ In those States the notice is filed in Book No. 1 by the registering authorities. A person taking a search of the same naturally has thus the means of discovering the pendency of the *lis*.

3.1.150 The Setalvad Law Commission had also recommended a provision for filing in Book No. 1 particulars of *lis pendens* with a view to its application to all the States in India. In other countries also there is a provision for registering pending actions concerning real property.

Position in the U.K.

3.1.151 In the U.K., under section 5 of the Land Charges Act, 1972,² the Land Registrar maintains a register of pending actions wherein the particulars of pending land actions are required to be recorded. A pending land action does not bind a purchaser without express notice of it unless it is registered for the time being under the Act. The effect of such "registration ensures that if the owner disposes of the land before the action is decided the new owner will be bound by the claim. For equitable claims, registration has the advantage of ensuring that third parties have notice, and for legal and equitable claims alike it avoids the penalties of non-registration. Registration lasts for five years; if the case has not then been decided, registration may be renewed for successive periods of five years."³

Position in Australia

3.1.152 In Australia the State enactments provide for registration of *lis pendens*. For instance, in New South Wales, under section 188(1)(b) of the Conveyancing Act, a *lis pendens* may now be registered in the register of causes, writs and orders affecting land. The registration is effective for five years and may be renewed. A *lis pendens* not so registered does not bind a purchaser for value without notice and no purchaser is affected with notice by an omission to make an enquiry or search other than a search in the register of causes, etc., or the general registry of deeds.⁴

¹Bombay Act No. 4 of 1939 amending section 52 of the Transfer of Property Act, 1882, in its application to the then State of Bombay.

²There has been a similar provision under the Judgments Act, 1939 and under the Land Charges Act, 1925 of the U. K.

³The Law of Real Property, Megarry and Wade, 4th edn. (1975), Stevens & Sons Ltd., page 1037.

⁴The Law of Real Property in New South Wales, Helmore, 2nd edn. (1966), Law Book Co. Ltd., pages 179-180.

Views of the Setalvad Law Commission

3.1.153 The Setalvad Law Commission had suggested the filing of particulars relating to *lis pendens* which would have applied to all the States in our country. The provisions suggested by the said Commission would require every court ordering the admission of a plaint or memorandum of appeal, in which an interest in, or right or title to, immovable property is in controversy, to send, to every registering officer within whose jurisdiction any part or item of the property is situate, a copy of the plaint or memorandum of appeal, as the case may be, with such other particulars as may be prescribed. The registering officer was required to file the copy in Book No. 1.¹

Distinction between Maharashtra/Gujarat position and the Law Commission suggestion

3.1.154 The provisions suggested by the Setalvad Law Commission differed from the provisions now in force in the States of Maharashtra and Gujarat with reference to registration of *lis pendens* in that the obligation to register is cast on the parties to the proceeding under the provisions in Maharashtra and Gujarat, whereas the provisions suggested by the Setalvad Law Commission foisted the obligation to send a copy of the plaint or memorandum of appeal on the court. Evidently, in view of this fact, there has been considerable opposition to the Setalvad Law Commission's proposal as regards the ability of courts to effectively comply with the requirements of the suggested provisions.

Views of the Kapur Law Commission

3.1.155 On the suggestion with reference to the court sending to the sub-registrar of assurances copies of plaints or memoranda of appeal, several comments were received by the Kapur Law Commission which had summarised them as under :

- (i) One line of criticism is, that the proposed amendment will throw enormous work on courts and registering officers, without any substantial advantage or benefit to the public. It would, it is stated, serve no useful purpose, and increase ministerial work.
- (ii) Regarding plaints and memoranda of appeal, it is pointed out, that the process of sending out copies involves immense trouble and expenditure, and will encumber the record of the

¹Clause 42(2) and (3) of the draft Bill suggested by the Law Commission of India (1957).

registering officers. A plaint or memorandum of appeal is only a preliminary stage of the proceedings and its transmission to the registering officer will be meaningless.

- (iii) Besides these objections, a few points of detail have been also made in the comments. Thus, one comment says that courts and officers fail to send copies for years, and that, therefore, a time limit of four month should be laid down.
- (iv) An alternative suggestion is that if copies of *decrees* passed after adjudication are sent to the Registration Department, the purpose will be served.
- (v) It has also been suggested, that these changes may be replaced by a simple provision requiring copies of order of courts directing *attachment* of immovable property to be registered.¹

In view of these, the Kapur Commission had expressed that the suggested provisions "dealing with plaint and memorandum of appeal, will have to be *dropped*".² (emphasis added)

Study Group's questionnaire

3.1.156 Subsequently, the Study Group set up by the Banking Commission to review legislation affecting banking had elicited through its questionnaire the views of banks, other public financing institutions and governmental authorities on the necessity or desirability of providing for the means by which the lending institution could ascertain the existence or otherwise of any pending litigation relating to the immoveable property to be charged. In particular, it had referred to the provisions now found in Gujarat and Maharashtra and had suggested for consideration the extension of similar provisions throughout our country.³

Banking Commission's views

3.1.157 While dealing with advances against immovable property, the Banking Commission had recommended the examination of the facilities available for investigation of title in general, "and the ascertainment of encumbrances on land, notice of *lis pendens*, etc. in particular".⁴

¹Thirty-fourth Report of the Law Commission of India (1967), pages 83-84.

²*ibid.*, page 86.

³Questions Nos. 15.3.1 and 15.3.2 of the Study Group's questionnaire.

⁴Report of the Banking Commission (1972), paragraph 21.50.

Views on the questionnaire

3.1.158 We have had the benefit of the comments received from several banks, concerned government authorities and other interested persons. Almost all the views received are practically unanimous in stressing the necessity for a provision which would help to indicate by appropriate filing in the books maintained by the sub-registrar of assurances the existence of any pending *lis* likely to affect the immovable property. Generally, the views have favoured provisions now in force in the States of Gujarat and Maharashtra.

Gujarat and Maharashtra provisions

3.1.159 In Gujarat and Maharashtra, the amendment to section 52 of the Transfer of Property Act, 1882, makes the operation of the doctrine of *lis pendens* subject to the registration of a notice given in the prescribed form. The advantage of this provision is that it is not the burden of the courts to furnish the particulars to the registering authorities. The purchaser acquiring the property in good faith will not be affected by the result of the *lis pendens* if no such registration has been made. Such a provision is by and large in line with the requirements of the law in the U.K. and Australia, to which we have referred earlier.

Our views

3.1.160 It is necessary to provide for registration of *lis pendens*. We recommend that provision may be made for filing in Book No. 1 particulars of pending actions on the lines now required to be filed in the States of Gujarat and Maharashtra. For this purpose, on the lines of the provisions applicable in those States section 52 of the Transfer of Property Act may be amended so as to be applicable to all the States.

(7) PRIORITY FROM DATE OF REGISTRATION OR DATE OF EXECUTION ?

3.1.161 Earlier we have considered the question of reducing the period between execution of the document required to be registered and the date before which it should be presented for registration. But a proposal for reducing the period made earlier by the Setalvad Law Commission had evoked comments which were not favourable. Though we have felt the necessity for reducing the period between execution of a document and its registration, in view of the difficulties pointed out by the comments earlier received on the proposal, we have recommended a provision which would enable a person obtaining an interest in immovable property to lodge immediately with the sub-registrar of

assurances a *priority notice* in the prescribed form, on receipt of which the sub-registrar may make a provisional entry in the property register regarding the service of such notice. Earlier, we have also recommended that if this is complied with, the priority for that transaction may relate back to the date of the lodgement of the priority notice, subject to the presentment of the document for registration within the time now allowed. As a consequence thereto, it is necessary to provide that where a person does not so protect his interest by lodging a priority notice, it shall be provided that his interest in the land shall take effect only from the date of registration and not from the date of execution. For this purpose, the present section 47 of our Registration Act, 1908, has to be suitably amended.

It is date of registration that should be important

3.1.162 In support of the view that it is ordinarily the date of registration and not the date of execution which should be relevant for determining the priority as regards transactions affecting interests in immovable property, we may refer also *inter alia* to the earlier registration law that prevailed in our country, the present position in other countries like the U.K. and Australia, the reasons which weighed with the Setalvad Law Commission for suggesting reduction of the time gap between execution and presentment of documents for registration, and the inordinate delay now found in the registration of documents by reason *inter alia* of the several other formalities now required to be complied with pursuant to the requirements of the Income-tax law, the Urban Land Ceiling legislation, etc.

Our earlier law decided priority as per date of registration

3.1.163 Our registration law originally provided priority to registered documents from the date of their registration and not from the date of their execution. The effect of Bombay Regulation IX of 1827 which provided for this was continued under Acts I and XIX of 1843. But the position was changed under the Registration Acts XVI of 1864, XX of 1866, VIII of 1871 and III of 1877. Our present provision under the 1908 Act has preserved the position that prevailed in 1877.¹

Bombay Regulation IX of 1827

3.1.164 The Bombay Regulation IX of 1827 had provided that "every deed or other writing transferring or mortgaging immovable property situated within the Zilla, if registered in the register of title-deeds,

¹vide Indian Registration Act, 1908, Desai Narotam, 4th edn. (1909), pages 72, 73 and 204.

shall, *without regard to the date of execution*, if proved to be valid, be preferred to, and satisfied before, any deed of the nature of those specified in section 3, Clause First either subsequently registered or not registered at all; but the preference shall extend only to the immoveable property thereby transferred or mortgaged;”¹ The reasons for the change in the position under the 1864 Act are not clear.

The U.K. law emphasises date of registration

3.1.165 In the U.K., priorities as between mortgages are determined under the Law of Property Act, 1925, according to the date of the registration of the charges under the Land Charges Act, 1925² (now replaced by the Land Charges Act, 1972). The solitary exception is with reference to mortgage by deposit of title deeds.

Date of registration emphasised in Australia

3.1.166 The Australian position also prefers the date of registration to the date of execution of a document which is required to be registered. Instruments duly executed bona fide for valuable consideration, and registered under the Registration of Deeds Act or any other Act repealed thereby, take priority, not according to their respective dates, but according to the priority of registration.³ Helmore has observed that “registered instruments in respect of, or affecting, the same estate or interest, notwithstanding any express, implied, or constructive notice, are entitled to priority the one over the other according to the date of their registration and not according to the date of each instrument itself.”⁴

Views of the Setalvad Law Commission

3.1.167 The Setalvad Law Commission, though it did not suggest any change as regards section 47 of the Registration Act which now provides for a document taking effect on registration from the date of its execution, had nevertheless pointed out the necessity for reducing the time gap now allowed for presenting a document for registration. It had observed that “the period of four months provided for presenting documents for registration should be reduced to one month. This

¹Section 6.

²Section 97 of the Law of Property Act, 1925, of the U.K.

³Section 12 of Act No. 22 of 1897 of New South Wales.

⁴The Law of Real Property in New South Wales, Helmore, 2nd Edn. (1966), Law Book Co., page 377.

would reduce the opportunities to bring ante-dated deeds into existence. It is also desirable that registration should be prompt.¹ However, as we have earlier indicated, the suggestion for reducing the period now allowed for presenting documents for registration was not pursued.

Delays in registration after presentment of documents

3.1.168 We are not merely concerned with the time gap now allowed for presenting documents for registration. We have also to take into account the fact that, with reference to transactions affecting immovable property, often there is considerable delay in the registration of documents even after they are presented for registration. While we are considering later the extent to which occasion for such delays could be obviated or reduced, we may here indicate that the period for which registration of documents is delayed while they are in the custody of the registering officer is considerable, though such delays may be due to the act or default of the parties in complying with any of the other requirements that they are now required to observe. For instance, we understand that in a place like Bombay, by reason of the non-production of the income-tax clearance certificates required under section 230A of the Income-tax Act, 1961, documents presented for registration in the year 1963-64 are still awaiting registration in the year 1977. It may here be observed that only *after* particulars of the documents are indexed in the index relating to Book No. 1, a search of the register will indicate the particulars of such transactions. Nevertheless, once the income-tax clearance certificates are produced by the parties concerned, these documents, which had already been admitted for registration would be entered in the register and thereafter they will take effect so as to rank in priority over all the transactions that might have taken place in the years since these documents were executed.

Need for priority based on registration of document or priority notice

3.1.169 The foregoing indicates the necessity for compulsorily registrable documents or transactions relating to creation of security interests taking effect from the date of their registration and not from the date of their creation. However, it may cause hardship to parties if the present provision in the Registration Act, which has been in our statute book for nearly a century, is now altered suddenly to provide for the determination of priority based only on registration. Section

¹Sixth Report of the Law Commission of India (1957), paragraph 49. Please also see paragraph 73 of the Report.

47 of our Registration Act and section 48 of our Transfer of Property Act, which are the relevant provisions in this regard, may have to be suitably altered to provide that—

- (a) priority as regards registered documents or registered secured transactions relating to an interest in immovable property shall be determined only from the date of registration and not from the date of their execution; and
- (b) if, however, the persons claiming under such document or transaction have registered a priority notice on the lines earlier recommended by us, priority as regards the transaction shall take effect from the date of registration of such priority notice, subject to the presentment of the document for registration within the specified time and the parties to the transaction complying with the requirements of any other law for the time being in force as regards registration of documents or secured transactions.

(8) REGISTRATION PROCEDURES

3.1.170 The present registration procedures for our country were originally developed nearly a century ago and they have continued without any substantial modification. Now the registration machinery is utilised not merely for the limited object of ensuring the genuineness of documents registered but also to serve several allied important functions. The ability of this machinery to aid investigation of title is one such important function. It is also now utilised to ensure that persons who are having property do not transfer it in a manner that would render it difficult for the State to recover their claims against the property-owner as regards his income-tax dues. The machinery also provides a check to aid the implementation of the policy of socialisation of urban land under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976. Hence, the value of this registration machinery has grown considerably and today it serves not merely the interests of parties to registered transactions but also the broader objectives of national policy. It is in this context that we have to refer to the need for considering all possible measures to eliminate, as far as they could be, the delays that occur in the working of this machinery and the need for introducing necessary legal and procedural changes for this purpose. Now the delays that occur with reference to registration of instruments affecting interests in land may be classified as delays at the pre-registration stage and those at the post-registration stage.

Pre-registration delays

3.1.171 The pre-registration delays with reference to registration of documents generally take place under the following circumstances:

- (a) furnishing of certificates under section 230A of the Income-tax Act, and
- (b) the obtaining of no objection certificate from the competent authority under the Urban Land Ceiling Act.

Under both the above cases, the documents are now admitted to registration since the parties have complied with all the requirements of the Registration Act but actual registration is deferred pending the production of the necessary certificates of clearance. At least with reference to the production of income-tax clearance certificates now there is inordinate delay and in a place like Bombay, as we earlier said, documents presented in 1963-64 are still awaiting registration. The value of the register will be considerably impaired if the register is not to indicate the pendency of such documents awaiting registration.

Need for provisional entry in the register

3.1.172 In view of the above, we recommend a statutory provision to the effect that, on the date a document is admitted for registration if it could not be registered that day itself, the sub-registrar of assurances should be required to file, as per a prescribed pro-forma, in Book No. 1, brief particulars about the document, which may be required to be furnished by the parties and verified by the sub-registrar. This would indicate to persons taking a search of the register about the pendency of such documents awaiting registration and would enable them to take care of their interest adequately. We consider such a provision is urgently required. Even as regards documents now pending registration and which come under this classification, the sub-registrars may be required to make such an entry in Book No. 1 *suo motu*. When the documents are finally registered, a *cross reference* should be given in the entry in Book No. 1 and the form so filed to the registration number and the date on which these documents are actually registered. Thus, a person taking a search and seeing a provisional entry would also come to know whether or not the related document has been actually registered subsequently.

Post-registration delays

3.1.173 Post-registration delays may contribute to retard the pace of subsequent transactions with reference to the immovable property. They may also at times prejudicially affect the interest of lending institutions. One feature of post-registration delays to which we shall

refer relates to a form of delay that takes place in places where there is in force the photocopying system of documents admitted to registration.

Photocopying of documents

3.1.174 Part XI-A of the Registration Act deals with the photocopying of documents and is now applicable only in a few States.

3.1.175 The said Part was introduced in the erstwhile State of Bombay under section 3 of the Indian Registration (Bombay Amendment) Act, 1930, which came into force from 4th September, 1930. Now the provisions of this Part are applicable to the States of Gujarat and Maharashtra.

Suggestion to extend photocopying scheme

3.1.176 The Kapur Law Commission had received comments favouring extension of the procedure for copying documents by photography also to areas that may be notified in other States. That Commission had considered this as a useful suggestion and expressed that it might be accepted. Accordingly, the Commission had suggested insertion of a new clause after clause (gg) of section 69(1) of the Registration Act so that the relevant provisions providing for photocopying of documents may extend throughout the country.

Delays experienced now

3.1.177 Ordinarily, photocopying of documents should facilitate expeditious completion of the registration. However, the experience gained under the working of the provisions relating to the photocopying procedure now in force in Maharashtra has shown that ordinarily it takes about *two years* before the copying work is completed with reference to any document sent to the photocopying establishment at Pune which is handling this work. We have also earlier referred to the concern expressed by the conveyancing practitioners regarding the inordinate delay that is now the general feature of the photocopying process.¹

3.1.178 We have tried to ascertain the reasons for such delay and we learn that the delay is attributed to the paucity of the material necessary for making such photocopies.

¹vide paragraph 3.1.13 of this Chapter.

Now delay in photocopying affects flow of credit

3.1.179 Again, this comes in the way of those acting for credit institutions expeditiously completing investigation of title with reference to land regarding which the relevant documents might have gone to the photocopying registry. On the other hand, the locking up of the original documents for such a long time with the photocopying registry precludes the concerned borrowers from availing themselves of credit from banks and other financing institutions by way of mortgage by deposit of their title deeds.

3.1.180 The consequence of such inordinate delay in the photo copying process is best illustrated with reference to registration under section 30 of the Registration Act. If the property is in Madras and the registration of the document is effected in Bombay under section 30(2) with reference to an encumbrance created on the property, for the Registrar of Assurances of Bombay to send to his counterpart in Madras a memorandum relating to, or a copy of, the document so registered, it would take at least two years. During this period, if the owner of the property avails himself of credit by securing the said property to a bank in Madras, the search which the bank may be taking in Book No. 1, maintained by the sub-registrar in Madras, with reference to the said property will not reveal the encumbrance created in Bombay. It is in view of this that with reference to registration under section 30(2) Explanation I to section 3 of the Transfer of Property Act applies the doctrine of constructive notice only from the date when the memorandum is filed in Book No. 1. But this by itself does not help the bank in Madras which would lose its priority to the person claiming rights under the encumbrance created in Bombay. Thus, there is a situation where for a couple of years a registered encumbrance does not come into the books and knowledge thereof is not made available to persons who may be subsequently dealing with the property because of the delay in the photocopying process.

Nced to eliminate delays in photocopying

3.1.181 Since the photocopying system has been introduced to expedite the copying process which in other places is generally used to be done by manual application, it will be defeating the purpose of the scheme if the delays experienced presently in the photocopying of documents are allowed to continue. Hence the State Governments who have introduced the photocopying system may consider the reasons for such delays and try to eliminate them. This is all the more necessary as this procedure is considered for extension throughout the country.

(9) BASIS FOR THE LEVY OF REGISTRATION CHARGES:

3.1.182 While on the subject of investigation of title and our registration law, we have perforce to refer also to the accepted basis on which the registration charges rest and the disregard in actual practice by the State Governments of such basis while framing their schedule of charges for registration.

Undesirable effects of high registration charges

3.1.183 We have to refer to the basis for the levy of registration charges since registration rates or charges are not related to the basis. On the one hand, it unnecessarily adds to the cost of credit, and, on the other, it really does not help the State Governments since knowledgeable persons and sufficiently creditworthy persons may create security interests in their immovable property either by availing themselves of credit from banks and other financing institutions by mortgage by deposit of title deeds and thus in effect avoiding both the stamp duty and registration charges that they may otherwise have to pay, or by registering, under section 30 of the Registration Act, the documents outside the State where the property is situate and at a place where the rates are comparatively low. In other words, the incidence of the burden of registration charges essentially falls only on not-so-very well-to-do persons who are now not in a position to avail themselves of credit by having recourse to such inexpensive methods.

Registration charge, a fee and not a tax

3.1.184 When the registration scheme was originally provided for under our statutes, it was made clear that there was no desire to make it as a source of revenue to the State and that the scale of fees should be fixed with a view to recover *only the cost of registration*. But the rates now charged for registration in several States do not support such view.

Government's assurance before the legislature

3.1.185 Before the Legislative Council, Mr. Ellis had observed that—
 “.....he thought that it was not proper that these registration fees should be regulated so as to form a source of revenue, or that they should be expended on any object other than that for which they were raised.”¹

¹Extract from the proceedings in the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1871, page 331.

Referring to this discussion, Sir Richard Temple had then observed that—

“.....if it was merely meant that there was no desire to make a revenue, then he thought the Members of the Government of India would be able to express their *entire concurrence*. Of course, it was known that the scale of fees was fixed with a view to recover the cost of registration.”¹

(*emphasis added*)

Decision in Delhi Cloth Mills' case

3.1.186 The fact that the registration charges should be regarded only as a fee related to the service rendered and should not be regarded as a source of revenue for the State has also been affirmed by the Punjab High Court in *Delhi Cloth and General Mills Co. Ltd. and others vs. The Chief Commissioner and the Sub-Registrar*.² In this case, a debenture trust deed to secure Rs. 2.5 crores was presented to the sub-registrar for registration in Delhi. The sub-registrar demanded Rs. 1,25,157.50 as registration fee in accordance with the scale of fees then in force in the Union Territory of Delhi. This demand was challenged in the Circuit Bench of the Punjab High Court at Delhi by a writ application under Articles 226 and 227 of the Constitution.

3.1.187 The High Court allowed the application holding that the demand in the instant case was not a fee but in its very nature was a tax. The High Court has *inter alia* observed:

“There is no reasonable co-relation between the fee levied and the cost of maintenance and administration of the registration department. To illustrate, a document running into several pages may be liable to a nominal fee whereas a document running into a single page may be liable to an exorbitant fee.Moreover, this may happen in the case of the same individual when he goes to the registration department with two documents; one chargeable to a nominal fee and the other to an exorbitant fee under the prescribed scale. It is also clear that the Act has no relation with the capacity of an individual to pay. This is being stated pertinently because certain fees may be justified if their imposition has something to do with the capacity of the individual to pay but all fees cannot be justified on that basis. For that purpose one has to keep in view the purpose and the object of the Act. In the present case the purpose and object of the Act have no relation to the paying capacity of an individual.

¹Extract from the proceedings of the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1871, page 332.

²A.I.R. 1964 Punjab 492.

In view of the fact that the registration fee is credited to the general revenues of the State without distinction, a fact from which there is no escape on the material on the record, it must be held that the fee demanded is not a fee but a tax."

3.1.188 In the above view, the Punjab High Court directed the Government to refund the amount of Rs. 1,25,157.50 excepting such amount as may be payable as registration fee. Since the appropriate fee could not then be determined the High Court directed that the amount be refunded subject to the condition that the petitioners will pay to the sub-registrar such amount as is prescribed by lawful rules that may be made in this behalf prescribing fees for registration of such documents.

Revised table of fees in the Union Territory of Delhi

3.1.189 Subsequent to the decision in the Delhi Cloth Mills' case, the Delhi Administration has revised the table of fees leviable under section 78 of the Registration Act, 1908, and this has come into force from 7th May 1964. As per this table, with reference to optionally registrable documents relating to immovable property the registration fee is only Rs. 2. As regards compulsorily registrable documents (other than leases of immovable property), the table has indicated a schedule of fees and the maximum payable is only Rs. 100.

Recourse to section 30 procedure

3.1.190 We have earlier referred to the fact that unduly high registration charges (which include stamp duties, no doubt) result in knowledgeable parties having more recourse to mortgage by deposit of title deeds. But even where there is a deed and it has to be registered, knowledgeable persons are able to avoid payment of heavy registration charges by having recourse to section 30 procedure.

3.1.191 Consequent on the revision of the schedule of registration fees with a ceiling of Rs. 100 per a compulsorily registrable document, the registration fee payable in the Union Territory of Delhi has come to be comparatively low. For instance, *ad valorem* registration fee now levied is on a graded slab scale for registration of compulsorily registrable documents in a range which varies from 1% to $\frac{1}{2}$ % in Maharashtra and which is around 3% in Tamil Nadu. This naturally provides an incentive for persons presenting documents for registration with reference to property situate in other States to have recourse to the procedure outlined in the Registration Act in section 30 for registration of such documents with the Presidency Registrar at Delhi pursuant to that section and thus effect a considerable saving in their payment of registration charges.

3.1.192 The above only goes to show that by having a scale of registration fees which is disproportionate to the services rendered, the concerned States may not be acting in conformity with law. The requirement for the payment of high registration charges may not also be considered equitable. This is because while affluent persons with expert legal advice may register, under section 30, the document with the Registrar of assurances of a State where the scale of fee is much lower, persons who do not have such means or advice are now obliged to pay exorbitant registration fees.

3.1.193 It has been pointed out that when a document relating to an immovable property situate outside the State is presented to a Registrar of Assurances for registration under section 30 of the Registration Act, 1908, the registration of such a document is at the discretion of the Registrar. But this is not an adequate safeguard and generally it should not be very difficult for persons desiring to present such documents for registration, under section 30 to adduce some reasons which may plausibly appeal to the concerned Registrar, such as having the document executed at Delhi (where we understand the stamp duties are also comparatively low).

Our recommendation

3.1.194 In the light of the above, we recommend that the State Governments may consider the scale of registration fee now levied and appropriately reduce it so that the registration system, which requires to be further strengthened and which now serves many useful purposes, may work with fairness to all and develop further as an effective instrument for helping government and public financial institutions in purveying credit more effectively.

Link-up between Book No. 1 and Record of Rights

3.1.195 In the chapter on "Title Registration—Necessity and Feasibility", we are considering the necessary features of the scheme for our country for developing a title registration scheme. In that chapter, we are pointing out the necessity for revising our Record of Rights so that it may serve effectively the role of a title register. We are also therein indicating the necessity for the farm-title passbook being made to serve as a basic document of title and as a land title certificate. But so long as we have a scheme for registration of deeds and we maintain a property register (Book No. 1) with the sub-registrars of assurances pursuant to the provisions of our registration law, there has to be proper co-ordination between the entries in Book No. 1 and the entries in the Record of Rights. At present, the sub-registrars are required to advise the revenue authorities regarding registration

of documents affecting the land situate in their respective jurisdiction. This procedure will have to continue on a firmer basis under statutory requirement, until the Record of Rights finally takes shape as a perfect title register and until we gain adequate experience in the working of the title registration scheme. Hence, we recommend that the maintenance of the property register with the sub-registrars of assurances may be continued after affecting the changes we have suggested in this chapter for broad-basing the scope of the property register, until a title registration scheme is fully developed for our country and we gain sufficient experience in the working of that scheme. Thereafter, the necessity or otherwise of continuing the property register, as now provided for in our registration law, may be reviewed.

CHAPTER 2

REGISTRATION OF TITLE — NECESSITY AND FEASIBILITY

In the previous chapter we mentioned that Shri T. A. Pai's suggestion for facilitating transfer of rights in real property just like shares or other securities echoes the principle underlying the legislation in other countries which assimilates, as far as possible, the law relating to *registration of title* as applied to movable assets like shares and scrips to the law relating to registration of title to land. We do not derive the full economic advantages of having a registration law in our country unless and until the law develops to the stage of evolving a title registration scheme appropriate to the socio-economic conditions prevailing in our country.

Economic gains of title registration scheme

3.2.2 In the countries where a title registration scheme has been successfully developed, security interest in immovable property is made more liquid and such security is enabled to fulfil most effectively the functional role of security in any scheme of credit planning. Both in the context of urban property and agricultural lands, the positive advantages that will accrue from the development of a title registration scheme are very considerable.

TITLE REGISTRATION ESSENTIAL FOR RURAL CREDIT EXTENSION

3.2.3 The necessity for a scheme of title registration has also been pointed out though not in very precise terms, by several official committees which have considered the problems facing extension of rural credit. While we are referring later to the consideration bestowed by these official committees, we have to add that we are yet to make a comprehensive examination of the legal and administrative requirements of a title registration scheme which will suit the conditions of our country.

TITLE REGISTRATION MAY PROCEED ONLY GRADUALLY

3.2.4 Nevertheless, development of a title registration scheme with reference to immovable property in our country is not a matter that could be achieved within a very short time.

IMMEDIATE NEED FOR STATUTORY FRAMEWORK

3.2.5 However, the work in this direction has to commence now even if we are to have this scheme as a long-term objective. For this purpose, the statutory framework has to be provided for with concurrent efforts to accelerate the pace of this development.

BASIC OBJECTIVES OF ANY REGISTRATION SCHEME

3.2.6 There could be three schemes of registration as regards interest in immovable property. The scheme may provide for either (i) registration of deeds, (ii) registration of encumbrances or (iii) title registration.

BROAD-BASING A DEED REGISTRATION SCHEME TO A SCHEME OF REGISTRATION OF ENCUMBRANCES

3.2.7 What we have now in our country is a scheme of registration of deeds affecting interest in immovable property. We have considered in the previous chapter how this scheme is defective. It does not provide at one place all the necessary information relating to the existence or otherwise of other transaction affecting the title to the land. With a view to strengthen our scheme from one of registration of deeds to that of registration of encumbrances, we have suggested in the earlier chapter the broad-basing of the earlier recommendations of the Setalvad Law Commission to provide for the filling in Book No. 1 (the property register, maintained by the sub-registrars of assurances, of the many transactions affecting interests in land) of the particulars of transactions about which ordinarily the genuineness of the documents or verification as to the passing of consideration and such other matters are not matters which could be normally disputed.

FRAMERS OF OUR REGISTRATION LAW ENVISAGED AN EXTENSIVE LAW LATER

3.2.8 Even when our existing scheme for registration of deeds was being developed, the framers of the statute had observed that:

“.....although it does not extend compulsory registration so far as was advocated at one time”, it was “wisely determined not to

make the law of registration too stringent on its first introduction, leaving its extension to the future, when the people at large from their experience of this limited measure shall have become fully sensible to the advantages of registration, and be prepared to receive without fear a more complete and extensive law on the subject."¹

TITLE REGISTRATION IS A NATURAL DEVELOPMENT

3.2.9 The fact that title registration is the logical and natural development of the registration scheme is a matter of wide recognition. The title registration scheme has gained gradual acceptance in many parts of the world where real property effectively plays its functional role as security for credit.

ADB-LAWASIA PROJECT'S STRESS ON TITLE REGISTRATION

3.2.10 The Research Project commissioned under the aegis of the Asian Development Bank and the LAWASIA on Credit and Security in several countries of Asian region has observed that "the *key* to a system of land tenure that will adequately identify the extent of the land and the borrower's interest in it is a proper cadastral survey supported by a *simple but efficient system of title registration*. Where these are absent, difficulties in taking security over land will be encountered."² (*emphasis added*).

IS IT INERTIA OF POLITICIANS OR SELF-INTEREST OF LAWYERS ?

3.2.11 The above Research Project has emphasised the need for introduction of a modern system of registration of title with boundaries of land determined by a cadastral survey. The Project has highlighted the fact that the absence of modern system of land tenure and registration, though it may not have "the drastic effect of destroying the security value of land, it may weaken the security by increasing the problem of uncertainty in identification. This in turn increases the complexity of conveyancing and security procedures, and therefore their cost. Furthermore, by encouraging low valuations, it reduces the

¹Speech of Hon'ble Mr. Ellis who moved the Report of the Select Committee on the Bill in the Council of the Governor-General of India, assembled for the purpose of making laws and regulations, 1864, Vol. III, page 74.

²Credit and Security, The Legal Problems of Development Financing, David E. Allan, Mary E. Hiscock, Derek Roebuck, University of Queensland Press, page 48.

security value of the collateral and deters subsequent lenders. The persistence of the old English-inspired systems of general law landholding and conveyancing is hard to explain *except in terms of the inertia of politicians or the self-interest of lawyers.*"¹ ...*(emphasis added)*.

MANY ASIAN COUNTRIES HAVE A SYSTEM OF REGISTERED TITLE

3.2.12 The above Research Project has also highlighted the fact that "the solution of most security problems lies in the provision of an efficient system of registration in each country" though there is no one solution and no one system of registration which "can be drawn up on paper and commended for adoption in each country".¹ This Research Project has revealed that in most countries of the Asian region there is a system of registered title of land though its efficiency and quality varies from country to country and this has also been commented upon by the authors of the project report.²

WHAT IN SUBSTANCE TITLE REGISTRATION MEANS ?

3.2.13 At this stage, we may briefly explain what a title registration really means and this is best done in the words of the authors of the Research Project on Credit and Security:

"In most countries registration falls into two classes: registration of titles and registration of deeds and documents. A system of registration of titles shows to whom the ownership of land belongs, and what other real rights exist in respect of each particular piece of land. In scope and in function a system of registration of title is something quite different from a system of registration of deeds. Under a system of registration of title the registers will contain a statement of the title upon which all can safely act. Shortly stated, when a title is registered, a certificate from the Registrar carrying on the face of it a title protected by statute is substituted for a bundle of deeds which have to be scrutinised each time a transaction relating to land is contemplated."³

¹Credit and Security, The Legal Problems of Development Financing, David E. Allan, Mary E. Hiscock, Derek Roebuck, University of Queensland Press, page 49.

²*ibid.*, page 55.

³*ibid.*

⁴The Credit and Security in Ceylon (Sri Lanka), The Legal Problems of Development Financing, Wickrema Weerasooria, David E. Allan, Mary Hiscock, Derek Roebuck, University of Queensland Press, pages 131-132.

TITLE REGISTRATION OR THE TORRENS SYSTEM

3.2.14 Title registration scheme was originally developed by Sir Robert Torrens and the schemes in several countries are generally referred to as Torrens schemes and the relevant legislation as Torrens Acts. While in broad features the schemes in different countries may be *ad idem*, every country has to develop its own scheme suited to its requirements.

TITLE REGISTRATION IN COMMON LAW COUNTRIES

3.2.15 The legislative provisions in the U.K. with reference to the application of the Torrens system and similar legislation in Canada, the States of the United States of America, Philippines, Malaysia and several other countries, may be called Torrens Acts. They "have a common purpose. In general they establish a system for the registration of title to land, whereby the official certificate will always show the state of the title and the person in whom it is vested. The purpose of a Torrens act proceeding is to simplify title and eliminate questions which no longer affect it."¹

TITLE REGISTRATION IN FORCE ALSO IN CIVIL LAW COUNTRIES

3.2.16 Not only in common law countries is a scheme of registration of title in force but it is also in force in civil law countries. Mather says that "registration of title to land in various forms was known in Continental countries generations before it was introduced into English law".²

DEFECTS OF THE PRESENT SYSTEM

3.2.17 It is obvious that the traditional way in which now title to land is traced in our country is cumbersome, costly, time-consuming and acts as a deterrent to security effectively fulfilling its functional role; it comes in the way of banks and other financing institutions contributing to their optimum capacity for the economic development of our country.

TITLE REGISTRATION SCHEME IS CERTAINLY DESIRABLE

3.2.18 It is obvious that it would be desirable to have a system of registration of title in India. This is definitely a superior system to

¹American Jurisprudence, 2nd Edn., Vol. 66, pages 656-657.

²Securities Acceptable to the Lending Banker, L. C. Mather, Third (Revised Edn.), (1973), page 193.

the alternative methods now available for registration of interests in land. The title registration system has proved its utility not merely in one country but in several countries which follow the common law principles or civil law system of jurisprudence.

FEASIBILITY OF THE SCHEME

3.2.19 The main question is only that of the feasibility of the introduction of a scheme of registration of title. In all countries where the Torrens system has been successfully developed, the development has been gradual, covering area by area, and the relevant legislation has also been the starting point for spurring the progressive introduction of a legislative scheme for registration of title.

SCHEME SHOULD BE ADAPTED TO OUR SOCIO-ECONOMIC CONDITIONS

3.2.20 But it is also obvious that while the basic conceptual ideas underlying the Torrens system merit adoption in our country by appropriate legislation the statutory scheme within which the system is to operate has to be so devised as to take note of the several features which are peculiar to the socio-economic conditions prevailing in our country, particularly as regards interests in immovable property.

TITLE REGISTRATION VS. COMMON LAW SYSTEMS

3.2.21 Title is the evidence or proof of a person's right to property or of an interest in property. Under the "old system" or the "Common Law system", a large number of documents and records may be required to prove the title. Under the title registration system, particularly under the Torrens system, "a single certificate may be sufficient to evidence the rights of the party concerned."¹

3.2.22 The Common Law system "is merely the obtaining and presentation of evidence of the chain of instruments and events constituting the title. In practice, where land under this kind of title is sold, the solicitor acting for the vendor supplies the solicitor acting for the purchaser with an abstract or summary of the instruments and events constituting the right to the land, and it is the duty of the purchaser's solicitor to examine the originals of the various instruments and the records of the various events, or such of them as the vendor has in his possession and is bound to produce, to check the abstract with the originals and, in the light of his legal knowledge,

¹The Law of Real Property in New South Wales, Helmore, Second Edn., (1966), page 31.

to determine whether each step is sufficiently proved. For this reason the system has been aptly described as a system of *private conveyancing*. For practical reasons, the length of time over which a vendor is bound to adduce proof of these steps on each occasion was limited by the practice of conveyancers. In each case it may be necessary to go back over a longer period in order to commence the investigation with what is called a 'good root of title'. The process may be likened to checking the soundness of the links in a chain to which some important object is attached, but though each transaction adds another link to the chain, a vendor is only bound to establish the strength of a specific length of the chain on each occasion."¹

(*emphasis added*)

3.2.23 In our country we are following the above system. There is no statutory provision in our country dealing with the period up to which an investigation of title should be carried out. We have earlier referred to this aspect and have recommended that there should be a statutory provision to deal with interest in immovable property created in favour of banks and other financial institutions, so that ordinarily there should be no occasion as regards banks' advances against real property for the investigation to be carried out on the title of the borrower for a period beyond 15 years. While this would considerably help in the process of investigation, having regard to the vastness of our country and the fact that investigation of title is always a costly process, it is necessary that we should consider the feasibility and desirability of a system of registration of title as developed in several parts of the world. In fact, as we shall see later, in the context of extending rural credit the need for the development of a *simple* title registration scheme is paramount and immediate.

TORRENS SYSTEM OF TITLE

3.2.24 The Torrens system of title was first established in South Australia in 1857. Sir Robert Torrens devised the system when he was in charge of the South Australian deeds registers. "He instantly perceived the complications and the chaos that pervaded the conveyancing affairs and noted a marked contrast with the orderly and efficient ease with which sales and mortgages of shares in merchant ships were transacted. Torrens adapted to lands the scheme of registration of merchant shipping."²

¹The Law of Real Property in New South Wales, Helmore, Second Edn., (1966), page 32.

²*ibid.*, pages 32-33.

3.2.25 The genesis of the title registration scheme has been thus indicated: "The immediate origin of registration of title is undoubtedly to be found in the great success which attended the application of the system to the stocks and shares of limited companies, and its extension to the title to land in new countries, particularly, the dominions. The movement in favour of registration is, therefore, yet another instance of the tendency to assimilate the law of real property to the law of personal property which has been such a marked characteristic of the reforms of the last century."¹

TORRENS SYSTEM HAD IMMEDIATE SUCCESS

3.2.26 The Torrens system "had an immediate success, it spread rapidly throughout Australia and New Zealand, and to many other parts of the world, more particularly the Canadian provinces".²

SPREAD OF TORRENS SYSTEM IN THE U.K.

3.2.27 In the U.K., a compulsory scheme of registration of title was introduced by the Land Registration Act, 1925, in several areas of that country. Gradually the area covered under this scheme of registration of title is being enlarged in the U.K. In a recent assessment, Megarry and Wade have observed:

"Registration of title is a great improvement on the old-fashioned system of private conveyancing, and is destined to supplant it in England as it has done in many other countries. The policy is to extend this machinery as fast as the facilities of the Land Registry permit. It now covers many of the principal urban areas of England and a number of countries also. Nearly half the work of conveyancing is estimated to concern registered land, so that this is already a very important branch of the law."³

3.2.28 As pointed out by Edward Moeran, "recent years have seen a notable speeding-up of registration of title. Now it is declared Government policy, already considerably implemented (albeit slowed down by the recurrent economy drives of economic crises), to make registration of title compulsory in all county boroughs and urban districts having a population of 10,000 or more in England and Wales.

¹Real Property Law, Second Edn., G. R. Y. Radcliffe, D.C.L., page 328.

²The Law of Real Property in New South Wales, Helmore, Second Edn. (1966), page 33.

³The Law of Real Property by Megarry and Wade 4th Edn. (1975), Stevens & Sons Ltd., page 1055.

There will soon be no legal backwater so remote as not to be concerned with registered title conveyancing.”¹

IN THE U.K., LOCAL SOLICITORS ORIGINALLY OPPOSED THE SCHEME

3.2.29 As L. C. Mather in his *Securities Acceptable to the Lending Banker*² has pointed out: “it requires little thought to appreciate the benefit to all concerned of being able to deal with a certificate of title rather than a collection of documents needing expert investigation and often numerous enquiries to avoid the possibility of unknown persons later establishing an interest in the land”. However, the introduction of the system and its compulsory extension in the U.K. encountered opposition from local solicitors. This is explained thus by L. C. Mather:

“The conservatism sometimes associated with the law was manifest at the time of the introduction of the Birkenhead reforming legislation in 1925. There were protests regarding the seemingly ruthless discarding of old forms and methods, and local protests against the prospect of an area becoming subject to compulsory registration were not uncommon until a few years ago. For better or for worse — it is suggested for better — the change is now fairly generally accepted.”³

SALIENT FEATURES OF THE TORRENS SYSTEM

3.2.30 The essential features of the system are:

“.... an officer of the State certifies authoritatively that a person is registered as the proprietor of the land, and with certain very important exceptions, anyone dealing with that person may safely accept, not the certificate held by the proprietor, but the duplicate bound up in the register book at its face value, and need not investigate the steps by which he became proprietor.

Transactions are effected by simple instruments in prescribed form which are not effective until registered by the Registrar-General, thereby receiving his imprimatur. The vast practical difference between titles under the Torrens system

¹Practical Conveyancing, Edward Moeran, 5th Edn., (1971), Oyez Publications, page 157.

²Securities Acceptable to the Lending Banker, L. C. Mather, Third (Revised) Edn. (1973), page 192.

³*ibid.*, page 195.

and those under the common law system will probably be the first thing to impress a novice on his introduction to the practice of conveyancing. The single certificate of title with its few and simple words is in striking contrast with the bulky bundles of abstracts and deeds often required to establish a title under the common law system.”¹

3.2.31 In brief, the scheme for the registration of title “differs fundamentally from the previous types of registration. In particular—

- (i) The system deals with registration of the whole title to the land and not merely each individual transaction.
- (ii) The registrar not only investigates the title himself but also, when satisfied, guarantees it.
- (iii) Registration of title normally puts an end to the usual investigation of title; for instead of having to examine all the deeds for the last thirty years or more, as is the case with ordinary land, a purchaser of registered land merely inspects the register to see that the vendor is certified to be the owner of the land. This is the principal benefit of the system; it simplifies and cheapens the investigation of title, by requiring full documentary proof once for all to the registrar and not on the occasion of every future disposition as well. The register also discloses many, but not all, of the incumbrances affecting the land.

Registration of title thus creates a new technique of conveyancing, replacing the system which has been traditional for centuries. Its basis remains that of the ordinary law of real property (subject to a few modifications), but the methods of carrying out sales, mortgages and other transactions are revolutionised.”²

3.2.32 In the U.K., it has been observed that registered land conveyancing is delightfully simple, both as to deducing and investigation of title.³ It has also been observed that “compared with unregistered conveyancing, the reduction in responsibility and mental anguish is notable; moreover, by no more than lifting the telephone

¹The Law of Real Property in New South Wales, Helmore, Second Edn., (1966), pages 33-34.

²The Law of Real Property, Megarry and Wade, 3rd Edn. (1966), Stevens & Sons Ltd., page 1027.

³Practical Conveyancing, Edward Moeran, 5th Edn. (1971), Oyez Publications, page 157.

you have at your elbow, in the Land Registry Enquiry Department, a friendly and expert service which can usually answer 'off the cuff' any questions which perplex you."¹

THE SCHEME CAN DEVELOP ONLY GRADUALLY

3.2.33 However, it has been recognised in the countries where the title registration scheme has been developed and with success that the development has to come about in a gradual and phased manner. As Mather has observed:

"To attempt suddenly to change all land in a particular locality from having evidence of title deduced from a bundle of deeds to having it provided by a simple certificate was an obviously impossible task. Not only does the first registration of a title necessitate an investigation into the existing title.... but the boundaries have to be inspected and mapped. In some cases there may be no existing boundaries and in other instances ownership may be divided or about to be divided."²

THE U.K. EXPERIMENT WITH VOLUNTARY REGISTRATION OF TITLE

3.2.34 When the title registration scheme was started in the U.K., it was initially on a voluntary basis, though there was a good progress in the area covered by the scheme after registration of title was made compulsory in respect of the area. The compulsion was brought about "by providing that in compulsory areas *all land sold*, or out of which a lease of 40 years or more is granted, shall be registered; registration must also be effected when a lease with more than 40 years outstanding is sold or if the freehold title is already registered and any lease of over 21 years is created. In this way the greater part of the land in a compulsory area will gradually have its title registered."³ (*emphasis added*). In non-compulsory areas, the registration of title scheme has been operating on a voluntary basis.

PROGRESS OF THE SCHEME ON A VOLUNTARY BASIS IN THE U.K.

3.2.35 How the voluntary scheme of registration of title was beneficial to the development of land is thus explained by Mather:

¹Practical Conveyancing, Edward Moeran, 5th Edn. (1971), Oyez Publications, page 157.

²Securities Acceptable to the Lending Banker, L. C. Mather, Third (Revised) edn. (1973), page 193.

³*ibid.*, and section 123 of the Land Registration Act, 1925 of the U.K.

“Long before registration became compulsory in an area it became customary for certain types of landowners to take advantage of the opportunity to register voluntarily. In particular, an estate developer is likely to be attracted to registration. Once he has had his title registered all house purchasers can be given a certificate based upon the title established for the main plot, with a consequent saving of time and expense. Many estate developers in ‘voluntary’ areas at present pursue such a course.”¹

PROGRESS OF THE SCHEME ON A COMPULSORY BASIS

3.2.36 The experience gained in the working of a title registration scheme in other countries indicates that of the

“areas in which compulsory registration has been introduced urban neighbourhoods are regarded as lending themselves to the adoption of the system more easily than rural districts. The problem of defining boundaries is obviously much less troublesome in a town where land is dear and jealously guarded than in the countryside where its value is agricultural only. The occupation and ownership of fields is sometimes even ‘understood’ by description in a community to whom the technicalities of business are an anathema, rather than ‘defined’ as for a calculating entrepreneur.”²

Where there are well-defined survey maps available, the problem of defining boundaries will not exist.

TITLE REGISTRATION WAS THE AIM OF OUR ORIGINAL LAW-MAKERS

3.2.37 Mr. Evans, who piloted our legislation on Transfer of Property, had expressed then that he “hoped some day, when our registration system was improved, to see a much greater change, and to see *incumbered land sold under a statutory title*, leaving all disputed questions to be fought out over the proceeds in court. But, pending this, it was very necessary to do something, and what was done ... would, he expected, remedy, or at least, ameliorate, many of the existing evils.”³ (*emphasis added*). Thus, the ultimate development of a scheme of title registration to replace our present system of registration of deeds was conceived by the framers of the law which was primarily intended to meet the then socio-economic conditions of our country.

¹Securities Acceptable to the Lending Banker, L. C. Mather, Third (Revised) Edn. (1973), page 194.

²*ibid.*, pages 194-195.

³Proceedings of the Council of the Governor-General of India, (1882), Vol. XXI, page 76.

ART OF CONVEYANCING IN INDIA

3.2.38 While considering the registration scheme now in force in our country and the lines on which it could be further developed, we have also to take into account the fact that, as observed in the Privy Council, "in India the art of conveyancing has been and is of a very simple character".¹ This is particularly so in rural parts and as regards transactions in agricultural land. Thus, in developing a title registration scheme for rural areas of our country covering agricultural land, this aspect has to be kept in view. Hence, it is upon the need for a simple title registration scheme that we shall first bestow our attention. In the context of extending rural credit this has assumed great significance.

VALUE OF RECORD OF RIGHTS

3.2.39 As we will see later, appropriately enough a large amount of emphasis has been placed on the need for up-dating our record of rights relating to land, particularly agricultural land, in the context of the necessity for extending rural credit on a massive scale for developing our rural economy and facilitating the expeditious flow of production-oriented credit, particularly to small agriculturists.

VILLAGE RECORD OF RIGHTS TO SERVE AS TITLE REGISTER

3.2.40 The Committee on Agricultural Credit Procedures set up by the Andhra Pradesh Government, the All-India Rural Credit Review Committee (1969), the Expert Group constituted by the Reserve Bank to go into State enactments having a bearing on commercial banks lending to agriculture, the Study Group of the Banking Commission which reviewed legislation affecting banking, the Banking Commission (1972) and the Committee on Integration set up by the Reserve Bank are some of the recent authorities which have stressed the necessity for the State Governments providing a record which would show the title of the farmer to the land without any necessity for any involved investigation as to his title.

RECORD OF RIGHTS AND FARM TITLE PASSBOOKS

3.2.41 In fact, when their recommendations are properly perceived, it is clear that the basic objectives underlying these recommendations could be completely achieved only under a scheme of registration of

¹Gokuldas vs. Rambux, 11 I.A. 126 at 133.

title. The scheme for the issue of farm title passbook recommended by almost all authorities which have gone into the question of the problems relating to extension of rural credit fits well into the legal structure necessary for the development of a title registration scheme. Under such a scheme, the farm title passbook should effectively play the role of a title certificate. In fact, unless the legal infrastructure relating to the issue of the farm title passbook ensures this place to the farm title passbook, the value of the scheme and the elaborate administrative preparedness and action that are directed towards the implementation of the scheme will not have effectively served their purpose.

COMMITTEE ON AGRICULTURAL CREDIT PROCEDURES

3.2.42 The Committee on Agricultural Credit Procedures set up by the Andhra Pradesh Government in 1965 has developed the idea of devising "a system whereby a single official or statutory document is prepared and maintained, in which all the particulars like extent of land, its value, credit limits and the other particular necessary for the use of the several credit agencies, are got reliably recorded.*The entries contained in the passbook regarding the extent and value of the land owned by him should be considered as adequate proof of his ownership of these farm lands.As the primary use of these passbooks is for obtaining credit for different purposes on the farm, it may be properly called 'farmer's credit passbook'.*"¹ (*emphasis added*).

3.2.43 The emphasised passage from the above report indicates that the basic objective of the passbook is to serve as a title register or as an extract from a title register. It is obvious that unless the legal infrastructure relating to our registration scheme effectively provides for the fulfilment of this assumption, the massive effort which the State Governments are now required to undertake will not be yielding commensurate results.

ANDHRA PRADESH GOVERNMENT COMMITTEE'S SCHEME COVERED BOTH CREDIT AND SECURITY ASPECTS

3.2.44 According to the Committee appointed by the Andhra Pradesh Government, the passbook should consist of four parts and Part 1 thereof should show *inter alia* the details of all the lands owned by the farmer. The creditworthiness of the farmer would be related to the value of the lands owned by him and recorded in the passbook. For this purpose, the credit agency is required to take into account all the lands that the farmer owns and occupies and which are offered by

¹Report of the Committee on Agricultural Credit Procedures appointed by the Government of Andhra Pradesh in 1965, pages 26-27.

him for being recorded in the passbook. That Committee also had drafted the several entries for which provision should be made in the farmer's credit passbook.

3.2.45 There are certain features which require mention as regards the farm title passbook envisaged by the Andhra Pradesh Government Committee. Firstly, the passbook has to be issued for each farmer; in other words, the passbook will be based on a nominal index and not a property index. Secondly, the passbook is intended to cover also credit limits and credit availments against such limits. In other words, the farm title passbook envisaged by the Andhra Pradesh Government Committee is intended to serve the requirements of both credit and security considerations. It will no doubt be ideal. But, as may readily be seen, the development of such a comprehensive farm title passbook would be feasible only *subsequent* to the development of a title registration scheme wherein the farm title passbook would *at least* fulfil the prime feature which is the *sine qua non* of a title registration scheme, namely, that the document reflects or represents a title register.

THE LEGAL BASIS AND EFFECT OF PASSBOOK ENTRIES

3.2.46 As regards the legal basis and the effect of entries in the passbook scheme, the Andhra Pradesh Government Committee felt that "the entries in the passbook in regard to extent of the land owned by the farmer will no doubt have been made by the Tahsildar with reference to entries that are contained in the local Revenue records."¹ That Committee has also gone into the question "as to how far the entries in the Revenue records or the document of Patta granted to the farmer (on which the Revenue entries are based) confer by themselves any legal title to ownership on the holders of the Patta".²

LEGAL STATUS OF THE PATTAs ISSUED TO AGRICULTURISTS

3.2.47 The Andhra Pradesh Government Committee has referred to the fact that the Andhra Pradesh State Law Commission had dealt with the above problem and had come to the conclusion "that the Patta by itself forms no part of the title and that it is the conveyance itself that gives the party a right to claim such title".³

¹Report of the Committee on Agricultural Credit Procedures appointed by the Government of Andhra Pradesh in 1965, page 27.

²*ibid.*

³*ibid.*

VALUE OF ENTRIES IN RECORD OF RIGHTS

3.2.48 That Committee has also pointed out that though in law an entry in the record of rights may be presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor, in view of the fact that entries in the record of rights have not kept pace with actual changes and mutations have fallen behind schedule, difficulties may arise if too much reliance is placed on these records for proving current ownership. Secondly, it found that "*in view of all this, the entries made in the farmer's passbook merely based on the Revenue records may hardly serve as conclusive evidence of title to the lands*".¹ (*emphasis added*).

ENQUIRY BY TAHSILDAR BEFORE ISSUING THE FARM TITLE PASSBOOK

3.2.49 In order to get over this problem, that Committee has recommended that "in order to ensure that the entries in the passbook of the farmer's lands do have sufficient evidenciary value of the true position, the Tahsildar will have necessarily to make further enquiries into the relevant claims and give his decision *which should* then be held as binding on all concerned".² (*emphasis added*).

LEGISLATION TO PROVIDE THE SCHEME FOR TAHSILDAR'S ENQUIRIES

3.2.50 Thus, the Andhra Pradesh Government Committee has recognised that, for preparing the title passbook which was considered as very vital and necessary for extending rural credit, a further independent summary enquiry regarding ownership to land based on the entries in the record of rights would be required. Again, in order that the Tahsildar's determination as to title may be binding, the Andhra Pradesh Government Committee has recommended that it is "necessary to provide in the Andhra Pradesh Co-operative Societies Act, 1964, an adequate authority under which the Tahsildar's findings in regard to title of land entered by him in the passbook could secure the full legal value".³

¹Report of the Committee on Agricultural Credit Procedures appointed by the Government of Andhra Pradesh in 1965, page 30.

²*ibid.*

³*ibid.*, page 31.

ANDHRA PRADESH GOVERNMENT COMMITTEE'S PROPOSALS REGARDING PREPARATION AND MAINTENANCE OF THE PASSBOOKS

3.2.51 As regards the preparation and maintenance of the passbook intended *inter alia* to evidence title to agricultural lands held by a farmer, the Andhra Pradesh Government Committee has provided that the owner-occupant of an agricultural land shall apply to the Tahsildar of the Taluq for the grant of the passbook in a prescribed form giving details of the lands held by him. The Tahsildar will have to decide on the application within 90 days from the date of receipt of the application and place the passbook in the hands of the applicant within that period.

REGISTER IN TAHSIL OFFICE RE. RECORDS OF PASSBOOKS

3.2.52 The Andhra Pradesh Government Committee has envisaged that in every Tahsil office "a register should be maintained to keep records of the passbooks issued to the cultivators in that area. There should also be adequate staff to keep this register and credit passbooks up-to-date. At the village level, the karnam or patwari must also keep record of the passbooks issued in the village in the appropriate register. He may be made responsible for reporting any discrepancies therein and asking for corrections in time."¹

RESPONSIBILITY OF THE PASSBOOK HOLDER

3.2.53 The Andhra Pradesh Government Committee has also envisaged that "the holder of the passbook must accept the responsibility to keep it up-to-date and if at any time it comes to the notice of the Tahsildar that he has been party to wrong entries, it should be possible for him to enforce the production of the credit passbook and after summary enquiry, cancel the said passbook or levy an appropriate penalty, for which statutory power may be taken".²

ENTRY IN PASSBOOK RE. SUBSEQUENT TRANSACTIONS AFFECTING LAND

3.2.54 The Andhra Pradesh Government Committee has also envisaged a procedure for the farm title passbook reflecting subsequent changes that may be taking place with reference to the ownership or occupancy of the land. On this, that Committee has observed that "as

¹Report of the Committee on Agricultural Credit Procedures appointed by the Government of Andhra Pradesh in 1965, page 33.

²*ibid.*, page 34.

and when the Tahsildar receives intimation from the Sub-Registrar (Registration Department) of any sales or other transactions affecting the lands of the passbook holders, he will arrange to call for the passbook and make necessary change therein before effecting mutations in the village records. Even now under the Board's Standing Orders, it is incumbent on the part of the sub-registrar to send to the Tahsildar due intimation of the changes in ownership of lands so that the Tahsildar can alter the Revenue records. This duty cast on the sub-registrar is based only on executive orders. If necessary, this provision will have to be incorporated in the Co-operative Societies Act.¹

EXPEDITIOUS COMPLETION OF PASSBOOK WORK

3.2.55 According to the Andhra Pradesh Government Committee, the Tahsildar and the village officials connected with the preparation of the farm title passbook work should function expeditiously and complete the work *before the Fourth Plan period ending 1971 in view of the urgency to increase agricultural production.*

3.2.56 That Committee has also recommended that for this purpose the Tahsildar should have a specially trained deputy called "agricultural credit officer". That Committee has also recommended that the village officers connected with the preparation of the passbooks should be paid some reasonable additional remuneration for this additional work.

CONSIDERATION OF THE PASSBOOK SCHEME BY THE ALL-INDIA RURAL CREDIT REVIEW COMMITTEE (1969)

3.2.57 The farm title passbook suggested by the Andhra Pradesh Government Committee on Agricultural Credit Procedures was subsequently considered by the All-India Rural Credit Review Committee, 1969. The All-India Rural Credit Review Committee supported the proposal of the Andhra Pradesh Government Committee and emphasised on having an authoritative record of the cultivator's rights in land, as this helps in each credit agency which proposes to lend to him having no need to examine separately the particulars of lands owned by him, his title to the lands, etc., and to that extent, the time and duplication involved in the scrutiny of these particulars by different credit agencies and in different context are reduced.

DIFFICULTIES POINTED OUT BY THE ALL-INDIA RURAL CREDIT REVIEW COMMITTEE (1969)

3.2.58 However, the All-India Rural Credit Review Committee had doubted that "although this proposal will save a lot of time-consuming

¹Report of the Committee on Agricultural Credit Procedure appointed by the Government of Andhra Pradesh in 1965, page 34.

effort for each agency, we doubt if the revenue machinery can be expected to attend to this work with the degree of expedition and devotion which is necessary. However, in view of the uncertain status which can be accorded to an entry in the passbook as evidence of a borrower's ownership or other rights in land, etc., we do not expect that the credit institutions will accept it as an adequate basis for their loan operations. On both these considerations, we are not certain that this arrangement will prove practicable."¹

NEED TO STRENGTHEN THE MACHINERY

3.2.59 In our view, the All-India Rural Credit Review Committee had rightly stressed the basic drawbacks which had to be overcome if the scheme for issue of farm title passbook to succeed in full measure. Though the revenue machinery and the registration authorities have no doubt to be involved, it is necessary to strengthen the machinery adequately in order that this work of farm title passbook registration could proceed with the degree of expedition and devotion which is really necessary.

PASSBOOK LEGISLATION IN STATES

3.2.60 Since then, the State Governments have appreciated the value of the register serving as record of rights being maintained up-to-date, and the farmers being given the farm title passbooks. Now, passbook legislation has been enacted in different States, particularly Gujarat, Karnataka, Madhya Pradesh, Maharashtra, Rajasthan and Uttar Pradesh, as part of the drive towards extension of rural credit with a view to achieve increased agricultural production.

ADMINISTRATIVE ARRANGEMENTS ALREADY COMPLETED RE. ISSUE OF PASSBOOKS

3.2.61 The State Governments have now appreciated the necessity for the expeditious preparation of Khate Pustikas or farm title passbooks and issuing of the same to the farmers. The administrative machinery for this purpose in the several States has already been geared up and is being adequately strengthened. For instance, in the State of Maharashtra, the Revenue Minister of the State Government, Shri M. D. Chaudhari, has explained the present position in the matter of the preparation and issue of farm title passbooks. He has pointed out that, though there are 60 lakhs farmers in the State, Khate Pustikas have been completed with reference to 40 lakhs of farmers. Of them,

¹Report of the All-India Rural Credit Review Committee, 1969, pages 498-499.

21 lakhs of Khate Pustikas have already been distributed and the remaining are expected to be distributed very shortly. The Khate Pustikas are distributed free of charge to farmers who pay Rs. 5 or less as land assessment. The State Government has also issued instructions to the Collectors to complete before the end of December 1977 mutation of entries to be made in the records of rights of lands, which have been pending for more than six months. Instructions have also been issued by the State Government to the Collectors to complete before December 1977 the relevant entries relating to the legal heirs of new landholders.¹ Similarly, other State Governments are also making necessary efforts for the expeditious preparation and issue of farm title passbooks to the farmers.

URGENT NECESSITY TO CONSIDER THE LEGAL STATUS OF KHATE PUSTIKAS

3.2.62 While the progress in the work of preparation and issue of farm title passbooks is no doubt not uniform in all the States, it is obvious that the administrative machinery in the several States is being geared up and the State Governments are alive to the necessity for issuing farm title passbooks to the farmers in order that problems relating to the determination of farmers' title to the lands may not unduly retard the flow and extension of rural credit. Hence, it has become a matter of imperative necessity to consider expeditiously the adequacy of the legal infrastructure governing the issue of farm title passbooks.

3.2.63 But all the efforts without an adequate statutory basis will not give the desired results and hence in spite of the enactment of the passbook legislation, the farm title passbooks have not yet gained the status of a title certificate or extract from a title register, as regards agricultural lands. For this purpose, it is very much necessary to ensure that these passbook legislations, to which we are alluding in detail later on, give to the title determination sufficient statutory basis, so that it can form and continue to be the good root of title and avoid unnecessary and cumbersome title investigation procedures which are required to be gone through in the absence of such title registration scheme.

¹Resume of the proceedings of the Conference of District Collectors and Divisional Commissioners, as given by the Maharashtra Revenue Minister, Shri M. D. Chaudhari at the press conference held in Bombay on the 8th September 1977 (*vide* news item in the Indian Express, dated 9th September, 1977).

NECESSITY FOR PROPER MAINTENANCE OF LAND RECORDS

3.2.64 The All-India Rural Credit Review Committee has also stressed that *"the proper maintenance of land records is an important prerequisite for ensuring the flow of institutional credit to agriculture.....* It is particularly in the areas coming under the zamindari or inam tenures that the position even in regard to settlement and preparation of records of rights is relatively unsatisfactory. Further, even if the initial survey and settlement of land have taken place, subsequent changes, if any, in ownership as a result of sale or partition of land often fail to get promptly and correctly recorded in the basic village record. *The pre-occupation of the revenue machinery in recent years with programmes of development seems to have resulted in the relative neglect of their basic responsibility in regard to these records.* Land records relating to cultivating tenants are still less satisfactory, as the provisions of land reform legislation are widely circumvented and oral and informal tenancy is fairly widespread. We consider that, *if institutional credit for agriculture is to expand, the least that the State Governments have to do is to ensure the maintenance of up-to-date and accurate records of rights in land, whether of ownership or tenancy. If necessary, the staff entrusted with survey and registration should be suitably strengthened.*"¹ (emphasis added)

EXPERT GROUP'S ASSESSMENT RE. RECORDS TO SHOW OWNERSHIP TO LAND

3.2.65 The Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture has found that *"the absence of up-to-date records in regard to ownership to land will create difficulties for institutional credit agencies in their loaning operations."*² (emphasis added).

3.2.66 The Expert Group has also commented on the necessity for land records being made up-to-date by mutation of entries as and when necessary. Non-mutation of entries in land records, as this Expert Group pointed out, gives rise to the problem of joint pattadars. Since the practicability of a bank financing all the pattadars jointly is open to question, this Expert Group has stressed the necessity for mutation of records within a stipulated time from the date of application for loan.

¹Report of the All-India Rural Credit Review Committee, 1969, page 619.

²Report of the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture, 1971, page 25.

CAN REGISTER OF LANDS BE MAINTAINED BY CREDIT INSTITUTIONS?

3.2.67 The Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture has pointed out that the availability of proper and accurate land records is so essential for the purpose of ascertaining the extent of land/interest therein held by an intending borrower; this forms an integral part of the appraisal of loan applications. In the absence of availability of such up-to-date land records, credit institutions have been forced to consider maintaining a sort of register showing the lands held by cultivators in the areas in which they extend credit.

REGISTERS MAINTAINED BY THE CO-OPERATIVE CREDIT SOCIETIES

3.2.68 The Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture appointed by the Reserve Bank of India has also referred to the fact that "every co-operative society maintains a register of land wherein are contained details of land held as an owner or as a tenant in respect of its members; this register is required to be prepared carefully on the basis of village land revenue records and is required to be kept up-to-date by annual check and verification. This procedure underlines the importance of up-to-date information regarding landholdings of borrowers as a necessary guide to indicate the extent of their interest in land and the genuineness of personal cultivation."¹

MAINTENANCE OF LAND TITLE REGISTER BY CREDIT INSTITUTIONS NECESSARILY INFLATES THE COST OF CREDIT

3.2.69 It is hardly necessary to mention here that if the credit institutions are also required to undertake the responsibility of maintaining up-to-date and accurate registers showing the land-holdings of all the agriculturists who may avail themselves of credit facilities from the institutions, it necessarily adds to the cost of credit. Actually, this involves the duplication of work partly now attended to by the revenue machinery and partly by the registration authorities. No wonder that when the question came up as to whether commercial banks, which have been of late extending sizeable credit to agriculture, should also maintain such a register, the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture had difficulty.

¹Report of the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture, 1971, page 25.

CAN COMMERCIAL BANKS MAINTAIN REGISTER OF LAND RECORDS ?

3.2.70 Dealing with the question as to whether commercial banks should also start maintaining similar registers on the lines of the registers now maintained by co-operative credit societies, the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture has observed:

“This may not be possible because the area of operation of a branch of a commercial bank is not delimited to a village or a small group of villages and it may have to deal with the applications of intending borrowers hailing from a large number of villages. Besides, the intimate knowledge that the managing committee of a primary agricultural credit society possesses of its members, their lands, etc., the emphasis on mutual supervision in a co-operative and availability of a village lobby that enables it to have up-to-date information on the disposition of the holdings and ownership thereof in a village, are special features which are not available to a commercial bank branch at least at the present stage. It, therefore, stands to reason that satisfactory arrangement should be made to enable commercial banks to get adequate and dependable information about the operational holding of an intending borrower and the nature of his interest therein to support his bona fide interest in land and cultivation. *These details can be made available only if land records are maintained up-to-date.*”¹ (emphasis added)

EXPERT GROUP'S ASSESSMENT ON FARM TITLE PASSBOOK SCHEME

3.2.71 The Expert Group has also considered the schemes framed by different State Governments, we have referred to earlier, for issue of title passbooks to the cultivators. This Group has considered the schemes for issue to cultivators of “Passbook” by the Rajasthan Government, “Khedut Khatawahi” by Gujarat Government, “Farm Title Pass Book” by the Karnataka Government, and “Jot Bahi” by the Uttar Pradesh Government.

¹Report of the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture, 1971, page 25.

FEATURES OF PASSBOOK SCHEMES IN FORCE IN THE STATES

3.2.72 Commenting on the above schemes for the issue of passbooks, the Expert Group has observed:

“A common feature of these books is that they indicate details of land held and rights therein. The book issued in Mysore and Uttar Pradesh contains, in addition, particulars of rights in land held by persons other than the pattadar/farm holder. The Rajasthan book contains details of sources of irrigation as also encumbrances in favour of co-operative credit societies and land development banks. The Gujarat book contains details of taccavi loans issued. In our opinion, it is useful to prepare such books and issue them to all agriculturists including tenants. Such books could be issued as and when land records are brought up-to-date. However, *it should be noted that these books require to be brought up-to-date every year so that banks can have a clear picture through these books about the rights in land held by an intending agriculturist-borrower as on the date of issue.* These books will serve as prima facie evidence to rights in land and provide the starting point to banks to proceed to verify such rights and details pertaining to encumbrances on the land referred to therein. We, therefore, recommend to State Governments to expedite bringing of record of rights up-to-date and issue such books quickly.”¹ (*emphasis added*).

POINTS FOCUSED BY THE STUDY GROUP OF THE BANKING COMMISSION WHICH REVIEWED LEGISLATION AFFECTING BANKING

3.2.73 It is in the context of the above schemes for a massive effort on the part of State Governments to facilitate the extension of rural credit to farmers, that the Banking Commission's Study Group which reviewed legislation affecting banking has posed for consideration the desirability of having a statutory scheme for a title registration. In this context, the questionnaire of the Study Group has referred to the wide acceptance in other countries of a scheme of title registration following the development by Sir Robert Torrens of a scheme of title registration originally in Australia and with subsequent adaptations thereof in the U.K., the U.S.A., Canada and other countries.

¹Report of the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture, 1971, page 26.

3.2.74 The above Study Group has referred to the report of one of the Provincial Banking Enquiry Committees (1929-30) which has said that "the use of land as basis of credit could be greatly facilitated by a radical and comprehensive revision of the Transfer of Property Act,"¹ and to the attention which the Central Banking Enquiry Committee (1931) has drawn to the need for removal of the legal impediments to ensure the availability of credit at reasonable rates. The Study Group has observed that "in the context of extending credit to the agricultural sector, it becomes necessary to ensure that lending institutions accept the charge against land without much difficulty. Considerable improvements have been made in the countries which follow the Torrens system of land title registration. This facilitates the ascertainment of a person's title to land. The feasibility of adopting such a system in India has to be considered."²

BANKING COMMISSION RECOMMENDED EXAMINATION OF TITLE REGISTRATION SCHEME

3.2.75 The Banking Commission has further gone into the subject and has recommended that "the system of registration of title deeds needs examination, and the question of issuing title deeds which would facilitate the ready ascertainment of the encumbrances on land has to be considered."³

DIFFERENCES BETWEEN TITLE REGISTRATION SCHEME AND PASSBOOK PROCEDURES

3.2.76 At this stage we may mention in brief the differences between the schemes for issue of farm title passbooks and the title registration schemes posed for consideration by the Banking Commission and its Law Study Group.

DIFFERENCES ONLY IN LEGAL FORM AND NOT IN ADMINISTRATIVE COST

3.2.77 In terms of the effort required and the administrative cost that may have to be provided for, we do not find much difference and hence we do not envisage much difficulty in the adaptation of the farm title passbook schemes as regards agricultural lands to the title registration schemes, so long as the schemes are based on a summary,

¹Burma Provincial Banking Enquiry Committee, Vol. III, paragraph 728, page 324.

²Report of the Banking Commission's Study Group Reviewing Legislation Affecting Banking, paragraph 8.34.

³Report of the Banking Commission, paragraph 21.50.

simple and expeditious procedure for the determination of title to land and the issue of a farm title passbook, which would serve as a title certificate, to the agriculturist.

3.2.78 But, in terms of legal consequences, there is a very substantial difference. In fact, it has to be urged that all the massive efforts that are now required to be put in for issuing farm title passbooks to farmers will not yield any desirable proportionate advantage unless a statutory backing is given to the summary determination of title, which even now is provided for in the procedure for the issue of farm title passbooks. Unless such a requirement is engrafted, it may not be of much advantage nor can it be expected that administrative authorities would take up seriously the up-dating of such record showing title and making of entries relating to mutations, etc., in a manner which would ensure that such title records are brought up-to-date every year.

PRESENT STATUS OF PASSBOOK IS OF DOUBTFUL VALUE

3.2.79 As at present seen, the schemes for the issue of farm title passbooks in force in the several States are not adequate to give the passbooks the status of title certificates and hence do not provide for adequate legal status for the passbooks. Being regarded only as of a prima facie evidenciary value, neither is the agriculturist very much interested in having a farm title passbook issued to him except under compelling circumstances, nor in real terms is he considerably benefited thereby. The administrative authorities who are already burdened with other work also do not have the motivating force to see that this work is completed and they act with speed only during special drives initiated by State Governments. Again, once the passbook is issued, the efforts necessary to keep it up to date are not kept up since at present the legal status of the farm title passbooks is not much. In other words, the lack of an adequate statutory basis for the title passbooks now, on the one hand, affects the value of the passbooks and, on the other, it erodes the efforts necessary to keep them up-to-date.

FURTHER RECOMMENDATIONS BY THE COMMITTEE OF INTEGRATION AND ITS WORKING GROUP

3.2.80 The Working Group on legal matters set up by the Committee on Integration of Co-operative Credit Institutions appointed by the Reserve Bank of India has also recommended that State Governments may arrange to issue the farmer's passbook (Bhoo Adhikar Patra) containing details relating to the title of a person to the immovable property held by him and all relevant particulars such as location, survey

numbers, boundaries, the extent of land or other immovable properties, assessments, etc. The Working Group has suggested that the book may also show charges created on the property by the holder thereof.¹

EFFECT OF FAILURE TO ENTER A CHARGE IN THE PASSBOOK

3.2.81 This Working Group has recognised the necessity for the passbook showing all the particulars relating to the land and in this view has recommended that "the entries in this regard should be made compulsory, *failure to do so should result in the ineffectiveness of such mortgage or charge vis-a-vis a mortgage or charge so entered in the book*".² (*emphasis added*). But such an effect can be given only if the statutory scheme for the issue of the passbook could be attuned to serve the basic features of a title registration scheme.

HOLDING OF PASSBOOK TO BE MADE OBLIGATORY

3.2.82 In the Working Group's view, it should be obligatory on the part of every landholder to secure a farmer's passbook on payment of a prescribed fee. Unless the passbook is going to serve as a title certificate and the register from which the entries therein are made is to have the status, in law, of a title register, casting such an obligation serves no purpose. But we do agree that such an obligation should be provided for, but it should be part of a scheme for title registration.

MADHYA PRADESH LAND REVENUE CODE

3.2.83 The above Working Group has referred to the Madhya Pradesh Land Revenue Code, 1959³ which provides for the issue of Bhoo Adhikar Evam Rin Pustika. Under the Madhya Pradesh Land Revenue Code, the landholder is required to maintain such a book, which shall be provided to him on payment of a prescribed fee, in respect of all his holdings in a village. The book is required to indicate encumbrances on the holdings, rights therein, recovery of land revenue in respect thereof and particulars of government loan and non-government loan.

¹Report of the Working Group on Legal Matters of the Committee on Integration of Co-operative Credit Institutions (1976), page 405.

²*ibid.*

³Section 114A of the Madhya Pradesh Land Revenue Code, 1959.

LIMITED SCOPE OF THE TAHSILDAR'S ENQUIRY

3.2.84 However, it is clear that while the Tahsildar is given an authority to decide finally "in case of any difference between the entries in the Khasra or field book and the Bhoo Adhikar Evam Rin Pustika" *suo motu* or otherwise and "after making such enquiry as he may deem fit", it is evident that the scope of the enquiry by the Tahsildar is very limited. It is also clear that the entries in the record of rights, even if they are based on such decision by the Tahsildar, have no binding effect as such as regards any claim to title with reference to the land. In other words, the status of entries in the record of rights as only of prima facie evidence of the rights to the immovable property is not altered. The Tahsildar may merely decide as to what should be the entry in the record of rights, and, that too, in the limited cases where the field book and the record of rights contain different entries with reference to the same plot of land. It is evident that the scope of this provision is to give a finality to a revenue adjudication with reference to the record maintained by the Department, and the Tahsildar's decision does not amount to a final determination of title to the land, which will bind the persons who may claim title to the land and on the strength of which banks and other lending institutions may extend credit without any necessity for a separate investigation and ascertainment of the title to the land.

REVIEW PASSBOOK SCHEMES AS PART OF TITLE REGISTRATION SCHEMES

3.2.85 In other words, we are now required to go into the legal infrastructure necessary for affording an adequate legal status to title books which are now being issued by several State Governments to farmers. We should also consider the legal provisions that may be necessary to ensure that such farm title passbooks are required to indicate, not merely by practice but under statutory obligations, all the necessary details, as far as they may be, which would indicate and evidence the title to the land. It is in this context as regards *agricultural lands* that we have to consider a title registration scheme which may be brought into force in the rural parts of our country.

BASIS OF OUR REVENUE RECORDS RE. AGRICULTURAL LANDS

3.2.86 Originally land tenures in different States were based on either a ryotwari settlement or a zamindari tenure. In course of time, with the accelerated legislative moves for abolishing intermediaries in land tenures, the zamindari estates have been gradually weeded out. Now

it is essentially the ryotwari settlement that requires to be seen, as this system has been extended also to areas where the zamindari or other allied estates were being recognised. It is also reasonable to assume that, having regard to the declared policies of the Government and the Directive Principles of State Policy embodied in the Constitution, the zamindari and other allied forms of estates, wherever they exist now, will soon become merely matters of historical interest.

SURVEY AND SETTLEMENT IN RYOTWARI SETTLEMENT AREAS

3.2.87 In the areas comprised in the ryotwari settlement, there has been a cadastral survey followed by the issue of ryotwari pattas to the landholders whose title was determined based on the survey and settlement.

1.3

ORIGINAL RECORD OF RIGHTS BASED ON SURVEY AND SETTLEMENT

3.2.88 The original records of rights maintained by the revenue authorities have been prepared as a result of such settlement. However, as the All-India Rural Credit Review Committee, 1969, has pointed out, these records have been allowed to become somewhat out of date by reason of the pressure on the revenue authorities to record the subsequent developments that have taken place in the holdings of the land as promptly as they should have been. Apart from the pressure on the village officials on account of other work, this is also directly the result of confining originally the scope and objective of our revenue records merely as documents to indicate the persons who are primarily liable to the payment of land revenue as regards the agricultural lands.

STATES' LAND REVENUE CODES HAVE NOW EXTENSIVE PROVISIONS TO DETERMINE TITLE

3.2.89 Even now, the Land Revenue Codes of different States provide for the landholders advising the village authorities of any changes that take place as regards the ownership of the land. For instance, section 149 of the Maharashtra Land Revenue Code provides for any

person, acquiring *inter alia* rights in land by purchase, mortgage or otherwise, reporting orally or in writing his acquisition of such rights to the Talathi within three months from the date of such acquisition.¹

3.2.90 The Talathi is required to give a written acknowledgement of the receipt of such report. He is required to enter in a register of mutations every report made to him, and also all intimations sent to him by the officer registering any document purporting to create, assign or extinguish any title to or any charge on land used for agricultural purposes, in the record of rights maintained by him. The Talathi is also required to post up a complete copy of the entry in a conspicuous place in the chavdi and give written intimation to all persons appearing from the record of rights or register of mutations to be interested in the mutations and to any other person whom he has reason to believe to be interested therein.²

3.2.91 When any objection is made to the Talathi orally or in writing, the particulars thereof are required to be entered by him in a register of disputed cases. He is required to give a written acknowledgement to the person making such objection. Disputed cases should as far as possible be required to be disposed of within one year by a revenue or survey officer not below the rank of Aval Karkun. The orders disposing of objections entered in the register of disputed cases are to be recorded in the register of mutations. After due certification, the entry shall be transferred to the record of rights. Such certification can be done by any revenue or survey officer not below the rank of an Aval Karkun. However, entries in respect of which there is no dispute may be tested and certified by a Circle Inspector after notice has been served on the parties concerned.³

¹However, we find in the Maharashtra Land Revenue Code that a charge not amounting to a mortgage is not required to be reported or entered in the record of rights (Explanation 1 to section 149 of the Code). While this is ordinarily all right, the position would require modification with reference to declaratory charges that may be obtained by co-operative credit societies and banks pursuant to the provisions found in the Co-operative Societies Acts and the legislation based on the Model Law applicable to provision of agricultural credit by commercial banks. We have discussed the provisions governing the declaratory charge in Part II of this Report which deals with Rural Credit. Even now under the applicable legislation, there is provision for such declaratory charges being noted in the record of rights. Hence, Explanation 1 to section 149 of the Maharashtra Land Revenue Code (and other provisions in *pari materia* in other States) should be brought in line with the provisions of the aforesaid legislation and the provisions in the Land Revenue Code amended suitably to ensure that declaratory charges in favour of institutional credit agencies are duly entered in the record of rights.

²Section 150 of the Maharashtra Land Revenue Code, 1966.

³*ibid.*

3.2.92 Any person whose rights, interests or liabilities are required to be or have been entered in any record or register maintained under the Revenue Code shall be bound, on the requisition of any revenue officer or Talathi engaged in compiling or revising the record or register, to furnish or produce for his inspection, within one month from the date of such requisition, all such information or documents needed for the correct compilation or revision thereof as may be within his knowledge or in his possession or power. The concerned revenue officer or Talathi, on such production, should give a written acknowledgement thereof to the person producing the document and endorse thereon a note, under his signature, stating the fact and date of such production, and return the same immediately after keeping a copy of it, if necessary.¹

3.2.93 Every holder of agricultural land, on making an application in that behalf in writing, may be supplied by the Talathi with a booklet containing a copy of the record of rights pertaining to such land, which is called Khate-Pustika.

3.2.94 Under the Rules,² the Talathi is required to sign or affix on the Khate-Pustika the stamp of the village or saza. Every entry in the Pustika is required to be made personally by the Talathi from the record of the village, and the Talathi is responsible for the correctness of every entry in the Pustika. Only certified entries in the record of rights should be entered in the Pustika. Each Pustika is required to be numbered as per a number code, and the number will indicate the district, taluka, village and ledger account of the holder in the land revenue accounts of the village. After filling the Pustika or making new entries therein, the Talathi is required to certify the same under his signature and affix the stamp of the village.

3.2.95 When any additional information or necessary changes are required to be filled in the Pustika, the holder shall present the Pustika to the Talathi either himself or through his authorised agent for the said purpose. Within fifteen days of the receipt of the Pustika, the Talathi is required to return the same duly corrected.

3.2.96 When any Pustika is torn, defaced or has become unfit for use or has been lost, the Rules provide the procedure for the issue of a duplicate.

¹Section 151 of the Maharashtra Land Revenue Code, 1966.

²The Maharashtra Land Revenue Khate-Pustika (Booklet) (Preparation, Issue and Maintenance) Rules, 1971.

3.2.97 Supplementary to the provisions providing for the issue of Pustika, the Government of Maharashtra has also promulgated rules for the preparation and maintenance of land revenue record of rights and registers [Maharashtra Land Revenue Record of Rights and Registers (Preparation and Maintenance) Rules, 1971]. The Rules *inter alia* provide for:

- (i) form of record of rights,
- (ii) procedure for preparation of the first record of rights, where no record exists in respect of lands in any village,
- (iii) preparation of the new record of rights in place of the existing record of rights,
- (iv) maintenance of record of rights and register of mutations, and
- (v) separate procedure for record of rights and register of mutations in respect of surveyed lands other than those used ordinarily for the purposes of agriculture only within the site of any village, town or city under section 126 of the Maharashtra Land Revenue Code, 1966.

3.2.98 *An entry in the record of rights, and a certified entry in the register of mutations are statutorily presumed to be true until the contrary is proved or a new entry is lawfully substituted therefor.*¹

3.2.99 Thus, we have outlined in brief the salient features of the underlying procedure for the preparation of the record of rights, the maintenance of the register relating thereto, the issue of farm title passbook to the agriculturist and the provisions now made for keeping such title passbooks up to date. While we have cited the provisions in force in the State of Maharashtra, we may presume that, with minor variations, there are substantially similar provisions applicable in other States which have decided in favour of the issue of passbooks. Now, for the reasons which we have earlier tried to give in an outline, the value of the farm title passbook is not sufficiently recognised in law as affording a firm basis for determining the title to land.

RE-ORIENT PASSBOOK SCHEMES TO TITLE REGISTRATION SCHEMES

3.2.100 It is clear from the provisions relating to the preparation and maintenance of record of rights and the issue of title passbooks that what is meant is that the record of rights is intended to serve as a title register and the farm title passbook as a title certificate regarding the ownership to land. If the value of the record of rights is to be

¹Section 157 of the Maharashtra Land Revenue Code, 1966.

properly recognised, it is necessary that the scheme regarding the maintenance of record of rights and the issue of title passbook should be adequately strengthened to ensure that they embrace the salient features of a title registration scheme. In other words, what is required is the re-orientation of passbook schemes to enable them to serve effectively as title registration schemes. Having regard to the vast administrative efforts that are being put in in the issue of the farm title passbooks and up-dating of village records, it is obvious that what is required is only a legal restructuring of the whole scheme in order to ensure that the basic objectives of a title registration scheme are fruitfully achieved with reference to agricultural land holdings.

3.2.101 Thus, the development of a title registration scheme regarding agricultural lands requires only a review of the working of the administrative machinery and the law and practice relating to the issue of farm title passbooks. The administrative machinery and the law and practice governing such issue of passbooks may have only to be reshaped with a view to ensure that the farm title passbook effectively serves the basic requirements of a title certificate. As a corollary thereto, it is necessary to ensure that the basic record of rights, from which farm title passbooks are prepared, is given the status of a title register, at least with reference to agricultural lands.

REVIEW FORM AND CONTENT OF RECORD OF RIGHTS

3.2.102 In order to achieve the above objectives, it is necessary to review and revise the form and content of the record of rights as now maintained at the village level. The register format should be made, as far as possible, uniform in all the States in material respects and it should allow easy handling and should contain all information considered as basically necessary to enable title to land being determined *ex-facie* from the entries in the register.

3.2.103 The record of rights retains the trait of its origin, namely, as a register envisaged primarily for the collection of land revenue and for this purpose meant to indicate the persons primarily liable therefor. The Khate-Pustikas are required to be made out "for the period commencing from the revenue year immediately preceding the date of the application to the date of the preparation of the booklet".¹ This Rule is understandable since the Khate-Pustika is now issued to each cultivator, indicating his total holdings of agricultural land in the village. But the register maintained on the basis of property index has to serve

¹Rule 4 of the Maharashtra Land Revenue Khate-Pustika (Booklet) (preparation, Issue and Maintenance) Rules, 1971.

as the basis for issuing the Khate-Pustikas. Already the record of rights is based on the field book and the holdings of an individual are traceable with reference to the description of the property.

REVISION OF RECORD OF RIGHTS

3.2.104 The existing record of rights may be presumed to be true and time may be given for objections as regards the entries therein to be made to the Tahsildar of each taluka in respect of the villages comprised in the taluka area. The Tahsildar may, in the light of objections, if any, to the entries that are now found in the record of rights, make necessary changes therein.

3.2.105 Persons aggrieved by the decision of the Tahsildar may be allowed to challenge the decision in a court of law and establish their right, title or interest to the land. The occasions for such disputes may be very few and far between and in practice the existing record of rights with necessary changes effected by the Tahsildar would become the reliable basis and serve as a title register as regards agricultural lands. The title record of rights so finalised should be considered as final and statutorily binding on all persons claiming an interest in the land.

PROTECTION TO CREDIT INSTITUTIONS RELYING ON RECORD OF RIGHTS/PASSBOOKS

3.2.106 It should be further statutorily provided that any credit institution extending credit against the security of land on the strength of a title as disclosed in the title record of rights finalised as per summary procedure described above should have its interest protected against the claims of any person who challenges the security interest in favour of the credit institution, and any purchaser who may be claiming title to the land from such credit institution should also be similarly protected. However, it is not necessary *at this stage* of development of the title registration scheme for any purchaser claiming an interest in the land and *not* deriving his title through any credit institution to be so specially protected. In such cases, the ordinary law of the land should take care of the situation until our title registration scheme becomes firmly established and we gain sufficient experience in the working of the scheme. Then the matter may be reviewed and it may be considered whether the time is ripe enough to extend the protection also to purchasers not claiming through any credit institution. This will give a workable basis and place the record of rights on a firm and reliable basis. Banks and other credit agencies will not also have the difficulty of spending considerable time and expense in

investigating title to agricultural lands. Ultimately, this will result in considerable saving in cost and an expeditious availability of credit to agriculturists. These measures will in turn help to generate the flow of credit and accelerate rural development.

STATUTORY REQUIREMENT REGARDING SUBSEQUENT ENCUMBRANCES

3.2.107 Once the title record of rights is so finalised, it should be made a statutory obligation that further charges or encumbrances of interests affecting such land *will not be recognised* against any credit institution or other agency extending credit relying on the record of rights, unless such charges or interests are duly notified to the authorities having custody and control over the record of rights and they are also carried out therein.

CONSTRUCTIVE NOTICE¹ RE. ENTRIES IN RECORD OF RIGHTS

3.2.108 The record of rights should be treated as a public document and entries therein as regards any land should be considered as constructive notice to all persons who may subsequently claim an interest in the land or who may be dealing with the land. For this purpose, the Explanation I to the definition of "notice" in section 3 of the Transfer of Property Act should be appropriately modified.

SPECIAL OFFICERS

3.2.109 It is in the above context that it is also necessary to ensure that special officers are posted, who have sufficient training in the survey and settlement of lands and who should be made responsible for periodic inspection of the village record of rights, and for ensuring that the record of rights is constantly revised and there are no avoidable delays in entering charges or noting the particulars affecting the interests in land. The same should apply also to mutation of names and other events arising by operation of law or act of parties and having the effect of affecting the title to land. Necessary subsidiary legislation should be expeditiously framed providing for the forms in which such charges should be notified to the village authorities/Tahsildar and the time within which applications therefor should be enquired into and disposed of.

3.2.110 If, under any circumstance, a person is aggrieved by any order of the Tahsildar as regards his claim or interest in the agricultural land, he should be at liberty to establish his rights in a court of law and for

for this purpose to institute legal proceedings within 90 days from the date of the decision of the Tahsildar. Unless the Tahsildar's decision is challenged within 90 days by appropriate legal proceedings, the decision of the Tahsildar should be held final, conclusive and binding and should operate as *res judicata*. Thus, not only will there be an impetus for all persons claiming an interest in agricultural land in having such interest duly noted in the record of rights, but it will also be ensured that disputes regarding land as regards mutation of entries and other claims are settled expeditiously and the record of rights effectively fulfils its pivotal role, which it is functionally competent to, and is eminently suited to, perform.

REVAMPING OF VILLAGE ADMINISTRATION

3.2.111 We are happy that the Government of India seem to have already realised the need in the above context for revamping village administration. From press reports we understand that the Government of India have already realised the necessity—

“to revamp agricultural administration throughout the country to meet the new requirements of the Janata Party's rural development programme. Every village will now have a *trained accountant* who will keep record of all inputs that go into the development of the village. He will also monitor the use of these inputs. *Land records, which are at present handled by patwaris, will be handed over to the village accountant.*

The accountant will thus become the focal point for official development programmes for the village. At the block level, agricultural officers will be given more powers and they will supervise the work of the village accountants in their area. At the district level, agricultural officers will be given powers similar to those of a Superintendent of Police.

State Governments have been asked to take up immediately training schemes for village accountants. If necessary, these schemes will be financed by the Centre.”¹ (*emphasis added*).

3.2.112 We have outlined above the basic procedure which, in our view, merits adoption for developing a suitable title registration scheme for rural lands. After we deal with the question of evolving an appropriate title registration scheme to govern urban lands, we shall take up some main features which could be common to both the schemes with a view to enhance the utility of the title registration scheme.

¹The Economic Times, Bombay, dated 26th August 1977.

URBAN LAND TITLE REGISTRATION SCHEME

3.2.113 Having seen in brief outline the title registration scheme suited to the conditions of our country, which could be applied to agricultural lands, we shall now consider the feasibility and scope for the development of an appropriate title registration scheme as regards urban lands.

SPECIAL FEATURES RE. URBAN LANDS

3.2.114 The question of developing an adequate title registration scheme to cover urban lands may not be considered as less important. But here we do not have record of rights for urban lands, except in areas covered by town planning schemes, in the manner and to the extent it is available now with reference to agricultural lands in our country. Again, persons who may be claiming an interest in any urban land and the sort of interest that they may claim may not be of the same nature as may be applicable to agricultural lands. Interest in urban property brings in more sophisticated transactions carried out with the skill of lawyers, town planners, architects, surveyors and builders. Hence, the simple and summary procedure appropriate for determination of title to agricultural lands cannot be applied with reference to determination of title, preparation of a title register and other allied questions which have to be solved in the process of developing a title registration scheme to cover urban property. Hence, regarding urban property, title registration scheme can proceed only gradually and by stages.

BEGIN WITH TOWN PLANNING SCHEME AREAS

3.2.115 While considering urban property, we do feel that the beginning of a title registration scheme may be effectively made in areas which are already covered or may be covered by town planning schemes. The statutory provisions governing town planning schemes relating to urban property are generally *ad idem*.

EFFECT OF STATUTORY PROVISIONS GOVERNING TOWN PLANNING SCHEMES

3.2.116 We may consider the position, for the purpose of present discussion, having regard to the provisions of the Maharashtra Regional and Town Planning Act, 1966. Under this statute, on and after the date on which a town planning scheme which has become final comes into force, all lands required by the Planning Authority, unless otherwise determined in such scheme, vest absolutely in the Planning Authority free from all encumbrances. All rights in the original plots which

have been reconstituted or determined and the reconstituted plots become subject to the rights settled by the arbitrator. The Planning Authority is required to hand over possession of the final plots to the owners to whom they are allotted in the final scheme.

3.2.117 On and after the date on which a final scheme comes into force, any person continuing to occupy any land which he is not entitled to occupy under the final scheme may be summarily evicted, if necessary with the help of the police authorities.

3.2.118 The effect of the statutory provisions governing a town planning scheme as regards the determination of title to land in the reconstituted plots under the scheme has been considered by the Supreme Court in their decisions in the State of Gujarat vs. Shantilal Mangaldas and others¹ and in the Municipal Corporation for Greater Bombay and another vs. The Advance Builders (India) Pvt. Ltd. and others.² Though under the Town Planning Act there is no vesting in the local authority of the lands comprised in the town planning scheme, "when the scheme comes into force, all rights in the original plots are extinguished and simultaneously therewith ownership springs in the reconstituted plots.....The lands covered by the scheme are subjected by the Act to the power of the local authority to readjust titles".³ As the Gujarat High Court has pointed out in Murtujakhan Joravarkhan Babi vs. The Municipal Corporation of City of Ahmedabad and others⁴ when the final town planning scheme is sanctioned, by statutory operation, the title of the various owners is adjusted. "All lands in the area which are subject to the scheme, to whomsoever they might have originally belonged, would absolutely vest in the local authority if under the scheme the same are allotted to the local authority. As a necessary corollary to this, all rights of the private owners in such lands would determine. Similarly,.....in respect of those lands which do not vest absolutely in the local authority but which are otherwise reconstituted, all rights in the original plots stand determined and the reconstituted plots become subject to the rights settled by the Town Planning Officer."⁵ Though the effect of the statutory provisions underlying a town planning scheme has been considered in the above decisions with reference to the provisions in the Bombay Town Planning Act, 1954, and/or the Maharashtra Regional Town Planning Act, 1966,

¹A.I.R. 1969 S.C. 634.

²A.I.R. 1972 S.C. 793.

³Per Shah, J., in A.I.R. 1969 S.C. 634 at 644-645,

⁴A.I.R. 1975 Gujarat 182.

⁵*ibid.*, at 191-192.

the general tenor of the provisions of the Town Planning Acts in the different States is similar and has substantially the same consequences on these matters.

DETERMINATION OF TITLE AS ON THE DATE OF THE FINALISATION OF THE TOWN PLANNING SCHEME

3.2.119 In view of the above, in areas comprised in the town planning scheme, there will not be any appreciable difficulty in determining title to land as on the date on which the town planning scheme has become final. Hence, as regards urban areas which have already been covered by the town planning schemes or which may be so covered hereafter, the title registration scheme could be extended without much difficulty.

RE. AREAS WHERE TOWN PLANNING SCHEME HAS ALREADY COME INTO FORCE

3.2.120 The title to the reconstituted plots comprised in town planning schemes in respect of areas where such schemes have already come into force may be determined by first taking the title to the reconstituted plots determined as on the date of the final sanction of the town planning scheme as valid until proved otherwise. By following a procedure similar to that followed while formulating a town planning scheme, the original determination of title as regards reconstituted plots may have to be revised in order to take note of changes that might have taken place in the title to urban land comprised in town planning schemes in areas where such schemes have already come into force.

RE. FUTURE TOWN PLANNING SCHEMES

3.2.121 In future, wherever town planning schemes are being framed, the area comprised therein could be brought within a statutory title registration scheme on and from the date of the final sanction of the town planning scheme. This will have the merit of avoiding the necessity of going through a further special procedure for determining title to urban land for the purpose of developing a title registration scheme.

3.2.122 We have outlined above how title registration schemes could be developed by adopting a procedure which will not involve any disproportionate cost, time and effort and which could be applied to cover agricultural lands and urban lands. Thus, it would be necessary to have two statutory schemes, one for developing a title registration scheme as regards agricultural lands and rural areas and the other as regards urban lands.

MAINTENANCE OF THE TITLE REGISTER

3.2.123 Having considered the problem as to how effectively we could go about and try to have an effective title register, we will also have to consider the need for maintaining the title register in a proper form so that the value of the register to indicate readily the names of persons entitled to the land, the nature of their interest, etc., and thus facilitate the enormous saving in cost, time and labour which are now required to be expended in the process of investigation of title.

GENERAL ASPECTS RELATING TO TITLE REGISTER.

3.2.124 In developing a title registration scheme both for the rural sector and the urban sector, on the following aspects special consideration and appropriate treatment have to be given:

- (1) Maintenance of the register property-wise;
- (2) Effect of non-registration; and
- (3) Registration of local land charges.

We shall briefly refer to these aspects.

(1) MAINTENANCE OF THE REGISTER PROPERTY-WISE

3.2.125 Under the scheme of the farm title passbook legislation, every cultivator or agriculturist is to be given a passbook showing his title to all the lands held by him. Unless the basic records relating to title registration are maintained on a property-wise basis, a title certificate issued on a nominal basis may not reflect for long the true state of affairs regarding the title. It is possible, no doubt, and often it will be useful, to have a passbook issued to an agriculturist containing the description of all the lands to which he is entitled. But such a certificate should be a subsidiary document to the principal register which should be maintained on a property-wise basis.

The U.K. experience

3.2.126 The experience of other countries also shows that the basic records for registration of real property should be kept on a property-wise basis and not maintained *merely* on the nominal index system.

It was because the Land Charges Act, 1925 of the U.K. was maintained on a nominal index basis that the land charges register in that country maintained under the Land Charges Act developed serious difficulties. As Megarry and Wade have observed:

“This system of registration against names is seriously defective from the point of view of a purchaser.... It has been said that ‘this system will end in chaos if it is perpetuated’, and that ‘it is obvious that such a register must in time sink under its own weight’.”¹

(2) EFFECT OF NON-REGISTRATION

3.2.127 With reference to determination of title to real property, it is necessary to ensure that all registered interests, as far as may be, are required to be entered in the title register. If any encumbrance or other interest is not entered in the title register relating to agricultural land or urban property, then it should be provided that such an unregistered interest or claim against the land will rank only subordinate to the claims of any credit institution or other lending agency extending credit relying on the title register. It should also follow that any security interest in favour of a credit institution, whether it is a commercial bank, co-operative bank, rural bank or other lending agency, should also be required to be entered in the title register and the farm title passbook so that it will be binding against subsequent lending agencies or other creditors.

Procedure re. deeds registered concerning registered land

3.2.128 While providing as above, which would require consequential changes to our present registration law, the basic procedures for registration of deeds with the sub-registrar of assurances may be allowed to continue. But the notice provisions should apply with reference to registered land only on the entry in the land register of particulars of the transaction affecting title. Already there is procedure for the sub-registrar of assurances advising the revenue authorities about instruments registered with him and affecting title to agricultural land.² These procedures will have to be strengthened suitably and made to rest on a statutory basis.

¹Megarry, R. E. and Wade H. W. R., *The Law of Real Property*, Fourth Edition, London, Stevens and Sons Limited, 1975, page 1045.

²Cf. section 154 of the Maharashtra Land Revenue Code, 1966.

(3) REGISTRATION OF LOCAL LAND CHARGES

3.2.129 In the U.K. there are separate local land charges registers which are maintained property-wise, in which the local authorities are required to indicate the restrictions and liabilities on the land consequent on the development requirements, other requirements of the local authorities, etc. It would be highly useful if the title register in our country can be required to indicate also the restrictions and liabilities on the land arising by way of local land charges. These features may be relevant *only with reference to urban lands*, and as regards agricultural lands they do not require any special consideration.

OTHER SALIENT FEATURES OF THE TITLE REGISTER

3.2.130 While formulating the scheme for the maintenance of a title register under statutory basis, it is necessary to indicate as to how the register should be kept and the types of titles that have to be registered in the register; there should also be provision for entering encumbrances on the title. We have considered the scheme for title registration in other countries, particularly in the U.K., Australia, the U.S.A. and Canada, and, in the light of our study, we find that we can develop a title register with reference to our agricultural lands as also urban property, which register may appropriately indicate particulars relating to—

- (i) the land, giving an indication of the reference to the survey map and the survey number,
- (ii) the name and address of the owner, including the name and address of joint owners, if any, and
- (iii) the rights of persons (with address and brief description) having a security interest in the land.

THE KINDS OF TITLE THAT MAY GENERALLY BE ENTERED IN THE TITLE REGISTER

3.2.131 The register should indicate the person who is entitled to the property as absolute owner. It should also reveal any leasehold interest or the interest of a lessee. Where the land is in the possession of a person who is not entitled to it as owner or as lessee but he is having merely a possessory title, the register should indicate that the person in possession is merely having a possessory title, though such instances will be few and far between. The register should not contain any notice of trust or benami claims on the land since such persons should not be allowed to claim title to the land in preference to the claim of a lending institution which has advanced against the land relying on the title as shown in the register of land records.

METHOD OF CREATING SECURITY INTEREST OR ENCUMBRANCE ON LAND COVERED BY A TITLE REGISTRATION SCHEME

3.2.132 With reference to any land comprised in a title registration scheme, it is possible to have a simple and expeditious means of recording the creation of a security interest in the land. Similar procedures exist in countries where title registration scheme has been adopted. There is no reason why we should not have the benefit of such provisions and thus provide for considerable saving in time, cost and labour in the creation of a security interests in land comprised in title registration scheme.

BANK ADVANCES AGAINST FARM TITLE PASSBOOK/TITLE CERTIFICATE

3.2.133 The farm title passbook/title certificate may serve as the basic document against *the deposit* of which banks and approved credit institutions may be allowed to obtain a security interest in the land covered by the farm title passbook/title certificate. In the U.K. there is such a practice as regards title certificates issued in respect of registered lands. Our legal framework should facilitate such expeditious creation of security interest.

THE U.K. PRACTICE *RE*. ADVANCE AGAINST DEPOSIT OF TITLE CERTIFICATE

3.2.134 The banker is merely handed a certificate of title. The advantages of this special procedure with reference to creation of a security interest in land comprised in the title registration scheme in the U.K. have aptly been summed up thus:

“Whether or not he intends advancing against the property, much less trouble is involved in dealing with a certificate than a packet of deeds which can sometimes be very large. Less strongroom space is occupied and there is less chance of a document being mislaid. The number of documents accompanying a land certificate will be small but where title to a property is by deed the frequently numerous documents have to be scheduled naming dates and parties.

While some banks have occasionally relied upon their own examination of the title where deeds were taken as security and still do so, most send them to solicitors for a report on title. This may take some time, since solicitors' offices are always busy and the examination of title is regarded very often as one of the least

urgent matters; it also involves the customer in expense..... With a land certificate no examination by solicitors is required. It may be that the entries, especially those showing the interest of joint owners or showing charges, need legal advice before their import is fully appreciated, but this will be infrequent. Again, where there is a land certificate the boundaries of the property will be defined with much greater certainty than where the description is to be discovered in a conveyance. With a conveyance there will sometimes be a map, but very often the boundaries will have to be elucidated from measurements described in a conveyance; and, if there is a map, it will be of less clarity and certainty than the copy of the Land Registry map to be found with the land certificate. In particular, where parts of a property have been sold off slowly over a number of years, as happens so often when taxation or death duties lead to the destruction of a country estate for building, the tracing of the relative area where title is by deed will sometimes even necessitate the assistance of a surveyor, whereas with a land certificate such a problem is eliminated formally. There is virtually no possibility of forgery of land certificate but the forgery of deeds, although rare, is by no means unprecedented. For all these reasons registered title is the more attractive for a lending bank. This ease of handling and speed of unprofessional examination is not in any way discounted by the manner in which the bank may become a mortgagee, the mere possession of the land certificate being at least as strong a weapon as the possession of deeds."¹

THE LAND CERTIFICATE OR THE TITLE CERTIFICATE

3.2.135 In the U.K., the certificate of title issued by the Land Registry to the registered proprietor is called a land certificate. It is an official certificate with a copy of the register inserted inside, including a copy of the official plan identifying the land. Each land certificate bears the date of its issue and subsequent corrections are always carried out at the registry free of cost. When a land certificate is lost or destroyed, there is provision for issue of a new certificate. Pending issue of a new certificate, office copy of the register and the plan may be obtained from the Registrar's office and are admissible in evidence in the place of the land certificate. Before a new certificate is issued, the land registrar may call upon the applicant for executing an indemnity for loss which the registrar and the trustees of the land registry insurance fund may sustain by reason of issuing a fresh certificate. We recommend similar provision for the farm title passbooks/title certificates issued under

¹Securities Acceptable to the Lending Banker, L. C. Mather, Third (Revised) edn., (1973), page 197.

the statutory scheme that may be developed for introducing a title registration scheme in our country relating to agricultural land and urban land.

THREE PARTS OF THE LAND CERTIFICATE

3.2.136 The land certificate is divided in the U.K. into three parts, namely, (1) the property register, (2) the proprietorship register and (3) the charges register, on the same lines on which the land register is maintained in the Registry.

PROPERTY REGISTER

3.2.137 This should give a brief description of the land and the estate comprised in the title with reference to a general map or to the field plan of the land. The certificate should indicate "where appropriate, notes... relating to the ownership of mines and minerals or to easements, rights, privileges, etc., for the benefit of the land. If the property is leasehold, short details of the lease will appear, including the term, rent and premium (if any) and a reference to the lessor's title, if it is registered. In short, there is a complete picture to guide the lending banker."¹ It should also disclose the date of registration.

PROPRIETORSHIP REGISTER

3.2.138 The proprietorship register should indicate whether the title to the land is held by a person absolutely or whether it is a leasehold interest or it is merely a possessory title. In the U.K., the title registration legislation provides for automatic conversion into absolute or good leasehold deeds of possessory titles which have remained in force after the registration for a period of 15 years in the case of freeholds and 10 years in the case of leaseholds.² In view of this, in the U.K., there are only a relatively small number of possessory titles outstanding today. We should have a similar provision in order that possessory titles with a cloud on the absolute ownership are not allowed to abound and add confusion to our rural landscape.

CHARGES REGISTER

3.2.139 The charges register should be a part of the title register and should give to the banker all particulars relating to the mortgages, charges, restrictive covenants and other encumbrances affecting the title to the land.

¹Securities Acceptable to the Lending Banker, L. C. Mather, Third (Revised) edn., (1973), page 199.

²*Ibid.*, page 200.

SEARCHES ON THE REGISTER

(I) CORRECTIONS IN THE FARM TITLE PASSBOOK/TITLE CERTIFICATE

3.2.140 In the U.K., the banker may send the land certificate to the registry for making all the entries relating to the certificate up-to-date and thereby ascertain also the presence or absence of any encumbrance relating to the property. When the certificate is returned to the banker "the certificate will be a facsimile of the register and the date of examination endorsed thereon. This is a simple and cheap method".¹ We should have suitable provisions relating to our title registration scheme to provide for this.

(II) ISSUE OF OFFICIAL SEARCH CERTIFICATES

3.2.141 In the U.K., there is also the procedure for the issue of an official search certificate relating to searches in the title register. Under this method, "apart from the obvious advantage that any errors are the responsibility of the registry, the bank has fourteen days in which to complete and register its charge and it will not be affected by any adverse entries made during these days of grace, unless they arise from a mortgage caution or a priority notice.... This period of grace is long enough to enable the bank, having found the register clear for its purpose, to obtain the charge from the mortgagor and to complete all other preliminaries to ensure priority."¹ In the U.K., the official search certificates are usually posted within two days if the application filed is in order. As far as possible, we should try to ensure a similar position in our country as regards searches concerning registered land.

NOTICE TO THE PRIOR ENCUMBRANCE HOLDERS

3.2.142 With reference to land comprised in title registration scheme, it is necessary to have a provision whereby a prior registered encumbrance holder is advised about the recording of a subsequent charge with reference to the land. Such a provision exists with reference to title registration schemes in force in other countries. For instance, in the U.K., there is provision for the Registry advising by post the prior registered encumbrance holder about registration of subsequent security interest in the land. Though this is necessary in the U.K. in order that the prior registered encumbrance holder's rights may not be affected with reference to future advances by reason of the registration of a subsequent charge on the land and the law in

¹Securities Acceptable to the Lending Banker, L. C. Mather, Third (Revised) edn., (1973), page 201.

our country relating to future advances is not the same, still such a provision will be useful in our country in order that banks and other financing institutions are promptly advised of the subsequent dealings with the land.

3.2.143 Earlier we have referred to the provision in the Co-operative Societies Acts, which has the effect of avoiding subsequent security interests so long as the charge in favour of the co-operative credit society is subsisting. Therein we have commented that such a provision is too drastic and that it unnecessarily affects the value of agricultural holdings without any comparable advantage to the lending institution. But at the same time, the need for a lending institution being promptly advised of the creation of any subsequent encumbrance is very much present in order to enable the credit institution to ensure the end-use of the credit and in order to enable it to have a close watch over the utilisation of the credit for productive and developmental purposes.

3.2.144 In view of the above, it is necessary to provide that the authorities maintaining the register of land title, whether it is with reference to agricultural land or urban land, should be required to advise the prior registered encumbrance holder whenever there is an application for registration of a charge or other form of security interest in the land.

REGISTRATION OF CAUTION

3.2.145 We have dealt with in an earlier chapter about the need for a provision for registration of caution in the books maintained by the sub-registrar of assurances as regards a transaction underway in order that a title investigated and found clear and marketable as of a very recent date is not suddenly impaired to the prejudice of the credit institution by reason of subsequent dealings that may take place after the completion of the title investigation and before registration of the charge in favour of the credit institution.

3.2.146 In the U.K., there is a statutory provision for a legal mortgagee registering a caution with reference to his charge on the land without applying for the formal registration of the charge at the Registry. When such a caution is registered, the legal mortgagee can ask for registration of the mortgage at any time subsequent thereto retrospectively from the date of the entry of the caution in the register.

3.2.147 Consistent with the spirit of the scheme of title registration, on the lines of the provisions which we have recommended earlier for registration of a priority notice in the books of the sub-registrar

of assurances, there should be a provision for facilitating the entry of such a priority notice in the register of title deeds and farm title-passbook/title certificate.

ENTRY IN TITLE CERTIFICATES/FARM TITLE PASSBOOKS OF MORTGAGE BY DEPOSIT OF TITLE DEEDS

3.2.148 We have already referred to the use that may be made of a farm title passbook/title certificate for creating a security interest in registered land by mere deposit of the certificate. As a corollary to this, it is necessary to provide that on the creation of such a security interest by deposit of the farm title passbook or the title certificate, the lending institution should be enabled to register its charge by an appropriate entry in the title register by making an application containing *inter alia* the signatures of the borrower and the person having authority to act on behalf of the lending institution. This will be consistent with what we have recommended in the chapter on the General Law relating to Real Property Security as regards provisions for filing with the sub-registrar of assurances particulars relating to a mortgage by deposit of title deeds created in favour of a bank or other approved lending institution. In line with the basic features of the scheme we have earlier set out with reference to mortgage by deposit of title deeds, it is necessary to ensure that the facility of creating a mortgage with reference to agricultural land or urban land comprised in any title registration scheme is available *only* to such banks and approved financing institutions.

NOTICE OF INTENDED DEPOSIT OF TITLE CERTIFICATES

3.2.149 It is possible that in many cases, pending the formal issue of a farm title passbook or title certificate, to which the provisions of a title registration scheme apply, the agricultural or urban borrower may require credit from a bank. So long as the title certificate is not issued to him and the land is covered by a title registration scheme, it should be possible to provide by statute for the borrower authorising the land registrar to issue directly to the lending institution the title certificate in his name and for the institution holding the same thereafter with the security interest in its favour recorded in the register in the manner applicable to the creation of security interests that have arisen by way of mortgage by deposit of title deeds.

3.2.150 In the U.K., when a customer requires accommodation to finance the purchase of a registered land and he is not in a position to deposit the land certificate because the transfer of the title to him is not complete, he may notify the Registrar of his intention to deposit

the land certificate, when issued, with the bank as security for an advance. When such a notice is given under the Land Registration Rules, 1925 of the U.K., the land certificate will be issued direct to the bank named as lender. This method is also helpful to bridge the gap when the title to the land is being registered for the first time.

3.2.151 On similar lines, our scheme relating to title registration may provide for the cultivator-borrower advising the registration authorities to issue directly to the bank the title certificate, that may be made out in his name, with reference to the property against which he has agreed to create a security interest in favour of the bank for availing himself of credit from the lending institution.

PART IV

**SUMMARY OF CONCLUSIONS
AND RECOMMENDATIONS.**

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Our present mortgage law

(1) As pointed out long ago by Sir Rashbehary Ghose in his Tagore Law Lectures, our real property security law "is choked with dusty formulas which, though they may have been useful in former times, have long ceased to serve any rational purpose. And this is specially true of the (Law of mortgage) ...; for the relations of mortgagor and mortgagee still lie under the shadow of obsolete conceptions from which they have not been able even in the twentieth century to disentangle themselves." [1.2.7]

Economic background when the law was made

(2) When the field was dominated by rapacious moneylenders and as banks and other financial institutions had not developed and even the few institutions then existing regarded lending against immovable property as opposed to traditional concepts relating to bank lending, the framers of our Transfer of Property Act realised the necessity for treating mortgagors as a weaker section of the society and considered that only in exceptional cases the mortgagee should be given the power of direct sale, though this power has all along been the chief feature of the law relating to mortgage in the U.K. An exception was made to cater to the needs of the elite class which comprised of the merchants and traders in metropolitan cities, and with reference to them the framers of the law applied the law relating to mortgage as then prevalent in the U.K. and called such a mortgage an English mortgage. Hence, the English mortgagee was given the right of private sale without the intervention of court. This power was not allowed in the case of a simple mortgage. Thus, in the situation that prevailed at the time of the consideration of the legislation on transfer of property, *inter alia*, by way of security, justifiable apprehension was expressed in extending to the mortgagee in India all the powers

which a mortgagee in England was allowed. Particularly, this was felt with reference to giving to the mortgagee the power of sale without the intervention of the court. [1.2.10 and 1.2.13]

(3) The recognition that mortgagees who were in the Presidency towns or who were Europeans should be distinguished from mortgagees in mofussil areas led to the enactment of the provisions for different forms of mortgages. Again, this distinction was based also on the credibility and the lending practices, on the one hand, of the city merchants or banks and, on the other, of the village moneylenders. Thus, a distinction was made in the original scheme as regards mortgages to which Europeans were parties, mortgages where the property was situated in the Presidency towns, and mortgages where the mortgagees were of native origin and the property was situated in the mofussil. This distinction was based on the fact that in the mofussil it was the money-lenders with their unscrupulous methods, who were, by and large, the persons lending against mortgage of immovable property. On the other hand, it was presumed that, as regards mortgages of property situated in the Presidency towns and mortgages where Europeans were parties, the mortgagors might be fully competent to take care of their interests. [1.2.16 and 1.2.17]

A different background now

(4) Our economic conditions have vastly changed since the enactment of the Transfer of Property Act in 1882. The role of the unscrupulous moneylenders dominating in the field of credit is no longer valid. It is not the village moneylender who is primarily required to extend credit in the mofussil. With our reliance on the institutionalisation of credit, banks and other financing institutions are the major lenders of credit today. In their dealings with their mortgagors, it is anachronistic to assume that they will adopt the unscrupulous methods which are characteristic of unscrupulous moneylenders. [1.2.19]

Special recognition to banks

(5) In extending credit, the necessity for suitable safeguards to banks and other financing institutions is now rightly stressed. It is understandable that the legal framework essentially conceived to deal with unscrupulous moneylenders is no longer appropriate to deal with credit given by banks and other financing institutions whose motivation is essentially not profit but socio-economic development. Banks today are not merely moneylenders but powerful instruments of social change. [1.2.20]

Mortgage by conditional sale

(6) The right of foreclosure was preserved only with reference to a particular form of mortgage, namely, mortgage by conditional sale, which was preserved in the statute. Now, this form of mortgage is a rarity and could be abolished. [1.2.22]

Mortgage by deposit of title deeds

(7) Over the course of years, mortgage by deposit of title deeds, far from being an exception of limited scope to the general rule of registered encumbrances on land, has gained much wider application on account of the obvious advantage in the cost of creation of the encumbrance, though in other respects this form of mortgage ranks inferior to the status of registered mortgage, particularly the English mortgage, with reference to the rights and remedies available to the parties. [1.2.24]

(8) For the reasons, namely, (a) that mortgages by deposit of title deeds are opposed to the policy of registration law, (b) that they lead to evasion of stamp duty, (c) that they are at variance with the principle of making the system of transfer of immovable property, as far as possible, a system of public transfer, and (d) that, when the amount secured is Rs. 100/- or upwards, they would be inconsistent with the general rule in section 58 of the Transfer of Property Act requiring a written instrument, the first Law Commission, the dissenter in the second Law Commission and dissenter in the Select Committee had opposed the statutory recognition of an unregistered form of mortgage, that is, mortgage by deposit of title deeds. However, in a limited area, based on established practice, creation of mortgage by deposit of title deeds was allowed to continue in order not to cause inconvenience to the city merchants and traders. Though the power to notify other areas as eligible places where a mortgage by deposit of title deeds could be created was reserved, it was never visualised that this power would be so utilised as to enlarge the area of the exception to cover practically the whole of the country.

[1.2.27 and 1.2.29]

(9) However, the State Governments have been notifying different places in the country wherein mortgages by deposit of title deeds could be created. In several States, by subsequent notifications, even taluka headquarters are included now in the list of notified places where mortgage by deposit of title deeds can be created. This list is gradually getting further enlarged. [1.2.33]

- (10) The following factors, namely, —
- (a) the inclusion of all taluka headquarters in the list of notified places;
 - (b) that the place where documents are handed over to the creditor's representative may be a non-notified place if the ultimate place of deposit is shown as a notified place; and
 - (c) that the property comprised may be wholly situate outside the notified place

make it clear that when their cumulative effect is considered, even the superficial restraints on the creation of mortgage by deposit of title deeds have no real significance. [1.2.34 to 1.2.36]

(11) The extension of the privilege of obtaining mortgage by deposit of title deeds is available not only to banks and other financing institutions which may be expected to proceed in a commercially reasonable manner, but also to all other classes of moneylenders whose propensity for unscrupulous actions was recognised initially as warranting restrictions on the rights of a mofussil mortgagee. While enlarging the list of places, the primary consideration with the State Governments has been to facilitate the extension of credit by banks and other financing institutions for productive purposes. It is not the intention that such extension should enure to the benefit of moneylenders as well. [1.2.37 and 1.2.38]

Mortgage by deposit of title deeds re. agricultural advances

(12) With reference to agricultural advances, the agriculturists do not have in the majority of cases title deeds which will enable them to create mortgage by deposit of title deeds. Again, in the case of agricultural advances, co-operative credit societies, which purvey short-term and medium-term rural credit, generally obtain a declaratory charge which is provided for under the Co-operative Societies Acts, and they do not generally have recourse to the mortgage form for obtaining a security interest in the land. The land development banks which purvey long-term rural credit obtain their security interests by way of mortgage of land; but they do not have recourse to mortgage by deposit of title deeds. As co-operative credit societies, including land development banks, are exempt from payment of stamp duty and registration charges, there is no definite advantage for such credit institutions having recourse to mortgage by deposit of title deeds while purveying rural credit. The position is now substantially the same agency providing rural credit. [2.1.151, 2.1.153 to 2.1.155 and 2.1.157]

(13) Hence, with reference to advances to agricultural sector, the recourse to mortgage by deposit of title deeds as a mode of creating a security interest in the land in favour of the lending institution is neither necessary nor feasible in the context of institutional lenders extending credit to the agricultural sector. [1.2.49]

(14) However, in view of the several difficulties faced by banks and other financing institutions in proceeding against the security through court, the Working Group set up by the Reserve Bank to consider the acceptance of equitable mortgage by financial institutions was unable to recommend the general acceptance by State Financial Corporations of equitable mortgages as security merely for the reason that the borrower is thereby saved from the burden of stamp duty and registration charges. Thus, the main purpose of enlarging the area for acceptance, that is, to enable banks and other financial institutions to have a general recourse to mortgage by deposit of title deeds has not been really achieved. [1.2.43]

(15) As regards the obvious advantage in the saving effected by way of stamp duty and registration charges regarding mortgage by deposit of title deeds, as pointed out by the Working Group set up by the Reserve Bank to consider the acceptance of equitable mortgage by financial institutions, while the initial burden of the stamp duty and registration charges may be heavy in the case of loans of very large amounts, if these charges are spread over the period of the loan and the amount of the loan is taken into account, the burden will not be such as to be prohibitive. Another aspect of the matter is that according to the decision of the Supreme Court in the India Cement Company's case (A.I.R. 1966 Supreme Court 1053), such costs and charges are allowable deductions for purpose of income-tax. If the tax allowance in this regard is taken into account, the case against registered legal mortgages, as being costly, is considerably weakened. [1.2.44]

(16) As pointed out by the Reserve Bank's Working Group on acceptance of equitable mortgage by financial institutions, the case of remission of stamp duty, etc., in respect of mortgages executed in favour of State Financial Corporations or for that matter in favour of any credit institution for the development, extension or needs of any industry in the State is as strong as that in the case of co-operative societies, in respect of which the State Governments have granted remission on a number of documents. [1.2.53]

(17) While the extension of the areas for the creation of equitable mortgages has not substantially helped banks and other financing institutions, it is reasonable to infer that this would have contributed

to the enhancement of the power and the grip of the moneylender over his indigent borrowers. [1.2.54]

(18) Though the financing institutions, particularly term-lending institutions, do not merely rely on the equitable mortgage in view of its drawbacks in realising the security, the Working Group on acceptance of equitable mortgages, etc., had recommended, and the banks are having, recourse to the obtaining of mortgage by deposit of title deeds, under special circumstances to help the borrowers, namely, in cases where the documentation regarding legal mortgage is likely to take considerable time and the borrower is in very urgent need of funds, for instance, to take delivery of machinery after paying the price. As pointed out by the Working Group, the question of an interim loan can definitely be avoided if steps for preparation of documents were taken immediately after loan was sanctioned. [1.2.55 and 1.2.57]

Consortium loans and inter se agreements

(19) Though the Working Group constituted by the Reserve Bank to consider the acceptance of equitable mortgage by financial institutions was in favour of only a very limited recourse to this form of obtaining a security interest in immovable property, in view of the size of consortium loans granted by IDBI, IFCI, ICICI, LIC, UTI and commercial banks/State Financial Corporations, these institutions are relying on mortgage by deposit of title deeds to secure their charge. Under the procedure they follow in consortium loans, the term-lending institutions are taking several mortgages to secure the total accommodation and are trying to link-up all the mortgages and bring them to a *pari passu* status with the aid of an agreement termed an "*inter-se* agreement". The attempt here is to gain the advantages arising under the English mortgage with regard to the recovery of the advance and the advantages available with reference to mortgage by deposit of title deeds as regards the cost for the creation of the security interest. Under this arrangement, the institution advancing the lowest amount takes a mortgage in English form and the other institutions advancing larger amounts take a mortgage by deposit of title deeds to secure their respective advances. But the *inter-se* agreement, for the reasons stated in paragraphs 1.2.61 to 1.2.63, may have to be regarded as a document modifying the mortgage in English form. In view of this, there may not be any appreciable saving in stamp duty and registration charges. [1.2.59]

(20) Apart from the above, such special arrangement for reducing the cost of credit is available only in the case of advances to big industrial concerns which qualify for availing themselves of consortium

loans from multiple financing agencies. Small companies and small business people are not now in a position to avail themselves of the benefit of such arrangements from their lending institutions since a facility for an inexpensive registration of charges is not available with reference to the charges over the assets of non-corporate borrowers. [1.2.64 and 1.2.65]

Mortgage by deposit of title deeds only in favour of banks

(21) It is not now feasible to eliminate totally the provisions for the creation of mortgages by deposit of title deeds, nor is it necessary. But, what is necessary is to have a distinction in our credit-security law as regards mortgages in favour of banks and other public financing institutions and mortgages in favour of other creditors. It would considerably simplify matters if the power to obtain mortgage by deposit of title deeds is confined only to banks and certain notified financing institutions. [1.2.67 and 1.2.68]

Registration of the mortgage

(22) On the lines of the provisions found in local enactments (like the Co-operative Societies Acts which provide for registration of a mortgage in favour of a land development bank being recorded in Book No. 1 maintained by the Registrar of Assurances under the Registration Act, 1908, when he is advised of the same by post), similar provisions should be made for all types of mortgages created in favour of banks and certain notified financing institutions, including mortgage by way of deposit of title deeds, being recorded in Book No. 1 *ibid.* [1.2.68]

Power of sale re. mortgages in favour of banks

(23) Again, the power of sale without the intervention of the court, allowed now to an English mortgagee under the Transfer of Property Act, should be allowed to all banks and certain notified financing institutions and this should be available to them with reference to all types of advances other than those made against the security of agricultural land and should be available independent of the form of the mortgage in their favour. [1.2.69]

Special law relating to rural credit

(24) When institutional agencies were required to extend rural credit in our country, the provisions of the general law dealing with credit against the security of real property and personal property were found inadequate. Then it was found necessary that such institutional

agencies should be clothed with special powers and privileges as regards their credit transactions. The special law dealing with rural credit against real property and personal property is the product of such development. [2.1.1]

Constitutional position

(25) The main feature of this special law relating to credit-security in the field of rural credit is that this is found in several local State enactments and is generally not touched by Central legislation. This is because rural credit, which essentially deals with credit to agricultural sector including the relief of agricultural indebtedness, and co-operative societies, which till recently were the main institutional agencies providing such credit, are both within the jurisdiction of the States under our Constitution. [2.1.4]

Objectives of rural credit

(26) In the light of the objectives for the extension of rural credit by the institutional credit agencies, we have to consider the extent to which the provisions of this special law have helped in enabling these institutional agencies fulfil their responsibility satisfactorily, and the changes, if any, that may have to be considered at this stage with reference to these provisions. [2.1.6]

(27) For the optimum utilisation of resources, it is necessary to see that rural credit is made available expeditiously, that there is not much scope for diversion of credit for unapproved purposes, and that there are prompt repayment and recovery of dues. The consideration of the extent to which the present legal infrastructure is conducive to such optimum utilisation of the resources allocated towards the rural credit will also indicate in what respects the present legal infrastructure would require to be strengthened or changed. [2.1.13]

Need for common statutory framework

(28) The provisions of the special law are now to be found as regards co-operative credit societies in the State Co-operative Societies Acts, and as regards commercial banks and rural banks in the Model Law (drafted by the Expert Group set up by the Reserve Bank) as adopted by the State Legislatures. Thus, the source of authority is not the same for the application of such provisions as regards the institutional agencies involved in rural credit. Our main concern should be the impact of the functioning of the institutional agencies on the rural economy and the country's development. We may have to ensure that differences are not so marked as to affect their functional

role in the field of rural credit. In this perspective, after noticing the several particular features pertaining to the credit-security law applicable to rural credit, we have to consider the desirability of developing a common statutory framework which would deal with credit-security questions arising in the field of rural credit irrespective of whether the institutional agency happens to be a co-operative credit society or a commercial bank or a regional rural bank. [2.1.21 and 2.1.22]

Distinction based on type of credit and not on agency providing it

(29) The nature of the security should vary with reference to short-term credit and long-term credit requirements, and not with reference to the question whether the same institution provides or different institutions provide the requirements of short-term credit and long-term credit. It is also necessary to consider the *inter-se* claims of an institution to priority essentially having regard to the nature of the credit extended, whether it is extending short-term credit or long-term credit. No doubt, an institution actually extending credit to any cultivator towards his short-term and long-term requirements may qualify for a claim in both the capacities. But the fact that an institution is competent to extend both types of credit should not as such, without reference to the credit it has actually given give the institution any right to claim priority. Hence, whether the same institution provides short-term credit and long-term credit to the cultivator or different institutions provide these types of credit, the requirements of short-term credit and long-term credit may have to be separately assessed. [2.1.29 and 2.1.30]

Security for crop loan

(30) As observed by the Expert Group constituted by the Reserve Bank to consider the State Enactments having a bearing on Commercial Banks Lending to Agriculture (1970), in regard to provision of short-term loans, the most suitable method of financing is the crop loan system already adopted by co-operatives in practically all States. Under this system, loans are generally granted on the basis of personal security with a charge on anticipated crops. By virtue of its simplicity, the crop loan system facilitates a wider coverage of cultivators — a matter of strategic significance in a country where small farmers are numerically large and a sizeable proportion thereof hold lands on lease on various terms and conditions. The repayment of such a loan should be expected normally out of the sale proceeds of the crop for which credit is provided, and therefore, such credit need not be denied to a cultivator who cannot provide land as security for the loan. This will be particularly so in the case of cultivators such as oral

tenants and share-croppers who for one reason or the other do not have a recorded right in land. It should be sufficient if in such cases the cultivator is required to provide guarantors for the loan availed of by him. [2.1.37]

Crop insurance

(31) Production credit for raising current crops against a charge on the anticipated produce without any charge on the land would get a natural fillip and greater acceptability after the introduction of a crop insurance scheme. It is heartening to note that the Government is already seized of the question of developing an appropriate machinery for providing crop insurance. [2.1.38]

Crop loans under Personal Property Security Law

(32) In our Report on Personal Property Security Law we have gone into the question of facilitating the creation of charges on crops, particularly current crops. Therein we have also considered giving a preferential position with reference to current crop loans given by banks. Under the provisions suggested by us, it is not necessary that the agriculturist, whether he is a share-cropper, tenant or a person cultivating the land on any other basis, should necessarily have an interest in the land which he is allowed, by law, to encumber. What is required is only that he should have a right to the crops and this he will be having with reference to the crops for the production of which he is responsible. [2.1.43]

Fixture advance under Personal Property Security Law

(33) The difficulties faced in financing fixtures like pumpsets by reason of the archaic legal notions which are still applied with reference to such transactions will be avoided by the provisions we have suggested in our Report on Personal Property Security Law to deal with fixture as a personal property including the provision for registration of security interests in fixtures by a simple, inexpensive and expeditious method which would put on notice those dealing with the land. [2.1.70 and 2.1.71]

(34) Expeditious consideration of the model Bill suggested by us for codifying transactions secured against personal property and which provides *inter alia* for—

- (i) recognition of purchase money priority in crops;
- (ii) perfected status to current crop loans by banks;
- (iii) security interest being protected before the crops become growing crops; and

(iv) a simplified registration machinery regarding charges on crops will also help in solving the vexed question of agriculturists availing themselves of credit for short-term purposes under the crop loan system, whether or not they have a chargeable interest in the land which they are cultivating. [2.1.44 to 2.1.49]

Linking of credit with marketing

(35) For successfully solving the problems relating to recovery of production credit the efforts for linking such credit with marketing arrangements for the produce grown by the utilisation of such credit should be adequately strengthened on the lines indicated by the All-India Rural Credit Review Committee (1969) *inter alia* by the primary credit societies being appointed as agents of the local marketing society for the collection or purchase of agricultural produce at the village level. On similar lines commercial banks (at their branch level) may be appointed as agents of the local marketing societies for the collection or purchase of the agricultural produce from agricultural borrowers to whom the banks have extended crop loans. [2.1.57]

Recovery of dues through regulated markets

(36) We strongly endorse the necessity for the statutory framework facilitating and enabling the recovery of dues of the co-operative credit society through the authorities constituted to regulate the mandi/regulated market, on the lines indicated by the Reserve Bank's Study Team (1972) on overdues of co-operative credit institutions. Further, the State Governments should amend suitably the relative enactments, such as the Agricultural Produce Markets Acts, Co-operative Societies Acts, etc., and those governing the Commodity Marketing Corporations. The scheme of such provisions should enure also to the benefit of commercial banks extending production credit. [2.1.60]

Recovery through procurement agencies

(37) We agree that provisions on the lines made by the Government of Maharashtra to impose on the agency responsible for procuring agricultural commodities a statutory responsibility of making deductions from the sale price on account of dues payable by the agriculturist-borrowers to the co-operative credit societies, would considerably help to solve the problems of recovery of dues, and endorse the recommendation of the aforesaid Study Team for suitable statutory provisions in the Co-operative Societies Acts of other States as well. Similar statutory provisions should enure also to the benefit of all public financing institutions extending rural credit, i.e., co-operative credit societies, commercial banks and rural banks. [2.1.64]

(38) The provisions applicable to commercial banks in regard to recovery of dues from out of the sale of crops through the designated authority should be modified to be in line with the provisions now applied with reference to the claims of cooperative credit societies. [2.1.66]

Amendment to the Code of Civil Procedure

(39) The Code of Civil Procedure, 1908, exempts from attachment and sale such portion of agricultural produce, or of any class of agricultural produce, as may have been declared to be free from liability. The State Governments have been authorised to declare by general or special order the portion of the agricultural produce, or any class thereof, as may appear to the Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family. These provisions are wide enough to cover agricultural produce which have been hypothecated. In order that institutional credit may not suffer, and as institutional credit agencies may be expected to act not unconscionably, these provisions of the Code may be amended to exclude from its scope the institutional creditors, i.e., banks (commercial, co-operative and rural banks). The Government of India may consider promoting an amendment to the Code of Civil Procedure for this purpose. [2.1.67]

(40) It may have to be ensured that the purchase money security interests which the lending institutions may have against agricultural machinery, etc., are not allowed to be defeated in the view that they are saved from attachment and sale under section 60 of the Code of Civil Procedure, 1908. Hence, such machinery required for large-scale cultivating operations should not be regarded as implements of husbandry necessary for the agriculturist to earn his livelihood and hence not liable to attachment and sale. This may be clarified by an Explanation to section 60(1) (b) of the Code of Civil Procedure 1908, on the following lines:

“Explanation : For the purposes of this sub-clause, the expression ‘implements of husbandry’ shall not cover agricultural machinery like tractors, pumpsets and other implements used in agriculture, which are either power-driven or the value of which exceeds a sum of Rs. 2,500/-.”

The Government of India may consider promoting an Explanation to sub-clause (b) of sub-section (1) of section 60 of the Code of Civil Procedure, 1908, on the above lines. [2.1.80]

Powers of the Registrar of Co-operative Societies

(41) The Registrar of Co-operative Societies should be empowered to attach the standing crops to enable the prompt recovery of the co-operative dues from the sale proceeds of the crops. Provisions on similar lines should also be made applicable to commercial banks to enable them seek similar recourse through the "designated authority". [2.1.69]

Short-term credit under declaratory charge

(42) For short-term credit, which is also termed as production credit and which is essentially for growing crops, insistence on a security interest in the land is not necessary; but such security interest may be obtained when the cultivating borrower is in a position to provide such a security interest. [2.1.83]

Background to the declaratory charge scheme

(43) The provisions relating to the statutory charge by way of a declaration amount to a parallel scheme of law providing for a simple, expeditious and inexpensive system of creation of security interests, the reconciliation of priority claims and the rights and remedies available to the parties to this arrangement. This scheme was developed at a time when institutional lending to agriculture had not developed on a massive scale as it is now channelised. The agriculturists were then under the grip of moneylenders and hence any restriction on an agriculturist's right to deal with his land was considered as indirectly a conferment of a benefit on him in so far as it precluded him from losing his interest in the land. In the changed conditions of today, this may not be so regarded. [2.1.111 and 2.1.112]

(44) The scheme relating to declaratory charge was originally developed without reference to the Constitutional provisions. Subsequent State enactments have merely reproduced substantially the original scheme. The totality of the provisions affecting a statutory charge created in favour of a co-operative credit society by means of a declaration (which is being extended to cover rural credit that may be given by commercial banks) may have to be now viewed having regard to the vast changes that have taken place in the rural landscape of our country and in the light of our Constitution, the extent to which the scheme helps the institutional lending agencies and the fairness of its provisions. [2.1.113]

Declaratory charge—advantages

(45) The method of obtaining a security interest in the land of the agriculturist by means of a declaratory charge under the provisions of the Co-operative Societies Act has certain positive advantages. Institutional agencies extending short-term credit to agriculturists under the set-up of the declaratory charge have recourse to this simple form of obtaining a charge by declaration. The All-India Rural Credit Review Committee has also emphasised the advantages of taking a declaratory charge as security for extending short-term credit. Since the charge is created by declaration and arises by operation of law, the agriculturists availing themselves of credit do have the facility of offering their interests in the land as security without incurring stamp duty and registration charges which may otherwise be payable if a mortgage deed is to be obtained. This also cures the difficulty experienced in creating mortgage by deposit of title deeds by agriculturists who do not have title deeds. This also cures the defect as regards rural credit being extended in the form of mortgage by deposit of title deeds where there are no recording arrangements. [2.1.115 to 2.1.117]

Some differences in Co-operative Societies Acts

re. Orissa

(46) The machinery provided for creating a declaratory charge and the procedure for its registration are simple, expeditious and inexpensive. There should be no difficulty for co-operative credit societies following the same procedure as now prevailing in other States and obtaining a security interest by way of a declaratory charge. What is required is only a statutory provision in the Orissa Co-operative Societies Act on the lines of that found in other State enactments relating to co-operatives for a security interest being created in favour of such institutions by way of a declaratory charge and the consequential deletion of the reference to "lands" in section 34 of that Act. [2.1.92]

re. Assam and Uttar Pradesh

(47) The co-operative societies enactments of Assam, Uttar Pradesh and West Bengal (including any other State where such provisions may exist) may be suitably amended to take out of the scope of the provisions relating to the statutory first charge, the land or other immovable property of the cultivator or the borrowing member. Consequentially, it is necessary to have adequate statutory provisions

on necessary lines in States where there are no such provisions, i.e., for creation of a security interest in favour of the lending institutions by means of a declaratory charge. [2.1.99 and 2.1.100]

re. West Bengal

(48) In West Bengal the provisions relating to declaratory charge have been introduced in the statute by the Bengal Co-operative Societies (Amendment) Act, 1965. Hence, in that State it will be sufficient if the scope of the provision conferring statutory first charge without any deed or declaration is confined to movable assets (by deleting sub-clauses (e) and (f) of sub-section (1) of section 47 of that Act). [2.1.101]

Special features of declaratory charge

(49) In several essential respects the scheme of the declaratory charge now differs from the general law of our country. Such special features may be considered with reference to the following:

- (i) obligatory nature of the charge,
- (ii) property that could be made subject to a declaratory charge,
- (iii) restraints on the borrower's right of alienation,
- (iv) declaratory charge securing future advances,
- (v) statutory priority for dues secured by declaratory charge,
- (vi) special arrangements for recording the declaratory charge,
- (vii) special provisions for recovery of the amount due under the declaratory charge, and
- (viii) assignability of security interest under the declaratory charge. [2.1.118 and 2.1.119]

(50) The obligatory nature of the present provisions relating to declaratory charge when an agriculturist avails himself of a loan from a co-operative credit society is unnecessary. Thus, an agriculturist residing in an area where credit is extended by co-operatives alone is discriminated vis-a-vis an agriculturist in another area whose agricultural credit needs are catered to by a commercial bank. On the lines of the provisions now being applied to commercial banks, an agriculturist-borrower from a co-operative credit society should be enabled to create a security interest in favour of the co-operative credit society by way of declaration; this need not be a compelling necessity in all cases, and the parties shall have the choice to decide differently having regard to the circumstances of the case. [2.1.122 and 2.1.123]

(51) The All-India Rural Credit Review Committee (1969) has also recommended that the agricultural credit society should not be precluded from accepting any other (that is, other than agricultural land) security if it is found more convenient. Extending the scope of the provision relating to declaratory charge to cover also "other immovable property" would also dispense with the necessity of the co-operative credit society having any recourse to mortgage by deposit of title deeds (equitable mortgage) in order to obtain a charge on other immovable property. Hence, in those States where the provisions of the Co-operative Societies Acts do not now specifically provide for a declaratory charge being created with reference to the "other immovable property" of the member-borrower, the position may be made clear on the lines of the provisions now found in the statutes in force in Andhra Pradesh and Tamil Nadu. [2.1.127, 2.1.129 and 2.1.130]

(52) The provisions in many co-operative societies enactments prohibiting the member-borrower from creating any further encumbrance on the land and annulling the effect of any encumbrances that he may create are unnecessary to protect the interest of the lending institution, unreasonably discriminatory and are inequitable. Hence, the Co-operative Societies Acts may be suitably modified to make this position clear. [2.1.138]

Conferment of alienation rights

(53) The Co-operative Societies Acts now do not purport to confer any rights of alienation of land on persons who do not have such rights. It is only the Model Law, which aims to extend with reference to rural credit given by commercial banks the provisions of the special credit-security law which was all along confined to co-operatives, that purports to confer such alienation rights on persons who may not otherwise have such rights. The class or classes of the agriculturists who should be conferred such rights should be decided by the State Government having regard to its policy relating to agrarian reforms. The legislation conferring such rights may also have to be protected from any challenge as offending the provisions of the Constitution relating to Fundamental Rights by inclusion in the Ninth Schedule to the Constitution of India. Unless warranted on account of the State Government's policy relating to agrarian reforms, it is not necessary to confer rights of alienation in land with reference to any class of agriculturists, which may have the effect of annulling the rights of other persons in the land including ownership rights. However, as regards tribal lands and lands belonging to the Bhoodan allottees, conferment of such rights may be valid as it will not affect other existing interests in land. [2.1.141 and 2.1.144]

Declaratory charge—future advances

(54) The provisions relating to the declaratory charge covering future advances in favour of co-operative credit societies (in States where this is not so) and commercial banks should be suitably amended to be in line with section 79 of the Transfer of Property Act, 1882. [2.1.148]

Rules of priority

(55) The question of the rules as to priority that should govern a security interest created in favour of a co-operative credit society or a commercial bank extending rural credit against declaratory charge may be considered with reference to—

- (a) a pre-existing registered charge on the immovable property in favour of any person,
- (b) a subsequent security interest that may be validly created in favour of a term-lending institution to secure a long-term credit given for the development of the land,
- (c) Government dues like arrears of land revenue and other dues recoverable as if they are arrears of land revenue, and
- (d) the reconciliation of the priority of a credit society *vis-a-vis* that of a commercial bank. [2.1.149]

vis-a-vis prior registered security interests

(56) The provisions of the special law in so far as they aim to confer on the lending institution the right of first charge irrespective of a prior registered charge may be considered as (i) undermining the capacity of the agriculturist to deal with his property, (ii) affecting adversely the value of the agricultural property, (iii) offending the salutary principle recognised in section 48 of the Transfer of Property Act, 1882, and (iv) not in conformity with the provisions of the Constitution. Hence, in line with the provisions now found in States like Andhra Pradesh and Karnataka, the provisions in the Co-operative Societies Acts of other States and the legislation based on the Model Law may have to be so modified as to provide that prior registered security interests in the agriculturist's immovable property are not affected by the declaratory charge created in favour of the institutional agency providing rural credit. [2.1.151, 2.1.153 to 2.1.155 and 2.1.157]

vis-a-vis long-term credit

(57) Having regard to the considerations relevant to short-term credit and long-term credit, it is necessary that institutional credit extended by way of long-term credit shall, in relation to the land secured, be ranking in preference to institutional credit extended by way of short-term credit. Hence, it is necessary, in those States where the position is not already made clear, to amend the Co-operative Societies Acts to specifically provide that the charge (arising by way of mortgage or otherwise) on the immovable property in favour of the land development bank shall rank in preference to the declaratory charge created in favour of a co-operative credit society. On the same basis, when a commercial bank extends only a short-term credit and the land development bank provides a long-term credit in a particular area, it is but just that the security interest in favour of the land development bank is given priority with reference to its long-term credit. The State legislation should make this position clear. [2.1.165 and 2.1.184].

(58) While providing for a priority for the security interest in the land for the mortgage that may be subsequently created in favour of land development bank which may be providing long-term credit, the law may be made clear to provide that such a preference arises as regards the amounts subsequently advanced when the charge in favour of the land development bank extending long-term credit has been created with the concurrence of the institutional agency which has given the short-term credit. [2.1.167]

vis-a-vis claims of State

(59) Institutional credit agencies cannot hope to have a security interest in the land which will rank in preference to the claims of the State as regards land revenue recoverable from the land. [2.1.169]

(60) We endorse the views of the Expert Group on State Enactments having a bearing on Commercial Banks Lending to Agriculture and consider that there should be parity of treatment for all institutional lending agencies as regards priority in recovery of loans *vis-a-vis* Government loans. [2.1.173]

(61) Claims of the Government for land improvement purposes such as those arising from a loan granted after the execution of the mortgage under the Land Improvement Loans Act, 1883, or the Agriculturists Loans Act, 1884, or any other law for the time being in force, are recoverable as arrears of land revenue due on the land. The

declaratory charge in favour of the institutional credit agency which has provided short-term credit may be clarified as subject to such Government claims. [2.1.176]

(62) Nowadays the machinery for recovery of land revenue is utilised for recovering several dues (including the dues of commercial and co-operative banks). Hence, to subordinate the dues recoverable under the declaratory charge to all dues which may be recovered as arrears of land revenue will be defeating the objects underlying the provisions providing for the declaratory charge. Hence, the dues recoverable under the declaratory charge should not be subordinated to dues other than arrears of land revenue and Government loans under the Land Improvement Loans Act, 1883, merely for the reason that these dues are recoverable as if they are arrears of land revenue. [2.1.179]

vis-a-vis registered awards

(63) The awards passed under the Agricultural Debtors Relief Acts which are charged on the land are generally registered with the Registrars of Assurances. While it is reasonable to provide for the subordination of the declaratory charge in respect of amount already secured and registered pursuant to an award under the Debt Relief Act, it will be prejudicially affecting the interests of the lending institution if the declaratory charge is considered also as subordinate to any award that may be registered subsequent to the creation of the declaratory charge. The applicable provisions in the co-operative societies enactments are not clear on this point. It is necessary to clarify this aspect. [2.1.180]

Inter-se institutional priorities

(64) As regards institutions extending short-term credit, it is but fair that the rule as to priority is based on the general principle and is related to the date of creation of the charge. Hence, as between a commercial bank and a co-operative credit society extending short-term credit, the priority as regards their security interests in the land or any interests therein should be determined as per the order of the creation of such charges in point of time. [2.1.183]

Registration of the charge

(65) When the sub-registrar of assurances is required to record the declaratory charge created in favour of a co-operative credit institution or a commercial bank, we will be creating a satisfactory legal

framework for the registration of all declaratory charges in favour of both these types of institutional agencies. Other institutional agencies and others would have constructive notice of the charges created in favour of the co-operative credit societies and commercial banks. The declaratory charges would be having a sounder basis in their operation. Even under the general law, the status of a declaratory charge will not in any conceivable circumstance be considered less than the rights flowing under a mortgage. Having regard to all these beneficial circumstances, it is necessary that the declaratory charges created in favour of co-operatives and commercial banks should be required to be recorded with the sub-registrar of assurances within whose territorial jurisdiction the lands are situate. Hence, on the lines of the provisions now found in the Co-operative Societies Acts of Andhra Pradesh and Tamil Nadu, the declaratory charge should, in all other States, be required to be registered with the sub-registrar of assurances. Registration should be an essential feature for the validity of the charge and should not be merely optional. The provisions relating to registration of such charge by an intimation thereof containing the prescribed particulars and authenticated and verified in the manner required should be sufficient for the sub-registrar to make an entry in Book No. 1 maintained by him with reference to the land. Such a notification of the charge to the sub-registrar may be effected by registered post acknowledgment due. This is a very essential provision for making the declaratory charge more meaningful and efficacious. [2.1.190 and 2.1.191]

Central Government to promote amendment

(66) Since the subject comes under the Concurrent List of the Seventh Schedule to the Constitution, the implementation of the above recommendation could be considerably facilitated by the Union making the necessary amendments to the Registration Act, 1908, thereby bringing into force the relevant provisions throughout the country. This will also prove to be an expeditious method for implementing this desirable reform in the recording of charges in favour of public financing institutions, as individual enactments by the several States are likely to take an inordinately long time. [2.1.192]

Entry in the record of rights

(67) In addition to a compulsory registration of the declaratory charge, wherever administrative arrangements are there for mentioning in the record of rights maintained by the village authorities such charges, such administrative arrangements may be continued as this will be an additional facility whereby at the village level (where there

may not always be an office of the sub-registrar of assurances) sufficient information may be available which will readily provide the governmental agencies or others information relating to the encumbrances on the agricultural land. [2.1.193]

Enforcement agencies

(68) While the State Governments are finding it convenient (as it is only to be expected) to name the authorities functioning under the Registrar of Co-operative Societies to function as the designated authorities under the legislation based on the Model Law to help recovering the dues of commercial banks in the field of rural credit, the authorities are now not entrusted with identical powers or privileges while they exercise the same function. This is so as the authority has to look to the provisions of the State enactment based on the Model Law while acting for the commercial banks, and it has to look to the provisions of the Co-operative Societies Act while acting for the co-operative credit societies. [2.1.197]

(69) This disparity now in the applicable provisions and the differences in the scope and extent of authority of the same officials while they act for the commercial banks and while they act for the co-operative credit societies are not conducive to the machinery functioning in an effective manner; nor is it in public interest as the cultivating borrower does not get the same opportunity of making adequate representations and explaining his position irrespective of his source of borrowing, that is, whether it is from a commercial bank or it is from a co-operative credit society. It is necessary that to the extent to which these differences are not related to the differences in the types of the organisational structure of the lending institutions, they require to be streamlined in order to ensure cohesive action and effective functioning of all the authorities involved. [2.1.198]

(70) There is no reason why with reference to the recovery of commercial banks' dues the Registrar of Co-operative Societies (or other designated officer) should be required to follow a procedure different from the procedure adopted with reference to the plaint filed by co-operative credit societies for the recovery of their dues. [2.1.203]

(71) Laying open two forums, namely, the civil court of original jurisdiction and the "designated authority", to deal with claims by commercial banks against agriculturists may not be either conducive to, or necessary for, the expeditious and effective settlement of such claims; nor will it be fair to the marginal farmers and agriculturists

who may submit to the summary procedure of the designated authority, whereas a well-to-do agriculturist-farmer may easily stall the proceeding before the designated authority by initiating proceedings in civil courts. Hence, it is necessary that the scope and extent of the authority of the forums now available for settlement of claims by co-operative credit societies and by commercial banks relating to dues from agriculturists should be identical. It is also necessary that with reference to the claims of both types of credit purveyors there should be no recourse to civil courts of original jurisdiction. [2.1.206 and 2.1.207]

(72) It is desirable, if not necessary, to deal with agriculturist-borrowers as a class and give them the same treatment whether they avail themselves of rural credit from a co-operative credit society or a commercial bank. Hence, it is necessary that on the lines of the provisions now found with reference to the recovery of dues of cultivating-borrowers of co-operative credit societies, remedies by way of appeal and revision (wherever applicable) should be provided also with reference to proceedings that may be instituted by commercial banks against their cultivating-borrowers. [2.1.208]

(73) Adoption of the provisions relating to summary procedure on the lines of the provisions now found in the Maharashtra Co-operative Societies Act with suitable modifications would facilitate the recovery of rural credit extended by commercial banks. [2.1.209]

(74) The Study Team which went into the problem of overdues of co-operative credit institutions has reiterated the recommendation of the All-India Rural Credit Review Committee (1969) for a provision in all Co-operative Societies Acts enabling the central co-operative banks to initiate action on their own against any defaulter-member of any primary agricultural credit society when the credit society is reluctant to do so. Such a provision already exists in the Co-operative Societies Acts of Andhra Pradesh, Haryana, Jammu and Kashmir, Punjab, Rajasthan, Uttar Pradesh and West Bengal. We endorse the recommendation of the Study Team and recommend such provisions in the Co-operative Societies Acts of the other States where such provisions do not exist now. [2.1.210]

(75) Recovery of dues through the machinery available for recovery of land revenue brings in help and assistance of the State revenue authorities in a big way and such assistance should be available both to co-operative credit societies and commercial banks while extending rural credit. It is illogical that such assistance is available when commercial banks extend such credit through co-operative credit societies and is not available to them when they extend such credit directly to the agriculturists. Hence, it is necessary that the award

or decree of the designated authority given on an application by a commercial bank for recovery of its dues from an agriculturists should also be made enforceable in the same manner as provided for in the law relating to recovery of land revenue. [2.1.214]

(76) It is desirable that in addition to the revenue officials, the Registrar of Co-operative Societies should also be empowered to execute the decree passed by him. As he has already been entrusted with the powers of civil court while considering the claims of co-operative credit societies, it is fitting that he is also conferred with the necessary powers for execution either directly by himself or through the officials of the revenue department, depending upon the circumstances of each case. In line with the provisions we have earlier recommended, the position should be the same with reference to recovery of dues also owing to commercial banks by agriculturists. [2.1.216]

(77) We do not agree that powers of execution can be considered as only of a ministerial nature. It would be contrary to accepted notions of justice and fairplay to confer on the officers of the lending institution powers of an executing court which, with reference to public financing institutions like co-operative credit societies, are now allowed to be exercised by officers exercising quasi-judicial functions, like the Registrar of Co-operative Societies and/or the Collector of the District. [2.1.217]

Power of sale re. agricultural lands

(78) The main difficulty faced with reference to the disposal of the property charged in favour of a co-operative credit society which is extending short-term credit is not due to any inadequacy of the machinery or the legal provisions available for bringing the property to sale. The remedy of approaching the Registrar of Co-operative Societies available to co-operative credit societies is also inexpensive. Under the circumstances, the suggestion of the Working Group on Legal Matters set up by the Committee on Integration of Co-operative Credit Institutions for conferring the power of direct sale without the aid of the Registrar of Co-operative Societies (by having recourse to a special form of mortgage called "Gehan"), which has been endorsed by the Committee on Integration, will not really help to solve the practical problems experienced in the disposal of the land by public financing institutions like co-operative credit societies. *A fortiori*, the position will be the same with reference to commercial banks lending to agriculture. [2.1.218 and 2.1.219]

(79) While trying to dispose of the property under the special law through the Registrar of Co-operative Societies or the designated authority (in the case of commercial banks), public financial institutions have been provided with a simple, inexpensive and not a very time-consuming procedure for the disposal of the charged land or any interest therein. By eliminating recourse to the Registrar of Co-operative Societies or the Village revenue officials in disposing of the land, realisation of the dues is not going to be facilitated. Having regard also to the peculiar features of our agricultural land, like tenurial claims, claims of the State Government towards its revenue, etc., it is also not advisable, nor is it fair to the agriculturist, to confer on the public financial institutions, whether they are co-operative credit societies or commercial banks, the further right, in addition to the right to invoke the help and assistance of the Registrar of Co-operative Societies and the revenue authorities, of directly disposing the charged land by their own officials. Hence, unlike in the case of industrial advances by public term-lending agencies, with reference to rural credit by institutional agencies, giving to them the right of directly disposing of the agricultural land is neither necessary nor desirable. [2.1.220 and 2.1.221]

State-owned Farming Corporations

(80) The Study Team on overdues of co-operative credit institutions has recommended the establishment of a State-owned Farming Corporation in each State which could serve as an important and effective agency in the realisation of overdues of co-operative credit institutions from wilful and recalcitrant defaulters. We strongly endorse the recommendation of the Study Team as this is very practical and in our view would prove to be the most effective way of solving the several problems now experienced in the case of disposal of the lands secured to institutional agencies extending rural credit. [2.1.224]

Interim measures

(81) Pending the formation of State-owned Farming Corporation in each State on the lines recommended by the Study Team on Overdues of Co-operative Credit Institutions, institutional agencies, whether co-operative credit societies, commercial banks or rural banks, should be freely allowed to bid at any sale that may be held by the Registrar of Co-operative Societies or the District Collector (or the designated authority). Provisions now found in the co-operative laws or elsewhere which restrain the institutional agency from bidding for acquiring the lands secured to it should be suitably modified for this purpose. Pending the formation of such State Farming Corporations,

at the auction sale, if there are no bidders willing to pay any higher price, the State Governments may also help the institutional credit agencies extending rural credit, by acquiring the lands for the minimum price, i.e., the amount actually recoverable as arrears or overdues and then they may make arrangements for disposing of the acquired lands to agriculturists who may be willing to take the lands. A preference in this regard may be given to the defaulting agriculturist provided he pays the overdues within a specified time together with the costs and expenses which the State Government might have incurred. [2.1.225]

Assignment of the charge

(82) The security interest arising under a declaratory charge in favour of a co-operative credit society (or a commercial bank under the legislation based on the Model Law) is created within a statutory framework which provides for the manner of creation of the security interest, the extent to which it operates and how it could be enforced. There is no specific provision (though there seems to be a necessity for the same) in this statutory framework providing for the lending institution being enabled to assign its security interest to secure any refinancing arrangement. [2.1.226]

(83) Hence, there should be a specific provision in the Co-operative Societies Acts and the legislation which purports to extend the scheme of such declaratory charge to rural credit extended by commercial banks, to clarify that the charge in favour of the lending institution may be assigned (such assignment should in turn be capable of being registered with the sub-registrar of assurances in the manner provided for the registration of the declaratory charge) by the lending institution and the assignee shall be entitled to the same rights and privileges as the assignor had with reference to the charge. [2.1.229]

Declaratory charge and medium-term loans

(84) As indicated in the Manual on Production-oriented System of Lending for Agriculture, medium-term credit to cultivators is given for meeting outlay relating to the replacement and maintenance of wasting assets and for capital investment designed to increase the output from land, such as the deepening of wells, sinking of new wells, installation of pumpsets, purchase of agricultural machinery or a pair of bullocks, etc. The term of the loan is not confined to one crop season. Though the repayment of the loan is expected from out of the sale proceeds of the produce, the loan cannot be liquidated from the produce of a particular year. It may have to be in instalments

spread over a term of years, usually three to five years. Since repayment of such credit is spread over a number of years and in view of the long-term gains to the land benefiting from such assistance (by the loan enhancing the income yielding capacity of the land), a charge on the land will be usually necessary. [2.1.230]

(85) For extending the medium-term credit, the security considerations would be adequately met, if an interest in the land is acquired by recourse to the provisions of the declaratory charge. To this extent, the suggestions, made earlier with reference to declaratory charge obtained for extending short-term credit, would substantially cover also the extension of credit by a lending institution for furnishing medium-term credit. [2.1.232]

Medium-term credit against personal property security

(86) The provisions suggested to the general law relating to personal property security, in our Report on the said subject, dealing *inter alia* with questions, namely, the preference in favour of purchase money credit, registration of security interests in fixtures, the provision for preservation of a perfected security interest regarding finance given for the acquisition of the property (even before such acquisition), are all features which would supplement and strengthen the available framework for institutional agencies extending medium-term credit. [2.1.233]

Legal mortgage vis-a-vis declaratory charge

(87) In practice, while extending rural credit, commercial banks have recourse to the statutory framework providing for a declaratory charge and land development banks have recourse to legal mortgage. Naturally, the relevancy of institutional agencies having recourse to different forms of obtaining security interests while performing the same function merits consideration. [2.1.238]

(88) The cost of creation of the security interest under both the procedures is substantially negligible. In the case of a declaratory charge there is no instrument which will attract stamp duty and registration charges. As regards the mortgage, though there is an instrument, the special provisions, that exempt from payment of stamp duty and registration charges on instruments executed in favour of co-operative societies (commercial banks' lending to agriculture is also given exemption from payment of stamp duty payable on agricultural loans upto a certain limit), ensure that the cost factor is the same whether the device adopted is one of declaratory charge or that of mortgage. [2.1.242]

(89) As regards registration of both a declaratory charge and a mortgage, the Co-operative Societies Acts of many States provide for the recording officer being furnished with the document containing the declaration or a copy of the mortgage deed, which may even be sent by post, and thereupon the charge or the mortgage is regarded as being duly registered. [2.1.243]

(90) As standard documents are taken for obtaining a mortgage as well as a declaratory charge (which are often printed), the fact that the form for obtaining declaratory charge is brief or that the mortgage document is a little more lengthy is not of significance from the point of view of time or labour involved in preparing the document for extending rural credit. [2.1.244]

(91) The mortgage document may also provide for covering future advances provided a maximum amount is specified consistent with the provisions of section 79 of the Transfer of Property Act, 1882. Thus, for covering future advances it is not necessary to prefer the method of the declaratory charge. [2.1.245]

(92) While a security interest obtained by way of a declaratory charge may not be readily assignable for securing the refinance to the society, the mortgage form facilitates this — we have suggested special provisions to rectify this defect now existing in the scheme for obtaining declaratory charge. [2.1.246]

(93) The principle that the interest of a long-term credit-provider shall rank in preference to the interest of an institution extending short term credit is already recognised and legislation in some States have given effect to that. Under the circumstances, though there are somewhat differing rules as to priority as regards declaratory charge and mortgage, within their scope they operate fairly and there is no special case for any substantial alteration in the present governing rules as to priority applicable to declaratory charge *vis-a-vis* the security interest arising under a mortgage. [2.1.249]

Mortgage form suited to long-term credit

(94) The fact that separate mortgage deeds are taken to secure subsequent loans by land development banks may be due to the special features of long-term credit. Thus, while taking a declaratory charge a co-operative credit society making an advance to the cultivator may reasonably assess the limit upto which credit may be required in subsequent years for seasonal agricultural operations and hence may be in a position to specify the extent to which the charge by way of declaration should cover future advances that may be a

recurring feature of short-term credit. On the other hand, unlike in the case of short-term credit, per cultivator extension of long-term credit is not such a recurring feature. Long-term credit may have to be provided having regard to the special circumstances of each case. Thus, once a development loan is given for providing or improving the irrigational facilities of a land, subsequent credit for the same purpose to the same cultivator or against the same land may not be necessary. Thus it may be more convenient for land development banks to take separate mortgage documents to secure each long-term credit and for the same reason recourse to a continuing security device may not be apt. [2.1.250]

Direct sale under Registrar's control

(95) The power of sale granted without the intervention of the court with reference to a mortgage in favour of a land development bank and provided for in the Maharashtra Co-operative Societies Act, 1960, is not the same as the power given to an English mortgagee to sell the mortgaged property without the intervention of the court in the circumstances provided for in section 69 of the Transfer of Property Act, 1882. As pointed out earlier, as regards agricultural lands, the main problem is the want of bidders who are in a position to offer a reasonable price. Again, agricultural lands are subject to tenurial and tenancy claims and disposal of the land cannot easily be effected by the lending institution without the aid or intervention of the Registrar of Co-operative Societies or the revenue officials who now constitute a special forum which could be approached by the lending institution for attachment and sale of the property. However, there should be no objection for the Registrar or the designated authority authorising the long-term credit-providing institution to exercise the power of sale without the intervention of the court after hearing the objections of the mortgagor and finding that in a given case it will be more convenient if this procedure is adopted, having regard to the inbuilt safeguards that are now provided for in the relevant provisions of the Maharashtra Co-operative Societies Act, 1960. It is desirable that such provisions are incorporated in the enactments relating to land development banks in those States where such provisions do not find a place now. [2.1.252]

(96) Since the land development banks are now conferred the right of sale of the mortgaged property without the intervention of the court subject to reasonable restrictions on the exercise of such power and subject to the authorisation and approval of the Registrar of Co-operative Societies, it may not be necessary to provide any other special form of mortgage incorporating the features of English mortgage for dealing with agricultural lands. [2.1.253]

(97) However, it is necessary that similar provisions within the circumscribed limits as indicated above should be available also to commercial banks when they extend rural credit for long-term purposes. The relevant legislation may be suitably modified to incorporate provisions on lines similar to the provisions now found in sections 133 to 136 of the Maharashtra Co-operative Societies Act, 1960. [2.1.254]

Multiplicity of statutes and multiplicity of differences

(98) With reference to short-term credit, medium-term credit and long-term credit which are extended by co-operative credit societies, land development banks, commercial banks and rural banks, there are now a multiplicity of State enactments. As may be expected, there are several variations of a major and minor nature in these enactments. These variations may be classified in the following groups :

- (i) the differences in the relevant provisions applicable to short-term and medium-term credit extended by co-operative credit societies in different States;
- (ii) the differences in the provisions dealing with extension of long-term credit by land development banks of various States;
- (iii) the differences now found in the applicable provisions of various States as regards extension of short-term, medium-term and long-term rural credit by commercial banks (including regional rural banks); and
- (iv) the differences found within a State in the treatment given to co-operative institutions and commercial banks in their extending—
 - (a) short-term credit, and
 - (b) long-term credit.

Though the Government of India, the State Governments, the Reserve Bank of India and the Agricultural Refinance and Development corporation have been bestowing considerable attention and have been taking special efforts to minimise the major discrepancies in the applicable statutes of different States in order to facilitate the smooth flow of rural credit by institutional agencies belonging to both categories, namely, co-operatives and commercial banks, the differences that have developed are very substantial and they are not conducive to the smooth extension of rural credit. [2.1.255 to 2.1.257]

Futility of piece-meal efforts

(99) It will become a massive effort and may not be very productive if steps are to be initiated with reference to the provisions now found in the State enactments in each State and as applied to the different institutional agencies and as a consequence thereto suggest suitable amendments to all the applicable statutes in every State. Though to a certain extent such steps may be unavoidable, the time and the effort that would be required and the co-ordination of the officials that is involved clearly indicate that by such an effort the changes required in the applicable laws cannot be effected within a reasonable time so that the extension of rural credit, which is vital for the country's economic development, may flow unhampered and under adequate and reasonable safeguards. Even after putting in such a massive effort and bringing about the desirable uniformity in essential respects in all the applicable statutes governing extension of rural credit by institutional agencies, it may be necessary to keep a continuous watch over the changes that may be considered necessary in the statutes in the light of subsequent experience by the Governments and the authorities at the Central and the State levels who are responsible for giving direction for the flow and the extension of rural credit by institutional agencies. [2.1.258 and 2.1.259]

Develop a comprehensive statutory scheme

(100) In order that our statutory framework dealing with credit-security aspects concerning rural credit provides and continues to provide the necessary inbuilt safeguards for extension of rural credit by institutional agencies and in order that the agriculturists who may approach different institutional agencies in the different regions of our country are all given an equitable treatment and are not unduly or unreasonably discriminated, we consider it necessary that the special law dealing with credit-security aspects and concerning rural credit should be developed as a comprehensive scheme which would apply alike both to co-operative credit agencies and commercial banks so long as they perform the same function, whether it be of extending short-term credit or of medium-term credit or of long-term credit. [2.1.260]

(101) For this, it is necessary to develop a comprehensive statutory scheme that will deal with all credit-security aspects relating to extension of rural credit by all institutional agencies. But, this may have to proceed in stages. These stages may relate to an interim plan and a long-term plan. [2.1.261]

Interim steps

(102) The interim plan for reforming the provisions of our special credit-security law dealing with rural credit may be initiated by the Reserve Bank of India in consultation with the Agricultural Refinance and Development Corporation.

- (i) As an interim expedient, the Reserve Bank of India and the Agricultural Refinance and Development Corporation may undertake a study covering all credit-security aspects and suggest the changes that may have to be made in the numerous enactments in different States in the light of our recommendations. In this, to the extent feasible, the respective State Governments' representatives may also be associated while the study covers the statutes in force in a State and the administrative machinery available in each State for dealing with all credit-security aspects pertaining to extension of rural credit.
- (ii) The Reserve Bank of India and the Agricultural Refinance and Development Corporation may then take up with the concerned State Governments, in consultation with the Government of India, the changes that may be necessary in the statutes applicable in each State.
- (iii) The State Governments may consider the changes suggested in the applicable statutes in their States keeping in view the need to avoid differences in the treatment of credit institutions performing the same function and the desirability of eliminating, to the extent possible, all serious bottle-necks in the flow of institutional rural credit and, at the same time, assuring to the agriculturists approaching either a co-operative credit society or a commercial bank an equitable treatment without any unreasonable discrimination. [2.1.262]

Long-term plan

(103) As part of a long-term plan, steps will have to be taken simultaneously to bring within one comprehensive statutory scheme all credit-security aspects relating to extension of rural credit by institutional agencies. In developing the scheme, the aspects mentioned in paragraph 2.1.263 of this Report will have to be taken into consideration. [2.1.263]

(104) As a consequence of developing such a comprehensive scheme for the special rural credit-security law of our country, some changes will have to be made in the State legislation. The Co-operative Societies Acts may be purged of all the provisions relating to—

- (a) the creation of declaratory charge, its priority, its registration and its enforcement;
- (b) the provisions relating to land development banks containing special priorities in favour of such banks; and
- (c) the provisions relating to the creation of first charge on the assets of the borrowing member,

and any other provision in so far as such provision deals with credit-security aspects. The provisions of the State enactments now applicable to commercial banks and rural banks based on the Model Law should be replaced by the comprehensive statutory scheme we have outlined above. [2.1.264 to 2.1.266]

Preparation of Model Law

(105) For bringing expeditiously the comprehensive statutory scheme to cover all credit-security aspects relating to rural credit given by institutional agencies and for ensuring that these provisions remain uniform throughout the country (which is very necessary for institutional agencies functioning effectively and for agriculturists availing themselves of credit without much cost and delay and without being unreasonably discriminated), the Reserve Bank of India may organise, in consultation with the Agricultural Refinance and Development Corporation, a project study after collecting the latest legislation applicable in all the States, and the Study Team may be asked to prepare a model law which every State may enact. As annexure to this model law, the necessary amendments to be carried out in the State enactments may also be got drafted by the Study Team. Once this is done, the Reserve Bank may take up with each State Government the desirability of the Government enacting a uniform legislation on the lines of such model law. [2.1.267]

Methods for expeditious implementation

(106) The effective institutional channelisation of purpose and production oriented credit is feasible only when the credit-security law governing such transactions is effective and free from unnecessary constraints and it is equitable and fair to the agriculturists and similar provisions govern the extension of such credit in all the States. Not only that we should see that the laws are made uniform as early as

they could be, it is also necessary to ensure that they are maintained in that form. For this purpose, the following two alternatives may be considered:

- (i) Constitutional amendments to the relevant Schedules, which will have the effect of transferring co-operative credit to the Union List or the Concurrent List; and
- (ii) invoking the provisions of Article 252 of the Constitution. [2.1.268 and 2.1.269]

Constitutional amendment vs. recourse to Article 252

(107) Since it is possible to bring about the necessary uniformity without a Constitutional amendment by recourse to Article 252 of the Constitution, we do not consider that there is any necessity for making Constitutional changes for this purpose. Again, continuous involvement of the States is absolutely necessary for rural development and for this such a Constitutional amendment which may have the effect of taking away partially at least the States' responsibility, is not desirable. However, the fact that an expert body like the Banking Commission (1972) has felt the necessity for suggesting a Constitutional change would also, we believe, go to impress on the States and the Union the necessity for their expeditious action to bring about a uniform pattern of legislation which would be rational, free from obscurity and be conducive to public interest and the larger economic development of our country. [2.1.270]

Central legislation

(108) Hence, it will be highly convenient and conducive to uniformity if the Central Government were to legislate in respect of these subjects in one enactment pursuant to a specific authorisation that may be given to the Central Government in this regard by the State Legislatures under Article 252 of the Constitution. [2.1.271]

(109) For the above purpose, the States may consider passing an appropriate resolution under Article 252 of the Constitution to enable Central legislation. Having regard to the main purpose of the comprehensive scheme of legislation that is being suggested and the necessity for uniformity so that institutional credit agencies operating at all levels may be facilitated to work effectively in a conducive environment with adequate safeguards, State Governments may consider favourably the question of the States passing the resolution under Article 252 of the Constitution, empowering Parliament to legislate in this field. [2.1.272]

Security for refinance credit

(110) Since the granting of credit by way of refinance against security interest in immovable property is a matter of recent development, it is not surprising that the present framework of our credit-security law is not found adequate. The present legal framework and the lines on which it may require modification may be considered with reference to the methods now adopted by the major institutions providing refinance *inter alia* against interests in immovable property. [2.2.1 and 2.2.3]

re. Refinance from the Industrial Development Bank of India (IDBI)

(111) While taking an agreement from an eligible institution availing itself of refinance, the IDBI requires such financing institution to declare that "it holds the securities mentioned in the financing institution's application (including the properties particulars whereof are given in the security documents) as security for the said loan/advance". As pointed out in paragraph 2.2.5 of this Report the scope and effect of this declaration are not clear. [2.2.4]

(112) Assuming that the declaration provides for creation of a security interest, there are now no clear legal provisions which will govern the enforcement of the security interest by a refinancier. This is because the provisions now found in the Transfer of Property Act dealing with mortgages and charges which set out the law relating to security interests in immovable property, are primarily concerned only with the *inter-se* rights and liabilities of the ultimate borrower and the financing institution. [2.2.6]

(113) On the lines of the provisions now found in the Co-operative Societies Acts, which enable the Registrar of Co-operative Societies to act to safeguard the interest of the refinancing credit institution like the debenture holders of the special development debentures issued by the State Land Development Bank (SLDB), there should be a designated officer of the State Government empowered by law to safeguard the interest of the public refinancing institution providing industrial credit. We also recommend that for providing refinance *inter alia* against security interests in immovable property, institutions like the IDBI should be protected by a statutory provision on the lines of the provision now found applicable with reference to the Agricultural Refinance and Development Corporation (ARDC) while that Corporation provides refinance facilities to eligible institutions. [2.2.8]

re. refinance from the ARDC

(114) Though the position under the general law is not adequate, the provisions in the special law now found in the Co-operative Societies Acts empower the Registrar of Co-operative Societies to act to safeguard the interest of the refinancing institution, such as the ARDC, when circumstances so warrant. These provisions afford a useful analogy and also serve as a precedent for considering the lines on which the interests of public refinancing institutions could be safeguarded when they provide refinance credit secured against any interest in immovable property. [2.2.7]

Advantage of the trust clause

(115) The advantage under the statutory trust clause in favour of the ARDC is that no formal charging is necessary of the security interest obtained by the eligible institution in favour of the ARDC. In effect, this clause secures to the ARDC *inter-alia* the security interest obtained by the eligible institution from the ultimate borrower without the necessity for giving descriptions of the property secured in any formal document. The technicalities as regards documentation, registration, etc., which are integral parts of an arrangement to provide a security interest by a formal instrument are all dispensed with. This enables the ARDC's security interest to cover charges or mortgages in favour of the eligible institution, that may be created by the borrowers from time to time during the currency of the ARDC loan. Thus, over a floating security the ARDC obtains a benefit in the nature of a fixed charge by the interposition of the device of the trust concept which is statutorily provided for. [2.2.14]

Security interest of State co-operative banks

(116) In so far as the declaratory charge serves as the security for the term loan which is refinanced, the state co-operative bank's rights with reference to such declaratory charge are not explicit. The scheme relating to the declaratory charge now found in the Co-operative Societies Acts provides for the security interest in favour of the lending institution, which would ordinarily be a primary co-operative credit society. If the primary credit society is not taking adequate steps towards the realisation of the loan, if necessary, by enforcing the security, where the circumstances warrant such action, the central co-operative bank and the Registrar of Co-operative Societies may step in towards the realisation of the debt due under the charge. But the state co-operative bank has no security interest available to it under the scheme providing for the creation of the declaratory charge. *A fortiori*, what it has not got, it cannot assign to the ARDC. [2.2.21]

(117) The fact that the general agreement entered into between the ARDC and the state co-operative bank provides for the ARDC obtaining an assignment of the security interest available to the state co-operative bank does not adequately safeguard a situation where the term loan is provided to the state co-operative bank for development of any land and it is intended that the ARDC should have a security interest (either under the trust clause or otherwise) against the land for the development of which the loan by way of refinance is extended. [2.2.22]

(118) Earlier we have recommended a statutory provision to provide for the assignment of the security interest arising by way of declaratory charge. On the implementation of this recommendation, it would be possible for the primary credit society to assign its security interest in favour of the central co-operative bank and for the central co-operative bank in turn to assign the same to the state co-operative bank. Under such a situation, it may be competent for the state co-operative bank to contract with the ARDC to assign its security interest in favour of the ARDC. If, in such a case, the ARDC relies on the trust clause and waives the formal conveyance in its favour of any security document charging the security interest available to the state co-operative bank, then the ARDC would have substantially the same extent of safeguard as is available to it now with reference to security interests held in trust by commercial banks availing themselves of refinance from the ARDC. [2.2.23]

State co-operative banks' efforts to reduce overdues

(119) Apart from the legal difficulties with reference to the creation of a security interest in agricultural land to secure refinancing arrangement pointed out above the necessity for a state co-operative bank being enabled to take appropriate action to enforce the security wherever circumstances warrant may be clearly seen in the context of the efforts to reduce co-operative overdues. At present, the state co-operative bank is not in a position to intervene directly since the Co-operative Societies Act generally provide only for the central co-operative bank (or the Registrar of Co-operative Societies) intervening if there is no prompt action by the primary credit society for enforcing the security to realise the dues. On the lines of the provisions now available to the central co-operative bank, the state co-operative bank also may be empowered to act either directly or through the central co-operative bank and this will provide an additional safeguard and may help considerably in reducing the quantum of co-operative overdues a problem which has been causing considerable concern to the Governments and the apex financing institutions. [2.2.24]

re. refinance to land development banks

(120) Now, the ARDC obtains under the special development debentures through the trustee (who will be the Registrar of Co-operative Societies) a floating charge *inter-alia* on the mortgages transferred or deemed to have been transferred to the SLDBs, under the provisions of the applicable Co-operative Societies Acts. [2.2.28]

Floating charge on immovable property

(121) The concept of floating charge with reference to immovable property is ambiguous. Firstly, there are no statutory provisions specifying clearly the rights and obligations of parties to such a security concept. Secondly, whether it confers a charge not amounting to an interest in immovable property, or in so far as it is backed by mortgages it should be considered as an interest in immovable property, is again a question, posing considerable difficulty. Thirdly, when the concept is proposed to be replaced under a new statutory framework governing all security interests in personal property, its retention only with reference to interests in immovable property is apt to give room for considerable difficulties. At any rate, the "floating charge" concept does not seem to be really employed except with reference to debentures issued by land development banks in the different States by reason of the statutory provisions now found in the Co-operative Societies Acts. [2.2.36 and 2.2.37]

(122) After the amendment of the ARDC Act in 1973, it is not necessary to apply the concept of floating charge with reference to the mortgages securing the extension of long-term rural credit through the land development banks. It may be sufficient if the agreement between the ARDC and SLDB (which may be approved by the State Government) provides that the Registrar of Co-operative Societies shall be the ex-officio trustee to enforce the trust for the benefit of the ARDC (arising in its favour under section 22(4) of the ARDC Act) if and when there is any default in the repayment of principal or payment of interest to the ARDC on the special development debentures. [2.2.39 and 2.2.40]

Powers of the Registrar of Co-operative Societies

(123) The Co-operative Societies Acts of the various States provide for the mortgages obtained by the primary land development banks to be transferred or deemed to be transferred in favour of the state land development banks. The State enactments also provide for the Registrar of Co-operative Societies acting as trustee and for the state

land development bank charging its mortgage interests arising in present or in future in favour of the debenture trustee. These provisions, in so far as their practical utility is concerned, would sufficiently enable the Registrar of Co-operative Societies to safeguard the interests of debenture holders, whether the debentures are supposed to create a "floating charge" over the mortgages or the mortgages are considered to be held in trust for the ARDC in line with the position prevailing now with reference to commercial banks availing themselves of refinance from the ARDC. [2.2.38]

Investigation of title

(124) Unlike personal property where ascertainment of title poses no major problems, the major obstacles coming in the way now of expeditious creation of security interest in real property are the protracted, expensive and highly technical and professionalised steps required to be taken for investigation of title to the property. Hence, in the review of the law relating to advances against real property, our legal infrastructure relating to investigation of title has necessarily to be reviewed. [3.1.11]

(125) In the matter of the law relating to investigation of title, our legislative scheme has remained substantially the same as originally developed in 1877 and we have not even kept up our tradition of considering the developments in Britain and applying the same to our country with appropriate adaptations, with the result that the system has become outmoded and anachronistic. [3.1.11]

(126) The present legal infrastructure with reference to investigation of title to land rests mainly on the provisions relating to registration of documents and encumbrances affecting interests in land. This is now found in the provisions of our Registration Act, 1908. The 1908 Act is only a codifying statute bringing into one legislative piece the 1877 Act together with the several subsequent amendments thereto. There is also provision in the Companies Act, 1956 for registration of charges *inter-alia* on immovable properties belonging to companies. But registration under the Companies Act is complementary and is not an alternative; it is a registration of the security interest whereas under the Registration Act, it is a registration of the instrument affecting the property. [3.1.23 and 3.1.24]

(127) Our legal infrastructure with reference to the applicable provisions meant to help ascertainment of title to immovable property requires a comprehensive review. Commercial bankers, public lending institutions, experienced solicitors, banks' legal advisers are all now finding the present procedure, which follows the common

law system of investigating title over a period of years spread over several decades, as considerably retarding the expeditious flow of development financing and the cost of this procedure as considerably high. For a developing country like ours, it is necessary that we should have a legal infrastructure which would facilitate the expeditious and inexpensive ascertainment of legal title to land, which would help considerably the extension of development finance. [3.1.22]

Record of rights and the Town Planning Schemes

(128) The All-India Rural Credit Review Committee, the Expert Group which considered the State enactments coming in the way of commercial banks lending to agriculture and other official committees which have gone into the problems faced by lending institutions in the spread of rural credit and extending development finance have also been emphasising the value of proper maintenance of the record of rights by the village level and the municipal authorities. However, in view of the administrative basis of the instructions now governing the requirement as to entry, in such record, of transactions affecting the title to the property and the fact that there has been a vast backlog of transactions not entered in such records, the value of such records has been considerably affected. Comparable to the record of rights developed as a result of survey settlement, we may also refer to the Town Planning schemes in the municipal areas whereunder there is also a determination of title based on the findings of the Town Planning scheme authorities. [3.1.31 and 3.1.32]

Ad-hoc Procedure in Co-operative Societies Acts

(129) The ad-hoc procedure found in some Co-operative Societies Act, which is applicable with reference to credit extended by land development bank, provides for separate investigation with reference to each application by a member availing himself of loan from a land development bank. This is not conducive to expedition. This summary procedure with reference to loan applications to land development banks does not avoid the proverbial delays with reference to investigation of title. Again, the validity of the provision postponing the claim of any other person, who could not for any reason make his objections in time, till the bank's dues are paid in full by the loanee notwithstanding anything contained in the Co-operative Societies Act or any other law, is open to obvious Constitutional objections. Even if such ad-hoc procedure is adopted, it does not remove any cloud on title except to safeguard the security interest in favour of the lending institution with reference to the particular

loan. Thus, this ad-hoc procedure does not really help the agriculturists very much in proving their title by reason of this enquiry. [3.1.16 and 3.1.19 to 3.1.21]

Areas amenable to reform

(130) As part of the measures capable of immediate implementation in the present scheme of our registration law, we may consider the following aspects with a view to simplify and expedite the investigation of title to land:

- (1) period-limitation for finding good root of title;
- (2) searches in the register;
- (3) need to reduce the time lag between execution and registration of registrable documents;
- (4) provision for registration of priority notice/caution;
- (5) provisions relating to constructive notice on registration;
- (6) provisions to make the register more complete *re.* charges on land;
- (7) priority from date of registration or date of execution?
- (8) registration procedures; and
- (9) basis for the levy of registration charges. [3.1.35]

Period of investigation

(131) Now the limitation on the length of time for which title has to be traced is decided in our country with reference to the facts of each case and there is no general rule which could ordinarily be applied and could be relied on. This is not a satisfactory position. The law and practice relating to conveyancing will be considerably simplified and conveyancing can be effected more expeditiously if we have an appropriate statutory provision that will at least be applicable to the security interests in immovable property obtained by banks and notified public financing institutions. [3.1.44]

(132) We should have a statutory provision providing that where a bank or other notified institution extends credit to a person after carrying out searches of the encumbrances and other charges revealed as a result of investigating title for a period of fifteen years, the interest of the bank or the lending institution shall not be affected by the claim of any other person whose claim would not have come to the notice of the bank during its investigation of the title for the

said period of fifteen years. A provision on these lines is necessary in public interest and will considerably help development financing institutions which are required to extend credit for large sums. [3.1.45]

(133) It should also be provided that the provision limiting the requirement as to search in the process of investigation of title with reference to security interests in favour of banks and other financing institutions for a period of fifteen years shall, however, not affect the claim of any person whose title or interest is not disclosed under such search. The statute shall also provide that without in any way affecting the security interest in favour of the bank or the lending institution, such a person's claim or interest should be capable of being enforced against the person who has availed himself of bank credit and against all persons claiming under him. [3.1.46]

Facility for search

(134) It is obvious that the provisions relating to searches in our country are totally inadequate to facilitate expeditious and inexpensive investigation of title to land or other immovable property. When compared with the provisions in this regard in other countries, it is evident that the provisions now in our country with reference to searches are at considerable variance as regards the extent to which they could go to satisfy the requirements of institutional lending agencies and others. [3.1.54]

(135) The provisions for furnishing encumbrance certificates may be extended to all the States. The State Governments may also go into the question of the charges now levied for furnishing encumbrance certificates and try to reduce them to the minimum possible having regard to the administrative work involved. [3.1.55]

(136) State Governments may also consider furnishing all information as regards encumbrances found in the register as expeditiously as possible and in this respect a study may be undertaken of the extent to which facilities for an expeditious search could be extended, at least with reference to information required by banks and other financing institutions. [3.1.56]

(137) State Governments may also consider issuing special encumbrance certificates where they can take additional precautions (if necessary by a second verification by an independent official) and issue the certificate without the present clause providing for a disclaimer of liability as regards the correctness or accuracy of the entries, which acts as a deterrent or institutional lenders relying merely on encumbrance certificates with reference to industrial advances. [3.1.57]

Time for registration of documents

(138) While there seems to be a case for reducing the time now allowed for registration of documents, in view of the comments given earlier on a similar proposal made by the law Commission of India in 1957, we have to consider effective alternative means by which it may be ensured that—

- (a) a search of the register would disclose also mortgages or charges affecting the land which are in the process of being completed; and
- (b) the interests of banks and other lending institutions are protected during the period which may be necessary to present the document for registration and complete the registration formalities. [3.1.62]

Lodgement of priority notice

(139) Our Registration Act should be amended to make it possible for a person obtaining a document securing an interest in immovable property to lodge immediately with the sub-registrar of assurances a priority notice in the prescribed form, on receipt of which the sub-registrar may make a provisional entry in the property register regarding the service of such notice. Provided the document is formally presented within the time allowed as per rules and is admitted before the sub-registrar in the manner now required, the priority for that document may relate back to the date of the lodgement of the priority notice. This would considerably eliminate the difficulties now felt by a person making a search in ascertaining the existence or otherwise of executed transactions awaiting registration and concerning the land. If the document is not presented for registration within the time allowed, the notice shall automatically lapse. [3.1.68]

Doctrine of constructive notice

(140) In our country the doctrine of constructive notice as applied to registered transactions is stated in Explanation I to the definition of the expression "a person is said to have notice" in section 3 of the Transfer of Property Act, 1882, which applies to any transactions relating to immovable property which is "required by law to be and has been effected by a registered instrument". Hence, constructive notice on registration is related to the registration of an "instrument". In other words, it does not cover entries or copies of documents required by law to be filed in Book No. 1, when there is no instrument providing for the creation of a security interest or other form of encumbrance on the land, or when there is such an instrument but,

instead of the instrument being registered, the special procedure of filing a copy of the instrument in Book No. 1 is being followed. The definition of "notice" in the Transfer of Property Act has to be widened to cover the development of the new situation as our scheme of registration has now been imperceptibly enlarged to provide for two types of registration. [3.1.70 and 3.1.87]

(141) Since a search of the register is a requisite which all prudent persons acquiring title to the property may be expected to undertake, there is no valid reason as to why there should be premium in favour of negligent persons who do not choose, for their own reasons, to undertake a search of the register before entering into any dealings concerning the land. Hence, Explanation I to the definition of the expression "a person is said to have notice" in section 3 of the Transfer of Property Act should be modified to cover all cases of registered instruments concerning the land whether or not the instruments are required to be compulsorily registered. In view of this the said Explanation may be amended on the lines indicated in paragraph 3.1.95 of this Report. [3.1.93]

Registration Act scheme

(142) While the basic scheme is by and large, adapted mainly to the registration of instruments and admitting of such documents formally presented for registration, the substantial additions to the entries to be made in Book No. 1 or copies of instruments to be filed in Book No. 1 require that the position of such registration of transactions as opposed to registration of instruments should be fairly clear as regards their effect and the treatment to be given to them under the applicable provisions of both the Transfer of Property Act and the Registration Act. [3.1.87]

Comparison with Companies Act scheme

(143) The filing provisions in the Registration Act, as regards transactions with reference to which either entries are made or the copies of the documents are filed in Book No. 1, may be contrasted with the provisions of the Companies Act, 1956, which provide for registration of a security interest in the assets of a company whether or not the creation of the interest is evidenced by a formal instrument. In view of this, companies are able to avoid the payment of stamp duty and registration charges and thus avail themselves of credit at a cheaper rate and banks are able to rely, wherever they could, on a security interest in the assets of companies obtained by way of deposit of title deeds. From the point of view of making the register

more useful, it is necessary to strengthen adequately the Registration Act provisions with reference to filing of particulars regarding security interests in the assets of non-corporate borrowers. [3.1.89 and 3.1.90]

Section 89 of the Registration Act

(144) A clause may be added to section 89 of the Registration Act, 1908 (after enlarging its scope on the lines considered later), somewhat on the lines recommended by the Setalvad Law Commission providing that the filing of copies, or the making of entries, under the said section shall, for the purposes of the Registration Act, have the same effect as if the transactions had been registered under the Registration Act. [3.1.92]

Register under-utilised

(145) We are not now able to derive the full value of the register maintained under the Registration Act property-wise in each sub-registry wherein substantial number of deeds and other instruments affecting title to immovable property are now registered. As a consequence, the register remains under-utilised, and it results in the avoidable expending of time, effort and money by banks, other financial institutions and members of the public who are dealing with the immovable property, or are acquiring an interest therein, by way of purchase, creation of security interest or otherwise. While ascertaining information regarding the existence or otherwise of charges or encumbrances which are not now entered in the register but the existence of which the register could effectively indicate, the members of the public and the public financing institutions are put to efforts, expense and expending of time which are beyond any reasonable proportion. If the register is made to serve as the source of information regarding the existence or otherwise of such charges or encumbrances concerning the land, the additional time, effort and cost now required to be spent by all concerned may be either wholly eliminated or made practically negligible. It is unfortunate that we have not been able to realise, since the introduction of the register a century ago, the necessity for deriving from the register the maximum utility and avoid such unnecessary trouble, effort and expense. It is in public interest that the register is made to be as self-contained as possibly we could make it. [3.1.97 and 3.1.98]

(146) In substance, the provisions suggested by the Setalvad Law Commission would have ensured that the register indicates also the existence or otherwise of transactions affecting title to immovable property which may arise out of—

- (a) security interests created in favour of Government for loans given to develop immovable property under the Land Improvement Loans Act, 1883, and the Agriculturists Loans Act, 1884;
- (b) grants, partition instruments made by Government or revenue officials;
- (c) decrees and orders affecting rights in immovable property;
- (d) certificate of sale of immovable property in a public auction held by civil court, revenue or other public officer;
- (e) vesting orders affecting immovable property; and
- (f) *lis pendens*. [3.1.103]

(147) Evidently, the Kapur Law Commission was influenced in its decision to drop the very salutary provisions suggested by the Setalvad Law Commission to make the register more useful and purposive, by the comments which seemed to have pointed out the addition to administrative work that may be caused in implementing the proposals. Unfortunately, administrative assessment has not properly evaluated the positive advantages for the economic development of our country at large that would accrue by the implementation of such proposals by way of the reduction in cost and the timely flow of credit.

[3.1.105 and 3.1.106]

(148) No sufficient weight has been given to the fact that when compared with the registration systems in other countries ours has remained stagnant ever since the same was devised and shaped by the statute of 1877. It is inevitable that improvement in organisation and methods have to be devised in order that the existing registration machinery serves more efficiently the basic objective of an efficient system of registration. The value of the proposals made by the Setalvad Law Commission has evidently not been fully appreciated later. Those proposals have now greater significance in the context of the catalytic role envisaged for banks and other public financing institutions to increase the tempo of urban and rural economic development by adequately meeting the credit needs of the different sectors under a purpose-oriented allocation of credit. [3.1.107 and 3.1.108]

Filing re. bank charges

(149) Section 89(3) of the Registration Act, 1908, has to be clarified to cover also the filing in Book No. 1 particulars of charges in favour of both commercial and co-operative banks. [3.1.119]

(150) Provision for entering in Book No. 1 particulars of mortgage by deposit of title deeds executed in favour of banks and other financial institutions would be of great benefit towards the extension of credit to the priority sectors both in urban and rural areas. Hence, in section 89 a new sub-section may be added to provide for the sub-registrars of assurances being advised to register, in a form prescribed, particulars regarding mortgages created by way of deposit of title deeds in favour of banks and other financial institutions. [3.1.122]

Partitions, grants by Government officials

(151) In its sixth report the Law Commission of India had recommended the widening of the scope of section 89 of the Registration Act, 1908, to cover *inter-alia* the filing in Book No. 1, or the entering of the particulars of partition instruments, grants, etc., made by Government or revenue officials. In order that the register may indicate, as far as may be, all material transactions affecting title to property, the proposal for entering in Book No. 1 particulars of partition of land, grants of land, etc., made by Government or revenue officials, may be accepted. [3.1.123]

Filing of decrees and orders

(152) Originally, the limited objective of prevention of fraud with reference to certain compulsorily registrable documents has been the main objective of our registration law. This cannot now be regarded as the sole purpose of our registration scheme. There is a great need for adequately strengthening our register by ensuring that a search in Book No. 1 would indicate, as far as may be, all charges and encumbrances on the land. It is in this context that we will have to consider the necessity of our registration law providing for the appropriate filing of decrees and orders of courts. [3.1.132]

(153) Registration of decrees and orders relating to immovable property under a simple procedure by providing for the filing of copies thereof in the relevant sub-registries where the properties are situate would obviate all difficulties earlier envisaged with reference to registration of such decrees and orders. It would also be inexpensive as the procedure relating to admitting a document for registration will not be applicable and personal presentment is dispensed with. Such a step will rationalise our registration scheme and make the register

more useful. The measure would be in line with the provisions found in other countries also. Compared to the obvious advantages for such registration by means of filing, the possible increase of some administrative workload should not be a deterrent and when proper O & M methods are applied, the administrative pressure could be eased. Hence, the scheme of section 89 of our Registration Act should be widened to cover also filing in Book No. 1 decrees and orders of court relating to immovable property. [3.1.138]

re. *awards*

(154) Though an award relating to immovable property may *per se* create only inchoate rights, it is in a higher status than a mere pending action. Hence, an award should also be included in the scope of the transactions affecting immovable property, which are required to be filed or entered in Book No. 1. [3.1.139]

re. *sale certificates*

(155) The filing provisions of our registration scheme already cover certificates of sale issued to auction purchasers regarding immovable property sold in public auction held by a civil court or a revenue officers. These provisions should cover also sale certificates issued by all public officers with reference to immovable property sold in public auction conducted by them. [3.1.140]

(156) There is need for clear-cut provisions with reference to all cases of auction sales of immovable property held as security by commercial and co-operative banks pursuant to the exercise of the right of private sale in cases where such power is now allowed. The purchaser in all such cases may be issued a certificate of sale and particulars of such certificate may be required to be furnished to the registering authorities in the prescribed form to be entered in Book No. 1 on the lines now provided for auctions conducted with reference to mortgages in favour of land development banks. [3.1.144]

re. *vesting orders*

(157) The provisions relating to filing in Book No. 1 should cover also vesting orders affecting immovable property, as otherwise the register will be silent on a very vital matter which affects radically the title to the immovable property as a result of the same having been vested in the Official Receiver/Assignee/Liquidator. The Official Receiver or Assignee or Liquidator may be statutorily obliged to furnish to the concerned sub-registrar of assurances particulars of the

immovable property comprised in the property of the insolvent so that the fact that the Receiver or the Assignee or the Liquidator is the person who has the legal custody of the property may be made clear to persons dealing with the immovable property. [3.1.148]

re. lis pendens

(158) It is necessary to provide for registration of *lis pendens*. Provision may be made for filing in Book No. 1 particulars of pending actions on the lines now required to be filed in the States of Gujarat and Maharashtra. For this purpose, on the lines of the provision applicable in those States, section 52 of the Transfer of Property Act may be amended so as to be applicable to all the States. [3.1.160]

Effective date on registration

(159) There is necessity for compulsorily registrable documents or transactions relating to creation of security interests taking effect from the date of their registration and not from the date of their creation. Section 47 of our Registration Act and Section 48 of our Transfer of Property Act, which are the relevant provisions in this regard, may have to be suitably altered to provide that—

- (a) priority as regards registered documents or registered secured transactions relating to an interest in immovable property shall be determined only from the date of registration and not from the date of their execution; and
- (b) if, however, the persons claiming under such document or transaction have registered a priority notice (on the lines earlier recommended by us), priority as regards the document or the transaction shall take effect from the date of registration of such priority notice, subject to the presentment of the document for registration within the specified time and the parties to the transaction complying with the requirements of any other law for the time being in force as regards registration of documents or secured transactions.

[3.1.169]

Delays in registration

(160) Now the registration machinery is utilised not merely for the limited object of ensuring the genuineness of documents registered but also to serve several allied important functions. The ability of this machinery to aid investigation of title is one such important function. It is also now utilised to ensure that persons who are having property do not transfer it in a manner that would render it

difficult for the State to recover its claims against the property-owner as regards his income-tax dues. The machinery also provides a check to aid the implementation of the policy of socialisation of urban land under the provisions of the Urban Land (Ceiling and Regulation) Act, 1976. Hence, the value of this registration machinery has grown considerably and today it serves not merely the interests of parties to registered transactions but also the broader objectives of national policy. It is in this context that we should consider all possible measures to eliminate, as far as they could be, the delays that occur in the working of this machinery and introduce necessary legal and procedural changes for this purpose. Now the delays that occur with reference to registration of instruments affecting interests in land may be classified as delays at the pre-registration stage and those at the post-registration stage. [3.1.170]

Pre-registration delays

(161) The pre-registration delays with reference to registration of documents generally take place under the following circumstances:

- (a) furnishing of certificates under section 230A of the Income-tax Act, and
- (b) the obtaining of no objection certificate from the competent authority under the Urban Land Ceiling Act.

Under the above cases, the documents are now admitted to registration since the parties have complied with all the requirements of the Registration Act but actual registration is deferred pending the production of the necessary certificates of clearance. At least with reference to the production of income-tax clearance certificates now there is inordinate delay and in a place like Bombay, documents presented in 1963-64 are reported to be still awaiting registration. The value of the register will be considerably impaired if the register is not to indicate the pendency of such documents awaiting registration. [3.1.171]

Provisional entry in Book No. 1

(162) Hence, there should be a statutory provision to the effect that, on the date a document is admitted for registration if it could not be registered that day itself. The sub-registrar of assurances should be required to file, as per a prescribed pro-forma, in Book No. 1, brief particulars about the document which may be required to be furnished by the parties and verified by the sub-registrar. This would indicate to persons taking a search of the register the pendency of such documents awaiting registration and would enable them to take

care of their interest adequately. Such a provision is urgently required. Even as regards documents now pending registration and which come under this classification the sub-registrars may be required to make such an entry in Book No. 1 *suo motu*. When the documents are finally registered a cross reference should be given in the entry in Book No. 1 and in the form so filed, the registration number and the date on which these documents are actually registered. Thus a person taking a search and seeing a provisional entry would also come to know whether or not the related document has been actually registered subsequently. [3.1.172]

Post-registration delays

(163) Post-registration delays may contribute to retard the pace of subsequent transactions with reference to the immovable property. They may also at times prejudicially affect the interest of lending institutions. [3.1.173]

Photocopying of documents

(164) Ordinarily, photocopying of documents should facilitate expeditious completion of the registration. However, the experience gained under the working of the provisions relating to the photocopying procedure now in force in Maharashtra has shown that ordinarily it takes about two years before the copying work is completed with reference to any document sent to the photocopying establishment at Pune which is handling this work. The conveyancing practitioners have expressed their concern regarding the inordinate delay that is now the general feature of the photocopying process. [3.1.177]

(165) This comes in the way of those acting for credit institutions expeditiously completing investigation of title with reference to land regarding which the relevant documents might have gone to the photocopying registry. On the other hand, the locking up of the original documents for such a long time with the photocopying registry precludes the concerned borrowers from availing themselves of credit from banks and other financing institutions by way of mortgage by deposit of their title deeds. The consequence of such inordinate delay in the photocopying process may be serious when considered with the registration procedure under section 30 of the Registration Act. [3.1.179 and 3.1.180]

(166) Since the photocopying system has been introduced to expedite the copying process which in other places is generally done manually, it will be defeating the purpose of the scheme if the delays

experienced presently in the photocopying of documents are allowed to continue. Hence, the State Governments which have introduced the photocopying system may consider the reasons for such delays and try to eliminate them. This is all the more necessary as this procedure is considered for extension throughout the country.

[3.1.181]

Registration charge—its basis

(167) When the registration scheme was originally provided for under our statutes, it was made clear that there was no desire to make it a source of revenue to the State and that the scale of fees would be fixed with a view to recover only the cost of registration. But the rates charged for registration in several States do not support such view. When registration charge is not related to the services rendered, it unnecessarily adds to the cost of credit, while it really does not help the State Governments since knowledgeable persons and sufficiently credit-worthy persons may create security interests in their immovable property either by availing themselves of credit from banks and other financing institutions by giving mortgage by deposit of title deeds and thus in effect avoiding both the stamp duty and registration charges which otherwise they have to pay, or by registering the documents outside the State where the property is situate and at a place where the rates are comparatively low, under section 30 of the Registration Act. In other words, the incidence of the burden of registration charges essentially falls only on not-so-very well-to-do persons who are now not in a position to avail themselves of credit by having recourse of such inexpensive methods.

[3.1.183 and 3.1.184]

(168) Consequent on the decision in the Delhi Cloth Mills' case, the Delhi Administration had to revise the table of fees leviable under section 78 of the Registration Act, 1908, which has come into force from 7th May, 1964. The scale of charges so specified indicates the maximum registration fee payable on a compulsorily registrable document as Rs. 100.

[3.1.189]

(169) Consequent on the revision of the schedule of registration fees with a ceiling of Rs. 100/- per compulsorily registrable document, the registration fee payable in the Union Territory of Delhi has come to be comparatively low. For instance, *ad valorem* registration fee now levied is on a graded slab scale for registration of compulsorily registrable documents in a range which varies from 1% to $\frac{1}{2}$ % in Maharashtra and which is around 3% in Tamil Nadu. This naturally provides an incentive for persons presenting documents for registration with reference to property situate in other States to have recourse to

the procedure outlined in section 30 of the Registration Act for registration of such documents with the Presidency Registrar at Delhi pursuant to that section and thus effect a considerable saving in their payment of registration charges. [3.1.191]

(170) The State Governments may consider the scale of registration fee now levied and appropriately reduce it so that the registration system, which requires to be further strengthened and which now serves many useful purposes, may work with fairness to all and develop further as an effective instrument for helping Government and public financial institutions in purveying credit more effectively. [3.1.194]

Link property register with record of rights

(171) So long as we have a scheme for registration of deeds and we maintain a property register (Book No. 1) with the sub-registrars of assurances pursuant to the provisions of our registration law, there has to be proper co-ordination between the entries in Book No. 1 and the entries in the record of rights. At present, the sub-registrars are required to advise the revenue authorities regarding registration of documents affecting the land situate in their respective jurisdiction. This procedure will have to continue on a firmer basis under statutory requirement, until the record of rights finally takes shape as a perfect title register and until we gain adequate experience in the working of the title registration scheme. Hence, the maintenance of the property register with the sub-registrars of assurances may be continued after effecting the changes we have suggested for broadbasing the scope of the property register, until a title registration scheme is fully developed for our country and we gain sufficient experience in the working of that scheme. Therefore, the necessity or otherwise of continuing the property register, as now provided for in our registration law, may be reviewed. [3.1.195]

Necessity for a title registration scheme

(172) We do not derive the full economic advantages of having a registration law in our country unless and until the law develops to the stage of evolving a title registration scheme appropriate to the socio-economic conditions prevailing in our country. In the countries where a title registration scheme has been successfully developed, security interest in immovable property is made more liquid and such security is enabled to fulfil most effectively the functional role of security in any scheme of credit planning. Both in the context of urban property and agricultural lands, the positive advantages that will accrue from the development of a title registration scheme are very considerable. [3.2.1 and 3.2.2]

(173) But the development of a title registration scheme with reference to immovable property in our country is not a matter that could be achieved within a very short time. The work has to commence now even if we are to have this scheme as a long-term objective. For this purpose, the statutory framework has to be provided for, and concurrently efforts made to accelerate the pace of this development. [3.2.4 and 3.2.5]

(174) The fact that title registration is the logical and natural development of the registration scheme is a matter of wide recognition. The title registration scheme has gained gradual acceptance in many parts of the world (including many Asian countries) where real property effectively plays its functional role as security for credit. [3.2.9]

(175) A system of registration of titles shows to whom the ownership of land belongs, and what other real rights exist in respect of each particular piece of land. In scope and in function a system of registration of title is something quite different from a system of registration of deeds. Under a system of registration of title, the registers will contain a statement of the title upon which all can safely act. Shortly stated, when a title is registered, a certificate from the Registrar of Assurances carrying on the face of it a title protected by statute is substituted for a bundle of deeds which have to be scrutinised each time a transaction relating to a particular piece of land is contemplated. [3.2.13]

(176) It is obvious that it would be desirable to have a system of registration of title in India. This is definitely a superior system to the alternative methods now available for registration of interests in land. The title registration system has proved its utility not merely in one country but in several countries which follow the common law principles or the civil law system of jurisprudence. [3.2.18]

(177) The main question is only about the feasibility of the introduction of a scheme of registration of title. In all countries where such schemes have been successfully developed, the development has been gradual, covering area by area, and the relevant legislation has also been the starting point for spurring the progressive introduction of a legislative scheme for registration of title. [3.2.19]

(178) The framers of our legislation on Transfer of Property had hoped that "some day, when our registration system was improved, to see a much greater change, and to see incumbered land sold under

a statutory title, leaving all disputed questions to be fought out over the proceeds in court. But, pending this, it was very necessary to do something, and what was done would,, remedy, or at least, ameliorate, many of the existing evils". Thus, the ultimate development of a scheme of title registration to replace our present system of registration of deeds was conceived by the original framers of our law. [3.2.37]

(179) While considering the registration scheme now in force in our country and the lines on which it could be further developed, we have also to take into account the fact that "in India the art of conveyancing has been and is of a very simple character", particularly in rural parts and as regards transactions in agricultural land. Hence, there is necessity for a simple title registration scheme in the context of extending rural credit. In the context of extending rural credit the need for the development of a simple title registration scheme is permanent and immediate. [3.2.23 and 3.2.38]

Maintenance of title records by the credit institutions

(180) It is hardly necessary to mention that if the credit institutions are required to undertake the responsibility of maintaining up-to-date and accurate registers showing the landholdings of all the agriculturists who may avail themselves of credit facilities from the institutions, it necessarily adds to the cost of credit. Actually, this involves the duplication of work now partly attended to by the revenue machinery and partly by the registration authorities. [3.2.69]

Title records maintained by State Governments

(181) The Committee on Agricultural Credit Procedures set up by the Andhra Pradesh Government, the All-India Rural Credit Review Committee (1969), the Expert Group constituted by the Reserve Bank to go into State enactments having a bearing on commercial banks lending to agriculture, the Study Group of the Banking Commission which reviewed legislation affecting banking, the Banking Commission (1972) and the Committee on Integration of Co-operative Credit Institutions set up by the Reserve Bank are some of the recent authorities which have stressed the necessity for the State Governments providing a record which would show the title of the farmer to the land without any necessity for any involved investigation as to his title. When their recommendations are properly perceived, it is clear that the basic objectives underlying these recommendations could be completely achieved only under a scheme of registration of title.

[3.2.40 and 3.2.41]

Scheme for issue of farm title passbooks

(182) The scheme for the issue of farm title passbook recommended by almost all authorities which have gone into the question of the problems relating to extension of rural credit fits well into the legal structure necessary for the development of a title registration scheme. Under such a scheme, the farm title passbook should effectively play the role of a title certificate. In fact, unless the legal infrastructure relating to the issue of the farm title passbook ensures this place to the farm title passbook, the value of the scheme and the elaborate administrative preparedness and action that are directed towards the implementation of the scheme will not have effectively served their purpose. [3.2.41]

(183) The All-India Rural Credit Review Committee had rightly stressed the basic drawbacks which had to be overcome were the scheme for issue of farm title passbook to succeed in full measure. Though the revenue machinery and the registration authorities have no doubt to be involved, it is necessary to strengthen the machinery adequately in order that this work of farm title passbook registration could proceed with the degree of expedition and devotion which is really necessary. [3.2.59]

(184) While the progress in the work of preparation and issue of farm title passbooks is no doubt not uniform in all the States, it is obvious that the administrative machinery in the several States is being geared up and the State Governments are alive to the necessity for issuing farm title passbooks to the farmers in order that problems relating to the determination of farmers' title to the lands may not unduly retard the flow and extension of rural credit. Hence, it has become a matter of imperative necessity to consider expeditiously the adequacy of the legal infrastructure governing the issue of farm title passbooks. [3.2.62]

Drawbacks of the present scheme

(185) In spite of the enactment of the passbook legislation, the farm title passbooks have not yet gained the status of a title certificate or extract from a title register, as regards agricultural lands. For this purpose, it is very much necessary to ensure that these passbook legislations give to the title determination sufficient statutory basis, so that it can form and continue to be the good root of title and avoid unnecessary and cumbersome title investigation procedures which are required to be gone through in the absence of such title registration scheme. [3.2.63]

(186) In terms of the effort required and the administrative cost that may have to be provided for, we do not find much difference and hence we do not envisage much difficulty in the adaptation of the farm title passbook schemes as regards agricultural lands to the title registration schemes, so long as the schemes are based on a summary, simple and expeditious procedure for the determination of title to land and the issue of a farm title passbook, which would serve as a title certificate, to the agriculturist. [3.2.77]

(187) But, in terms of legal consequences, there is a very substantial difference. In fact, it has to be urged that all the massive efforts that are now required to be put in for issuing farm title passbooks to farmers will not yield any desirable proportionate advantage unless a statutory backing is given to the summary determination of title, which even now is provided for in the procedure for the issue of farm title passbooks. Unless such a requirement is engrafted, it may not be of much advantage nor can it be expected that administrative authorities would take up seriously the up-dating of such record showing title and making of entries relating to mutations, etc., in a manner which would ensure that such title records are brought up-to-date every year. [3.2.78]

(188) Being regarded only as of a *prima facie* evidenciary value, neither is the agriculturist very much interested in having a farm title passbook issued to him except under compelling circumstances, nor in real terms is he considerably benefited thereby. The administrative authorities who are already burdened with other work also do not have the motivating force to see that this work is completed and they act with speed only during special drives initiated by State Governments. Again, once the passbook is issued, the efforts necessary to keep it up-to-date are not kept up since at present the legal status of the farm title passbooks is not much. In other words, the lack of an adequate statutory basis for the title passbooks now, on the one hand, affects the value of the passbooks and, on the other, it erodes the efforts necessary to keep them up to date. [3.2.79]

Legal infrastructure that is necessary

(189) We may consider the legal infrastructure necessary for affording an adequate legal status to title passbooks which are now being issued by several State Governments to farmers. We should also consider the legal provisions that may be necessary to ensure that such farm title passbooks are required to indicate, not merely by practice but under statutory obligations, all the necessary details, as far as they may be, which would indicate and evidence the title to

the land. It is in this context as regards agricultural lands that we have to consider a title registration scheme which may be brought into force in the rural parts of our country. [3.2.85]

(190) Having regard to the vast administrative efforts that are being put in for the issue of the farm title passbooks and updating of village records, it is obvious that for the scheme relating to the issue of farm title passbooks serving effectively as a title registration scheme, what is now required is only a legal restructuring of the whole scheme in order to ensure that the basic objectives of a title registration scheme are fruitfully achieved with reference to agricultural landholdings. Thus, the development of a title registration scheme regarding agricultural lands requires only a review of the working of the administrative machinery and the law and practice relating to the issue of farm title passbooks. The administrative machinery and the law and practice governing such issue of passbooks may have only to be reshaped with a view to ensure that the farm title passbook effectively serves the basic requirements of a title certificate. As a corollary thereto, it is necessary to ensure that the basic record of rights, from which farm title passbooks are prepared, is given the status of a title register, at least with reference to agricultural lands.

[3.2.100 and 3.2.101]

Record of rights

(191) In order to achieve the above objectives, it is necessary to review and revise the form and content of the record of rights as now maintained at the village level. The register format should be made, as far as possible, uniform in all the States in material respects and it should allow easy handling and should contain all information considered as basically necessary to enable title to land being determined *ex-facie* from the entries in the register. [3.2.102]

Its revision

(192) The existing record of rights may be presumed to be true and time may be given for objections as regards the entries therein to be made to the Tahsildar of each taluka in respect of the villages comprised in the taluka area. The Tahsildar may, in the light of objections, if any, to the entries that are now found in the record of rights, make necessary changes therein. Persons aggrieved by the decision of the Tahsildar may be allowed to challenge the decision in a court of law and establish their right, title or interest in the land. The occasions for such disputes may be very few and far in between and in practice the existing record of rights with necessary changes effected by the Tahsildar would become the reliable basis and serve

as a title register as regards agricultural lands. The title record of rights so finalised should be considered as final and statutorily binding on all persons claiming an interest in the land.

[3.2.104 and 3.2.105]

Banks' reliance thereon

(193) It should be further statutorily provided that any credit institution extending credit against the security of land on the strength of a title as disclosed in the title record of rights finalised as per summary procedure described above should have its interest protected against the claims of any person who challenges the security interest in favour of the credit institution, and any purchaser who may be claiming title to the land from such credit institution should also be similarly protected. However, it is not necessary at this stage of development of the title registration scheme for any purchaser claiming an interest in the land and not deriving his title through any credit institution to be so specially protected. In such cases, the ordinary law of the land should take care of the situation until our title registration scheme becomes firmly established and we gain sufficient experience in the working of the scheme. Then the matter may be reviewed and it may be considered whether the time is ripe enough to extend the protection also to purchasers not claiming through any credit institution. This will give a workable basis and place the record of rights on a firm and reliable basis. Banks and other credit agencies will not also have the difficulty of spending considerable time and expense in investigating title to agricultural lands. Ultimately, this will result in considerable saving in cost and an expeditious availability of credit to agriculturists. These measures will in turn help to generate the flow of credit and accelerate rural development.

[3.2.106]

(194) It should also be made a statutory obligation that further charges or encumbrances or interests affecting such land will not be recognised against any credit institution or other agency extending credit relying on the record of rights, unless such charges or interests are duly notified to the authorities having custody and control over the record of rights and they are also carried out therein.

[3.2.107]

Effect of public notice

(195) The record of rights should be treated as a public document and entries therein as regards any land should be considered as constructive notice to all persons who may subsequently claim an interest in the land or who may be dealing with the land. For this purpose,

Explanation I to the definition of the expression "a person is said to have notice" in section 3 of the Transfer of Property Act should be appropriately modified. [3.2.108]

Up-dating of the record of rights

(196) It is also necessary to ensure that special officers are posted, who have sufficient training in the survey and settlement of lands and who should be made responsible for periodic inspection of the village record of rights, and for ensuring that the record of rights is constantly revised and there are no avoidable delays in entering charges or noting the particulars affecting the interests in land. The same should apply also to mutation of names and other events arising by operation of law or act of parties and having the effect of affecting the title to land. Necessary subsidiary legislation should be expeditiously framed providing for the forms in which such charges should be notified to the village authorities/Tahsildar and the time within which applications thereto should be enquired into and disposed of. [3.2.109]

(197) We are happy that the Government of India seem to have already realised the need in the above context for revamping our village administration with a trained accountant who will *inter-alia* handle the land records and be the focal point for official development programmes for the village. [3.2.111]

Disputes re. entries

(198) If, under any circumstance, a person is aggrieved by any order of the Tahsildar as regards his claim or interest in the agricultural land, he should be at liberty to establish his rights in a court of law and for this purpose to institute legal proceedings within 90 days from the date of the decision of the Tahsildar. Unless the Tahsildar's decision is challenged within 90 days by appropriate legal proceedings, the decision of the Tahsildar should be held final, conclusive and binding and should operate as *res judicata*. Thus, not only will there be an impetus for all persons claiming an interest in agricultural land in having such interest duly noted in the record of rights, but it will also be ensured that disputes regarding land as regards mutation of entries and other claims are settled expeditiously and the record of rights effectively fulfils its pivotal role, which it is functionally competent to, and is eminently suited to, perform. [3.2.110]

Title registration re. urban lands

(199) Persons who may be claiming an interest in any urban land and the sort of interest that they may claim may not be of the same nature as may be applicable to agricultural lands. Interest in urban

property brings in more sophisticated transactions carried out with the skill of lawyers, town planners, architects, surveyors and builders. Hence, the simple and summary procedure appropriate for determination of title to agricultural lands cannot be applied with reference to determination of title, preparation of a title register and other allied questions which have to be solved in the process of developing a title registration scheme to cover urban property. Hence, regarding urban property title registration scheme can proceed only gradually and by stages. [3.2.114]

Areas coming under Town Planning schemes

(200) While considering urban property, the beginning of a title registration scheme may be effectively made in areas which are already covered or may be covered by town planning schemes. In areas comprised in the town planning scheme, there will not be any appreciable difficulty in determining title to land as on the date on which the town planning scheme has become final. Hence, as regards urban areas which have already been covered by the town, planning schemes or which may be so covered hereafter, the title registration scheme could be extended without much difficulty. [3.2.115 and 3.2.119]

(201) The title to the reconstituted plots comprised in town planning schemes in respect of areas where such schemes have already come into force may be determined by first taking the title to the reconstituted plots determined as on the date of the final sanction of the town planning scheme as valid until proved otherwise. By following a procedure similar to that followed while formulating a town planning scheme, the original determination of title as regards reconstituted plots may have to be revised in order to take note of changes that might have taken place in the title to urban land comprised in town planning schemes in areas where such schemes have already come into force. [3.2.120]

(202) In future, wherever town planning schemes are being framed, the area comprised therein could be brought within a statutory title registration scheme on and from the date of the final sanction of the town planning scheme. This will have the merit of avoiding the

necessity of going through a further special procedure for determining title to urban land for the purpose of developing a title registration scheme. [3.2.121]

Salient aspects re. title registers

(203) Thus, it would be necessary to have two statutory schemes, one for developing a title registration scheme as regards agricultural lands in rural areas and the other as regards urban lands by adopting a procedure which will not involve any disproportionate cost, time and effort. [3.2.122]

(204) In developing a title registration scheme both for the rural sector and the urban sector, on the following aspects special consideration and appropriate treatment have to be given;

- (1) Maintenance of the register property-wise;
- (2) Effect of non-registration; and
- (3) Registration of local land charges. [3.2.124]

Property-wise register

(205) Under the scheme of the farm title passbook legislation, every cultivator or agriculturist is to be given a passbook showing his title to all the lands held by him. Unless the basic records relating to title registration are maintained on a property-wise basis, a title certificate issued on a nominal basis may not reflect for long the true state of affairs regarding the title. It is possible and often it will be useful, to have a passbook issued to an agriculturist containing the description of all the lands to which he is entitled. But such a certificate should be a subsidiary document to the principal register which should be maintained on a property-wise basis. [3.2.125]

Effect of non-registration

(206) With reference to determination of title to real property, it is necessary to ensure that all registered interests, as far as may be, are required to be entered in the title register. If any encumbrance or other interest is not entered in the title register relating to agricultural land or urban property, then it should be provided that such an unregistered interest or claim against the land will rank only subordinate to the claims of any credit institution or other lending agency extending credit relying on the title register. It should also follow that any security interest in favour of a credit institution, whether it is a commercial bank, co-operative bank, rural bank or

other lending agency, should also be required to be entered in the title register and the farm title passbook so that it will be binding against subsequent lending agencies or other creditors. [3.2.127]

Link with Registration Act scheme

(207) While providing as above, which would require consequential changes to our present registration law, the basic procedures for registration of deeds with the sub-registrar of assurances may be allowed to continue. But the notice provisions should apply with reference to registered land only on the entry in the land register of particulars of the transaction affecting title. Already there is procedure for the sub-registrar of assurances advising the revenue authorities about instruments registered with him and affecting title to agricultural land. These procedures will have to be strengthened suitably and made to rest on a statutory basis. [3.2.128]

Local land charges

(208) It would be highly useful if the title register in our country can be required to indicate also the restrictions and liabilities on the land arising by way of local land charges. These features may be relevant only with reference to urban lands, and as regards agricultural lands they do not require any special consideration. [3.2.129]

Parts of the title register

(209) We can develop a title register with reference to our agricultural lands as also urban property, which register may appropriately indicate particulars relating to—

- (i) the land, giving an indication of the reference to the survey map and the survey number,
- (ii) the name and address of the owner, including the name and address of joint owners, if any, and
- (iii) the rights of persons (with address and brief description) having a security interest in the land. [3.2.130]

(210) The register should indicate the person who is entitled to the property as absolute owner. It should also reveal any leasehold interest or the interest of a lessee. Where the land is in the possession of a person who is not entitled to it as owner or as lessee but he is having merely a possessory title, the register should indicate that the person in possession is merely having a possessory title, though such instances will be few and far in between. The register should not

contain any notice of trust or benami claims on the land since such persons should not be allowed to claim title to the land in preference to the claim of a lending institution which has advanced against the land relying on the title as shown in the register of land records.

[3.2.131].

(211) In the U.K., the title registration legislation provides for automatic conversion into absolute or good leasehold deeds of possessory titles which have remained in force after the registration for a period of fifteen years in the case of freeholds and ten years in the case of leaseholds. In view of this, in the U.K., there are only a relatively small number of possessory titles outstanding today. We should have a similar provision in order that possessory titles with a cloud on the absolute ownership are not allowed to abound and add confusion to our rural landscape.

[3.2.138].

Creation of security interests in registered lands

(212) With reference to any land comprised in a title registration scheme, it is possible to have a simple and expeditious means of recording the creation of a security interest in the land, similar to the procedures existing in countries where title registration scheme has been adopted.

[3.2.132]

(213) The farm title passbook/title certificate may serve as the basic document against the deposit of which banks and approved credit institutions may be allowed to obtain a security interest in the land covered by the farm title passbook/title certificate. As a corollary to this, it is necessary to provide that on the creation of such a security interest by deposit of the farm title passbook or the title certificate, the lending institution should be enabled to register its charge by an appropriate entry in the title register by making an application containing *inter-alia* the signatures of the borrower and the person having authority to act on behalf of the lending institution. This facility of creating a mortgage with reference to agricultural land or urban land comprised in any title registration scheme should be available only to banks and approved financing institutions.

[3.2.133 and 3.2.148]

(214) Our scheme relating to title registration may also provide for the cultivator-borrower advising the registration authorities to issue directly to the bank the title certificate, that may be made out in his name, with reference to the property against which he has agreed to create a security interest in favour of the bank for availing himself of credit from the lending institution.

[3.2.151]

(215) Pending issue of a new certificate, in the U.K. the office copy of the register and the plan may be obtained from the Registrar's

office and they are admissible in evidence in the place of the land certificate. We may have necessary provisions to have a similar position under the statutory scheme that may be developed for introducing a title registration scheme in our country. [3.2.135]

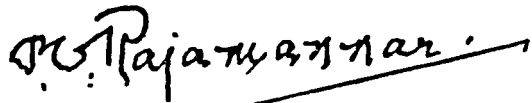
(216) That part of the title register wherein charges are recorded (viz. the charges register) should be a part of the title register and should give to the banker all particulars relating to the mortgages, charges, restrictive covenants and other encumbrances affecting the title to the land. [3.2.139]

(217) As far as possible, we should try to ensure in our country that official search certificates are furnished as regards searches concerning registered land. [3.2.141]

(218) The need for a lending institution being promptly advised of the creation of any subsequent encumbrance is very much there in order to enable the credit institution to ensure the end-use of the credit and in order to enable it to have a close watch over the utilisation of the credit for productive and developmental purposes. In view of this, it is necessary to provide that the authorities maintaining the register of land title, whether it is with reference to agricultural land or urban land, are required to advise the prior registered encumbrance holder whenever there is an application for registration of a charge or other form of security interest in the land. [3.2.143 and 3.2.144]

Entry re. priority notice

(219) Consistent with the spirit of the scheme of title registration, on the lines of the provisions which we have recommended earlier for registration of a priority notice in the books of the sub-registrar of assurances, there should be a provision for facilitating the entry of such a priority notice in the register of title deeds and farm title pass-book/title certificate. [3.2.147]



(P. V. RAJAMANNAR)
Chairman



(R. KRISHNAN)
Secretary.

21st October 1977.

ANNEXURE 1

BANKING LAWS COMMITTEE (GOVERNMENT OF INDIA)

Review of Legislation Affecting Banking

***QUESTIONNAIRE ON THE LAW RELATING TO LOANS AND ADVANCES BY BANKS AND OTHER FINANCIAL INSTITU- TIONS**

While the general law relating to loans and advances by banks and other financial institutions is found mainly in the Contract Act, the Transfer of Property Act, the Stamp Act, the Registration Act and the English Common Law as applied in India, there are special provisions applicable to co-operative societies, companies and some statutory financial corporations. It is necessary that for the development of the credit system of the country, the laws as to loans and advances by financial institutions have to be simple, certain, flexible and capable of being adapted to the growing needs of the society. Hence, the law has to be reviewed having regard to the needs of the changing times and the developments in other advanced countries. To facilitate such review, the following Parts of the questionnaire have been framed with reference to the provisions of the aforesaid enactments and the law in certain other countries, especially U. K. and U. S. A.

@PART 13—LOANS AND ADVANCES BY BANKS—GENERAL

Group 1—*vis-a-vis* the law in other countries

- 13.1.1 Do you consider it necessary or desirable that the law in India relating to loans and advances by banking and other allied institutions should, as far as possible, be in line with the law in other developed countries?
- 13.1.2 Article 9** of the Uniform Commercial Code (UCC) of the United States of America sets out, in a codified form, a comprehensive scheme for the regulation of security interests in personal property and fixtures. But there is no such statutory scheme in India. Do you consider it necessary or desirable to have a similar statutory scheme in India?

*The questionnaire was originally issued by the Banking Commission's Study Group which reviewed legislation affecting banking.

@Parts 5, 6, 11, 12 and 16 to 21 of the questionnaire relate to other branches of laws under review by the Banking Laws Committee. Parts 7 to 10 of the questionnaire relate to the Revision of the Negotiable Instruments Law, on which the Banking Laws Committee has already submitted its Report to the Government of India in February, 1975.

**Some of the salient features of Article 9 of the UCC are referred to in Parts 16 and 17 of the questionnaire.

13.1.3 The Agricultural Credits Act, 1928[@] of U. K. contains special provisions for an easy and simple method of creation of charges in favour of banks in relation to their advances to the agricultural sector.

- (a) Do you consider it necessary or desirable to have such special statutory provisions in favour of banks in India? If so, would you like to have similar provisions applied in relation to all classes of banks? Or, would you confine such provisions to any class of banks?
- (b) Do you consider that such special provisions should apply in relation to all types of advances by such banks or that they should be confined only to particular types of advances, such as advances to agricultural sector, small-scale industries, etc.? If you favour the latter, please indicate the types of advances in relation to which such special provisions could be applied.
- (c) Do you also consider it necessary or desirable that such special provisions should be available only in relation to advances by banks up to a specified sum? If so, please indicate the limit.

Group 2 — Special provisions relating to financial institutions.

13.2.1 The co-operative credit societies and the land development banks have the benefit or special provisions* relating to creation of the charge, enforcement thereof, recovery of dues, etc.

- (a) Do you consider that generally it is necessary or desirable to have similar provisions applied in relation to other classes of banks? If not, would you favour their extension only to a class or classes of them; in which case, please specify.
- (b) Do you favour the application of such special provisions in relation to all types of advances by such banks or do you regard that they should be confined to particular types of their advances, such as advances to the agricultural sector, small-scale industries, etc.? If you favour the latter, please indicate the types of advances in relation to which such special provisions could be applied.
- (c) Do you consider it necessary or desirable that such special provisions should be available only in relation to loans and advances up to a specified sum? If so, please indicate the limit.

13.2.2 The Industrial Finance Corporation Act and the State Financial Corporation Act have special provisions for facilitating the expeditious enforcement of their claims against the borrowers.

- (a) Do you consider it necessary or desirable to have similar provisions applied also in relation to all classes of banks generally? If not, would you favour their extension to some of them; in which case, please specify them.

[@]Some of the salient features of the Agricultural Credits Act, 1928 of U.K. are referred to in Parts 16 and 17 of the questionnaire.

*Some of the salient features of the Co-operative, Societies enactments are referred to in Parts 14, 15 and 16 of the questionnaire.

- (b) Do you favour the application of such special provisions in relation to all types of advances by such banks or do you regard that they should be confined to particular types of advances, such as advances to the agricultural sector, small-scale industries, etc.? If you favour the latter, please indicate the types of advances in relation to which such special provisions could be applied.
- (c) Do you consider it necessary or desirable that such special provisions should be available only in relation to loans and advances up to a specified sum? If so, please indicate the limit.

PART 14—LOCAL LEGISLATIONS AFFECTING BANK LENDING

Group 1 — Land tenures and land reform measures

- 14.1.1 The land tenures, as modified by the land reform measures, do not give to all types of agriculturists an interest in the land which they could freely charge for their credit needs. What measures would you suggest to safeguard advances to agriculturists who are not in a position to offer land or any interest therein, as security?
- 14.1.2 It has been suggested that agriculturists having no rights to charge land under their personal cultivation should statutorily be given the right to charge the land, or their interests therein, in favour of a bank for the purpose of obtaining financial assistance for agricultural purposes. Are you in favour of such a measure?
- 14.1.3 It is said that from a purely banking point of view it is necessary that steps should be taken to remove all impediments to the free transfer of lands. Please state the present impediments in your State regarding the free transfer of lands, together with your suggestions for overcoming them. If such impediments are based on statutory provisions, please furnish, if you could, copies of such provisions.
- 14.1.4 The local legislations restricting the sale or mortgage of land generally provide for suitable exemptions, *inter alia*, in favour of co-operative banks. Generally do you favour such exemptions also in relation to all other classes of banks or only to certain classes of them (in which case, please specify)?
- 14.1.5 It has been suggested that commercial banks should be exempted (as in the case of co-operative banks in some States) from the provisions of the local legislations providing for ceilings on, or against fragmentation of, holdings of agricultural lands. Do you consider this necessary or desirable?
- 14.1.6 It has been suggested that agriculturists availing themselves of credit facilities from banks against a charge/mortgage of the lands under their cultivation should not be permitted to lease or create tenancy rights thereon without the permission of the lending bank. Do you agree that such a provision is necessary or desirable?
- 14.1.7 Even in cases where the land could not ordinarily be sold in pursuance of a civil decree on account of any provision affecting agriculturists, it has been suggested that it should be allowed to be attached and sold through court when the decree is in favour of a bank. Do you agree?

- 14.1.8 It has been suggested that in execution banks should be permitted to purchase in public auction, the property charged in their favour. Do you consider it necessary or desirable to provide for such a general provision in favour of banks?
- 14.1.9 It has been felt that during the period banks are in possession of agricultural land charged in their favour, by subsequent purchase or otherwise, they should be permitted to lease out the property to any person subject to the conditions that the lease does not exceed one year at a time and that such lessee should not acquire any larger interest in the property notwithstanding any other local law. Do you consider such a provision as necessary or desirable?

Group 2 — Debt Relief legislation

- 14.2.1 It is said that the Debt Relief legislation comes in the way of the agriculturists availing themselves of necessary credit from financial institutions. Are you in favour of exempting all classes of banks from the purview of such legislation?
- 14.2.2 Please state whether the Debt Relief legislation in your State exempts all or any classes of banks from the scope of its provisions.
- 14.2.3 If, in your State, any class of banks is not wholly exempted from the provisions of the Debt Relief legislation, please indicate the nature of the provisions applied to them and how, if at all, they adversely affect the banks concerned. If possible, please give the extracts of the relevant provisions.

Group 3 — Money-lending legislation

- 14.3.1 As banking is a Central subject, do you consider that legislation relating to moneylending should not apply to banking institutions?
- 14.3.2 Assuming that such legislation can relate to banking institutions, please state whether all or any of the provisions (please furnish copies of the relevant provisions) of the moneylending legislation in your State are applicable to any class of banks. If so, do you favour the exemption of all classes of banks from the applicability of such provisions?

PART 15—CHARGE ON IMMOVABLE PROPERTY

A. INVESTIGATION OF TITLE

Group 1 — GENERAL

- 15.1.1 It is felt that the present sources for determining title to land, especially agricultural land, are not satisfactory. Do you agree? If so, have you any suggestions for providing expeditious means for the determination of title to land, especially agricultural land?

Group 2 — Ascertainment of encumbrances on land

- 15.2.1 While the registration rules in some States, like Andhra Pradesh, Kerala and Tamil Nadu, provide for the grant of certificates showing the existence or otherwise of encumbrances over the land, the rules

in some other States do not so provide. Do you consider that it would be advantageous if the facility of granting "encumbrance certificate" could be extended to all the States?

Group 3 — *Lis pendens*

- 15.3.1 At present, a charge on immovable property in favour of the lending institution is subject to the result of any pending litigation in relation to the property, whether or not the lending institution has notice of the pendency of the litigation. Do you consider that it is necessary or desirable to provide for any means by which the lending institution could ascertain the existence or otherwise of any pending litigation relating to the immovable property to be charged?
- 15.3.2 In Gujarat and Maharashtra, such charge is affected by the result of any pending litigation only if "a notice of the pendency of a suit or proceeding is registered under Section 18 of the Indian Registration Act, 1908" prior to the creation of the charge. Do you consider it necessary or desirable to have a similar provision applied throughout India?

(*vide* State amendments to Section 52 of the Transfer of Property Act and Section 18 of the Indian Registration Act).

Group 4 — Torrens System of Land Title Registration

- 15.4.1 Under a system of land title registration (known as Torrens System) introduced in Australia, a certificate of title is issued to the holder of a land and any encumbrance or claim in relation to the land is recognised only if it is noted in that certificate. This scheme saves considerably the cost and time for ascertaining the title to land, and has been successfully adopted in Canada, U. K. and some other Commonwealth countries, Ireland, Philippines and many States of the United States of America. Do you consider that any such scheme is feasible and necessary or desirable in India?

Group 5 — Title deeds of agricultural lands

- 15.5.1 In the absence of title deeds, the determination of title to agricultural lands becomes difficult and this also affects adversely the cost of creation of charges on such lands. What measures would you suggest for overcoming this?
- 15.5.2 It has been suggested that the State Governments should provide for the grant of title deeds to all holders of agricultural land. Do you consider such an action necessary or desirable? Please state if there are any provisions to this effect in your State. Could you please send copies of such provisions with your views on the experience gained so far in the working of the provisions, and suggestions, if any, for their improvement?
- 15.5.3 Do you consider that Patta, or Sanad, or other similar document should have the status of a document of title to facilitate creation of charges on agricultural lands? Do you consider their present status satisfactory? If not, would you like to have the position statutorily clarified?

B. CREATION OF CHARGE/MORTGAGE ON LAND

Group 6—Transfer of Property Act

- 15.6.1 Do you consider that the different forms of mortgages and the different rights of the parties to such mortgages serve any useful purpose nowadays and do you like to retain them? If not, what changes you would suggest?
- 15.6.2 Are you in favour of providing for only two types of mortgages, viz., possessory and non-possessory?
- 15.6.3 Under the Transfer of Property Act (TPA), the mortgagee (excepting the Government) has the right of private sale only under certain specified circumstances. Are you in favour of conferring the right of private sale in relation to all mortgages? Or, in any event, with reference to mortgages in favour of banks? If not in relation to all classes of banks, at least in relation to some classes of them (please specify)?
- 15.6.4 Under the TPA, though the mortgage is in English form, the right of private sale is not available if the parties to the mortgage belong to specified communities. Are you in favour of doing away with this distinction?
- 15.6.5 Though the creation of mortgage by deposit of title deeds saves time, trouble and expense in registration, ordinarily the third parties have no means to know of the transaction. Would you suggest any method by which third parties could be put on notice of the transaction?
- 15.6.6 Under the TPA, mortgage by deposit of title deeds could be created only in specified places. It has been suggested that at least all places with a minimum population (please specify the minimum) should be notified as places where such mortgage could be created. Do you agree?
- 15.6.7 It has also been expressed that it would be dangerous to extend this facility to places where people are illiterate and backward. Do you agree?
- 15.6.8 In some States, like West Bengal, the local law does not permit the creation of mortgages over agricultural land by way of deposit of title deeds. Please state such impediments, if any, in your State, for the creation of charges on land by way of deposit of title deeds. If possible, please give the extracts of the relevant provisions. Please also state whether all or any classes of banks should be exempted from such provisions.
- 15.6.9 Under the TPA, where the mortgaged property is situate in Calcutta, Madras, Bombay, or other notified place a power of sale without the intervention of the court could be reserved under the mortgage deed. Do you feel that the places now notified are adequate? If not, do you favour more number of places to be notified? Can you give the criteria that should be applied, in your view, for notifying a particular place under this provision?

Group 7 — Cost of creation of charges

- 15.7.1 Do you favour the reduction of duty payable by all or any classes of banks on bonds and mortgage deeds?

- 15.7.2. The Agricultural Credits Act, 1928 of U. K. exempts from stamp duty, instruments executed by cultivating farmers in favour of banks. Do you consider it necessary or desirable to extend a similar concession in favour of cultivating farmers in India?
- 15.7.3 Persons availing themselves of credit from cooperative banks against charge/mortgage on their lands are not liable to pay any stamp duty or incur registration charges. It has been suggested that similar concession should also be available to agriculturist-borrowers of commercial banks. Do you agree? Would you also like to provide for such concession in relation to advances by commercial banks to priority sectors, such as to small-scale industries?
- 15.7.4 Certain State Governments, like Gujarat, Mysore and Tamil Nadu, are providing some concessions in relation to stamp duty and/or registration charges for agricultural loans and advances by commercial banks up to certain specified limits. Please indicate such types of concessions in your State. If possible, please give the extracts of the relevant provisions. Do you consider these concessions adequate? If not, please state what further concessions should be given.

C. SPECIAL PROVISIONS IN FAVOUR OF CO-OPERATIVE SOCIETIES

Group 8 — Statutory charge by declaration

- 15.8.1 The Co-operative Societies Acts provide for a charge on the immovable property, or any interest therein, of the borrower-member, being created by a declaration which is to be registered with the Registrar of Assurances. Do you consider that such a provision is a desirable one? If so, would you like to extend the benefit of such a provision to all classes of banks, or would you like to confine such a provision to any class or classes of banks?
- 15.8.2 Please give your experience, if any, on the working of the provision in the co-operative societies enactments providing for a charge by means of a declaration on the immovable properties of the borrower-member of a co-operative society.
- 15.8.3 If you are in favour of a charge on land that could be created by a mere declaration, do you consider it necessary or desirable that the borrower should be prohibited from subsequently transferring or further encumbering the property without the prior consent of the lending institution, as is now the position in the case of the declaratory charge in favour of co-operative societies?
- 15.8.4 Generally, a declaratory charge in favour of a co-operative society extends also to future advances that may be made by the society. If you are in favour of a declaratory charge, would you also like to cover the lending institutions' future advances? If so, should such charge extend to future advances only subject to such maximum as may be determined at the time of the declaration?
- 15.8.5 In your view, should the effect of the charge, as per declaration, be to give the financing bank priority over any secured claims excepting arrears of land revenue, or amounts due to Government recoverable as land revenue, or only as regards secured claims arising subsequent to the creation of the declaratory charge?

- 15.8.6 Would you prefer that a declaratory charge as above should be available to all types of lendings by banks or should it be confined to particular types of advances like advances to agricultural sector, small-scale industries, etc.? If you prefer the latter, please indicate the types of advances to which you would like to confine the scope of such a charge.

Group 9 — Statutory first charge over land

- 15.9.1 The Uttar Pradesh Co-operative Societies Act, *inter alia*, provides in favour of a co-operative society a first charge (subject to priority in respect of certain Government dues) over the land when the loan is given for—

- (a) irrigational development of the land;
- (b) purchase or redemption of the land;
- (c) purchase or construction of any house or building on the land.
- (d) reclamation or protection or for effecting improvement of the land;
- (e) preparing the land for orchard or plantation purposes.

Do you favour such a provision? If so, would you like an extension of such a provision in favour of all or any classes of banks?

Group 10 — First charge over workshop, godown or other place of business

- 15.10.1 The Co-operative Societies enactments generally provide for a first charge on any "workshop, warehouse or business premises" acquired out of any loan of money given by the co-operative society. Are you in favour of such a provision being extended to all or any classes of banks?

Group 11 — Statutory first charge over unspecified properties

- 15.11.1 Under the Uttar Pradesh Co-operative Societies Act, when a loan is advanced for the purchase of cattle or other livestock or for acquiring agricultural implements or other equipments relating to transport, dairy or animal husbandry, a first charge is created on the land of the borrower-landlord in addition to the charge on the assets so acquired. Do you consider this provision a necessary or desirable one? If so, do you favour that this provision could be extended to all or any classes of banks?
- 15.11.2 The Orissa Co-operative Societies Act provides for a first charge (subject to priority in respect of certain Government dues), *inter alia*, on the lands of a member, or a past or deceased member, in respect of any debt or outstanding dues from him to the society. Do you favour such a provision? If so, would you like the extension of such a provision in favour of all or any classes of Banks?

Group 12 — Priority of charge in favour of land development banks

- 15.12.1 The Co-operative Societies enactments generally provide for the mortgage in favour of land development banks ranking in preference to any claim of the Government arising out of any loan under the Land Improvement Loans Act granted after the execution of such mortgage

deed. Do you consider it necessary or desirable for such priority to be given to medium-term or long-term loans that may be granted by all or any classes of banks?

- 15.12.2 The Madras Co-operative Land Mortgage Bank Act, 1968 provides that a mortgage in favour of a land mortgage bank shall have priority over all other claims against the property secured by such mortgage, subject to the claims of Government in respect of land revenue. Are you in favour of this provision? If so, would you like such priority to be made available in relation to advances by all or any classes of banks?

D. REGISTRATION OF CHARGES

Group 13 — Registration in the Record of Rights

- 15.13.1 In the case of co-operative banks, there is a provision for registering the encumbrances in their favour in the Record of Rights. Do you consider that similar mention of the encumbrances in favour of all classes of banks should also be provided for in the Record of Rights?
- 15.13.2 By giving a suitable statutory basis, could the Record of Rights be made to serve as a basic and reliable source for ascertaining the encumbrances over land? If so, would you also like to provide that entering of a charge in the Record of Rights shall constitute notice of such charge to all persons who may be subsequently dealing with the property?

Group 14 — Registration of statutory charge

- 15.14.1 Do you consider that in cases where a statutory charge is provided on the immovable assets of a borrower, it is necessary for such charge to be duly registered with an authority so that third parties dealing with those assets of the borrower may have means of knowing the applicability of such charge in relation to his assets? If you so agree, please indicate whether such registration could be provided for with the Registrar of Assurances or any other authority.
- 15.14.2 Under the Co-operative Societies enactments, in the case of charges on "any workshop, warehouse or business premises", at present there seems to be no provision for registration. Do you consider it necessary or desirable for the registration thereof, so that third parties dealing with those assets of the borrower may have means of knowing the applicability of such charge in relation to those assets? If you so agree, please indicate whether such registration should be provided for with the Registrar of Assurances or any other authority.

Group 15 — Registration with Registrar of Companies

- 15.15.1 In the case of companies, the registration is required to be made both with the Registrar of Companies and with the Registrar of Assurances. Do you consider that this dual system of registration is necessary? If not, do you favour that it would be adequate if a scheme of registration provides for registration with anyone duly constituted authority?

- 15.15.2 As in the case of companies, do you consider it necessary or desirable to provide for a scheme of registration of charges on the assets of co-operative societies? If so, who should be the registering authority?
- 15.15.3 Mortgages over the assets of companies by way of deposit of title deeds do not suffer from the drawback of third parties dealing with the charged properties not knowing the existence of the transaction, in view of the provision for registration of such charges with the Registrar of Companies. As this considerably helps the companies to avail themselves of credit at less cost, do you consider that even in relation to the assets of borrowers other than companies, an inexpensive scheme of registration applicable to all types of charges could be evolved? If so, please give your suggestions in this regard.

Group 16 — Registration by post

- 15.16.1 The Agricultural Credits Act, 1928* of U. K. provides for registration of an agricultural charge being effected by sending by post to the Land Registrar a memorandum of the instrument with other particulars of the charge together with the prescribed fees. Do you consider that a provision for registration of charge by post on these lines could be provided for in India?
- 15.16.2 The Maharashtra Co-operative Societies Act provides that mortgages (or leases) in favour of land development banks need not be registered provided the development bank sends a copy of the deed to the concerned registering officer, and that such registering officer should file the copy in Book No. 1. In order to minimise the time taken, and avoid other procedural delay in registration, do you consider it necessary or desirable to provide on the aforesaid lines with reference to charge/mortgage in favour of all classes of banks?
- 15.16.3 The Co-operative Societies enactments of certain States provide that it shall not be necessary for an officer of a land development bank to appear in person or by an agent at any registration office in any proceedings connected with the registration of an instrument executed by him in his official capacity, or to sign as provided in Section 58 of the Indian Registration Act. Are you in favour of such a provision? If so, would you like to provide so in relation to all classes of banks?

Group 17 — Tax clearance certificates

- 15.17.1 Under Section 230A of the Income-tax Act, document creating charge over land (other than agricultural land) valued at more than Rs. 50,000 is not allowed to be registered unless the borrower produces tax clearance certificates. Do you consider that in relation to loans and advances granted by banks it is necessary to insist on the production of such certificates before the registration of the relative document charging such immovable property of the borrower?

*Section 9(3): "Registration of an agricultural charge shall be effected by sending by post to the Land Registrar at the Land Registry a memorandum of the instrument creating the charge and such particulars of the charge as may be prescribed, together with the prescribed fee; and the Land Registrar shall enter the particulars in the register and shall file the memorandum".

ANNEXURE 2

LIST OF INSTITUTIONS AND INDIVIDUALS TO WHOM THE QUESTIONNAIRE IN ENGLISH/HINDI WAS SENT

1. Concerned Departments of the Government of India.
2. Departments of State Governments and Union Territories.
3. Law Commission of India.
4. Registrars of Companies.
5. Registrars of Co-operative Societies.
6. All Scheduled and non-Scheduled Commercial Banks.
7. All State Co-operative Banks.
8. Selected Urban and District Central Co-operative Banks.
9. Industrial Development Bank of India, Industrial Finance Corporation of India, Industrial Reconstruction Corporation of India Ltd., Industrial Credit and Investment Corporation of India Ltd., State Financial Corporations, Life Insurance Corporation of India and such other financial corporations.
10. Indian Banks' Association.
11. Foreign Exchange Dealers' Association.
12. All India State Co-operative Banks' Federation.
13. All India Institute of Chartered Accountants and their regional associations.
14. Bar Council of India.
15. Bar Association of India.
16. Supreme Court Bar Association.
17. State Bar Councils.
18. Bar Associations of High Courts.
19. All District Bar Associations.
20. Federation of Indian Chambers of Commerce and Industry.
21. Indian Merchants' Chamber.
22. Chambers of Commerce in various States and Union Territories.
23. Stock Exchanges.

24. Merchants' Associations in various States and Union Territories.
25. Manufacturers' Associations and other producers' associations in various States and the Union Territory of Delhi.
26. Educational and Training Institutions.
27. University Law Departments.
28. Foreign Central Banks and Foreign Experts.
29. Senior and Middle Level Executives of Reserve Bank of India and its associate Institutions, and of other commercial banks.
30. Specified individuals including those who have requested for copies of the Terms of Reference/Questionnaire.

ANNEXURE 3

INSTITUTIONS AND INDIVIDUALS WHO ANSWERED THE QUESTIONNAIRE (INCLUDING THE HINDI VERSION) OR SUBMITTED MEMORANDA

1. Allahabad Bank.
2. Bank of Baroda.
3. Bank of India.
4. Canara Bank.
5. Indian Bank.
6. Punjab National Bank.
7. Syndicate Bank.
8. United Commercial Bank.
9. State Bank of Saurashtra.
10. State Bank of Indore.
11. Belgaum Bank Ltd.
12. Bank of Madura Ltd.
13. Benares State Bank Ltd.
14. Corporation Bank Ltd.
15. Federal Bank Ltd.
16. Hindustan Mercantile Bank Ltd.
17. Jammu and Kashmir Bank Ltd.
18. Karnataka Bank Ltd.
19. Karur Vysya Bank Ltd.
20. South India Bank Ltd., Tinnevely.
21. Tanjore Permanent Bank Ltd.
22. Vysya Bank Ltd.
23. Chartered Bank.
24. Grindlays Bank Ltd.
25. Andhra Pradesh State Co-operative Bank Ltd.

26. Gujarat State Co-operative Bank Ltd.
27. Himachal Pradesh State Co-operative Bank Ltd.
28. Rajasthan State Co-operative Bank Ltd.
29. Gandhi Co-operative Urban Bank Ltd., Vijayawada.
30. All India State Co-operative Banks' Federation Ltd., Bombay.
31. Indian Council of Economic Affairs, Calcutta.
32. Bombay Incorporated Law Society, Bombay.
33. Federation of Indian Manufacturers, New Delhi.
34. Andhra Pradesh High Court Advocates' Association, Hyderabad.
35. Frontier Chamber of Commerce, Shillong.
36. Bellary District Chamber of Commerce, Bellary.
37. Madras Stock Exchange Ltd., Madras.
38. Amalgamations Private Ltd., Madras.
39. Industrial Finance Corporation of India, New Delhi.
40. Agricultural Finance Corporation, Bombay.
41. Gujarat State Financial Corporation.
42. Assam Financial Corporation.
43. Punjab Financial Corporation.
44. Uttar Pradesh Financial Corporation.
45. State Industries Promotion Corporation of Tamil Nadu Ltd., Madras.
46. Officers of the Department of Banking Operations and Development, Reserve Bank of India, Jammu.
47. The Finance Secretary, Government of West Bengal, Calcutta.
48. The Secretary to the Government of Gujarat, Finance Department, Ahmedabad.
49. The Registrar of Co-operative Societies, Orissa.
50. The Registrar of Co-operative Societies, New Delhi.
51. The Registrar of Co-operative Societies, Goa, Daman & Diu.
52. The Registrar of Co-operative Societies, Madhya Pradesh.
53. The Advocate General, Tripura.
54. Shri Aleem M. A., State Bank of Mysore, Bangalore.
55. Shri Bhandari M. C., Calcutta.
56. Shri Bhat M. V., Vijaya Bank Ltd., Bangalore.
57. Shri Bhat K. G., Manager, Syndicate Bank, Visakhapatnam.
58. Shri Bhattacharjee B. B., State Bank of Bikaner and Jaipur, Head Office, Jaipur.

59. Shri Challisery D. T., Deputy Chief Officer, Reserve Bank of India, Agricultural Credit Department, Bangalore.
60. Shri Gandhi C. T., Dena Bank, Calcutta.
61. Shri Hate M. V., Reserve Bank of India, Agricultural Credit Department, Bombay.
62. Shri Hussain K. M., Additional Chief Development Officer, State Bank of Mysore, Bangalore.
63. Shri Inasu M. L., Chairman, Purbhanchal Bank Ltd., Gauhati.
64. Shri Kaka P. N., Central Bank of India, Pune.
65. Shri Karuppanchetty M. R., Joint Chief Officer, Department of Banking Operations and Development, Reserve Bank of India, Calcutta.
66. Shri Keshva Ammanayya, Panja, South Kanara.
67. Shri Mathur P. S., Agent, State Bank of Bikaner and Jaipur, Bharatpur.
68. Shri Mehta K. C., Bank of Baroda, Ahmedabad.
69. Shri Murthy K. S., State Bank of Mysore, Bangalore.
70. Shri Nanjappa B. R., Manager, State Bank of Mysore, Mandya.
71. Shri Narayana Murthy P., Deputy Superintendent, State Bank of Mysore, Head Office, Bangalore.
72. Shri Noronha B., Syndicate Bank, Caranzalam, Goa.
73. Shri Noronha E. G., Deputy Chief Officer, Department of Banking Operations and Development, Reserve Bank of India, Ahmedabad.
74. Dr. Ponnuswamy K., Faculty of Law, University of Delhi.
75. Shri Ramkrishnan V., Instructor, Staff College, Indian Overseas Bank, Madras.
76. Shri Ramanan K. V., State Bank of Mysore, Bangalore.
77. Shri Rao B. R., Syndicate Bank, Manipal.
78. Shri Rao P. M., Syndicate Bank, Manipal.
79. Shri Satyamurti V. Shimoga, Dena Bank, Gariabaud, Dist.: Raipur, (M. P.).
80. Shri Sengupta C. R., Manager, Industrial Development Bank of India, Calcutta.
81. Shri Shetty B. B., Industrial Adviser, Syndicate Bank, Manipal.
82. Shri Shah R. A., Cambay.
83. Shri Singh J. B., Deputy Secretary, Government of Orissa, Bhubaneswar.
84. Shri Subramaniam A., Staff Training Centre, State Bank of Hyderabad, Aurangabad.
85. Shri Nanjappa K. M., Coorg.

ANNEXURE 4

INSTITUTIONS WHICH SUPPLIED INFORMATION REGARDING THE OBTAINING OF SECURITY BY WAY OF MORTGAGE BY DEPOSIT OF TITLE DEEDS

1. State Bank of India.
2. State Bank of Bikaner and Jaipur.
3. State Bank of Hyderabad.
4. State Bank of Indore.
5. State Bank of Mysore.
6. State Bank of Patiala.
7. State Bank of Saurashtra.
8. State Bank of Travancore.
9. Allahabad Bank.
10. Bank of India.
11. Canara Bank.
12. Central Bank of India.
13. Dena Bank.
14. Indian Overseas Bank.
15. Punjab National Bank.
16. Union Bank of India.
17. United Bank of India.
18. Bank of America.
19. British Bank of the Middle East.
20. Citibank.
21. Chartered Bank.
22. Federal Bank Ltd.
23. Mercantile Bank Ltd.
24. Mitsui Bank Ltd.
25. Andhra Bank Ltd.
26. Bharat Overseas Bank Ltd.

27. Sangli Bank Ltd.
28. Vijaya Bank Ltd.
29. Bank of Madura Ltd.
30. New Bank of India Ltd.
31. Hindustan Commercial Bank Ltd.
32. Bank of Rajasthan Ltd.
33. Vysya Bank Ltd.
34. Purbanchal Bank Ltd.
35. Naini Tal Bank Ltd.
36. Dhanalakshmi Bank Ltd.
37. Karnataka Bank Ltd.
38. Jammu & Kashmir Bank Ltd.
39. Bank of Thanjavur Ltd.
40. South India Bank Ltd.
41. South Indian Bank Ltd.
42. Kumbakonam City Union Bank Ltd.
43. Bori Doab Bank Ltd.
44. Lord Krishna Bank Ltd.
45. Ganesh Bank of Kurundwad Ltd.
46. Tamil Nadu Mercantile Bank Ltd.
47. Nedungadi Bank Ltd.
48. Parur Central Bank Ltd.
49. Oriental Bank of Commerce Ltd.
50. United Western Bank Ltd.
51. Bank of Karad Ltd.
52. Karur Vysya Bank Ltd.
53. Punjab Co-operative Bank Ltd.
54. Kashi Nath Seth Bank Private Ltd.
55. Industrial Development Bank of India.
56. Industrial Credit and Investment Corporation of India Ltd.
57. Assam Financial Corporation.
58. Delhi Financial Corporation.

59. Gujarat State Financial Corporation.
60. Himachal Pradesh Financial Corporation.
61. Haryana Financial Corporation.
62. Jammu & Kashmir State Financial Corporation.
63. Karnataka State Financial Corporation.
64. Kerala Financial Corporation.
65. Madhya Pradesh Financial Corporation.
66. Orissa State Financial Corporation.
67. Punjab Financial Corporation.
68. Rajasthan Financial Corporation.
69. Tamil Nadu Industrial Investment Corporation Ltd.
70. Uttar Pradesh Financial Corporation.
71. West Bengal Financial Corporation.
72. Unit Trust of India.

ANNEXURE 5

SHRI R. KRISHNAN
(Deputy Legal Adviser, R.B.I.)

Secretary
BANKING LAWS COMMITTEE
(GOVERNMENT OF INDIA)

Other Officials of the Special Cell assisting the Banking Laws Committee

Shri S. B. F	..	Banking Officer
„ L. H. Kulkarni	..	—do—
„ N. K. Puri	..	Legal Officer
„ D. R. Sardesai*	..	Rural Credit Officer
„ Ch. L. Mohana Rao	..	Sub-Accounts Officer
„ O. S. Khanna	..	Staff Officer
„ A. F. Pereira	..	—do—
„ A. R. Dalvi	..	—do—
„ V. Vembu	..	Personal Assistant

*Earlier associated with the work of the Committee.

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