INAUGURAL ADDRESS

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I deem it a privilege to be asked to inaugurate this seminer on Company Law, Monopolies and Restrictive Trade Practices Act.

It is a trite saying that a corporation registered under the relevant statutory law is a legal person distinct from its shareholders. The principle of legal personality distinct from the shareholders who hold fractional interests in its trading activity is a legal machanism designed to involve a large number of persons of relatively small means to be associated in activities industrial or commercial. The process of establishing the concept of an independent personality of the company evolved as a technique intended to achieve certain economic results, has been responsible for important legal development giving strong impetus to the industrial revolution and economic prosperity all over the world during the last hundred years. It has revolutionised trade, commerce and industry and has made a lasting impression on nations' political, economic and social structure. The legal fiction runs through the fabric of our jurisprudence that a company is a legal person with status and personality distinct from the members constituting it; its roots may be traced to the industrial revolution and the floating of many companies and to British Parliament enacting the Limited Liability Act 1855. The true import of the fiction was however appreciated only when the House of Lords expounded the doctrine of corporate personality in *Salomon* v. *Salomon & Co. Ltd.*, (1897) A.C. 22. The Legal and the commercial world is largely beholden to the trader Salomon who had the bright idea of resorting to what then was regarded as a subterfuge. Salomon desired to convert his business into a company with limited liability He did so by selling the business to a limited company with a nominal share capital. The shareholders of the company were Salomon, his wife, his four sons and one daughter, each of whom subscribed for one share. The business was transferred to the company and in part payment of the price Salomon received mortgage debentures. The company was found to be moribund and was ordered to be liquidated. The unsecured creditors of the company claimed in the course of the winding up that the issue of debentures was fraudulent and since the company consisted of only Salomon and the members of the family

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the whole transaction must be deemed a fraud on the creditors. In the view of the House of Lords it was legitimate for a person complying with the requirement of the Companies Act, to transfer his business and to receive in consideration thereof mortgage debentures for in law a company is from the moment of its incorporation a distinct legal person with an existence independent of the members composing it.

Salomon's case was the starting point of a revolution, legal and economic. Two important consequences flow from the fiction : ownership and management are vested in different hands, and while participating in operation of vast magnitude the responsibility of the shareholders is normally limited. The principle that the company is independent of the shareholders has had a tremendous impact on industry and trade. It has given impetus to trade and commerce of vast magnitude. The size and complexity of modern companies and progressive extension of their spheres of activity have dominated trade and industry all over the world. Corporate principle is the main instrument of harnessing scientific knowledge and technology to effective and sound economical use. It is responsible for a chain reaction in the utilisation of economic resources and scientific knowledge leading to a continuous march towards better living conditions for the citizens by the vital adjustment processes utilising the fruits of scientific and technical knowledge. The joint stock company is now at the centre of the economic life of nations developed and developing; it wields immense power political as well as social. Its power is not restricted to production of goods and services—it extends to many spheres apparently as far apart as, wage rates, working conditions of employees, labour management relations, the entire field of organised economic sector, course of price fixation, capital formation, investment policies, financing and refinancing arrangements etc.

The influence of the companies on the community, especially of large companies has spread across almost the entire range of economic and commercial activity. They have also a subtle but a pervasive influence on the social and political life of the community. In economically advanced countries, the influence of the university, the charitable and professional associations, labour and other vocational unions is peripheral and derivative whereas the primary influence exercised by the corporate sector is direct and positive. With the participation of the common man as investor and the growing consciousness of obligation of the company to the employees, the consumer of its products, and to the general public there is increasing realisation that the company law must remain dynamic and keep pace not only with the developing economic climate, but the consciousness of the society in its wider role, as an important instrument of social and economic advancement of the nation.

The former concept of a company as a mere profit making device whose ultimate aim was to maximise returns on investments and to

distribute the profits or a part of them among the shareholders is no longer operative. The company is now recognised as an instrument wielding tremendous socio-economic power over the ultimate well-being of the nation, and on that account subject to corresponding definable responsibilities towards the shareholders, the employees, the suppliers of raw materials, the consumers of its products and the society at large which is its proper and effective management. A corporate industrial or commercial undertaking is not only a private enterprise, it is a national asset.

Our state has become conscious of the potential of the corporate sector and its beneficient role, as well as its capacity to harm the society. On that account many pressures for change in the law and practice of companies have been built.

The changes which the statutes dealing with companies in India have undergone furnish a commentary on the developing social consciousness and of the role of companies in the life, social, economic and political in our State.

This Act of 1913 was concerned with the technique of company management and company administration. Extensive modifications were made by the amending Acts of 1937 and 1951 to remove the glaring defects in the functioning of companies in India, and to rectify short-comings disclosed by the managing agency system. These Acts, the Acts of 1913, 1937 and of 1951, followed closely the structure and social philosophy permeating the English Companies Acts then in force. Proposals for reform of the company law in India were also largely conditioned by the same philosophy—primary concern to prevent malpractices in company management which had assumed prominence because of the circumstances prevailing during and after the World War II. The first version of the Bill introduced in 1953 in the Indian Parliament was largely infused by a desire to secure technical perfection in stifling malpractices in the management of companies It was a bill dominated by the traditional thinking that the Companies Act was technical legislation designed to control company management. In drafting the bill the positive role of company legislation to make the company a medium of social and economic regeneration of the nation was not fully realised. But during its progress through Parliament, several far reaching innovations were made embodying a philosophy of ensuring fulfilment of newly formulated goals and a social structure and economic policy consistant with modern political thought. The philosophy underlying these innovations originated in policies, historical, economic and sociological and influenced largely by political thought in other countries.

The Act of 1956 was soon found inadequate to deal with ever increasing demands of the new philosophy and the Act was found defective.

It was amended in several important respects by the amending Act 31 of 1965. The trend towards modification has followed certain broad patterns :

(1) Developing a form of company management which is subject to the least abuse. Preventing diversion of funds of companies for purposes that defeat or impede longer economic goals of the nation.

(2) Achieving effective control of shareholders of company management.

(3) Utilising company as a means of serving public interest restricting monopolistic and restrictive malpractices.

(4) Control and restrictions over companies to ensure utilisation and their potentiality in the regeneration of the nation.

Development of the corporate sector in the economy of our nation has however been responsible for certain abuses. Human nature being what it is, an instrument of great economic benefit has not infrequently been utilised for illicit personal gain by the management resulting in mis-appropriation of funds, concentration of economic and occasionally of political power, for restrictive trade practices for monopolies by stifling competitions and other directions harmful to social welfare of the country.

Administration of the Companies Act has therefore to be a dynamic process; it needs to be constantly watched, *first* for ensuring that the statutory controls are effectively and properly exercised and are not misused, and *secondly* for the purpose of determining whether because of inherent deficiencies there is no effective operation and are required to be modified.

Industry and commerce thrive on the initiative and integrity of experienced entrepreneurs and expert managerial talent. A modern enterprise demands leadership as well as business expertise. In our country there is great dearth of expert managerial talent. Improvement in the quality of management cannot be secured by laws or administrative arrangements. The management has to reconcile the conflicting claims of numerous interests having a vital stake in the enterprise. It is for the management to synthesise the claims and to evolve and integrate its policy in the interest of the enterprise. This is a difficult task which needs firstrate ability coupled with leadership. Law can set up conditions suitable for throwing up this leadership. The law may also serve in another direction. Until the right type of leadership is forthcoming, amateurish or inefficient management may be controlled so as to safeguard the interests of the shareholders in particular and of the community in general.

Though efficient management of a company is a matter of its domestic concern it has a vital bearing on the national economy. In view of its pervasive influence upon trade, commerce and industry, company law must remain in touch with economic developments.

This is not an occasion on which I can go into the numerous provisions in which modifications in the Companies Act are necessary. I propose briefly to touch upon a few problems which require deep and sustained thinking and need expert guidance for improving company management and administration.

In the early days of corporate enterprise in our country a large majority of the companies were managed by managing agents who generally subscribed to a major part of the capital. The directors of the company were figure heads. Managing agents carried on the business for and on behalf of the companies. But managing agencies have now been finally abolished. The directors are in management of the affairs of companies. An awareness of the multiple responsibility of the management of the corporate enterprise is growing especially with the replacement of the family or private business of a few by the large corporations in a dominant form of business enterprise. Though the form and structure of the company has remained the same, with the greater awareness of its position in the context of its social responsibilities in industry and business its effective administration is receiving greater and more pointed attention. It is now realised that the responsibilties of management in the complex economic and commercial life of the nation are magnified to the enterprise, to the shareholders, creditors, workers, customers and the community. It is for the management to reconcile the conflicting duties. The management had to maintain a reasonable balance between its manifold obligations, and priorities. The Act of 1956 has accordingly superimposed upon the traditional legal structure of the company law in the larger interest of the public a system of social control.

With the extinction of the managing agency system, which served primarily the object of the enterprise alone, it is found necessary to strengthen the form of management through the Board of Directors, and Managing Directors who are trained in the spectrum of their wider duties. There is a growing school of thought which advocates the adoption of the two-tier system of management which has now taken root in certain communities. The two tier system envisages a dual management objective to ensure effectively the interest of the enterprise, the shareholders and the creditors on the one hand and of the public who have a wider interest therein on the other. This is achieved by (*a*) a supervisory board and (*b*) a management board. The former is designed to provide representation to the shareholders in the management of public companies and sometimes to the employees in addition. The latter attends to the day-to-day management. The problem whether in our country, with appropriate adjustments, the two-tier system should be adopted, is occupying the minds of persons interested in a healthy development of the corporate sector. Those who advocate this form of management contemplate a supervisory board of representative shareholders,

of workers and of the public interested in the management. Whether such a supervisory board may introduce an agency obstructing the smooth running of the industry because of the peculiar conditions in our country is a matter on which serious thought without any predilections must be given.

The problem whether the powers of the board of directors, who are since the extinction of the managing agency system directly concerned with the management, should be widened in the interest of the industry and of the public, with or without external control on their functioning, has also assumed serious proportions, and demands sustained and careful study.

A related problem which has exercised the minds of those who are interested in a healthy corporate sector is the institutional or plural executive as against the individual executive represented by the Managing Director. This problem with the passage of time is bound to assume grave importance in the context of a healthy development of the corporate sector. Connected with the problem of the consequences arising from the abolition of the managing agency is the problem of having a board of executives who would with expert knowledge, practical and theoretical, be qualified to take over and carry on the management efficiently. If the opinion is in favour of maintaining individual executives, it will be necessary to consider whether it is conducive to the interest of the corporate sector that a person should be entitled to act as a managing director to more companies than one.

One more problem which is bound to obtrude upon the consideration of effective administration of industry relates to the feasibility and extent of the representation of the employees on the board of directors. This is a serious problem which requires consideration in the context of conditions prevailing in our country and without any bias, academic or sentimental. The public, the consumers of the product of the industry and others who are also vitally interested in the industry have claimed representation on the board of directors. A few decades ago this proposal may have sounded Utopian. But in the context of greater consciousness of the role of companies in our country it is necessary to give a serious thought to that demand.

Minority groups of shareholders (minority being substantial but from its nature inadequate) also have claimed representation on the board of directors. Whether this is feasible and if adopted what controls should be devised to prevent the board meeting from converting itself into a debating society is a matter which needs serious consideration. Some academicians have expressed the view that the provisions of sections 397 and 398 with some modifications are adequate to protect minority interests against abuse of authority by the majority. There is also a strong and vocal contrary opinion. A suggestion is also made that a person present by proxy should be entitled not only to vote but also to participate in the debate, and to address

the meeting of the shareholders. Whether this may throw up a class of professional agitators out to advance their personal interests or is likely to effectively protest the interest of the company, the industry and others interested therein is also a matter which requires consideration.

It has been suggested that it should be made obligatory upon public companies to appoint qualified secretaries with duty to guide the management of the companies in the matter of compliance with the requirements of the provisions of the Companies Act. It is not unusual to find that the company management often commits default in complying with the technical requirements of the provisions of the Companies Act. Whether a statutory provision compelling appointment of qualified secretaries in respect of all public companies may benefit the company or an agency of obstruction is a matter which again demands careful study. If the suggestion for compulsory appointment of the secretary, proper adjustment of his functions as a semi-professional adviser of the company management may require to be carefully worked out. Whether the secretary be treated as a semi professional adviser or a mere employee, and whether a statutory provision may be enacted for enrolling persons who may be appointed secretaries, subject to disciplinary control initially by the Government and after certain norms of professional behaviour are laid down, the disciplinary jurisdiction of their own bodies would also require serious consideration.

Company management demands managerial personnel who should be possessing integrity and drive. The Companies Act gives no significant direction to this very important problem. It appears to proceed on the assumption that in course of time conditions will be favourable to the creation of expert managerial personnel with integrity and leadership—till then the law must control by adequate machinery apprehended mismanagement and malpractices.

Section 298 requires the previous approval of the Central Government to the appointmant of any person as whole-time director or a managing director. But the section gives no guidance as to what should be considered in dealing with the application for appointment of a managing or a full-time director. It would, in my opinion, be conducive to better administration of the Act if some guidance intended to specify the qualifications and other conditions be prescribed by the Act for appointment of a person as managing director or full-time director. It is time that academic qualifications—and that can be the only qualifications which may be prescribed — may serve no useful purpose. It is also said that an academic qualification appropriate for one enterprise may be wholly unsuitable for another enterprise. These difficulties in the practical working of the Act will undoutedly have to be faced. Discussion of this problem may also lead to the formation of some guiding tests.

Directorship till recently was regarded by some as a position of honour, and not of responsibility. Several persons who have no qualifications to be incharge of an enterprise are being appointed directors because they have money, influence, name or pull. Some persons accept directorship in a large number of companies. The Companies Act has prescribed that a person cannot be director of more than 20 public companies. How any person, however competent he may be, can effectively discharge his duties as a director in as many as 20 companies is a matter which puzzles every person who takes intelligent interest in company management. The limit requires to be drastically reduced. It is also necessary to consider whether a managing director of a company should be prohibited from undertaking directorship of another company.

Direct control which the Government may exercise over companies is again a very thorny problem which requires deep thinking. It is a problem of many dimensions. A case for enacting provision for control to ensure honest and efficient management would on strictly academic considerations be irresistible. But it must be remembered that undue interference with the internal working of a commercial enterprise by bureaucrats with little or no knowledge of the practical working of the enterprise, and no sympathetic or indulgent attitude, may seriously interfere with the effective functioning of the company.

Control takes various forms :—

(*a*) Control over remuneration.
(*b*) Control over qualification for appointment.
(*c*) Appointment of government directors on board of directors.
(*d*) Control on inter-corporate investments and loans.

If these controls are devised and administered with the object of ensuring that the comnany is an instrument for the good of the shareholders, the employees, and the general public, there may be nothing to cavil at. But power without responsibility is a fruitful source of evil. It is necessary that exercise of the power should be coupled with the consciousness that primary function of the authority is the interest of the company for general public benefit.

It is found that sometimes former managing agents after abolition of the managing agencies have continued to maintain their hold indirectly under different designations as Secretaries, Treasurers, Agents, sole selling agents, consultants or technical advisers. These arrangements are sometimes recorded in some agreements made with a view to divert the profits of the company.

Exercise of the power of the directors and of the company to contribute from the fund at their disposal for charitable purposes, and for political

purposes, demands a close study. Under the 1913 Act, there was no restriction on the power to make contributions to charitable or other transfer. By section 293(1) as originally enacted under the Act of 1956 the power of the board of directors were restricted but not of the company in general meeting. Under section 293A which was inserted by the amendment Act of 1960, power to make contributions to any political party or for any political purpose was restricted and the amounts contributed were required to be disclosed in the profit and loss account.

Before this amendment was made, section 293(1)(e) dealing with contributions to charitable and other funds generally applied to political contributions. A company can obviously not make a contribution to a political party or a fund unless it is so authorised by its memorandum of association. It has been usual in the memorandum of association of companies floated during the last few years to incorporate such a power. These companies which had incorporated no such power permitting contributions to political funds have by amendment assumed such powers. It is noteworthy that under S. 293(I) to the extent of Rs. 25,000 the amount may be contributed even out of the capital of the company.

Another problem of importance is the protection of the minority shareholders. Ordinarily majority shareholders are entitled to exercise powers of the company and to control its affairs. *Foss* v. *Harbottle* (1843) 2 Har 461. But the rule of majority has to be softened in its rigour in certain specific cases, lest it may be used to harass the minority. A shareholder is a member of the company and he has a vital interest in its working. It is true that effective pursuit of the company's purposes cannot be allowed to be obstructed by obnoxious or selfish actions of shareholders constituting majority or minority. But so also the majority cannot be permitted to abuse its authority and damage the interest of the company or of the minority shareholders. Since the majority may change the company's structure and bring about major changes in the memorandum and the articles, even substituting new purposes, the legislature has attempted to protect the interests of the minority against possible injury. The power of the majority cannot be invoked to perpetuate acts which amount to "fraud on the minority." The expression "fraud on the minority" does not predicate actual deceit, it only means that the Court will grant protection against action which is analogous to misuse of fiduciary position. Illustration of the exercise of the powers are expropriation of the company's property; release of directors in respect of actions not done in good faith; expropriation of the property of other members; malicious or discriminatory abuse of powers by the majority, etc. The Companies Act 1956 has made provision in sections 397 and 398 for some protection. The problem whether these provisions effectively protect the minority against oppression or mismanagement requires to be carefuly examined. It has been suggested that minority

representation on the board of directors might greatly reduce the possibility of the misuse of the power by the majority. Whether this is a feasible suggestion and may be adopted with appropriate safeguards raises an important problem.

The right to apply to the Court under sections 397 and 398 of the Companies Act may be exercised by not less than 100 members or one tenth of the total number of members, whichever is less, or by any member or members holding not less than one tenth of the issued share capital. It is however open to the Central Government to authorise any person or persons to apply even if the above requirements are not fulfilled. But the procedure of obtaining the Court sanction involves considerable delay. It is necessary to consider whether some procedure or medium may not be evolved enabling more expeditious relief.

Problems relating to the power of the Registrar of Companies to inspect books of account under section 209(4) and of effective exercise of the power of special audit under section 233A and whether an investigation under sections 235 and 237 should be preceded by an inspection of the Registrar may reduce possibilty of precipitate action also require careful study.

I do not propose to say much about the Monopolies and Restrictive Trade Practices Act 1969. It is an Act, as the preamble states, to provide that the operation of the economic system does not result in the concentration of economic power to common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto. The Act provides for setting up a commission with jurisdiction to inquire into any restrictive trade practice, or monopolistic trade practice and for making appropriate orders not inconsistent with the Act. The Act aims at avoiding concentration of economic power by prohibiting in certain cases expansion of undertaking, controlling establishment of new undertakings or merger, amalgamation and take over of undertakings. Extensive powers are conferred upon the Central Government including the power to direct division of undertaking, after taking into consideration matters specified in section 28. It provides for investigation by the Commission of Monopolistic Trade Practices which are prejudicial to public interest.

Mr. Justice K.S. Das Gupta of Supreme Court made a thorough enquiry into the problem of monopolistic and restrictive trade practices in India and submitted an admirable report. The Act is based on the recommendations made by the Commission.

The Act is enacted with praiseworthy intentions. It contains salutory provisions aimed at controlling monopolistic and restrictive trade practices.

A senior Judge of the Madras High Court has been appointed the Comissioner. Whether the Act will achieve what it is intended to achieve in the large public interest, is a matter on which it is too early to hazard an opinion.

I have touched briefly a few of the significant problems which arise in the present day administration of the Act. A seminar like the present which is a general meeting of experts in the corporate law is best fitted to suggest ways and means for improving the administration of the Act, and to make it an effective instrument of the economic advancement of our State. I trust you will spare some time for dealing with the practical problems of company administration. I am not suggesting that the academic problems are less significant. I only seek to emphasise the necessity of a study of problems academic as well as practical, of company administration so that the benefit of your deliberations may effectively serve the principal object of holding the seminar.