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MERCANTILE LAW

*Versha Vahini**

I INTRODUCTION

THIS SURVEY will cover in addition to the general principles of contract, specific contracts such as agency, guarantee, bailment and pledge, law relating to negotiable instruments, sale of goods and partnership. The survey covers all the important Supreme Court and high court judgments delivered in 2006. They are analysed under appropriate heads.

II LAW OF CONTRACTS

Offer, invitation to offer

A contract is an agreement; an agreement is a promise and a promise is an accepted offer. An offer is the final expression of the willingness by the offeror to be bound by his offer should the other party choose to accept it whereas in an invitation to offer, the party proposes certain terms on which he is willing to negotiate without expressing his willingness.[1] In *Adikanda Biswal*,[2] the question was whether the advertisement for allotment of plots by Bhubaneshwar Development Authority (BDA) was an offer or an invitation to offer. The advertisement held out that the allotment would be made on first-cum-first-served basis and out-right purchase would be given priority. The court observed that the authority did not intend to allot the plot straightway to any person who deposited the consideration money along with the application but only held out an assurance to the applicant that the allotment would be decided on the first-come-first-served basis and out right purchaser would get the priority. Thus, the advertisement was not an offer but an invitation to offer.

The question of promissory estoppel also arose in this case. The court observed that the BDA had to fulfil the said promise and allot plots to the petitioner on first-cum-first-served basis giving priority to those applicants who intended to make out right purchase of the plots unless the BDA satisfied the court by placing relevant materials before it stating that due to

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1 Avtar Singh, *Law of Contract and Specific Relief* 16 (9th Ed.) (2005).

2 *Adikanda Biswal* v. *Bhubaneshwar Development Authority*, AIR 2006 Ori 36.

supervening circumstances fulfilment of such promise by the BDA would be contrary to public interest.

In *M/s. I.B.P. Co. Ltd.* v. *Ramashish Prasad Singh*[3] the respondent was interested in getting petrol pump dealership from the appellant. Defendant no. 3, an official of the appellant, made certain averments to the respondent regarding the requisites for obtaining dealership. Relying upon such averments, the respondent changed his position and invested huge amount of money in the land and other preparations in order to secure the dealership. But finally, the dealership did not come through and he filed a suit alleging that there was an oral agreement between him and the appellant. The question before the court was whether the oral agreement between defendant no. 3 and the respondent could be deemed to be an agreement enforceable by law. The court held that assurances given by an official, not authorized to make agreement on behalf of the company, could not be termed as offer. This, according to the court, could at best be said to be a sincere advice and thus, no contract in the eye of law was said to be formed.

Acceptance

The acceptance of an offer culminates into a concluded contract. The place of conclusion of contract is important because it determines the 'cause of action', which in turn determines the territorial jurisdiction of the court in which a suit may be filed. Generally the place of contract is considered where the acceptance is received by the proposer. The problem, however, arises when communication is sent through e-mail, which may be sent from any place to be accessed/received at any place. The Information Technology Act, 2000, supplies a solution to the problem by providing that the communication of acceptance through electronic media is complete at the place where the proposer has his place of business. In *P R Transport Agency*[4] the court has observed that the acceptance of communication sent through e-mail is deemed to be received by the petitioner at Varanasi and Chandauli, which are the only two places where the petitioner has his place of business.

According to section 8 of the Contract Act, an offer may be accepted by performing the conditions stated in the offer or by receiving consideration. However, the conduct through which offer is accepted must be with the intention of accepting the offer. In *Bhagwati Prasad*[5] the railways offered two cheques to the appellant with the condition that if the offer was not acceptable, the cheques should be returned forthwith, failing which it would be deemed that the appellant accepted the offer in full and final satisfaction of its claim. It was further clarified that the retention of the cheques and/or encashment would automatically amount to satisfaction in full and final settlement of the claims. The appellant, in this case, wrote a letter to the railways protesting that the amount was less and en-cashed the cheques. The

3 AIR 2006 Pat 91.
4 *M/s. P R Transport Agency* v. *Union of India*, AIR 2006 All 23.
5 *M/s. Bhagwati Prasad Pawan Kumar* v. *Union of India*, AIR 2006 SC 2331.

court, after scanning through various high court judgments,[6] held that if the cheques were en-cashed without protest, then it was presumed that the offer was accepted unequivocally whereas if the appellant had protested to the railways to pay the balance amount and had en-cashed the cheques afterwards, then in view of the express non-acceptance of the offer, the appellant could not be presumed to have accepted the offer. The court in this case, could not find out categorically as to whether the letter of protest was written after en-cashing the cheques or before, in the absence of evidence. Still, the court went on to hold, strangely enough, that by en-cashing the cheques the appellant accepted the offer by adopting the mode of acceptance prescribed in the offer. It may be submitted that the decision by the apex court is not in line with the *ratio* laid down in this case.

In *Rakesh Kumar*[7] the defendant failed to pay the amounts due on account of goods supplied to it. After negotiations, the defendant agreed to pay a sum of Rs. 14 lakhs and settle the accounts once and for all. Again the defendant, after paying around Rs. 3.5 lakhs, defaulted in making further payments. The plaintiff filed a suit for recovery with interest. The defendant alleged that the suit was time barred as far as the old contract was concerned, because the plaintiff never accepted the fresh offer of Rs. 14 lakhs. After perusal of section 25,[8] and the decision in *Tarsem Singh*[9] the court observed that it was not necessary that a contract, to be valid, should always be in writing. But, being a bilateral transaction, the contract should always be mutually accepted. Both the parties should be *ad idem*. The court also observed that it was not necessary to give express consent, it might also be in implied terms. In this case, the court held that though there was no written contract expressing acceptance, but the fact that the plaintiff accepted the part payment of the settled account, made by the defendant, amounted to acceptance of the offer.

A letter of intent merely expresses an intention to enter into a contract. There is no binding legal relationship at this stage.[10] But, in *Dresser Rand*,[11] the Supreme Court observed that a letter of intent might be construed as letter

6 *Union of India* v. *M/s. Gangaram Bhagwandas*, AIR 1977 MP 215; *Union of India* v. *M/s Rameshwarlal Bhagchand*, AIR 1973 Gau 111; *Amar Nath Chand Prakash* v. *Bharat Heavy Electricals Limited*, AIR 1972 All 176.

7 *M/s. Rakesh Kumar Dinesh Kumar* v. *U.G. Hotels & Resorts Ltd.*, AIR 2006 HP 137.

8 *Section 25: Agreement without consideration, void, unless it is in writing and registered or is a promise to compensate for something done or is a promise to pay a debt barred by limitation law* – An agreement made without consideration is void, unless – ....

(3) it is a promise, made in writing and signed by the person to be charged therewith or by his agent generally or specially authorised in that behalf, to pay wholly or in part debt of which the creditor might have enforced payment but for the law for the limitation of suits. In any of these cases, such an agreement is a contract....

9 *Tarsem Singh* v. *Sukhminder Singh*, AIR 1998 SC 1400.

10 *Rajasthan Cooperative Dairy Federation Ltd.* v. *Maha Laxmi Mingrate Marketing Service Pvt. Ltd.*, (1996) 10 SCC 405.

11 *Dresser Rand S.A.*v. *M/s Bindal Agro Chem Ltd.*, AIR 2006 SC 871.

of acceptance if such intention was evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, a letter of intent is issued communicating the acceptance of the offer and asking the contractor to start work with a stipulation that the detailed contract would be drawn up later. If such a letter is issued to the contractor, though termed as a letter of intent, it may amount to acceptance of the offer resulting in a concluded contract between the parties. This is decided with reference to the terms of the letter. In this case, the court did not find the letter of intent binding on the parties so there was no concluded contract.

Auction, bidding

In *IVRCL & SEW* v. *State of J&K*,[12] the Jammu and Kashmir High Court observed that the pre-qualification conditions for bidding must be scrupulously complied with, lest it should encourage discrimination, arbitrariness and favouritism, which are totally opposed to the rule of law. Any relaxation or waiver of conditions laid down by the state in favour of one bidder would create justifiable doubt in the minds of other bidders and would impair the rule of transparency and fairness. In this case, the notice inviting tender required experience of 'completed work' but the appellant's experience certificate stated 'substantially completed the work'. The appellant's plea for pedantic approach to the prescribed criterion was rejected by the court on the ground that it would provide room for manipulation to suit the whims of the state in picking and choosing a bidder for awarding contracts.

In *New Golden Bus Service, Bhatinda* v. *State of Punjab*,[13] the state government invited tenders for hiring vehicles. The notice invited yearly quotation but did not specify that the period of contract would be for three years. Respondent no. 3 submitted a quotation for three years but the appellant for one year. The government granted contract to respondent no. 3 as his was the lower bid. The appellant challenged the decision on the ground of illegality. The court held that mere omission to specify the period of contract in the notice would not render the entire tender process vitiated on account of vagueness. This decision may not be said to be a sound judgment. Omission is minor but significant. It may be argued that had the appellant known about the period of contract, he would have given different, probably lesser, quotation taking into account the economies of scale.

In *Vasudevan*[14] tenders were invited but because of non-satisfactory bids, the respondent refused to accept the highest bid and decided to issue re-tender notification. In the subsequent notification, the eligibility requirements were relaxed. This decision of the respondent was challenged on two grounds. First, the decision to reject the bids was taken without assigning any reason. Second, the eligibility requirements were arbitrarily relaxed to suit one party. Rejecting both the contentions and upholding the order of the

12 AIR 2006 J&K 39.
13 AIR 2006 P&H 141.
14 *M. Vasudevan* v. *C E O Chennai Metropolitan Devpt., Authority*, AIR 2006 Mad 45.

respondent, the court observed that there was nothing arbitrary or unfair and the respondent was not required to give reasons as it was neither a quasi-judicial nor an administrative order affecting rights and liabilities. The court also upheld the relaxation of eligibility requirements, as the contract in question was not a contract for some highly specialised work like setting up a highly technical factory or establishment. It was only for collection of parking fees, which is not a highly specialised work.

In *Utpal Mitra*,[15] the authorities, after conducting an inquiry, found that certain persons had obstructed the respondent from entering into the office when he came to submit his tender papers. The respondent was, therefore, permitted to submit tender papers after the last date for submission was over. The petitioner challenged the act of the authority as being *mala fide*. Refusing to interfere, the court upheld the decision of the authority for extension of time because the decision was taken only after conducting the enquiry. The court rather appreciated the authority for the decision as being warranted by the rules of fairness.

In *Ranjit Kumar Saha* v. *State of Tripura*,[16] the petitioner filed a writ petition for relief against forfeiture of his security deposit. The notice inviting tender (NIT) given by the government provided that no bidder would be allowed to surrender his rate before finalization of the tender and if so surrendered, the earnest money deposited by him would be liable to be forfeited. In this case the bidder surrendered the bid and the government forfeited the earnest money deposited by him. The petitioner contended that he has statutory right under section 5 of the Contract Act to withdraw offer before it is accepted. The court relying on *Ganga Enterprises*,[17] observed that withdrawal of an offer before its acceptance was one thing and forfeiture of the earnest money on such withdrawal was quite another and upheld the forfeiture. Similarly, the Supreme Court in *State of Maharashtra* v. *A. P. Paper Mills Ltd.*[18] upheld the forfeiture of earnest money on withdrawal of bid within 45 days and set aside the order of the Bombay High Court asking the government to refund the earnest money forfeited in consequence of such withdrawal.

Valid contracts

In *Meenu Sahu*[19] the Life Insurance Corporation (LIC) issued a life insurance policy to the husband of the petitioner, after taking clearance from the development officer and the doctor appointed by LIC. The policy-holder died within two years of taking the policy due to jaundice. The LIC sought to avoid the policy on the grounds of fraud and misrepresentation. The court held that LIC could not refuse the payment of the assured sum as the policy

15 *Utpal Mitra* v. *The Chief Executive Officer*, AIR 2006 Cal 74.
16 AIR 2006 Gau 70.
17 *National Highway Authority of India* v. *Ganga Enterprises*, AIR 2003 SC 3823.
18 AIR 2006 SC 1788.
19 *Smt. Meenu Sahu* v. *Life Insurance Corporation of India*, AIR 2006 All 156.

was issued only after obtaining the necessary clearances from the development officer and the medical practitioner appointed by it. It is the LIC and not the policyholder who should be held accountable for any act or omission on the part of the development officer or medical practitioner.

In *Indochem Electronic*[20] the appellant supplied faulty EPABX and intercom facilities, which was causing trouble since its installation. The appellant repaired the system many a time even after the lapse of one year of warranty period. The appellant made representation to the respondent that despite expiry of period of warranty, maintenance of the system to the respondent's satisfaction was its contractual obligation. The court in view of such representations concluded that there was contract with respect to warranty for an extended period, which could not be revoked by the appellant on its own.

Void agreements

In *Tulshiram Maroti Kohad*,[21] the appellant entered into an agreement to give his minor daughter in marriage after she attains majority, to Roopchand, respondent no.1. The respondent later on refused to marry the girl. The appellant claimed damages for all the expenditure actually incurred by him on the betrothal ceremony and other arrangements and for lowering his esteem in the society and for mental torture. The question before the court was about the validity of the contract because the girl was a minor at the time of entering into the contract. The court while observing that the engagement or betrothal *was not a contract* upheld the validity of contract of marriage relying on *Khimji Kuverji Shah*,[22] wherein it was held that a guardian could enter into a contract on behalf of the minor and could also sue for breach.

Agreements in restraint of trade are void. Under section 27 a restrictive covenant extending beyond the term of the contract is void and not enforceable because the doctrine of restraint of trade does not apply during the continuance of the contract since it applies only when the contract comes to an end. However, while construing section 27, neither the test of reasonableness nor the principle of restraint being partial is applicable unless it squarely falls within the express exceptions engrafted in section 27. In *Percept D'Mark*[23] the question arose whether the right of 'first refusal' contained in a contract between the appellant and the respondent after the contract came to an end was violative of section 27 of the Contract Act or not. Granting interim relief, the court observed that the appellant was free to proceed against the respondent for the breach of agreement before the appropriate forum. The court observed that legal position with regard to post-contractual covenants or restrictions has been consistent, unchanging and

20 *Indochem Electronic* v. *Addl. Collector of Customs*, (2006) 3 SCC 721.
21 *Tulshiram Maroti Kohad* v. *Roopchand Laxman Ninawe*, AIR 2006 Bom 183.
22 *Khimji Kuverji Shah* v. *Lalji Karsmsi Raghavji*, AIR 1941 Bom 129.
23 *Percept D'Mark (India) (P) Ltd.* v. *Zaheer Khan*, (2006) 4 SCC 227.

completely settled in India. However, the court expressed the possibility of reconsideration of this settled principle of law but in the same breath refused to reconsider in the present interlocutory proceedings.

The parties to the contract may by agreement confine themselves to the jurisdiction of one of the several civil courts having concurrent territorial jurisdiction in respect of a suit, subject only to one restriction provided in section 28 of the Contract Act. Ouster clauses in such agreements are construed strictly and the jurisdiction is held to be excluded only when it is the inevitable result of the agreement. The question that arose in *P R Transport Agency*[24] was whether the ouster clause can exclude the jurisdiction of a high court under article 226 of the Constitution of India. The Allahabad High Court answered the question in the negative by putting the jurisdiction of high court under article 226 at a higher pedestal than that of the civil court. The high court brought forth vital differences between the two courts' jurisdiction by observing that the civil courts get the power through statute whereas high court's powers emanate from the Constitution itself; a high court can exercise *suo motu* power whereas civil courts get jurisdiction only upon filing of the suit. The court held that the power of a high court is part of the basic structure of the Constitution, which cannot be ousted even by statute let alone by an agreement.

In *Shin Satellite*[25] the contract between the parties provided for arbitration in case of any dispute arising between them from the contract. The arbitration clause attached 'finality and bindingness' to the arbitrator's determination and parties could waive all rights of appeal or objection in any jurisdiction. There was another clause relating to severability according to which if any provision of the contract is held invalid, illegal or unenforceable due to any reason that will not affect the rest of the contract. The arbitration clause in the agreement was challenged on the ground that it is violative of section 28 of the Contract Act. The issue before the court was whether the entire arbitration clause be held invalid or only the 'final and binding' part of the clause be held illegal. Applying the principle of severability to the contracts, the court observed that the test is 'substantial severability' and not 'textual divisibility'. It is the duty of the court to sever trivial or technical parts from main or substantial parts and consider the question if the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. The court upheld the arbitration clause minus 'final and binding' sub-clause, as valid.

Voidable contracts

In *Smt. Munna Kumari* v. *Smt. Umrao Devi*,[26] the gift deed was challenged on the ground that it was made under undue influence. The court relying on

24 *M/s. P R Transport Agency* v. *Union of India*, AIR 2006 All 23.
25 *Shin Satellite Public Co. Ltd.* v. *Jain Studios Ltd.*, (2006) 2 SCC 628.
26 AIR 2006 Raj 152.

Afsar Sheikh[27] observed that the law relating to undue influence in the case of a gift *inter vivos* is the same as in the case of a contract as embodied in section 16 of the Contract Act. Section 16(3) contains a rule of evidence according to which, there are three stages for consideration. Firstly, whether the plaintiff has proved that the relationship is such that one party is able to dominate the will of the other. Secondly, whether the influence amounted to 'undue influence' and thirdly, whether the transaction is unconscionable. The burden of proving that it was not induced by undue influence is on the person who was in a position to dominate the will of the other. On the basis of these principles, the evidence in the present case was examined and found that the lady who was living with the donor for last 35 years had influenced the making of the will according to which the donor had gifted his property to the minor daughter of a third person, with whom this lady had an affair, instead of his own adopted son. The plaintiff discharged his burden by showing the kind of relationship, which could have influenced the decision of gift, but the defendant could not show that the gift deed was not executed under undue influence.

Fraud avoids all judicial acts. A decree obtained by playing fraud is a nullity and it can be challenged in any court even in collateral proceedings.[28] In *Chewang Dorjee Lama* v. *Lerap Dorjee Bhutia*[29] the appellant sold plot no. 231 to the respondent. After the execution of sale, the respondent fraudulently inserted plot no. 230 and 232 in the sale deed. The court relying upon *Narsinghdas*,[30] held that in order to vitiate contract on the ground of fraud, it must be a fraud covered under section 17[31] of the Contract Act, which requires that the fraud should be committed at the very inception and not by a subsequent conduct or representation on the part of the party or his representative-in-interest. However, the case was decided in favour of appellant on other grounds.

It is well-settled that a deed duly registered is legally presumed to be valid and the burden lies on the person who challenges its validity on the grounds of fraud and undue influence etc. An exception to this rule is that if the deed is unconscionable and is executed by a person who is victim of physical or mental handicap or where he is positioned to be dominated, then the initial

27 *Afsar Sheikh* v. *Soleman Bibi*, AIR 1976 SC 163.

28 *S P Chengalvaraya Naidu* v. *Jagannath*, (1994) 1 SCC 1 as cited in *N. Khosla* v. *Rajlakshmi*, (2005) 3 SCC 605.

29 AIR 2006 Sikkim 37.

30 *Narsinghdas Takhatmal*v. *Radhakisan Rambakas*, AIR 1952 Bom 425.

31 *Section 17:* "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agents, with intent to deceive another party thereto his agent, or to induce him to enter into the contract;
(1) the suggestion as a fact, of that which is not true, by one who does not believe it to be true;
(2) the active concealment of a fact by one having knowledge or belief of the fact;
(3) a promise made without any intention of performing it;
(4) any other act fitted to deceive;
(5) any such act or omission as the law specially declares to be fraudulent.

burden will be cast on the person enjoying the deed and was in dominating position to secure the deed, to show that he secured the deed in good faith.[32] In *Ramu Mahabir* v. *Ghurhoo Samu*[33] the plaintiff, an illiterate and old man of 70 years of age, transferred his entire property by way of sale for just Rs. 20,000/- to his nephew/ defendant to the exclusion of his own daughters. He was living with his nephew for last eight years after the marriage of his daughters. The court found the sale of property, which was the only source of his livelihood to the exclusion of his own daughters, unconscionable and observed that the burden was on the nephew to show that the deed was valid and had been executed in all fairness and *bona fide* and not otherwise influenced by any fraud or misrepresentation. After perusal of pleadings, the court observed that the defendant misrepresented the old man that the papers he was signing were surety bond and not the sale deed. The court set aside the sale deed as one obtained by fraud, misrepresentation and undue influence.

It is the duty of the plaintiff to prove the agreement and its enforceability. According to section 29[34] an agreement is not enforceable for want of certainty. The certainty, however, can be gathered not only from the terms of the contract but also from the intention of the parties.[35] The test is not whether the terms of the contract are certain but whether it is capable of being made certain. Applying this principle, the court, in *Giriraja Shetty*,[36] held that the terms of the contract with regard to the extent of lands to be sold by the parties was not certain. The court also found the evidence and statements made by the parties inadequate to read certainty in the terms of the contract.

In *Harmesh Kumar* v. *Maya Bai*,[37] the court analysed the doctrine of *non est factum.*[38] In this case, the respondent executed a specific power of attorney in favour of Gian Chand, her brother-in-law authorising him to contest litigation on her behalf. But Gian Chand taking advantage of her illiteracy fabricated the general power of attorney and transferred all her property in the name of his son. When Maya Bai came to know about this transfer, she filed a suit alleging fraud. The two lower courts concurred in holding the deed as fraudulent. On

32 See *Daya Shankar* v. *Smt. Bachi*, AIR 1982 All 376; *Parasnath Rai* v. *Tileshra Kaur*, 1965 All LJ 1080; *Chinta Dasya* v. *Bhalku Das*, AIR 1930 Cal 591 etc.

33 AIR 2006 All 273.

34 *Section 29: Agreements void for uncertainty* – Agreements, the meaning of which is not certain, or capable of being made certain, are void.

35 *Kumbara Narasimhappa* v. *Lakkanna*, AIR 1959 Mys 148; *Ponnuswami Goundar* v. *Kalyanasaundara Ayyar*, AIR 1930 Mad 770.

36 *N.K. Giriraja Shetty* v. *N. K. Parthasarathy Setty*, AIR 2006 Kant 180.

37 AIR 2006 P & H 1.

38 The doctrine implies that when a person is induced by the false statement of another to sign a written contract, which is fundamentally different in character from the one which he envisages then such a person is competent to say that it is not his document. It was initially evolved to relieve illiterate or blind people from the effects of a contract which owing to natural infirmities they were unable to read with no fault of theirs or which was not perperly explained to them.

appeal, the division bench of Punjab and Haryana High Court applied the doctrine of *non est factum* and held that the transfer made pursuant to this power of attorney was void and not merely voidable.

The doctrine *non est factum* was first evolved in England in *Thoroughgood* v. *Cole*[39] expounded further in *Foster* v. *Mackinnon*[40] that a document obtained fraudulently is invalid not merely on the ground of fraud but on the ground that the mind of the signer did not accompany the signature. This doctrine was followed in India for the first time in *Sannibibi*,[41] *Brindaban Mishra*[42] and *Ningawwa* v. *Byrappa Shidappa, Hireknrabar*.[43] The doctrine, as it was evolved, distinguished between documents on the basis of the character and the contents. If the document is fundamentally different in character than the signer envisaged, then it could be held void *ab initio* whereas if the contract is different only in details or contents then the contract could be held voidable. This distinction held ground for around one century till 1970 when the House of Lords in *Saunder*[44] did away with this distinction, which was followed by the Supreme Court of India in *Bismillah*.[45] The Punjab and Haryana High Court in the present case, though, took note of changed position in *Bismillah* but strangely applied the overruled ratio of *Ningawwa*. This reflects the apathy of the court in writing judgments. The court observed that:[45a]

> [T]he classical principle of '*non est factum'* making distinction between the character of the document and then making them void as considered by the Supreme Court in *Ningawwa's* case would be fully applicable to the facts of the present case.

Not only the high court but even the Supreme Court referred to *Ningwwa* in *Prem Singh*,[46] and overlooked *Bismillah*.

Privity of contract

In *Bhatinda Chemicals*,[47] the plaintiff was the consignee of the goods to be shipped from Dubai for which bill of lading was issued by Balaji Shipping (UK) Ltd. After loading the goods on the ship, the authorities attached the goods under court's order. The plaintiff filed suit against the defendants (ship and its owner) for non-delivery of goods. The court held that the suit was not maintainable as there was no privity of contract between them.

39 (1584) 2 Co. Rep 9a.
40 (1869) LR 4 CP 704.
41 *Sannibibi* v. *Siddik Hussain*, AIR 1919 Cal 728.
42 *Brindaban Mishra Adhikary* v. *Dhurba Charan Roy*, AIR 1929 Cal 606.
43 AIR 1968 SC 956.
44 *Saunders* v. *Anglia Building Society*, (1970) 3 All ER 961.
45 *Smt. Bismillah* v. *Janeshwar Prasad*, AIR 1990 SC 540.
45a *Supra* note 37 at 8.
46 *Prem Singh* v. *Birbal*, (2006) 4 SCC 353.
47 *Bhatinda Chemicals Ltd.* v. *M.V."X-PRESS NUPTSE"*, AIR 2006 Bom 311.

Cancellation of contracts

In *Vijay Jaiswal* v. *State of M.P.*,[48] the respondent sent a letter to the appellant cancelling the contract entered into between the two on the ground that there were irregularities in accepting the bid. Relying on *Beg Raj Singh*[49] and *Moolchand*,[50] the court held that such a cancellation without affording right of hearing to the appellant was improper as after entering into agreement, a statutory right was conferred on the respondent.

Time as essence of contract

Section 55 of the Contract Act provides that when the time of performance of contract is essential, the failure to perform contract at a fixed time renders the contract voidable at the option of other party. Generally in case of sale of immovable property time is never regarded as the essence of the contract as there is a presumption against time being essence of the contract. In such cases, if the parties intend the time to be essence, they must express it in unequivocal language.[51] Whether time is essence or not depends upon the intention of the parties to the contract. In *Virendra Mohan Singh*,[52] the court held that time was not the essence as the party asked for payment much after the dates for payments had expired.

Similarly, where the contract provides for extension of time, the time is usually not considered as the essence of contract and the delay does not render the contract voidable.[53] The Delhi High Court, however, in *M/s. Haryana Telcom Ltd.* v. *Union of India*,[54] rejected the contention of time not being essence of contract even on the face of a clause relating to extension of time. The contract in this case besides providing for extension of time also stipulated that should delivery be made after expiry of the contracted delivery period without the concurrence of Department of Telecommunication (DoT) and be accepted by the consignee, such deliveries will not deprive DoT of its right to recover liquidated damages. The court held that this clause did not show that time was to be treated not as the essence of contract when any delivery made even during extended period was to invite liquidated damages. This was not a case where extension of time could be given in normal course.

In *Brahmanand*,[55] the original agreement had fixed the date for performance but in subsequent communication, time was extended for the performance of the contract. The other party stopped insisting on performance of the contract. The court observed that under section 63 a promisee may extend time for performance of the promise. However, such an agreement to extend time need not necessarily be reduced to writing but may be proved by oral evidence or conduct including forbearance on the part of the other party.

48 AIR 2006 MP 65.
49 AIR 2003 SC 833.
50 AIR 1973 MP 245.
51 *Badru Nisha* v. *Yogendra Prasad Sinha*, AIR 2006 Pat 71.
52 *Amteshwar Anand* v. *Virender Mohan Singh*, AIR 2006 SC 151.
53 *M/s. Arosan Enterprises Ltd.* v. *Union of India*, AIR 1999 SC 3804.
54 AIR 2006 Del 339.
55 *S. Brahmanand* v. *K. R. Muthugopal*, AIR 2006 SC 40.

The court in this case held that the party by not insisting upon performance accepted the offer to extend time and thereby the limitation period too was held to be extended.

Frustration of contract

The doctrine of frustration comes into play when a contract becomes impossible of performance after it is made. There are five conditions that must be fulfilled before excusing parties from performance on the ground of frustration: (i) there should be a valid and subsisting contract; (ii) some part of the contract is yet to be performed; (iii) the contract after it is entered into becomes impossible to perform; (iv) the impossibility is by reason of some event, which the promisor could not prevent; and (v) the impossibility is not induced by the promisor or due to his negligence. In *Vigneshawara*,[56] the court rejected the contention of frustration of contract by the respondent who agreed to sell certain property to the appellant but found out, later on, that he did not have absolute title to the entire property but to the major portion of it. The first appellate court held the contract unenforceable on the ground of frustration of contract. The high court, on appeal, reversed the trial judge decision and held that due to the lack of absolute title over the entire plaint properties, the agreement has not become unenforceable. The fact that over a portion of the properties brothers of the respondent had fractional share, would not make the entire agreement impossible of performance. He was definitely liable to transfer whatever land he had and the appellant was entitled to purchase the same. The court held that section 56 was not attracted in this case, as the contract had not become impossible to perform due to any subsequent event. But in *Bhatinda Chemicals*,[57] the contract of sending goods through ship was held to have become frustrated due to the attachment of goods by the orders of the court.

Appropriation of payments

Appropriation is the act of setting apart or assigning a thing or substance to a particular use or person to the exclusion of others. It means application to a special use or purpose. If a debtor makes a payment to a creditor or does not specify which debt the payment is in settlement of, the creditor may appropriate it to any of the debts outstanding on the debtor's account. This is often known as appropriation of payments. Sections 59 to 61 of the Act govern the above principle. It was observed that these sections get attracted only when more than one debt is due from a debtor to the creditor.[58]

Performance of contract

Section 37 mandates the parties to a contract to perform their respective promises, unless such performance is dispensed with under the provisions of this Act or of any other law. Section 62 (effect of novation, rescission, and

56 *N.G. Vigneshwara Bhat* v. *P. Srikrishna Bhat*, AIR 2006 Ker 322.
57 *Bhatinda Chemicals Ltd.*, *supra* note 47.
58 *Gurpreet Singh* v. *Union of India*, (2006) 8 SCC 457

alteration of contract) is one such case in point that permits the parties not to perform the contract if they agree to rescind, alter or substitute a new contract for the older one. Assignment results in alteration of contract because of the change of parties and the other party may avoid his obligations under the contract unless he agrees to such assignment. However, there is an exception to this rule. In *Shrikant,*[59] the court observed that when the government by statute vests certain assets of the state in a statutory corporation and consequently transfers all the rights and obligations of the state connected with such assets, then all the existing contracts become contract between the statutory corporation and the contractor even without the consent of the contractor. The court observed that in such cases, it is not necessary to have a separate instrument of transfer or assignment as the statute engrafts itself over the subsisting contract.

Under section 67 of the Contract Act, the promisor is excused from performance if reasonable facilities for such performance are neglected or refused by the promisee. The question of neglect of facilities came up in *Shantikunj,*[60] wherein the Chandigarh administration allotted a site to the respondent on lease for 99 years for which the payment had to be made in three equal yearly instalments. It was found by the respondent later on that the site was not developed and was lacking in basic amenities such as roads, water supply, sewerage, landscaping etc. The respondent did not pay the instalment on the ground that in the absence of such 'amenities' it was not possible to 'enjoy' the property. The court refused to apply section 67 and give relief on the ground that there was no specific promise on the part of the administration that providing of such 'amenities' shall be a condition precedent to the allotment and enjoyment of property.

Restitution

The Andhra Pradesh High Court in *Holy Faith*[61] scanned through the philosophy underpinning principle of restitution. According to the court there are two time-honoured principles. First, *ex turpi causa non oritur actio* means 'no right of action arises out of a shameful cause'. Secondly *in pari delicto potior est conditio defendentis* means 'where both the parties are guilty of wrongdoing, the position of the defendant is stronger'. The maxim of *pari delicto* may be said to be an exception to the first principle, which is established not for the benefit of plaintiffs or defendants but is founded on the principles of public policy. Section 65[62] of the Contract Act makes another

59 *Shrikant* v. *Vasantrao,* (2006) 2 SCC 682.

60 *Municipal Corp., Chandigarh* v. *M/s. Shantikunj Investment Pvt. Ltd.,* AIR 2006 SC 1270.

61 *Holy Faith International Pvt. Ltd.* v. *Shiv K. Kumar,* AIR 2007 AP 198.

62 *Section 65: Obligation of person who has received advantage under void agreement, or contract that becomes void* – When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore, it, or to make compensation for it, to the person from whom he received it.

exception to the first principle by providing for the restoration of any advantage received under void agreements. However, the court in the present case did not find the underlying contract between the parties forbidden and thus there was no question of application of doctrine of restitution.

Section 70[63] provides for restoration or compensation in cases where there is no written contract but a situation similar to that of a contract has arisen. It was held in various cases,[64] that three conditions must be fulfilled in order to invoke the principle of equitable compensation under section 70. One, a person should lawfully do something for another person or deliver something to him. Two, in doing so, he must not intend to act gratuitously. Three, other person must enjoy the benefit thereof. If all the three conditions are fulfilled, the latter person is liable to make compensation to the former in respect of or to restore the thing so done or delivered. This is applicable to individuals, corporate bodies and the government alike. The court in *Municipal Committee, Pundri* v. *Bajrang Rao Nagrath*[65] found all the three conditions being fulfilled as the municipal committee enjoyed the non-gratuitous work, done by the respondent on oral request of the committee and held that respondent deserved to succeed on the basis of section 70 of the Contract Act.

Damages

The party who is injured by the breach of contract may bring an action for damages. Damages here means the compensation in terms of money for the losses suffered. The court in *Shankar Prasad*[66] held that the damages under section 73 could only be given for any loss actually suffered and not for any remote or indirect loss or damage.

Section 74 of the Contract Act provides that where the sum is mentioned in the contract, the party suffering from breach is entitled to receive 'reasonable compensation' not exceeding the amount so mentioned, which acts as maximum limit of liability. The fact, however, remains that before granting compensation the *factum* of breach must be established.[67] Compensation cannot be granted on assumed breach of contract.

Liability of surety

In *Choudhary Parkash Chand*,[68] the question that came up for

63 *Section 70. Obligation of person enjoying benefit of non-gratuitous act* – Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such another person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

64 *State of West Bengal* v. *M/s. B K Mandal,* AIR 1962 SC 779; *New Marine Coal Co.* v. *Union of India*, AIR 1964 SC 152; *V R Subramanyam* v. *B. Thayappa*, AIR 1966 SC 1034; *Pannalal* v. *Dy. Commr., Bhandara*, AIR 1973 SC 1174.

65 AIR 2006 P&H 142.

66 *Jalpaiguri Zilla Parishad* v. *Shankar Prasad Haldar,* AIR 2006 Cal 1.

67 *State of Rajasthan* v. *Nathu Lal,* AIR 2006 Raj 19.

68 *J and K Bank* v. *Choudhary Parkash Chand,* AIR 2006 J & K 11.

determination was whether the surety in case of hypothecation is entitled to the benefits of section 141[69] of the Contract Act. The J & K bank gave loan for the purchase of lorry to one Mr. Bachan Singh, who defaulted in repayment of loan. The bank did not exercise its right to seize and sell the vehicle in time and rather filed a suit against the guarantors for recovery of money. The trial court applied *Chitranjan Rangnath Raja*[70] and *Chaman Lal*[71] and held that the non-seizure of hypothecated vehicle has prevented the surety to resort to the remedy against principal debtor and thus discharged the guarantors. The high court, on appeal, reversed the decision of the trial court and observed that these two cases are distinguishable from the case in hand. The court observed that the liability of the guarantor is co-extensive with that of the principal debtor in the absence of a contrary clause in the guarantee deed.

The high court also scanned through two Supreme Court decisions to appreciate the distinction between hypothecation and pledge and impliedly held that section 141 is better suited in case of pledge wherein the goods are in the possession of the creditor than in case of hypothecation wherein the physical possession is in the hands of the principal debtor.

In *Syndicate Bank* v. *Channaveerappa Beleri,*[72] the question was with respect to the period of limitation for enforcing guarantor's liability in case of continuing guarantee. In this case, the bank gave overdraft facility to the company for which the directors gave 'continuing guarantee' to repay 'all and every sum' due to the bank 'on demand'. The company started running in losses and stopped its activities, operations in the accounts of the company with the bank. The bank sent demand on company and its directors for repayment of the amount due to the bank but in vain. After initiating winding up proceedings against the company, the bank filed suit after three years against the guarantors i.e. directors, for recovery of around nineteen and half lakhs rupees. The trial court and the Karnataka High Court, on appeal, dismissed the suit on the ground that it was time-barred. The Supreme Court, on special leave petition, held that it was not time barred on the ground that the limitation period started only when the demand made by the bank for repayment was breached and not when the account ceased to be a 'live account' as was held by the lower court. The court distinguished the present case from *Samuel*[73] in which it was held that the limitation period did not start as long as the account was 'live account' in the sense that it was not settled and there was no refusal on the part of the guarantor to carry out the

69 *Section 141. Surety's right to benefit of creditor's securities* - A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

70 *State Bank of Saurashtra* v. *Chitranjan Rangnath Raja,* AIR 1980 SC 1529.

71 *J. And K. Bank* v. *Chaman Lal*, 1991 Kash LJ 314.

72 AIR 2006 SC 1874.

73 *Margaret Lalita Samuel* v. *Indo Commercial Bank Ltd.,* AIR 1979 SC 102.

obligation. It was observed that in the present case, the guarantor agreed to repay 'on demand' and thus the limitation period of three years would start only when the bank made a demand and the demand was not met by the guarantor. The court entered a caveat in this ratio by holding that the 'demand' made should be for payment of a sum which was legally due and recoverable from the principal debtor. If the debt was already time-barred against the principal debtor, the question of demanding from creditor for the first time did not arise. The limitation period for guarantor would start from the date of such demand and refusal/ non-compliance even if the claim against the principal debtor got subsequently time-barred. The court rejected the contention that cessation of 'operation accounts' should be treated as refusal to pay by the principal debtor as it did not amount to demand by the creditor.

Bank guarantee

The question in *Mula Sahakari,*[74] was whether the document in question was a contract of indemnity or guarantee. The court observed that while construing a document, the terms and conditions contained therein should be taken into consideration and if there is any ambiguity, only then the surrounding circumstances should be referred to. Applying this principle, the court held the document in question was contract of indemnity as appellant undertook to indemnify the cooperative society against all losses, claims, damages, actions and costs which might be suffered by it. The document did not contain the usual words found in a bank guarantee furnished by a bank, for instance, "unequivocal condition" or "unconditional and absolute' or "the cooperative society would be entitled to claim the damages without any delay or demur" etc.

It is a well-settled principle that the obligation of a bank under bank guarantee is independent of the underlying transaction between the beneficiary and the person at whose behest the bank guarantee is issued because the bank is not a party to the same.[75] It means a bank is required to make payment in discharge of its obligations irrespective of any dispute between the parties to the underlying transaction.[76] The same is an irrelevant ground for the court also, for passing injunction restraining the bank from making payment in discharge of its obligations.[77]

The above rule, however, is subject to two exceptions – fraud and where the payment of bank guarantee results in special inequities in the form of irretrievable injustice. It has been held that the fraud has to be of an egregious nature as to vitiate the entire underlying transaction. A special inequity in the form of irretrievable injustice, on the other hand, is caused only if the party

74 *State Bank of India* v. *Mula Sahakari Sakhar Karkhana Ltd.*, (2006) 6 SCC 293.
75 *Veer Probhu Marketing Ltd.* v. *National Supply Corporation*, AIR 2006 Cal 301.
76 *Bank of Baroda* v. *Ruby Sales Corporation (Agency)*, AIR 2006 Guj 251.
77 *Man Industries India Ltd.* v. *N.V. Kharote Engineering & Contractors*, AIR 2005 Bom 311. Also see *M/s Alcove Industries ltd.* v. *M/s Oriental Structural Engineering Ltd.*, AIR 2005 Del 173; *Vinitec Electronics Pvt. Ltd.* v. *HCL Infosystems Ltd.*, AIR 2005 Del 314.

is rendered absolutely remedyless for recovery of the amount in case it ultimately succeeds. This general rule and its exceptions are fairly settled.[78] In *M/s. BSES Ltd. (Now Reliance Energy Ltd.)* v. *M/s. Fenner India Ltd.*,[79] the Supreme Court dissuaded the expansion upon settled exceptions to the rule in line with foreign judgments[80] by observing that whatever may be the law as to the encashment of bank guarantees in other jurisdictions, when the law in India is clear, settled and without any deviation whatsoever, there is no occasion to rely upon foreign case law. The court, thus, in this case, held that encashment of bank guarantees, even if for the purpose of securing advance or performance, would not be covered under any of the two exceptions.

In *Hindustan Construction*,[81] the Delhi High Court delineated upon the concept of irretrievable injustice or special inequities and observed that it would come into play where the parties to a contract attempts to frustrate results of an internal adjudication mechanism, provided by the contract, by recourse to encashment of bank guarantee. It is particularly so where such determination is 'final' under the terms and conditions of the contract. Such an attempt to overreach the process of adjudication would influence the decision or tilt the special inequities in favour of the applicant before the court. In the case in hand, the court found that the respondent is attempting to frustrate the unfavourable findings recorded by the internal determinative adjudicating machinery. The court, thus, held that the encashment of bank guarantee would cause irretrievable injustice and injury because appellant may not even be able to bear such a financial imbalance. And no injustice would be caused to the respondents if encashment was not permitted to them at this stage, subject to the condition that they were kept alive by the appellant.

The contract of bank guarantee is an independent contract between the bank and the beneficiary. Even if the bank guarantees are unconditional, the invocation should be in accordance with the terms of the contract of guarantee. The right of invocation is not unfettered and the obligation of the bank to pay is absolute the moment condition is fulfilled.[82] In *Sanicons*[83] the respondent invited tenders for construction for which the appellant filed bid along with the bank guarantee as bid security. The ITB (instructions to bidder) provided for forfeiture of bid security in case of withdrawal of the bid or non-acceptance of bid price or failure to sign the agreement or failure to furnish required performance security. In this case, the appellant's experience certificate was found to be non genuine. The government rejected the application and also forfeited the security money by encashing the bank

78 *Hindustan Corporation Company Limited* v. *State of Bihar*, AIR 1999 SC 3710; *U P State Sugar Corporation* v. *Sumac International Ltd.*, (1997) 1 SCC 568.

79 AIR 2006 SC 1148.

80 Such as *TTI Team Telecom Ltd.* v. *Hutchinson 3G UK Ltd.*, (2003) 1 ALL ER (Comm.) 914; *Samwoh Asphalt Premix Pte. Ltd.* v. *Sum Cheong Piling Pte. Ltd.*, (2002) 1 SLR 1.

81 *Hindustan Construction Co. Ltd.* v. *Satluj Jal Vidyut Nigam Ltd.*, AIR 2006 Del 169.

82 *Veer Probhu Marketing Ltd.* v. *National Supply Corporation*, AIR 2006 Cal 301.

83 *M/s. Sanicons* v. *Government of AP*, AIR 2006 AP 282.

guarantee. The court in this case, held the forfeiture invalid as it was not in terms with the ITB as well as contrary to the terms of the bank guarantee.

Bailment

In *Forbes Camphell*,[84] it was observed that on delivery of goods by the steamer agent to the port trust and on issuance of a receipt by the port trust under section 42(2) of the Major Port Trust Act, 1963, the contract of bailment comes into existence under section 148 of the Contract Act. Under section 158 of the Contract Act, the bailor is duty bound to pay to the bailee the necessary expenses incurred by him for the purpose of the bailment. These expenses also include, *inter alia*, wharfage or demurrage charges. The goods remain in the custody of the port trust on behalf of the steamer agent, which is in control of the goods. The consignee or the endorsee cannot take away the said goods unless the steamer agent gives a delivery note or an endorsement on the bill of lading permitting the giving of delivery to the consignee or his endorsee. Steamer agent is free to take back the goods at any point of time after paying all charges due to port trust and other authorities. After giving delivery note to the consignee or his endorsee, the steamer agent will be free from all liability and no charges will accrue against him. In this case, no delivery order was issued and thus the steamer agent was held liable to pay all charges accrued on account of goods stored with port trust.

In *Oriental Insurance*[85] the second plaintiff entrusted goods with the defendant, a public carrier for being transported from Sirumugai to Amritsar by lorry. The defendant failed to effect safe and due delivery of the goods at the destination. The defendant even acknowledged it in the certificate given to the plaintiff for making insurance claim. Subsequently, the plaintiff filed the suit against the defendant under Carriers Act and section 161 of the Contract Act dealing with bailee's responsibility, for recovery of damages. The defendant denied the charge of bad delivery. The lower court dismissed the suit by ignoring admission of the defendant. The high court on appeal held the dismissal improper and set aside the finding of the lower court. The high court also observed that being a public carrier disowning the liability after admitting the damages in the written document for use of the same by the plaintiff to claim damages from insurance company is highly condemnable. Such act would attract penal action against the defendants.

In *Suneel Kumar Gupta*[86] the appellant hypothecated raw material to the bank for availing cash credit facility but the goods remained in physical custody of the appellant. The goods got destroyed due to fire. The appellant informed the bank about the incident. Later on when the bank filed suit against the appellant for failure to pay the debt, the appellant alleged that since goods were hypothecated and got destroyed due to fire, the bank did not have any

84 *Forbes Forbes Camphell & Co. Ltd., Bombay* v. *Board of Trustees of the Port of Bombay*, AIR 2006 Bom 162.
85 *Oriental Insurance Co. Ltd.* v. *Kalpaka Transport Co. Ltd.*, AIR 2006 Mad 307.
86 *Suneel Kumar Gupta* v. *Punjab and Sindh Bank*, AIR 2006 Uttranchal 26.

claim against him to recover any sum from him. The court observed that according to law if the goods are lost after being pledged, then the creditor is not entitled to recover the loan from the debtor. But in this case, it was not pledge because the goods remained in physical possession of the appellant. Delivery of physical or constructive possession to the creditor is necessary for the purposes of pledge of the goods.

Agency

An agency is created when a person authorizes another person to do some specified acts on his behalf. The relationship between an agent and a principal is consensual and not contractual. It means that the relationship between the two can be created by the consent of both the parties. The consent need not necessarily be to the relationship of principal and agent itself. They may be held to have consented if they have agreed to a state of facts on which the law imposes the consequences, which result from agency, even if they do not recognize it themselves and even if they have professed to disclaim it.[87] In *S. D. C. Co. Ltd.* v. *Trading Corpn. of India Ltd.*[88] the defendant had the license to export cement. It used to purchase cement from other agencies including plaintiff. The cement had to be packed in six ply craft paper bags. The craft paper had to be imported, license for which was also with the defendant. The plaintiff, in this case, got the craft paper imported with the permission of the defendant, to be converted into craft bags by approved converters. Later on the government banned the export of cement and the craft paper imported by the plaintiff remained unused. The plaintiff filed a suit against the defendant for recovery of amount spent on unutilised craft paper bags. The question in this case was as to the nature of relationship between the two. The plaintiff could succeed only if the relationship of principal and agent could be established. The court scanned through the factual matrix and observed that the ownership, control and supervision in respect of import was with the defendant. He had control over the manner of disposal of the unutilised craft paper as the plaintiff had no right to sell or dispose of unutilised paper bag. The court held that this and many other such conditions shows that the relationship between the two fell within the ambit of principal and agent relationship. The court thus decreed the payment of amount[89] spent by the plaintiff on unutilised craft paper along with interest.

An agent is obliged to look after the interests of the principal and in fact principal is bound by the act and the conduct of the agent under the law except in case of criminal offences.[90] In *M/s. J M Baxi and Company* v. *Food Corporation of India*,[91] the trial court decreed the suit for recovery of money

87 *Chairman, Life Insurance Corporation* v. *Rajiv Kumar Bhasker*, AIR 2005 SC 3087.
88 AIR 2006 Del 276.
89 *Section 222: Agent to be indemnified against consequences of lawful acts* – The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.
90 *Veer Probhu Marketing Ltd.* v. *National Supply Corporation*, AIR 2006 Cal 301.
91 AIR 2006 Cal 94.

on account of shortage of goods and mutilation of part thereof, filed by the claimant against the master as well as the servant. The Calcutta High Court, on appeal, modified the decree passed by the trial judge to the extent that the decree passed by him was not binding upon the agent but only on the master on the ground that there was no material on record to show that the agent had agreed to take any responsibility in the transaction between the claimant and the master. But under section 230, the agent of the foreign principal is always treated for all practical purposes as *sui juris*. Such an agent is answerable to all concerned in relation to all the transactions.[92]

Revocable power of attorney can be terminated at any time by the principle or the agent in any manner specified under section 201. However, if the agency is terminated without reasonable cause, the agent or the principal, as the case may be, is entitled to get damages for incurring expenditure.[93]

Power of attorney

Power of attorney is an instrument to create agency whereby a person is authorized to act on behalf of another. Power of attorney can be revocable and irrevocable. Generally speaking, irrevocable power of attorney is created where power of an agent is coupled with his interest in the subject matter. But the Calcutta High Court observed that such a power of attorney is unknown in the jurisprudence as it is not an 'agency' in true sense but may properly be termed as "proprietary power."[94] However, such an agency, according to section 202, cannot be terminated to the prejudice of agent's interest without an express contract in this regard.

Generally an agent, according to section 230, cannot personally enforce contracts entered into by him on behalf of his principal nor is he personally bound by them. But this section does not envisage a situation where the right of an agent is protected in terms of section 202. The question in case of *Tashi Delek*[95] was whether an agent with interest in the subject matter of agency had an independent right to question the validity of a notification affecting his right to trade. In this case, the appellants were appointed as agents by the Sikkim and Manipur government to conduct online lottery. The appellants had invested huge sum of money in the State of Karnataka. The Government of Karnataka issued a notification, banning lottery in the state and provided for penal consequences for any violation. The appellants along with the state government filed a writ petition in the Supreme Court against the State of Karnataka. The question was whether the appellants, being agents, have any independent right to file a writ petition. The Supreme Court scanned through Supreme Court and various high court judgments and held that an agent, who has interest in the subject matter of the agency, may sue in his own name. The court considered this question from another angle also. According to the

92 *Veer Probhu Marketing Ltd.* v. *National Supply Corporation,* AIR 2006 Cal 301.
93 *Vipin Bhimani* v. *Sunanda Das,* AIR 2006 Cal 209.
94 *Ibid*.
95 *M/s. Tashi Delek Gaming Solutions Ltd.* v. *State of Karnataka,* AIR 2006 SC 661.

court, if any person is liable for prosecution for violation of any provision of a notification or if the notification affects his right to carry on business, he always has a right to challenge the validity of such a notification. Same is applicable to the agents as well. Here the court held that since the notification was affecting his right to carry on business and he could be punished for violation of any provision, he had an independent right to file suit as well as a writ petition.

Power of attorney can be executed either in general terms or may be specific to the performance of some particular act. Whether the power of attorney is general or specific depends upon the nature of powers conferred through it. Where the authority is given to do particular acts followed by general words, then the general words are restricted to what is necessary for proper performance of a particular act.[96]

Judicial review in respect of contracts

In *Sanicons*[97] the Supreme Court reiterated what was held in *ABL International*[98] and *Srilekha Vidhyarthi*[99] that when an instrumentality of the state acts unfairly, unjustly, unreasonably and contrary to the public good and public interest, whether in discharge of its contractual, constitutional and statutory obligation, it amounts to violation of constitutional guarantee found in Article 14. Under such circumstances, the court observed that there should be no inhibition to grant relief under article 226 of the Constitution of India.

III NEGOTIABLE INSTRUMENTS ACT

According to section 20 of the Negotiable Instruments Act[100] if a person gives either wholly blank or partly written negotiable instrument, he is presumed to have given *prima facie* authority to the holder to make or complete it for the amount specified therein or not exceeding the amount covered by the stamp and he shall be liable under the instrument in the capacity in which he has signed it. In *A. Kannivel Chettiar*[101] the executant

96 *Harmesh Kumar* v. *Maya Bai*, AIR 2006 P & H 1.

97 *M/s. Sanicons* v. *Government of AP*, AIR 2006 AP 282.

98 *ABL International Ltd*. v. *Export Credit Guarantee Corpn. of India Ltd.*, (2004) 3 SCC 553.

99 *Kumari Srilekha Vidyarthi* v. *State of UP*, AIR 1991 SC 537.

100 *Section 20: Inchoate stamped instruments* – Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in [India], and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount, provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

101 *A. Kannivel Chettiar* v. *M. K. Govindaraja Mudaliar*, AIR 2006 Mad 208.

admitted signature but asserted that he did not sign in the condition in which it was filled. The court observed that the burden of proof was on executant, which he could not discharge and thus was held liable under the instrument.

Special rules of evidence

Section 118 of the Act deals with certain presumptions with respect to the negotiable instruments. According to the first presumption, every negotiable instrument admitted or proved is, presumed to have been made with consideration though the amount of consideration cannot be presumed.[102] The court in *Narayana Menon*,[103] while applying the definitions of 'proved' and 'disproved'[104] to the principle behind presumption of consideration under section 118(a), observed:[104a]

> The court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise probable defence.

If the defendant fails to discharge the initial burden of proof, the plaintiff will invariably be held entitled to the benefit of presumption arising under section 118(a). Once the defendant discharges the initial burden of proof, the presumption would 'disappear' and will not haunt the defendant any longer.[105] Resultantly, the onus would shift to the plaintiff, who would be obliged to prove it as a matter of fact both under sections 118(a) and 139.

Crossed cheques

In *Mandvi Coop. Bank*,[106] two demand drafts of the respondents, drawn on Syndicate Bank were lost in-transit. The respondents filed a police complaint regarding the loss of drafts. The appellants without making inquiry about the person who opened a new account, casually allowed him to encash the said demand drafts. The bank did not examine the person who encashed the said demand drafts or the person who introduced the said person to prove that there was no negligence. Fixing of liability on the bank was held to be proper.

Bouncing of cheques

Cheques have become an inseparable part of business. However, use of

102 *Thomas* v. *K.C. Thomas*, AIR 2005 Ker 129.
103 *M. S. Narayana Menon* v. *State of Kerala*, AIR 2006 SC 3366.
104 As stated in s. 4 of the Evidence Act.
104a *Supra* note 103 at 3372.
105 *G. Vasu* v. *Syed Yaseen Sifuddin Quadri*, AIR 1987 AP 139.
106 *Manager, Mandvi Co-op Bank Ltd., Bombay* v. *M/s. Viswa Bandhu*, AIR 2006 Mad 47.

cheques as negotiable instruments depends upon the integrity and honesty of the parties. It is noticed that cheques are often issued as a device, *inter alia*, for defrauding the creditors and stalling the payments, which causes incalculable loss, injury and inconvenience to the payee and results in loss of credibility of the business transactions. Considering this, section 138 was inserted to provide for swift and smooth remedy to the payees against civil court remedy, which is a long-drawn out process.[107]

Under section 138, the drawer of a cheque is deemed to have committed an offence, if the bank returns the cheque unpaid. Where the person committing the offence, prescribed under this section is a company, then every person who is in-charge of and is responsible to the company for the conduct of the business of the company shall be liable to be proceeded against under section 141. It is a deeming provision. Whether the person is in charge of or is responsible to the company for the conduct of the business and whether the allegations are sufficient to attract the culpability are to be adjudicated during trial. Merely being a director of a company is not sufficient to make the person liable under section 141. In *Sabitha*[108] the court refused to hold the present director liable for the cheques issued by former directors, who were in-charge of and were responsible for the conduct of the business of the company at that time. The court declined the contention that all the directors were responsible under section 141.

One of the requirements of section 138 is that the payee or the holder in due course, as the case may be, is required to give notice to the drawer of the cheque, who is required to make payment within 15 days of the receipt of the notice. The question that arose in *Vinod Shivappa*[109] is whether the non-service of notice on account of the non-availability of the addressee amounts to service of notice and gives rise to cause of action against the drawer under clause (c) to the proviso of section 138. The court observed that the main purpose of the proviso is to protect honest drawers whose cheques may have been dishonoured for the fault of others or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence, failed to make necessary arrangements for the payment of the cheques. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their *modus operandi* to cheat unsuspecting persons. Applying the rule of purposive construction or the mischief rule, the court observed that the question of deemed service has to be answered by reference to the facts of each case and no universal rule of application can be laid for the presumption of service of notice. Thus, in each case, it is open to the complainant to prove during trial by evidence that the endorsement is not correct and the drawer is deliberately avoiding to receive notice, which amounts to refusal to receive notice.

107 *Mosaraf Hossian Khan* v. *Bhagheeratha Engg. Ltd.*, (2006) 3 SCC 658.
108 *Sabitha Ramamurthy* v. *RBS Channabasavaradhya*, AIR 2006 SC 3086.
109 *D. Vinod Shivappa* v. *Nanda Belliappa*, AIR 2006 SC 2179.

IV LAW OF SALE OF GOODS

Definition of 'goods'

Section 2(7) of the Sale of Goods Act, 1930 provides for the definition of "goods",[110] which excludes actionable claims and money. In *Sunrise Associates*,[111] the question before the Supreme Court was whether the 'lottery tickets' are goods under the Sale of Goods Act, which is liable for sales tax or actionable claims. The opinion of the two judge bench of the Supreme Court in *H. Anraj*[112] that lottery tickets were goods and liable to sales tax under the state sales tax laws was approved by the three judge bench in *Vikas Sales Corpn.*[113] The court in the present case overruled both the earlier cases and ruled that sale of lottery tickets was not the sale of goods but at the most a transfer of an actionable claim.

Contract of sale

Section 12 of the Act provides that breach of condition gives rise to a right to repudiate the contract whereas breach of warranty gives rise to a claim for damages. However, whether a stipulation is a condition or a warranty depends upon the construction of the contract in each case. In *Indochem Electronic*[114] the appellant supplied and installed faulty EPABX and intercom facilities to the respondent, which was not functioning properly since its installation. The appellant deputed a technician and made certain repairs from time to time. But the system could not be rectified satisfactorily. In view of this breach of warranty, the state commission directed the appellant to take back the system and refund the cost of the instrument with interest @ 12%. The National Commission dismissed the appeal. The decision of the National Commission was challenged in the Supreme Court on the ground that it was merely a breach of warranty, which did not warrant repudiation of contract. The Supreme Court though acceded to the contention that no right accrued to a purchaser to reject the goods on breach of stipulation of warranty and he could claim only damages also upheld the judgment of the state commission by observing that this would not mean that the extent of damages cannot be equivalent to the price of the goods.

In *Maruti Udyog Ltd.* v. *Susheel Kumar Galgotra*,[115] the court reversed the decision of the J & K High Court in which the high court asked for the replacement of the defective car of the respondent. The Supreme Court on appeal referred to the *corpus juris secundum* and the manual of warranty,

110 S. 2(7) "goods" means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.

111 *Sunrise Associates* v. *Govt. of NCT of Delhi*, (2006) 5 SCC 603.

112 *H. Anraj* v. *Govt. of TN*, (1986) 1 SCC 414.

113 *Vikas Sales Corpn.* v. *CTO*, (1996) 4 SCC 433.

114 *Indochem Electronic* v. *Addl. Collector of Customs*, (2006) 3 SCC 721.

115 AIR 2006 SC 1586.

which provided for replacement of defective part and not the car, directed the replacement of defective part (clutches assembly) and payment of Rs. 50,000 to the respondent.

Rights of unpaid seller against the goods

In *Laxmi Lal* v. *Paras Ram*[116] the appellant/ plaintiff being unpaid seller filed a suit against respondent/ defendant for recovery of money. The plaintiff supplied cotton to the defendant who in turn executed promissory note to secure payment. Plaintiff filed suit for price as well as the interest on unpaid price, which was contested by the defendant on the ground that the plaintiff is carrying on business of money lending without licence. Both the courts below dismissed the case on that ground. Reversing the decision on appeal, the high court observed that both the courts below have committed serious error of law and held that sale of goods on credit basis could not be treated as loan advanced, to qualify the seller as lender. It was also observed that trader usually charged interest over due amount on the cost of sold goods, but the transaction could not be termed as advancing loan in any manner for which licence was required.

Breach of contract

In *Devidayal Sales*[117]the supplier filed money suit for recovery of outstanding amount from the defendant for supplying goods to it. The defendants claimed for adjustment of damages both - liquidated and unliquidated - for non-delivery and short delivery of goods. The court rejected the claim for unliquidated damages for non-delivery or short delivery on the ground that the claim has to be based on the principles of mitigation of losses by the defendants even if the right to claim damages is established. The defendant needs to prove the *factum* of non-delivery or short-delivery, claim for danages as well as the quantum of damages, which the defendant failed in this particular case. The court, however, decreed the claim of plaintiff for lesser amount after adjusting the liquidated damages in accordance with the terms of the contract.

V PARTNERSHIP ACT

Nature of partnership firm

Informal partnership between two or more persons to take up a joint enterprise is a joint venture. A joint venture, which can be time bound or work specific, involves partners' contribution of finances, knowledge, technical know-how, mutual control of management, expectation of profit, sharing of profit etc.[118] Sharing of profit and losses of business between three brothers

116 AIR 2006 Raj 302.
117 *M/s. Devidayal Sales Pvt. Ltd* v. *State of Maharashtra*, AIR 2006 Bom 307.
118 *GVPREL-MEE (JV)* v. *Govt. of AP*, AIR 2006 AP 169.

equally does not, however, indicate partnership.[119]

Registration of firm

In *M/s Balaji Constructions Co., Mumbai* v. *Mrs. Lira Siraj Shaikh*,[120] the appellant/ plaintiff filed a suit against the respondent/ defendant for the specific performance of a contract. The lower court dismissed the suit on the ground that the plaintiff was not a registered firm and was, thus, barred under section 69 of the Partnership Act, 1932. The high court on appeal upheld the decision of the lower court relying upon *Shreeram Finance*[121] that if the firm is not registered and the persons suing have not been shown in the register of the firms as partners in the firm, the suit is hit by the provisions of section 69 (2). However, once the firm is registered, the bar is removed and a suit may be instituted even with respect to the subject matter, which has taken place before registration. The court also reiterated that where an unregistered firm institutes a suit, it can either withdraw the suit and file fresh suit after registration or secure registration pending the suit in the court.[122]

In *Chandrayya Mutawayya Trabatti*,[123] however, the court held that the suit for recovery of damages by the unregistered firm for misconduct of forcible breaking of lock of the partnership shop and taking away certain articles lying therein by a partner, was not barred by section 69. Similarly, a suit for dissolution of partnership even if it is unregistered, is not barred by section 69.[124]

VI CONCLUSION

In the year 2006, many interesting cases were decided. *Harmesh Kumar* v. *Maya Bai*[124a] the doctrine of *non est factum* was discussed in detail. The Punjab and Haryana High Court in this case has gone through the evolution of the doctrine and consequent changes in it. In the beginning, the doctrine used to make distinction on the basis of the character and the contents. But this distinction was given up in *Saunders*,[125] which was recognised by the Supreme Court of India in *Bismillah*.[126] But the Punjab and Haryana High Court in the present case, though, took note of changed position in *Bismillah* but strangely applied the overruled ratio of *Ningawwa*, which reflects the apathy of the courts in writing judgments.

119 *M/s. Rakesh Kumar Dinesh Kumar* v. *U.G. Hotels & Resorts Ltd.*, AIR 2006 HP 137.
120 AIR 2006 Bom 106.
121 AIR 1989 SC 1769
122 *Samyukta Cotton Trading co.* v. *Bheemineni Venkata Subbaiah*, AIR 2005 AP 1.
123 *Chandrayya Mutawayya Trabatti* v. *Sidram Ganpat Ingale*, AIR 2006 Bom 76.
124 *Ramesh Choubey* v. *Dulari Kuer*, AIR 2006 Pat 167.
124a *Supra* note 37.
125 *Supra* note 44.
126 *Supra* note 45.

The government has wide discretion in contractual matters, which is respected by the judiciary. The *New Golden Bus Service*[127] and *Vasudevan*[128] prove the point.

In *Bhagwati Prasad*[129] the court, after scanning through various high court judgments laid down the ratio that if the cheques are encashed without protest, then it is presumed that the offer is accepted unequivocally whereas if the appellant has protested for the balance amount and then has en-cashed the cheques, then in view of the express non-acceptance of the offer, the appellant can not be presumed to have accepted the offer. Though the court laid down the ratio but did not apply it to the facts of the case. The court, could not find out categorically, in this case, whether the letters of protest was written after encashing the cheques or before, in the absence of evidence and still, went ahead to hold, strangely enough, that by encashing the cheques the appellant accepted the offer by adopting the mode of acceptance prescribed in the offer. It may be submitted that the decision by the apex court is not in line with the *ratio* laid down in this case.

127 *Supra* note 13.
128 *Supra* note 14.
129 *Supra* note 5.