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MERCANTILE LAW

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I INTRODUCTION

THE PRESENT 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 the important Supreme Court and high court judgments delivered in 2007. They are analysed under different heads.

II LAW OF CONTRACTS

Offer, invitation to offer

In *United Bank of India* v. *Shyam Sunder Banerjee*,[1] the bank sought to replace the generator set of 3.5KVA capacity, installed in its premises, with 5 KVA. The respondent sent a proposal to replace the generator set to which, the bank responded with a letter stating its intention to get replacement done by the respondent. The letter contained the name of the brand, mode of payment, installation and maintenance etc. of the generator set. The respondent did not accept the bank's terms relating to the mode of payment and duration of service and put forward its own terms regarding payment and installation expenses and other charges. The bank did not give any further reply to it and got the generator set installed by other operator. The question here was whether the contract was concluded or not. The respondent argued that the silence of the appellant should be taken as acceptance of the terms given by the respondent. The court, however, decided that there was no concluded contract. The bank's letter, though, was in response to the respondent's proposal was merely an invitation to offer. It could not be taken as acceptance of respondent's proposals.

Acceptance

Under section 4[2] of the Contract Act, communication of acceptance is

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1 AIR 2007 Cal 87.

2 Section 4 – **Communication when complete** – The communication of a proposal is complete when it becomes to the knowledge of the person to whom it is made.
The communication of an acceptance is complete -as against the proposer, when it is put in a course of transmission to him so at to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer.

complete as against the proposer when it is put in a course of transmission to him so as to be out of the power of the acceptor. An absolute and unqualified acceptance is necessary to convert a proposal into a promise. In *Vishwa Industrial Company Pvt. Ltd.* v. *Mahanadi Coalfields Ltd.,*[3] the question arose whether there was absolute and unconditional acceptance to make a concluding contract. In this case, the petitioner had given an omnibus performance guarantee against various orders from coal India Ltd. and its subsidiaries. The respondent, one of the subsidiaries, invited tenders for supply of material and asked for separate performance guarantee. The petitioner submitted the bid claiming that it is not required to submit separate performance guarantee. The respondent, however, kept on insisting for separate guarantee in various letters whereas the petitioner kept on claiming exemption. In one of the letters, finally, the respondent agreed and gave the work order. But the petitioner in no uncertain terms expressed their unwillingness to complete the work order. Even thereafter various correspondences were made between the parties with regard to the said formal order placed on the petitioner. Ultimately the respondent issued a risk-purchase notice to be complied within 15 days. The petitioner replied back refuting any liability. The respondent then cancelled the said purchase order and procured the same from alternative source at the risk and loss of the petitioner. It also suspended the business relationship with the petitioner for a period of six months. The petitioner challenged the decision in the high court on the ground that notice as well as the decision was unreasonable, illegal and without jurisdiction. The issue before the court was whether the work order amounted to unqualified and unconditional acceptance of the offer made by the petitioner. It was observed that the work order stipulated that one copy of the supply order duly accepted, signed, stamped and returned as a token of acknowledgment and acceptance within ten days and in case no reply was received, same would be presumed to be accepted. The petitioner, however, wrote back that the term of performance guarantee was not acceptable to it. It was held that contact was not completed.

Revocation of acceptance is complete as against the person to whom it is made only when it comes to his knowledge. In *Madhumita Sarkar*,[4] the insurer cancelled the policy taken by the deceased husband of the appellant before his death in accordance with the contract of insurance. The relevant clause in the contract provided for the cancellation of policy, at any time, by the insurance company by notice in writing, which shall be deemed sufficiently given if posted to the address of the insured as last registered in the company's books and should be deemed to have been received by the

> The communication of a revocation is complete -as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;as against the person to whom it is made, when it comes to his knowledge.

3 AIR 2007 Ori 71.

4 *Madhumita Sarkar* v. *Oriental Insurance Company Ltd.*, AIR 2007 Cal 237.

insured at the time when the same would be delivered in the ordinary course of post. As the cancellation of the policy never reached the insured or the appellant, she challenged, in the high court, the refusal of payment of sum assured and for a direction upon the insurer to pay the sum assured together with the interest. The company took the position that the notice was the letter of cancellation and that it was handed over to the postmaster. The court held that there was no cancellation of policy and ordered the payment of sum assured. The court observed that unless the letter is sent under certificate of posting there is no question of tendering letter to the postmaster. Even ordinary letters, as a matter of practice, are simply dropped into the postal box. Instead of following the common course of dropping the letters into the postal box, the insurer handed over the letter to the postmaster, which is not an ordinary way of posting letters. Thus the presumption under relevant clause of the insurance contract was held to be of no benefit to the insurer.

Auction, bidding

In *Laba Baruah* v. *State of Assam*[5] the question was whether the submission of "call deposits" from a Gauhati Co-operative Urban Bank with the tender despite the specific condition for submitting the earnest money by way of NSC/ KVP or by fixed deposit receipt, term deposit receipt/ guarantee bond of a nationalized bank, could be accepted by the state authority as earnest money. The state authority, in this case, rejected the tender application of the petitioner on the ground that submission of "call deposits" as earnest money was violative of the specific terms and conditions of the Notice Inviting Tender. The Gauhati High Court upheld the decision of the state authority.

Similarly in *Gayatri Banerjee*,[6] the notice inviting tender specifically stated that vehicle should be one not having already run more than one lakh kilometres and crossing the age of five. The vehicle offered by the respondent was more than five years old. So his selection by the authority was held to be wrong.

In *Infotech 2000 India Limited,*[7] the state government invited the bids for online lottery system. The bids, according to the terms and conditions, were to be valid for five months. The appellant was found to be the second highest bidder. The letter of intent was issued to the highest bidder, who defaulted in signing the agency agreement and in fulfilling other terms and conditions. The government forfeited the earnest money of the highest bidder and a letter of intent was issued to the appellant, being the second highest bidder. The appellant did not execute the contract and claimed the return of bank guarantee on the plea that once the highest bidder is issued the letter of intent, the others become unsuccessful bidders. The bids of the unsuccessful bidders are discharged and are not open for acceptance and the

5 AIR 2007 Gau 164.
6 *Gayatri Banerjee* v. *State of West Bengal*, AIR 2007 Cal 233.
7 *Infotech 2000 India Limited* v. *State of Punjab*, AIR 2007 P&H 58.

bidders are entitled to the get the earnest money back. The court rejected the argument of the appellant and held that since the bid was valid for five months, acceptance of bid of the appellant by the government within this period was valid. Rejecting the argument of the appellant that forfeiture of the earnest money of both the bidders would result in unjust enrichment the court observed that offer of each tenderers is a separate offer and for different reasons, earnest money of one or more bidders could be forfeited.

The scope of judicial review of the terms and conditions of the notice inviting tender is very limited. Relying upon *Educomp Datamatics*,[8] in which it was observed that courts cannot strike down the terms of the tender because it feels that some other terms would have been fair, wiser or logical, the Bombay High Court in *M/s Mega Enterprises*[9] observed that the courts would not interfere unless the terms of the tender notice are shown to be arbitrary or discriminatory or actuate by malice. In other words, the court can interfere only if the terms offend article 14 of the Constitution of India. In this case two conditions relating to the eligibility criterion for participating in the bid were challenged on the ground that these were incorporated to favour the incumbent as these conditions were not there in the last year's tender notice. Refusing to interfere, the court observed that the authorities in their wisdom had incorporated this condition and it was not open for the court to examine the correctness of the condition.

Valid contracts

According the section 11, a person of unsound mind is not authorised to enter into a contract. In *Chacko* v. *Mahadevan*,[10] the appellant sold one cent of his property for Rs. 18,000. After around ten months, he sold three cent for just Rs. 1,000 to the respondent through a contract, which the appellant sought to avoid on the ground that he was mentally ill when the contract was executed. It was shown that around one month after the deal, he was treated for alcoholic psychosis in the mental hospital. Taking into consideration the medical certificate and the nature of deal, the high court termed it as unconscionable and thus void. The Supreme Court, on appeal, acting on the maxim *res ipsa loquitur* i.e. matter speaks for itself ruled that no one in his senses would sell property worth Rs. 54,000 for Rs. 1,000. It held that it was obvious that he was not of sound mind and some fraud was played on him, which rendered the contract void.

Unlike Hindu marriage, a marriage, under Islamic Law, is a permanent and unconditional civil contract between two persons with "mehar" as its essential feature. In *Hasina Bano* v. *Alam Noor*,[11] the Rajasthan high court observed that "mehar" is an unsecured debt, which is recoverable by the wife

8 *Directorate of Educcation* v. *Educomp Datamatics ltd.*, AIR 2004 SC 1962.
9 *M/s Mega Enterprises* v. *State of Maharashtra*, AIR 2007 Bom 156.
10 AIR 2007 SC 2967.
11 AIR 2007 Raj 49.

or her heirs from the husband or in the event of his death, from his assets. In this case, the issue was whether "mehar" could be relinquished conditionally by the wife. Actually, the petitioner, in this case, was divorced by the husband. When she claimed her mehar money, he alleged that right to claim mehar was relinquished by her in a written agreement in return for the custody of their son with her. The court observed that since the concept of contract is the basis of marriage, the principles of a valid contract would be applicable. It was held that the mehar could be relinquished conditionally but with free consent under section 14 of the Contract Act, which should not be induced by duress, fraud, misrepresentation, influence or mistake.

Voidable contracts

In *Shamim Afroz*,[12] it was observed that it is for the complainant to come out with all the essential facts necessary to establish the contentions of misrepresentation or fraud etc. By merely making some general allegation, the existence of misrepresentation or fraud cannot be established. The court too is required to scrutinize the pleading and then find out as to whether the plea is made out and full particulars required for establishing the fraud, misrepresentation are available.

In *Markande*,[13] the appellant alleged fraud and undue influence in his pleadings along with affidavit to support the allegations. The high court observed that in a case where the fraud or undue influence is alleged, which is not controverted or disputed in the pleadings of the other party, the fact asserted should be taken to be correct and no proof for the same was required to be produced in the court.

In *Akshoy Kumar Paul*[14] the appellant bought a medi-claim insurance in 1999, which was renewed in 2000, 2001 and 2002 as it is. He suffered heart attack in 2003 and then his policy in 2003 was renewed excluding the cover for cardiac ailments. His policy when renewed in 2004 again without covering cardiac ailments, he approached the court on the ground that his consent for cover, which excluded cardiac ailments, was taken under compulsion. He argued that he had no choice but to consent to or to remain without the policy. The court accepted that the appellant was forced and/ or pressurised into consenting to the exclusion of the cover for cardiac ailments and directed the insurance company to renew the policy without excluding any disease already covered under the existing policy, which may have been contracted during the period of the policy.

Void agreements

According to section 23 and 24, an agreement is void if the consideration or the object is unlawful. In *Udho Rai*,[15] one of the brothers

12 *Shamim Afroz* v. *Mehfooz-ul Hasan*, AIR 2007 MP19.
13 *Markande* v. *Sudama Chaubey*, AIR 2007 All 70
14 *Akshoy Kumar Paul* v. *New India Assurance Company*, AIR 2007 Del 136.
15 *Udho Rai* v. *Ambika Tiwary*, AIR 2007 Pat 136.

entered into an agreement for the sale of land which was owned by him along with his brother by misrepresenting that the land belonged to him. The other party filed a suit for the specific performance of the contract. The court observed that the object of the agreement was to give injury to the rights of the brother, which is unlawful. The court, thus, held the contract void on the ground of unlawful object and refused to grant specific performance.

In *Heera Singh*,[16] the state government entered into a contract with the appellant for the remodelling of the earthwork by removing hard soil existing at the site. Later on it was realised by the appellant that the soil was not merely hard but it also included pebbles and stones which would require more labour and thus more remuneration. The department denied the extra money. The court observed that this stand of the government forced the appellant to do more labour without any extra payment, which amounted to 'forced labour' – a practice forbidden by article 23 of the Constitution of India. The court held the contract void under section 23 of the Contract Act.

In *Sunil Pannalal Banthia* v. *C & I Dev. Corpn. of Maharashtra Ltd.,*[17] the appellant got the plot on lease from the original allottee. The respondent, the development corporation executed a deed of lease in favour of appellant on receipt of the full lease premium and a deed of confirmation was issued. Eventually the respondent also issued a development permission and commencement certificate on the basis of which the appellant commenced the construction work. After around two years, the respondent terminated the agreement of lease and demanded return of possession of the allotted plot on the ground that the same was in contravention of section 23 of the Contract Act. The writ petition filed by the appellant in the high court was dismissed. On appeal, the Supreme Court held that after having holding out assurances causing appellants to alter their position, it was not open to the respondent to take a unilateral decision to cancel the contract on the ground that it acted without jurisdiction and/ or in excess of jurisdiction and in violation of its rules and regulations. On the other hand, the court held that the stand taken by the respondent was opposed to public policy as it was not entitled to take a unilateral decision to cancel the contract for its own wrong.

Performance of contract

Section 37[18] mandates parties to the contract to perform their respective obligations unless dispensed with or excused under the contract act or any other law. In *Hotel Vrinda Prakash* v. *Karnataka State Financial Corpn.*,[19] term loan was borrowed by the petitioners from the financial

16 *Heera Singh* v. *State of Rajasthan*, AIR 2007 Raj 213.

17 AIR 2007 SC 1529.

18 **Section 37 - Obligations of parties to contract -** The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance in dispensed with or excused under the provision of this Act, or of any other law.
Promises bind the representative of the promisor in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

19 AIR 2007 Kar 187.

corporation through a deed of hypothecation, which provided for the foreclosure premium on the premature closure of loan account with the prior approval of the corporation and on such terms and conditions as may be prescribed. The petitioner sought to foreclose the account for which they were asked to pay 2% premium on the advanced payment. The petitioner challenged the said levy being arbitrary, illegal and without jurisdiction. The court ruled that the corporation had the power and authority to levy prepayment/ foreclosure premium and petitioner having accepted the terms and condition of the contract cannot contend that the action of the respondent in charging premium is illegal.

Frustration of contract

Section 56 provides that an agreement to do an act impossible in itself is void. A contract to do an act, which after the contract is made, becomes impossible or unlawful, becomes void. The provisions of this section though do not cover every case of frustration but applies to a subsequent unforeseen event or contingency for which neither of the parties is responsible.[20] In *Rozan Mian*,[21] the question was whether a decree for the specific performance of an agreement for sale could sustain where the performance had become impossible by reason of law. In this case, the plaintiff and defendant entered into an agreement in 1973 for sale and purchase of Thika Tenancy.[22] The agreement, having not been carried out, the plaintiff filed a suit in 1974, which was decreed by the trial court in 1990. However, during the pendency of the suit, an Act was passed in 1981, which prohibited the transfer of interests of thika tenant. The Act, having overriding effect, rendered all the transfers or agreements for transfers in contravention of the provision of the Act void. The high court, on appeal, reversed the decree granted by the trial court. Applying section 56, the Supreme Court, on further appeal, held that since the contract has become void by operation of law after the promulgation of 1981 Act, the plaintiff was entitled only to the refund of the consideration together with interest and cost of the suit.

In *Syed Khursed Ali,*[23] the appellant agreed to supply beef under an agreement to the Nandkhana Zoo. The state government, on the other hand, passed Prevention of Cow Slaughter Act, 1960 under which he was asked to give undertaking that he would not slaughter cows and bulls. Under such circumstance, it became impossible for him to supply beef. So he wrote to the zoo authorities to allow him to supply buffalos' meat but in vain. The zoo authorities terminated the contract and forfeited the security deposits, which was challenged by the appellant. The high court applied the doctrine of

20 *Syed Khursed Ali* v. *State of Orissa*, AIR 2007 Ori 56.
21 *Rozan Mian* v. *Tahera Begum*, AIR 2007 SC 2883.
22 Under Calcutta Thika Tenancy Act, 1949, it was possible to sell the structure on the land without the land. The person getting the transfer of the structure without the land would become Thika Tenant.
23 *Supra* note 20.

'frustration of venture' and held that the performance by the appellant had become an impossibility, which could be brought within the fold of "*force-majeure*". The respondent was asked to refund the security deposit to the appellant.

Restitution

Section 70[24] 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 has been held in various cases,[25] 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.

In *Ram Pravesh Prasad,*[26] an emergency task of repairing the road, damaged by flood, was given to the appellant by the Superintending Engineer at Rs. 2,45,694. On making demand by the appellant for payment, the matter was referred to the liability committee, which recognised the completion of work but objected to the payment on the ground that there was no advertisement, no tenders, no formal contract and no authenticated measurement book was maintained. The Patna High Court observed that where there is no contract in strict sense of term but still a party has performed a part of the contract, the other party cannot escape saying there was no contract. The appellant, thus, was entitled to get compensation. This judgment may have repercussions as it may give the persons free hand in assigning the contracts probably to his favourites, at least in times of emergency.

Unjust enrichment

The purpose of section 72[27] also is to prevent unjust enrichment. The Kerala High Court in *Pampara Philip*[28] observed that even if one party to the contract breaches the contract by way of misrepresentation, the other party

24 **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 letter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

25 *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.

26 *Ram Pravesh Prasad* v. *State of Bihar*, AIR 2007 Pat 26.

27 **72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion:** A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

28 *Pampara Philip* v. *Koorithottiyil Kunhimohammed*, AIR 2007 Ker 69.

is not entitled to appropriate whatever it gets under the contract. The plaintiff, in this case entered into a contract for buying a jeep from the defendant and paid some advance and took the possession of the vehicle. Later on he realised that he was misrepresented about the vehicle. He asked for refund of the advance he made. The court held that he is entitled to come out of the contract and refund of money but since he was in possession of the jeep and was using it for commercial purpose for 36 days, he was asked to pay Rs. 3,600/- for using the jeep.

In *Ajay Kumar Agrawal* v. *O.S.F.C*[29] the petitioner took over M/s. Maa Bhawani Rice Industries from Orissa State Financial Corporation. It afterwards applied for supply of electricity to the electricity board. In response, the board issued a notice that no power connection would be given unless petitioner first cleared the outstanding dues against the previous owner. The petitioner filed a writ petition challenging the decision. However, *pendente lite*, the petitioner entered into an agreement with the power supplier and agreed to pay the outstanding bill in instalments and also paid the first instalment. During the proceedings in the court, the petitioner alleged that board had no right to insist on the payment but the petitioner had to pay under compelling circumstances and this amount should be refunded to it. The court observed that electricity being a public property, its supply is governed by the statute, which did not permit the demand of arrears of payment for consumption by an erstwhile consumer from a new consumer. Moreover, the court observed, that the board as distribution licensee was clothed with the status of a state under article 12 of the Constitution of India as it is discharging pre-eminently governmental function. So it cannot act like a private party and is governed by the elements of public law. The court held that board had resorted to methods by virtue of its superior bargaining position, not contemplated by law, which amounted to unjust enrichment. Thus, the board was asked to adjust the amount paid by the petitioners in their future bills.

In *Mahila Sewa Sahakari Bank*,[30] the appellant purchased the *Kisan Vikas Patra* from the post office, which did not inform the appellant that the rules did not permit them to purchase the same. After five years, when the appellant sought to renew the *vikas patra*, the post office informed that neither the said amount could be renewed nor could it get the original amount on its maturity with interest on it. The court observed that when the post office had accepted the opening of account in which the appellant never made any misrepresentation or concealed any fact, then being the functionaries of the government, it could not be allowed to act and take such an arbitrary and incomprehensible stand. The court applied the principle of unjust enrichment and asked the respondent to refund the original money along with interest.

29 AIR 2007 Ori 37. Also see *Kerala State Electricity Board* v. *Hindustan Constructions Co. Ltd.*, AIR 2007 SC 425.

30 *Mahila Sewa Sahakari Bank Ltd.* v. *Chief Post Master*, AIR 2007 Guj 72.

Under certain circumstances, payment of excise or *octroi* may result in unjust enrichment to the government. It is, however, well settled that the excise or *octroi* duty, already paid, could be refunded only when it is not passed on to the consumers. In *Dilip Jain*,[31] the court concluded that since the burden of *octroi* was not passed on to the consumers, the appellant could be given the amount paid by them, back. The court, however, refused to apply section 72 of the Contract Act and observed that it is applicable to only contractual relationships between the parties and not to the levy and realisation of *octroi* by the municipal corporation, which purports to exercise statutory power conferred on it by the notification.

Damages

Under section 73, a party is entitled to get compensation or damages for the breach of contract. In *Council of Scientific & Industrial Research* v. *Goodman Drug House P. Ltd*.,[32] the Indian Institute of Petroleum (IIP) a registered society and a constituent laboratory under the appellant, agreed to convert menthone to menthol within five months and supply it to the respondent, who incurred huge expenditure in setting up plant to use the same. But the appellant failed to convert menthone to menthol even in three years and could not supply it to the respondent. A case of breach of contract was made out and was referred to arbitrator, who awarded compensation worth Rs. 90 lakhs to the respondent. The appellant's application for setting aside the award was dismissed in the district court. The High Court of Uttarakhand, on appeal, refused to interfere with the decision and was of the view that the amount awarded was in consonance with the provisions of section 73.

In *State of Kerala* v. *M A Mathai,*[33] the respondent contractor entered into an agreement for work with the appellant state, which could not be completed within time. The time was extended and supplemental agreements were executed. The respondent moved the court alleging coercion and demanded damages. The trial court accepted the plea that due to threat of forfeiture, re-allocation and re-arrangement, supplemental agreements were entered into by the respondent and awarded damages of Rs. 9,53,669/-. The high court on appeal restricted the decretal amount to Rs. 10,00,000/-. The Supreme Court reversed the orders of both the lower courts on the ground that mere assertion by the respondent of coercion without any material support should not be accepted. Moreover, the court observed that if the contractor has accepted for the delayed performance without any objection, he later on cannot claim compensation for any loss occasioned due to price escalation or otherwise unless at the time of such acceptance, he gives notice to the promisor of his intention to do so. The court added that under Indian

31 *Dilip Jain* v. *State of Rajasthan*, AIR 2007 Raj 206.
32 AIR 2007 Uttrakhand 58.
33 AIR 2007 SC 1537.

law, in spite of there being a contract between the parties where under the contactor undertakes not to make any claim for delay in performance of contract occasion by an act of employer, a claim for damages may be entertained in one of the following situations: if the contractor repudiates the contract exercising his right to do so under section 55; the employer has given an extension of time either by entering into supplemental agreement or by making it clear that escalation of rates or compensation for delay would be permissible; or if the contractor makes it clear the escalation of rates or compensation for delay shall have to be made by the employer and the employer accepts performance in spite of delay and such notice.[34]

In *Thiriveedhi Channaiah* v. *Gudipudi Venkata Subba Rao (D) by LRs,*[35] an agreement of sale of land was entered into and an advance sum of Rs. 50,000 was paid. However, before the execution of the agreement, government issued a notice for acquisition of the said land. The appellant did not pay rest of the money and the respondent forfeited the advanced sum. The appellant filed a suit for the return of money in which the court below decreed for specific performance because *pendente lite* the notification of the government was struck down by the high court. The high court in this case, on appeal, reversed the decree of specific performance on the ground that the appellant was not ready and willing to perform his part of the contract and upheld the forfeiture of the sum. To the contention of frustration of contract by the respondent, the court held that mere issuance of notification cannot lead to the conclusion that the contract has become frustrated. The apex court, on appeal, held that respondent could not exercise his right to forfeit the entire amount as he himself has agreed that given the notification, the contract has been frustrated and cannot be enforced by either of the parties.

Interpretation of contracts

In *Kuldeep Gandotra*,[36] the court rejected the contention to rely upon oral agreement to interpret a written agreement on the ground of section 92 of the Indian Evidence Act, 1872, which mandates that no evidence of any oral agreement is admissible between the parties to a contract which has been set down to writing for the purposes of contradicting, varying, adding to or subtracting from its terms. Thus where the plain meaning of the clause is clear, the assistance of extrinsic evidence cannot be availed of.

Liability of surety

Section 128 of the Contract Act provides that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise

34 *Id.* para 8.

35 AIR 2007 SC 2439.

36 *Kuldeep Gandotra* v. *Shailendra Nath Endley*, AIR 2007 Del 1. Also see *Arosan Enterprises Ltd.* v. *Union of India*, AIR 1999 SC 3804 and *Heera Singh* v. *State of Rajasthan*, *supra* note 16, laying down that the contract should be read in its entirety.

provided. In *A N Ponnappan*,[37] it was reiterated that a creditor is free to proceed against either the principal debtor or the surety for realisation of its debt unless otherwise provided in the contract. In this case, it was held that the state financial corporation was free to realise the entire loan advanced to the industrial concern not only from the properties of the industrial concern but also from the properties pledged or mortgaged by the sureties for the loan advanced by the corporation.

In *A L Chowdhary*,[38] State Financial Corporation took possession of the property of the guarantor and issued public notice for auction/ sale without giving notice to guarantor. The guarantor filed a writ petition challenging the act wherein the Gauhati High Court restored the possession of the property to the guarantor. The court observed that the guarantor is entitled to be served a proper notice before proceeding against his property in case of the default by the principal debtor. The court also clarified the distinction between the liability of the surety and that of the guarantor by observing that though both are bound for another person, a surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration and is held responsible to every known default of his principal whereas the contract of guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal and is often founded on a separate consideration from that supporting the contract of the principal.[39]

In *Syndicate Bank* v. *K. Prakash*,[40] the question arose whether the acknowledgment of time-barred debt would revive the liability of surety as well. In this case, the first defendant obtained the overdraft facility from plaintiff-bank for his business. The second defendant stood surety for the repayment of the said loan. Both executed a pronote on 19-5-1986 for Rs. 25,000. The principal debtor paid Rs. 1,000 and acknowledged the debt on 3-2-1987 and further on 11-8-1988, the suit was filed on 11-12-1990. Construing the start of limitation period from 11-8-1988, the suit was decreed against the principal debtor but dismissed against the surety as time-barred. The Madras High Court, on appeal, observed that acknowledgement of debt has the effect of postponing the bar of limitation but the contract remains the same as the statute of limitation only bars the remedy but does not extinguish the debt. Since the liability of the surety is co-extensive with that of the principal debtor, the liability of the surety will revive along with the principal debtor on acknowledgement. There is no need for separate acknowledgement by the guarantor.

Bank guarantee

It is a well-settled principle that the obligation of a bank under bank

37 *A N Ponnappan* v. *Kerala Financial Corporation*, AIR 2007 Ker 234.
38 *A L Chowdhary* v. *Tripura Industrial Development Corpn. Ltd.*, AIR 2007 Gau 113.
39 *Id.* at 120.
40 AIR 2007 Mad 307.

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. 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.[41] The same is an irrelevant ground for the court also, for passing injunction restraining the bank from making payment in discharge of its obligations.[42]

Bank guarantee should be in unequivocal terms, unconditional and recite that the amount would be paid without demur or objection. The terms of the bank guarantee, therefore, are extremely material. Since bank guarantee represents an independent contract between the bank and the beneficiary, both the parties are bound by the terms thereof and invocation has to be in accordance with the terms of the bank guarantee or else, the invocation itself is considered bad.[43]

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.[44] A special inequity in the form of irretrievable injustice, on the other hand, is caused only if the party is rendered absolutely remediless for recovery of the amount in case it ultimately succeeds. This general rule and its exceptions are fairly settled.[45]

Summarising the principle in *Himadri Chemicals*,[46] the Supreme Court observed *inter alia* that bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature. Existence of dispute between the parties is not a ground for issuing injunction to restrain enforcement of the same. However, fraud or irretrievable harm or injustice may supply the ground for issuing injunction. In this case, the respondent agreed to supply 26,000 metric tones of Extra Hard Pitch (the goods) to the appellant for which the appellant opened an irrevocable letter of credit in favour of the respondent. The goods were to come to India from Iran in two shipments. The money was paid for the first shipment. In second shipment, total of 12500 metric tones of goods arrived wherein the money for 1250 was paid after negotiating the papers. The appellant asked the bank not to

41 *M G S S K* v. *National Heavy Engg. Co-op. Ltd.*, AIR 2007 SC 2716; *Interior's India* v. *Balmer Lawrie and Co.*, AIR 2007 Del 16.

42 *A P S E B* v. *Bulk Systems International Ltd.*, AIR 2007 Kar 55; *Jagdish Constructions Ltd.* v. *M P Rural Road Development Authority*, AIR 2007 MP 266.

43 *Supra* note 41. Also see *Infotech 2000 India Limited* v. *State of Punjab*, AIR 2007 P&H 58 para 17.

44 *Mauria Udyog Ltd.* v. *Corporation Bank*, AIR 2007 Del 259.

45 *Supra* note 41. Also see *Daewoo Motors India Ltd.*, AIR 2003 SC 1786; *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.

46 *Himadri Chemicals Industries Ltd.* v. *Coal Tar Refining*, AIR 2007 SC 2798.

make payment for rest of the goods arrived in the second shipment on the ground that there were discrepancies in the goods. The Supreme Court affirmed the decision of the division bench of Calcutta High Court refusing to grant injunction restraining the respondent from receiving any payment under a letter of credit as no case of fraud or irretrievable injustice is made out by the appellant. The apex court agreed with the high court that if there had been a fraud in respect of the entire consignment, it could constitute fraud. But since there was no problem with the part of the consignment, it was not a case of fraud. While considering the second exception, the court rejected the contention of the appellant that once the money was paid, it could not be recovered as the company was a foreign company with no assets in India. The court rather observed that a case of damages is already going on in the high court with respect to the same goods in which the respondent has furnished a bank guarantee for a sum of Rs. 21 crore. So the honouring of the letter of credit by the bank will not result in irretrievable injustice.

In *M/s. Harcharan Dass Gupta*,[47] the Delhi High Court reiterated that the liability of the bank to honour the encashment of bank guarantee is unconditional, unequivocal and is not dependent upon happening of any event. In this case, the court held that contract of bank guarantee was independent of the contract for construction of 400 dwelling houses between the DDA and the appellant.

Clarifying on the issue of construction of a document of a (bank) guarantee or indemnity, the Supreme Court in *State Bank of India* v. *Mula Sahakari Sakhar Karkhana Ltd*.,[48] observed that a document, as is well known, must primarily be construed on the basis of the terms and conditions contained therein and no such words should be supplied to the document, which the author thereof did not use.

Bailment

Under section 173 of the Contract Act, a pawnee has a right to retain the goods pledged for the payment of the debt including interest on the debt and all necessary expenses incurred by the pawnee in respect of the possession or for the preservation of the goods pledged. The right of the pawnee is intermediate between a simple lien, wherein the holder possesses mere right of detention and a mortgage wholly passes the property in the things conveyed. The pawnee has a right to further assign or pledge his special property interest in the goods.[49] In other words, the pawnor at the time of the pledge not only transfers the special right but also his right to transfer the general property right in the things pledged in the event of pledge remaining unredeemed resulting in the sale of pledge by public auction.[50]

47 *M/s. Harcharan Dass Gupta* v. *Delhi Development Authority*, AIR 2007 Del 75.
48 AIR 2007 SC 2361.
49 *Bank of Bihar* v. *State of Bihar*, AIR 1971 SC 1210.
50 *Karnataka Pawnbroker's Association* v. *State of Karnataka*, 1998 AIR SCW 3564.

Even the state does not have any preferential right for recovery of its debts over a mortgagee or pawnee of goods as secured creditor. The preferential right of the state to the recovery of debt over other creditors is confined to ordinary or unsecured creditors.[51] The pawnee even has the right to be satisfied from the property in the hands of the government obtained by lawful seizure.[52] In case of bankruptcy of the pawnor, the pawnee is a secured creditor with respect to the things pledged. The provisions contained in sections 172 to 176 are similar to that of common law of England.[53]

The above being the settled position, the issue before the Supreme Court in *Central Bank of India* v. *Siriguppa Sugars and Chemicals Ltd.*,[54] was with respect to the precedence of the rights of the pawnee bank over the claims of the cane commissioner regarding payment of dues to the cane growers and that of the workmen of the company. In the instant case, the respondent pledged its stock of sugar with appellant bank for securing the repayment of the loan. The labour commissioner passed an order under Industrial Disputes Act in respect of the dues to the workmen. Similar order was passed by the cane commissioner for recovery of amounts due from the company to be paid to the sugarcane growers, who had supplied the sugarcane to the company. The company challenged these orders. During the pendency of the proceedings, the recovery authority forcibly took possession of the stock of sugar pledged with the pawnee bank. The bank got itself impleaded in the writ petition. Considering the perishability of goods, the sugar was sold and an amount of Rs. 1,53,50,400 was recovered. The said writ petition was dismissed by the single judge, against which an Letters Patent Appeal was filed and an interim order was passed to the effect that a sum of Rs. 43,00,000 be made available to the labour commissioner, Rs. 60,00,000 to the cane commissioner and Rs. 20,00,000 to the Bank. The pawnee bank challenged the interim order in the Supreme Court on the ground that its right as pawnee had been ignored. The court relied upon the precedents and held that the pawnee bank has the precedence over the claims of the cane commissioner and that of the workmen. It was ordered that first the bank's claim be satisfied and only if there is surplus, it be made available to the cane commissioner and to the labour commissioner. The court distinguished the present case with the *Rohtas Industries* case,[55] which laid down that the workers' dues will have priority over other banks and financial institutions on the ground that only in case of liquidation of the company that workers will have claim at par with secured creditors.

In *Mahendrabhai Kantilal Dave*,[56] the court reiterated the difference between pledge and hypothecation as pledged goods are either physically or

51 *Dena Bank* v. *Bhikhabahi Prabhudas Parekh & Co.*, 2000 AIR SCW 4237.
52 *O. Konavalov* v. *Commander, Coast Guard Region*, 2006 AIR SCW 1654.
53 *Lallan Prasad* v. *Rahmat Ali*, AIR 1967 SC 1322.
54 AIR 2007 SC 2804.
55 1987 (2) SCC 588.
56 *Mahendrabahi Kantilal Dave* v. *Manekchowk Coop. Bank Ltd.*, AIR 2007 Guj 188.

constructively handed over to the creditor who has direct control over it whereas hypothecated goods remain in the custody of the borrower. But the pawnee has every right to possess them in case of default by the pawnor. However, the right to possess, the Kerala High Court in *Shibi Francis*[57] observed, can be exercised only through lawful means and can not be enforced by availing service of hired hoodlum by the financiers of the vehicles. In this case, the hypothecation agreement permitted the financier to take possession of the vehicle in case of default of instalments and for this purpose the borrower had agreed to give unrestricted entry to the premises where the vehicle is kept and not to prevent the financier or its agent from taking possession of the vehicle. The financier of Toyota Innova, in this case, took forcible possession of the vehicle from the petitioner in default of payments. Such a forced possession was sought to be justified on the basis of alleged legally valid terms of the agreement. Relying upon *Tarun Bhargava*[58] the court held that such terms and conditions cannot reasonably be conferred by agreement by the party who is in need and who would be agreeable to sign on the dotted lines. It was observed that the right to take possession of the property by force would amount to giving license to unleash violence which cannot be permitted in the state where law enforcement is entrusted with the state machinery.

Agency

Section 230 provides that an agent neither can enforce the contracts entered into on behalf of the principal nor is bound by it. In *Trister Consultants*,[59] the question was whether a director of a company can be held liable in the capacity of an agent for breach of contract by the company. The Delhi High Court observed that though directors of company are referred to as agents of the company in the context of their fiduciary duty to the company but they cannot be treated as acting as agents of the company in the conventional sense of an agent *vis-à-vis* third parties.

Power of attorney

Power of attorney can be revocable and irrevocable. Generally speaking, irrevocable power of attorney is created where power is coupled with an interest of the agent 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."[60] However, such an agency, according to section 202, cannot be terminated to the prejudice agent's interest without an express contract in this regard.

57 *Shibi Francis* v. *State of Kerala*, AIR 2007 Ker 296.
58 *Tarun Bhargava* v. *State of Haryana*, AIR 2007 P&H 98.
59 *Trister Consultants* v. *M/s. Customer Services India Ltd.*, AIR 2007 Del 157.
60 *Vipin Bhimani* v. *Sunanda Das*, AIR 2006 Cal 209.

Judicial review in respect of contracts

The apex court in *B.S.N. Joshi* v. *Nair Coal Services Ltd.*,[61] categorically underlined the parameters and scope of judicial review in contractual matters in the following manner: (i) If there are essential conditions, the same must be adhered to; (ii) if there is no power of general relaxation, ordinarily same shall not be exercised and principal of strict compliance would apply; (iii) if, however, a deviation or relaxation is to be made, it should be made fairly and to all the parties; (iv) if the successful bidder has substantially complied with the purport and object for which essential conditions are laid down, the court will not ordinarily interfere with such decision; (v) the contractors should not form cartel, if despite the same, their bids are considered and are given an offer to match with the rates quoted by the lowest tender, public interest would be given priority; (vi) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

III NEGOTIABLE INSTRUMENTS ACT

According to section 20[62] if a person gives either completely 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*[63] the executant 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 the 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.[64] In *Shyamrao* v. *Champalal*,[65] the plaintiff showed the

61 AIR 2007 Gau 164.

62 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 then case may be, upon it a negotiable instrument, 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.

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

64 *Thomas* v. *K.C. Thomas*, AIR 2005 Ker 129.

65 AIR 2007 MP 13.

promissory note for rupees 2000 supposedly executed by the defendant in lieu of loan taken by him. The defendant denied the taking of loan as well as execution of promissory note. The plaintiff sought to enforce the promissory note on the basis of section 118, which presumes the presence of consideration. The court observed that the statutory presumption under section 118 arises only if the execution of the promissory note is admitted. The court rejected the appeal because the execution of the promissory not was not proved.

Bouncing of Cheques: Requirement of Notice

The law merchant treated negotiable instruments as instruments that oiled the wheels of commerce and facilitated quick and prompt deals and transactions. This continues to be the position as recognised by the legislation.[66] However, use of 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.[67]

Supreme Court in *SMS Pharmaceuticals*[68] outlined the essential ingredients of the offence under section 138 as: issuance of cheque, presentation of cheque, dishonour of cheque, service of statutory notice and non-compliance of the notice. One of the important requirements is the serving of demand notice. In a landmark case, *K Bhaskaran,*[69] it was held that once the demand notice is dispatched by post with correct address on it, it is presumed to have been received within reasonable time by the drawer of the cheque by virtue of section 27 of the General Clauses Act, 1897. The actual receipt of the notice by the drawer of the cheque is not required by the law. Endorsing this viewpoint, the court in *Vinod Shivappa*[70] observed that if "receipt of notice" is interpreted literally, then scrupulous drawers can evade their responsibility by avoiding the receipt of the notice by various means.[71]

66 *N. Rangachari* v. *Bharat Sanchar Nigam Ltd.*, AIR 2007 SC 1683.
67 *Mosaraf Hossian Khan* v. *Bhagheeratha Engg. Ltd.,* (2006) 3 SCC 658.
68 *SMS Pharmaceuticals Ltd.* v. *Neeta Bhalla,* 2005 AIR SCW 4740.
69 *K Bhaskaran v. Sankaran Vaidhyan Balan,* (1999) 7 SCC 510.
70 *D. Vinod Shivappa* v. *Nanda Belliappa*, AIR 2006 SC 2179.
71 It was also observed in *Vinod Shivappa* that the main purpose of the proviso is to protect the 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 but at the same time, not to protect the unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their *modus operandi* to cheat unsuspecting persons.

However, the issue arises whether, in the court of law, the complainant merely needs to disclose the necessary particulars with regard to the service of notice in order to enable the court to draw presumption under clause (c) of the proviso to section 138 or does he additionally need to show that the drawer is deliberately avoiding the receipt of such notice. Such a question was referred to the three-judge bench in *C.C. Alavi Huji* v. *Palapetty Muhammed*[72] by a two-judge bench as the latter was of the opinion that the presumption of "receipt of notice" was not properly considered from the perspective of section 114 of the Evidence Act in the *Shivappa* case. The question was "whether in the absence of any averments in the complaint to the effect that the accused had a role to play in the matter of non-receipt of legal notice; or that the accused deliberately avoided service of notice, the same could have been entertained keeping in view the decision of this court in *Vinod Shivappa* case?". The three-judge bench went through section 27 of the General Clauses Act as well as section 114 of the Evidence Act and observed that it is needless to emphasize that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque so as to satisfy the court that a *prima-facie* case has been made out after complying with the mandatory statutory procedural requirement. It is then for the drawer of the cheque to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover is incorrect or that the letter is never sent to this address or the report of the postman is incorrect, so on and so forth.

While, so far, the discussion has been around the 'sending' or 'receipt' of notice, an interesting case came up regarding the contents of the notice. In *M/s. Rahul Builders* v. *M/s. Arihant Fertilizers & Chemicals & Anr.*,[73] a cheque for a sum of Rs. 1,00,000/- got bounced because of the closure of the account with the bank. The cheque amount was part of outstanding sum of Rs 8,72,409/-. The aggrieved party issued a notice, in which the details of the dishonoured cheque were mentioned. However, the operative part at the end of the notice read, "In view of the above, you are requested to remit the payment of my pending bills within 10 days from the date of receipt of this letter otherwise suitable action as deemed fit will be taken against you." It may be emphasised that the notice demanded the payment of all the outstanding bills i.e. Rs. 8,72,409/- in general words. Relying upon *Suman Sethi*[74] and *K R Indra*,[75] the court observed that an omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not serve the requirement of law under section 138 NI Act which uses "makes a demand for the payment of the said amount of money." The court

72 (2007) 6 SCC 555.
73 Cr. App. No. 525 of 2005 (Decided on 2.11.2007).
74 *Suman Sethi* v. *Ajay K. Churiwal and Another*, (2002) 2 SCC 380.
75 *K R Indra* v. *Dr. G. Adinarayana*, (2003) 8 SCC 300.

was of the opinion that since it is a penal provision, it should be construed strictly and notice should demand the payment of money bounced in the cheque in the grace period.

It may be submitted that the court is correct in holding that the demand notice should be specific to the amount of dishonoured cheque, as the disputes regarding other outstanding amount cannot be brought under NI Act. Also, there is a distinction between the dishonour of cheque on the one hand and non-compliance with the notice, on the other, as incriminating circumstance, which exposes the drawer for being proceeded against under section 138 of the Act.

Bouncing of cheques: liability of the director of a company

In *N. Rangachari* v. *Bharat Sanchar Nigam Ltd.,*[76] the two cheques issued by Data Access (India) Ltd. to BSNL (respondent) got bounced on presentation for insufficiency of funds. BSNL filed a complaint against the present appellant and respondent no. 2 being the directors of the Data Access Ltd. as in charge of and responsible to the company for conduct of business of the company. The appellant moved the High Court of Delhi for quashing of proceedings against him under section 482 of the Cr.PC on the grounds that neither he signed the cheques nor was he director at that time as he had resigned four days before the said cheques were signed. The high court dismissed the petition. It was challenged in the Supreme Court. The apex court also dismissed the appeal without taking into consideration the fact that the appellant was not the director at the relevant point of time.

If there is non-compliance of the statutory notice under section 138, a complaint may be filed in the court of magistrate, who is empowered to dismiss a complaint even without issuing a process under section 203 if he is of the opinion, after considering the matter that there is no sufficient ground for proceeding. This suggests that the magistrate has to apply his mind and form an opinion whether to issue process or not. For this a *prima facie* case should be made out by the complainant.[77] The question is whether after issuing a process, can a magistrate, recall its order. In *Everest Advertising*[78] summons were issued against the directors of the company, which were called back by the magistrate. The high court, on appeal, affirmed the order of the magistrate on the ground that allegations in the complaint were far from sufficient to summon the directors. The Supreme Court, on further appeal, did not deliberate upon the issue and observed "without going into the finer question raised by Mr. Tulsi, we may notice …" Instead the court went on to decide whether the complaint should mechanically reproduce the wording of section 141 or should it contain specific averments relating to the persons in charge or responsible to the company

76 *N. Rangachari* v. *Bharat Sanchar Nigam Ltd.*, AIR 2007 SC 1683.
77 *Supra* note 68.
78 *Everest Advertising Pvt. Ltd.* v. *State Govt. of NCT of Delhi*, AIR 2007 SC 1650.

and thus be held liable. Relying upon *SMS Pharmaceuticals*[79] the court held that the requirements of section 141 had been complied with and case had been made out against the directors.

IV LAW OF SALE OF GOODS

Contract of sale

In an agreement for sale of immovable property, certain salient features, which are common to all contracts, can be listed. They include, identity of the property; consideration for sale; mode of payment thereof; timing and method of delivery of possession; the period, within which the contract must be concluded and the consequences that must ensue, on account of non-compliance with the conditions.[80]

A written contract particularly in respect of immovable property, is not only desirable, but also would be helpful in ascertaining the terms of the contract, which are necessary for granting specific performance of the contract. Though law permits oral agreements but it places a relatively heavier burden upon the person to prove it. A major area of difference between written and oral agreements is the matter of discerning and ascertaining the consensus *ad idem* of the parties. In the former, the clauses in the agreements reflect it virtually excluding speculation or guess work whereas oral agreements present a stupendous task to the courts in this regard.[81]

Right to claim interest

In *State of Bihar* v. *Shakti Tubes Ltd. Co*.,[82] an agreement was entered into between the appellant and the respondent for the supply of pipes. The terms and conditions of the contract stipulated that in case of delayed supply, the appellant had the option to impose penalty or to forfeit the amount of security deposited by the respondent or to refuse the acceptance of materials. The contract also contained a clause that the supplier will not claim any interest or damages against the appellant with respect to any money or balance or unsettled claim, difference or misunderstanding between the Engineer-in-chief on the one hand and the supplier on the other hand or with respect to any unavoidable delay on the part of the office in making periodical or final payment or in any other respect whatsoever. While filing tender, the respondent stated that no excise duty was included in the quoted price as there was no such duty applicable, but in case of future alteration in any tax/ excise duty etc. the rates will be altered accordingly. The tender documents were read as part of the contract between the parties.

The respondent, in pursuance of the contract, supplied the 60% material within time whereas the supply of 40% of material got delayed but the

79 *Supra* note 68.
80 *P. Prabhakara Rao* v. *P. Krishna*, AIR 2007 AP 163.
81 *Id.*, para 12.
82 AIR 2007 Pat 99.

appellant accepted the delayed supply. Instead of taking any of the actions stipulated in the contract, the appellant delayed the payment to the respondent, who filed a suit for claiming interest as well as the subsequently imposed excise duty. The trial court decreed the suit. The High Court of Patna, confirming the decree, upheld the right of the respondent to claim interest on the the ground that 'Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993,' which granted statutory right to claim interest on delayed payments, can not be superseded by any contract to the contrary. Moreover, since the appellant had accepted the delayed delivery, it had no right to delay the payment as it was not a stipulated action in the contract. On the question of claim in respect of excise duty, the appellant resorted to the condition stipulated in the contract that royalty and other taxes shall be borne by the supplier at his own cost. Both the courts rejected this argument and observed that plain meaning of this clause was that royalty and other taxes as were applicable at the time of submitting tender but did not include royalty or taxes levied subsequently. Also the court observed that in accordance with section 64A of the Sale of Goods Act, the buyer is to bear any change – increase or decrease – in the taxes.

Similarly in *Akuli Charan Das*,[83] applicability of the Orissa Minor Minerals Concession Rules, 2004, which has the effect of increasing the royalty on the use of minor minerals, to the contracts entered into prior to the promulgation of said rules was challenged in writ petition. The petitioner, here, was a contractor who had entered into a contract with the state government, which *inter alia* provided that all the dues, taxes, royalties and other levies payable by the contractors shall be included in the rates, prices and total bid prices. The question is who should bear the burden of enhanced royalty? Is it the contractors or the government? The court held that by virtue of section 64A (2) of the Sale of Goods Act, which entitled the seller to add the enhancement in the sale price, the state, being the ultimate buyer, had to bear the burden. The court also observed that when a contractor purchases minor minerals, he bears the royalty and when he uses the same in the work of state, he can justifiably claim the reimbursement of the royalty paid.

V PARTNERSHIP ACT

Nature of partnership firm

According to section 7 of the Partnership Act, a partnership is "at will" if there is no provision for the duration or determination of the partnership firm. Such partnership can be dissolved by any partner by serving notice on other partners whereas in other cases, a partnership can be dissolved either with the consent of all the partners or in accordance with a contract between

83 *Akuli Charan Das* v. *State of Orissa*, AIR 2007 Ori 97.

the partners. In *Ramesh Kumar* v. *Smt. Lata Devi*,[84] the appellant dissolved the firm by serving notice on other partners. The issue, in this case, was with respect to the nature of the partnership. The court observed that the answer to the question had to be gathered from the intention of the parties, exhibited in the various clauses of the partnership deed, which in the present case provided that death or retirement of a partner will not dissolve the partnership and the same will be carried on by the surviving partners or by taking the successors of the deceased partners as partners by mutual agreement. After reading the relevant clauses of the contract and applying the ratio given in *Karumuthu Thiagrajan,*[85] *Premnath Anand,*[86] *MOH Uduman*[87] and *Suresh Kumar Sanghi,*[88] the court held that partners could not be considered as "at will" as the partners had contracted for dissolution by mutual consent.

Registration of firm

In *Hirendra Bhola* v. *Gulati Marketing Company*,[89] the court relying upon *Loonkaran Setia*[90] observed that the provisions contained in section 69(2), which bars the filing of suit to enforce a right arising from a contract by or on behalf of an unregistered firm against any third party, is mandatory in character.

Partnership and arbitration

By virtue of section 69(3) parties are exempted from the prohibition created by operation of section 69 in respect to the enforcement of a right to realise assets, settlement of the accounts of dissolved firm or any right or power to realise the property of the dissolved firm. In *Dinesh Jangid*,[91] a legal notice was served on the respondent to invoke arbitration clause of the partnership deed to settle the disputes, but the respondent did not respond. He alleged that since the partnership deed was not registered, it could not be acted upon. The court observed that after dissolution, the partnership subsists for the purpose of completing pending transactions, winding up the business and adjusting the rights of the partners. For these purposes, the authority, rights and obligations of the partners continue. It was, thus, held that when right to sue subsists, then there is no prohibition to invoke arbitration clause under the deed of partnership.

In *Ravi Prakash Goel* v. *Chandra Prakash Goel*,[92] the appellant was the legal heir of one of the partners of a firm. His mother was in partnership with the respondents, which provided for arbitration in case of any dispute.

84 AIR 2007 MP 159.
85 AIR 1961 SC 1225.
86 Air 1976 Bom 405.
87 AIR 1991 SC 1020.
88 AIR 1982 Del 131.
89 AIR 2007 MP 165.
90 *Loonkaran Setia* v. AIR 1977 SC 336.
91 *Dinesh Jangid* v. *Laxmi Kant Jangid*, AIR 2007 Raj 203.
92 AIR 2007 SC 1517.

His mother resigned from the partnership and demanded for rendition of accounts to her son. The partners did not give any access to the appellant and thus he moved for appointment of arbitrator. The high court dismissed his application on the ground that the applicant did not have any binding arbitration agreement with other partners. The decision was challenged in appeal in the Supreme Court, where the question was: are the legal heirs, on whom the right of a partner to sue for rendition of accounts is transferred, entitled to invoke arbitration clause contained in the partnership deed to commence proceedings after the death of the partner for the disputes arising during the life time of the partner? Reversing the decision of the high court, the apex court held that the legal heir was entitled to invoke the arbitration clause. The decision is good because if a person inherits any right then he also inherits all the legal means to enforce the same.