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MERCANTILE LAW

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I INTRODUCTION

THE SURVEY contains cases decided by the high courts and the Supreme Court on the Law of Contract, Sale of Goods, Partnership, Negotiable Instruments and Banking Law. A good number of cases have been decided on all these branches and in most of these cases, the established principles of law have been reiterated. However, in some of the cases, either conflicting opinions or debatable propositions have been enunciated; those have been discussed in detail in light of the counter view point.

II LAW OF CONTRACT

Offer and acceptance

An offer and acceptance need not always be formal, nor does the law of contract require that consent to a contract must be in writing.[1]This principle of law has been reiterated by the Madras High Court in *T. Jayaram Naidu & Anr*.v.*Yasodha & Ors*[2]. It was held that under section 10 of the Indian Contract Act, 1872 even an oral agreement is valid and enforceable through the court of law, provided the person claiming the right establishes the existence of such an oral agreement and also the fact that he was ready and willing to perform his part of the contract. A heavy burden lies on the plaintiff to prove that there was a *consensus ad idem* between the parties that culminated into an oral contract. The proof must be absolutely clear and certain.[3] In *Khadin Hussain* v. *Maqbool Hussian*[4] an important question of law has been raised as to whether a party has a right in law to retract the offer made under the Judicial Oath Rules, 1950. The court held that where the respondent makes an offer to pay the claimed amount if the petitioner affirms his claim on oath which he (petitioner) does, a valid contract comes into existence and the respondent cannot resile from the contract.

An offer is the final expression of willingness by the offeror to be bound by his offer should the other party choose to accept it. A mere letter of

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1 *Coffee Board* v. *Commissioner of Commercial Taxes*,(1988)3 SCC263

2 AIR 2008 (NOC) 972 (Mad).

3 *Ummer & Anr*. v. *Kunhava*, AIR 2008 (NOC) 277 (Ker).

4 AIR 2008 J&K 72.

intent would not constitute an offer. In *Jitender Kataria* v. *Hindustan Petroleum Corporation Ltd.*[5] the petitioner had applied for petrol pump under the scheduled caste category. A letter of intent was issued to him. Subsequently, his application was not accepted. It was held that a distinction has to be maintained between an acceptance and a mere letter of intent. *An offer will ripen into a contract only when there is an absolute and unconditional acceptance in the sense as is understood in the language of section 7.*[6] A letter of intent issued to the petitioner, in the instant case would not constitute a firm offer of dealership to him. Similarly, in *Rawatsons Engineers (P) Ltd* v. *Union of India & Ors*[7] railways had issued notices inviting tenders. The petitioner had also submitted a tender that was found ambiguous. There was no absolute and unqualified acceptance from the railways. It was held that there being no acceptance, parties cannot be said to be at *consensus ad idem*. Thus, there cannot be any breach of a contract that never existed. In *Harminder Singh* v. *Punjab and Sind Bank*[8] the authorized officer intimated successful bidder to pay balance amount within 15 days from the date of auction so that the sale may be confirmed. The court held that the conditional acceptance of the bid would not culminate into a concluded contract in the absence of confirmation by the authorities.

Mere mental assent to an offer does not conclude a contract either under the Indian Contract Act[9] or in English law.[10] A qualification was added to this principle by the Supreme Court of India in *Bharat Petroleum Corp. Ltd* v. *Great Eastern Shipping Co. Ltd.*[11] It was laid down that it is no doubt true that the general rule is that an offer is not accepted by mere silence on the part of the offeree, yet it does not mean that an acceptance has to be given always in so many words. Under certain circumstances, offeree's silence, coupled with his conduct that takes the form of a positive act, may constitute an acceptance — an agreement *sub silentio*. The terms of the parties can be proved not only by their words but also by their conduct.[12]

5 AIR 2008 (NOC) 2570 (P&H).

6. Emphasis added.

7 AIR 2008 (NOC) 2009 (Pat).

8 AIR 2008 P&H 39.

9 See for instance; *Bagwandas* v. *Girdarilal*, (1966)SCR 656. The Supreme Court has held that an agreement does not result from a mere state of mind : intent to accept an offer or even a mental resolve to accept an offer does not give rise to a contract. There must be some external manifestation of that intent by speech, writing or other act. See also, *Hindustan Cooperative Insurance Society* v . *Shyam Sunder,* AIR 1952 Cal 691; *Century Spinnig and Mfg Co* v. *Ulhasnagar M.C.*, (1970) 1 SCC 582. This should be contrasted with *Life Insurance Corp. of India* v. *Brazinha D' Souza,* AIR 1995 Bom 223, where a proposal was received with premium amount which was kept in suspense for compliance of formalities. It was held that a contract has not come into existence.

10 See, *Brogden* v. *Metropolitan Railway Co,* (1877) 2 App Cas 666 (HL); *Carlill* v. *Carbolic Smoke Ball Co*., (1893) 1 QB 256.

11 AIR 2008 SC 357.

12 *Id*. at 361.

The Gauhati High Court in *Union of India* v. *M/s Jain Enterprises*[13] has come up with a debatable observation. The railway administration had issued a cheque with a condition that if the amount is not acceptable to the respondent (offeree) in full and final settlement, then this advice of payment along with the cheque should be returned to this office. The court held that if the offeree before encashment of the cheque/pay order objected to such conditions, it would not amount to acceptance of the conditions attached to the cheque by conduct. As against this, if the offeree without any protest retained the cheque and encashed it, then it would amount to acceptance of the offer by conduct.

The offeree must protest by positive action against the conditions attached to the offer before en-cashment of the cheque even where the cheque is received during the pendency of the proceedings before the tribunal. The court did not accept the contention that the conduct of the offeree to continue with the proceedings before the tribunal is sufficient to hold that he (offeree) did not accept the conditions of the cheque. It is submitted that the court has not adopted a pro-consumer approach. Why should continuing of the proceedings before the tribunal, in the instant case, be not construed as a protest against the conditions attached to the cheque? It is only when the conditions were not acceptable to the respondent that he decided to continue the proceedings before the tribunal which would amount to protest by conduct. After all, respondents had to invest time and money in continuing the proceedings not to talk of attendant difficulties.

Concluded contract

The Supreme Court in *New Okhla Industries Development Authority & Anr.*v. *Arvind Sonekar*[14] was called upon to decide as to whether a concluded contract has come into existence between the opposite parties. In this case, appellants had issued an advertisement in 1993, inviting applications for the registration for allotment of plots to institutions including nursing homes and hospitals. It was specifically mentioned in the scheme that the rate shall be the one as prevailing at the time of allotment. The respondent also submitted an application along with the registration fee of Rs 1lakh. He was informed by the appellants to deposit some more money within seven days so that necessary steps could be taken for the allotment of a plot which he failed. His application was screened out and his entire amount of registration fee was refunded. The respondent made another request in 1996 which was accepted and a fresh allotment letter was issued to him indicating the price Rs. 3600 per sq mtr, as against Rs. 2750 per sq mtr offered earlier. The respondent accepted the offer, deposited the required amount, and submitted an affidavit accepting the attendant conditions. A lease deed was executed in his favour. He then filed a complaint before the MRTP Commission, alleging

13 AIR 2008 (NOC) 2266 (Gau).
14 AIR 2008 SC 1983.

that others who were allotted plots in 1997 were charged a rate prevailing in 1993 and prayed that this benefit be extended to him as well. The commission upheld this contention on the ground that a concluded contract had come into existence at the time when the complainant had accepted the offer in 1993 and in pursuance to that he had deposited an amount of Rs.1 lakh. Against this decision of the commission, the present appeal was filed before the apex court. The court observed that it is true that an offer was made by the appellants to the respondent in 1993 but it is also an admitted fact that this offer of the appellants was not accepted by the respondent as he had failed to deposit the required amount. The registration fee was refunded to the respondent by an account payee cheque and the same was encashed by him without any murmur. Now he cannot turn around and say that the letter of 1993 was an allotment letter which had resulted into a concluded contract between him and the appallants.[15]

In *Quadricon Pvt Ltd.* v. *Bajarang*[16] it was laid down that a communication by fax is similar to communication by telex. The communication by fax is instantaneous and is in fact possible by means of a telephone connection. In case of communication by fax, the contract would be complete only when an acceptance is received by the offeror.

The petitioner in *R. Elanchizhian* v. *The Secretary to Government of Tamil Nadu*[17] got IMFL shop through lots and paid the earnest money. He was the highest bidder and his bid was accepted by the sale officer. He fully knew the terms and conditions of auction notice. The petitioner was asked to apply for licence within seven days, failing which the earnest money deposited would be forfeited. On the basis of these facts, the court held that the contract has come into existence and it is not open for the petitioner to wriggle out of contractual obligation.

In *VIP Industies Ltd.* v. *Saboo Sodium Chloro Ltd. & Anr.*[18], a proposal was made by "A" through a letter to "B" to purchase 10,000 pieces of suit case. A cheque of rupees one lac was sent along with the proposal. The branch area sales executive of "B" accepted the proposal. It was held that a concluded contract had come into existence. In *Kisan Sahkari Chini Mills Ltd &Ors* v. *Vardan Linkers and Ors.*[19], tenders were invited for sale of molasses. The tender conditions restricted participation to only *bona fide* consumers. Further, the earnest money was to be deposited to each sugar mill from which tenderer was desirous to purchase molasses. The respondent had not satisfied any one of these conditions. The Supreme Court held that the offer of the respondent was not, under these circumstances, valid and will not result into a concluded contract.

15 *Id*. at 1986.
16 AIR 2008 Bom 88.
17 AIR 2008 (NOC) 973 (Mad).
18 AIR 2008 (NOC) 1449 (Raj).
19 AIR 2008 SC 2160.
20 AIR 2008 Del 51.

The legal implications of a concluded contract were delineated by the Delhi High Court in *Kamal Gupta* v. *Bank of India.*[20] It was laid down that a promise made by the promisor is binding on his legal representatives in case of his/her death, unless a contrary intention appears from the contract. Promise to perform an obligation under a contract is not personal to the contracting party but is also binding on his representatives. The legal representatives are not personally liable but liability is to the extent of the estate of the deceased inherited by them.[21]

In line with the already established legal position,[22] it was laid down in *M/s Shriram Steels, Raipur* v. *M/s Vandana Trailers, Sakti*[23] that the making of a contract gives rise to a cause of action and suit can be filed at a place where this cause of action arises. Thus, the suit can be instituted at a place where the contract is made or concluded.

The Karnataka High Court in *M/s Sapna Ganglani & Anr.* v. *M/s.R.S. Enterprises & Anr.*[24] missed an opportunity of far reaching implications to decide as to whether a contract can be concluded by an e-mail. It was contended that by virtue of the provisions[25] of the Information Technology Act, 2000, a contract in respect of an immovable property cannot be validly entered into through e-mail. Therefore, the contract in question, which is said to have been entered into between the plaintiff and the defendants in respect of immovable property through e-mail, cannot be enforced in law. Instead of answering this pointed question, the court observed that it is a mixed question of law and fact to be decided by the trial court.[26]

Consideration

The term 'consideration' means a reasonable equivalent or other valuable benefit passed on by the promissor to the promisee that shall be adequate or sufficient and valuable having regard to the facts, circumstances and necessities of each case. This legal proposition enunciated in *Sree Sakthi Paper Mills Ltd*. v. *M/s Anjaneya Enterprises & Ors.*[27] clarifies the spirit of the explanation to section 25 of the Contract Act which simply says that a consideration to the contract need not to be adequate. In *K.S. Bakshi & Anr*.v. *State & Anr.*[28] a contract was executed between the owner of the land and a builder to construct a multi-storied residential building. The builder had undertaken to pay Rs.138 lakhs to the owner by way of 30 cheques and the

21 *Id*. at 54.

22 See for instance; *ABC Laminant Pvt*. v. *AP Agencies, Saleem,* AIR 1989 SC 1239; *Baroda Oil Cakes Traders* v. *Parshottam Narayandas Bagulia,* AIR 1954 Bom 491; *Remco Textiles* v. *Union of India*, AIR 1960 Ker 257.

23 AIR 2008 Chh 34.

24 AIR 2008 Kar 178.

25 S. 1(4) (f) of the IT Act provides that nothing in this Act shall apply to any contract for the sale of immovable property or any interest in such property.

26 *Supra* note 24 at 184.

27 AIR 2008 (NOC) 143 (Ker).

28 AIR 2008 (NOC) 998 (Del).

owner had agreed to block his assets till the completion of the construction. It was held that such an act of the owner amounts to consideration within the meaning of section 2(d) of the Contract Act.

An agreement without consideration is void. This statement of law contained in section 25 of the Contract Act has three exceptions: (a) promise made on account of natural love and affection; (b) past voluntary service; and (c) time barred debt. The exception of time barred debt is contained in section 25(3) which states: it is a promise, made in writing and signed by the person charged therewith, or by his agent generally or specially authorized in that behalf to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suit.

The Madras High Court in *K. Jeyaraman* v. *M/s. Sundaram Industries Ltd.* [29] laid down that the above section contemplates an express promise on the part of promisee and promise should be unconditional. In the instant case, an averment made in the document in question shows that appellant had agreed to pay only after receiving the amount from the state electricity board. This document only conveys a conditional promise and cannot be construed as a promise under section 25(3) of the Contract Act. In *Madishetti Shekar & Anr* v. *Puliyala Komurelli*[30] it was held that section 25(3) operates as an exception to the law of limitation, and where there is an express promise in an agreement between the parties to pay time barred debt, the suit cannot be held to be barred by limitation. Similarly, in *Viayj Ganesh Gondhlekar* v. *Indrail Jairaj Damale*[31]appellant had extended the date of cheque from time to time under his own signature and had revalidated the cheques. The court held that this validation amounts to fresh promise that has revived the time barred debt.

Free consent

Consent of the parties to a contract is said to be free when it is not caused by (a) coercion, or (b) undue influence, or (c) fraud, or (d) misrepresentation, or (e) mistake. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.[32]

In *Munusamy* v. *Nava Pillai*[33] the defendant had sold his property for Rs. 3,12,370 and then resold it to the plaintiff for Rs I,12,750 who filed a suit for specific performance of contract. The defendant alleged that the second sale of his property was obtained from him by the plaintiff out of force, coercion and undue influence. The plaintiff could not produce any independent witness to rebut presumption of coercion which could be inferred from the payment of much less consideration than that he had

29 AIR 2008 (NOC) 2532(Mad).
30 AIR 2008 AP 131.
31 AIR 2008 (NOC) 414 (Bom).
32 S. 14, Contract Act.
33 AIR 2008 (NOC) 1401 (Mad).

received under the first contract of sale of his property. The court held that the consent to the contract, in the instant case, was caused by coercion and it was immaterial that the defendant had failed to lodge any complaint to police about threat, coercion or undue influence. Similarly, in *M/s Q. Soft System & Solutions (P) Ltd.*v. *H.N. Giridhar*,[34] an employer had executed a contract with an employee requiring the latter to pay an amount of Rs 2 lakhs on his failure to render service for two years. In pursuance to this agreement, a cheque was issued by the employee that was dishonoured. The employee alleged that he had issued the cheque under coercion. The court re-directed the case to the trial court with an observation that the contract may be termed as void after ascertaining the factual position.

In *M/s Chendur Forgings (P) Ltd.* v. *M/s Bhandari Interstate Carriers, Madras*[35] a consignment was entrusted to plaintiff carrier. The truck carrying the consignment met with an accident. The parties agreed to engage crane for lifting consignment from the accident spot and defendant would pay the crane and freight charges at the time of taking of delivery of consignment from the plaintiff. The defendant alleged that the contract in question was caused due to undue influence. The court held that the defendant had himself admitted that the accident was not caused due to the negligence of the plaintiff carrier and had subsequently agreed to pay crane charges. It cannot be said that the agreement came to be executed by undue influence.

The Delhi High Court was called to expound on the scope of misrepresentation in *Chhanga Lal and etc* v.*MCD and Anr.*[36] In this case, MCD had made an offer to allot plots. The offer was restricted to only unauthorized dairy owners and the sole criterion for eligibility was that the applicant should carry on dairy business. The petitioner was provisionally allotted a plot but it was afterwards discovered that he had made a misrepresentation and his allotment was cancelled. The court ruled that in case of fraudulent misrepresentation, the innocent party can rescind the contract or claim damages or both. The MCD was, therefore, justified in rescinding the contract and also had a right to claim damages. In case of misrepresentation of fact at a pre-contractual stage, the innocent party (MCD in the present case) is entitled to recover damages for misrepresentation only and not for "expectation or interest" in the contract as if the same has been executed and performed.[37]

In *Shrimati Chhangura W/o Shyam Bali Tewari* v. *Mata Prasad S/o Satya Narain & Ors*[38] the vendor had died immediately after executing a sale deed and the trial court found that the vendor was not in a fit state of mind to understand the implication of his signature or thumb impression on the sale deed. It was further testified by the fact that a huge area was sold for

34 AIR 2008 (NOC) 1294 (Kar).
35 AIR 2008 Mad 218.
36 AIR 2008 Del 146.
37 *Id.* at 152.
38 AIR 2008 (NOC) 1141 (All).

a meager sum which was not fully paid. The vendor, being a *sirdar* had no right to transfer property on the date of execution of the deed. The court held that the sale deed executed in such suspicious circumstances was hit by section 16 and was liable to be set aside.

The MP High Court in *State Bank of India* v. *M/s. Jagdish Talkies etc.*[39]elucidated the legal position relating to fraud as defined in section 17 of the Contract Act. The respondent had opened a savings bank account in SBI and it was alleged that he had committed fraud by not disclosing that he is a holder of money in his own capacity or otherwise. The court observed that nowhere from the documents was it shown that it was necessarily to be disclosed at any point of time that the money in question did not belong to the plaintiff-customer personally. Had there been an obligation on the part of the customer to disclose about the nature and/or source of money with which the account was to be opened, it could have successfully been said that the plaintiff having failed to discharge his obligation had committed fraud or misrepresentation.

The court ruled that admittedly since the plaintiff had not disclosed about the money as his own, it could not be said that the plaintiff made a suggestion as a fact which was not true. In order to constitute a fraud there should not merely be a concealment of fact but it should be an active concealment. Section 17 clearly lays down that mere silence as to facts likely to affect the willingness of a person to enter into a contract is not a fraud, unless the circumstances of the case are such that, regard being had to the facts, it is the duty of the person keeping silence to speak.

The court reconfirmed the already established dichotomy between the misrepresentation and fraud and held that the principal difference between the two is that in case of fraud the person making the suggestion does not believe it to be true whereas in case of misrepresentation, the same is believed to be true.[40]

Legality of object

The Supreme Court in *BCPP Mazdoor Sangh* v. *NTPC*[41] was called upon to resolve the dispute of the employees of NTPC (PSU) who were transferred to a private concern (BALCO) on the basis of a bi-partite contract entered into on 22.05.1990 between the two concerns. The services of 236 employees, appointed before this agreement, were also transferred. The appellants impugned this agreement on the ground that it unilaterally changed the service conditions of even those employees who were not party to the agreement. The apex court referred to its earlier ruling in *Central Inland Water Transport Corporation Limited and another* v. *Brojo Nath Ganguly and Anr.*[42] in which it was held that in the vast majority of cases such

39 AIR 2008 (NOC) 116 (MP).
40 *Ibid*.
41 AIR 2008 SC 336.
42 AIR 1986 SC 1571.

contracts are entered into by the weaker party under pressure of circumstances, generally economic, which results in inequality of bargaining power. Furthermore, majority of such contracts are in a standard or prescribed form or consists of a set of rules. They are not contracts between individuals containing terms meant for those individuals alone. These contracts are entered into by the party with superior bargaining power with a large number of persons who have far less bargaining power or no bargaining power at all. Such contracts which affect a large number of persons or a group of persons, if they are unconscionable, unfair or unreasonable, are injurious to the public interest. To say that such a contract is voidable would be to compel each person with whom the party with superior bargaining power had contracted to go to the court to have the contract adjudged as voidable. This would only result in multiplicity of litigation which no court would encourage and would also not be in the public interest. Such a contract or such a clause in a contract ought, therefore, to be adjudged void. While the law of contracts in England is mostly judge made law, the law of contracts in India is enacted in a statute, namely, the Indian Contract Act. In order that such a contract should be void, it must fall under one of the relevant sections of this Act. The only relevant provision in this Act which can apply is section 23 which states that 'the consideration or object of an agreement is lawful, unless….the court regards it as….opposed to public policy'. The apex court then concluded that the contract in question is against public policy.

In *Smt. Chongtuokhawi* v. *Union of India & Ors*[43] a compromise decree dividing family pension between the widow/legally married wife and father of deceased and others was recorded by the civil judge under order 23 rule 3 of Civil Procedure Code. This rule, *inter alia,* provides that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties) the court shall order such agreement, compromise or satisfaction to be recorded. The Gauhati High Court assailed this compromise decree on the ground that the rule under which the compromise decree was recorded expressly provides that it should be based on a lawful agreement. The term "lawful agreement" excludes not only unlawful agreements i.e. the object or consideration for which is unlawful as defined in the Contract Act, but all agreements which on the face of them are void and, therefore, will not be enforced by the court. Section 23 of the Contract Act states that the consideration or object of an agreement is lawful unless it is forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law or is fraudulent or involves or implies injury to the person or property of another or the court regards it as immoral or opposed to public policy, and in each of these cases, the consideration or object of an agreement is said to be unlawful.

43 AIR 2008 Gau 6.

The court invoked the ratio of *Baladeo Jha* v.*Ganga Prasad*[44] and held that a compromise is a contract between the parties with a stamp of approval by a court, subject to all the conditions of a valid contract. Any agreement to do something which is forbidden by law is null and void, and a decree based on such agreement is equally void. The compromise decree in question is also against the provisions inasmuch as it has been obtained in a suit the entertainability whereof is prohibited by the provisions[45] of the Pensions Act.[46]

In *Bhavani Amma Kanakadevi & Ors.* v. *CSI Dekshinea Kerala Maha Idavaka*[47] a sale deed expressly provided that if assignee failed to construct the college on the land sold to him, the property shall be reconveyed to the assignor on the same price. The Kerala High Court held that to impose total restraint on transfer of property or to impose rules which keeps it out of circulation for ever offends public policy, irrespective of whether such conditions are imposed by a deed of transfer, a will or a simple contract. A contract opposed to public policy is void and unenforceable under section 23 of the Contract Act.[48]

The Patna High Court in *Tirhut Dugdh Utpadak Sahkari Sangh Ltd & Anr*. v. *Oriental insurance Co. Ltd & Anr.*[49] held that a condition in the policy which gives unilateral right to an insurance company to short terminate policy with an obligation to refund an un-utilized *pro rata* premium is not against the public policy. Similarly, in *Deo Narayan Jaiswal* v. *Special Judge (EC Act) Court No 5 Deoria & Ors.,*[50] it was held that an agreement allowing landlord to reconstruct shop without dispossessing tenant and there after letting it out to the same tenant on higher rate protecting his rights under the Rent Act would not make the object of the agreement unlawful.

The AP High Court in *Smt P. Archana alias Atchamamba* v.*Varada Siva Rama Krishna*[51] gave a purposive interpretation to section 25 of the Hindu Marriage Act,1955 by invoking section 23 of the Contract Act. In this case, the appellant was divorced by her husband (respondent) who paid her at the time of divorce Rs 30,000 towards permanent alimony and Rs.65000 towards

44 AIR 1959 Pat 17. It was laid down that the object of s. 12 of the Pensions Act 47 is to prevent traffic in the pension as it is opposed to public policy. Therefore, a compromise decree by which a division has been made between the parties with respect to the amount of pension would amount to traffic in the pension and will come within the mischief of s. 23 of the Contract Act.

45 S. 12 provides: All assignments, agreements , orders, sales, and securities of every kind made by the person entitled to any pension , pay or allowance mentioned in section 11, in respect of any money not payable before the making therefore, on account of any such pension, pay or allowance, or for giving or assigning any future interest therein, are null void.

46 *Supra* note 43 at 10.

47 AIR 2008 Ker 38.

48 *Id*. at 42.

49 AIR 2008 Pat 89.

50 AIR 2008 All 163.

51 AIR 2008 AP 216.

the value of the gold ornaments and *pasupukumkuma* presented to her by her parents at the time of marriage. It was agreed by the parties that there shall not be any future claim against each other. The appellant filed an application before the family court for maintenance of Rs.4000/ per month or in the alternative permanent alimony of Rs 50,000. This application was dismissed on the ground that there was an agreement between the parties not to make any further claim for maintenance in future. Against this dismissal, the present appeal was filed. The court ruled that keeping in view the very intendment and object of section 25 of the Hindu Marriage Act, the claim for enhanced maintenance cannot be rejected merely on the ground that there was a settlement between the parties under which the applicant agreed not to make any further claim for maintenance. As a matter of fact, such an agreement, defeating the right of maintenance provided under a statute, being contrary to public policy, was not valid.[52] The court did not agree with the opinion of the single judge in *Manjit Singh* v. *Savita Kiran*[53] in which it was held that the court may decline to grant maintenance to a wife who has bartered away her right to maintenance through an agreement.

Restraint of trade

The principal issue in *VFS Global Services Pvt. Ltd*. v. *Suprit Roy,*[54] was relating to the enforceability of the "Garden Leave Clause" in the service contract of the employees of the petitioner. Under this clause, the employee is prohibited from carrying on any business which competes directly or indirectly with the whole or any part of the visa processing services or a business similar to the business of the employer for a period of three months after serving the notice period and ceasing to be an employee of the company. The court held that section 27 of the Contract Act provides that every agreement by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void. An exception is carved out in section 27 by which a person who sells goodwill of his business may agree with the buyer to refrain from carrying on a similar business within specified local limits so long as the buyer carries on a like business, provided such limits appear to the court reasonable having regard to the nature of the business. A clause of the nature involved in the instant case is in restraint of trade and hit by section 27 of the Contract Act. To obstruct an employee, who has left his service from obtaining gainful employment elsewhere, is not fair or proper.

It was further held that a clause prohibiting an employee from disclosing commercial or trade secrets is not in restraint of trade. The effect of such a clause is not to restrain the employee from exercising a lawful profession, trade or business within the meaning of section 27 of the Contract Act**.**

52 *Id.* at 220.
53 AIR 1983 (P&H) 281.
54 AIR 2008 (NOC) 1502 (Bom).

Uncertain agreements

Agreements, meaning of which is not certain, or capable of being made certain, are void.[55] The Supreme Court in *DDA N.D.* v. *Joint Action Committee, Allottees of SFS Flats*[56] held that a contract must be construed in such a way that it must lead to a conclusion that the parties understood the meaning thereof. The terms of agreement cannot be vague or indefinite. A definite price is an essential element of binding contract. Although it need not to be stated in the contract, yet it must be worked out on some premises as was laid down in the contract. An assertion of the price either expressly or impliedly is imperative.[57]

Contingent contracts

In *Dr. S.B. Sharma* v. *Suresh C. Sharma & Anr*[58] a suit for specific performance was filed by the plaintiff vendee and it was prayed that an injunction be granted restraining defendant vendor from alienating suit property pending suit. The court found that the execution of sale deed in favour of the plaintiff was contingent upon sale in favour of defendant by the original owners within the stipulated period of six months extendable by one year which did not happen. The court held that the contract in question is a contingent contract and invoked section 35 of the Contract Act. This section provides: "contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time, becomes void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible." The court ruled that the non happening of the contingent event would relieve the parties from promise and the contract would become unenforceable.

Performance of joint promises

The defendants and the deceased guarantor in *Karnail Singh Randhawa* v. *Jagir Kaur & Ors.*[59] had jointly promised the bank to repay the loan advanced to the defendants. Consequently, the deceased had also mortgaged his land in favour of the bank as a security in his capacity as a guarantor. Since he had co-extensive liability, the bank secured a decree against the deceased along with the defendants and thereafter compelled the deceased's successor in interest to pay the debt. On the basis of these facts, the court held that the guarantor including his successor in interest would be entitled to recover the same from the defendants (principal debtors) in view of the explanation appended to section 43 of the Contract Act.[60]

55 S. 29 of the Contract Act.
56 AIR 2008 SC 1343.
57 *Id.* at 1360.
58 AIR 2008 (NOC) 1622 (P&H).
59 AIR 2008 (NOC) 975 (P&H).
60 The Explanation states: Nothing in this section shall prevent a surety from recovering, from his principal, payment made by the surety on behalf of the principal, or entitle the principal to recover any thing from the surety on account of payments made by the principal.

Performance of reciprocal promise

The owner of the vehicle in *Manager United India Insurance Co. Ltd.* v. *Abbisetti Venkatarao*[61] issued a cheque towards premium for the insurance policy of the vehicle which bounced and no amount was paid towards the premium at any time subsequently. The vehicle met with an accident and it was contended by the insurance company that there was no valid insurance cover at the time of the accident.

The court held that it is an admitted fact that the insurance company has failed to intimate the owner of the vehicle that his cheque paid towards premium has bounced and his insurance policy stands cancelled due to the non payment of premium. This lapse was so crucial in the estimation of the court that it turned scales in favour of the insured. The court distinguished the present case from the decision of the apex court in *National Insurance Company Ltd* v. *Seema Malhotra and Ors*.[62] in which the insurance company had returned the dishonoured cheque to the insured with an intimation that his policy had lapsed due to the non payment of premium. The court, however, relied on the decision of the division bench in *M. Nageswara Rao* v. *New India Assurance Company and others,*[63] wherein it was held that in view of the provisions covered by sections 147 (5) and 149 (1) of the MV Act, the insurance company could not be exempted from liability when the procedure contemplated by the law was not followed by giving an opportunity to the owner of the vehicle to make good the loss sustained by the drawee and when the insurance company failed to produce any evidence that the notices were served on the insured *to the effect that the cheque had not been honoured by the concerned bank and the insurance policy stood lapsed*.[64]

Time as an essence of a contract

The parties to a contract sometimes specify the time for its performance and it is expected that they will stick to the time stipulated in the contract. But if any one of them fails to do so, the question arises what is the effect of this breach on the contract. Will contract survive? Or will it render the contract voidable at the option of the promisee as contemplated under section 55 of the Contract Act. The Supreme Court had to answer this crucial question in *Balasaheb Dayandeo Naik* v. *Appasaheb Dattatraya Pawar.*[65] In this case the defendant had entered into an agreement for the sale of his land in 1985 for Rs. 85000 per acre. The agreement was reduced to writing and according to the terms of the contract, the sale deed was to be executed by the defendant within a period of six months. It was agreed that the possession of the land will be delivered at the time of execution of the sale deed. An amount of Rs.20,000 was paid by the plaintiff to the defendant as

61 AIR 2008 AP 8.
62 AIR 2001 SC 1197.
63 2004 (3) ACJ 1554.
64 Empasis added.
65 AIR 2008 SC 1205.

earnest money. It was contended by the defendant that the plaintiff had failed to perform his part of promise within the prescribed period of six months which was an essence of the contract. This crucial question was already debated before a number of cases.[66] In line with these decisions, the apex court held that mere fixation of time within which a contract is to be performed does not make this stipulation an essence of contract. The court quoted with approval a number of decisions[67] in which it was held that there is a presumption that time is not an essence in case of contract of the sale of immovable property. Even where parties have expressly provided that time is an essence of contract, such a stipulation will have to be read along with other provisions of the contract. It is submitted that this presumption that time is not an essence of contract relating to sale of an immovable property was evolved by the courts in times when prices were stable and inflation was unknown.[68] The real estate business is being carried on by trained executives on large scale commercial lines in which huge money is being invested after taking loans from financial institutions. This business will not flourish on uncertain terms. Needless to mention here that businesses are not in the habit of placing upon their contracts stipulations to which they do not attach some importance and value.[69] The court should take into account factors like nature of the property agreed to be sold, the possibility of price fluctuation, the need for executing this contract, conduct of the parties before, at the time of, and subsequent to the contract and other surrounding circumstances before arriving at the conclusion whether or not time is the essence of the contract of sale of immovable property.[70]

A new dimension was added by the AP High Court in *Shaik Mahaboob Saheb* v. *Kampasati Nageswara Rao*[71] to this debate of 'time as an essence of the contract of sale of immovable property.' It was opined that when the contracting parties have prescribed any time limit within which the contract has to be performed, the said time limit may not amount to making time as the essence of the contract, yet it must have some meaning. It cannot be said that the prescribed time limit is without any consequences. The court asked:

66 See for instance; *Swarnam Ramachandran & Anr*. v. *Aravacode Chakungai Jayapalan*, (2008) 8 SC 689; *Chand Rani* v. *Kamal Rani* (1993) 1 SSC 519; *Indira Kaur (Smt.)* v. *Sheo Lal Kapoor* (1988) 2 SCC 488; *Govind Prasad Chaturvedi* v. *Hari Dutt Shastri,* AIR 1977 SC 1005.

67 *Ibid*.

68 The Supreme Court in *K.S. Vidyanadam* v. *Vairavan*, (1997) 3 SCC 1 went to the extent of saying that "indeed we are inclined to think that the rigor of the rule that time is not of the essence of the contract of sale of immovable properties was evolved by the court in times when prices and values were stable and inflation was unknown. This rule requires to be relaxed if not modified particularly in case of urban immovable properties. It is high time, we do so".

69 Lord Cairns in *Bowes* v. *Shand,* (1877) 2 AC 455.

70 These factors were taken into consideration by the Kerala High Court in *Kachappu* v. *Somasundaram Chettiar,* (1991) 1 Ker LJ 525 and reached to the conclusion that time in the instant case is of essence to the contract of sale of immovable property.

71 AIR 2008 AP 55.

Can it be stated as a rule of law or a rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non existent? The court rightly held that all this means that while exercising its direction, the court should also bear in mind that when the parties prescribe certain time limit, it must have some significance and that the said time limit cannot be ignored altogether on the ground that time has not been made the essence of the contract relating to immovable properties. The court also questioned the latitude given by the other courts in the matter of seeking remedies where time is not the essence of the contract. In the opinion of the court, it would depend upon the purpose for, and the circumstances under which the transaction came into existence.[72] The court rightly advocated that time has come to ignore the age old presumption that time is not an essence in case of the contract of sale of immovable property and decide each case on its merits.

Similarly, in *Pundi Govindarajan* v. *Subas Chandra Sahu,*[73] a date was fixed for the execution of a sale deed and it was expressly mentioned that if vendee fails to obtain sale deed within the prescribed time, the agreement to sell shall stand cancelled. The court held that the stipulated time is an essence of the contract and vendee is not entitled to the specific performance of the contract.[74] The Bombay High Court went a step ahead in *Kamla Pribhadas Nebhnani* v. *Haren Krishanakumar Mehta*[75] and held that even if it is not expressly stipulated in the agreement, parties can either expressly or by conduct make time as an essence of the contract. In *Karnataka Electricity Board* v. *M.S. Angadi*[76] a contractor had undertaken to complete the construction work within four months from the date of agreement. He failed to do so and plaintiff-corporation was compelled to call for fresh tenders. The court read in the agreement time as an essence of the contract and asked the contractor to pay excess amount which the corporation was compelled to pay to the second contractor for completing the work including the interest @ 6% p.a. However, in *V. Purushothaman & Ors.* v. *Kuppusamy,*[77] a sale deed was to be executed within the stipulated date. The date for performance of the contract was extended by both the parties from time to time. The court held that the time was not an essence of the contract.

Frustration of contract

A bare reading of section 56 makes it clear that an agreement to do an act impossible in itself is void and equally a contract becomes void which

72 *Id.* at 58.
73 AIR 2008 (NOC) 813 (AP).
74 For similar opinion see, *A Gunasekaran* v. *K. Damayanthi*, AIR 2008 (NOC) 2533 (Mad).
75 AIR 2008 (NOC) 2647 (Bom).
76 AIR 2008 Kar 55.
77 AIR 2008 (NOC) 1280 (Mad).

was possible to perform at the time it was executed but because of the subsequent events, not in the control of the promisor, its performance becomes impossible or unlawful. The obligation to perform the contract under such circumstances stands discharged.[78]

In *Alluri Narayana Murthy Raju* v. *Distt. Collector, Visakhapatnam Distt. & Ors.*[79] the petitioner was granted lease hold rights for one year to quarry the sand in Gostani river in Maddi Gram Panchayat, Visakhapatnam District, after emerging highest bidder at an auction. The residents of the village prevented him from mining sand on the ground that it will lead to depletion of the ground water that will affect the irrigation channels. Consequently, lease period was extended by one more year. Despite police protection given to the miners, promulgation of section 144 Cr PC in the mining area, injunction by the civil court and criminal complaint against the protestors, resistance of the villagers continued. He, therefore, filed this present petition for the refund of bid amount of Rs 8,35,000 by pleading doctrine of frustration as provided in section 56 of the Contract Act.

The court held that section 56 exhaustively deals with the doctrine of frustration. It contains three limbs. The first limb declares that an agreement to do an act impossible in itself is void. The second limb renders the contract void on account of subsequent events, which the promisor could not prevent, rendering performance of the contract either impossible or unlawful. The third limb fastens the liability of payment of compensation on the promisor for the loss suffered by the promisee on account of non performance of an act, if the promisor knew or with reasonable diligence he might have known, and which the promisee did not know, that the performance of the contract would be impossible or unlawful.

The court, without deliberating on the controversy[80] whether section 56 would apply to lease agreement or not, laid down that the conclusion is inevitable that on account of the events that have taken place subsequent to the entering into the contract, which were beyond the control and contemplation of the parties to the contract, performance of the contract had become impossible. Therefore, the second limb of section 56 was squarely attracted to this case and thus the doctrine of frustration envisaged by the said provision applied an all fours to the contract entered into by the petitioner. Thus, the respondents were ordered to refund Rs. 8,35,000, which was the consideration paid by the petitioner.[81]

78 *R.V.R. Estate & Construction Ltd* v. *United Commercial Bank,* AIR 2008 Gau 38.

79 AIR 2008 AP 264.

80 See for instance, *Raja Dhruv Dev Chand* v. *Raja Harmohinder Singh*, AIR 1968 SC 1024, where the Supreme Court held that authorities in the courts in India have generally taken the stand that s. 56 of the Contract Act is not applicable when the rights and obligations arise under a transfer of property under a lease. See also, *Abdul Hashem* v. *Balahari Mondal,* AIR 1952 Cal 380; *Tarabhai Jivanlal* v. *Padamchand,* AIR 1950 Bom 89; *Alanduraippa Koil Chithakaddu* v. *T.S.A. Hamid,* AIR 1963 Mad 194 and *Sri Amuruvi Perumal Devaasthanam* v. *Sebapathi Pillai,* AIR 1962 Mad 132.

81 *Supra* note 79 at 268.

Novation

Novation is an agreement between the parties to substitute the existing contract with a new contract. Obviously, the substituted contract must have all the trappings of a valid contract including free consent of both the parties. In *DDA. & Anr.* v. *Joint Action Committee, Allottee of SFS Flats & Ors.*[82] the Supreme Court held that it is a well known principle of law that a person would be bound by the terms of the contract subject of course to its validity. A contract in certain situations may also be avoided. The terms and conditions of the contract can indisputably be altered or modified. They cannot, however, be done unilaterally unless there exists any provision either in contract itself or in law. Novation of contract must precede the contract making process. The parties thereto must be *ad idem* so far as the terms and conditions are concerned. With a view to make novation of a contract binding and in particular some of the terms and conditions thereof, the offeree must be made known thereabout. It is obligatory on the part of offeror to bring the same to the notice of the opposite party. A party to a contract cannot at the later stage, while the contract was being performed, impose terms or add conditions which were not part of the offer.[83] In similar vein, the AP High Court in *Ayodhya Prasad.*v. *Phulesara Bhagwan Das*[84] concurred with the earlier rulings[85] that one of the essential requirements of novation as contemplated by section 62 is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of new contract in place of the old would have the effect of rescinding or completely altering the terms of the original contract. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are so inconsistent that they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract

In *Subash Chand Jain & Ors.*v. *Haryana Financial Corporation & Ors.*[86] it was laid down that novation is of two kinds (a) change of parties, and (b) substitution of a new contract in place of the old one. In the instant case, the petitioners had guaranteed repayment of huge loan under a continuing guarantee. The principal debtor had afterwards rescheduled repayment of the loan with creditor without taking petitioners into confidence. The court held that rescheduling of loan and extending the period for its repayment had resulted in the benefit of the petitioners. Therefore, it cannot constitute the basis to conclude that there is a novation of contract of such a nature as to discharge the petitioners.

82 AIR 2008 SC 1343.
83 *Id.* at 1357.
84 AIR 2008 All 169.
85 See for instance, *Late Construction and ors* v. *Dr. Rameshcanndra Ramnik shah and ors*, AIR 2000 SC 380.
86 AIR 2008 P&H 99.

Accord and satisfaction

The accord is an agreement made after some breach whereby some consideration other than his legal remedy is to be accepted by the party not in fault followed by performance of the substituted consideration.[87] In *M/s A.K. Construction Banda* v. *UP Power Corporation Ltd Lucknow & Anr.*[88] a dispute arose on works contract. The contractor received an amount which was acknowledged by a receipt in writing and also received subsequently as security amount. However, he contended that this amount was received by him for the work which he had completed and claimed compensation for not being allowed to complete the remaining work which resulted in his loss. The court held that this is a case of accord and satisfaction because nothing prevented the contractor from saying that he had received payment in part satisfaction only for the work which he had completed and is reserving his claim for compensation. He received the amount without any murmur and cannot afterwards come to the court for claiming the balance amount.

Restitution

In *Chhanga Lal and etc.* v *MCD and Anr.*[89] it was held that in case of voidable contracts a party rescinding the contract must restore the benefit received under this contract to the opposite party in terms of section 64. This is, however, subject to the principle of *restitutio integrum*. The intention is that *status quo ante* should be restored. It is in this context that the legislature has been careful to use the words "restore as far as may be" in section 64 of the Contract Act. It clarifies that a person rescinding the contract is bound to return the benefit he has received under the contract and is entitled to set off damages suffered at the hands of the opposite party.

The court ruled further that doctrine of *pari delicto* is not applicable where the opposite part has made fraudulent misrepresentation. This doctrine applies to immoral or illegal contracts and is based upon the principle that no court will lend its aid and entertain action founded upon an immoral or illegal act that forms basis of a cause of action. Courts do not assist a plaintiff who is guilty of having entered into an immoral or illegal agreement with a third party. In such cases, sometimes right to restitution is not granted on the ground that the court will not help *particeps criminis* and could reject the claim on the line of principle *"let estate lie where it lies"*.[90]

Quasi contracts

In *State of Tamil Nadu & Anr.* v. *T.R. Surendranath*[91] a contract for the construction of roads was executed for which earnest money and additional

87 *Union of India* v. *Kishori Lal Gupta*, AIR 1953 Cal 642.
88 AIR 2008 All 117.
89 *Supra* note 36 at 152; see also *RKRK Khandelwal* v. *State of MP & Ors,* AIR 2008 (NOC) 971 (MP).
90 *Id*. at 153.
91 AIR 2008 (NOC) 974 (Mad); see for similar opinion; *R Sing Wadhwa* v. *State of MP & Ors,* AIR 2008 (NOC) 682 (MP).

security was deposited by the tenderer. The tenderer committed default that did not, however, entail any loss to the high way authority. The court ruled that the high way authority is liable to return earnest money and additional security under quasi contracts. It cannot retain this amount with safe conscience. That would amount to unjust enrichment. The MP High Court held in *State Bank of India* v. *M/s. Jagdish Talkies*.[92] that where the respondent had opened a saving bank account in the petitioner's bank and interest amount was credited in his account according to the routine bank practice applied to all the saving bank accounts, it cannot be said to be payment by mistake so as to justify invocation of section 72.

Damages for breach of contract

A substantial question of law came up for consideration in *Kamil* v. *Central Dairy Farm*.[93] The question was whether the amount of security deposited by the plaintiff-appellant for due performance of the contract is liable to be forfeited on the mere allegation of breach of contract without respondent establishing that he had suffered actual loss or damage? The court rightly pointed out that in order to appreciate the above substantial question of law, it is first necessary to consider the provisions of sections 73 and 74 together and not separately as they provide for the consequence of breach of contract. The general principle which is embodied in section 73 of the Act is that whenever there is a breach of contract, the party who suffers by such a breach is entitled to recover the loss or damage caused to him from the other party. However, the recovery of any such loss or damage cannot be made unless the party claiming has actually suffered the loss or damage and the same has been quantified.

The following principles were culled out from section 74: (a) the party complaining of breach of contract must prove that he has sustained loss or damage due to breach of the contract; (b) only reasonable sum can be awarded as compensation for the loss or damage so sustained; (c) whatever may be the actual quantum of loss or damage sustained, the compensation cannot exceed the sum named in the contract; (d) the court has a power to dispense with the proof of damage or loss so suffered; and (e) it is always open to the other party to show that no loss was actually suffered.

The court concluded that "even in those cases where the damages or penalty is named in the contract or is provided by the forfeiture clause, the proof of actual amount of loss or damage may be dispensed with, nonetheless sufferance of loss or damage due to such breach of contract is *sine qua non* for claiming damages or for forfeiture of the security amount." A person is entitled to compensation in terms of money only if he has actually suffered damage or loss on account of breach of contract by the other party and not

92 *Supra* note 39.
93 AIR 2008 All 33.

otherwise.[94] It is pertinent to mention here that this observation of the court is in consonance with a long line of authorities on this point.[95] The Delhi High Court went a step ahead in *Indian Oil Corporation* v. *M/s Lloyds Steel Industries Ltd.*[96] by holding that if liquidated damages are awarded to a party who has not suffered any loss, it would amount to 'unjust enrichment. One would like to ask: why should not a complaining party be entitled to compensation for breach of promise made by the opposite party even if loss or damage has not been suffered on account of such breach? After all, a party to a contract has undertaken an obligation to fulfil it and not to commit breach of it. It is in recognition of the right of the complaining party to have his contract being performed and for the fault of the opposite party not to honour his own promise that a compensation, even though nominal, be awarded. Contract must not be the sports of an idle hour, mere matters of pleasantry, and badinage, never intended by the parties to have any serious effect whatsoever.[97]

In *Cheprolu Jaganmohana Rao* v. *Bhavanarayana Swamy*[98] the plaintiff conducted auction for the sale of paddy. The defendant emerged as the highest bidder and his bid was accepted. However, he failed to pay balance price and also did not lift bags of paddy. The plaintiff had to resell these paddy bags at lower price and suffered loss. This loss was directly attributed to breach of contract. The court held that the plaintiff was, therefore, entitled to recover actual loss with interest at reasonable rate of 12% per annum. Similarly, in *Bombay Cricket Association* v. *Selvel Publicity and Consultant Pvt. Ltd.*[99] the plaintiff invited tenders for sole advertising rights for cricket match and defendant's offer was accepted. Subsequently, defendant withdrew from the contract without assigning any reason which resulted in financial loss to the plaintiff. A copy of the auditor's report and other documents were produced by the plaintiff to prove the loss. The court awarded decree to the plaintiff with interest. Existence of a written contract is not necessary for claiming damages.[100] In *State of Kerala & Anr.* v. *T.E. Mohammed Kunju*[101] there was delay in completing the work within the stipulated time which was caused due to delay in the handing over of site and

94 *Id*. at 35-36. See for similar opinion, *HPMC* v. *M/s Khemka Containers (p) Ltd.,* AIR 2008 (NOC) 399 (HP). The court did not allow forfeiture of earnest money on account of breach of contract in absence of proof of damage.

95 *Fateh Chand* v. *Balkishnan Dass,* AIR 1963 SC 1405; *Maula Bux* v. *Union of India,* AIR 1970 SC 1955; *Union of India* v. *Rampur Distillery and Chemical Company Ltd,* AIR 1973 SC 1093.

96 AIR 2008 (NOC) 866 (Del).

97 See Lord Stowell in *Darlymple* v. *Darlymple*, (1811) 161 ER 656.

98 AIR 2008 (NOC) 112 (AP).

99 AIR 2008 (NOC) 113 (Bom).

100 *M/s New Media Broadcastin (Pvt.) ltd. & Anr. etc*. v. *Union of India,*. AIR 2008 (NOC) 967 (Del).

101 AIR 2008 (NOC) 2008 (Ker) .

various other obligations required to be performed as per contract. The contractor had well in advance informed the opposite party that escalation charges have to be paid. The work of the contractor was accepted in spite of delay. The court held that the contractor was entitled to damages.

In *Pawanputra Commotrade Pvt Ltd*. v. *Official Liquidator, High Court, Calcutta & Anr.*[102] auction sale of company's assets was conducted by the official liquidator. The highest bidder could not deposit balance amount within the stipulated time and thus sale could not be finalized in his favour. In pursuance of the order of the company judge, the second successful bidder, who had deposited Rs. 10 lakhs, automatically stepped into the shoes of the first bidder. The court held that once the second successful bidder accepted the offer and deposited money, contract between him and the official liquidator stood concluded. He was equally bound to comply with the terms and conditions of sale and to deposit balance earnest money within the stipulated time. He could not afterwards contend that forfeiture clause could not operate because the contract in question had not been concluded. Having deposited only Rs. 10 lakhs, against the bid amount of Rs. 3.5 crores, invocation of forfeiture clause could not be challenged as oppressive or onerous.[103] Similarly, in *State of Bihar & Ors* v. *Bhawani Industries Ltd.,*[104] the contractor failed to supply steel within the stipulated time due to price rise. He was given more time by the concerned department but he adopted dilly dallying tactics in execution of agreement by raising non contentious issues. The contractor was blacklisted and his earnest money was forfeited. This order was upheld by the court as being proper.

The Delhi High Court in *Indian Oil Corporation* v. *M/s Lloyds Steel Industries Ltd.*[105] held that section 74 does not confer a special benefit on any party to the contract. Where there is a clause for liquidated damages, the court will award to an aggrieved party only reasonable compensation which would not exceed the amount of liquidated damages stipulated in the contract. In *H.P. State Forest Corporation Ltd. & Anr*. v. *Sita Ram*[106] the respondent had undertaken to transport timber, some of which was then washed away in the flood. It was held that the loss was caused by the natural calamity and there was no clause in the agreement fastening liability on the contractor in case of such eventuality.

102 AIR 2008 (NOC) 398 (Cal).

103 Similarly in *Jaipur Development Authority, Jaipur* v. *M/s. Anokhi Builders Pvt. Ltd*. AIR 2008 (NOC)1740 (Raj), the court held that contract had come into existence when the highest bid of the builder for the construction of plots for commercial complex had been accepted. The argument of the builder that a contract has not been concluded is untenable and invocation of forfeiture clause is proper as the builder had committed breach of the terms of the contract.

104 AIR 2008 Pat 121.

105 *Supra* note 96.

106 AIR 2008 (NOC) 1503 (HP). See also *H.P. State Electricity Board* v. *M/s Ansal Properties & Industries Ltd.*, AIR 2008 (NOC) 2773 (HP).

In *HP Housing Board* v. *M/s Rajive Brothers*[107] it was held that the suit for compensation filed within three years from the date of rescission of contract was not barred by time.

Contract of insurance

The Supreme Court reiterated the already established position in *P.J. Chacko* v. *Chairman, Life Insurance Corporation of India*[108] that contracts of insurance are contracts of *uberrima fides*. Every fact of materiality must be disclosed otherwise there is a good ground for rescission of the contract of insurance. This duty to disclose continues up to the conclusion of the contract and covers any material alteration in the character of the risk between proposal and acceptance. The court further held that a deliberate wrong answer which has a great bearing on the contract of insurance, if discovered, may lead to the policy being vitiated in law. The purpose of taking a policy of insurance is not very material. It may serve the purpose of social security but then the same should not be obtained with a fraudulent act by the insured. The proposal can be repudiated if a fraudulent act is discovered. The proposer must show that his intention was *bona fide*. It must appear from the face of the record.[109]

The apex court reconfirmed its earlier long held stand that the Life Insurance Corporation is a state within the meaning of article 12 of the Constitution of India. Its action must be fair, just and equitable but the same would not mean that it shall be asked to make a charity of public money.[110]

Bank guarantee

An unconditional on demand guarantee was executed in *Bank of India* v. *Nangia Construction (India) Pvt. Ltd & Ors*[111] which was invoked within the validity period but the bank tried to find excuses for refusing payment. The Supreme Court came down heavily on the bank and observed that it was unfortunate that a nationalized bank was finding excuses for refusing to make the payment on totally untenable and frivolous grounds. The entire trust, faith and confidence of people depend on the conduct and credibility of the nationalized banks. In the present day world, the national and commercial transactions largely depend upon the bank guarantees. In case the banks are permitted to dishonour their commitments by adopting subterfuges, the entire commercial and business transactions will come to a grinding halt.[112]

In *Global Aviation Services Pvt. Ltd*. v. *Malaysia Airlines Sytem, Berhad & Anr.*[113] a general sales agency agreement was executed between the

107 AIR 2008 (NOC) 1739 (HP).
108 AIR 2008 SC 424.
109 *Id*. at 426.
110 *Id*. at 428.
111 AIR 2008 SC 2906.
112 *Id*. at 2907.
113 AIR 2008 (NOC) 966 (Bom). See also *Rashtriya Ispat Nigam Limited* v. *M/s Jayathilal and Company Pvt. Ltd. & Anr.,* AIR 2008 (NOC) 109 (AP).

parties and a bank guarantee was furnished by the petitioner which covered all credits and any other sum that was due and payable under agreement. There was a dispute between the parties and respondent invoked the bank guarantee. The appellant contended that this invocation was not in tune with the terms of the agreement. The court held that a dispute in regard to interpretation of underlying contract cannot furnish a ground for restraining invocation of guarantee. In the absence of any material to establish fraud, or irretrievable injustice or special equities, invocation of guarantee is not improper.

The effect of possible fraud on unconditional bank guarantee was expounded in *National Project Constructions Corporation Ltd*. v. *Water Resources Department, Gwalior & Ors.*[114] The court held that a fraud in connection with unconditional bank guarantee would vitiate the very foundation of such a bank guarantee. The fraud should be of an 'egregious nature as to vitiate the entire underlying transaction.' The second situation relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. The harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee.[115]

In *State Bank of India, New Delhi* v. *Jaipur Vidut Vitran Nigam, Jaipur*[116] a performance guarantee was executed which imposed absolute obligation on banker to pay, irrespective of any dispute which may arise between the parties on a question whether a party had fulfilled his part of the contract or not. The court ruled that the performance guarantee was unconditional and absolute in character. The contention that unless the contractor had committed breach of the contract, bank was not entitled to invoke the said guarantee, or that bank was required to prove damages before invoking said guarantee, was not tenable.

The Gujarat High Court in *Jivanlal Joitaram Patel* v. *National Highways Authorities of India and Ors*[117] has laid down that when the bank guarantee has been given pursuant to a particular contract, it is not open to the respondents to encash it against the alleged breach and non compliance of the conditions of a different contract.

The jurisdictional issue relating to bank guarantees was resolved by the Rajasthan High Court in *State Bank of India, New Delhi* v. *Jaipur Vidut Vitran Nigam, Jaipur.*[118] In this case, the bank guarantee was executed by Delhi branch of plaintiff-bank. The bank had its branch at Jaipur. It was held

114 AIR 2008 (NOC) 5 (M.P.); See *also M/s Trafalgar House Construction* v. *State of Orissa & Ors.*, AIR 2008 (NOC) 118 (Ori).
115 *IND Synergy Ltd*. v. *Bharat Heavy Electricals Ltd & Ans.,* AIR 2008 (NOC) 965 (Bom).
116 AIR 2008 (NOC) 1282 (Raj).
117 AIR 2008 Guj 181.
118 *Supra* note 116.

that a part of the cause of action in terms of clause in bank guarantee has arisen within the territorial jurisdiction of the court at Jaipur, which could exercise jurisdiction to decide the suit.

Liability of surety

The liability of surety is coextensive with that of principal debtor. This statutory position was restated by the Supreme Court in *Karnataka State Financial Corporation* v. *N. Narasimhaiah.*[119] The court held that the liability of a surety is made co extensive with that of principal debtor by virtue of section 128 of the Contract Act. The rights and liabilities of a surety and the principal borrower are otherwise different and distinct.

The AP High Court in *M/s Kurnool Chief Funds (P) Ltd* v. *P. Narasimha & Ors*[120] held that a surety is a person who comes forward to pay the amount in case the borrower fails to pay the same unless it is held by the competent court through a decree that he is not liable to pay the amount due to the creditor. In the event of a decree in favour of the creditor against the principal borrower, the wings of the decree can be extended against the sureties as their liability is co-extensive with the principal debtor. When once there is a decree, the creditor is at liberty to proceed either against the principal borrower or sureties.[121]

Referring to the instant case, the court held that the suit against the principal debtor was dismissed for default and the decision became final. There was no liability surviving against the debtor for realization of the amount due to the creditor. Once the liability of principal debtor is extinguished, the sureties' liability gets automatically terminated. Therefore, without making the principal debtor liable for payment of amount to the creditor, the sureties cannot be made liable for recovery of the amount. The position will be different where the suit is decreed against the principal debtor. It will be open for the decree holder to go against any one of them irrespective of the fact whether he is a principal debtor or a surety.[122]

Continuing guarantee

The Supreme Court was called in *Sit Ram Gupta* v. *Punjab National Bank*[123] to determine the scope of continuing guarantee in relation to an agreement executed between the parties. The appellant had guaranteed a loan to the respondent bank under an agreement the operative part of which read as: "the guarantors hereby declare that this guarantee shall be a continuing guarantee and shall not be considered or in any way affected by the fact that at any time the said accounts may show no liability against the borrower or may show any credit in his favour but shall continue to be a guarantor and

119 AIR 2008 SC 1797.
120 AIR 2008 AP 38.
121 *Id.* at 41.
122 *Ibid*.
123 AIR 2008 SC 2416.

remain in operation in respect of all subsequent transactions." The appellant had subsequently revoked this guarantee by writing a letter to the manager of the bank but even then loan was sanctioned to the defendant. The contention of the appellant in the instant case was that he had revoked his continuing guarantee well in advance and is entitled to the benefit of section 130. This section provides: 'a continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor'. The apex court heavily relied on the above clause in the agreement and observed that there cannot be any dispute that the appellant had clearly agreed that the guarantee shall be a continuing one and shall not be considered as cancelled or in any way affected by the fact that at any time the said accounts may show no liability against the borrower or may show even credit in his favour. This was an agreement which in the opinion of the court was binding on the appellant. The apex court opined that now question arises whether the statutory provision under section 130 of the Contract Act shall override the agreement of guarantee. The court gave a totally new turn to the facts in question and held that "in our view, the agreement cannot be said to be unlawful nor the parties have, either before the trial court or the high court, alleged that it was unlawful. The agreement of guarantee entered into by the appellant with the bank was lawful.... It is not now open to the appellant to turn around and say that he has successfully revoked the continuing guarantee and is entitled to the benefit of section 130." The court ruled that in view of the nature of guarantee entered into by the appellant with the bank, the statutory provision under section 130 of the Act shall not come to his help.[124] It is submitted that section 130 is absolute in this sense that it does not use the common expression like "save as otherwise agreed to between the parties, or subject to contract to the contrary". The language of section 130 is plain and brooks no ambiguity. It makes amply clear that continuing guarantee as to future transactions can be revoked by giving notice of revocation to the creditor, *irrespective of the nature of the agreement executed by the surety with the creditor.*[125] The crucial question in the instant case was: whether the appellant had revoked his contract well before the loan was sanctioned or not? The appellant had revoked his guarantee well in advance which was not refuted by the opposite party. It was the responsibility of the sanctioning bank to ask the principal debtor to arrange new guarantor or to persuade the appellant to withdraw his revocation letter which they failed. The fault of the respondent should not have become the liability of the appellant.

Banker's lien

The J&K High Court explained the scope of banker's lien in *J&K Bank Limited* v. *Abdul Samad Chaloo.*[126] In this case, respondent had an account

124 *Id.* at 2418.

125 Emphasis added.

126 AIR 2008 J&K 1. For a diametrically opposite view see *Kottayam District Coperative Bank Ltd. Kottayam* v. *P.S. Mohanan Nair & Ors,* AIR 2008 (NOC) 1504 (Ker).

in the J& K Bank, Amira Kadal branch. He was a partner of a firm which was operating in Anantnag. This firm had an account in the same bank in Anantnag. The firm defaulted and the bank exercised a lien against the personal account of the respondent in Amira Kadal branch. The crucial question for judicial determination was whether the appellant bank could create a lien and adjust the outstanding amount of the firm against the amount in the personal account of the respondent? The court held that section 171 of the Contract Act provides for banker's general lien. The banker can look to his general lien as a protection against loss of loan. The deposits and securities are species of goods over which lien may be exercised.[127]

Pledge

Pledge is a special kind of bailment where the object of the delivery of goods is to provide security for a loan or for fulfilment of an obligation. In *Smt. Kamili Sarojini* v. *Indian Bank, Avanigadda Branch*[128] a lady sought to repay the loan amount for releasing her ornaments pledged with the bank by her deceased husband as a security for gold loan. The bank demanded probate of will before permitting her to repay the loan. The court held that when son and daughter had not raised any objection to the will, it was not proper on the part of the bank to insist on probate of will or succession certificate.

The counter effect of section 176 was highlighted in the *Bank of Baroda* v. *M/s Nainital Seeds Corporation & Ors.*[129] The defendant bank (pawnee), after taking over the unit of defendants (pawnors), had not taken care to protect the pledged goods, i.e. wheat seeds and paddy seeds etc. The certified seeds had lost their value and the bank sold them without prior information to pawnors. The court ruled that in these circumstances the bank cannot obtain a decree for the recovery of debt because the bank was not able to redeliver the pledged goods to the debtor. Similarly, in *Smt. Gunvanti & Anr.* v. *Mool Chand,*[130] a loan was advanced by pledging gold ornaments to a goldsmith. The pawnor had failed to repay the loan amount and the suit for recovery of debt was filed by the pawnee. He was asked by the court to produce the ornaments which he did. The pawnor refused to accept these ornaments on the ground that they are fake and did not belong to her. The pawnee contended that he did not satisfy himself about the correctness of the gold.The court held that the plea of pawnee is unbelievable. It was further held that there is another ground to doubt the veracity of the statement of the pawnee that even after the lapse of so many years, when the price of gold has increased manifold, he did not seek relief of sale of goods. Obviously, he must be knowing that the ornaments which he has produced in the court are not of gold. On these facts, the court ruled that where a pawnee files a suit

127 *Id.* at 1.
128 AIR 2008 AP 71.
129 AIR 2008 Utr 19.
130 AIR 2008 (NOC) 683 (Raj).

for recovery of debt, though he is entitled to retain the goods, he is bound to return them on payment of the debt. Where he has himself put in a position where he is not able to redeliver the goods, he cannot obtain a decree.

In *State Bank of Travancore* v. *Commercial Tax officer, Trivandrum & Anr*[131] the court held that a bank is within its rights under section 176 of the Contract Act to sell gold ornaments, which were pledged to it, at a public auction. This would amount to realization of security by pledgee bank.

Agency

An agent is a person employed to do any act for another, or to represent another in dealing with third person.[132] In *K.N. Agrawal* v. *M/s. M.R. Portfolio Services & Anr.*[133] it was laid down that the act done by an agent on behalf of the principal, which is within the actual authority of the agent, binds the principal. Motive of the agent is immaterial.

In *Mrs Niloufer Siddiqui* v. *Indian Oil Corporation*[134] respondent offered dealership of Indane gas to the petitioner subject to some conditions which included that the allotment would be governed by the company's standard agreement which was to be provided by the company. The dealership was given to the petitioner but the standard agreement was never sent to her. The company terminated agency on the ground that terms of this standard agreement were violated. The court held that terms and conditions of standard agreement have not formed the basis of the contract in the instant case. The question of violation of its terms and conditions did not arise. The termination of agency on the ground of violation of standard agreement was declared improper. Similarly, in *R Sandhyarani* v. *M Mylarappa*[135] principal died after executing power of attorney in favour of agent. The time period of this power of attorney came to an end. The court held that the agent had no right to sell or bequeath property as per the terms of power of attorney which had already expired. The registered sale deed executed according to the terms of the power of attorney without any valid title over property is not valid. Against this, in *Smt. Ram Asri* v. *Rakesh Chand & Ors*[136] the property was sold by the agent holding registered power of attorney. The sale was effected with delivery of possession which was never challenged by the principal (owner) during his life time. The vendees had also no notice of cancellation of power of attorney. Invoking section 208 of the Contract Act, the court held that the termination of an agent's authority is not to take place unless communicated to him and will not affect third party's rights unless it becomes known to him. It was, therefore, obligatory for the plaintiff to have established not only that the agent had the knowledge of cancellation of the general power of attorney but also the vendees had that knowledge.

131 AIR 2008 (NOC) 1209 (Ker).
132 S. 182, Contract Act.
133 AIR 2008 (NOC) 1188 (MP).
134 AIR 2008 Pat 5.
135 AIR 2008 (NOC) 114 (Kar).
136 AIR 2008 P&H 194).

The court gave full effect to the irrevocable power of attorney in *Shanti Budhiya Vesta Patel & Ors* v. *Nirmala Jayprakash Tiwari & Ors.*[137] It was found that the owner had executed a registered irrevocable power of attorney in favour of the developer of the land, authorizing him to sell, transfer, raise money, compromise, and settle any dispute regarding the property in question. These rights were granted to the developer on payment of consideration. After the death of the owner of the land, his legal heirs also executed irrevocable power of attorney in favour of the developer. The court held that this power of attorney was valid and binding.

In *Jetair Pvt. Ltd* v. *Makers and Sellers Union & Anr*[138] the personal liability of the agent was to be determined. It was held that in the absence of any contract to that effect an agent cannot be personally sued under section 230 of the Contract Act. The agent was only selling, regulating and monitoring cargo booking for his principal, an international air carrier. The agent delivered goods to consignee/ buyer without collecting original documents from him resulting in loss to the consignor. It was found that the actual carriage and delivery was done by the principal himself and, therefore, the agent could not be held liable.

III SALE OF GOODS

Concept of sale

The sale of pledged goods constitutes a sale under the Sale of Goods Act, 1930. This legal exposition was propounded in the *State Bank of Travancore* v. *Commercial Tax Officer, Trivandrum and Anr.*[139] The bank had sold pledged gold ornaments at a public auction as mandated by the Banking Regulations Act, 1949. The court held that though it amounts to realization of security by pledgee bank, it is nonetheless sale of goods. It involves transfer of general property in goods by pledgee bank to buyer and there is a contract between the bank and the buyer. The bank would, therefore, be seller under the Sale of Goods Act.

The sale involves transfer of property in goods for a price. The Orissa High Court held in *M/s KJSL Utkal (JV)* v. *Mhanadi Coalfields Ltd. & Two Ors*[140] that the payment of price is crucial for determining the nature of transaction but the mode of its payment is immaterial. The mode of payment would include the deferred payment.

Document of title to goods

The railway receipt issued to the consignor of goods is a document of title to goods within the meaning of section 2(4) of the Act. It represents the

137 AIR 2008 (NOC) 1738 (Bom).

138 AIR 2008 (NOC) 669 (NCC). This case was decided by the National Dispute Redressal Commission under the Consumer Protection Act, 1986 by invoking s. 230 of the Contract Act.

139 *Supra* note 131.

140 AIR 2008 (NOC) 410 (Ori).

title to the goods and the goods themselves. With this background, the Rajasthan High Court in *Kailash Chandra Modi* v *Union of India & Anr.*[141] held that where the railway receipt is handed over with an endorsement on payment of price of the goods, then there is an absolute transfer of goods. The consignee or the endorsee of the consignment is entitled to action for delivery of the consignment so also for damages occasioned on account of failure to perform the contract.

Implied warranty

Venkateswar v**.** *Rampratap,*[142] explains the scope of an implied warranty. In this case plaintiff had purchased a stolen vehicle without knowing it or having any doubt about its title. The receipt given by the defendant clearly stated that vehicle in question was his absolute property, free from all encumbrances. Thus there was an implied warranty regarding the title as envisaged under section 14. The purchaser was held entitled to get back his consideration from the defendant.

Performance of contract

In *M/s Om Enterprises* v. *State of Bihar & Ors*[143] the court held that once goods are accepted there is a simultaneous obligation to make payment. It is a well settled law under the Sale of Goods Act that where a party has a right to repudiate the contract and /or right to reject the goods but he does not do so on the delivery of the goods, this amounts to acceptance of goods in terms of section 42 of the Act.

Auction sale

In *Shabbir Ahmad Khan* v. *Central Bank of India, Vijayawada and Anr.*[144] an auction sale of teak lots was organized and the DFO was competent to accept or reject the bid. One of the conditions of auction was that the successful bidder shall immediately, after acceptance of his bid, sign the bid sheet in respect of the lot knocked down in his favour. The court held that in view of the express language used in this contract, signing of bid sheet by the bidder is to be done only after the auctioning authority accepted the bid. Once the bid was knocked down, the auction was announced as closed and bid sheets were signed by the successful bidders, the sales were completed. The DFO was then powerless to retract this step and repudiate the sale for good or bad reasons. The act on the part of the auctioning authority in permitting the highest bidders to sign the bid sheet in respect of the concerned lot amounted to acceptance of their bids. This was the clear effect of the provisions of section 64(2) of the Sale of Goods Act

141 AIR 2008 (NOC) 538 (Raj).
142 AIR 2008 (NOC) 1612 (Raj).
143 AIR 2008 Pat 74.
144 AIR 2008 AP 85.

III PARTNERSHIP

A partnership is a relationship between the partners to share the profit of a firm. The existence of a contract is *sine qua non* for the relationship of the partnership. Such a contract can be either express or implied. The court in *Smt. Usha Gopirathnam & Ors*. v. *Shri P.S. Ranganathan & Ors.*[145] had to interpret a clause in the partnership deed stating that heirs or representatives in interest of dead partner(s) shall be entitled to be partners of the firm. The court held that the words "entitled to" used in the partnership deed could not be construed to mean "in place of the deceased partner". Unless the heir or representative of a deceased partner exercised his option pursuant to the use of expression "entitled to", no inference could be drawn as to existence of partnership, the deceased partner did not automatically become the partner of the firm. The words "entitled to" qua partnership meant continuity.

In *Pabitra Constructin & Co*. v. *UCO Bank & Ors.*[146] a firm was constituted by three partners who opened a joint bank account with a specific instruction to the bank that it should operate on the signature of any two of the partners. The court held that such a condition could not preclude any of the joint account holders from giving fresh instruction to the bank to stop further transaction unless all the three partners operate such account conjointly and if such instruction was given to the bank, it should immediately stop the operation of the account and ask the parties to resolve their disputes among themselves.

Retirement of partner

The mode of retirement of a partner came for discussion in *Smt. Usha Gopirathnam & Ors*. v. *Shri P.S. Ranganathan & Ors.*[147] The letter of retirement was given by one of the partners of the firm to other partner who habitually was in charge of the business of the firm. The letter clearly indicated that he was desirous of retiring from the partnership firm and that his account be settled by assessing his assets and liabilities. He then did not draw any profit from the date of retirement till his death. The court opined that the deceased partner had clearly indicated his intention to retire and subsequent events including non drawal of his share of profit also led to the conclusion that he had retired from the partnership firm.

In *Mrs. Meenakshi Sathish* v. *M/s Southern Petrochemical Industries Corporation Ltd. (SPIC) & Ors*[148] a cheque was issued by the firm that was

145 AIR 2008 (NOC) 2137.

146 AIR 2008 Cal 103.

147 *Supra* note 145.

148 AIR 2008 (NOC) 1518 (Mad). Smilarly, in *Smt. D. Shamantakamani & Anr*. v. *The State of AP. & Ors*, AIR 2008 (NOC) 692 (AP), the court held that where a notice of retirement of a partner has not been published in the official Gazette nor given to the registrar of firms but only published in the local newspaper that will not absolve the retired partner from its liability to third person for dishonour of the cheque.

not honoured. The petitioner pleaded that he had retired from the firm before the disputed cheque was issued. It was found that the petitioner had not given the public notice as is mandated under section 72 of the Partnership Act, 1932. The court observed that the petitioner could not shirk her liability to third parties in view of section 45 of the Act. The petitioner was liable for the acts of reconstituted firm as her retirement was not published in terms of section 72.

Dissolution of firm

The partnership firm once formed cannot live for eternity. It may be dissolved and one of the modes of dissolution is the death of the partner. *Pawan Nandlal Agrawal* v. *Asian Dye Chemicals* [149] explains the resultant consequences of the death of a partner. The court held that the death of the partner results into the death of the firm as well except where there is a contract to the contrary.[150] It is not necessary that the contract must be express. It may be implied and could be spelt out from the subsequent conduct of the partners. In the case on hand, defendants entered into an agreement with the firm after the death of one of the partners. This showed that the firm continued to exist even after the death of one of the partners and defendants also considered it to be a partnership firm. The failure to intimate this change to the registrar of firms did not have the effect of cancellation of the registration of firm. It would merely result in imposition of penalty under section 69 (A).

Effects of non registration of firm

The registration of the partnership firm is not compulsory but the effects of its non registration are so pervasive that it is in the interest of the partners of the firm to have it registered. Section 69(2) bars a suit against a third party if it is for enforcing a right arising from a contract. The bar equally applies both to the suit by the firm as well as on behalf of the firm. Two mandatory requirements which must be fulfilled before such a suit can be filed to enforce contractual right by the firm or on behalf of the firm are that (i) the firm must be registered firm; and (ii) the persons suing are or have been shown in the register of firms as persons of the firm. The ambit of the expression "Persons suing" was discussed in *M/s Sapna Ganglani* v. *M/s R.S. Enterprises*.[151] The court toed the line of a number of already decided cases[152] and held that this expression meant 'all the partners of the firm at the time of the institution of the suit'. In the present case, the cause title of the plaint described the plaintiff as M/s R.S. Enterprises represented by an

149 AIR 2008 (NOC) 804 (Bom).

150 See for similar opinion, *DVD. Monte* v. *N. Venkatesh & Ors,.* AIR 2008 (NOC) 262 (Mad).

151 *Supra* note 24.

152 See for instance, *Savariraj Pillai* v. *M/s R.S.S Vastrad and Company* AIR 1990 Mad 198; *M/s Shankar Housing Corporation* v. *Smt. Mohan Devi and Ors.* AIR 1978 Del 225; *Bharat Sarvodaya Mills Co. Ltd.* v. *M/s Mohatta Brothers,* AIR 1969 Guj 178; and *Prag Oil Mills Depot* v. *Transport Corporation of India and Anr.,* AIR 1978 Ori 167.

authorized signatory who was not the partner but was authorized by one of the partners of the firm to institute a suit. The court held that the addition of words "represented by authorized signatory" were of no significance and did not alter the nature of plaint of a firm which was registered one. The plaint was not liable to be rejected for want of signature and verification by all or any one of the partners of firm. It is not the requirement of law under section 69(2) of the Partnership Act that all partners of a firm should be shown in cause title and all of them shall have to sign the plaint. This principle of law was stretched further in *M.S.P.L. Limited* v. *M/s S.B. Minerals.*[153] It was held that the bar under section 69 is basically in respect of suits which are filed by partnership firm for the purposes of enforcing contracts. The fact that the name of the person who filed a suit did not figure in register of firms as a partner of the firm is a mere procedural defect and not one constituting a material irregularity. The suit does not become bad as technically partnership firm is registered. This rule was further extended in *Sat Pal & Anr*. v. *Puran Singh & Ors.*[154] The court held that the suit for recovery of debts of a dissolved firm can be maintained by surviving partner even without impleading legal representatives of a deceased partner. This bar for filing of suit would not, however, apply to a suit for rendition of accounts under section 69 (3) (a).[155]

In *Smt. K. Vasantha Kumari* v. *D. Devendra Reddy*[156] a complaint was filed against the dishonour of the cheque. It was contended that a criminal complaint shall not lie against an unregistered firm. The court observed that section 69 (2) debars the institution of a suit filed to enforce the right arising from a contract with an unregistered firm. Section 69 (2) was not applicable to the present case. The criminal complaint against the dishonour of the cheque shall not be dismissed for want of registration of the firm. Similarly, in *Chhagan Lal Gupta* v. *State of UP*[157] the court held that a suit by a partner of an unregistered dissolved firm for enforcement of right to realize property of this firm was maintainable and bar of non registration was not attracted.

IV NEGOTIABLE INSTRUMENTS ACT

Promissory note

A crucial issue of interpretation of promissory note came for

153 AIR 2008 Kar 60.

154 AIR 2008 (NOC) 2414 (P&H).

155 *Ram Singh* v. *Daulat Ram & Anr*, AIR 2008 HP 1.

156 AIR 2008 (NOC) 669 (Kar) See for similar opinion, *Indrajit Gogoi* v. *Auto Sales and Service Station*, AIR 2008 (NOC) 1760 (Gau) It was held that nothing contained in s. 69 prohibits prosecution in terms of s. 138 of the Negotiable Instruments Act by an unregistered firm of a person who may have issued a cheque addressed to such a firm, when such a cheque is dishonoured and, upon notice of demand for payment having being received by the drawer, he fails to make payment.

157 AIR 2008 (NOC) 2638 (All).

consideration in *M. Nayamathulla* v. *A. Chitharanjan Reddy.*[158] The precise point involved in this case was: 'whether an instrument to be a promissory note requires a recital which conjunctively incorporates a promise to pay not only to a certain person, but also to the order of a certain person and to the bearer of the instrument as well.' The present case was first heard by a single judge who doubted the correctness of the decision rendered by another single judge of the same court in *Kotla Sudheer Kummar* v. *Mallavarapu Jojayya,*[159] which had, in his opinion misread the *ratio decidendi* of the full bench decision in *Bolisetti Bhavannarayana* v. *Kommuri Vullakki Cloth Merchant Firm, Tenali and Ors.*[160]

The respondent had in the instant case filed a suit for the recovery of certain sum from the petitioner on the basis of the document which he characterized as promissory note. The instrument reads; "Today I Md. Nyamatullah promises to pay A. Chittaranjan Reddy, a sum of Rs 6,90,000 to be paid on or before March 2002." The petitioner contended that this document could not be called as a promissory note. Section 4 of the Negotiable Instruments Act (NI Act) defines a "promissory note" as an instrument in writing, other than the bank note or a currency note, containing an unconditional undertaking signed by a maker to pay a certain sum of money only to, or to the order of a certain person, or to the bearer of the instrument.

The single judge in *Kotla Sudheer Kumar* had interpreted the full bench decision in *Bolisetti Bhavannaryana* to mean that to be a promissory note, the instrument in question must contain all the three recitals i.e.,(a) the promise to pay a certain person; (b) to the order of the certain person; and (c) to the bearer of the instrument. The single judge in *M. Nyamathulla* questioned this deduction of *ratio* from the decision of the full bench in *Bolisetti Bhavannarayana* and observed that on a true and fairest construction of the decision of the full bench no such inference appears to be suggested. The court then recorded its own conclusion by stating that "having regard to the disjunctive phraseology employed in the statute and the grammatical construction of the statutory language, it would appear that first of all section 4 must be satisfied as to the nature of the instrument and the unconditional undertaking signed by the maker. Then it is not necessary that the promise to pay should not only be in favour of certain person, but to the order of a certain person and to the bearer of the instrument as well." It is because of this disagreement shown by the single judge in the instant case with the opinion of another single judge expressed in *Kotla Sudheer Kumar* that the matter was referred to the larger bench which made the following observation:[161]

158 AIR 2008 AP 141.
159 AIR 2002 AP 170.
160 1996 (2) ALD 424 (FB).
161 *Supra* note 158 at 144.

> The sentence in the definition of the promissory note, i.e. "to pay a certain sum of money only to, or to the order of" is read to be one sub clause. The sentence cannot be split into two and read that the unconditional undertaking may be either to the person or to the order. If the clause is split into two, it produces unintelligible and incongruous result. The comma succeeding and preceding the word 'to the order of' indicates that a certain sum of money must be paid to or to the order of. If that reading is not permissible, there would not have been any difference between a bond and a promissory note.

The court reached the above conclusion with the help of the definition of the term "Bond" as provided in the Indian Stamps Act, 1899.[162] It was laid down that the principal ingredient which distinguishes the term "Bond" from the "promissory note" is that if the instrument is an unconditional undertaking to pay or to the order of certain person, it is to be classified as a promissory note. The court agreed with the opinion of the single judge in *Kotla Sudheer Kumar* and concluded that an instrument to be a promissory note must necessarily contain the words 'to the bearer, or to order' in a way that these two words are to be read conjunctively and not disjunctively.[163]

The question for judicial determination in *Jakka Gopal Reddy* v. *Neelakantam Venkata Krishna*[164] was whether the document in dispute was a promissory note or not. The first page of the document carrying recitals was signed by the executants but the stamp was not affixed. However, on the reverse side, in continuation to the first page was recited that a consideration of Rs.12000 had been received and stamps were duly affixed signed by the executants and attested by two attesters. The court ruled that all these recitals had to be taken into consideration while deciding whether the document in question was a promissory note or not. The later portion of the document, wherein stamps had been fixed and executants had duly signed, could not be separated or severed from the former portion of the document especially keeping in view the word 'PTO' that had been written on the first page. In light of this, document in question had to be treated as a promissory note.

Holder in due course

Where a bearer cheque is issued by the guarantor of a firm for adjustment towards the cash credit facility account of the borrower firm, the bank would be a holder in due course under section 9 of the NI Act and a complaint can be filed by the bank against the guarantor on dishonour of the cheque.[165] The power of attorney holder cannot be said to be a 'payee' or

162 S. 2(5) reads as: bond includes; (a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be….

163 *Supra* note 158 at 145.

164 AIR 2008 (NOC) 255 (AP).

165 AIR 2008 (NOC) 1771 (P&H).

'holder in due course' and he is not eligible to file a complaint.[166] The holder in due course has every authority to complete the blank pronote and bill of exchange delivered to him after being properly signed by the maker of the instrument. A bare reading of the provision would go to show that it would apply to only a stamped instrument viz. pronote and bill of exchange and not to cheques. Section 20 will have no application to the blank cheques issued by the drawer after putting his signature. There is no clear provision in the NI Act to cover such instruments. However, if a drawer of a cheque gives authority to the payee or a holder in due course or a stranger for that matter to fill up the cheque signed by him, such an instrument is also valid in the eyes of law.[167]

Presentment of cheque

A significant issue of law was decided in *Shroff Publishers and Distributors Pvt. Ltd & Ors.* v. *M/s Springer India Pvt. Ltd.*[168] Section 72 of the NI Act provides that a cheque must, in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer. It was laid down that the use of the word 'the bank' and 'banker' in the section is indicative of the intention of the legislature. The former has a direct article and the latter an indirect article prefixed to it. If the legislature intended to have the same meaning for 'the bank' and 'banker' there was no cause or occasion for mentioning it distinctly and differently by using two different articles. It is worth noticing that the word 'banker' in section 3 of the NI Act is prefixed by the indefinite article 'a' and the word 'bank' where the cheque is intended to be presented under section 138 is pre-fixed by the definite article 'the'. The same section permits a person to issue a cheque on an account maintained by him with a bank and makes him liable for criminal prosecution by the bank if it is returned by the bank unpaid. 'The' is always mentioned to note the particular thing or a person. 'The' would, therefore, refer implicitly to a specific bank and not to any bank.

It was further held that a combined reading of sections 3, 72 and 138 of the Act leaves no doubt that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable. It, however, does not mean that cheque is always to be presented to the drawer's bank on which the cheque is issued. The payee of the cheque has an option to present the cheque in any bank including the collecting bank where he has his account. But to attract the criminal liability of the drawer of the cheque, such collecting bank is obliged to present the cheque in the drawer's bank on which the cheque is drawn within the period of six months from the date on which it is shown to have been issued. The non presentation of the cheque

166 AIR 2008 (NOC) 2539 (All).
167 *S Gopal* v. *D. Balachandran*, AIR 2008 (NOC) 1300 (Mad).
168 AIR 2008 (NOC) 423 (Del).

to the drawer's bank within the period specified in section 138 would absolve the person issuing the cheque of his criminal liability under section 138 of the NI Act.

Presumption as to negotiable instruments

The rule relating to presumption under section 118 of the NI Act is elucidated by the Supreme Court in *Mallavarapu Kasivisweswara Rao* v. *Thadikonda Ramulu Firm & Ors.*[169] by reconfirming its earlier rulings on this subject.[170] It is laid down that once execution of the promissory note is admitted, the presumption under section 118 would arise that it is supported by consideration. Such a presumption is rebuttable, if the defendant is proved to have discharged the initial onus of proof by showing that the existence of consideration was improbable or doubtful or the same was illegal. The onus would then shift to the plaintiff who would be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. If the defendant fails to discharge the initial onus of proof by showing the non existence of the consideration, the plaintiff would invariably be held entitled to the benefit of presumption arising under section 118 (a) in his favour. This presumption arises when the accused admits signature on cheque and the amount on it.[171] In *K.S. Bakshi & Anr.* v. *State & Anr,*[172] a contract was executed between the builder of the complex and the owner of the land for which a cheque was issued that was dishonoured. The court held that cheque was a part of consideration and could be said that it was paid towards liability and presumption under section 118 (a) could be drawn that the dishonoured cheque was issued as a consideration. In *Pittala Subramanyam* v. *State of AP*[173] the complainant testified that he lent Rs. 1 lakh as hand loan to accused who issued the disputed cheque towards the discharge of his liability. This fact was not disputed by the accused. The court held that the presumption was to be drawn in favour of the complainant as the accused had failed to dispel the presumption by placing required evidence on record. The presumption under section 118 of the NI Act is available to a complainant when he proves execution of the cheque. Where the complainant has failed to prove passing of any consideration and also any legally enforceable debt or liability, presumption under section 118 (a) regarding consideration is not available.[174] *Nirmala G. Sindhe* v. *Shivaji G. Pol*[175] represents the other side of the coin. In this case, defendant denied to have executed any promissory

169 AIR 2008 SC 2898.
170 See for instance, *Bahrat Barrel & Drum Company* v. *Amin Chand Payrelal* (1999) 3 SCC 35.
171 AIR 2008 (NOC) 141 (Kar).
172 AIR 2008 (NOC) 998 (Del).
173 AIR 2008 (NON) 990 (AP).
174 *G Gopan* v. *Tonny Varghese & Anr.,* AIR 2008 (NOC) 702 (Ker).
175 AIR 2008 (NOC) 1002 (HP).

note and pleaded that certain blank papers had been signed and misused by the plaintiff. He also placed further evidence to disprove possible lending of money by plaintiff by demonstrating her financial inability. It did not amount to the execution of demand promissory note as claimed by the plaintiff. The court declared that presumption in favour of plaintiff for passing off consideration stood rebutted by the defendant.

Presumption in favour of holder

Section 139 incorporates what is popularly called as reverse burden. The said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential for the economic life of the country like India. This, however, shall not mean that the courts shall put blind eye to the ground realities. Section 139 mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have been rebutted. Other important principles of jurisprudence, namely, presumption of innocence as a human right and the doctrine of reverse burden introduced by section 139 should be delicately balanced. Such balancing acts indisputably would largely depend upon the factual matrix of each case, the materials brought on record and the legal principles governing the same.[176]

Crossed cheque

Negotiability of crossed cheque can be destroyed if it is marked as non negotiable on its face. It is not affected by its simply being crossed whether generally or specially.[177]

Dishonour of cheque

Section 138 of the NI Act deals with the dishonour of cheques because of the insufficiency etc, of funds in the account of the drawer of the cheque. This section was inserted with a view to regulate financial promises in growing business, trade, commerce and industrial activities of the country. The incorporation of the provision is designed to safeguard the faith of the creditor in the drawer of the cheque.[178] The commission of the offence under this section entails conviction. Once the offence is committed the prosecution proceedings can be initiated not only for the recovery of the amount covered in the cheque but for bringing the offender to the penal liability. The scheme of the provision would indicate that it is primarily to provide an additional criminal remedy over and above the civil remedies available under the Ac.[179]

176 *Krishna Janardhan Bhat* v. *Dattatraya G. Hegde,* AIR 2008 SC 1325.
177 *Sr. Manager, Punjab and Sind Bank* v. *Sanjive Wallia*, AIR 2008 (NOC) 527 (NCC).
178 *Vinay Devanna Nayak* v. *Ryot Seva Sahakari Bank Ltd,* AIR 2008 SC 216.
179 *Sree Sakthi Paper Mills Ltd.*v. *M/s Anjaneya Enterprise & Ors.,*. AIR 2008 (NOC) 143 (Ker).

It is, however, to be remembered that the criminal liability under section 138 is attracted only on account of the dishonour of the cheques issued in discharge of liability or debt, but not on account of issuance of security cheques.[180]

In case of dishonour of cheque, the accused is not required to step into the witness box for discharging his burden. He may discharge his burden on the basis of the material already brought on the record. An accused has a constitutional right to maintain silence. The standard of proof on the part of an accused and that of the prosecution is different. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof to establish the defence on the part of an accused is 'preponderance of probabilities.' Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which he relies.[181]

The statutory presumption has an evidentiary value. The question as to whether the presumption stood rebutted or not must therefore be determined keeping in view the other evidence on record. Where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements have to be taken into consideration.[182]

A person incurs criminal liability only if dishonour of cheque can be attributed to an act or omission on his part and the cause of action cannot accrue at any stage prior to presentation and dishonour of cheque.[183]

The expression "another person" used in section 138 came up for judicial interpretation in *V. Rajendran* v. *Tamil Nadu Industrial Investment Corp. Ltd*.[184] In this case 35 monthly cheques with dates were issued. They represented monthly payments to be made on 3rd of every month. This amount was to be adjusted by the complainant bank from current account to loan account. The court opined that it was a transfer on paper effected from one account to another account of the same bank. Beneficiary was the bank itself. The complainant bank would fall within the ambit of the expression "another person" employed in section 138.

The court in *K. S. Bakshi & Anr.* v. *State & Anr.*[185] was called to delineate the scope of the expression 'other liability' used in section 138. It was held that the general expression 'other liability' follows only single expression 'debt' which is not a distinct *genus*. The rule of *ejusdem generis* is not applicable in absence of the distinct *genus*. Hence expression 'other liability' cannot be interpreted in light of the preceding word 'debt' and must

180 *Sudhir Kumar Bhalla* v. *Jagdish Chand & etc.,* AIR 2008 SC 2407.
181 *Supra* note 176 at 1332.
182 *Id*. at 1330.
183 *Shanker Lal Sharda & Anr*. v. *State NNCT of Delhi & Anr.,* AIR 2008 (NOC) 134 (Del). Also see, *Smt. Taraben Jamnadas* v. *Narendra Kumar Khetsi & Ors*., AIR 2008 (NOC) 133 (Bom).
184 AIR 2008 (NOC) 131 (Mad).
185 AIR 2008 (NOC) 998 (Del).

be given ordinary and grammatical meaning so as to include any liability to pay.

The word 'bank' used in section 138 came for interpretation in *Rajeev Chakraborty* v. *Golaghat Truck Owners Association.*[186] The court held that the term 'bank' did not mean that the cheque must be presented to the drawer's bank on which cheque was issued. In *Smt. Bandeep Kaur* v. *S. Avneet Singh*[187] it was laid down that there was no provision in the NI Act warranting cognizance against a person other than the 'drawer' of the cheque if the cheque issued by him was dishonoured. It was further held that the words 'such person shall be deemed to have committed the offence' used in section 138 made it abundantly clear that the 'drawer' of the cheque alone should be liable if the said cheque was returned unpaid on account of the conditions mentioned under section 138. In view of this legal position, the wife, who was a joint account holder along with her husband, could not be held liable for dishonour of the cheque issued by her husband.The accused husband could alone be saddled with culpability as he was the only 'drawer' of the cheque.

In *Southern Steel Ltd* v. *Jindal Vijayanagar Steel ltd.*[188] the directors had placed huge purchase orders against the cheques that were dishonoured. These directors had full knowledge of the fact that the company was declared sick under SICA. The court held that the conduct of the directors amply demonstrated that they had an undisputed debt and they had no intention right from the inception to pay it. Hence they were not entitled to any indulgence of the Supreme Court under its extra-ordinary jurisdiction under article 136 of the Constitution.[189]

The petitioner in *T. Nagappa* v. *Y. R. Muralidhar*[190] was facing criminal charges for dishonour for his cheque. His contention was that the respondent had obtained a signed cheque from him in the year 1999 as a security for a hand loan of Rs. 50,000 which had been paid back. But instead of returning the cheque, the same had been misused by entering a huge amount which he did not owe to the petitioner. He prayed to the court below that the cheque in question be referred to the Director of Forensic Science Laboratory for determining the age of his signature. This plea was not accepted. The apex court observed that when a contention was raised that the complainant had misused the cheque, even in a case where a presumption could be raised under section 118(a) or 139 of the said Act, an opportunity must be granted to the accused for adducing evidence in rebuttal thereof. As the law places burden on the accused, he must be given an opportunity to discharge it. An accused has a right to fair trial. He has a right to defend himself as a part of

186 AIR 2008 (NOC) 1000 (Gau).
187 AIR 20008 (NOC) 1301 (P&H).
188 AIR 2008 SC 3143.
189 For similar opinion see also, *John K. John* v. *Tom Varghese,* AIR 2008 SC 278.
190 AIR 2008 SC 2010.

his human right as also his fundamental right as enshrined in article 21 of the Constitution of India. The right to defend oneself and for that purpose to adduce evidence is recognized by the Parliament in terms of sub-section (2) of section 243 of the Code of Criminal Procedure.[191]

The following principles have been distilled from the decisions handed down by various courts pertaining to the different provisions of the NI Act.

- The cognizance of any offence punishable under section 138 of the NI Act cannot be taken unless there is a complaint in writing[192] made by the payee or by holder of the cheque in due course[193] or by the payee through his power of attorney[194] or by managing partner acting as an agent of the rest of the partners.[195] Where a cheque is issued in favour of the wife and the complaint is filed by the husband who is neither the holder of the cheque nor holder of the power of the attorney, it is not maintainable.[196]
- An accused cannot be convicted for dishonour of his cheque unless the statutory notice is given to him,[197] which is *sine qua non* for launching prosecution.[198] No procedure has been prescribed for serving notice. The service of notice through fax,[199] telegram[210]or by registered post or a certificate of posting[201] would be sufficient compliance with this statutory mandate. Where a properly addressed notice has been sent to the accused, it is deemed to have been served on him.[202] The complaint shall not be maintainable in absence of notice to the accused prior to the filing of complaint under section 138.[203] Where the accused has refused to receive the notice, it shall be deemed to have been served.[204]

191 *Id.* at 2011. In *Naseema* v. *Shareefa*, AIR 2008 (NOC) 703 (Mad) the court refused to send the signature of the accused to an expert for verification on the ground that it is tactics to prolong litigation.

192 *Housing Development Finance Corporation Ltd* v. *Kanisan Parambil Kelu & Anr.* AIR 2008 (NOC) 701 (Ker).

193 *Roy Joseph Creado & Ors.* v. *SK. Tamisuddin & Ors,* AIR 2008 (NOC) 1290 (Bom).

194 *Smt. K. Vasantha Kumari* v. *Davendra,* AIR 2008 (NOC) 696 (Kar).

195 *Nasar Abdul Khadri* v. *State of Kerala,* AIR 2008 (NOC) 700 (KER); *Chenab Textile Mills Ltd* v. *R.B.G.J. Silk Mills Pvt. Ltd* , AIR 2008 (NOC) 1763 (HP).

196 *Dr. Pramod Shivshankar* v. *Basaraj,* AIR 2008 (NOC) 993 (Bom).

197 *M/s Bhavani Auto Distribution* v. *K. Muraleedharan & Anr*. AIR 2008 (NOC) 139 (Guj).

198 *Vishnu Bhat* v. *Narayan R. Bandekar & Ors.*, AIR 2008 (NOC) 2543.

199 *Nirmalchand Kothari* v. *Anil gaurkhede,* AIR 2008 (NOC) 1511 (Chh).

200 *Vellanki Leasing & Financing Pvt. Ltd* v. *Pfimex Pharmaceuticals Ltd & Ors.*, AIR 2008 (NOC) 989 (AP).

201 *V. Satyanarayana Raju* v. *G.B. Gangadhara Reddy & Anr*. AIR 2008 (NOC) 992 (AP).

202 *Supra* note 161.See also,*Gangadhar* v. *Raghunathasa,* AIR 2008 (NOC) 699 (Kar).

203 *Mohan Meakin Ltd*.v. *M/s R. Jagavtar & Comp*,AIR 2008 (NOC) 431 (HP); See also, *First e-learning Quest Private Ltd & Ors.* v. *M/s Tera Construction Pvt Ltd*., AIR 2008 (NOC) 999 (Del).

204 *Hashimali Tahirali* v. *Shahikant Manakchand (D) by L.Rs,* AIR 2008 (NOC) 1006 (MP); *R. Sridher* v. *T.K. Rajendra Sha*, AIR 2008 (NOC) 1008 (Mad).

- The reason given by the bank, "accounts closed and transferred to some other branch" can also be brought within the expression "insufficient funds" so as to attract section 138.[205]
- There is a presumption that cheque was issued in discharge of debt or liability. The burden of proof is on the accused to show that cheque was not issued in discharge of debt. If the accused does not lead any evidence or when there is no cogent evidence to show that there is no debt or liability, it would be improper to hold that the accused had discharged his onus and presumption has been rebutted.[206]
- Putting of signature on blank cheque is not equivalent to the word 'drawn' used in section 138. The word 'drawn has to be understood as 'execution' of the cheque.[207]
- A complaint can be filed by the director of the company against the dishonour of the cheque provided he is authorized to depose on behalf of the company.[208]
- Where an accused admits that he had issued two cheques that were dishonoured, he cannot then turn around and contend that cheques were not issued for legally enforceable debt.[209]
- The ingredients of section 138 make it amply clear that every cheque that is dishonoured gives rise to the commission of an alleged offence for which there is a specific punishment. Where four cheques are dishonoured that give rise to four distinct offences. The fact that only two complaints were filed in respect of four cheques that were dishonoured cannot reduce the number of offences alleged to have been committed merely by clubbing two alleged offences in one complaint.[210]
- Where neither account on which cheques were drawn is in the name of the petitioner nor is he signatory to the cheque, the complaint against him shall not lie.[211]
- The stop payment instruction issued by the accused prior to the due date of the cheques will not preclude an action under section 138. Once a cheque is issued by the accused, presumption follows that it is in discharge of any debt or other liability.[212]

205 *A. Sathayanarayan* v. *K. Selvam,* AIR 2008 (NOC) 2544 (Kar).
206 *P. Seetarama Raju* v. *State of AP& Anr.*, AIR 2008 (NOC) 693 (AP).
207 *Ibid*.
208 *Director Maruti Foods and Farms Pvt Ltd*. v. *Basanna Pattekar* AIR 2008 (NOC) 140 (Kar).
209 *M/s PKN Caps & Polymers Pvt Ltd.* v *K. Vishnu Prasad,* AIR 2008 (NOC) 142 (Kar).
210 *Kershi Pirozsha Bhagvagar* v. *State of Gujarat and Ors*. AIR 2008 (NOC) 138 (Guj).
211 *Sharmendra Maheshwari* v. *Pramod Kedia & Anr*. AIR 2008 (NOC) 417 (Chh).
212 *Tara Chand* v. *State Govt. of NCT of Delhi & Ors*., AIR 2008 (NOC) 421 (Del). See also, *G. Kandaswamy* v. *Manager Bank of India , Chennai*, AIR 2008 (NOC) 441 (NCC); *Somnath* v. *State of Punjab & Anr*., AIR 2008 (NOC) 704 (P&H.); *Jarnail Singh* v. *State of Punjab & Anr*, AIR 2008 (NOC) 1519 (P&H).

- The complainant has a duty to adduce evidence of either actual service of notice or he may take the risk of proving the service of notice by relying on the legal presumption. In the latter case, it would be sufficient for the complainant to adduce evidence to show that a notice was sent by the registered post to the accused and that the address to which the notice was sent was the correct address. The presumption is, however, a rebuttable one.[213]
- Where an accused made only a conditional offer to make payment and is not ready and willing to make payment under cheques in question, the criminal proceedings against him cannot be dropped.[214]
- It is not mandatory that in every case for the offence under section 138 of the Act double the cheque amount shall be imposed as fine.The complainant has no absolute right to insist on that.[215]
- Offence of dishonour of cheque is complete on failure by accused to make payment on demand notice within the prescribed period. Once the offence is committed, any payment made subsequent thereto would not absolve accused of his liability of criminal offence.[216]

Limitation period

The complainant is required to give notice to an accused within 30 days after receiving the information from bank regarding non payment of cheque and the accused has to be given 15 days time to make payment and in case he fails to pay within the stipulated time, then the complainant can present the complaint within one month. It means that the cause of action accrues after the expiry of 15 days of receipt of notice. It is a statutory requirement and this period cannot be curtailed. The legislature made a provision that on the complaint being presented after 30 days, cognizance could be taken only if complainant satisfies the court that he has a reasonable cause for not filing the complaint.[217] The condonation of delay by court, on its own motion, in respect of an offence is not permissible.[218] But the legislature in its wisdom did not think it proper to make any provision to cover contingency where complaint is presented before the expiry of 15 days of the notice. It has not

213 *Mrs Fatima Begum* v. *Md. Sajid Alam Chowdhury,* AIR 2008 (NOC) 427 (Gau); *Rajendraprasmad Gangabishen Porwal* v. *Santoshkumar Parasmal Saklecha & Anr,* AIR 2008 (NOC) 2277 (Bom).

214 *Citichen India Ltd. & Anr*. v. *Gujarat Alkalies and Chemicals Ltd & Anr.* AIR 2008 (NOC) 429 (Guj).

215 *R. Ravishaih* v. *T.S. Manjuula,* AIR 2008 (NOC0 1516 (Kar).

216 *Supra* note 193.

217 *Gautam Saikia* v. *Diganta Sarmah,* AIR 2008 (NOC) 1759 (Gau) the burden lies on the complainant to satisfy the court that he was prevented from making the complaint.

218 *Gautam Saikia* v. *Diganta Sarmah,* AIR 2008 (NOC) 1759 (Gau).

purposely done that as it would curtail the right of the accused to make the payment within 15 days. If payment is made within 15 days no offence remains under section 138 and therefore cognizance taken before the expiry of 15 days is not legal.[219]

Where a court decides to condone the delay, it has to give an equal opportunity to the opposite parties.[220] The offence of dishonour of cheque is complete on failure of the drawer to make the payment within 15 days of receipt of the notice of the amount due on the cheque. Even if the payment is made on the 16th day, the same is not sufficient to come out of the rigours of section 138.[221]

The question which arose for consideration in *Dr. Premish Verma* v. *Lokesh Sharma,*[222] was whether for calculating the period of 30 days, the period has to be reckoned by excluding the date on which the information from the bank is received. The court ruled that it is to be noticed that the proviso to section 138 uses the word 'of' after the words providing the statutory period during which payee or holder of the cheque is required to act. Sections 9 and 12 of the General Clauses Act and the Limitation Act respectively use the word 'from' instead of 'of'. It is, therefore, necessary to consider what is the purport of the word 'of'. The word 'of' used in proviso to section 138 is akin to the word 'from'. Sections 9 and 12 of these Acts are therefore applicable. The date on which the information from the bank was received by the payee or the holder of the cheque is to be excluded while reckoning the period of 30 days within which the payee is required to give a notice in writing to the drawer of the cheque making a demand for the said amount of money.

The offence created under section 138 is not of the type which creates a continuous or recurring cause of action. In *Kapil Upadhyay* v. *M/s Milan Auto*[223] a notice was sent to the accused for the payment of money against the dishonoured cheque. The payment was not made and the complainant failed to file a complaint within one month from the date of cause of action. He then issued another notice demanding money. This notice was also not complied with. The complainant then filed a complaint on the basis of the second notice. The court held that the second notice was clearly time barred and no cognizance of this offence could be taken against the accused on the basis of the time barred complaint. Mere reading of the provisions of section 138 make it abundantly clear that a competent court can take cognizance of a written complaint only when such complaint is made within one month from the date of cause of action which arises on 15th day of sending notice to the drawer by the payee after receiving information from the bank

219 *Anil Kumar Shukla* v. *State of UP*, AIR 2008 (NOC) 1509 (All).
220 *M/s Falkan Medico Ltd & Ors.* v. *M/s Pankaj Advertising,* AIR 2008 (NOC) 433 (MP).
221 *Smt. Nutan Damodhar Prabhu & Anr* v. *Ravindra Vassant Kenkre & Anr*., AIR 2008 (NOC) 1753 (Bom).
222 AIR 2008 (NOC) 416 (Chh).
223 AIR 2008 (NOC) 432 (MP).

regarding non payment of the cheque and that too when amount of cheque is not paid within that period. Once the cause of action arises in such cases that cannot be stopped by any subsequent event. A conflicting opinion was expressed by the Bombay High Court in *Kishorilal Ramnath Dhoot & Anr.* v. *Roots and Herbal Pvt. Ltd & Anr.*[224] It was held that it is a well settled legal position that there is no restriction regarding the number of times the cheque can be presented and that on every subsequent presentation and dishonour there arose the fresh cause of action for filling of the complaint and the period of sending the notice is to be reckoned from the date of receipt of the intimation of bank about dishonour on the last presentation and on the basis of this the complaint is maintainable.

This conflict of opinion was put to rest by the Supreme Court in *Anil Kumar Goel* v. *Kishan Chand Kaura,*[225] which represents the most liberal interpretation of section 138. The court observed: clause (a) of the proviso to section 138 does not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. This apart, in the course of business transactions, it is not uncommon for a cheque being returned due to insufficient funds or similar such reasons and being presented again by the payee after sometime, on his own volition or at the request of the drawer, in expectation that it would be encashed. The primary interest of the payee is to get his money and not prosecution of the drawer, recourse to which normally is taken out of compulsion and not by choice. On each presentation of the cheque and its dishonour, a fresh right and not a cause of action accrues in his favour. He may, therefore, without taking pre-emptory action in exercise of his such right under clause (b) of section 138, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque.[226]

Offences by companies

Section 141 holds every person liable for the offence of dishonour of the cheque who was in charge of, and responsible for the conduct of the business of the company at the time of the commission of the crime.[227] This section provides for a constructive liability. A legal fiction has been created thereby. The statute being penal in nature, it should be construed strictly. It requires strict compliance of the provisions which require specific averments in the complaint petition so as to satisfy the requirements of this section.[228] Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability under

224 AIR 2008 (NOC) 2278 (Bom).

225 AIR 2008 SC 899.

226 *Id.* at 901.

227 *Rajeev Gupta* v. *State & Anr.* AIR 2008 (NOC) 135 (Del); *Zeninth Mining Pvt. Ltd & Anr.*v. *National Co-operative Marketing Federation of India Ltd.,* AIR 2008 (NOC) 419.

228 *Paresh P. Rajda* v. *State of Maharashtra,* AIR 2008 SC 2357; *Anoop Jhalaani* v. *State & Anr*. AIR 2008 (NOC) 136 (Del).

section 141.[229] What is required is that the person who is sought to be made criminally liable under section 141 should be at the time of commission of offence in charge of and responsible to the company for the conduct of business.

The Supreme Court in *Malwa Cotton & Spinning Mills Ltd*. v.*Virsa Singh Sidhu,*[230] observed that if the person committing an offence is a company, by application of section 141, it is deemed that every person who was in charge of and responsible to the company for the conduct of business of the company and the company are guilty of the offence. A person who proves that the offence was committed without his knowledge or that he had exercised due diligence is exempted from the liability by virtue of the proviso to sub-section (1). The burden in this regard has to be discharged by the accused.

A complaint was filed against the company and its director in *DCM Financial Services Ltd.* v. *J. N. Sareen*[231] for issuing a post dated cheque which was dishonoured. The director had resigned two years before the filing of the complaint which the complainant knew. The Supreme Court held that in these circumstances, a person could not be held liable two years later when the cheque was dishonoured. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of the offence who will be responsible for its commission.[242]

The court further held that the liability depends upon the role which one plays in the affairs of the company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of 'every person' the section would have said 'every Director, Manager or Secretary' in a company is liable. The legislature is aware that it is a case of criminal liability which means serious consequences for those persons who are sought to be made liable under this section. Therefore, only those persons who can be said to be connected with the commission of the crime at the relevant time have been subjected to action.[233]

229 *DCM Financial Services Ltd.* v. *J. N. Sareen*, AIR 2008 SC 2260.

230 AIR 2008 SC 3273; *Roshan Lal Gupta & Ors* v. *State of UP & Anr.*; AIR 2008 (NOC) 988 (All).

231 *Supra* note 229 at 2265.

232 *Kapal Mehra* v. *Indusind Enterprises & Finanac Ltd & Anr*. AIR 2008 (NOC) 995 (Bom). It was held that every director is not necessarily in charge of a company and responsible for the conduct of the business. As against this, it was held in *R.L. Verma & Ors*. v. *J.K. Verma & Ors.*, AIR 2008 (NOC) 997 (Del) that a complaint cannot be quashed merely because directors had nothing to do with the transaction in respect of which cheque was issued.

233 *Id.* at 2260. See also, *Sona P. Walvekar* v. *State of West Bengal & Ors.,* AIR 2008 (NOC) 695 (Cal)

Although the apex court did not say it loud and clear, nevertheless, one could gather from the reading of the judgment that the expression "relevant time" used in section 141 means the time when the cheque was dishonoured and not when it was issued.[234]

Cognizance of offences

The question whether an amendment made to section 142(b) by the Act 55 of 2002 was intended to operate retrospectively came for discussion before the Supreme Court in *Anil Kumar Goel* v. *Kishan Chand Kaura.*[235] The court pronounced that all laws that affect substantive rights generally operate prospectively and there is a presumption against their being retrospective if they affect vested rights and obligations, unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous, effect will have to be given to the provision in question in accordance with its tenor. If the language is not clear then the court has to decide whether in the light of the surrounding circumstances retrospective operation should be given to it or not. The court then concluded that taking into consideration the plain and clear language of section 142, there is nothing in this section to show that it was intended to operate retrospectively.[236]

The requirements of a complaint were summarized by the Bombay High Court in *Roy Joseph Creado & Ors.* v. *SK. Tamisuddin & Ors.*[237] It was laid down that a plain reading of section 142 shows that the cognizance of any offence punishable cannot be taken unless there is a complaint in writing made by the payee or by holder of the cheque in due course. This section begins with *non obstante* clause. Therefore, it supersedes the general definition of the word "complaint" as given in section 2(d) of the Code of Criminal Procedure. The legal requirements of a valid complaint for the purpose of NI Act are: (i) there has to be a complaint in writing regarding the commission of an offence; (ii) the complaint must be made by the payee or one who is holder of the cheque in due course; (iii) the allegations in the complaint shall make out a *prima facie* case of cognizable offence.

234 See for contrary opinion, *Bhagwati Prasad Baja*j v. *Brahim Prakash Sharma*; AIR 2008 (NOC) 418 (Del).

235 AIR 2008 SC 899. However, in *Kumudben Jayantilal Mistry* v. *State of Gujarat & Anr*. AIR 2008 (NOC) 430 (Guj), it was held that the amendment to s. 142 by the N.I.Act (Amendment and Miscellaneous Provisions) Act, 2002 would have retrospective effect atleast for the pending cases.

236 *Id*. at 901.

Compounding of offence

Section 147 of the NI Act opens with the words, "notwithstanding anything contained in the Code of Criminal Procedure 1973, every offence punishable under this Act shall be compoundable". The section starts with a *non obstante* clause, which will have the legal effect of prevailing over any provision in any other statute, which are in vogue. By means of introduction of the said section, the legislature enabled the parties to a case under section 138 to enter into a compromise. Section 320 of the Criminal Procedure Code describes the compoundable and non compoundable cases with or without the permission of the court. This section has no bearing on section 147 of the NI Act. The reason being, that the NI Act is a special statute, which has an overriding effect to prevail over the provisions of general law.[238]

The compounding essentially involves a compromise or agreement. If the complainant is not willing to accept a compromise the same cannot be imposed upon him by the court and matter will have to be dealt with in accordance with law.[239] The apex court has put to rest conflicting opinions propounded by various high courts[240] and held in *Vinay Devanna Nayak* v. *Ryot Seva Sahakari Bank Ltd.*[241] that presumably, Parliament realized that the compounding of offences should not normally be denied that it inserted section 147 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 to this effect. The court, in line with its earlier pronouncements,[242] held that in view of section 147 and the primary object underlying section 138, there is no reason to refuse compromise between the parties.[243]

Jurisdiction

In *Nazir Ahmad Kaboo* v. *Feroz Iqbal*[244] it was held that the place where from notice of demand had been issued shall be a place where suit can be instituted. In *Smt. Nutan Damodhar Prabhu & Anr.* v. *Ravindra Vassant Kenkre & Anr.*[245] the complainant and the accused were residing within the jurisdiction of JMFC Panaji. The account's payee cheques given by the accused to the complainant were drawn on the bank situated within the jurisdiction of JMFC Panaji. The court held that JFMC Panaji had jurisdiction

237 AIR 2008 (NOC) 1290 (Bom).
238 *Rajan K. Moorty* v. *M. Vjayan*, AIR 2008 (NOC) 438 (Mad).
239 *Ibid.*
240 *Satya Chit Funds (P) Ltd.* v. *Prakash Khattar*, AIR 2008 (NOC) 996; see also *infra* note 241 at 718.
241 AIR 2008 SC 716.
242 See for instance, *Cranex Ltd. & Anr.* v. *Nagarjuna Finance Ltd. & Anr.* (200) 7 SCC 338; *Electronic Trade & Technology Development Corporation Ltd. Indian Technologists & Engineers*, (1996) 2 SCC 739.
243 *Supra* note 241 at 718.
244 AIR 2008 (NOC) 1514 (J&K).
245 AIR 2008 (NOC) 1753 (Bom).

to try the offence. Though the complainant may have accounts at different places, it does not follow that the complainant could file complaint at the place where he had an account. The jurisdiction would have to be gathered from the place where money was intended to be paid.

V BANKING LAW

The banks and financial institutions in India, unlike international bankers, do not have the power to take possession of securities and sell them. It was noticed that the pre-existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms resulting in the slow pace of recovery of defaulting loans and the consequent mounting levels of non performing assets of banks and financial institutions. It was to enable the banks and financial institutions to realize their long term assets, manage the problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of the securities and sell them and reduce the non-performing assets by adopting measures for recovery or reconstruction etc that Parliament enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.[246]

The object of the Securitisation Act is to accelerate the process of recovery of debts by enabling recovery of debts by a non adjudicatory process. The strong bias of the legal fraternity towards the adversarial litigation paved the way for the de-generation of the regular civil courts where delay and digression defeat the justice delivery process. Technical hair splitting has become the bane of our law courts giving rise to cynicism among the public at large over the interminable delay in civil litigation. It was to provide for liquidation of secured assets on a war footing that Parliament enacted the Securitization Act for quicker remedies to banks and financial institutions through a non adjudicatory process. This Act proceeds on the basis that the liability of the borrower to repay the secured debt has crystallized and it is to remove all fetters on the rights of the secured creditor to choose one or more of the cumulative remedies under the Act that the provisions are geared in such a way that the recovery of the dues to the banks and financial institutions is not delayed by any adjudicatory process in preference to the existing forum which breeds delay.[247]

Bank

The definition of 'Bank' provided in the Securitisation Act has been borrowed from the Banking Regulation Act, 1949 which does not encompass cooperative banks within its fold. The cooperative banks cannot, therefore, be termed as banking company. Consistent with the ruling of the Supreme

246 Hereinafter referred to as Securitisation Act.

247 *C.R. Sindhu* v. *State of Kerala*, AIR 2008 Ker 65 at 68.

Court,[248] the Karnataka High Court in *V. Krishnaswamy & Anr.* v. *Karnataka Rajaya Kajgarika Sahakara Bank Niyamitha Bangalore & Anr.*[249] held that the recovery proceedings cannot be initiated by the cooperative bank under the Securitisation Act. The entire proceedings culminating in possessing the property pursuant to an order under section 14 of the Securitisation Act by cooperative bank is void *ab initio*. The property possessed by the cooperative bank is required to be returned to the borrower A contrary view was expressed by the Bombay High Court in *M/s Rama Steel Industries* v. *Union of India.*[250] It was held that the question of availability of other mechanism of recovery cannot be a bar for providing remedy under the Securitization Act as this remedy is in addition to and not in derogation of any other remedy available under any other law. The court distinguished the present case from the ruling of the Supreme Court in *Greater Bombay Cooperative Bank Ltd* v. *M/s United Yarn Tex. Pvt. Ltd., & Ors*[251] on the ground that the question before the apex court was about the availability of the remedies under the RDB Act to cooperative banks covered under the State Cooperative Societies Act. The question was not about the remedies available under the Securitisation Act.

Borrower

Section 1(2) of the Securitisation Act refers to security agreement and the right of the secured creditor to proceed against any security on the charge created in favour of him in terms of the said section and to exercise rights under sub-section (4) of section 13. In order to proceed against the security interest for the repayment of the secured debt or any installment thereof, notice is required to be issued to the borrower. The word 'borrower' in section 13(2) of the Securitisation Act is to be interpreted and understood in this context. Reading the definition of the term 'borrower' in section 2(f) together with section 13 (2), it becomes abundantly clear that the said word will include the person who had created any mortgage or pledge as well as his legal representatives.[252]

The term 'person aggrieved' includes a borrower and other persons aggrieved by the mode of recovery of secured debts adopted by the secured creditor under section 13(4). The bidder in auction sale is not a 'person aggrieved' and has no right to file an appeal in respect of forfeiture of 25% of deposited bid amount.[253]

248 *Greater Bombay Cooperative Bank Ltd* v. *M/s United Yarn Tex. Pvt. Ltd.,* 2997 (5) SCALE 366.

249 AIR 2008 Kar 20 at 23.

250 AIR 2008 Bom 38, similar opinion was expressed by the Kerala High Court in *A.P. Vargese* v. *Kerala State Co-operative Bank Ltd.*, AIR 2008 Ker 61.

251 *Supra* note 248.

252 *Supra* note 20.

253 *M/s Rose Valley Real Estate and Construction Ltd.* v. *United Commercial Bank & Anr.*, AIR 2008 Gau 38.

Possession and sale of secured assets

Statement of objects and reasons in enacting the Securitisation Act, 2002 and its provisions are self eloquent and clearly indicate that the secured creditor is not required to obtain a decree from a competent court /DRT, before being entitled to take steps as permitted by the Act for the purpose of enforcement of recovery against the secured assets. The only condition required to be fulfilled by a secured creditor is serving of a notice under section 13(2). The secured creditor is also required to communicate reasons to the borrower as to why representation of the borrower is not acceptable to the creditor. Mere rejection of the representation does not give the borrower a cause of action to approach DRT under section 17. It is only after the secured creditor has taken steps under section 13(4) that the borrower can approach DRT by an appeal against such an action by secured creditor. No judicial forum comes into picture till that stage.[254]

The Securitisation Act has been given an overriding effect and the other provisions of law should yield to the provisions of this Act.[255]A reading of the statutory scheme of the Securitisation Act will go to show that consequent on the default committed by a borrower the secured creditor is given the right to enforce the security interest created by the borrower in his favour by having recourse to the provisions of this Act. Section 13 indicates that the rights given to the secured creditor is notwithstanding the provisions contained in sections 69 and 69A of the Transfer of Property Act, 1882. Consequent on the default committed by a borrower, the secured creditor may require him by a notice in writing under section 13(2) of the Act to discharge in full his liability within 60 days of the date of notice failing which the secured creditor is given the authority to exercise all or any of the rights provided under sub-section (4) of section 13. This section gives the secured creditor the right to take recourse to any one or more of the four measures enumerated thereunder for the purpose of recovering the secured debt. One such measure is to take possession of the secured assets of the borrower. The said provision does not envisage any notice either to the borrower or to any other person before the secured creditor takes possession of the secured assets. Thus, when a secured creditor, who is entitled to the possession of the secured assets by virtue of section 13(4)(a), makes a written request under section 14 (1) of the Act to the chief judicial magistrate, he has no option but to assist the secured creditor in taking the possession of the assets and handing it over to the secured creditor.[256]

The interpretation of "non performing assets" was debated in *M/s Anu Stone Crusher & etc* v. *Bank of India & ors*.[257] It was laid down that it is an asset or account of a borrower which has been classified by a bank or financial institution as substandard, doubtful or lost asset. Sub-section (2) of

254 *Indus Ind Bank Ltd.* v. *State of Maharashtra,* AIR 2008 (NOC) 2474 (Bom).
255 *Asset Reconstruction Company* v. *Paharpur Cooling Towers Ltd,* AIR 2008 MP 70.
256 *Ibid*.
257 AIR 2008 MP 244.

section 13 further provides that once the account in respect of a secured debt is classified as non performing asset then the secured creditor may require the borrower by notice in writing to discharge his full liabilities within 60 days failing which he will be entitled to exercise the rights under sub-section (4). Thus, the classification of account as non-performing asset by the bank and issuance of notice requiring the borrower to discharge his liabilities are two different independent steps. But it is only after the first step is over, the bank may exercise its discretion to take recourse to the second step. Further the word "full" in sub-section (4) of section 13 has an important significance and it denotes that in case the borrower has failed to discharge his liabilities in full within the period specified in sub-section (2), the bank becomes entitled to take recourse to the measures provided in the sub-section to recover its secured debt. Thus, for the borrower to avoid an action under sub-section (4) by the bank, he must discharge his liability in full within the period specified in the notice and he cannot escape the action by making part payments. It is also to be noted that the definition of non-performing assets does not state that once the account of borrower is classified as such it ceases to be a non-performing asset if any payment made by the borrower thereafter towards the debt is adjusted in his account.[258]

In *Meher & Co.* v. *Union of India*[259] the petitioner was the highest bidder in the sale of secured assets but could not make payment of installments within the stipulated period. This order was cancelled which was challenged in the court and the petitioner showed his willingness to pay the whole amount including interest. The court said that it is for the bank to take a decision in this regard. The court can neither interfere nor issue direction to the bank.

The petitioner emerged highest bidder in an auction for the sale of secured assets in *Harminder Singh & Anr*. v. *Punjab and Sind Bank & Anr.*[260] The authorized officer issued a letter intimating the successful bidder to pay the balance sale consideration within the stipulated time so that sale is confirmed. The required amount was not paid and the court held that it would not amount to confirmation of sale.

In *M. K. Ramesh Kumar* v. *Asset Reconstruction Company (India) Ltd.*[261] a mortgagor created an equitable mortgage in favour of bank in respect of her leasehold rights in property and subsequently these rights were converted into full ownership rights by conveyance deed issued in her favour by government during currency of mortgage. The court held that the respondent with whom bank entered into assignment agreement and transferred all loan incidents would be entitled to take action under section 13 (2) and (4) of Securitisation Act *qua* the mortgaged property for recovery of the dues.

258 *Id*. at 246.
259 AIR 2008 (NOC) 598 (AP).
260 *Supra* note 8.
261 AIR 2008 AP 45.

In *Bank of Baroda* v. *O.L. of Bennzo Petro-Chemicals Ltd. Ahmad & Ors*[262] the sale of assets of a company in liquidation was ordered. The court held that the secured creditor (bank) having the first charge over assets would be entitled to receive its share from sale realization.

Enforcement of secured interest

The Gujarat High Court in *Gaurangbhai Bipinbhai Pandya* v. *Bank of Baroda*[263] had to resolve co-relation, if any, between the rights of the secured creditor under the securitization Act and banker's lien under the contract law. The petitioner had defaulted in the repayment of house building loan taken from the respondent bank. The bank sold his secured assets in an auction sale for the enforcement of security interest. The surplus money was retained by the bank for other transactions by exercising banker's general lien. The court held that it deserves to be recorded that when the bank enforces its security interest under the Securitization Act, it is clothed with the statutory power which can be construed within the ambit of such power and it cannot be mixed up with the rights, if any, of the bank pertaining to the different loan transaction, in different capacity based on separate agreement entered into for such purpose. If the language of section 13(7) of the Act is considered, it provides that the secured creditor shall hold the amount in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of dues of the secured creditor and the residue of the money so received is required to be paid to the person entitled thereto in accordence with his rights and interests. The use of the words in section 13(7) "in absence of any contract to the contrary" would be applicable to the contract, if any, pertaining to such property or realization of the security interest of such property, or to such interest incidental to the principal transaction of creation of security interest or realization of security interest. Therefore, under the Act such words "in absence of any contract to the contrary" cannot be related to any contract, which is not directly or indirectly concerned with such loan transaction, or a different contract altogether pertaining to a different loan transaction. It appears that on a true construction of section 13(7), the bank can exercise the right under the contract if it is so conferred upon it by the loan transaction or the agreement pertaining thereto through which, the security interest is created or any incidental thereto.[264]

In *Kolluri Suresh Rani* v. *Andhra Bank Anr.*[265] the bank took possession of the secured assets under section 13(2) after giving the borrower several opportunities and making repeated requests. The court instructed the bank to consider rescheduling of payment in the event borrower is ready and willing

262 AIR 2008 (NOC) 1682 (Guj).
263 AIR 2008 Guj 141.
264 *Id.* at 144.
265 AIR 2008 (NOC) 599 (AP).

to pay the amount due. Similarly, in *Amit Raj Enterprises & Ors*. v. *UCO Bank & Ors*.[266] the petitioner had offered to compromise under one time settlement scheme. The bank responded by issuing a letter to deposit 25% of amount of offer to entertain offer. Inspite of it, a notice was issued under section 13(2). The court passed an interim order that if the petitioner deposits 25% of one time amount within three weeks no coercive steps will be taken. The petitioner deposited the required amount but his offer was thereafter rejected without assigning any reason. The court directed the bank to reconsider the matter in its right perspective and pass reasoned order afresh in accordance with law.

In *Arjun Motors Pvt. Ltd* v. *State of Karnataka & Ors*[267] the court held that the recovery of sales tax dues shall have priority over right of bank as a secured creditor to proceed against property of borrower which has been mortgaged in favour of bank. The dues of the government, if any, have a prerogative over any other dues and charges. A contrary view was expressed in *Union of India* v. *Debt Recovery Tribunal, Chandigharh*[268]by invoking earlier decisions of the apex court.[269] It was laid down that state cannot get precedence over the bank when the right of bank had arisen before the right of the state.[270]

An interesting question for judicial determination arose in *Rajan Kakar & Ors* v. *Vijaya Bank & Ors*.[271] The borrower had approached *lok adalat* with the consent of the bank. It was agreed that the outstanding amount will be paid by the borrower in nine instalments. The court ruled that the award of *lok adalat* is deemed to be a decree. The award passed by it cannot be overridden in terms of the Securitisation Act and it is not open to the bank to have recourse to the Securitisation Act after submitting to the jurisdiction of the *lok adalat*.

In *M/s Atma Tube Products Ltd*. v. *Debt Recovery Appellate Tribunal & Anr*.[272] the court held that the borrower company can be given an opportunity to file objections under section 13(3A) which is procedural in nature and can be applied retrospectively.

Jurisdiction of civil court barred

The civil court has no jurisdiction to entertain the matter where an action has been taken or even in matter in respect of which an action may be taken later on under the Securitisation Act. In *Yuth Devpt. Co-op. Bank Ltd* .

266 AIR 2008 (NOC) 601 (Jhar); *Mansoor Ansari Ashrafi* v.*The Central Bank of India & Ors*., AIR 2008 (NOC) 875 (Pat).

267 AIR 2008 Kar 39.

268 AIR 2008 HP 105.

269 *Dena Bank* v. *Bhikhabhai Prabhudas Pareksh & Ors*., 2000 (5) SCC 694; *M/s Builders Supply Corporation* v. *Union of India,* AIR 1965 SC 1061.

270 See for similar opinion, *Punjab National Bank* v. *State of HP. & Ors,* 2008 (1) Shim L C 409. The court held that crown debts would not rank higher than the secured debts of the banks.

271 AIR 2008 Del 17.

272 AIR 2008 (NOC) 876 (P&H).

Kolhapur v. *Balasaheb Dinkarrao Salokhe*[273] the court held that even though the action under section 14(4) was not yet taken, such an action could be taken in future in view of the notice issued under section 13(2) and (3) of the Securitisation Act. This legal exposition is substantiated by the express language of section 34 which provides that the jurisdiction of the civil court is barred in respect of any action taken or to be taken in pursuance of any powers under the Securitisation Act.

The Securitisation Act bars jurisdiction of the civil court in respect of matters which can be taken before the debt recovery tribunal for adjudication. In *Vysya Co-operative Bank Ltd*. v. *G. Keerthana*[274] a suit for partition was filed in the civil court in respect of the property that was mortgaged in favour of the bank and in respect of which the bank had already taken proceedings under the Act and had taken possession of the very property. The court held that these facts were not sufficient to construe that section 34 was attracted to oust the jurisdiction of the civil court.

Jurisdiction of debt recovery tribunal

The issue involved in *V.D. Mathew* v. *State Bank of Travancore*[275] was whether the debt, which had become final on the basis of a decree before the amendment *viz.,* 17.1.2000, to the Recovery of Debts Due to Banks and Financial Institutions Act, could be amenable to the jurisdiction of the tribunal. Section 2(g) was substituted by the Act of 2000 with effect from 17.1.2000.This section provides the definition of debt to mean, among other things, liability payable under a decree or order of any civil court. By such amendment, decree debts could also form foundation of an application under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act (RDB Act).This is essentially an enabling provision, which is intended to exclude any contention that the tribunal did not have the authority to treat debts on the basis of the decrees issued before the coming into force of Act 1 of 2000.

The Supreme Court in *Bank of India* v. *Ketan Parekh*[276] held that in matters falling under the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992, the debts recovery tribunal had no jurisdiction. Similarly, in *Kanhaiya Lal* v. *State Bank of India & Ors.,*[277] the court held that once the bank had statutory remedy which it availed and took it to its logical conclusion, its result could not be discarded and ignored and proceedings afresh started under the Securitisation Act.

An application under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 has to be filed before the tribunal in

273 AIR 2008 Bom 167.
274 AIR 2008 Kar 25.
275 AIR 2008 Ker 194.
276 AIR 2008 SC 2361.
277 AIR 2008 Pat 153; *Sajjan Textile Mills Ltd.* v. *ICIC Bank Ltd,* AIR 2008 SC 2697.

execution of the decree to recover any debt from any person and such application has to be accompanied by a fee as provided in section 19 (3). But from second proviso to sub section (3) of section 19, it is clear that the stipulation about payment of application fee in section 19 (3) of the said Act does not apply to a case which has been transferred to the tribunal.[278]

One time settlement scheme

The one time settlement scheme issued by the Reserve Bank of India does not have any statutory roots. Such schemes do not confer any statutory right on a borrower to seek their enforcement by issuance of *mandamus* nor does it create any corresponding legal duty on the financial institutions. There is no provision in the Securitisation Act which may empower a chief general manager to issue one time settlement scheme.

The courts can, however, in deserving cases in the interest of justice and to balance equities may issue *mandamus*. However, it has to be strictly to avoid injustice to the parties as an exception and not in a routine matter.[279]

Method of recovery of debt

The recovery of any amount due from customers of banks should be by a method known to law or a fair practice of debt collection, which has an approval of the Reserve Bank of India which enjoys the overall supervisory and monitoring power over all banks in the country. Taking notice of the criticism about the illegal methods being adopted by certain banks issuing credit cards, Reserve Bank of India issued certain guidelines to be adopted by all the commercial banks issuing credit cards and which are employing recovery agents for collection of dues. It was categorically observed in these guidelines that banks or recovery agents should not resort to intimidation or harassment of any kind, either verbal or physical, against any person in their debt collection efforts, including acts intended to humiliate publicly or intrude privacy of credit card holders, family members, referees and friends making threatening and anonymous calls or making false and misleading representations. These guidelines have to be scrupulously followed and recovery agents appointed by the bank cannot resort to activities of using criminal force against the card holders for the recovery of the amount due. If any such criminal force or harassment is made by the banks or the recovery agents employed by them, the affected persons will have a right to take recourse to law by lodging a complaint with police or can move competent criminal court having jurisdiction.[280]

278 *State Bank of India* v. *M/s Glass Decorate Bhubaneswar & Ors. ,* AIR 2008 Ori 147.

279 *Kinittex Oversees Pvt. Ltd.* v. *State Bank of Patiala & Ors*., AIR 2008 P&H 59; *M/s Meeran & Ors* v. *Central Bank of India & Anr.*, AIR 2008 (NOC) 1207 (AP.); *Punjab & Sind Bank* v. *Debt Recovery Tribunal,* AIR 2008 (NOC) 1455 (P&H.); *M/s Choudhury Traders* v. *State Bank of India & Anr.,* AIR 2008 (NOC) 1681 (AP.); *Babusha International* v. *Canara Bank*, AIR 2008 Del 185.

280 *B.V.S.P..Choudary* v. *The Station House Officer, Mahankali, Police Station Secunderabad & Ors.,* AIR 2008 AP 147.