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MERCANTILE LAW

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I INTRODUCTION

THIS SURVEY discusses all the major decisions of the High Courts and the Supreme Court relating to mercantile law which includes law of contracts, sale of goods, partnership, negotiable instruments and banking laws. These courts have reiterated more or less already established principles on the subject except in case of banking laws where some courts have attempted to extend the reach of the relevant enactments by formulating principles not only for those for whom these legislations are essentially enacted but also for those who may directly or indirectly be brought within the fold of these legislations. It has been also observed, in some cases, that courts are not prepared to come out of the traditional doctrines propounded by the common law courts. It is urged here that the new economic setting of this country harbingered by the globalization which has culminated through privatization demands fine tuning of the old doctrines that have outlived their utility and are now coming in the way of new economic policy which calls for unification and harmonization of laws at the global level.

II LAW OF CONTRACTS

Offer

In *M/s Technocom* v. *Railway Board*,[1] the court ruled that it has now been established beyond doubt that a notice inviting tender is nothing but calling of an offer under section 4 of the Contract Act, 1872.

Counter offer

The Bombay High Court in *Claridges Infotech Pvt. Ltd*. v. *Surendra Kapure*[2] followed the decision of the apex court[3] and held that in the instant case, the offer was for the acquisition of 29.4 per cent of the share capital

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1 AIR 2009 Pat 15.

2 AIR 2009 Bom 1.

3 *Mayawanti* v. *Kaushalya Devi* (1990) 3 SCC 1. The Supreme Court held that it is a settled law that if a contract is to be made, the intention of the offeree to accept the offer must be expressed without leaving room for doubt as to the fact of acceptance and the coincidence of the terms of acceptance must be absolute and must correspond with the terms of the offer.

of a limited company. The acceptance was to the acquisition of those shares whereby the plaintiffs would be acquiring 29.4 per cent of the right, title and interest in the plot of land of Sahara international airport. It was held that, *ex facie*, the acceptance would amount to a counter offer and not susceptible to the inference of a concluded agreement that could form the basis of a suit for specific performance.

The courts in India are still not prepared to go beyond this popularly called "Mirror Image" rule. This rule has now culminated into the "Last Short" doctrine. It means that where conflicting communications are exchanged, each is a counter offer, so that if a contract results at all, it must be on the terms of the final document in the series leading to the conclusion of the contract.[4] The courts have sometimes found it difficult to determine whether a communication was a counter offer or not.[5] It may not be clear some times from the communication of the offeree whether he is making a counter offer or merely seeking further information.[6] The Vienna convention on contracts for the international sale of goods has provided solution to this problem. Article 19(2) of this convention provides that a purported acceptance containing additional or different terms which do not materially[7] alter the terms of the offer, constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. The obvious advantage of this rule is the certainty which it brings in the formation of the contract that is lacking in the "Mirror Image" rule. This rule is gaining wider acceptance in other jurisdictions[8] and it is high time for the Indian courts to switch over to this rule which may prove quite handy in the present era of globalization mandating unification of laws at the global level as the contract formation will no more be frequently confined to the parties within the borders of the country.

The "Mirror Image" rule, however, cannot be overlooked in a situation where offeree accepts only a part of the offer and rejects the rest. This is what exactly happened in *M/s Technocom* v. *Railway Board*.[9] The court rightly held that an offeree cannot unilaterally trinket the offer and accept a part of it and force the same as an agreement on the head of the offeror. It is not an acceptance in the eye of law.

Concluded contract

A concluded contract will not come into existence unless there is an

4 *Simbia Steel and Building Supplies* v. *James Clerk and Eatons Ltd.* (1986) 2 Lloyd 's Rep.225.
5 Cheshire, Fifoot and Furmoston's , *Law of Contract* (12th edn., 1991).
6 *Stevenson* v. *Mclean* (1880) 5 QBD 346.
7 The material alteration includes among other things, the price, payment, quality and quantity of goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes.
8 See s. 2- 207(1)(2) of the Uniform Commercial Code of America.
9 AIR 2009 Pat 15.

acceptance of an offer and suit for damages is maintainable only when there is a concluded contract.[10] In *Steel Union Private Ltd.* v. *Commissioner of Customs*,[11] the petitioner was the highest bidder. He was communicated the acceptance. The conditions of auction sale included that the highest bidder shall forfeit his earnest money if full payment was not tendered within the specified time. The court held that once the bidder is communicated acceptance of bid, the contract is concluded and authorities are not bound to make further communication for approval of offer. All the attendant terms and conditions will come into play. The decision would be otherwise where acceptance of offer has not been effectively communicated to the bidder as in *Bihari lal Mahato* v. *State of Jharkhand*.[12] Interestingly, there were two bidders who had quoted the same price. It was decided to allot the work to one of them without communicating this decision to him. Later on, certain disqualifications were detected from his tender and the work was allotted to the other bidder. The court held that unless acceptance is formally communicated to the bidder, there cannot be a concluded contract.

In *Hubli Dharwad Municipal Corporation* v. *Chandrashekar M. Shetty*,[13] the Karnataka High Court in line with the already pronounced judicial policy in India,[14] laid down that the provisional acceptance of highest bid by itself does not bring about concluded contract, particularly when provisional acceptance is made subject to final approval through resolution of competent authority in terms of conditions of auction sale. The court further laid down that the terms and conditions of the auction sale must be made known to the bidders. No concluded contract can come into existence unless the terms and conditions of the auction sale are effectively communicated to the plaintiff. In the instant case, the conditions of auction sale were neither published along with the paper publication nor the copy of the conditions was published at the place of auction. The court ruled that the result of this lapse was that the conditions never formed part of the written contract that had come into existence between the contesting parties.

Biswanath Shaw v. *Central Bank of India*,[15] is yet another case on conclusion of the contract relating to auction sales. In the instant case, an auction sale was organized by the bank and the petitioner was the highest bidder. The petitioner was intimated that he was the highest bidder; however,

10 The *Maharashtra Rajya Sahakari Kappos Utpadak Panan Mahasangha Ltd.* v. *Manga Bhaga Chaudhary*, AIR 2009 (NOC) 2321 (Bom); see also *Vipab Kumar* v. *Smt Asha Lata Ahuja*, AIR 2009 (NOC) 2673 (P&H), wherein the court held that payment of total consideration was also required to conclude the contract.

11 AIR 2009 (NOC) 1215 (Cal).

12 AIR 2009 Kar 65.

13 AIR 2009 Kar 41.

14 *Union of India* v. *S. Narain Singh*, AIR Punj 274; *Somasundaram Pillai* v. *Government of Madras*, AIR 1974 Mad 366; *Muthu Pillai* v. *Secretary of State*, AIR 1923 Mad 582; *Union of India* v. *Bhimsen Walaiti Ram* (1969) 3 SCC 146; *Muthu Mohd Rawther* v. *Pathanamithitta Municipality* (1991) 2 Ker LT 514.

15 AIR 2009 Cal 243.

he would be informed about the sale of the property within 15 days. The bank did not then contact the petitioner and conducted another auction. Challenging this action of the bank, the petitioner contended that the bank had committed breach of the concluded contract. The court rejected this contention on the ground that it was apparent on the strength of the condition of the sale notice that no inviolable right had accrued to the petitioner as no contract had come into existence.

Expounding the legal position on the subject, it was held that the power of judicial review under article 226 of the Constitution was not akin to appellate powers. The writ court merely reviews the manner in which the decision was made. Rarely is the decision directly tested unless it is shocking. The state or any of its limbs have the freedom to contract, the decision being subject to the *Wednesbury* principles of reasonableness and being free from arbitrariness. In matters relating to contracts, there is a commercial element and the state as a contracting party has as much commercial freedom as a private party, subject again to the decision being reasonable and by and large fair. Even if there is an irregularity in the decision making process, the court has to exercise its discretion under article 226 of the Constitution with caution and only in the furtherance of public interest and not on pedantic legality.[16]

Once the contract is concluded in favour of the highest bidder, he cannot be allowed to wriggle out of the completed contract.[17]

There have been divergent opinions[18] of the courts on the issue of conclusion of insurance contract at the time when the cheque for the first installments has been accepted by the insurance company without communicating formal acceptance. In *Elisa Tony Phillip, Kelachandra* v. *Manager LIC of India Kottayam.*,[19] the national consumer disputes redressal commission (national commission) held that the mere encashment of cheque would not result into a concluded contract where neither acceptance of the proposal was communicated nor the policy was issued to insured by the insurance company. Similarly, the Gujarat High Court in *S.R. Kharidia* v. *Max. New York Life Insurance Co. Ltd.*[20] held that the mere fact that proposal form was submitted along with the first premium would not conclude contract between the parties, unless the insurance company had taken steps to underwrite the risk and issued policy to the insured.[21]

It is submitted that the aforesaid line of reasoning would not do any good to the global policy of encouraging people to have insurance cover to

16 *Id.* at 247.

17 *Steel Union Private Ltd.*. v. *Commissioner of Customs,* AIR 2009 Cal 282.

18 *Hindustan Cooperative Insurance Society* v. *Sham Sunder*, AIR 1952 Cal 691. This should be contrasted with *LIC* v. *Brazinha D' Souza*, AIR 1995 Bom 223; *LIC* v. *Venkadarn Koteseswararamma* (2003) 1 Bankmann 152.

19 AIR 2009 (NOC) 785.

20 AIR 2009 Guj 57.

21 AIR 2009 Guj 59.

ward off any risk to their life or property. The potential consumers of insurance will lose faith in these corporations if their polices are rejected on technical grounds. This will in turn harm the insurance business. These corporations cannot be allowed to play hide and seek with the consumer who has parted with his hard earned money by depositing cheque which has been accepted by the corporation without shouldering any responsibility. It is trite to say that a contract can be express or implied and it is not always necessary to communicate acceptance. The notification of acceptance is required for the benefit of the person who makes the offer, he may dispense with notice to himself or it may be said that performance of the condition is sufficient acceptance without notification.[22]

The insurance cover is emerging as one of the critical social security measures and cannot be left at the mercy of these corporations especially in a situation, "where public bodies are degenerating into store house of inaction, papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked."[23] The big businesses cannot be given licence to rob the rest.

Where an insurance corporation has accepted a cheque from a person interested in having an insurance cover and nothing remains to be done on his part, it should be deemed that a contract by conduct has come into existence when the corporation has accepted the cheque as a first installment of the premium, notwithstanding the fact that a formal acceptance letter has not been issued by the corporation.

The principle of law that a contract without consideration is void was restated in *Thakurmal* v. *Chakradhar Rao Bhosie*.[24] This principle has been extended to insurance contracts by the Andhra Pradesh High Court in *Kaninent Naga Srinivas Alias Srinivas* v. *Ganjanan Purushottam Patil*.[25] In this case, a cheque was paid towards premium that was dishonoured for want of sufficient funds. The insurance company duly informed the insured about the same and cancelled the policy. An accident was caused subsequently and the court held that insurance company was not liable to pay compensation as no contract was in existence for want of consideration. It appears that the court did not consider insurance contract from the date of issuance of policy to the date of maturity as one contract but a package of contracts each requiring separate consideration. This opinion is in right direction. It would protect the legitimate interest of the insurance companies especially where an insurance company has discharged its responsibilities and insured's misfortune has befell on him because of his own slackness.

22 Per Brown LJ in *Carlil* v. *Carlil Smoke Ball Company* (1893) 1 QB 256.

23 These words were expressed by the Supreme Court in the different context in *Lucknow Development Authority* v. *M. K. Gupta*, AIR 1994 SC 787.

24 AIR 2009 Chh 27.

25 AIR 2009 (NOC) 1086 (AP).

Implied contract

An implied contract like express contracts requires meeting of minds. The courts will refuse to read an implied term into a contract which is silent on the point or did not clearly indicate the nature of terms.[26]

Enforceability of contract

In *M. Raja Appar* v. *M. Gnanasambandam*,[27] it was laid down that a family arrangement may not have commercial undercurrent but the basic requirements of *consensus ad idem*, absence of fraud, misrepresentation, undue influence or coercion, *etc*. are not dispensed with.

Promise to pay time-barred debt

An agreement without consideration is void. This general statement of law contained in section 25 of the Contract Act has three exceptions namely, promise made (a) on account of natural love and affection, (b) past voluntary service, and (c) time-barred debt. Delineating the scope of this third exception, the AP High Court, in *Municipal Council, Malout* v. *Satish Kumar*,[28] laid down that in case of section 25(3), a contract of debt, which was rendered void by reason of expiry of period of limitation, revives by acknowledgment and promise made by the promisor. In either case, promisee gets a right to enforce the contract of debt under section 18 of the Limitation Act read with its section 19 for which no further undertaking is necessary except the promisor's acknowledgement of the debt. In case of section 25(3) of the Contract Act, the promisee has to plead and prove four components. These are (i) there is a debt payable by the promisor, (ii) the promisor acknowledges the debt, (iii) promisor agreed to make payment under the contract, and (iv) there is a specific promise or undertaking in writing by the promisor to treat such acknowledgement of debt as fresh enforceable contract. Thus, to save contract from being void for want of consideration promisee must not only acknowledge the time-barred debt but also make specifically the promise in writing to pay such time barred debt.

Fairness in government contracts

The Patna High Court reminded the state government in *State of Bihar* v. *Ram Binod Chaudhary*,[29]of its responsibility by holding that it is true that in a contractual matter, the jurisdiction of the court under article 226 of the Constitution is very limited but at the same time it cannot be ignored that even in pure contractual matters, the state is bound by the principles of fairness and reasonableness.

26 *Supra* note 2.
27 AIR 2009 Mad 159.
28 AIR 2009 (NOC) 2566 (AP).
29 AIR 2009 Pat 115.

Undue influence

The Supreme Court in *Bellachi* v. *Pakeeran*[30] outlined the scope of undue influence as envisaged in section 16 of the Contract Act. It was laid down that section 16 describes as to what constitutes undue influence. The relationship between the parties, so as to enable one of them to dominate the will of the other, is *sine qua non* for constitution of undue influence. It was further laid down that in a given case it is possible to hold that when an illiterate, *pardanashin* woman executes a deed of sale, the burden would be on the vendee to prove that it was the genuine sale deed. Where, however, this sale deed was a registered document, it carries with it a presumption that it was executed in accordance with law. The apex court ruled that law does not envisage raising of presumption in favour of undue influence. A party alleging the same must prove it subject of course to just exceptions.

It is submitted for the sake of clarity that section 16 has, broadly speaking, two parts. The first part provides that if the subsisting relationship between the parties is such that one of them is in a position to dominate the will of another and uses that position to obtain an unfair advantage over the other, he is said to have caused undue influence. To take the benefit of this part, the party alleging undue influence must establish that the subsisting relationship between him and the opposite party was such that he (opposite party) used that relationship to his unfair advantage.

The second part provides that a person is deemed to be in a position to dominate the will of another (a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Thus, for the second part, the party alleging undue influence has to prove a particular relationship as mentioned above in clauses (a) and (b). Once that relationship is proved, it shall be deemed that undue influence has been caused. The burden of proof that such contract, which on the face of it appears unconscionable, was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Thus, it is submitted that it is not correct to contend that law under section 16 does not envisage raising of presumption. It does raise presumption in the circumstances outlined above and the burden of proof that the contract was not the result of undue influence rests on the opposite party.

Fraud

The courts have always viewed the contracts of insurance with great circumspect. The contract of insurance is a contract of utmost good faith (*uberrima fides*). In *LIC* v. *Permanent Like Adalat*,[31] the insured had failed

30 AIR 2009 SC 3294.
31 AIR 2009 (NOC) 467 (P&H).

to disclose heart ailment in-spite of the fact that he was on medical leave when he submitted proposal form. The court held that such a material fact cannot be trivial so as to be ignored by the insurance company. Non-disclosure of material fact clearly disentitles insured to claim compensation and misrepresentation of material fact vitiates contract of life insurance.

Mistake

In *Rathnam* v. *Susheelamma*,[32] the court restated the already established principle of law that the mistake envisaged under section 20 must be a mutual mistake of facts between both the parties essential for the said agreement.

Lawful object

In tune with the social justice policy in India, the Allahabad High Court in *Mahesh Chandra Dwivede* v. *State of UP*,[33] held that the compromise made by a divorced wife that she would not claim maintenance is opposed to public policy. The divorced wife is entitled to maintenance till she remarries or is unable to maintain herself even where divorce is obtained by mutual consent. Any agreement or compromise taking away this right from a divorcee would be hit by section 23.

The court was called in *Mohinder Singh* v. *State of Punjab*,[34] to determine the validity of an interesting settlement between the members of the *gram sabha.* It was stated in the settlement that for two years 'M' would remain as *sarpanch* and for the remaining three years 'R' would be the *sarpanch.* The court declared this settlement void, being contrary to law and public policy. No one can be allowed to trade in the office which will be held only by a person who is elected democratically.

Restraint on legal proceedings

The Allahabad High Court had to answer an interesting question of law relating to restraint of legal proceedings in *Shashi Agarwal* v. *Chairperson, Debt Recovery Appellate Tribunal, Allahabad*.[35] The court rightly opined that if the proceedings are initiated by a party against another and in such proceedings a compromise is arrived at out of own sweet will for withdrawal of the proceedings against each other, then such compromise cannot be said to be hit by section 28 in as much as no restraint is being placed upon the institution of the proceedings. Such an agreement is arrived at by the parties in order to settle their dispute outside the court including

32 AIR 2009 Kar 79.

33 AIR 2009 (NOC) 205 (All). Similarly, in *Chandrashekar G. Sullad* v. *Tuheed Co-operative Housing Society* (*Regd)*, AIR 2009 (NOC) 264 (Kar), the court held that the purchase of land against s. 79-B of the Karnataka Land Reforms Act, 1961 by the cooperative society was forbidden *qua* s. 23, Contract Act.

34 AIR 2009 (NOC) 434 (P& H).

35 AIR 2009 All 189.

the arrangement that they will not pursue the court proceedings any further. Holding otherwise would not only encourage litigation but make all those compromises bad in law that prohibit further litigation on the issue upon which comprise was struck. However, challenging a compromise on the ground that it forecloses further possibility of litigation is different from a challenge to the compromise on the ground that it has been arrived at with, for instance, *mala fide* intention. The parties are free to challenge compromise on the ground that it was fraught with bad intention but cannot challenge on the ground that it is hit by section 28.

Contingent contract

In *Kasinath Panda* v. *Silla Satyabadi Patra*,[36] the court found that alienation of property was possible only after the permission to this effect was granted by the government. It was held that this is a contingent contract subject to an implied condition that transferor will obtain sanction of authority. It will be concluded only on the happening of contingency in question. The specific performance of the contract in this situation cannot be insisted upon.

Specific performance of contract

In *Nakubai Valu Dhokane (deceased)* v. *Bhagwansing Prakash Chandra*,[37] the court ruled that where no time was fixed for the performance of the contract, it must be then performed within a reasonable time. A period of three years prescribed under article 54 of the Limitation Act, 1963 for specific performance of contract can be taken as a reasonable time.

Time as essence of contract

One who asserts that time is crucial for the performance of the contract must prove it.[38] Generally, in contracts relating to the sale of immovable property time is not the essence of the contract unless it is so specifically stipulated in the contract. The courts would generally examine the conduct of the parties subsequent to entering into the contract, the intention of the parties, whether the time specified was extended and thereafter the parties reasserting their intention of treating the time as essence of the contract. In other words, it would depend upon the terms and conditions of the contract, conduct of the parties and attending circumstances thereto.[39]

The Supreme Court in *M.D. HSIDC* v. *Hari Om Enterprises*[40] held that the corporations cannot be allowed to 'eat the cake and have it too.' Where a corporation had failed to give actual possession of the industrial plot and

36 AIR 2009 (NOC) 707 (Ori).
37 AIR 2009 (NOC) 385 (Bom).
38 *M/s Ramnath Publications Pvt. Ltd.* v. *A.R. Madana Gopal,* AIR 2009 (NOC) 549 (Mad).
39 AIR 2009 (NOC) 1054 (Bom).
40 AIR 2009 SC 218 at 223.

work plan allotted to the respondent, it cannot be then contended that the respondent had committed breach of the contract because he had failed to put up the building and start industrial production within the time stipulated in the letter of allotment.

Frustration of contract

The Madras High Court in *Ramasamy Athappan* v. *Secretariat of the Court, International Chamber of Commerce*,[41] expounded the ambit of the expression "incapable of being performed" occurring in section 56. The court opined that this expression signifies frustration and consequent discharge. If after making of contract, the promise becomes incapable of being fulfilled or performed, due to unforeseen contingencies, the contract is frustrated.

Discharge of contract

The Supreme Court in *National Insurance Company Ltd.* v. *M/s Boghara Polyfab Pvt. Ltd.*[42] came down heavily on the government departments, statutory corporations and government companies for issuing routinely undated 'no due certificates' or a full and final settlement vouchers acknowledging receipt of a sum which is smaller than the claim in full and final settlement of all claims as a condition precedent for releasing even the admitted dues. Even where the date is mentioned in the receipt and the payment is released long thereafter, the receipt acknowledging the amount, as having been received on a much earlier date, will be absurd and meaningless. Such a procedure is unfair, irregular and illegal and requires to be deprecated.[43]

Novation of contract

The Delhi High Court in *M/s S.K. Sharma* v. *Union of India*[44] held that once a settlement agreement is signed, the same is novation, rescission or alteration of the original contract between the parties. Where parties to a contract agree to submit to a new contract or to rescind or alter it, the original contract need not to be performed. Similarly, if the original contract contains a term for the dispute resolution mechanism through arbitration but the same term is not reflected in an altered contract that amounts to novation. It is not then open to a party of such contract to contend that the disputed contract be decided only through arbitration as the original contract contained a term to that effect unless both the parties to that contract agree or that term relating to arbitration contained in the original contract is reflected in the new contract.

41 AIR 2009 (NOC) (Mad).
42 AIR 2009 SC 170.
43 *Id.* at 184.
44 AIR 2009 (NOC) 2057 (Del).

Breach of contract

In the *State of AP* v. *T.V. Krishna Reddy*,[45] the court reconfirmed earlier principle that suit for damages can be filed where the notice communicating termination of contract by the defendant was received by the plaintiff as it can be said that a part of cause of action has arisen at that place.

Forfeiture clause

In *M/s Ajaya Enterprises P. Ltd*. v. *M.C.D.*,[46] it was laid down that when the contract provides a provision for forfeiture, this clause can be invoked notwithstanding the fact that the respondent has not established that he has suffered loss.

Obligation for non-gratuitous act

Section 70 provides that where without any contract something has been done by one party not intending to do so gratuitously and the other party has enjoyed benefit without any demur and objection, obviously the party who has taken benefit is bound to compensate the party who has done that gratuitous act. Where it is shown that some work has been done and the same has been accepted, then that party (acceptor) cannot turn around and say that the payment cannot be made on the ground of lack of his competence to accept the work. That would amount to unjust enrichment and is contrary to the provision of section 70.[47]

Payment made by mistake

In *State of Maharashtra* v. *Swanstone Multiplex Cinema (P) Ltd*.,[48] the Supreme Court held that a person who unjustly enriches himself cannot be permitted to retain the same for his benefit. Where it becomes established that he cannot retain it with safe conscience, the doctrine of unjust enrichment can be invoked irrespective of any statutory provisions. In *Smt. Sushila Kanojia* v. *State of U.P.*,[49] the petitioner was paid excess pension by the bank by mistake. The court ruled that the petitioner was liable to reimburse the bank and did not accept the plea that an amount paid in excess for no fault, fraud or representation by the recipient, cannot be recovered.

Liability of surety

In *Mohamed Ali* v. *T.N. Indl. Investment Corpn. Ltd*.,[50] the Madras High Court restated the legal position that the liability of surety is coextensive with that of a principal debtor. This legal position has given birth to the

45 AIR 2009 (NOC) 647 (AP).
46 AIR 2009 Del 133.
47 AIR 2009 Cal 284.
48 AIR 2009 SC 2750 at 2759.
49 AIR 2009 (NOC) 2320.
50 AIR 2009 Mad. 44; see also *Punjab National Bank* v. *Giriraj Prasad Mittal*, AIR 2009 (NOC) 2567 (Raj).

principle of election in favour of the creditor. The creditor by exercising such election can proceed against the surety and there is no need to exhaust the remedies against the principal-debtor before enforcing the liability of the surety.[51] The Madras High Court, in line with the earlier decisions on the subject, held in *Tamil Nadu Industrial Investment Corpn. Ltd.* v. *M/s Sudarsanam Industries*,[52] that the liability of surety even in case of continuing guarantee is coextensive with that of principal-debtor. The amount in question can be recovered from the guarantor without being recovered from the principal-debtor.[53] The surety can revoke continuing guarantee and his liability can be restricted upto the date when the notice of revocation is sent to the principal debtor.

In *M. Venkataramanaiah* v. *M/s Margadarsi Chit Fund*,[54] the court was called upon to delineate unusual distinction between the liability of joint promisors and sureties. It was laid down that if there exists two or three joint promisors in a contract; each one of them is under an obligation to perform the contract. There does not exist any primacy among the joint promisors in the context of obligation to perform. The surety, on the other hand, stands totally on a different footing. The basic and primary obligation to perform a contract is on the person defined as principal-debtor and obligation of surety is secondary in nature. Sections 43 and 44 make it amply clear that discharge of one joint promisor would not ensure the benefit to the other joint promisor. Almost opposite results flow between the principal-debtor and the surety. Discharge by one would discharge the other. Any transaction or deal between the creditor and the principal-debtor, without the knowledge of the surety, to alter the terms of the contract, or the circumstances mentioned in the provisions, such as section 135 of the Act, would have the effect of completely relieving the surety.

Though it is competent for a creditor to choose to proceed against the principal-debtor or sureties, the presence of the principal-debtor in proceedings becomes peremptory, not for the purpose of insisting that creditor must proceed against him but to examine whether debt can still be recovered from principal-debtor and to verify whether creditor has resorted to any steps giving rise to consequences under section 135. If, for any reason, it emerges that the amount cannot be recovered from principal-debtor, the whole entitlement of the creditor collapses. This is in contrast to the cases of joint promisors covered by sections 43 and 44. To illustrate, if the promisee to a contract suffers any disability from proceeding against

51 *Id*. at 48; see also *Darshan Kumar* v. *State Bank of India,* AIR 2009 (NOC) 1982 (P& H); *P.K. Shukla* v. *State,* AIR 2009 (NOC) 2066 (Cal). It was laid down that creditor was entitled to proceed against guarantor in preference to principal debtor. For similar opinion, see *Bansilal Nivrutti Pandit* v. *Punjab National Bank,* AIR 2009 (NOC) 2818 (Bom).

52 AIR 2009 Mad 15.

53 AIR 2009 (NOC) 386 (Ori).

54 AIR 2009 (NOC) 940(AP).

one of the co-promisors, his right to proceed against the other promisors does not get extinguished or erased.

Discharge of surety

The surety stands discharged in case the creditor had an arrangement with the principal-debtor. Such an arrangement can be in the form of a composition or promise to give time, or not to sue the principal-debtor. The contracts of this nature can be either express or implied. This situation is comparable to novation of contract. In *Chandrasekhar* v. *Special Deputy Tehsildar, Hyderabad*,[55] the court held that the surety continues to be liable for personal guarantee or continued guarantee till he addresses a letter or through proper documentation as agreed upon between the parties, informs the principal-debtor about his inability to continue as surety.

Liability of an agent

The Supreme Court in *Prem Nath Motors Ltd* v. *Anurag Mittal*[56] held that section 230 of the Contract Act categorically makes it clear that an agent is not liable for the acts of a disclosed principal subject to a contract to the contrary.

Bank guarantee

In *Bokaro Steel Employees Co-operative Housing Construction Society Limited* v. *State of Jharkhand*,[57] it was held that it is well settled that the legal position of the banker in connection with the fixed deposit is one of the debtor and the banker continues to be debtor, even though the period fixed for the deposit has expired. The fixed deposit is a complete statutory contract between the bank and the depositor and contractual obligation cannot be altered or changed. What is required under law is that the banker should obtain an authority from the customer before paying back such deposits to a person other than the depositor. The court further held in the instant case that once the petitioner who was the depositor issues the cheque to the members, the same will amount to conferring of authority on the bank to honour the cheque and pay the amount to the beneficiary. The implications of holding otherwise were outlined by the court by stating that if banks are permitted to dishonour their commitments by adopting such subterfuges, the entire commercial and business transactions will come to grinding halt. The only exception is in case of fraud which is of an egregious nature committed by the beneficiaries against the bank.[58]

55 AIR 2009 (NOC) 383 (AP).
56 AIR 2009 SC 567.
57 AIR 2009 Jha 39.
58 This opinion is in line with the opinion of the apex court expressed in *Delhi Cloth and General Mills Ltd. Company* v. *Harnam Singh,* AIR 1955 SC 590.

Invocation of bank guarantee

The unconditional bank guarantee can be revoked only under two circumstances, namely (i) there is an allegation of fraud in connection with such a bank guarantee, or (ii) encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned.[59] The court reiterated in *Sudarshan Wadia* v. *Titan Industries Ltd*.[60] already established position that injunction restraining invocation of bank guarantee can be granted where it is a *prima facie* case of fraud committed by the owner defendant and irretrievable injury to the plaintiff.

III SALE OF GOODS

Conditions and warranties

In *Kailash Sharma* v. *Patna Muncipal Corpn*.,[61] the Patna High Court held that section 13(2) must be read with section 59 of the Sale of Goods Act, 1930. The combined effect of these two sections is that where there is a warranty, the purchaser can at the best raise a claim for damages but cannot repudiate the transaction itself as was sought to be done by the corporation in the instant case. The buyer can set up a claim against the seller for breach of warranty in diminution or extinction of the price, or sue the seller for damages for breach of warranty.[62]

Passing of property

Where there is a contract for the sale of specific or ascertained goods and property was to pass to buyer only upon the payment of sale consideration, unless the entire sale consideration is paid, no property would pass on to the buyer.[63]

IV PARTNERSHIP

Nature of partnership

The partnership cannot be created simply by agreeing to share profit of the business equally. It may be a joint venture to which rigours of unregistered firm will not apply.[64]

Joint and several liability

In *Smt. Nazneen* v. *Director of Enforcement*,[65] the concept of "joint and several liability" of the partners was delineated by holding that the partners

59 *State Bank of India* v. *Nihar Fathima,,* AIR 2009 (NOC) 110 (Mad).
60 AIR 2009 (NOC) 2820 (Kar).
61 AIR 2009 Pat 11.
62 *Id* at 12.
63 *Sagar Warehousing Corporation* v. *Pawan Hans Helicopters,* AIR 2009 Del 8.
64 AIR 2009 (NOC) 1153 (AP).
65 AIR 2009 (NOC) 720 (Raj).

of a firm who are responsible for the conduct of business and were incharge at the relevant time can be held personally liable.

Rendition of accounts

In *Syed Azim* v. *Syed Mahaboob Hussain*,[66] the plaintiff was an independent partner in his right having 20 per cent share. The partners settled their accounts by way of deed to which plaintiff was not a party. The court ruled that this deed would not bind the plaintiff who was an independent partner in his own right.

Dissolution of firm

The Delhi High Court in *Rakesh Kumar* v. *Umesh Kumar*[67] was called upon to resolve the issue as to whether a firm 'at will' can be dissolved by the death of the partner. It was contended that a firm 'at will' can be dissolved by any partner by giving one month's notice and death of the partner will not affect the status of the firm. The court ruled that section 42(c) of the Partnership Act, 1932 provides that subject to contract between the partners, a firm is dissolved by the death of a partner. In view of this provision, it was open to the parties to incorporate a clause in the partnership deed that notwithstanding the death of one of the partners, the partnership would continue. In the absence of such clause, the partnership firm would stand dissolved by operation of law if any one of its partners died. The court did not accept the plea that the partnership was 'at will' and it could be dissolved by any partner by giving one month's notice in writing to the other partners of his intention to dissolve the firm and as no partner had given notice for the dissolution of the partnership in terms of the said clause, it continued to exist till the filing of the suit. The court dismissed this argument by saying that it was not tenable.

Effects of non-registration of firm

The primary object of the registration of a firm is the protection of third parties who were subjected to hardship and difficulties in the matter of proving as to who are the partners. The registration of firm provides protection to the third parties against false denial of partnership and the evasion of liability. Once a firm is registered under the Act, the statement recorded in the register regarding the constitution of the firm is conclusive proof of the fact contained therein as against the partner. A partner whose name appears on the register cannot deny that he is not a partner except under the circumstances provided. Even then, the registration of a partnership firm is not made compulsory under the Act. A partnership firm can come into existence and function without being registered.[68]

The English law insofar as it makes registration compulsory for a firm and imposes a penalty for non-registration was not followed when the

66 AIR 2009 (NOC) 536 (AP).
67 AIR 2009 Del 129.
68 *V. Subramaniam* v. *Rajesh Raghuvandra Rao*, AIR 2009 SC 1858 at 1862.

Partnership Act was made in India in 1932 as it was considered that this step would be too drastic and introduce several difficulties. Hence, registration was made optional at the discretion of the parties, but following the English precedent, any firm which was not registered by virtue of sub-sections (1) and (2) of section 69 disabled a partner or the firm (as the case may be) from enforcing certain claims against the firm or third parties (as the case may be) in a civil court. An exception to this disability with regard to an unregistered firm was made in sub-section (3)(a) of section 69, and this clause enables the partners in an unregistered firm to sue for the dissolution of the firm or for accounts or for realizing the property of the dissolved firm. This exception in clause (a) of section 69(3) was made on the principle that while registration of a firm is designed primarily to protect the third parties, the absence of registration does not mean that the partners of an unregistered firm lose all rights in the said firm or its property and hence cannot sue for accounts or for its dissolution or for realizing their property in the firm.[69] However, it is to be borne in mind that the bar under section 69(2) of the Partnership Act has no application where a suit is filed in respect of enforcement of statutory right or a common law right.[70]

The Himachal Pradesh High Court in *Naranjan Chauhan* v. *State of H.P.*[71] followed the long line of decisions of the apex court[72] and held that the provisions of section 69 were mandatory in character. The plea that a firm is not registered cannot be taken at any stage even if it is not specifically mentioned in the written statement. This plea being a legal one, it can be taken up for consideration and it is not correct to contend that it should be specifically mentioned.[73] In *Mandanlal* v. *Smt. Badam Bai*,[74] it was laid down that the suit for dissolution of firm and rendition of accounts was not barred and could be filed notwithstanding the absence of registration of partnership firm. The purpose of registration of firm is to protect interests of third parties and disability is confined to suits to enforce a right arising from a contract or conferred by the Act.

V NEGOTIABLE INSTRUMENTS

Drawer

The definition of the word 'drawer'[75] was revisited in *Smt. Ratan Devi*

69 *Id*. at 1858.
70 *M/s Yessay Foodoils* v. *P.A. Moosa*, AIR 2009 Kar 103 at 107.
71 AIR 2009 HP.10
72 *K.M. Service* v. *H.B. Vittala Kamath* (1996) 10 SCC 88; *Premlala* v. *Ishar Das Chaman Lal* (1995) 2 SCC 145; *Loonkaran Sethia* v. *Ivan John*, AIR 1977 SC 336.
73 *Supra* note 71 at 12.
74 AIR 2009 (NOC) 1046 (MP).
75 S. 7 provides that the maker of a bill of exchange or cheque is called the drawer; the person thereby directed to pay is called the 'drawee.'

v. *Alok Kansal*.[76] It was laid down that the maker of bill of exchange or cheque is called 'drawer' and he is liable under section 138 of the Negotiable Instruments Act, 1881 (NI Act) for the dishonour of the cheque. Where the wife was joint account holder but had not signed the cheque nor was notice of demand given to her, she could not be termed as 'drawer' and proceedings against her were liable to be quashed. A wide interpretation of the word 'drawer' came to notice in *Komalam Gopi* v. *T.K. Mohankumar*.[77] The Kerala High Court very rightly laid down that the debt or liability need not to be the personal liability of the drawer. Section 138 applies even when the drawer discharges debt of another.

'Holder in due course'

The 'holder in due course' of a negotiable instrument can be any person who fulfils the following requirements: (a) he must be a holder for a consideration; (b) the instrument must have been transferred to him before it became overdue; (c) he must be a transferee in good faith and should not have any reason to believe that there was any defect in the title of the transferor.[78] In *Sridhar Narayan Hedge* v. *Karnataka Bank Limited, Managlore*,[79] the court held that the 'holder in due course' must be transferee in good faith and must have no sufficient cause to believe that any defect existed in the title of the transferor over the cheques. In the instant case, two cheques for substantial amount were issued by two members of a family to other two members of the same family. This was, in the opinion of the court, sufficient to cause suspicion about the entitlement of payees to receive the amounts mentioned therein. The complainant bank had not acted in good faith, and there were several circumstances and reasons to raise suspicion as to whether the payees were entitled to receive money. The complainant bank, in these circumstances, could not be said to have become 'holder in due course.'

In *Ashok Kumar* v. *Dr. T.R Bhageerath*,[80] the court reaffirmed the established legal position that the legal representatives of 'payee' or the 'holder in due course' are entitled to file a criminal prosecution under section 142 of the NI Act. The 'holder' means any person entitled in his own name to the possession thereof and to receive or recover the amount under the instrument from the drawer.[81] In view of this, the legal representatives of a 'payee' or 'holder in due course' are entitled to the legal possession of the instrument and further to receive and recover the amount from the drawer. Section 118(g) of the NI Act specifies that holder of a negotiable instrument is a 'holder in due course.' Therefore, the legal representatives

76 AIR 2009 (NOC) 730 (Raj).
77 AIR 2009 (NOC) 2574.
78 *Sridhar Narayan Hedge* v. *Karnataka Bank Limited, Managlore,* AIR 2009 (NOC) 954 (Kar).
79 *Ibid*.
80 AIR 2009 (NOC) 131 (Kar).
81 S. 8, Negotiable Instruments Act.

of deceased 'payee' or 'holder in due course' are entitled to file a complaint under section 142 of the Act for an offence punishable under section 138 of the NI Act.

Endorsement

Law contemplates making of an endorsement by a 'drawee' on the back of a cheque regarding the part payment which he has received. In India, even attachment of a slip of paper to the cheque is statutorily recognized in section 15 of the NI Act. Where a portion of the amount covered by the cheque is repaid by the accused and 'drawee' did not endorse the same on cheque and presented it for collection of full amount, dishonour of such cheque will not be an offence.[82]

Non liability of bank

In *Canara Bank, Nalgonda* v. *Nalgonda Co-operative Central Bank Ltd.*,[83] it was held that protection under section 131 was not available to the bank when it was demonstrated that it ought to have suspected the *bona fides* of the transaction and it failed to take proper and necessary care in the matter. This failure amounted to negligence and demonstrated lack of good faith on the part of the bank, clearly disentitling it to the protection under section 131 of the NI Act.

Presumption

Presumption under sections 118 and 139 is to be drawn in favour of the complainant that the accused issued the said cheque towards the repayment of any legally recoverable debt or other liability. The courts cannot insist that cheques must be accompanied by some documents to indicate the existence of liability. If it is upheld, the courts would not only be reading a requirement which is not prescribed by law but also negating the presumption required to be drawn under section 139 of the NI Act.[84] The mere denial by the accused will not constitute rebuttal of evidence. He has to prove that as on date he had sufficient funds and that the cheque has been dishonoured for reasons other than want of sufficient funds.[85]

The Gauhati High Court had to consider the scope of the expression "shall be presumed" used in section 139 of the NI Act in *Ambika Baishya* v. *State of* Assam.[86] It was observed that when section 139 is read carefully, it becomes transparent that it is mandatory for the courts, unless contrary is proved, to presume that the holder of the cheque holds it for the discharge, in whole or in part, of the debt or other liability of the drawer. It means that if a person holds the cheque for a particular sum of money, it

82 *Joseph Sartho* v. *G.Gopinathan,* AIR 2009 (NOC) 402 (Ker).
83 AIR 2009 AP 89.
84 *Devidas S. Mardolkar* v. *Harichanda Mandrekar,* AIR 2009 (NOC) 396 (Bom).
85 *N. Hasainar* v. *M. Hasainar,* AIR 2009 (NOC) 953 (Kar).
86 AIR 2009 (NOC) 128 (Gau).

shall be presumed by the court that the drawer of the cheque had the liability to pay, at least, the sum of money for which the cheque was drawn.

The court further expounded the difference between the expressions "may presume," on the one hand, and "shall presume" or "it shall be presumed" on the other. The court said, "when the legislature uses the expression 'may presume' such presumption is called a natural presumption or presumption of fact, which a court is entitled to raise if the facts of a given case so require. However, when the statute uses the expression "shall presume" or "it shall be presumed" such a presumption is a presumption of law as distinguished from the presumption of fact. In a given case, when the facts established make it a case for raising a presumption of law, it becomes obligatory for the court to raise such presumption."

Drawing the distinction between the requirements of presumption in section 114 of the Evidence Act and section 139 of the NI Act, it was laid down that while under section 114 of the former Act, it is open to the court to draw or not to draw a presumption as to the existence of a fact from the proof of another fact, the court is, under section 139 of the later Act, obliged to raise presumption. Thus, in the case of a presumption of law, the court has no option but to raise presumption provided that the facts requiring for raising such a presumption exist. The presumption of fact can be rebutted by an accused by offering an explanation, which is reasonable and plausible; a presumption of law cannot be discharged by an explanation alone. The truth of the explanation must be proved. The court further held that the expression "unless the contrary is proved," which occurs in section 139, makes it clear that the presumption has to be rebutted by proof and not by mere explanation, however plausible such explanation may be. This can be done either by eliciting material from the cross-examination of the complainant and his witnesses or by adducing defence evidence.

In *P. Venugopal* v. *Madan P. Sarathi*,[87] the apex court held that the presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby. The presumption raised does not extend to the extent that the cheque was issued for the discharge of any debt or liability which is required to be proved by the complainant. This is a question of fact to be decided on the basis of facts of each case.

When execution of pronote and its receipt stood proved, then presumption under section 118 is available.[88] But this presumption stands rebutted when attesting witnesses of pronote or receipt categorically admitted that no consideration was passed on.[89]

Insufficient funds

A wide interpretation to the expression "insufficient funds" came to notice in *Manish Bajaj* v. *M/s Maza Construction Pvt. Ltd., Indore*.[90] The

87 AIR 2009 SC 568.
88 AIR 2009 (NOC) 2167 (P&H).
89 AIR 2009 (NOC) 2168 (P&H).
90 AIR 2009 (NOC) 136 (MP).

court put more fire power in the armoury of the financial institutions by holding that where on account of 'stop payment' instructions, the cheque is dishonoured, that will invite punishment under section 138 of the NI Act and it is immaterial whether there was sufficient amount in the account of the accused or not. Similar elaborative interpretation was given in *V.J. Prakasan* v. *Vasudevan*.[91] It was laid down that when a cheque was dishonoured with an endorsement "account closed" it would amount to returning of cheque unpaid because the amount of money standing to the credit of that account is insufficient to honour the cheque as envisaged in section 138. However, where accused has sufficient reason to give stop notice to the bank, he will not be held liable for dishonour of cheque under section 138.[92]

Offence by company

A flexible interpretation to the word 'company' was given by the Bombay High Court in *Dadasaheb Rawal Co-op, Bank of Dondaicha Ltd.* v *Ramesh Jawrilal Jain*.[93] It was laid down that a plain reading of the expression 'company' as used in sub-clause (a) of the explanation appended to section 141 makes it clear that it is inclusive of any body corporate or other association of individuals. The term 'association of individuals' will include club, trust, HUF business, *etc*. It shall have to be construed *ejusdem generis* along with other expression 'company' or 'firm.' Therefore, a joint family business must be deemed as a juristic person like a 'company' or 'firm.' It is submitted that it is a purpose oriented construction of the explanation and would do world of good to the financial institutions which form the life line of the country. However, this interpretation has to be confined to the NI Act only and cannot be extended to other legislation using the expression 'company' as they operate with different scheme of things and with different objectives. The court further held that the pattern of account in joint family business is different from that of partnership. No member of family can say that he or she is the owner to the extent of any particular share in the profits and assets. There is unity of ownership and community of interest. The shares of the individual members in the profit and loss are not worked out unlike in case of partnership account. All the members of a family can be roped in as drawers of cheque though signatory was one of them. The manager is liable not only to the extent of his share in the joint family property, but also personally.

Directors and other functionaries of company can be made vicariously liable only when principal offender is a company. The prosecution of a company is *sine qua non* for prosecution of various functionaries of the company being in-charge and responsible for conduct of affairs of company

91 AIR 2009 (NOC) 2835 (Ker).
92 AIR 2009 (NOC) 2834 (J&K).
93 AIR 2009 (NOC) 126 (Bom).

at the relevant time of commission of the offence.[94] Where the director was neither signatory to cheques nor there was any averment to that effect that he was in-charge and responsible for day-to-day affairs of firm, he cannot be held liable.[95]

In *Sham Sadashiv Wagh* v. *M/s Muley Constructions Pvt. Ltd.*,[96] it was laid down that the director nominated by IDBI to oversee affairs of the company was not directly concerned with its financial affairs. He could not be held vicariously liable under section 141. In *Anil Kumar* v. *State of Bihar*,[97] the court found that the notice was not issued within the statutory period of 30 days to the accused who was one of the directors and company was also not impleaded as a party. It was held that a case of cheating under section 420, IPC had not been made out.

The Kerala High Court, in *Usha Sanghi* v. *Dr. George Jaco*,[98] held that the offence under section 138 takes effect on the date of dishonour of cheque and the accused persons will be vicariously liable if they were directors at the time the cheque was dishonoured.[99] To attract culpability, such director must either be in-charge of, and responsible to, the company for conduct of its affairs or it must be proved that the offence was committed with his consent or connivance or the same must be attributable to his neglect.[100] It depends upon the role which one plays and not on the designation or status.[101] Where the director has resigned prior to the issuance of the alleged cheque, he cannot be liable as the resignation is effective from the date when the director submits it.[102] It is necessary to specifically aver in complaint that at the time offence was committed, the person accused was in charge of, and responsible for, conduct of business of the company.[103]

The Delhi High Court, in *Vinay Kumar Kedia* v. *State*,[104] ruled that it is the director who can be held vicariously liable for the acts of the company and not the chairman/vice-chairman. The Companies Act, 1956 does not make a chairman responsible for the conduct of day-to-day affairs of the company. Nor can it be inferred that simply because a person is a chairman/ vice-chairman of company, he has consented to or connived in the commission of the offence. It is submitted that the proper test to determine

94 *Manish Kant Aggarwal* v. *M/s National Agriculture Co-operative Marketing Federation of India Ltd.,* AIR 2009 (NOC) 1231 (Del).
95 *Ibid*; *Sameer Karnani* v. *The State,* AIR 2009 (NOC) 1817 (Del).
96 AIR 2009 (NOC) 123 (Bom).
97 AIR 2009 (NOC) 727 (Pat).
98 AIR 2009 (NOC) 133 (Ker).
99 See also, AIR (NOC) 138 (Mad).
100 *V. L. Sunny* v. *A.P. Venugopal,* AIR 2009 (NOC) 403 (Ker).
101 *G. Ravichandran* v. *G. Ramalingam,* AIR 2009 (NOC) 407 (Mad).
102 *Manish Kant Aggrawal* v. *M/s National Agriculture Cooperative Marketing Federation of India Ltd.,* AIR 2009 (NOC) 1231 (Del); *Vinay Kumar Kedia* v. *State,* AIR 2009 (NOC) 2069 (Del).
103 AIR 2009 (NOC) 2832 (HP); *Smt. Bhahma Devi* v. *State of UP,* AIR 2009 (NOC) 394 (All).
104 AIR 2009 (NOC) 2069 (Del).

liability of the accused is his role in financial matters of the company especially in issuing the cheque which eventually was dishonoured.

In *Amarnath Baijnath Gupta* v. *M/s Mohini Organics Pvt. Ltd*,[105] the Bombay High Court did not accept the contention that the process is to be issued under section 138 read with section 141 once the magistrate who is seized of the matter is satisfied that a case is made out against the accused and where process has been issued under section 138 only it is liable to be quashed. This contention was further stretched by stating that the legal effect of section 141 is that the persons mentioned in this section shall be deemed to be guilty of the offence under section 138 of the Act which is committed by the company. Turning down these contentions, it was laid down that if the magistrate on the basis of the averments made in the complaint as well as the verification of the complaint is satisfied that the complainant has made out a case under section 141, he can issue process for the offence punishable under section 138 of the said Act against the company as well as the directors or the persons referred to in sub-section (1) of section 141.

Complainant for dishonour of cheque

The Supreme Court has decided two cases in 2009 namely, *M/s Shankar Finance & Investment* v. *State of AP*[106] and *National Small Industries Corporation Ltd.* v. *State (NCT of Delhi)*[107] on the issue whether power of attorney holder can file a complaint on behalf of the 'payee' and in both these cases opinions expressed by the AP and Delhi High Courts, respectively, were reversed. Both the High Courts had opined that power of attorney holder was not competent to file complaint on behalf of 'payee.' The apex court advocated harmonious and purposive interpretation of section 142 of the NI Act and section 200 of the Criminal Procedure Code, 1973 (Cr PC). Section 142 of the NI Act requires that no court shall take cognizance of any offence punishable under section 138 except upon a complaint made in writing by the 'payee.' Thus, the two requirements are that (a) the complaint should be in writing; and (b) the complainant should be the 'payee' (or the holder in due course).

The court ruled that once the complaint is in the name of 'payee' and is in writing, the requirements of section 142 are fulfilled. Who should represent the 'payee,' is not a matter that is governed by section 142 but by the general law. It is thus evident that in a complaint relating to dishonour of the cheque (which has not been endorsed by the 'payee' in favour of anyone), it is the 'payee' alone who can be the complainant. The requirement of section 142 of the Act that 'payee' should be the complainant is met if the complaint is in the name of the 'payee.' If the 'payee' is the company, necessarily the complaint should be filed in the name of the company

105 AIR 2009 (NOC) 950 (Bom).
106 AIR 2009 SC 422.
107 AIR 2009 SC 1284.

through a corporeal person who is capable of taking legal recourse in court. Even if the complaint is made in the name of incorporeal person, it is necessary that a natural person represents such juristic person in court.[108] A company can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney. The attorney holder is the agent of the grantor. When the grantor authorizes the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder, and not by the attorney holder in his personal capacity.

The NI Act only provides that dishonour of cheque would be an offence. However, the procedure relating to initiation of proceedings, trial and disposal of such complaints is governed by the Cr PC. Section 200 of the Code requires that the magistrate, on taking cognizance of an offence on complaint, shall examine upon oath the complainant and the witnesses present and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses.

Section 138 mandates that 'payee' alone shall be the complainant. Section 142 of the NI Act and section 200 of the Cr PC contemplate that only a corporeal person being a complainant. It mandatorily requires the examination of the complainant and the sworn statement being signed by the complainant. If section 142 of the NI Act and section 200 of the Cr PC are literally applied, the result would be: (a) that the complainant should be the 'payee' of the cheque; and (b) he should be examined before issuing process and his signature should be obtained on the deposition. Therefore, if the 'payee' is a company, an incorporeal body, the said incorporeal body can alone be the complainant. An incorporeal body can obviously neither give evidence nor sign the deposition. If literal interpretation is applied, it would lead to impossibility as an incorporeal body is incapable of being examined. In the circumstance, a harmonious and purposive interpretation of section 142 of the NI Act and section 200 of the Cr PC becomes necessary. As a result, the company becomes a *de jure* complainant and its employee or other representative, representing it in the criminal proceedings, becomes the *de facto* complainant. Thus, in every complaint, where the complainant is an incorporeal body, there is a complainant-*de jure*, and a complainant-*de facto*. Clause (a) of the proviso to section 200 provides that where the complainant is a public servant, it will not be necessary to examine the complainant and his witnesses. Where the complainant is an incorporeal body represented by one of its employees, the employee who is a public servant is the *de facto* complainant and in signing and presenting a complaint, he acts in the discharge of his official duties. Therefore, it

108 *Meghnath Saikia* v. *M/s Xinmin*, AIR 2009 (NOC) 398 (Gau).

follows that in such cases, the exemption under clause (a) of the first proviso to section 200 of the Cr PC will be available.[109]

In *Govind Ram Chanani* v. *Latha,*[110] it was laid down that where the complaint is filed by a person who is neither a partner nor authorized by the partners to file a complaint, such complaint is not maintainable.[111]

Territorial jurisdiction

In *M/s Harman Electronics (P) Ltd.* v. *M/s National Panasonic India Ltd.*,[112] the Supreme Court elucidated the scope of the provisions of section 138 of the NI Act. The apex court observed that what would constitute an offence for dishonour of cheques is mentioned in the main provision of section 138. The proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken. If the ingredients for constitution of the offence laid down in the provisos (a), (b) and (c) appended to section 138 of the NI Act are intended to be applied in favour of the accused, there cannot be any doubt that receipt of a notice would ultimately give rise to the cause of action for filing a complaint. As it is only on receipt of the notice that the accused at his own peril may refuse to pay the amount. Clauses (b) and (c) of the proviso to section 138, therefore, must be read together. Issuance of notice would not by itself give rise to a cause of action but communication of the notice would. The court further laid down that the presumption raised in support of service of notice would depend upon the facts and circumstances of each case. The presumption has to be raised not on the hypothesis or surmises but only if the foundational facts are laid down therefor. Only because presumption of service of notice is possible to be raised at the trial, the same by itself may not be a ground to hold that the distinction between giving of notice and service of notice ceases to exist.

It was further held that the court derives jurisdiction only when the cause of action arises within its jurisdiction. The same cannot be conferred by any act of omission or commission on the part of the accused. A distinction must be borne in mind between the ingredient of an offence and commission of the part of the offence. While issuance of a notice by the holder of a negotiable instrument is necessary, service thereof is also imperative. Only on a service of such notice and failure on the part of accused to pay the demanded amount within a period of 15 days thereafter, the commission of an offence completes. Giving of notice, therefore, cannot have precedence over service. The High Court, at a place from where notice for dishonour of cheque was given, has no jurisdiction to try complaint.[113]

109 *Supra* note 107 at 1288; see also *Smt. Bhahma Devi* v. *State of UP,* AIR 2009 (NOC) 394 (All); *Smt. Durgadevi* v. *Shalikram Vitthalrao Korde.,* AIR 2009 (NOC) 1816 (Bom).

110 AIR 2009 (NOC) 1817 (Del).

111 See also *Nathan Industries Villianur*. v. *M. Arulselvam,* AIR 2009 (NOC) 2576 (Mad).

112 AIR 2009 SC 1168.

113 *Id.* at 1175.

Limitation period

Divergent opinions were expressed by the Madras, Bombay and Allahabad High Courts on the issue of reckoning of limitation period. The Madras High Court in *Mahesh Kumar* v. *Adil Nath Exports*[114] laid down that once a cheque is presented and dishonoured, presentation and dishonour of the same cheque for the second time does not give rise to fresh cause of action. The complaint is barred by limitation. Similar opinions were expressed by the Bombay High Court in two successive judgments in *M/s Devi Packaging Industries, Chennai* v. *M/s Bazargaon Paper & Pulp Mills Pvt. Ltd. Nagpur*[115] and *M/s Cotex* v. *State of Maharashtra*.[116] As against this, opposite opinions were expressed by the Allahabad High Court in *Smt Bhahma Devi* v. *State of UP*[117] and *Muzahir Hussain* v. *State of UP*.[118]

Surprisingly, the judgments of the Madras and Bombay High Courts were pronounced in ignorance of the opposite opinion expressed by the Supreme Court in *Anil Kumar Goel* v. *Kishan Chand Kaura*,[119] that represents the most liberal interpretation of section 138. The apex court had observed:[120]

> 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 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 premptory action in exercise of his right under clause (b) of Section, 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.

In view of the contrary opinion expressed by the Supreme Court, it is submitted that the above judgments pronounced by the Madras and Bombay High Courts can be at the best called as *per incuriam* and thus devoid of any binding effect.

114 AIR 2009 (NOC) 1234.
115 AIR 2009(NOC) 2328 (Bom).
116 AIR 2009(NOC) 2329 (Bom).
117 AIR 2009 (NOC) 394 (All).
118 AIR 2009 (NOC) 395 (All).
119 AIR 2008 SC 899.
120 *Id.* at 901.

In *P.K Shukla* v. *State*,[121] it was held that even if complaint was filed prior to accrual of cause of action, it was not liable to be dismissed as being premature. The court might not take cognizance till the time the cause of action arose. The date when the court took cognizance was crucial and not the date when the complaint was filed.

It is submitted that there is no apparent rationale in allowing a complainant to approach the court well before the actual cause of action arose. It is quite possible that the opposite party may fulfil his promise within the stipulated time. Why should one assume that he (the opposite party) will not fulfil his promise? Presenting of a complaint well before the actual cause of action arose will amount to misuse of judicial process and will, at times, force the opposite party to take hasty decisions.

In *West Asia Maritime Ltd.* v. *Elnet Ltd., Chennai*,[122] it was laid down that the cheque can be presented a number of times within six months from the date of its issue. But once statutory notice is issued calling upon drawer/ accused to make payment, the legal process constituting the offence is set into motion and thereafter the 'payee' cannot get any fresh period of limitation by sending the cheque again for payment. The period of limitation would be reckoned from the date of receipt of notice,[123] excluding *gazetted* holidays.[124]

Compounding of offences

Phool Chand Saraogi v. *State of Rajasthan*,[125] represents a case where the court is not prepared to peep through the letters of law to catch its spirit. The court admitted, in the instant case, that the offence under section 138 is compoundable under section 147 of this Act but a compromise requires an agreement between the litigating parties and, if one party is not agreeable, there can be no compromise. The accused, had deposited the disputed amount in the court and prayed for compounding of the offence. It was laid down that once an offence was made out under section 138, any payment made subsequent thereto would not absolve the accused of the criminal offence, though in the matter of awarding of sentence, it might have some effect on the court trying the offence.

It is submitted that it is to be borne in mind that the object of this provision is not to punish the accused but to secure payment. When the accused has made the payment, even after the institution of complaint, the compounding of offence should be encouraged and facilitated.

121 AIR 2009 (NOC) 2067 (Cal).
122 AIR 2009 (NOC) 2837 (Mad).
123 See also *Muzahir Hussain* v. *State of UP,* AIR 2009 (NOC) 395 (All).
124 *Smt. Minakshi Sharma* v. *Hitendra Kumar Sharma,* AIR 2009 (NOC) 1820 (Raj).
125 AIR 2009 (NOC) 959 (Raj).

Jurisdiction of *lok adalat*

The Bombay High Court in *M/s Subhash Narasappa Mangrule* v. *Sidramappa Jagdevappa Unnad*,[126] was to decide whether *lok adalat* could take cognizance of the offence under section 138. The court laid down that *lok adalat* could take cognizance when both the parties jointly make application indicating their intention to compromise which covers the proceedings under section 138 of the NI Act. This decision is in the right direction because the object of section 138 is not to inflict punishment but to secure payment of debt. If this purpose is achieved by approaching the *lok adalat*, why this opportunity should not be grabbed?

General principles

The following principles of law have been deducted from various decisions propounded by the courts during 2009 relating to the NI Act:

(i) Section 138 authorizes the secured creditor to issue demand notice. No format is prescribed for such notice. It may be served by a registered post[127] or through an e-mail.[128] The demand notice must be sent to the accused at the last known address but if notice has been sent at the address at which he never resided at any point of time, his conviction would not be proper.[129] The Supreme Court in *M/s Indo Automobiles* v. *M/s Jai Durga Enterprises*,[130] overruled the judgment of the Allahabad High Court which had held that although notice through registered post and under certificate of posting were sent by the complainant but because of the endorsement of the postal peon, the service could not be said to have been effected. The court held that where a demand notice has been sent through registered post and also under a certificate of posting, it shall be presumed to have been served to the drawer. In line with its earlier rulings,[131] the apex court held that section 138-b of the NI Act invites a liberal interpretation favouring the person who has the statutory obligation to give notice under the Act because he must be presumed to be loser in the transaction and the provision itself has been made in his interest and if a strict interpretation is asked for that would give a handle to the trickster cheque drawer.[132]

126 AIR 2009 (NOC) 1890 (Bom).

127 *Raj Rani* v. *Vinder Singh*, AIR (NOC) 729 (P& H); *Prafullaa Kumar Mohanty* v. *Akshya Kumar Biswal*, AIR 2009 (NOC) 2577 (Ori).

128 *M/s Paul Dias & Sons* v. *M/s SDS Shipping Pvt. Ltd*., AIR 2009 (NOC) 2330 (Bom).

129 *M/s Venkatesswara Feeds* v. *M/s Anand Drugs*, AIR 2009 (NOC) 2836 (Mad).

130 AIR 2009 SC 386.

131 See, for instance, *K.Bhaskaran* v. *Sankaran Vaidhyan Balan*, 1999 (7) SCC 510; *V. Raja Kumari* v. *P.Subbarama Naidu* (2004) (8) SCC 7741.

132 However, for *per incuriam* judgment, see *Ram Prasad Sahu* v. *Pandey Giri*, AIR 2009 (NOC) 2573 (Jhar) wherein opposite finding was recorded by the court.

(iii) A complaint can be filed by a 'payee' or 'holder in due course.' The complaint filed by the manager of the firm cannot be entertained.[133] The complainant must be validly authorized to file the complaint otherwise it is liable to be rejected due to infirmities in authorization.[134] It can be filed and signed by the power of attorney of complainant if he is authorized to file the complaint.[135]

(iv) A complaint is to be read as a whole. The hyper technical approach of rejecting complaint is not to be adopted if the substance of allegation made in the complaint fulfils the requirement of section 141.[136]

(v) The statutory period of 15 days[137] is provided within which the payment is to be made after the demand notice is served. The demand notice is not valid simply because it gives less time to the accused than the prescribed statutory maximum period.[138]

(vi) The practice of admitting evidence on affidavit is desirable but not mandatory. It saves judicial time and promotes speedy justice. The courts, however, cannot compel complainant to file proof affidavit in lieu of examination-in-chief.[139]

(vii) Where the accused is not the signatory of the cheque and there is neither any specific averment in the complaint nor any material evidence placed on record to indicate that the accused is in-charge of the affairs of the company or is responsible for the conduct of business of company, the complaint is liable to be rejected.[140]

(viii) The complaint for dishonour of cheque cannot be quashed merely on the ground that the complaintant had already taken recourse to arbitration proceedings.[141]

(ix) The cheque cannot be termed as invalid merely because there is a difference in amount mentioned in it in words and figures.[142] If there is a discrepancy between the demand notice and the amount

133 *M/s Surindera Steel Rolling Mills* v. *Sh.Sanjiv Kumar,* AIR 2009 958 (P&H).

134 *M/s Antifriction Bearing Co.,Ciombatore* v. *M/s Bharath Bearing Ltd., Coimbatore,* AIR 2009 (NOC) 725 (Mad).

135 *M/s Jayam Food Processing Industries* v. *M/s Bhalram Traders,* AIR 2009 (NOC) 957 (Mad); *Agarwal Trading Co.* v. *Latoor Lal*., AIR 2009 (NOC) 1237 (Raj).

136 *M/s Green Sea Marine* v. *V.A. Anty,* AIR 2009 (NOC) 723 (Ker).

137 This statutory period of 15 days has been substituted by 30 days by an amendment Act No 55 of 2002. This amendment has prospective operation as held in *Goa Antibiotics & Pharmaceuticals Ltd.* v. *R.K. Chawla,* AIR 2009 (NOC) 2572 (Bom).

138 *Muzahir Hussain* v. *State of UP,* AIR 2009 (NOC) 395 (All).

139 *Subramanian M. B.* v. *Krishnakumar P,* AIR 2009 (NOC) 724 (Ker).

140 *Sharwan Kumar* v. *M/s Vardhman Spinning & General Mills Ltd.,* AIR 2009 (NOC) 728 (P& H).

141 *M/s Sri Krishna Agencies* v. *State of AP,* AIR 2009 SC 1011.

142 *N. Hasainar* v. *M. Hasainar,* AIR 2009 (NOC) 953 (Kar).

mentioned in the cheque, it will not disentitle the complainant to claim amount which is less than what is claimed in the notice.[143]

(x) The mode and manner in which cognizance could be taken for the offence of dishonour of the cheque is laid down under special provisions in section 142(a) of the NI Act. The general provision of section 190 of Cr PC could not be made applicable.[144]

(xi) Where the accused after receiving legal notice replied to the same along with consolidated draft/cash order without making payment towards cheques individually, there is no cause of action left for the complainant under section 138 to file a complaint.[145]

(xii) Where the delay in filing a complaint has been condoned, the accused has an indefeasible right to oppose condoning of delay. If he is not given this right, it will amount to violation of the principles of natural justice.[146]

(xiii) There is no legal embargo for getting opinion from the handwriting expert, which would effectively assist the court in reaching a just decision. By no stretch of imagination it could be stated that the opinion of the expert is not a relevant factor for adjudication of the dispute and in order to unearth the truth, the court can very well refer the matter for comparison and necessary chemical examination.[147]

VI BANKING LAWS

Objects of SARFAESI Act

The legislature, while enacting the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), was concerned with the measures to regulate securitisation and reconstruction of financial assets and enforcement of security interest. The Act enables banks and financial institutions to realize long term assets, manage problems of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.[148] In respect of the liabilities to a bank or financial institution, the remedies for such an institution to proceed against has undergone substantial change in view of the enactment of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act)

143 *Kempanarasimhaiah* v. *P. Rangaraju,* AIR 2009 (NOC) 955 (Kar).

144 *M/s Surinndera Steel Rolling Mills* v. *Sh.Sanjiv Kumar,* AIR 2009 (NOC) 1236 (P&H..)

145 *M/s Boss Gears Ltd . & Ors.* v. *M/s Mohta Bright Steels P. Ltd.,* AIR 2009 (NOC) 2068 (Del).

146 AIR 2009 (NOC) 405 (Mad).

147 *V.P. Sankaran* v. *R. Uthirakumar,* AIR 2009 Mad 166 at 169.

148 *Authorised officer, Indian Oversees Bank* v. *Ashok Saw Mill,* AIR 2009 SC 2420 at 2425.

followed by a reformative legislation under SARFAESI Act which has already been upheld by the apex court as constitutionally valid.[149]

Co-relation of SICA and SARFAESI Acts

The SARFAESI Act is an enactment to regulate securitization and reconstruction of financial assets and enforcement of security interest. The Sick Industrial Companies (Special Provisions) Act, (SICA) is to make special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, with the ultimate goal of taking preventive, ameliorative, remedial or other measures and the expeditious enforcement of the measures so determined. Both these enactments focus on the measures which are needed for asset management, either of the company or of the security company. The special provisions relate to recovery of debts by the secured creditors, subjecting the contract between the parties to be governed by the statutory provisions under the Act. It would, therefore, appear that there is an element of election which would enable the secured creditor to choose between different modes and forums for recovering its dues.[150]

Section 37 of the SARFAESI Act enumerates different statutes and provides that the provision of the SARFAESI Act shall be in addition to, and not in derogation of, the legislations mentioned therein. On a reading of sections 35 and 37 of the SARFAESI Act, in conjunction, it can held that all enactments and laws in force, including those mentioned in section 37, would also be available to a secured creditor including SICA, notwithstanding the other provisions of the SARFAESI Act.[151]

Banker

The term "banker" includes any person acting as a "banker" and any post office saving bank.[152] This definition of "banker" is so wide and enhanced that it includes any person acting as a "banker." In fact, it also includes the post office saving bank. Banking need not necessarily be a business run with a profit motive. As a matter of fact, banking is an evolutionary concept, it cannot be said that bodies which carry on business not with a profit motive, but with the incidents with which a business of banking is associated, are not banks. What makes a person a "banker" is not what he does with the money of which he obtains the use by lending it at interest or by investing it, but by the terms upon which he obtains deposits of money from the banking customers. If it was the intention of the legislature to restrict the meaning of "banker" as per the Banking Regulation Act, 1949 (BR Act), a specific provision would have been made in the Negotiable Instrument Act to define the word "banker" as any person regulated by the BR Act. On the other hand,

149 *Indian Oversees Bank* v. *Popuri Veeraiah,* AIR 2009 AP 170.
150 *Tara Devi Kelanka* v. *State Bank of India,* AIR 2009 Jhar 81.
151 AIR 2009 Ker 76.
152 AIR 2009 Kar 184.

the legislature in its wisdom has enhanced the scope of the term "banker" under the Negotiable Instrument Act. The scope of the term "banker" under the Act is beyond the meaning included in the BR Act. While defining the word "banker," the language employed in the section is "includes" which is meant to ensure that not only the "bank," "banker," "banking institutions," incorporated by the Act of Parliament or under the BR Act are within its ambit but also to embrace business of banking. When a word is defined to "include," the definition is inclusive or illustrative. Therefore, the scope of word "banker" under the Negotiable Instrument Act is vast and stretches beyond the BR Act.

In *Indian Oversees Bank* v. *Popuri Veeraiah*,[153] the question for resolution was as to whether the bank as a secured creditor can claim any preference under the provisions of the SARFAESI Act over the proceedings under the Provincial Insolvency Act, 1920. The court held that the petitioner was a bank registered company under the Companies Act, 1956. Section 8 of the Provincial Insolvency Act, categorically states that insolvency petition cannot be presented against any corporation or against any association and registered company. The question of initiating any insolvency proceedings against a company/bank is not sustainable or valid having regard to the exemption provided under the Provincial Insolvency Act.[154]

Banking company

The Madras High Court in *Raj Kumar Khemka* v. *Union of India*[155] was called to determine whether the provisions of the SARFAESI Act would apply to a 'cooperative bank.' The court observed that there was no definition of "bank" under the BR Act, though it defines "banking" under section 5(b), 'banking company' under section 5(c) and banking policy under section 5(ca). 'Banking company' has also been defined under section 2(e) of the RDB Act and section 2(d) of the SARFAESI Act, as per which, the 'banking company' shall have the meaning assigned to it in clause (c) of section 5 of the BR Act. The definition of the 'banking company' has been bodily lifted from the BR Act and incorporated in section 2(d) of the SARFAESI Act. However, the term "bank" has been defined in section 2(d) of the RDB and section 2(c) of the SARFAESI Act. These definitions have five clauses. There is a distinction in the definition of "bank" in these enactments. While first four clauses are common in both the definitions, section 2(c)(v) of the SARFAESI Act empowers the central government to specify any other bank for the purposes of the Act. While exercising this power, the central government has specified 'cooperative bank' as defined in section 5(cc) of the BR Act as a "bank.' The court ruled that the

153 *Supra* note 149.
154 *Id.* at 173.
155 AIR 2009 Mad 43. See also *Nashik Merchants Cooperative Bank Ltd.* v. *M/s. Aditya Hotels Pvt. Ltd.*, AIR 2009 Bom 138.

Parliament has thus consistently made the meaning of 'banking company' clear beyond any doubt to mean a company engaged in banking, and not a cooperative society engaged in banking and in Act 23 of 1965, while amending the BR Act, it did not change the definition in section 5(c) or even in section 5(d) to include 'cooperative banks'; on the other hand, it added a separate definition of "cooperative bank" in section 5(cci) and primary 'cooperative bank' in section 5(ccv) of section 56 of the BR Act. Parliament while enacting the SARFAESI Act created a residuary power in Section 2(c)(v) to specify any other bank as a bank for the purpose of that Act and in fact did specify "cooperative banks" by notification dated 28.1.2003.

In *Standard Chartered Bank* v. *Applitech Solution Ltd.*,[156] it was laid down that where the rights and liabilities of the ICICI bank were assigned in favour of Standard Chartered Bank in the absence of any objection raised by the ICICI Bank against the terms and conditions of assignment, the Standard Chartered Bank, as assignee, can always prosecute the proceedings pending before the DRT.

Debt

In *Irene Isabella* v. *Authorised Officer, SBI*,[157] the court held that the term "debt" includes the amount payable under a decree. The fact that the bank had obtained preliminary decree in a suit praying for sale of mortgaged property will not debar the bank from proceeding under section 13(4) of the SARFAESI Act. The primary object of the Act outlined in its 'objects and reasons' read with section 13 is to enable and empower the secured creditor to take possession of their securities and to deal with them without the intervention of the court. In an application under section 17, the tribunal is concerned only with the validity of the acts of the accused creditor in taking possession of the securities and dealing with the same under section 13 and not with the determination of the quantum of claim *per se*. It is for the tribunal to decide in each case whether the action of the bank/financial institutions was in accordance with the provisions of the Act and legally sustainable.[158]

Service of notice

The Allahabad High Court in *Aradhana Seth* v. *Presiding officer, Debt Recovery Tribunal*,[159] widened the scope of section 13 of SARFAESI Act. It was rightly laid down that the purpose of serving notice upon the borrower under sub-section (2) of section 13 of the Act was that a reply may be submitted by the borrower explaining the reasons as to why measures may

156 AIR 2009 Guj 54.
157 AIR 2009 Mad 3 at 4.
158 *Id*. at 7.
159 AIR 2009 All 41.

or may not be taken under sub-section (4) of section 13 in case of non-compliance with the notice within 30 days.

The jurisdiction of the DRT is wide. The Patna High Court outlined the scope of the RDB and SRFAESI Acts in *Bank of Baroda* v. *Union of India*.[160] It was laid down that the RDB Act provides for an expeditious procedure for recovery of dues of banks and financial Institutions with the intervention of independent impartial authority. Apparently, noticing that the procedure was still taking too long time, the SRFAESI Act was enacted in the year 2002. These two Acts are complimentary to each other. The DRT is not an authority superior to that of bank under the SRFAESI Act. Recognizing this, the legislature provided an appeal to DRT under section 17 of the SRFAESI Act against an action taken under its section 13(4). The jurisdiction of the DRT to interfere in matters pertaining to the SRFAESI Act arises only when an appeal in terms of section 17 of the SRFAESI Act is filed, otherwise it has no jurisdiction over actions taken under section 13(4) of the SRFAESI Act. The provisions of the SRFAESI Act would override provisions of any other Act which are in conflict thereto. These two Acts are not in conflict but they are complimentary to each other.

Balancing of legitimate interests

The Supreme Court was called upon in *Authorised officer, Indian Oversees Bank* v. *Ashok Saw Mill*,[161] to determine as to whether the DRT would have jurisdiction to consider and adjudicate with regard to measures taken under section 13(4) or whether its role in terms of section 17 of the SARFAESI Act would be confined to the stage contemplated under section 13(4). The apex court held that section 13 enables the secured creditor, such as banks and financial institutions, not only to take possession of the secured assets of the borrower, but also take over the management of the business of the borrower. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in section 17 to balance competing legitimate interest of the financial institutions and the borrowers. Section 17 allows any person, including the borrower, aggrieved by any of the measures mentioned in sub-section (4) of section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter. The apex court ruled that the intention of the legislature is clear that while the banks and the financial institutions have been vested with the stringent powers for the recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also restore possession even though possession may have been

160 AIR 2009 Pat 28.
161 AIR 2009 SC 2420 at 2425.

made over to the transferee. The consequences of the authority vested in DRT under sub-section (3) of section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of section 13(4) of the Act. The legislature by including sub-section (3) in section 17 has gone to the extent of vesting the DRT with the authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Thus, law contemplates that action taken by a secured creditor in terms of section 13(4) is open to scrutiny and cannot be set aside but even *status quo ante* can be restored by DRT.

Procedure for recovery

The bank or any other financial institution has every right to make the recovery that too expeditiously for which legislature has enacted a special statute. However, the institutions and the authorities are bound to ensure strict compliance of the statutory requirement, particularly of those provisions which have been meant to protect the interest of the borrower for the reason that detailed and full fledged procedure followed in civil court proceedings is not applicable in these proceedings.[162] The legislature in its wisdom to protect the public at large from any kind of misrepresentation or fraud enacted the provisions of rule 8(2) providing mandatorily to publish the notice of possession in two newspapers having wide circulation in the locality one of them shall be in *vernacular* language with an object to invite maximum numbers of intending purchasers so that the property secures the best price. The purpose of enacting such a statutory requirement is to protect the borrower and the guarantor from any kind of distress sale of their property and to a certain extent to prevent any kind of collision or fraud either by the authorities or by the auction bidders. The non-compliance of the statutory provisions would vitiate the proceedings altogether.

A conjoint reading of sections 13 and 14 of the SARFASI Act would make it clear that the secured creditor on issuance of notice under section 13, can enforce the secured interest even without the intervention of the court or tribunal and if he intends to take possession of the secured assets, he may invoke section 14 of the Act by approaching jurisdictional district magistrate for the relief of taking possession through the said court. The procedure laid down in sections 13 and 14 of the Act is unambiguous which would pave the way for the secured creditor to take possession of the assets and documents relating to the loan. Sub-section (2) of section 14 of the Act also provides that the chief judicial magistrate may also take steps to use force as necessary for taking possession and forward the assets to the secured creditor. An important factor to be borne in mind is that section 14 of the Act, while providing for taking recourse through the chief judicial

162 *Swastik Agency* v. *State Bank of India , Bhubaneswar,* AIR 2009 Ori 147.

magistrate, does not contemplate any adjudication or enquiry after hearing both the parties. Before taking the aid of section 14 of the Act, the secured creditor is expected to exhaust the procedure contained in section 13 of the Act.

Order to attach property

In *Jeet Ram* v. *State*,[163] it was laid down that attachment of property by itself does not create a title nor operate to confer any title in the attaching creditor or the attaching authority. The attachment basically prevents a private alienation of the property attached and the property cannot be dealt with to the prejudice of the claims enforceable under the attachment. Essentially, an attaching creditor obtains by way of attachment *custodia legis* for the satisfaction of his debt.

Enforcement of security interest

Section 13 contains procedure for enforcement of the security interest created in favour of the secured creditor. Section 13(3A) gives opportunity to the borrower to present his version of the case. It provides that borrower may on receiving the notice make any representation or objection that shall be considered by the secured creditor. If the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, it shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. The court in *Malhotra Tractors* v. *Chief Managers, SBI Faizabad*[164] outlined the scope of this provision. It was laid down that this provision is mandatory in nature and neither the bank nor the authority had right to proceed in violation of this provision. It is only after this representation or objection is thoroughly considered that the bank or any competent authority can proceed further. The court further ruled that while deciding the objections, it shall be incumbent upon the authorities to pass a speaking or reasoned order on the basis of the material on record.[165]

In *Biswanath Shaw* v. *Central Bank of India*,[166] it was held that SARFAESI Act is an exception to the general rule. Its scheme envisages possession being obtained first and subsequent adjudication as to whether the possession was obtained in accordance with the provisions of the said Act. The principle of obtaining possession of a property by due process of law thus stands modified in the context of the right of a secured creditor apparently covered by the said Act to enforce its security interest.[167]

163 AIR 2009 Raj 33.
164 AIR 2009 All 150.
165 *Id*. at 151.
166 AIR 2009 Cal 236.
167 *Id*. at 243.

Restoration of secured assets

The Calcutta High Court in *Biswanath Shaw* v. *Central Bank of India*[168] comprehensively dealt with different issues including restoration of secured assets. It held that section 17(3) of the Act empowers the tribunal to pass such order as it may consider appropriate and necessary in relation to any of the measures taken by the concerned secured creditor under section 13(4) of the Act. The restoration of possession to the borrower would arise if the tribunal came to the conclusion that any of the measures taken by the secured creditor was not in accordance with the provisions of the said Act or the rules made thereunder and requires restoration of the management or possession of the secured assets to the borrower. The sub-section does not preclude restoration of management of any business or restoration of the possession of any asset to an appellant who is not a borrower but against whose assets the secured creditor has to proceed erroneously. The court ruled that the reference to the borrower in the sub-section may be justified since the overwhelming majority of the appellants were expected to be borrowers and it would only be the odd third party against whose assets a bank or a financial institution proceeds under the said Act.

The court rightly held that if the tribunal has the authority to decide the propriety of the measures taken by the secured creditor upon an appellant bringing a complaint before it, it would be absurd to suggest that irrespective of as to whether the appellant is the borrower in respect of the concerned transaction involving the secured creditor, the asset had to be returned to only the borrower who was to be put in possession of the asset despite the non-borrower appellant having established its right over such asset.

The court further held that the last limb of sub-section (3) was of widest amplitude and empowered the tribunal to pass such order as it may consider appropriate and necessary in relation to any of the measures taken by the secured creditor under section 13(4) of the Act. There was no limitation apparent from the relevant words as to the authority of the tribunal to effectively deal with such a situation. The plain words of the sub-section were enough and no complex rule of statutory interpretation was necessary to be invoked for the understanding of the purport of the provision.[169]

Right to appeal

The Kerala High Court in *V.P. Fakrudheen Haji* v. *State Bank of India*[170] gave wide interpretation to section 17 of the SARFAESI Act which gives right to appeal. It was contended by the petitioner that though section 17 empowers any person including borrower to make an application to the DRT, restoration of possession of the secured assets could be made only

168 *Ibid*.
169 *Supra* note 166 at 239.
170 AIR 2009 Ker 79.

in favour of the borrower. Therefore, it was contended that the remedy provided under section 17 was illusory. This contention was not accepted by the court. It was laid down that there can be no doubt that any person including the borrower can challenge the measures taken under section 13(4) by making an application to the DRT as provided in sub-section (1). If the DRT comes to the conclusion that any of the measures taken by the secured creditor under section 13(4) is not in accordance with the provisions of the Act and the rules made thereunder, it may declare such measures as invalid. It may pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13. If the tribunal finds that the recourse taken by the creditor under the section is invalid, nothing prevents the tribunal from passing appropriate orders protecting the interests of the appellant, whether the appellant is the borrower or any other person. If the tribunal finds that the recourse taken under section 13(4) is invalid and it is found that the appellant who is not a borrower was dispossessed of by such recourse under section 13(4), it would only be proper for the tribunal to pass an order putting the appellant in possession of the property or to pass any other appropriate order in the facts and circumstances of the case.

Appeal to the appellate tribunal

The Orissa High Court in *Kalyan Mahanty* v. *Presiding officer, Debt Recovery Tribunal*[171] was called upon to determine (i) whether any appeal can be preferred under section 20 of the Act against any order other than the final order passed by the tribunal. (ii) Whether alternative remedy is a bar to invoke writ jurisdiction of this court under articles 226 and 227 of the Constitution on the facts and circumstances of the case. The court observed that a plain reading of sub-section (i) of section 20 of the Act made it clear that any person aggrieved by an order made or deemed to have been made by tribunal may prefer an appeal to the appellate tribunal having jurisdiction in the matter. Thus, it does not say that only against the final order of the tribunal an appeal can be preferred to the appellate tribunal. The only embargo provided in sub-section (2) is that an order which is made by the tribunal with the consent of the parties is not appealable to the appellate tribunal.[172]

Answering second question, the court observed that the Act of 1993 has been enacted with a view to provide special procedure for the recovery of debts due to the banks and financial institutions. It is a self-contained code and the statute itself provides a hierarchy of appeals. Since alternative remedy by way of appeal is available under section 220 of the Act of 1993, the judicial prudence demands that the court should normally refrain from exercising its jurisdiction under articles 226 and 227 of the Constitution.[173]

171 AIR 2009 Ori 181.
172 *Id*. at 182.
173 *Id*. at 184.

Resolution of disputes

Section 11 of the SARFAESI Act deals with the resolution of disputes. It provides that where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely the bank or the financial institution or securitisation company or reconstruction company or qualified institutional buyer, such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 as if the parties to the dispute had consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.

The Kerala High Court in *Smt Pushpalatha, S.* v. *State Bank of Travancore*,[174] found an opportunity to expound the scope of the above provision. It was laid down that a reading of section 11 shows that the disputes which could be resolved by recourse to that provision are disputes relating to securitisation or reconstruction or non-payment of any amount due including interest. Such a dispute could be resolved only when that arises amongst any of the parties stated in that said provision. They are the bank or the financial institution or the securitization company or the reconstruction company or a qualified institutional buyer. Therefore, any dispute between a secured creditor and a debtor in relation to the security interest or secured debt does not fall for arbitration under that provision. Section 11, for that reason, cannot be initiated by a debtor.

It is submitted that the above opinion has curtailed the scope of the provision and deprived an ordinarily debtor (natural person) of the benefits of the procedure laid down in the Arbitration and Conciliation Act. The expression, "arises amongst any of the parties" used in section 11 makes it abundantly clear that the ambit of the provision is elastic enough to encompass the natural person/debtor also. The broad scope of this expression cannot be narrowed down by the word "namely". Invariably, debtor (natural person) is one of the parties to such disputes. The disputes *inter se* amongst the financial institutions may not be so frequent and one of the objectives of the passing the Act is the recovery of the debt from the individual debtor (natural person). The court has laid much emphasis on the word "namely" by virtue of which the scope of this provision was confined to the financial institutions only but even dictionary meaning of the word "namely" allows its flexible interpretation. For instance, *Webster's Third New International Dictionary* explains the meaning of the world "namely" as "that is to say," "especially," "specifically" and "expressly." Thus, if the meaning "especially" is assigned to the word "namely", it becomes clear that different financial institutions mentioned in section 11 are only illustrative and not exhaustive list of parties who can avail benefits of section 11 and if at all it is considered as the exhaustive list, it may be so

174 AIR 2009 Ker 181.

construed only with reference to the financial institutions and not for all possible parties of disputes covered under the SARFAESI Act. There is also no apparent reason in adopting this narrower interpretation. The above interpretation may also be viewed as a dual standard, one for the individual debtor (natural person) and another for financial institutions which may not stand the scrutiny of article 14 of the Constitution. There is of course need to amend this provision to iron out its creases so that what at present appears implicit is made explicit by adopting such language that would enfold all the possible parties to the dispute.

Territorial jurisdiction

In *Elements Coke Pvt. Ltd* v. *UCO Bank*,[175] the precise question asked to the Calcutta High Court was whether the DRT at Calcutta had jurisdiction to entertain an application under section 17 of the SRFAESI Act over the subject matter of the dispute arising out of an action taken by the concerned bank against the borrower as per section 13(4) of the said Act for realization of its dues by sale of the mortgaged property of the petitioner at Gujarat. The court opined that the failure to discharge the liability by the borrower as per demand notice under section 13(2) of the said Act was an integral part of the cause of action for which remedy under section 13(4) can be sought. The moot question is as to how to ascertain such failure. The court observed that in the instant case, the borrower was required to pay his debt at the Ashram Road branch of the bank at Ahmedabad. The said branch was required to examine its records for ascertaining as to whether the borrower had discharged his liability or not. In case it was found that the borrower had failed to discharge his liability, steps for realization was to be taken by sale of the secured assets, which admittedly, in the instant case, situated at Ahmedabad, was beyond the territorial jurisdiction of the DRT at Kolkata.

The court further held that on examination of the scheme of the said Act, particularly section 13, the measures provided under section 13(4) were in the nature of execution of the ultimate decision of the secured creditor taken under section 13(3A) coupled with the fact of non-payment of the dues so determined under section 13(2) and/or section 13(3A) of the said Act. This execution proceeding can be taken up before the tribunal within whose territorial jurisdiction the secured assets are situated. Mere service of notice under section 13(2) and/or communication of the decision of the secured creditor to the borrower at its registered office at Kolkata may form part of the cause of action, however insignificant it may be, but this cause of action does not form integral part of the cause of action under section 13(4) of the Act as this part of the cause of action has no correlation with the measures to be taken by the secured creditor under

175 AIR 2009 Cal 252.

section 13(4) for realization of its dues by sale of the secured assets of the borrower.[176]

Jurisdiction of civil court

No civil court shall have the jurisdiction to entertain any suit in respect of any matter which a debt recovery tribunal or any appellate tribunal is empowered by or under the Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the SARFAESI Act or under the RDB Act, 1993.[177] The overriding provision in section 35 of the Act and its intent apparent from section 37 provides that the Act is in addition to and not in derogation of certain other regulatory and general statutes. It conceives of a single window redress before the DRT. The jurisdiction under article 226 of the Constitution cannot be taken away by such statute but a grievance capable of being redressed by the tribunal under the said Act should not ordinarily be allowed to proceed in the High Court.[178] This provision would not apply to a suit where the action of the banks and other parties is assailed as fraudulent. The allegation of fraud in obtaining certain orders depriving the valuable right of a third party can be looked into by the civil court which has jurisdiction to deal with it. Such an issue falls outside the purview of the DRT or the appellate tribunal.[179]

In *Tara Devi Kelanka* v. *State Bank of India*,[180] the plaintiff bank had proceeded to exercise its powers under the provisions of section 13 of the SARFAESI Act by resorting to the preliminary steps of issuance of notice to the defendants/borrowers followed by a notice under section 13(4) of the Act for taking possession of the secured assets of the borrowers. The court ruled that section 34 would prohibit the court from passing any order which would amount to restrain or injunct the bank from taking any action from realization of its outstanding dues from the borrower in pursuance of the powers conferred to the bank under the SARFAESI Act. [181]

General principles

The following general principles have been culled out from various judgments handed down in 2009 relating to banking laws:

176 *Id*. at 257. Similarly, in *Achintya Mandai* v. *M/s Chaitanya Agro Products*, AIR 2009 (NOC) 2830 (Del), it was laid down that except the fact that statutory notice dispatched from Delhi none of other events shows that offence was committed at Delhi. The court at Delhi had no jurisdiction.

177 S. 34, SARFAESI Act.

178 *Supra* note 166 at 243.

179 *Cambridge Solutions Ltd., Bangalore* v. *Global Software Ltd.,* AIR 2009 Mad. 74; *State Bank of India* v. *Gopal alias Gopalan & Anr.,* AIR 2009 Mad 50.

180 *Tara Devi Kelanka* v. *State Bank of India,* AIR 2009 Jhar 81.

181 *Id.* at 83.

(i) Where an alternative remedy is available to the petitioner, writ petition is not maintainable.[182] The court cannot issue a writ of *mandamus* to the authority concerned unless it is satisfied that by non-performance of its duty by the said authority the petitioner has suffered any legal injury.[183]

(ii) Chief judicial metropolitan magistrate mentioned in section 14 will include chief judicial magistrate in non-metropolitan areas while exercising jurisdiction under section 14. Section 3(4) of Cr PC is not required to be resorted to. This provision is applicable if statutory functions under an Act are assigned to a magistrate. If only the word magistrate is used, in order to ascertain whether it refers to the judicial magistrate or executive magistrate, the functions vested in magistrate have to be examined in light of section 3(4), Cr PC.[184]

(iii) Where notice has been issued by reference to the wrong provision of law, that by itself will not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.[185]

(iv) It is open to a secured creditor to move against any secured assets and it is not essential that all the secured properties should be put to sale simultaneously. If by sale of one property substantial recovery could be made, it is not necessary that all the properties should be sold or possession be taken under section 13(4) of the Act.[186]

(v) Where several cheques have been dishonoured, each dishonoured cheque has different cause of action for different individual offences. Merely because common notice was issued, it cannot be said that there is only one cause of action.[187]

(vi) The RDB Act permits creditor to recover the outstanding amount from the principal borrower as well as guarantor. The plea of the guarantor that the property of the principal borrower should be first sold off before proceeding against the guarantor is not tenable.[188]

182 *Sumantri Devi* v. *Canara Bank through Branch Manager,* AIR 2009 (NOC) 895 (Jhar).
183 *Pramod Kumar Rath* v. *State of Orissa,* AIR 2009 Ori 82.
184 *V.N. Radhakrishnan* v. *State of Kerala,* AIR 2009 (NOC) 896 (Ker).
185 *Sujit Kumar Roy* v. *Union of India,* 2009 Cal 160.
186 *Wasan Shoes Ltd.* v. *Chairperson D. R. A. Tribunal, Allahabad,* AIR 2009 All 163.
187 AIR 2009 (NOC) 2831 (Guj).
188 AIR 2009 (NOC) 1977 (All).