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MERCANTILE LAW

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I INTRODUCTION

THE CASES relating to mercantile law reported during the year 2010 include subjects of law of contracts, sale of goods, partnership, negotiable instruments and banking law There was no deviation from well known principles of law on the subject except in case of compounding of offences under banking law. The apex court came up with guidelines in case an accused is interested in compounding the offence for which he has been charged. It is hoped that these guidelines will reduce considerably the burden of litigation in cases involving dishonour of a negotiable instrument. The controversy relating to effect of 'stop payment' notice and its possible fall out in case of dishonour of the cheques has not died down inspite of the two rulings of the apex court. Incidentally two decisions of the High Courts handed down during the surveyed year are in conflict with the decisions of the apex court. Some of the courts have either made doubtful propositions or left many questions unanswered in their decisions that have been discussed in detail with possible alternatives.

II LAW OF CONTRACTS

Concluded contract

The Bombay High Court in *Maharashtra Housing and Area Development Authority* v. *Maharashtra State Human Rights Commission*,[1] was called upon to decide an issue of far reaching implications. The court maintained that there was no meeting ground between the human rights and the rights arising out of the contract. In the instant case, respondent no. 2 had applied along with others for tenements in pursuance of an advertisement issued by the petitioner (MHADA), a statutory authority for housing development in Maharashtra. An officer of the petitioner wrote to her that she would be informed whether she would be admitted in the proposed cooperative housing society. She made an application before the respondent (MHRC) contending that MHADA was bound to act upon the said letter and allot to her one residential flat. The

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1 AIR 2010 Bom. 104.

MHRC, viewing the subject as a human rights violation, directed MHADA to allot a residential flat of a certain restriction in a certain area at the specified price. This order of the MHRC was challenged by MHADA in the present petition. The court eloquently held:[2]

> The enforcement of the right of residence as a part of the fundamental right or a human right can be enforced against the state under legislation or delegated legislation of the scheme. Though such a right exists, the entire populace cannot claim to be given a flat or such other residence from the Government under any contract sought to be entered into by them. A right under a contract is a civil right. It can be enforced against the other contracting party whose obligation is set out under the contract. Consequently for all those rights which arise under any contract or a specific provision can be enforced there under in the appropriate forum only. It is for any aberration under State policy, Government inaction or as a residuary provision, where no statutory rights can be enforced through Civil Courts that the jurisdiction of the Human Rights Commission would come into play.

The underlying reasoning of the above opinion was that there were thousands of applicants for single premises consequent upon a single advertisement of MHADA. All applicants did not have any legal rights vested in them by virtue of their application. They would be vested with legal rights only upon the issue of allotment letter when the contract between the applicants and MHADA was concluded. The court rightly opined that MHADA had only published an advertisement which was not an offer but only an invitation to the public to make an offer for the purchase of flat. These flats were allotted by lots. It was only when lots were drawn and a letter of allotment was issued that the offer of the party making an application was accepted and the contract was complete. The court not only answered the direct question that was raised in the appeal but also answered the question that is likely to be raised in future. The court observed that the MHRC had exercised jurisdiction not vested in it as there was no concluded contract. Even otherwise, it had no jurisdiction to enforce a civil right arising out of the concluded contract. *The non-performance of the contract cannot be taken to mean violation of a human right so as to give jurisdiction to any human rights commission. There are well defined boundaries of civil rights and human rights and their causes of action are also separate. These are two separate species of rights with same centre, but different circumferences*.[3]

2 *Id* at 107.
3 *Italics* supplied by the author.

Fraud

The Supreme Court in *Venture Global Engineering* v. *Satyam Computer Service Ltd.*,[4] elaborated the scope of doctrine of fraud as defined in section 17 of the Contract Act, 1872. The apex court observed that the Common Law doctrine of fraud has been assimilated in section 17 which is of wide amplitude. The court disallowed the contention that the expression 'fraud' should be narrowly construed and held that the mere fact that fraud being of infinite variety and may take many forms cannot be a ground for constricting its scope. The issue in hand in this case was whether an award induced by fraud or corruption can be set aside. The court invoked clause (2) of section 17 which states that the active concealment of a fact by one having knowledge or belief of the fact is also a species of fraud. Elucidating this statement, the court expanded the doctrine of fraud by holding that facts concealed must have a causative link and if the concealed facts, disclosed after passing of the award, have a causative link with the facts constituting or inducing the award, such facts are relevant in setting aside proceeding and award may be set aside as affected or induced by fraud.

Restitution

In *Padinhare Veeti Madhavi* v. *Pachikaran Veetil Balakrishnan*,[5] the appellant had purchased joint property of the respondent and his mother. The sale deed was executed by the mother on behalf of herself and her minor son. The property was sold for Rs. 6000/-, out of which Rs. 4000/- were immediately paid for meeting the liability of the father of the minor. The remaining amount of Rs. 2000/- was paid at the time the sale deed was executed. This amount was utilized by the mother for purchasing of land on behalf of her minor son and the sale deed executed also made mention of consideration amount of Rs. 2000/-. On attaining the age of majority, the minor filed a suit for setting aside the sale deed in which his mother had sold his property by contending that his father had no liability and there was no necessity to sell the property. He also pleaded that the alienation by his mother was wrongful and injurious to him as it was for a meager consideration. He expressed ignorance about the property which had been purchased in his name by his mother out of Rs. 2000/- received from the defendant. The lower court set aside the sale deed that was challenged in the present appeal.

The decision of the lower court was reversed by the High Court. The court borrowed the opinion expressed in *Chacko* v. *Sreeja*[6] in which sections 64 and 65 of the Contract Act were invoked. In both these sections, the doctrine of restitution requires that the party who approaches the court for rescission of the contract which is voidable or void or has become void or is discovered to be void may be asked to restore the "benefit" or "advantage"

4 AIR 2010 SC 3371.
5 AIR 2010 Ker. 111.
6 1991 (1) KLT 191.

which that party has received from the defendant and only then the relief sought can be granted. The court construed the words "benefit" or "advantage" as including the property that has been purchased, in the instant case, out of the money that was the consideration for the impugned transaction. The court ruled that the equity demands that in such cases relief of rescission of the contract can be granted subject to return of the property by the minor which he had purchased from the money received by him as a consideration for the transaction which he now wants to rescind. The High Court adopted an equitable approach by enlarging the scope of the doctrine of restitution in case of a minor's agreement. The court did not confine the scope of this doctrine to the return of immediate benefits but extended it to those benefits that may indirectly accrue because of the benefits which a minor has received from the major. The court ruled that the doctrine of restitution demands that the minor should return the land which he has purchased for Rs. 2000/-, an amount which he received as a part of the consideration for the sale of his property which he now wants to rescind. The court further ruled that the return of Rs. 2000/- to major would result into injustice to him as the price of the property over the period of time might have gone very high.

This decision is in the right direction and in resonance with the equitable principle that one 'who seeks equity must do equity'. This wide construction to the words "benefit" and "advantage" would deter the minor to blow hot and cold as per his choice and convenience. It may, however, be remembered that the court has invoked sections 64 and 65 of the Contract Act forgetting the fact that the Privy Council had long way back in the celebrated case of *Mohoribibi* v. *Dharmodas Ghose*[7] ruled that these two sections were inapplicable to minor's contract as the contract with minor is void *ab initio* and not merely voidable. The court should have taken the help of section 33 of the Specific Relief Act, 1963 to resolve this issue as it is the relevant section on the subject which deals with the doctrine of restitution. Interestingly, the word "benefit" is used in section 33 also. The above broad construction adopted by the court would equally apply to section 33 also.

Restraint of legal proceedings

The Allahabad High Court in *Shashi Agarwal* v. *Chairperson, Debts Recovery Appellate Tribunal*[8] was called to determine the status of a compromise in which parties had agreed to withdraw proceedings against each other. The court rightly held that where an agreement was arrived at by the parties outside the court including the arrangement that they will not pursue the court proceedings such an agreement was not hit by section 28. The question that still awaits answer is; If such a compromise also stipulates that neither party can go to the court afterwards, is that stipulation hit by section 28?

7 (1903) 30 IA 114.
8 AIR 2010 All. 24.

Frustration of contract

In *Premier Explosive Ltd* v. *Chairman & M.D. Singareni Collieries*,[9] the petitioner company was supplying explosives and accessories to Singareni Collieries Ltd. for over two decades. This company emerged yet again as the highest bidder and received a detailed purchase order. Around three months later, it submitted a representation setting out that the price of ammonium nitrate melt had increased round about two thousand rupees per metric ton and hence sought for revision of rate for supply of the explosive from Rs. 7.59 to Rs. 8.225 per cub. mt. which was not accepted by the respondent company. The petitioner company immediately thereafter requested the respondent to short close the contract and to make alternative arrangements for supply of explosives. The respondent then floated fresh tenders and requested the petitioner company to continue to make supplies till the alternative arrangement at full scale was made. The petitioner company also participated in the tender and emerged as the second lowest tenderer. The tender was allotted to another concern and the petitioner company was asked to show cause as to why the contract awarded in its favour be not terminated. The petitioner company replied by stating that if short closing was not possible without penal clause, then it may be allowed to continue to supply up to the balance order period. However, the respondent terminated the order and forfeited the performance bank guarantee, duly imposed risk purchase and other penalties as per the terms of the purchase order.

One of the contentions raised was whether in view of the steep rise in the price the contract stood frustrated. The court responded by stating that the question relating to frustration of a contract, on the score of impossibility of its performance, was always a question of fact which has got to be decided as to who was guilty of the act or omission which rendered the contract unenforceable. The doctrine of frustration was truly an aspect forming part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and therefore covered by the sweep of section 56 of the Contract Act. This doctrine was, therefore, to be applied within very narrow limits. The prospectus of dwindling profits from the contract all due to inflation of the procurement price of the raw materials clearly, therefore, was not a factor which fell within the purview of section 56. The court, in line with the established judicial principles, ruled that the disappointed expectations of one of the parties to supply the material to the other did not frustrate the contract. A contract could not be declared to have been frustrated because its performance had become more onerous on account of unforeseen circumstances.

A question of great practical significance was raised in *Indian Rare Earth Ltd.* v. *Managing Director, Southern Electricity Supply Co. of Orissa Ltd.*[10]

9 AIR 2010 AP 108.
10 AIR 2010 Ori. 115.

In this case, three 132 KV electric distribution towers of Chhatrapur sub-station supplying power to the petitioner's factory were uprooted on 17th October 1999 due to supper cyclone causing complete disruption of power supply to the petitioner's factory for 36 days. The respondent company demanded charges for the months of October and November which was challenged by the petitioner. The petitioner invoked regulation 85(3) of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 1998 which states "During statutory power cuts and power restrictions imposed by the licensee, if the restriction on demand is imposed for a period exceeding sixty hours in a month, the monthly demand charges shall be imposed in accordance with the period and quantum of demand restrictions imposed. In all other cases the consumer shall be liable to pay the full demand charges." The opposite counsel argued that section 85(3) can be utilized only when there was a statutory power cut and power restriction, which was not the act of God. The disruption of the power supply in the instant case was an act of God; the aforesaid provision would not be applicable to the petitioner's case.

The court, without going into the technicalities of law, laid down an equitable principle by holding that the above provisions showed that the demand charge related to a charge on the consumer for keeping reserve the energy to supply him to the extent of contractual demand of energy. A consumer was liable to pay the same if the energy was supplied to him by the licensee whether he drew or utilised the same or not. The aforesaid relationship of the consumer with the supply company arose out of a contract entered into between them, having mutual obligations. The court ruled that in the present case, it was seen that by the act of God, it became impossible for the supply company to supply the power to the consumer. The supervening circumstances, in which neither of the parties had any control, made the performance of the contract impossible during the period in question, it could be said that the contract fell under the doctrine of frustration. In such a situation, the supply company had no obligation to supply power and if any claim had been made by the consumer for non-supply of energy, it went without saying that the company could have escaped from the liability thereof taking resort to the aforesaid doctrine of frustration. When the company could have escaped from the liability by availing of the doctrine of frustration, in such premise, it was fallacious to say that it could have pressed the consumer to pay the tariff charges even though it had not supplied the power to the petitioner.

Cause of action

The settled legal position is that mere making of an offer would not give rise to a cause of action.[11] However, in *Vadada Ganeswara Rao* v.

11 *A.B.C. Laminant Pvt. Ltd*. v. *A.P. Agencies Salem*, AIR 1989 SC 1239.

Smt.Mummidisetti Vijaya Chamundeswari,[12] the AP High Court has ruled that communication of revocation of offer would give an independent cause of action and the place of revocation of offer would be the place where the suit can be filed on the basis of this cause of action. This opinion was expressed by the court on the basis of section 4 of the Contract Act which provides that communication of revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it. The court has given much weight to the communication of revocation ignoring the fact that mere communication of revocation of the offer is not sufficient unless that revocation reaches the offeree before he posts the letter of acceptance. If making of an offer will not give rise to the cause of action, as opined by the apex court, how its revocation will give?

Pledge

The apex court in *Maharashtra State Cooperative Bank Ltd.* v. *Assistant P.F. Commissioner*[13] found an opportunity to expound the ambit and scope of section 176 of the Contract Act. In the instant case, the sugar mill had pledged sugar bags with bank as a security for repayment of loan. The attachment and sale of these bags by the P.F. Commissioner for realisation of provident fund dues was challenged by the bank on the ground that by virtue of the deed of pledge executed by the sugar mills, the bank had become owner of the sugar bags and the same could not have been attached and sold for realization of the amount due under the Act. The court observed that the two ingredients of a pawn or a pledge were: (1) that it is essential to the contract of pawn that the property pledged should actually or constructively be delivered to the pawnee and (2) a pawnee has only special property in the pledge but the general property therein remains in the pawner and wholly reverts to him on discharge of the debt. A pawn, therefore, was a security where, by virtue of the contract, a deposit of goods is made as security for a debt. The right to property vests in the pledgee only so far as is necessary to secure the debt. In this sense, a pawn or pledge is an intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed.

III PARTNERSHIP

Nature of partnership and registration of firm

In *Registrar of Firms, Societies and Non Trading Corpns.* v. *Tarun Manna,*[14] it was laid down that the partnership is the relationship between persons created by contract whereby the parties to such contract have agreed

12 AIR 2010 AP 74.
13 AIR 2010 SC 868.
14 AIR 2010 Cal. 79.

to share the profit of the business. The first condition necessary for the existence of the partnership is that there must be an agreement by the partners to share the profit of the business. The other condition is that such business must be agreed to be carried on by all or any one of them acting for all; in other words, there must be existence of agency among the partners of the proposed business as specifically recognised in section 18 of the Partnership Act, 1932. Once an agreement to run a partnership business is entered into and the partners have formally executed the deed incorporating the terms thereof, the next step is of registration of the firm which is optional and not compulsory; but in the absence of registration, it creates a lot of impediments in the smooth running of the proposed business as prescribed in section 69 of the Act.

Section 58 of the Act prescribes the mode of making application for registration while section 59 casts a duty upon the registrar to register the partnership after being satisfied that the requirement of section 58 are complied with by the applicant. A plain reading of section 58 makes it clear that even if the actual transactions of the proposed business have not yet started, the partners of the proposed firm can make application for registration of the partnership before the registrar of an area where the partners have agreed to start the proposed business.

Dissolution of firm

Section 44 of the Act provides for dissolution of a firm by the court. There are seven grounds under which dissolution of a firm by the court is possible. The moot question raised in *Jagdish Chandra* v. *Hari Narain*[15] was whether an arbitrator can decide dissolution of firm. The court said that where a clause in articles of partnership or agreement provides that all differences between the partners will be referred to the arbitrator, the (arbitrator) will have power to decide in such cases whether or not such partnership shall be dissolved. The court, however, did not decide as to whether an arbitrator will be bound by the grounds mentioned in section 44 or go beyond these grounds and award dissolution of the firm.

Reconstitution of firm

A substantial question of law raised in *Nobel Kuries* v. *Sebatian*[16] was whether a fresh registration is required consequent to the reconstitution of a firm to maintain a suit in view of section 69(2) of the Partnership Act and whether non-intimation of the reconstitution of the partnership firm to the registrar of firms would affect the maintainability of the suit.

The court held that there is no provision in the Act which states that when there is a reconstitution of the firm, which is already registered, a further registration is required after such reconstitution. What is required is only an intimation to the registrar of firms about the reconstitution/change as provided

15 AIR 2010 (NOC) 1005 (Raj.).
16 AIR 2010 Ker. 99.

under sections 60 to 63. Then the question arises as to what is the consequence of not intimating the registrar of firms about reconstitution on the maintainability of the suits? The court held that sections 60 to 63 of the Act require that any change in the constitution of a registered partnership firm be intimated to the registrar of the firms. But neither the Act nor the rules made thereunder provide any time limit for that purpose. The court maintained a difference between the reconstitution and dissolution of the firm and observed that non-intimation of reconstitution or change in the firm to the registrar of firms by itself cannot affect maintainability of the suit but the second condition under section 69(2) of the Act has to be complied with. It must be proved that all partners are in the register of firms as partners.

IV SALE OF GOODS

Transfer of property

In *Munni Ram* v. *Fakir Chand*,[17] the court held that the property in the motor vehicle would stand transferred in terms of section 19 of the Sale of Goods Act, 1930 and not according to the provisions of the Transfer of Property Act, 1882. The court laid down that it was true that the change of the name of the owner in the registration certificate has to be effected in terms of section 50 of the Motor Vehicles Act and the transferee would be otherwise liable for punishment but the property in the vehicle will be transferred at the time when the parties intended it to be transferred as provided under section 19 of the Sale of Goods Act. The ownership of the motor vehicle is not dependent upon the entries in the registration certificate.

The court did not come in agreement with the opinion expressed earlier by the division bench of the same court,[18] in which it was held that the owner of the vehicle is its registered owner and called it as *per incuriam*. The court, in the instant case, observed that the defendant-appellant had admitted that both the parties had purchased the vehicle by contributing equal amount and were owner of the vehicle in equal shares. Therefore, though the registration of the vehicle was in the name of the appellant alone, the title of the movable property would vest with the respondent and entry in the registration certificate was not a condition precedent for ownership of the movable property.

V NEGOTIABLE INSTRUMENTS

Dishonour of cheque

The Supreme Court was called to delineate the scope of section 138 of the Negotiable Instruments Act, 1881 (NI Act) in *P.J. Agro Tech. Ltd* v. *Water Base Ltd.*[19] The appellant was an agro-based company. The respondent no. 1 was

17 AIR 2010 P & H 50.
18 *Vipin Kumar Sharma* v. *Jagwant Kaur*, 2005 (3) PLR 454.
19 AIR 2010 SC 2596.

appointed as its distributor but this dealership was discontinued after some time when the business became unprofitable. The appellate company settled all outstanding dues with the respondent no. 1 and also gave him authorisation to collect all dues directly from the customers of the appellant no. 1. The appellant company requested respondent no.1 to coordinate with one K. Balashankar Reddy, the then general manager at Nellor for collecting dues that were still outstanding. Subsequently, however, the appellant received a notice from respondent no. 1 purporting to be a notice under section 138 of the NI Act wherein it was stated that a cheque issued by K. Balashankar Reddy drawn on the State Bank of Hyderabad, Nellore branch had been returned dishonoured with the endorsement "Account closed." The notice also demanded repayment of the cheque amount from the appellants. The reply to this notice was sent immediately stating that the appellant had no account with the State Bank of Hyderabad and the cheque in question had not been issued by him. There was no response to this reply and instead the appellant was served with summons from the court of XVIIIth metropolitan magistrate. The said summons was challenged by the appellant before the High Court on the ground that the company did not have any account with the State Bank of Hyderabad and K. Balashankar Reddy had issued a cheque from his personal saving bank account and that none of the directors had signed the cheque. The High Court dismissed the said petition holding that the cheque which had been issued by K. Balashankar Reddy was to meet the liabilities of the appellant. This order of the High Court was challenged before the Supreme Court. It was contended that both the learned magistrate as well as the High Court had failed to consider section 138 in its proper perspective. In order to attract section 138, it was necessary that a cheque should have been drawn by a person on an account maintained by him with his banker and if the said cheque was dishonoured, it would be deemed that such person had committed an offence and would without prejudice to any other provision of the Act, be punished with an imprisonment.

The apex court, after dissecting section 138, held that for the applicability of this provision, a cheque which is dishonoured must have been drawn by a person on an account maintained by him with the banker for payment of an amount of money to another person out of his account for the discharge of whole or a part of any debt or other liability. It is only such a cheque which is dishonoured that would attract the provisions of section 138 of the above Act against the drawer of the cheque. The court further laid down that, in the instant case, the cheque which had been dishonoured may have been issued by K. Balashankar Reddy for discharging the dues of the appellant and its directors and the respondent company may have a good case against the appellant for recovery of its dues but it would not be sufficient to attract the provisions of section 138. The appellant company and its directors cannot be made liable under section 138 for a default committed by K. Balashankar Reddy. An action in respect of a criminal or quasi-criminal provision has to be strictly construed in keeping with the provisions alleged to have been violated. The proceedings in such matters are in *personam* and cannot be used

to foist an offence on some other person who under the statute was not liable for the commission of such offence.[20]

The two case, namely *Narayanan Kuttikrishnan Nair* v. *State of Kerala*[21] and *G. Murali Bajaj* v. *Selvarai*[22] decided by the Kerala and Madras High Courts, respectively came in agreement on the issue of dishonour of cheque but incidentally the *ratio* of these judgments is not in line with the decisions of the Supreme Court in *Goaplast Pvt. Ltd.* v. *Shri Chico Ursula D'Souza*[23] and *Rangappa* v. *Mohan*[24]

In *Narayanan,* the court held that when a cheque was issued by a drawer which was dishonoured because of his stop payment instruction, the burden is on him (drawer) to show that he had sufficient funds to clear the amount under the instrument and stop payment instruction was given for other valid reasons. In *G. Murali* the court was more emphatic in its ruling. It was held that the presumption about the dishonour of the cheque for reasons contemplated under section 138 was rebuttable and the accused shall have a right to lead evidence to show that the cheque was dishonoured not for the reasons contemplated under section 138 and that he had sufficient funds in his account on the relevant date to satisfy the cheque amount. Thus, by proving that he had sufficient funds on the relevant date, the accused can rebut the presumption. The proof required for such rebuttal is not the proof beyond reasonable doubt and it can be on preponderance of probabilities.

The above two opinions have not made mention of the observations recorded by the apex court in *Goaplast* and *Rangappa*. In *Goaplast*, it was held that once a cheque was issued by a drawer, a presumption under section 139, which says that the holder of cheque receives it in discharge of whole or a part of any debt or other liability, must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment before due date of payment will not preclude an action under section 138 by the drawee or holder of cheque in due course. In *Rangappa*, it was laid down that ordinarily in cheque bouncing cases, what the courts have to consider is whether the ingredients of the offence enumerated in section 138 of the Act have been met and, if so, whether the accused was able to rebut the statutory presumption contemplated by section 139 of the Act. The apex court further said that with respect to the facts of the present case, it must be clarified that contrary to the trial court's findings, section 138 of the Act can indeed be invoked when a cheque is dishonoured on account of stop payment instructions sent by the accused to his bank in respect of a post-dated cheque, irrespective of insufficiency of funds. This judgment has been given in the light of the given facts and cannot be said as laying down any general principle for future courts to follow.

20 *Id.* at 2599.
21 AIR 2010 (NOC) 305 (Ker.).
22 AIR 2010 (NOC) 195 (Mad.).
23 (2003) 3 SCC 232.
24 AIR 2010 SC 1898.

It is submitted that the above opinions of the two High Courts, though expressed in ignorance of the opinions of the apex court, represent the correct proposition of law. The presumption under section 138 is rebuttable and can be rebutted if the drawer shows to the satisfaction of the court that he had sufficient funds at the relevant time but had other valid reasons to issue stop payment notice. This is what in fact happened in *G. Murali*. There was sufficient evidence to show that the accused did have grievance against the complainant because the goods supplied were defective owing to which stop payment instructions were given to the bank. The accused had sufficient funds in the bank and this was testified by the bank official who was examined as witness and who had categorically stated that the account had sufficient funds to meet the cheque amount.

If the above views of the apex court are taken as correct exposition of section 138, they are bound to cause injustice to an innocent drawer who issued a posted-dated cheque but in return did not receive what was due to him. These views will lend handle to a drawee to exploit the helplessness of the drawer who has issued a cheque but cannot issue a stop payment notice even where he has genuine grievance against the drawee. It is hoped that these views of the apex court will be revisited in near future and such interpretation will be given to the above mentioned provision which is rooted in the ground realities and good enough to cover exigencies like the one that surfaced in *G. Murali.*

Demand notice

In *HDFC Bank Limted* v. *Amit Kumar Singh,*[25] the court opined that section 138(b) of the NI Act is unambiguous. It requires that a demand in writing be made by the payee by 'giving a notice in writing to the drawer of the cheque within 30 days of receipt of intimation that the cheque has been dishonoured'. The expression "giving of notice" has to be read in context of section 27 of the General Clauses Act, 1897, which means that a notice must be properly addressed. The word "properly" obviously envisages notice being sent to the correct present address of the noticee. The complainant will not be able to demonstrate before the court that it had "properly" addressed notice unless it is able to produce proof of delivery in the form of a postal endorsement or certificate of courier agency or an internet generated delivery report or some other proof of delivery. The court observed that these days it was not difficult to obtain a certificate of delivery from postal department or courier service agency. That certificate would indicate the status of delivery. Where noticee did not receive, or refused or that he had left the address, or was not available, it would be for the court to be satisfied whether this would amount to service of notice.

25 AIR 2010 (NOC) 407 (Del.).

In *Dr. Geetha* v. *Vasanthi S. Shetty,*[26] the complainant had received information about the return of the cheque from her banker on 13.1.2003. The court said that the offence though commences on dishonour of the cheque, it becomes complete only upon the failure on the part of the drawer of the cheque to pay the amount covered under the cheque within fifteen days from the date of the receipt of the notice. Therefore, issuance of notice as required under clause (b) of the proviso to section 138 of the Act is mandatory and not a mere formality. The court ruled that the issuance of notice under section 138(3) is to give intimation to the drawer of the cheque about dishonouring of the cheque and to give him an opportunity to pay the money covered under the cheque and thereby to avoid the criminal prosecution being launched against him. By amendment, the requirement of issuing notice on the part of the drawee of the cheque within fifteen days was substituted by 30 days. In other words, by virtue of this amendment, notice should be issued within 30 days from the date of the receipt of the information from the banker about return of the cheque. It was further held that there was nothing to indicate that the amendment brought to clause (b) of proviso to section 138 of the Act has retrospective effect. Merely because the said amendment was in the nature of substitution, it cannot have retrospective effect, more so, when it relates to initiation of penal action. Therefore, the amendment brought to clause (b) of the proviso to section 138 cannot be deemed to be in force from the inception, *i.e.* from the date of commencement of the statute and the amendment brought into effect subsequently cannot create a fresh cause of action for the complainant to issue notice and lodge a complaint based on such notice.

Legally enforceable debt

The Supreme Court in *Rangappa* v. *Mohan*[27] made a thread bare discussion on the presumption mandated by section 139. It was observed that the presumption incorporated in section 139 does not indeed include the existence of a legally enforceable debt or liability. This is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant. Section 139 of the Act is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While section 138 of the Act specifies a strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose impact is usually confined to the private

26 AIR 2010 (NOC) 724 (Kant.).
27 *Supra* note 24.

parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse onus clauses and the accused/defendant cannot be expected to discharge an unduly high standard of proof. The court added that in the absence of compelling justification, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under section 139, the standard of proof for doing so is that of preponderance of probabilities. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own.

Compounding of offences

The NI Act makes dishonuor of cheque a criminal offence but this offence has been made compoundable under section 147 of the Act inserted by way of amendment in 2002. The question arises as to when such offence can be compounded? Is it to be compounded before or after the criminal complaint is made? Can an application for compounding of an offence be made at the appellate stage? These questions were raised before the apex court in *K.M. Ibrahim* v. *K.P. Mohammed*[28] and *Damodar S. Prabhu* v. *Sayed Babalal H*[29] but interestingly two opposite rulings were pronounced.

In *K.M. Ibrahim,* the appellant issued a cheque to the first respondent for an amount of Rs. 95,000/- in discharge of a legally enforceable debt. However, this cheque was dishonoured for want of funds. A statutory notice was issued to the appellant within the prescribed time limit informing the appellant about the dishonour of the cheque and calling upon him to pay the amount due. Since the appellant failed to pay the amount in time, the respondent filed a complaint before the CJM which found the accused guilty of the offence with which he was charged. In default of his payment of fine, it was ordered that the appellant would undergo rigorous imprisonment for a further period of three months. Aggrieved by the said judgment, the appellant filed a criminal appeal. While affirming the conviction, the appellate court reduced the sentence to a period of one month. The said order was challenged before the High Court, which decide the matter in the light of section 357(3), Cr PC. The High Court dismissed the revision against which an appeal was filed before the apex court.

It was contended before the apex court that a specific power had been given to the parties to a proceeding under the NI Act under section 147 to compound the offence. There could be no reason as to why the same cannot

28 AIR 2010 SC 276.
29 AIR 2010 SC 1907.

be permitted even after conviction. It was urged that in order to facilitate settlement of disputes, the legislature thought it fit to insert section 147 by amending the NI Act and provided that notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under the Act would be compoundable.

The apex court observed that the object of section 320, Cr PC, which would not in the strict sense of the term apply to a proceeding under the NI Act is to give the parties to the proceedings an opportunity to compound the offence mentioned in the table contained in the said section, with or without the leave of the court, and also vests the court with jurisdiction to allow such compromise. By virtue of sub-section (8) of section 320, the legislature has taken one step further in vesting jurisdiction in the court to acquit the accused/convict of the offence on the same being allowed to be compounded. Inasmuch as it is with a similar object in mind that section 147 has been inserted in the NI Act by amendment, an analogy may be drawn as to the intention of the legislature from section 320(8), Cr PC although the same has not been expressly mentioned in the amended section 147 of the NI Act.

The court, however, gave unnecessary twist to the decision in the instant case by holding that this court was empowered under article 142 of the Constitution to pass appropriate orders in line with sub-section (8) of section 320, Cr PC in an application under section147 of the aforesaid Act in order to do complete justice to the parties. The court held that the *non obstante* clause included in section 147 gave this provision an overriding effect over the provisions of the Code relating to the compounding of offences. The court further said that the application under section 147 of the NI Act can be made by the parties after the proceedings had been concluded before the appellate forum. However, section 147 did not bar the parties from compounding an offence under section 138 even at the appellate stage of the proceedings.

As against the above opinion, the apex court in *Damodar S.Prabhu* came up with radical observations and at the end formulated guidelines for the future courts to follow in such cases. It was observed that the tendency of litigation to adopt compounding as a last resort in case of dishonour of cheque is putting unnecessary strain on judicial system and is contributing to increase in the number of pending cases. Moreover, free and easy compounding of offences at every stage, however belated, gives an incentive to the drawer of the cheque to delay settling the case for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice.

The court further ruled that section 147, which permits compounding, does not carry any guidance on how to proceed with the compounding of offences under the Act. The scheme contemplated under section 320, Cr PC cannot be followed in the strict sense under section 147. In view of this legislative vacuum, the Supreme Court formulated a graded system of levying costs on the parties so as to encourage them to go in for early compounding. The following guidelines were framed:

a) Directions can be given that the writ of summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.
b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the court deems fit.
c) Similarly if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.
d) Finally if the application is made before the Supreme Court, the figure would increase to 20% of the cheque amount.

The apex court further clarified that even though the imposition of costs by the competent court was a matter of discretion, the scale of costs has been suggested in the interest of uniformity. The competent court can of course reduce the costs with regard to the specific facts and circumstances of a case while recording reasons in writing for such variance. Any cost imposed in accordance with these guidelines should be deposited with the legal services authority operating at the level of the court before which the compounding takes place. For instance, in case of compounding during the pendency of proceedings before a magistrate's court or a court of sessions, such costs should be deposited with the district legal services authority. Likewise, costs imposed in connection with composition before the High Court should be deposited with the state legal services authority and those imposed in connection with compositions before the Supreme Court should be deposited with the national legal services authority.

The guidelines for filing a criminal complaint have also been formulated as it has been observed by the apex court that the complaints are being increasingly filed in multiple jurisdictions in a vexatious manner which causes tremendous harassment and prejudice to the drawers of the cheque. For instance, in the same transaction pertaining to a loan taken on instalment and upon the dishonour of each of such cheques, different complaints are being filed in different courts which may have jurisdiction in relation to the complaint. The apex court made it mandatory for the complainant to disclose that no other complaint has been filed in any other court in respect of the same transaction. Such a disclosure should be made on a sworn affidavit which should accompany the complaint filed under section 200, Cr PC. If it is found that such multiple complaints have been filed, orders for transfer of the

complaint to the first court should be given, generally speaking, by the High Court after imposing heavy costs on the complainant for resorting to such a practice. These directions shall have prospective effect.

The apex court, being aware of the general impression in the country that the courts are increasingly encroaching on the domain of the legislature, made its stand clear by holding that it was conscious of the fact that the above guidelines could be seen as an act of judicial law making and, therefore an intrusion into the legislative domain. Justifying this stand, the court held that it is to be kept in mind that section 147 of the Act does not carry any guidance on how to proceed with the compounding of offences under the Act. In view of the legislative vacuum, there is no hurdle to the endorsement of some of the suggestions (these suggestions were in fact put forward by the attorney general) which have been designed to discourage litigants from unduly delaying the composition of the offence in cases involving section 138 of the Act. The graded scheme for imposing costs is a means to encourage compounding at an early stage of litigation. In the *status quo*, valuable time of the court is spent on the trial of the these cases and the parties are not liable to pay any court fee since the proceedings are governed by the Code of Criminal Procedure, even though the impact of the offence is largely confined to the private parties.

Limitation period

There has been considerable disagreement amongst the High Courts[30] as well as different benches of the Supreme Court on the issue whether after the notice issued under clause (b) of section 138 of the NI Act is received by the drawer of the cheque, the payee or holder of the cheque, who does not take any action on the basis of such notice within the prescribed period is entitled to send a fresh notice in respect of the same cheque and, thereafter, proceed to file a complaint under section 138 of the Act.

The courts have not shown unanimity on this issue with the result uncertainty continues on this subject. In *Tameeshwar Vaishnav* v. *Ramvishal Gupta,*[31] the apex court was called upon to determine this issue. The court first tried to distinguish the present case with the earlier cases holding opposite opinion[32] and after nullifying their applicability on the case in hand, it turned

30 See, for instance, *Gujarat Tours & Travels P. Ltd.* v. *Anup Gulati*, AIR 2010 (NOC) 408 (Del.); *M/s Devi Packaging Industries, Chennai* v. *M/s Bazargaon Paper & Pulp Mills Pvt. Ltd. Nagpur*, AIR 2009 (NOC) 2328 (Bom.); *M/s Cortex* v. *State of Maharashtra*, AIR 2009 (NOC) 2329 (Bom.), where courts have ruled that once a cheque was presented and dishonoured, presentation and dishonour of the same cheque for the second time did not give rise to fresh cause of action. As against this, contrary views were expressed in *Smt. Bhahma Devi* v. *State of UP*, AIR 2009 (NOC) 394 (All.); *Muzahir Hussain* v. *State of UP*, AIR 2009 (NOC) 395 (All.).

31 AIR 2010 SC 1209.

32 See *S.L. Construction* v. *Alapati Srinivasa Rao* (2009) 1 SCC 500 : 2000 AIR SCW 2902; *Sadanadan Bhadran* v. *Madhavan Sunil Kumar* (1998) 6 SCC 514; *Prem Chan Vijay Kumar* v. *Yashpal Singh* (2005) 4 SCC 417.

to section 138. It was opined that the provisions of section 138 and clauses (a), (b) and (c) to the proviso thereof indicate that a cheque has to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. Clause (b) indicates that the payee or the holder in due course of the cheque has to make demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of the information by him from the bank regarding the return of the cheque as unpaid and clause (c) provides that if the drawer of the cheque fails to make the payment of the said amount of money to the payee or to the holder in due course of the cheque within 15 days of receipt of the said notice, the payee or the holder of the cheque may file a complaint under section 142 of the Act in the manner prescribed.

Coming to the facts in hand, the apex court observed that it was clear that in the instant case, first notice was issued on 14th June 2006 whereas the complaint was filed on 10th July 2006. It must, therefore, be held that the complaint was filed beyond the period of limitation and the magistrate below erred in taking cognizance on the complaint filed on the basis of the second notice. Similarly, the High Court was also wrong in affirming the order of the magistrate.

It is submitted that the above opinion has compounded the uncertainty which could have been laid to rest by seizing this opportunity but went a begging. This opinion needs to be revisited otherwise it is bound to cause inconvenience to both the parties. In the business world, it is not unusual to find that a cheque is returned for want of insufficient funds or for other reason and then again is presented either by the payee on his own or at the request of the drawer with this hope that it would be encashed. If it is insisted that time for filing a complaint shall be reckoned from the date when the cheque was first submitted and dishonoured, this may then take away an opportunity from the drawee to manage to keep sufficient funds in the account to meet the liability of the cheque which he has failed to keep at the time when the cheque was first presented. It is to be borne in mind that the object of these provisions is not to punish the drawer but to secure payment to the drawee. If it is achieved without filing a criminal complaint, it is to be encouraged and, if possible, facilitated. It is suggested that an explanation be added to section 138 to reckon the period of limitation from the date when the cheque was last presented but dishonour.

VI BANKING LAWS

Secured creditor

A technical plea was taken for judicial determination in *M/s Kathikkal Tea Plantation* v. *State Bank of India*[33] by invoking section 14(1) of the

33 AIR 2010 Mad. 24.

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) . The secured creditor, namely the bank had taken only a symbolic possession of the secured assets under section 13(4). The assets were sold in a public auction after the borrower had committed default. Thereafter, they issued a sale certificate in favour of the auction purchaser. Subsequently, the secured creditors proceeded to take possession under section 14(1) since the secured debtors continued to be in *de facto* possession. This section reads thus "(1) where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request in writing, the Chief Metropolitan Magistrate (CMM) or the District Magistrate (DM) within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof and the CMM or as the case may be the DM shall, on such request being made to him, to take possession of such asset and documents relating thereto." It was contended that the bank ought to have taken physical possession of the secured asset, even before the issuance of the sale certificate by resorting to section 14(1).

It was contended that section 13 specifically says that the property can be transferred only after taking possession. Where the bank had taken only a symbolic possession or constructive possession of the secured asset by issuing a notice under section 13(4) of the SARFAESI Act and had failed to take the actual physical possession in the first instance, it does not have a right to take physical possession of the property by resorting to section 14(1). It was further contended that once the sale certificate was issued and money was received by the bank, the purpose was over and the bank was no longer a secured creditor and the property cannot be a secured debt.

The court very rightly held that section 14 cannot be read in isolation but has to be read conjunctively with section 13 so as to achieve the object of the SARFAESI Act. The object of this Act is the speedy recovery of money by taking possession of the properties. The third party, who comes forward to purchase the secured asset, must have confidence that he would get the title to the property at the earliest. If the transferring of the property by way of title is going to be delayed endlessly, the object of the Act which is meant for speedy recovery would be defeated in whole. The court cautioned by stating that the mechanical way of interpretation of the provisions would defeat the object of the Act. The court concluded that the combined reading of sections 13 and 14 in the background of the object would show that it cannot be said that the secured creditor cannot take actual physical possession after issuing sale certificate merely for the reason that the language found in section 14 refers to the secured creditor and secured asset.[34]

34 *Id.* at 34.

Demand notice

A debatable principle of law was pronounced in *M/s. Adi Jogesh Radio* v. *State of W.B.*[35] It was opined that the notice under section 13(2) of the Act and the time afforded thereunder is to give the noticee an opportunity to stave off the measures enumerated in section 13(4) of the Act being resorted to by the secured creditor. Section 13(2) would certainly place an embargo on the secured creditor to take any of the steps contemplated in section 13(4) without a notice being issued and without the statutory period running. But such embargo would not extend to the measures otherwise available to the secured creditor but which have not been set down under section 13(4) of the Act. If a secured creditor had issued a notice under section 13(2) of the Act and, without waiting for the period of 60 days thereafter, had proceeded to take any of the measures enunciated in section 13(4), there is a possible argument that the conduct of the secured creditor would be in derogation of the statute. But if the secured creditor resorts to any measure not referred to in section 13(4) and informs the borrower of the credit given to him upon adopting such other measure, the secured creditor's conduct cannot be questioned on the ground that he has acted contrary to the scheme of the said Act.

The above exposition of law would give license to the banks to play hide and seek against the borrowers. If the bank in question has issued a notice by invoking the provisions of the SARFAESI Act, the other provisions of the same enactment must be sequentially followed so as to conclude the claim in a systematic and logical manner as envisaged under the Act. If the bank has on its own volition decided to choose to invoke the provisions of the SARFAESI Act, it would be equitable to allow the borrower to conduct himself according to its provisions. The bank under these circumstances should not be allowed to blow hot and cold at one and the same time.

Security interest

An issue of far reaching implications was forcefully debated in *K.P. Muhammed Basheer* v. *Deputy General Manager (authorized officer) Kannur District Co-op. Bank Ltd*.[36] involving ambit and scope of section 31(1) of the SARFAESI Act. The appellant petitioner contended that the respondent did not have jurisdiction to initiate the impugned proceedings under the Act in as much as such action was taken in relation to security interest created in agricultural land; the land in question being a rubber plantation, duly certified and supported by the rubber board through various schemes. The respondent contended that the basic document relating to the property in question would show that the land was originally a barren land and afterwards it was used for rubber plantation which was not an agricultural land falling under section 31(1) of the SARFAESI Act. It was contended that the term "agricultural land" in

35 AIR 2010 Cal. 25.
36 AIR 2010 Ker. 118.

section 31(1) means only such lands on which agricultural operations are being carried on for the purpose of livelihood, whereas plantation with large extent of property is essentially a commercial activity, not intended to be excluded from the purview of the Act. It was further pleaded that the different items specified in section 31 predominantly show that properties of commercial importance are not intended to be excluded and the exclusion applies only to small items, the recovery of which may affect livelihood.

The arguments on both sides finally crystallized into a single issue as to whether a piece of land planted with rubber is to be excluded from the term "agricultural land" for the purpose of section 31(1) of the Act. This provision excludes the operation of the SARFAESI Act to certain cases. It, *inter alia*, states that the provisions of this Act shall not apply to any security interest created in agriculture land.

The court first laid emphasis on the purpose of interpretation by stating that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended, but what has been said.

Turning to the question in hand, the court noted that neither the term "agricultural land" nor "agriculture" is defined in the Act. The court opined that the general sense of a term in which it has been understood in common parlance is to be adopted for understanding the scope of the terms "agriculture" , "agriculture purpose" and "agriculture land", *etc*. in different contexts where the statute that fell for consideration did not give any definition of such terms. Agricultural land is that species of land which could be said to be either used ordinarily for agricultural purposes or must have a connection with an agricultural use or purpose. It is on the nature of use that the meanings of "agricultural purpose" and agriculture become relevant. Taking help of the authoritative dictionaries, the court held that "agriculture" is the art or science relating to the practices of cultivating the land. Agriculture is the process by which human skill is expended upon land. Human labour, with or without the aid of implements, tools and machines, is employed utilizing the art or science of cultivating the ground. In its good sense, it means farming, horticulture, forestry, *etc.* including the allied pursuits, preparation of land or fields in large quantities, preparation of soil, planting of seeds, raising and harvesting of crops, *etc*. In certain shades, agriculture also includes management of live stocks, *etc*. But primarily, it is understood as the process of putting land to use in the growing of crops by employing human skill and labour upon land. The court ruled that the term "agriculture" cannot be defined or understood by the nature of the products cultivated. No such classification is conceivable unless specifically provided for having regard to the specific need to make such classification. If such classification is to provide different consequences of a statute, including its applicability, such classification should be found explicit on the clear expressions in that particular statute.

The court further observed that the primary exercise in agriculture cannot be treated as an activity alien to agriculture, even if it relates to growing and harvesting of product or crop which goes in for consumption otherwise than as an edible item. Continuing in the same vein, the court said that rubber sap is a biological product generated from the rubber trees which are grown as plantations, utilizing human skill and labour, by carrying out an agriculture process starting with preparing the lands for the cultivation. Rubber saplings are generated by different modes; by germination of seed or by botanical manipulations like grafting, budding, *etc*. Those saplings are planted, watered, provided with manure and otherwise cared for to grow them up. The court rightly called this process as agriculture. The mere fact that the product is ultimately taken from the rubber trees is sap that goes into processing or consumption other than as food is no intelligible criteria to say that rubber sap taken from the rubber trees is not an agriculture produce, in common parlance, or that cultivation of rubber is not agriculture and still further, that lands on which rubber is cultivated is not an agricultural land.

All in all, the court cleared the mist of confusion on the issue of activities falling in the domain of agriculture and agricultural purpose which is excluded from the operation of the SARFAESI Act.

In *M/s. Asha Mechanical Works* v. *State of UP*,[37] the petitioner was given loan under a scheme of the central government known as self-employment scheme and he had utilized the same for the establishment of industry for carrying on business of repairs, acquisition of implements and machinery but did not repay the loan. He was issued a notice under section 13(2) which was challenged by him on the ground that he had got loan for establishing an industry in connection with the agriculture which is exempted from the operation of the SARFAESI Act. The court ruled that the petitioner may, as an incidence of business, be repairing or manufacturing some machinery which may be used by farmers also but that alone will not make it a loan for agricultural purpose. Running a factory in which some tools of agriculture may be manufactured or repaired would not make it a factory established wholly for agricultural purpose.

Enforcement of security interest

The Supreme Court in *United Bank of India* v. *Satyawati Tandon*[38] made a thread bare analysis of the enforcement of security interest and laid down a number of principles of law. In this case, the appellant had sanctioned a loan of Rs. 22,50,000/- in favour of M/s. Pawn Colour Lab. for which respondent no. 1 stood as surety, mortgaged her property and executed an agreement of guarantee making herself liable for repayment of the loan amount with interest. Two and a half years later, the account of the respondent was declared as NPA, thereupon the respondent no. 1 deposited Rs. 50,000/- and gave a

37 AIR 2010 All. 169.
38 AIR 2010 SC 3413.

written undertaking to pay the balance amount in instalments. However, she did not fulfill her promise to repay the remaining amount. This compelled the appellate to issue notice to respondent nos. 1 & 2 under section 13(2) requiring them to pay the balance amount along with future interest and incidental expenses within 60 days. Upon receipt of the notice, respondent no. 1 offered to pay a sum of Rs. 18 lakhs for settlement of the loan account but the appellant did not accept the offer and filed an application under section 14 of the SARFAESI Act, which was allowed by the DM. Thereafter, the appellant issued notice under section 13(4) to respondent nos. 1 & 2.

Faced with the imminent threat of losing the mortgaged property, respondent filed a petition praying that the appellant may be restrained from taking coercive action in pursuance of the notices issued under section 13(2) and (4). She pleaded that the notices issued by the appellant for recovery of the outstanding dues were *ex facie* illegal and liable to be quashed because no action had been taken against the borrower, *i.e*. respondent no. 2 for recovery of the outstanding dues. As against this, it was pleaded that action initiated against respondent no. 1 was consistent with provisions of the SARFAESI Act and the writ petitioner was bound to discharge her obligations to pay the outstanding dues. It was further pleaded that the writ petition was liable to be dismissed because an alternative remedy was available to the petitioner under section 17 of the SARFAESI Act. The High Court held that it was not clear from the documents as to what steps had been taken by the bank against the borrower of the loan and merely issuance of notice under section 13(2) of the SARFAESI Act was not sufficient. The bank should have proceeded against the borrower and exhausted all the remedies against him and only after that the bank could have proceeded against the guarantor.

The apex court came down very heavily against the above decision of the High Court and held that normally it does not interfere with the discretion exercised by the High Court to pass an *interim* order in a pending matter but, having carefully examined the matter, there was no option but to make an exception in this case because the order under challenge had the effect of defeating the very object of the legislation enacted by the Parliament for ensuring that there are no unwarranted impediments in the recovery of the debts *etc*. due to banks, other financial institutions and secured creditors.

The apex court then analyzed the statutory mechanism in place for the recovery of the secured credit. The court observed that section 13 of the SARFAESI Act contains a detailed mechanism for enforcement of security interest. Sub-section (1) of section 13 lays down that notwithstanding anything contained in section 69 or 69-A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal by such creditor in accordance with the provisions of this Act. Sub-section (2) enumerates the list of many steps needed to be taken by the secured creditor for enforcement of the security interest. This sub-section provides that if a borrower, who is under liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-performing

asset, the secured creditor may require the borrower by notice in writing to discharge his liability within sixty days from the date of the notice with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of section 13(4). Sub-section (4) specifies various modes which can be adopted by the secured creditor for recovery of the secured debt. The secured creditor can take possession of the secured assets of the borrower and transfer the same by way of lease, assignment or sale for realising the secured assets. This is subject to the condition that the right to transfer by way of lease, *etc.* shall be exercised only where substantial part of the business of the borrower is held as secured debt. If the management of whole or part of the business is severable, the secured creditor can take over management only of such business of the borrower which is relatable to security. The secured creditor can appoint any person to manage the secured asset, the possession of which has been taken over. Sub-section (10) lays down that where dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application before the tribunal under section 17 for recovery of balance amount from the borrower. Sub-section (11) states that without prejudice to the rights conferred on the secured creditor under or by section 13, it shall be entitled to proceed against the guarantors or sell the pledged assets without resorting to the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets. In terms of section 14, the secured creditor can file an application before the CMM or the DM within whose jurisdiction the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the CMM or DM, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor.

Section 17 contains remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under sub-section (4) of section 13. Such an aggrieved person can make an application to the tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an *Explanation* has been added to section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of section 13(3-A) shall not constitute a ground for filing application under section 17(1). Sub-section (2) of section 17 casts a duty on the tribunal to consider whether the measures taken by the secured creditor for the enforcement of security interest are in accordance with the provisions of the Act and the rules made thereunder. If the tribunal, after examining the facts and circumstances of the case and evidence adduced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub- section (4) of section 13, it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the tribunal finds that the recourse taken by the secured creditor under sub-section (4) of section 13 in accordance with the provisions of the Act and the rules made thereunder, then notwithstanding anything contained in any

other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in section 13(4) for recovery of its secured debt. Sub-section (5) of section 17 prescribes the time limit of sixty days within which an application made under section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the tribunal fails to decide the application within a maximum period of four months, either party can move the appellate tribunal for issue of a direction to the tribunal to dispose of the application expeditiously. Section 18 provides for an appeal to the appellate tribunal.

The apex court held that if the respondent no. 1 had any tangible grievance against the notice issued under section 13(4) or action taken under section 14, she could have availed remedy by filing an application under section 17(1). The court further held that the expression "any person" used in section 17(1) was of wide import. It took within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under section 13(4) or section 14. Both the tribunal and the appellate tribunal were empowered to pass *interim* orders under sections 17 and 18 and required to decide the matter within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

In *Bharabhi Ramniklal Sata* v. *Collector & DM*,[39] the question was whether the action taken under section 14 of the SARFAESI Act amounts to taking measures under section 13(4) of the Act. In this case, lands in question were mortgaged with Bank of Baroda. The bank issued notice under section 13(2) of the SARFAESI Act but did not receive any reply. It took steps under section 14 of the Act and requested DM to assist the secured creditor in taking possession of the secured assets. The appellants, being aggrieved by such action, preferred an appeal under section 17 of the Act, which was opposed by the bank on the ground that it had not taken any measure under section 13(4) of the Act and thereby appeals under section 17 were not maintainable. This contention was accepted by the presiding officer who observed that it was difficult to hold on the strength of the order of the DM passed under section 14 of the SARFAESI Act that the possession is taken or the measures under section 13(4) are taken and thereby dismissed all the appeals being premature and not maintainable. Aggrieved by this order, an appeal was preferred before the single member bench. It was observed that there was a provision of appeal under section 17 of the Act against an action under section 13(4) of the Act and in the circumstances, authority acting under section 14 of the SARFAESI Act was not required to go beyond the scope of provisions of section 14 of the Act by usurping adjudicatory power available to DRT under section 17 of the Act.

39 AIR 2010 Guj. 72.

Against this decision, revision petition was filed before the division bench. The issue raised on behalf of the bank was that unless symbolic or actual possession of the land was taken, it cannot be alleged that any measure was taken under section 13(4) of the Act. The division bench reversed the opinion of the single bench and held that from sub-section(4) of section 13 of the Act, it was evident that taking over possession was one of the measures, which could be taken by the secured creditor to recover the secured debt. Even without taking possession of the secured asset, the management of the business of the borrower could be taken over including right of transfer by way of lease, *etc*. and a person could also be appointed to manage the secured asset, the possession of which had been taken over. It was further held that the word 'possession" was a relative word and dichotomy between symbolic and physical possession did not find place in the Act. It is abundantly clear that for taking possession, one of the measures for recovery of secured debts under sub-section (4) to section 13 of the Act includes the measures taken by secured creditor under section 14 and, therefore, if any order is passed under section 14, it can be opposed under section 17.

In *Industrial Finance Corporation of India* v. *Parekh Platinum Ltd.*,[40] the Gujarat High Court laid down that the SARFAESI Act has not fixed any time limit for taking recourse to proceedings under sub-section (4) of section 13 of the Act, after issuance of notice under sub-section (2) of section 13 of the Act, or after rejecting representation/objection, presumably for the reason that parties may negotiate and settle the disputes themselves. Legislature in its wisdom thought it fit to give exclusive right to the secured creditor to give as much time as possible to the borrower before taking recourse under sub-section (4) of section 13 of the Act, but the borrower cannot be heard to contend that the mere fact that the secured creditor did not take recourse to sub-section (4) of section 13 immediately after non-discharging of liability by the borrower within sixty days from the date of notice under sub-section (2), the entire proceedings initiated under sub-section (2) would come to an end.

The court further ruled that even if no time limit has been prescribed under sub-section (4) of section 13 of the Act, secured creditor has to take recourse to measures prescribed therein within a reasonable time depending on the facts and circumstances of each case. In a case where secured creditor has shown indulgence to the borrower by giving reasonable time that does not mean that entire proceedings initiated by it under sub-section (2) of section 13 has lapsed or vitiated.

Locus standi

The moot point raised before the Gujarat High Court in *Lalikumar Jivabhai Thakkar* v. *State Bank of India*[41] was whether an application by a third party can be entertained by the DRT under sub-section (25) of section

40 AIR 2010 Guj 35.
41 AIR 2010 Guj. 4.

19 of the RDB Act if the tribunal is convinced that the orders passed by it would amount to an abuse of its process. Section 19(25) reads:

> The Tribunal may make such orders and give such direction as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.

While spelling out the real import of the above provision, it was ruled that every court or tribunal is obliged to see that its process shall not be abused or misused. Improper and tortuous use of a legitimately issued process of a tribunal to obtain a result that is either unlawful or beyond the process and scope would amount to its abuse. The expression "ends of justice" used in the above provision means not only justice to the parties but also to witnesses and others which may be inconvenienced. The tribunal is empowered to make such orders and directions as to secure ends of justice. It is also empowered to make such orders and issue such directions so that process of the tribunal is not abused. The court further ruled that the statute has not interdicted third parties to bring to the knowledge of the tribunal that its process is being abused and there is also no stipulation in the Act that such powers can be invoked at the instance of the parties to the proceeding. The question whether there has been an attempt to abuse the process of tribunal depends upon the facts and circumstances of each case which a third party can bring to the notice of the tribunal. If the tribunal finds that the mortgage has been created fraudulently and sham and bogus documents were produced before the tribunal to get the favourable orders to the prejudice of a third party, that fact can always be brought to the notice of the tribunal. The tribunal has an obligation to see that its process be not abused. The tribunal would also be guarded against the abuse of its process by a third party to defeat the object and purpose of the Act which is expeditious adjudication and for recovery of the debt of the banks and financial institutions.[42]

In *Vicky Kumar Rana* v. *Kamal Kumar Nangia,*[43] the issue was whether a person who is not the creditor can approach the DRT in appeal against the action of the bank. The court answered it in affirmative and held that it has been visualized by the legislature that there may be persons other than the borrowers who may have an interest in the property and may have some objections regarding the realization of the loan amount from the secured assets and for such a person section 17(1) of the Act makes it abundantly clear that any person which will include "borrower" as well as non-borrower also if he feels aggrieved from any action of the bank he can approach the DRT which is a specialised forum created under the Act itself to seek redressal of his grievance. Further, in order to make this scheme of the Act operative both functional as well as effective, the jurisdiction of the civil court has been

42 *Id.* at 7.
43 AIR 2010 Del. 210.

specifically barred under section 34 of the Act. A conjoint reading of sections 13, 17 and 34 of the Act would clearly show that even though the plaintiff who may be claiming himself to be the tenant in respect of the third floor of the suit property which was pledged with bank as a secured asset had to approach the DRT in case he felt aggrieved from the action of bank in issuing the public notice or by threatening to take possession of the suit property when the officials of the bank along with the borrowers are alleged to have visited and threatened the plaintiff from being disposed. The court further held that section 34 of the Act ousted the jurisdiction of the civil court which is prohibited from taking cognizance of the suit filed by the plaintiff himself.

This judgment will serve many objectives. It has given *locus standi* to any person other than the borrower to go against the action of the bank which at times may be capricious and arbitrary or not strictly in line with the tenor of the law. It has provided a level playing field for the third person as well, in addition to the borrower. It has also recognised exclusivity of the SARFAESI Act to deal with all issues raised by or against the banks or other financial institutions by the borrower or any other person.

Status of an authorized officer

In *M/s. Mid India Power and Steel Ltd.* v *M.P. Audyogik Kendra Vikas Nigam (Indore) Ltd.*,[44] the court was called to determine the status of the authorized officer under SARFAESI Rules, 2002. A company, Kusum Ingots and Alloys Limited, was extended financial assistance by many secured creditors including IDBI bank but it failed to return the same in accordance with the agreed terms. The authorised office of the IDBI bank on its behalf and on behalf of all the secured creditors sold secured assets of the borrower for Rs. 805.81 lakhs in a public auction in exercise of the powers conferred under section 13 of the SARFAESI Act read with rules 6, 8, and 9 of the Security of Interest (Enforcement) Rules, 2002 in favour of the petitioner. In pursuance of the said auction, a sale certificate was issued by the authorised officer of the IDBI bank in favour of the plaintiff. On the basis of the said sale certificate, the petitioner purchaser approached the respondent for execution of the lease deed in its favour. However, the respondent informed the petitioner to first get the sale certificate registered from the sub-registrar of the documents under the provisions of the Registration Act, 1908 and deposit the amount of lease rent and other charges and only then lease deed will be executed. Aggrieved by this insistence, the petitioner under article 226 of the Constitution sought direction to the respondent to execute the lease deed.

The petitioner contended that the sale certificate issued to him by the authorized officer needs no registration in view of the provision contained section 17(2)(xii) of the Registration Act. Reliance was placed on the judgments of the Supreme Court in *B. Arvind Kumar* v. *Govt. of India*[45] and

44 AIR 2010 MP 201.
45 (2007) 5 SCC 745.

of the division bench of Madras High Court in *K. Chidambara Manickam* v. *Shakeena.*[46] The respondent in his reply stated that the sale certificate issued by the authorised officer of the IDBI bank was not covered under section 17(2)(xii) of the Registration Act and as such its registration was not compulsory. It was also contended that the Supreme Court in *B. Arvind Kumar* had an occasion to consider the question in respect to the sale certificate issued on the basis of the order of the court and had not dealt with the question in regard to the sale certificate issued by the authorized officer of the bank. The respondent also claimed that *K. Chidambara Manickam* was also inapplicable as the question whether the term civil or revenue officer referred to in section 17(2) (xii) of the Registration Act included the authorized officer of the bank, was not decided.

The court, after taking into account claims and counter claims, proceeded first with the analysis of the *ratio* of the Supreme Court in *B. Arvind Kumar* in which it was held that when a property was sold by public auction in pursuance of an order of the court and the bid was accepted and the sale was confirmed by the court in favour of the purchaser, the sale becomes absolute and the title vests in the purchaser. The sale certificate is merely the evidence of such title; no further deed of transfer from the court is contemplated or required. This opinion of the apex court was held inapplicable to the case in hand for the reason that it was dealing with a case in which property was sold by public auction in pursuance of an order of the court. As against this, in the present case, the sale certificate had been issued by the authorized officer of the IDBI bank who was neither a court nor a civil or revenue officer.

Similarly, the opinion expressed in *K. Chidambara ManickamI* was held to be inapplicable to the case in hand. In that case, it was held that the sale of the secured asset in public auction as per section 13(4) of the SARFAESI Act, which ended in issuance of sale certificate as *per* rule 9(7) of the Rules, 2002, was complete and absolute sale and the same need not to be registered under the provisions of the Registration Act. This judgment, in the opinion of the present court, had not decided as to whether the authorized officer of the bank while conducting the sale under the SARFAESI Act and Rules of 2002 can be said to be a civil or revenue officer as per the requirements of section 17(2)(xii) of the Registration Act.

The court then concluded that when the property of a borrower was sold by public auction by the authorized officer of the bank who was neither a civil nor a revenue officer, one cannot claim that the sale certificate issued on the basis of such sale will be covered under section 17(2)(xii) of the Registration Act and its registration was not compulsory. The term 'authorized officer' has not been included in section 17(2) (xii) of the Registration Act by way of amendment after coming into force of the SARFAESI Act. The definition of "authorized officer" under Rules of 2002 also does not give it a meaning of civil

46 AIR 2008 Mad. 108.

or revenue officer, the terms which find place in section 17(2) (xii) of the Registration Act. In the circumstances, the sale certificate issued by the authorized officer cannot be construed so as to hold that it is by a civil or revenue officer and, therefore, its registration is not compulsory. It can be, therefore, safely construed that the term authorized officer cannot be read in section 17(2) (xii) of the Registration Act.[47]

Arbitration agreement

In *Surya News Print & Papers Pvt. Ltd*. v. *Branch Manager, State Bank of India,*[48] it was laid down that sections 17 and 18 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDB Act) provides a bar in respect of jurisdiction of courts or authorities other than the DRT to adjudicate the matter relating to the recovery of debts due to financial institutions. In the instant case, the memorandum of association of the company had an arbitration clause and the company attempted to invoke this clause for adjudication of the present dispute with the bank by contending that by virtue of this arbitration clause the jurisdiction of the DRT had been ousted. The court ruled that the memorandum of association cannot be construed as an agreement as provided under section 7 of the Arbitration and Conciliation Act, 1996. Moreover, the memorandum of association of a company was not a contract between the bank and the company and it had no nexus with the contract executed between the bank and the borrower.

The question that still awaits answer is: Can an agreement between the bank and the company to resolve dispute, if any, by arbitration, be enforced? Is this agreement valid, void or only unenforceable? Would it be enforceable as it is valid or is it void because it defeats the provisions of law or would it be simply unenforceable because sections 17 and 18 of the RDB Act bar the jurisdiction of courts or authorities to adjudicate the matter relating to the recovery of the debts due to financial institutions other than the DRT?

Powers of district magistrate

In M/s. Puran Maharashtra Automobiles Aurangabad v. *Sub-Divisional Magistrate, Aurangabad,*[49] the Bombay High Court observed that the analytical reading of section 14 of the SARFAESI Act reveals that a secured creditor is entitled to make a request in writing to the CMM or the DM within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, where possession of any secured asset is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of the Act. It can further be seen that once such request is made, the CMM or the

47 *Id*. at 206.
48 AIR 2010 Ori. 32.
49 AIR 2010 Bom. 53.

DM is required to make to the secured creditor possession of such assets and documents relating to and forward said assets and documents.

The court, while dissenting from the opinion expressed by the Kerala High Court in *Aseena* v. *Sub-Divisional Magistrate Palakkad*,[50] held that from section 14(2) of the SARFAESI Act, it was amply clear that for the purposes of securing compliance of sub-section (1), the CMM or DM can take or cause to be taken such steps and use or cause to be used such force as may in his opinion be necessary. It can thus be clearly seen that the powers exercised by the CMM or DM are purely executionery in nature. The said authority is required only to take possession of the assets or documents once an application is made by the secured creditor pointing out that he is entitled to take possession of any secured assets under the provisions of the Act and that such assets are situated within the jurisdiction of the CMM or DM. Once the secured creditor is entitled to take possession in view of the provisions of sub-section (4) of section 13, the only thing he is required to do is to make an application in writing to the CMM or DM. If the two conditions stipulated in section 14 are satisfied, the CMM or DM has no option but to take steps for taking possession of the secured assets and documents relating thereto and forward such assets and documents to the secured creditor. It can thus clearly be seen that no element of quasi-judicial functions are to be performed by the CMM or DM while exercising the powers under section 14, but he is only required to perform as an act of executionery nature in taking possession and delivering it to the secured creditor. Taking into consideration that the nature of powers that are exercised by the CMM or DM under section 14 of the said Act are purely executionery in nature and particularly when no element of quasi-judicial functions or application of mind is required while exercising the said powers, it was held that it was difficult to accept the contention of the appellants that the DM was a *persona designata* and that he cannot delegate the powers to other officer.

In *Authorized officer, Canara Bank* v. *Sulay Traders*,[51] the Gujarat High Court found an opportunity to discuss threadbare the powers of DM as provided in section 14 of the SARFAESI Act. The issue involved in the present case was whether the magistrate was required to issue notice under section 14 of the SARFAESI Act to the borrower or that he had only to issue the orders under section 14 of the Act without the verification of the condition precedent for exercise of the powers.

The court observed that as *per* the scheme of the Act, the following facts are required to be verified by the DM while exercising powers under section 14 of the SARFAESI Act:

(i) The transaction of the mortgaged property;
(ii) The declaration of the account as NPA;

50 AIR 2009 Ker. 1.
51 AIR 2010 Guj. 91.

(iii) The issuance of the notice under section 13(2) of the SARFAESI Act and the receipt thereof by the borrower, or the person against who order is to be passed.
(iv) The reply of the borrower or the guarantor as the case may be, or the person against whom the order is to be passed;
(v) The decision of the bank, if any, with the proof for communication of the same to the person concerned.
(vi) The declaration that after the communication of the decision under section 13(3A) of the SARFAESI Act, the payment is not fully made by the borrower and such would include the details of the payment, If any, made by the borrower after notice under section 13(2) of the SARFAESI Act or after communication of the decision under section 13(3A) of the SARFAESI Act as the case may be;
(vii) The statement mentioning the net amount outstanding as recoverable by the bank;
(viii) The details of the litigation, if any, for recovery of the amount, may be before the civil court, or may be before the DRT or before the board of nominees or before any forum known to law as the case may be;
(ix) The statement to the effect that no prohibitory order is passed by any competent forum in such proceedings or the order, if any, which would result into putting clog over the exercise of the power under the SARFAESI Act by the financial institution /bank;

It is only after the aforesaid details are submitted that the magistrate would be required to examine the same and after the conditions precedent for exercise of the powers under section 13 (4) of the SARFAESI Act are verified, the order under section 14 of the SARFAESI Act may be passed by the magistrate. If he has any doubt about the genuineness of the statement made, or the reliability of the statement made, or about the condition precedent for exercise of the powers under section 13(4) of the SARFAESI Act, he may also be required to issue notice to the borrower and, thereafter, he may exercise the power under section 14 of the SARFAESI Act. It cannot be concluded that the power to be exercised under section 14 of the SARFAESI Act is not mechanical exercise of the power and the magistrate without issuing any notice in every case, even if the conditions precedent are not verified, would be required to issue order under section 14 of the SARFAESI Act for providing police assistance.

The magistrate, while exercising power under section 14 of the SARFAESI Act, is required to verify the existence of the facts attracting power under section 14(4) of the SARFAESI Act, and he is not required to examine or adjudicate the rights of the parties. The magistrate will be required to make only factual verification. He will be required to verify whether there is a document of equitable mortgage and whether the original title deeds are deposited with the bank or not. Similarly, whether notice under section 13(2) of the SARFAESI Act has been served upon the person concerned or not, whether any reply or

objection is raised or not and, if yes, whether decision is taken or not and whether such decision is communicated or not and whether any payment is made or not after the notice under section 13(2) of the SARFAESI Act and, if yes, any amount outstanding, *etc*. There cannot be any exhaustive list of the verification of facts, but suffice it to state that he would only be required to verify the existence of the fact which are relevant to have a condition precedent for exercise of the power under section 13(4) of the SARFAESI Act. But he will not be required to adjudicate on the aspects of illegality and validity of such facts or the rights flowing therefrom. However, it merits mention here that if there is any prohibitory order of any competent forum restraining the bank from exercising the power under the SARFAESI Act, or restraining the bank from recovering the amount which is made as the basis for exercising of the power under the SARFAESI Act, it would be sufficient for the magistrate to decline the exercise of the power.

The above guideline will streamline the procedure which the magistrates have to adopt in such case as it was found that varied procedures were followed by the magistrates as per their choice and convenience.

The compatibility of section 14 of the SARFAESI Act and section 21 of the General Clauses Act came for discussion in *Union Bank of India* v. *State of Maharashtra.*[52] It was held that section 14 was procedural in nature and the procedure stipulated therein enabled the secured creditor to take the assistance of the CMM or DM in taking possession of the secured assets. Section 14 merely empowers the CMM or DM to assist the secured creditor in taking possession of the secured assets as *per* the procedure provided under section 14 of the SARFAESI Act. It does not clothe DM with the power to adjudicate in respect of any dispute pertaining to secured assets. Section 14(1) of the SARFAESI Act provides the contingency in which the secured creditor can request the CMM or DM in writing within whose jurisdiction the secured assets fall to grant assistance for taking over possession of the secured assets. Sub-section (2) of section 14 provides the procedure which CMM or DM may undertake for the purpose of securing compliance with the provisions of sub-section (1). Sub-section (3) of section 14 provides finality to the act done by CMM or DM by exercising power under section 14. The magistrate having exercised the said power under section 14 becomes virtually *functus officio* in relation to the concerned issue. The order passed or act done by the magistrate under section 14 is given finality by the statute. The general power provided under section 21 of the General Clauses Act is to add to, amend, vary or rescind any order, *etc*. is clearly inapplicable in view of the specific scheme of the provisions of section 14 of the SARFAESI Act. Since the statute expressly provides finality to the act done by the magistrate as *per* the scheme of section 14 of the Act, the said act of DM stands excluded from the purview of the General Clauses Act. It is well settled that section 21

52 AIR 2010 Bom. 150.

embodies only a rule of construction; nature and extent of its application must be governed by the relevant statute which confers the power to issue such order. Once the magistrate has exercised power within the limit circumscribed by section 14, the said act of the magistrate stands excluded from the purview of section 21 of the General Clauses Act. The provision of section 14 of the Act does not vest DM with the jurisdiction to adjudicate and decide any dispute regarding the secured assets and vesting the said jurisdiction in him by applying the provisions of section 21 of the General Clauses Act would amount to re-writing the provisions of section 14 which is impermissible in law since court can merely interpret the provisions of the statute, it cannot re-write, recast or redesign the section of the statute.

Right to appeal

In *T. Bhuvanandran* v. *LIC Housing Finance Ltd.*,[53] three questions were raised for judicial determination: (i) Is a borrower entitled to approach DRT to dispute the facts and figures submitted by the bank? (ii) Can proceedings under the SARFAESI Act be pursued during the pendency of the civil suit instituted by the petitioner? (iii) Can notice be issued twice by the secured creditor so as to sustain an action under SARFAESI Act?

The court rightly held that the right to appeal as contemplated under section 17 makes it amply clear that any person aggrieved by any of the measures referred to in sub-section 4 of section 13 is entitled to approach the DRT in the manner specified therein. The borrower can challenge the matter before the DRT on all points including the actual liability to be discharged by him so as to redeem the property concerned. This is more so when the jurisdiction of other forums including the civil court is specifically barred by virtue of the stipulation under section 34, where it is expressly provided that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the 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 Act or under the RBD Act, 1993.

Answering the second question, the court on the analogy of an earlier ruling of the apex court[54] held that the pendency of a civil suit is no bar to the proceedings under the SARFAESI Act.

The third question was also meticulously discussed and answered in affirmative. It was held that the SARFAESI Act nowhere stipulates that once a notice is issued under section 13(2), it is necessarily to be followed by the measures contemplated under section 13(4). In other words, the rights and liberties of the secured creditors who had chosen to issue notice under section

53 AIR 2010 Ker. 15.

54 The apex court in *M/s. Transcore* v. *Union of India*, AIR 2007 SC 712, held that pendency of the proceedings before the DRT was not a bar and the secured creditor was at a liberty to proceed with such steps under the SARFAESI Act.

13(2) are not barred from considering the matter afresh on the basis of the objections to be submitted by the borrower in response to the notice as provided under sub-section (3A) to section 13 and to proceed with further steps as found to be fit and proper after effecting the corrections/ modifications, if so necessitated, based on the objections which otherwise will make the chance to file objections an empty formality.[55]

A substantial question of law raised in *M/s. Sravan Dall Mill P. Ltd.* v. *Central Bank of India*[56] was whether the remedy under article 226 of the Constitution was available to the petitioner challenging the notice under section 13(2) of the SARFAESI Act. The respondent bank had issued notice to the petitioner under section 13(2) declaring his debt as NPA. This notice was challenged by the petitioner on the ground of faulty classification of the assets. The issue raised by the bank was that the petitioner must invoke the jurisdiction of the DRT under section 17 of the SARFAESI Act. The court opined that DRT cannot exercise jurisdiction unless section 13(4) was invoked. In absence of the invocation of this provision, the only remedy to redress the grievance of the petitioner would be judicial review under article 226.

Territorial jurisdiction

The Gujarat High Court handed down two judgments on the issue of territorial jurisdiction. In *Balbir Kumar Paul* v. *Bank of Baroda*,[57] the petitioner challenged the order passed by the recovery officer confirming the sale of immovable property of the petitioner being land and building situated at Shital Ganj, Buland Shahar on the ground that the recovery officer had no jurisdiction to pass any order as the property was situated beyond the local limits of jurisdiction of the tribunal which had issued the certificate of recovery.

The High Court invoked section 19(23) which states: Where the tribunal which has issued a certificate of recovery, is satisfied that the property is situated within the local limits of the jurisdiction of two or more tribunals, it may send the copies of the certificate of recovery for execution to such other tribunal where the property is situated. The court held that so far as sub-section (23) was concerned, the tribunal had to be satisfied about the location/ situation of the property and if the property was not situated within the local limits of jurisdiction of the tribunal, it had to send the said recovery certificate to the tribunal within whose local limits of jurisdiction the property was situated. The court further observed that it was not disputed that the property was situated at Shital Ganj-Buland Shahar, UP and that being so, the tribunal ought to have sent the same to the concerned tribunal. Similarly, the recovery officer ought to have held that the recovery certificate cannot be executed here and the recovery officer had no jurisdiction to pass any order.

55 *Supra* note 46 at 19.
56 AIR 2010 AP 35.
57 AIR 2010 Guj. 83.

The above judgment was successfully challenged in the letters patent appeal in *Bank of Baroda* v. *Balbir Kumar Paul*.[58] The court said that the words used in sub-section (23) of section 19 of the Act provides that where the property is situated within the local limits of jurisdiction of two or more tribunals, the tribunal may send copies of the certificate of recovery for execution to such other tribunals where the property is situated. The word used here is "may" and not "shall". The court posed a question: Even if the legislature has used word "may" should such requirement be read as mandatory? The court a that thnswered the question holding that the legislature having used the term "may" in sub-section (23) of section 19 would ordinarily be understood to have authorised the tribunal concerned to send the copies of the recovery certificate for execution to the tribunal within whose local jurisdiction such property may be situated. The court ruled that unless the term "may" was read as "shall"making the requirement mandatory in nature, the case of the original petitioner must fail.

It is submitted that the latter opinion of the High Court is in line with the tenor of the law and also resonates with the objects of the RDB Act. The above mentioned provision in fact gives discretion to the DRT to issue a certificate of recovery for its execution on its own or to send it for execution to such other tribunal where the property is situated. The object is the speedy recovery of the public money. The locking up of such huge amount of public money in litigation prevents proper utilisation and recycling of the funds for the development of the country. It is to be borne in mind that the RDB Act was enacted to provide for expeditious adjudication and recovery of debts due to banks and financial institutions. Keeping in view the expeditious recovery of debts, the DRT would be within its rights whether it executes recovery on its own or sends the recovery certificate for execution to the tribunal where the property in question is situated.

Bar of civil suit

In *Sumathi* v. *Sengottaiyan*,[59] suit properties were mortgaged in favour of the secured creditor. The suit for partition in the same property was filed by the plaintiff-daughter of the defaulting borrower. She contended that being a coparcenary, she was entitled to a share in the said property by virtue of the Hindu Succession (Amendment) Act, 2005. The court admitted that the plaintiff may institute a suit for partition before the competent civil court but cannot lawfully challenge the proceedings initiated by the secured creditor under the SARFAESI Act before the civil court as there is a clear bar under section 34 of the SARFAESI Act. This section imposes a bar on the civil court to grant any relief of injunction with respect of any action taken in pursuance of the power conferred under the SARFAESI Act. Therefore, the trial court has no authority to entertain the prayer for injunction sought for by the plaintiff

58 AIR 2010 Guj. 124.
59 AIR 2010 Mad. 115.

as against the secured creditors who had already initiated proceedings under the SARFAESI Act. The court took the support of section 6 of the Hindu Succession Act, 1956, which states that the coparcenary status conferred under the amendment Act would not affect or invalidate any partition that took place prior to 20th December 2004. The family partition in the present case had taken place on 11.09.1974. This section, in the opinion of the court, does not help the cause of the plaintiff in view of the fact that the family partition had taken place much before the deadline set in the amended provision.

The opinion of the court, however, shall be taken as a precedent for the ruling that the DRT has an exclusive jurisdiction in respect of any matter falling under the domain of the SARFAESI Act. It is submitted that the outcome in such cases should remain unchanged even where the family partition had taken place after the deadline set in section 6 of the Hindu Succession Act. This is because of the reason that the SARFAESI Act is a complete code in itself and if there is any grievance against the measures taken under this Act, there is scope for invoking section 17 of the same Act. The DRT has an authority under section 17 even to invalidate or nullify any action already taken if it is established that any error or wrongful use of the powers has been committed by the opposite party.

The above opinion cannot be, however, made applicable where the dispute does not fall within the purview of the SARFAESI Act. This was made clear by the Gujarat High Court in *Naliniben Rajnikant Patel* v. *Rashmikant Manubhai Amin*[60] wherein it was laid down that the DRT had no jurisdiction, power or authority to entertain and decide the issue either at the instance of the bank or the petitioner's co-sharers regarding the declaration of co-ownership rights over the suit property.

Judicial review

There has been no unanimity amongst the High Courts on the issue of invocation of writ jurisdiction in matters where alternative remedy is available before the DRT. In *M/s. Sravan Dall Mill P. Ltd*. v. *Central Bank of India*,[61] the question was whether the remedy under article 226 was available to the petitioner challenging the notice under section 13(2) of the SARFAESI Act. The respondent bank had issued notice to the petitioner under section 13(2) declaring his debt as NPA. This notice was challenged by the petitioner on the ground of faulty classification of the assets. The objection raised by the bank was that the petitioner must invoke the jurisdiction of the DRT under section 17 of the SARFAESI Act. The court opined that DRT cannot exercise jurisdiction unless section 13(4) had been invoked. In absence of the invocation of this provision, the only remedy to redress the grievance of the petitioner would be judicial review under article 226. The SARFAESI Act is a complete code in itself. Any action taken under section 13(4) can be challenged

60 AIR 2010 Guj. 130.
61 AIR 2010 AP 35.

before the DRT under section 17 of the Act[62] but if no action is taken under this section, any action of the bank can be challenged by way of writ petition.

Similar judicial restraint was exercised in *KGN Mineral and Metal Pvt. Ltd.* v. *United Bank of India*.[63] It was held that the petitioner did not make any representation after receipt of notice under sub-section (2) of section 13 as contemplated under section 13(3A). It was open to the petitioner to raise objections by way of representation under section 13(3A). Once such representation is made, it was incumbent upon the secured creditor to communicate its reasons for non-acceptance of the representation or objection to borrower within one week of receipt of such representation. Since the petitioner had not availed this alternative remedy, the instant petition was not maintainable and the same was liable to be dismissed at the trial stage itself.

The contrary opinion was expressed in *K. Ramaselvam* v. *Indian Overseas Bank*[64] by the Madras High Court. It was held that the existence of alternative remedy may not be considered a bar in the present case. The court attempted to justify this stand by holding that the present case did not require the determination of any disputed question of fact and the matter was being decided purely on the interpretation of the statutory provisions and the rules and to relegate the parties to pursue their remedy under the Act before the DRT and, thereafter, at the debts recovery appellate tribunal that would ultimately be an exercise in futility which would unnecessarily prolong the matter.

It is submitted that the purpose of providing exclusive manner and method of recovery of secured debts would be frustrated if the High Courts readily entertain writs in such matters by exercising jurisdiction under article 226. It is true that there may arise exigencies where writ jurisdiction has to be exercised but its exercise cannot be routine one. The SARFAESI Act has provided a specialized mechanism for the speedy recovery of debts with a suitable appeal process. The borrowers would prefer to invoke writ jurisdiction to buy time and derail the recovery process under the SARFAESI Act. The High Courts should, therefore, seldom intervene in such matters.

The Supreme Court in *United Bank of India* v. *Satyawati Tondon*[65] vehemently advocated exercise of judicial restrained in the cases of above nature. The apex court observed:[66]

> [W]e are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any government, directions, orders or writs for the enforcement of any of the rights conferred by

62 *Bharatbhai Ramniklal Sata* v. *Collector & DM*, AIR 2010 (NOC)163 (Guj.).
63 AIR 2010 Chh. 33.
64 AIR 2010 Mad. 93.
65 AIR 2010 SC 3413.
66 *Id.* at 3422.

> Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self imposed restraint evolved by this court, which every High Court is bound to keep in view while exercising power under article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filling application, appeal, revision, etc. and the legislation in question contains a detailed mechanism for redressal of his grievance. It must be remembered that stay of an action initiated by the state and/ or its agencies/instrumentalities for recovery of taxes, cess, fee, etc seriously impedes execution of the projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizen. In cases relating to recovery of the dues of Banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institution, which ultimately proves detrimental to the economy of the nation. Therefore, the High court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters.

The High Court may in exceptional case, after considering all the relevant parameters and public interest, pass an appropriate interim order. The court further held:[67]

> It is a matter of serious concern that despite repeated pronouncements of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT and SARFAESI Acts and exercise jurisdiction under article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their due. The court said, "we hope and trust that in future the High Courts will exercise their discretion in such matters with great caution, care and circumspection.

Public interest litigation

The Supreme Court in *Common Cause* v. *Union of India,*[68] had to address the issues raised in a public interest litigation. This PIL was filed by Common Cause, a registered society, urging the court to issue guidelines to the

67 *Id.* at 3426.
68 AIR 2010 SC 3351.

government to evolve a mechanism for reducing the number of NPAs. It was contended that the aggregate figure of NPAs worked out on the basis of data compiled by the banking division of the ministry of finance was Rs 43,577/- crores. According to the petitioner, non-recovery of such huge amount of NPAs resulted in substantial funds of banks not being available for development of the country's economy and this in turn affected the citizens. The petitioner alleged that the steps taken by the union government to recover the NPAs have not yielded positive results and the finance ministry of the was reported to have admitted that 27 nationalised banks had written off a staggering amount of Rs. 4010 crores as bad debts which were on account of defaults made by men of substantial means and influence and, if proper checks are introduced to ensure that loans and advances are not given to fraudulent borrowers, the NPA will get substantially reduced.

The petitioner cited the decision in *Vishaka* v. *State of Rajasthan*[69] for the proposition that if there was no enacted legislation to provide for the effective enforcement of any substantial right, the court can issue guidelines/directions for the effective enforcement of the fundamental rights under article 32, which would be law under article 141 of the Constitution, till a suitable legislation was enacted to occupy the field.

The court did not agree with the petitioner's contention and held that whether the legislative and administrative measures taken by the union government had been effective or not was not an issue to be decided by the court; it was for the union government and Parliament to consider because reduction and control of NPAs were not within the domain of judiciary but within the domain of the executive and legislature under the Constitution. The court further held that in the field of economic activities, there has to be judicial deference to the legislative and executive judgment and the decisions of complex economic matters are to be based on experimentation or what one may call trial and error method.

69 (1997) 6 SCC 241.