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MERCANTILE LAW

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I INTRODUCTION

THIS SURVEY covers an analysis of the cases relating to the subject traditionally known as mercantile law which includes laws dealing with contracts, partnership, negotiable instruments and banking. The decisions handed down during the surveyed year, 2011 have more or less restated already established principles. However, in some of the cases, the courts have shown unpreparedness to deal with negotiable instrument cases in a new way as demanded by what is now commonly known as "anywhere banking" which is markedly different from traditional banking business that has been revolutionized by the use of internet.

II LAW OF CONTRACT

Concluded contract

In *Life Insurance Corpn. of India, Tirupathi, A.P.* v. *Jamuna*,[1] the court considered whether an acceptance of the premium deposited by the applicant to the issuance company can ripen into a contract by conduct? In this case, one Mr. Naidu (late) sent a proposal for taking a life insurance to the LIC. Mr. Naidu paid by cheque a sum towards premium. Within 12 days of filing the proposal Mr. Naidu died in a road accident. The policy by LIC had not been issued till then.

The court in this matter stated that the contract of insurance will be concluded only when the party to whom an offer has been made accepts it unconditionally and communicates his acceptance to the person making the offer. A contract under Contract Act implies offer, acceptance and consideration. If before the acceptance the offerer dies, the offer immediately lapses and, hence there cannot be any acceptance after his death.

Revocation of contract

The Supreme Court was called in *State of Haryana* v. *Malik Traders*[2] to determine whether scope of section 5 of the Indian Contract Act can be constricted by a contract to contrary? In the instant case, the appellant (State of Haryana) invited tenders from interested persons for collection of toll at toll bridge over

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1 111 (2011) CPJ 474 (NC).

2 AIR 2011 SC 3574.

river Yamuna on Karnal-Meerut road, near U.P. border. The respondent, M/s. Malik Traders, was one of the 13 bidders who submitted tenders. As required by the terms and conditions of the bid, all the bidders, including the respondent, deposited the bid security of rupees 20 lakhs in the form of bank guarantee or FDR in favour of the executive engineer. As required under the terms and conditions of the bid, the respondent in his written offer /bid agreed to keep the bid open for acceptance upto 90 days after the last date of receipt of bid. The respondent also agreed that it shall be bound by the communication of acceptance of the bid dispatched within the aforesaid period of 90 days. The respondent emerged as a second highest bidder. He then wrote to the executive engineer on 15.11.08 that he is not interested in the work and the amount of bid security deposited by him may be refunded. The work was first offered to the highest bidder who could not complete the required formalities. His contract was cancelled and the work was then offered to the second highest bidder on 26.11.2008 in spite his letter of revocation sent earlier.

This case was first heard by Punjab & Haryana High Court which had ruled that bid can be revoked at any time before it is accepted, this being the mandate of section 5, it cannot be contracted out. This opinion was reversed by the apex court by holding that under the cover of the provisions contained in section 5 of the Act; the respondent cannot escape from the obligations under the agreements contained in its offer/bid. The right to withdraw an offer before its acceptance cannot nullify the agreement to suffer any penalty for the withdrawal of the offer against the terms of agreement. The court ruled that a person may have a right to withdraw his offer during the period of bid validity; he has no right to claim that the bid security should not be forfeited and it should be returned to him. Forfeiture of such bid security amount does not, in any away, affect any statutory right under section 5 of the Act. The underlying rationale of this ruling was also given by the apex court by stating that bid security was given by the respondent and taken by the appellants to ensure that the offer is not withdrawn during the bid validity period of 90 days and such conditions are included to ensure that only genuine parties make the bids. In the absence of such conditions, persons who do not have the capacity or have no intention of entering into the contract will make bids. The very purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the offer is withdrawn in violation of the agreement.[3]

It is submitted that surprisingly the fundamental argument, critical for the decision of the present case, as to whether promise without consideration would stand, was neither raised nor addressed.[4]

3 *Id*. at 3576.

4 In *Alfred Schonlank* v. *Muthunayna Chetti* (1892) 2 Mad. LJ 57, it was laid down that both on principle and on authority, it is clear that in the absence of consideration for the promise to keep the offer open for a time, the promise is mere *nudum pactum*. As against this, the English Law Revision Committee has suggested in its 6th interim report that a promise to keep an offer open, even if without consideration, should be enforceable.

Competence of the parties

In *Nilima Gosh* v. *Harjeet Kaur,*[5] the Delhi High Court was called to elucidate combined effect of sections 11 and 12 regarding competence of the parties due to unsoundness. It was laid down that section 11expressly provides that only a person of sound mind can enter into a contract and it follows from section 12 that unsoundness of mind of a person has to be seen at the time when he enters into a contract and it is immaterial if such a person is usually of unsound mind but occasionally of sound mind or is usually of sound mind but occasionally of unsound mind. What is to be seen is whether at the relevant time, the party executing a contract was of sound mind or of unsound mind. The state of mind of the executant at the time of the execution of the contract is critical for determining his capacity to contract.[6] The court rightly did not declare two agreements to sell dated 21.02.1985 and 07.09.1987 void on the ground that the executant was declared medically unfit on 10.01.1990 and not on the above two dates when he executed these agreement.

Waiver of rights of surety

Section 133 discharges surety in case of any variation or composition between the principal debtor and creditor. This is a statutory right given to surety but can he waive this right? This question was answered in the *State Bank of India* v. *Vivek Garg.*[7] The court ruled that the rights of the surety as laid down under chapter VIII of the Contract Act can be varied by entering into a contract and would be subject to the terms of such contract. The surety by an agreement can give up the rights available to him under sections 133,134,135,139 and 141of the Contract Act provided that is not hit by section 23 thereof. In other words, the surety can waive his rights available to him under the various provisions contained in chapter VIII of the Contract Act by entering into the contract. The court very rightly said that such an agreement would not be opposed to public policy because it is not to defeat the debt of the creditor but to ensure that the money of the creditor is secured and recoverable in accordance with law.[8]

It is submitted that the above interpretation is quite logical. Sections 133,134,135,139 and 141 have been incorporated to safeguard the interest of the surety as he cannot be left at the mercy of the principal debtor and creditor. He has to be taken on board while effecting any change or compromise etc. in the original contract of guarantee but if he himself by his free will waives this statutory right and gives free hand to the creditor and principal debtor, he cannot have then recourse of the above provisions.

***Quasi* contract**

The Guwahati High Court in *State Bank of India, Shillong* v. *T Bardhan*[9] failed to appreciate true spirit of *quasi* contract relationship in which the principle of *quantum meruit* is rooted. In the instant case, the plaintiff-respondent is a registered

5 AIR 2011 Del.104.
6 Emphasis supplied.
7 AIR 2011 (Sikk) 7.
8 *Id*. at 14.
9 AIR 2011 Gau. 68.

valuer of immovable properties with the Central Board of Direct Taxes, New Delhi. He is presently carrying on the profession of consulting engineer and valuer. As per the facts of the case, he was engaged by the appellant bank for evaluating fair market value of two plots of land which he did and submitted his report together with the bill for his professional fee to the appellant bank for payment.

The court in the first instance presented a perspective of the doctrine by opining that a claim under *quantum meruit* arises where work is done or goods are supplied, not in pursuance of any express or tacit contract, but under circumstances which would import in law an obligation to pay. *Quantum meruit* is a reasonable compensation awarded on implication of a contract to renumerate. Compensation under *quantum meruit* is awarded for work done or service rendered when price thereof is not fixed by contract.

The court then opined that seemingly the principle can actually apply in this case. However, on a closer scrutiny, it is doubtful if the principle can actually apply under the factual circumstances of the case. This observation of the court is surprisingly based on the ground that there is no *consensus ad idem* between the bank and the respondent for payment of the professional fee and the respondent did not claim compensation but only professional fee.

It is submitted that the court misplaced the doctrine and lost sight of the very rationale over which the *quasi*-contractual relationship rests. The *quasi*-contracts are not contracts in strict sense of the term but are contracts like. The liability under section 70 would arise when a non- gratuitous act has been done and other person has enjoyed benefit thereof. It is not to be proved that there was a contractual obligation coupled with *consensus ad idem*. These are the requirements of a valid contract and not that of a *quasi*-contract, where contractual relationship need not to be proved. The court decided the case against the respondent by maintaining hyper technical difference between fee and compensation for the purposes of this case and laid down that the plaintiff-respondent has claimed the fee in his pleadings and not the compensation. The court overlooked the rationale basis of the *quasi*-contract as enunciated by Lord Manisfield in the celebrated case of *Mosses* v. *Macferlan*[10] that law and justice must prevent unjust enrichment, i.e., enrichment of one at the cost of another. If the court had given this observation some consideration, the decision would have been otherwise.

Damages

The Andhra Pradesh High Court in *Gatta Rattaiah* v. *Food Corpn. of India*[11] has narrowly construed section 74[12] which has defeated the very purpose for which this provision was enacted. The court ruled that it is not an absolute right to forfeit

10 All ER Rep. 581, (1558-1774).

11 AIR 2011 AP 65.

12 S.74 states: when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

the entire amount without the proof of actual damages. On the other hand, when the material on record shows that the extent of the damages or loss suffered by the party is less no one can be allowed to enrich by taking undue advantage of the forfeiture clause. Evidently, the purpose of paying compensation is only to see that the wronged party does not suffer loss due to the breach of the contract and when actual loss is ascertainable, it is not permissible to hold that the forfeiture of entire amount is legal especially when no loss is caused or loss caused is much less than the amount to be forfeited.[13]

It is submitted that section 74 provides for compensation for breach of contract where penalty is stipulated. A deeper analysis of this provision reveals that it has two parts. Part I provides that where a contract has been broken and a fixed sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled to receive from the party who has broken the contract a reasonable compensation not exceeding the amount so named, whether or not actual damage or loss is proved to have been caused. Part II provides that where a contract has been broken and the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled to receive from the party who has broken the contract the penalty stipulated for whether or not actual damage or loss is proved to have been caused. Thus a sum may be fixed in the contract in the form of a compensation or penalty which a party committing breach of contract is to pay to a party complaining of such breach. The object of compensation is to make good the loss caused by the breach of contract and the object of the penalty is to punish the party for committing breach of the contract. This is the reason that the above provision provides that the court may award reasonable compensation not exceeding the amount mentioned or the stipulated penalty whether any actual loss has been suffered or not. The court has discretion in awarding compensation which is to be reasonable but this discretion is missing if penalty is stipulated in case of breach of contract and the court has to award that amount but should not exceed the amount stipulated. The difference between compensation and penalty must be given due waitage.

Liability of surety

The Madras High Court, while reversing single bench judgment of the same court, very rightly held in the *State Bank of India* v. *Jayanthi*[14] that it is not correct to say that the liability under the contract of guarantee stands revoked or extinguished on the death of the guarantor. Section 131 of the Contract Act clearly provides that in case of death of guarantor, the continuing guarantee stands revoked in respect of future transactions. Section 131 states that the death of guarantor operates, in absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transaction. The language of this section is plain and free from ambiguity. It would not admit any other interpretation than the one given to it by the division bench in the instant case. It is well settled that on the death of the guarantor, the liability exists and such liability can be fastened on the estate of the

13 *Id*. at 69.

14 AIR 2011 Mad.179.

deceased, being inherited by his legal heirs, and the creditor can recover the dues out of the estate of the deceased.[15]

General lien

A tricky question of far reaching implications was to be answered in the *State Bank of India* v. *Jayanthi,*[16] i.e., whether a bank is entitled to retain the documents of title by invoking power of general lien under section 171 of the Contract Act in respect of the title deeds deposited to secure a loan transaction for amount due on a different account?

In the instance case one N.P.S. Mahendran (late), the borrower, deposited the title deeds of the property to secure a loan transaction availed in respect of two plantation companies, Sanjay Bala Tea Plantation and Aarthy Bala Tea Plantation. The deposit of title deeds by which the mortgage was created by the deceased borrower was for a specific purpose. The bank sought to hold the documents for a balance due in a different loan account where the deceased was not borrower.

The appellant bank contended that they have a right to retain the title deeds of the property delivered to them in the normal course of business transaction by exercising general lien under section171 of the Act and, therefore, they are not bound to return the same till the liability in the other account where the mortgager (husband of the 1st respondent herein) was a guarantor, is discharged.

The court in reference to section 171 of the Contract Act admitted that no document was placed before it to show that the borrower had given any authorization to the bank to hold the documents of the mortgaged property, given to secure the loan transaction. In such a case it is clear that the borrower had deposited the documents for a specific loan and the bank cannot hold the documents for a balance due in a different loan account where N.P.S. Mahendran is not a borrower.

Time as an essence of the contract

The Supreme Court in *Saradmani Kandappan* v. *S. Rajalakshmi*[17] stated that there is an urgent need to revisit the principle that time is not of essence in contract relating to immovable property and also explained the current position of law with regard to contracts relating to immovable property made after 1975, in view of the changed circumstances arising from inflation and steep increase in prices. The court in the same breath held that they do not propose to undertake that exercise in the present case, nor are referring the matter to a larger bench as they have held on the facts of this case that time is the essence of the contract relating to immovable property.[18]

Performance of the reciprocal promise under the Contract Act

Explaining the scope of section 52 of the Contract Act which relates to the order of performance of the reciprocal promises, the Supreme Court in *Saradmani*

15 *Id*. at 182.
16 *Id*. at 179.
17 AIR 2011 SC 3234.
18 AIR 2011 SC 3248.

Kandappan v. *S. Rajalakshmi*[19] laid down that where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires. The court exemplified scope of the section by stating that lets illustrate the scope of section 52 with reference to an agreement of sale which provides that the vendor shall make out to the satisfaction of the purchaser a good, marketable and subsisting title and provide all documents as required by the purchaser to satisfy him about the title of the vendor, that the vendor shall obtain a certificate of clearance from a specified authority for the sale, that the sale shall be completed within a period of four months of receipt of the clearance certificate and the purchaser shall pay the balance sale price at the time of registration of the sale. It is evident that the vendor will have first to make out a title by producing the documents required by the purchaser and also obtain the clearance certificate. Only thereafter the sale deed shall have to be executed and payment of the sale consideration will have to be made at the time of registration of the sale deed. The vendor cannot seek payment of the balance sale price without performing his obligations as per the agreement.[20]

III PARTNERSHIP

Act of the partner

In *Sagarmal Gulabchand Jain* v. *Gujarati Beedi Co.,*[21] the court elucidated the scope of sections 19 and 22 of the Indian Partnership Act. It was laid down that the conjoint reading of these two sections goes to show that an act of a partner binds a firm, which is done to carry on, in the usual way, the business of the kind carried on by the firm. Therefore, the said two sections are not in conflict with each other. Instead, section 22 may be construed as procedural provision. An act of a partner performed in the usual way of business of the firm would bind the partnership firm. Thus, section 22 being procedural provision, it shows as to how a partner can bind his partnership firm and its partners, once his act falls within the four corners of section 19(1) of the Act. The help of the procedure provided in section 22 may be taken, if the basic conditions prescribed under section 19(1) are established. If that basic requirement is not satisfied, even though a partner complies with the procedure provided in section 22, by executing documents in the manner provided there under, it will not yield any fruitful result inasmuch as such an act will not bind partnership firm.[22]

Registration of partnership

Section 69 in unambiguous terms makes it clear that a firm that sues a third party must be a registered firm and should seek to enforce a right "arising from a contract". It means that to escape from the bar, the firm must be a registered firm

19 *Ibid.*
20 *Id*. at 3250.
21 AIR 2011 MP 172.
22 *Id.* at 180.

and the person suing should have been shown in the register of firms as a partner in the firm. In *Indian Bank* v. *M/s Nippon Enterprises South, Chennai*[23] the firm was registered on 14.11.74 and the entries were made upto the year 1995. As there was no change of partners, subsequently, the registration was not renewed and consequently, the names of the partners were not shown in the register of firms. The court held that in order to maintain an application and to avoid the bar contemplated under sub section(2) of section 69 the relevant test would be whether on the date of the suit the firm was registered and the names of the partners were shown in the register of firms.

The court further ruled that in order to apply section 69(2), an application against the third party should be to enforce the "right arising from a contract". The provisions of sub-section 69 are not applicable in the event the application is not for enforcement of the "right arising from a contract". Further, the bar of section 69(i) and (ii) is applicable to partners and not to the outsiders and to the suit instituted by or on behalf of the firm.[24]

In *Modern Food Industries (India) Ltd.* v. *M/s. Nandlal & Co.*[25] the question that arose before the Patna High Court was whether the judgment and money decree of the subordinate judge (Bhagalpur) is a nullity in the eye of law and liable to be set aside because the partnership firm was not registered on the date of presentation of plaint although subsequently it was registered?

In this case, a partnership firm carrying out civil constructions registered with the Government of Bihar, filed a money suit against the defendants who had issued a tender notice and entered in agreement with the plaintiff. The contentions raised on the validity of the decree were dismissed by the court on the ground that although on the date of presentation of the plaint the suit was not maintainable as barred under section 69(2) of the Partnership Act, subsequent to the presentation and prior to appearance of defendants it was duly registered, and no prejudice is caused to the defendant if the old member of the suit is continued and also no objection was raised by the defendants in the written statement. Therefore, the judgment and decree are not a nullity.

Powers of registrar

The powers of the registrar came up for discussion in *M/s. Sri Lakha Granities* v. *Eklavya Singh.*[26] The powers of the registrar were put in a proper perspective by drawing limits of his powers. The court opined that section 64(2) of the Partnership Act authorizes registrar to initiate proceedings for rectification but only on application made by all the parties who have signed any document related to the firm filed before him and not otherwise. No proceedings can be initiated by the registrar for cancellation of the entry recorded in conformity with the provisions of section 63 of the Act in the garb of the power conferred under section 64 of the Act for rectification of the mistakes and that too at the instance of one of the partners of the firm who has allegedly retired after the reconstitution of the partnership.

23 AIR 2011 Mad. 239.
24 *Shivpujan Yadav* v. *Bishnudeo Prasad*, AIR 2011 Jhar. 38.
25 AIR 2011 Pat. 60.
26 AIR 2011 Raj. 49.

The court has disapproved exercise of the jurisdiction by the registrar for cancellation of entries made in register of firms. The court held that remedy for cancellation of a partnership deed is available under the general law before the civil court of competent jurisdiction and the registrar has no jurisdiction whatsoever to entertain any appeal or application for declaring the reconstitution of partnership deed as null and void and cancelled the entries made on the basis of such partnership deeds. If a document is claimed to be void or voidable, the same could always be so adjudged by the civil court of competent jurisdiction in terms of the provisions of section 31 of the Specific Relief Act[27]

IV NEGOTIABLE INSTRUMENTS

Promissory note

Negotiability of the document is the main feature of a promissory note while the certainty of the sum payable and an unconditional undertaking signed by the maker are the other two important requirements to be satisfied for the document to fall within the description of the promissory note. In *B. Jaya Raghava Naidu* v. *B. Rama Subha Reddy,*[28] the court remained busy in delivering technical justice overlooking the fact that the parties to the instrument (promissory note in the instant case) have not drafted it after reading the relevant provisions. They may not be even conversant with the language used and its fallout.

The document in question in the instant case contained two sentences. In the first sentence, the fact of the defendant receiving the sum of Rs.5 lakhs on 01.07.2005 from the plaintiff was acknowledged. In the second sentence, it was mentioned that the defendant will pay the amount in six months. The court observed that while the requirement of the sum being certain and an unconditional undertaking are satisfied, the document did not refer to the person to whom the defendant has undertaken to pay. Therefore, the essential requirement of "undertaking to pay to a certain person" being absent from the document, it cannot be said that the document satisfies the ingredients of a promissory note.

This rigid approach of the court, it is submitted, is bound to cause hardship to innocent holder of the instrument who may find himself caught in cryptic words used by the maker of the instrument.

Presentation of the cheque

In *Prabhu Dayal Modi* v. *M/s. Euro Developers Pvt. Ltd.,*[29] the Bombay High Court expounded the meaning of the expression "presentation of the cheque to the bank". It was held that this expression means presentation of the cheque to the drawee bank and none else. The payee may deposit the cheque with its banker situated anywhere for presentation to the drawee bank. Deposit of the cheque by the payee with its banker does not amount to presentation within the meaning of section 138 of the Negotiable Instrument Act, 1881. The payee's banker with whom

27 *Id*. at 56
28 AIR 2011 AP 62.
29 AIR 2011 Bom. 117 (NOC).

the cheque is deposited acts only as an agent of the payee for the purpose of presentation of the cheque to the drawee bank and the bank with whom the cheque is deposited by the payee does not become the agent of the drawee bank. It only acts as an agent of the payee and presents the cheque to the drawee bank, which is expected to clear the cheque and make the payment; if the funds are insufficient or arrangement is not made with the drawee bank the cheque will be dishonored by the drawee bank and then the cheque is returned as unpaid by the drawee bank. The act of returning the cheque unpaid is completed at the place where the drawee bank is situated. Only the intimation of cheque being dishonored is received by the banker of the payee with whom the cheque is deposited and that banker conveys the information received from the drawee bank to the payee.

The court further held that though giving of notice is important ingredient, it does not give cause of action but its communication gives cause of action. The notice is to be given by the bank where this transaction has taken place. In the instant case, whole transaction between the parties had taken place at Jaipur but the complainant inspite of the fact that he had branch office at Jaipur, chose to issue notice from Mumbai where its head office was situated. The court ruled that cause of action had arisen at Jaipur and jurisdiction to entertain complaint would be with magistrate at Jaipur and not with magistrate at Mumbai.[30]

It is submitted that the above ruling may not hold water anymore because of the radical changes brought in the banking business due to technology which has given birth to 'anywhere banking business: This facilitates acceptance of cheques by any branch of the bank which can be credited in the account of the drawee or payment can be made to him if sufficient funds are available in the account of the drawer and cheque can be returned by any branch where this cheque is presented with a memo attached assigning reasons for its non-acceptance. In view of these changes brought by technological developments, it cannot be now correct to say that presentation of the cheque means its presentation to the drawee bank and not to the bank where it is actually presented.

A very intricate issue relating to the presentation of the cheque was to be resolved in *M/s. Sukant Papers* v. *Om Prakash Jain.*[31] It was contended that section 138 envisages that at the time of issuance of cheque, the account maintained by the accused should be a 'live account'. This argument was not accepted by the court that on the ground that in commercial transactions, cheques are exchanged in lieu of liabilities and are frequently given against the purchaser of goods *etc*. on the trust that the cheque would be encashed and it was a valid negotiable instrument. At the time when a cheque is given by a person to another, the drawer of the cheque gives it as a valid negotiable instrument. If the cheque is given against the closed account, the holder of the cheque, to whom the cheque is given, cannot be penalized for this dishonesty of the drawer of the cheque and it cannot be said that section 138 would not be attracted. The words "on an account maintained by him" cannot be read as "on an account being maintained by him". The words "an account

30 See for similar opinion *M/s Religare Finvest Ltd*. v. *State,* AIR 2011 (NOC) 161 (CAL) and *Gopal Mishra* v. *State*, AIR 2011 (NOC) 198 (Del).

31 AIR 2011 (NOC) 164 (Del).

maintained by him" implies that the account was opened by him and for operation of the account cheque book was issued to him.

It is submitted that a cheque issued against a dead account should be viewed more seriously than the one where account becomes dead after the cheque is issued. In the former case, one can easily argue that the maker of the instrument had no intention right from the word go to make payment that is why he issued a cheque against a dead account. This act alone should implicate the maker instead of explicating him.

Dishonour of cheque

In *K.V. Daavis Kannayikkal Vareed* v. *M.K.Unnikrishnan,*[32] the court made it clear that dishonour of cheque by itself does not give rise to a cause of action under section 138 of the Negotiable Instrument Act, (NI Act) because the payment can be made on receipt of notice on demand contemplated in clause (b) of section 138 and in that event there is neither any offence nor any attempt to commit the offence. Failure to pay the amount within 15 days of the receipt of notice alone will give rise to a cause of action.

In the instant case, summons was issued from the Chief Judicial Magistrate court on the address mentioned in the complaint and notice was affixed on the door of the house bearing the number mentioned in the complaint. Therefore, it is evident that the lawyer's notice sent by the complainant intimating the dishonor of the cheque shall be deemed to have been served. Since the accused executed cheque in favour of the complainant, which was dishonoured due to insufficiency of funds in the account of the accused and the complainant had validly complied with clauses (a) and (b) of the proviso to section 138 of the NI Act and the accused failed to make the payment within 15 days of the notice, the accused has committed an offence punishable under section 138 of the Act and he is liable to be convicted for that offence.

In *Santhi C Santhi Bhavan* v. *Mary Sherly,*[33] the court maintained difference between the 'giving of cheque and execution of cheque'. It was laid down that if prosecution proves that accused has made or prepared or created a cheque, which contains an order in writing, under his signature, directing the banker to pay a certain sum of money only to the payee or the bearer or to the order of a certain person, he can be said to have 'drawn' the cheque. Such 'drawing' is also referred to as 'execution' as a legal synonym by various courts and the bar. Therefore, absence of word 'execution' in section 138 is of no consequence. It is also not an excuse not to prove execution/drawing in a prosecution under section 138. The fact that accused has 'drawn' the cheque, can be proved by any known method recognized by law. The mere production of a cheque or making the same as an exhibit in a case, however, will not prove that the cheque is drawn by the accused. The factum of drawing or execution of cheque has to be proved by evidence of person or persons who can vouchsafe for the truth of the facts in issue. It can be proved by direct or circumstantial evidence, which is admissible in law. The court must be satisfied

32 AIR 2011(NOC) 427 (Ker).
33 AIR 2011 (NOC) 424 (Ker).

from the allegations in the complaint and from the evidence adduced that the cheque was made, prepared or created by accused. The court must be convinced that the order in writing which is found in the cheque was made by accused himself or by some other person at the instance of accused or under his instructions. Even if such other person cannot be identified or examined, complainant can still prove execution by circumstantial evidence. There must also be satisfactory evidence to show that accused himself signed the cheque. Then alone, it can be said that the accused has drawn the cheque. Issuance and execution are different acts. Proof of issuance or giving of cheque by accused to complainant alone will not suffice to constitute offence under section 138.

Vicarious liability of directors

The Supreme Court in *Harsendra Kumar D*. v. *Rebatilata Koley*[34] overruled the opinion of the Calcutta High Court on the issue of vicarious liability of the directors. The apex court very rightly held that where uncontroverted documents relating to accused directors' resignation, well before the issuance of the cheque in question, are before the court, there is no reason to hold that director vicariously liable for the act of the company. The apex court sounded a word of caution by holding that criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of the person than dragging him in a criminal case. The court rightly opined that the high court fell into grave error in not taking into consideration the uncontroverted documents relating to appellant's resignation from the post of director of the company. Had these documents been considered by the high court, it would have been apparent that the appellant has resigned much before the cheques were issued by the company.

The court then recorded its own findings by stating that the appellant had resigned from the post of the director on 02.03.2004 which was accepted through a resolution and conveyed to the registrar of companies as well. The dishonoured cheques were issued by the company on 30.04.2004, i.e. much after the appellants had resigned from the post of director of the company. These facts leave no manner of doubt that on that date the offence was committed by the company, the appellant was not the director; he had nothing to do with the affairs of the company.[35]

The apex court further held that every company is required to keep at its registered office a register of its directors, managing director, manager and secretary containing the particulars with respect to each of them as set out in clauses (a) to (e) of sub- section(1) of section 303 of the Companies Act, 1956. Sub-section(2) of section 303 mandates every company to send to the registrar a return in duplicate containing the particulars specified in the register. Any change among its directors, managing directors, managers or secretaries specifying the date of change is also required to be furnished to the registrar of the companies in the prescribed form within 30 days of such change. There is thus statutory requirement of informing the registrar of companies about change among directors of the company. In this view of the matter, it must be held that a director whose resignation has been accepted by the company and that has been duly notified to the registrar of the companies cannot

34 AIR 2011 SC 1091.

35 *Id*. at 1099.

be made accountable and fastened with liability for anything done by the company after the acceptance of resignation. The words 'every person who at the time the offence was committed', occurring in section 141 of the NI Act are not without significance and these words indicate that criminal liability of a director must be determined on the date the offence is alleged to have been committed.[36]

V BANKING LAWS

Financial institutions

In *Bharat Steel Tubes Ltd.* v. *IFCI Ltd*.,[37] the Supreme Court plugged what could have proved a possible gate way of escape from the liability under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Securitization Act). In the instant case, the judgment of the Delhi High Court, holding that the respondent, IFCI Ltd. is a "financial institution" under section 4A (2) of the Companies Act, 1956 read with section 2(1) (m) of the Securitization Act and that, as a consequence, the respondent- IFCI Ltd. would be entitled to take recourse to the provisions of the Securitization Act in order to enforce a "security interest" which had accrued in its favour, was challenged in the instant case.

The apex court opined that the provisions of sub-section (1) of section 4 (A) stand independent of sub-section (2) and the financial institutions named in sub-section (1) of section 4 (A) encompassing the public financial institutions are not covered by the embargo enforced by the proviso to sub-section (2) of the said section. The proviso controls the width of sub-section (2) which refers to the powers of the central government to specify by notification in the official gazette and subject to the provisions of sub-section(1), such other institutions as it may think fit to be a financial Institution. Sub-section (2) of section 4A is applicable only to institutions which are not mentioned in sub-section (1). It is the latter category of financial institution to which the proviso applies. In view of section 4A (i) (ii) of the Companies Act, 1956, the IFCI was admittedly regarded as a "Public Financial Institution" for the purposes of the said Act. The court ruled that the conversion of IFCI of India into a company did not alter its position and status as a financial institution in view of section 5 of the Industrial Finance Corporation (Transfer of Undertaking and Repeal) Act, 1993, which was in the nature of a saving clause, whereby all matters, including all benefits, relating to the corporation, stood wholly transferred in favour of the new company.[38]

Possession of secured assets

In the case of *IDBI Bank* v. *Hytaisun Magnetics Ltd.*,[39] decided by the High Court of Gujarat, financial assistance was taken by the borrowers from the IDBI bank, with the execution of necessary documents to secure the credit facility. On default in repayment of outstanding dues, their account was classified as Non-

36 *Id*. at 1096.
37 AIR 2011 SC 2568.
38 *Id*. at 2571.
39 AIR 2011 Guj. 129.

Performing Asset (NPA). On refusal of payment of dues and peaceful physical possession of the mortgaged property the bank filed an application before the district magistrate. The district magistrate refused to assist the bank for it failed to prove that it is a secured creditor.

The court observed that chapter III of the Securitization Act deals with enforcement of the security interest. Under section 13(1), 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 the Act. For that, the secured creditor, on default in repayment of secured debt by installments thereof by the borrower and if the debt is classified by the secured creditor as Non-Performing Assets (NPA), is liable to issue notice under section 13(2) asking the borrower to discharge in full his liability to the secured creditor within sixty days. Under section 13(3), the details of the amount payable and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower are to be mentioned. On receipt of such notice, opportunity is given to the borrower to make a representation or objection under section 13(3A) of the said Act. The bank or the financial institution, if does not accept the representation or objection, is supposed to communicate the reason to the borrower. In case the borrower fails to discharge his liability in full within the period specified in sub section (2) of section 13, the secured creditor may take recourse to one or more measures as mentioned in section 13(4).[40]

The court concluded by holding that it is amply clear that for taking possession of secured assets, the bank or the financial institutions is not required to take help of any court or tribunal and can take it on its own by following the procedure prescribing under the Act and the rules framed there under. If any person is aggrieved by such measures, which amounts to a measure under section 13 (4), the aggrieved person can move before the tribunal, namely the Debts Recovery Tribunal (DRT) under section 17.[41]

The court on the basis of its own findings laid down the following principles:

(i) The secured creditor has a right to enforce security interest without the intervention of the court or tribunal in accordance with the provisions of the said Act.
(ii) The borrower, who is under liability to the secured creditor under an agreement, is entitled to take a notice under section 13(2) of the said Act.
(iii) The secured creditor who intends to enforce the secured asset is bound to give details of amount payable by the borrower and the secured assets intended to be enforced.
(iv) The borrower has a right under section 13(3 A) to make representation or raise objection. If any objection is there with regard to the secured asset, that can be raised only at the stage of section 13(3A) under the said provision, only the secured creditor will determine the objection and not any court or tribunal.

40 *Id*. at 131.
41 *Id*. at 132.

(v) No cause of action takes place even after the decision taken by the secured creditor under section 13(3A) till the secured creditor takes recourse of one or more measures including the measure to take possession of the secured asset of the borrower under section 13(4) of the Act.

(vi) The secured creditor is competent to take possession of all the secured assets on its own following the procedure laid down under rule 8 of the Security Interest (Enforcement) Rules, 2002.

(vii) Only when the secured creditor finds difficulty to take possession of the secured asset, it may take assistance of the chief metropolitan magistrate or the district magistrate under section 14 of the Act.

(viii) The measures taken under section 14 amount to measures taken under section 13(4) of the Act.

(ix) As the measures taken under section 14 amount to measures undertaken under section 13 (4) of the Act, under section 14(3) such measures cannot be called in question before any court or tribunal.

(x) If such measures taken under section 14 which amount to measures taken under section 13(4) are not in accordance with the Securitization Act or the rules framed thereunder, including the objection, if any, raised that the asset is not a secured asset to be taken under section 13(4), the aggrieved person has a remedy under section 17 before the DRT to show that the measures taken are against the Act (section 13(4)) or the rules framed thereunder].

(xi) Such determination is to be made by the DRT including the question whether the asset is a secured asset or not and the chief metropolitan magistrate or the district magistrate has not been empowered to adjudicate such dispute, but is directed only to assist the secured creditor in taking possession of the secured asset. If they are not empowered to adjudicate the dispute, they cannot also call for the secured creditor to produce any document to decide whether the asset is secured asset or not, which will be futile exercise in absence of power to adjudicate such issue.

(xii) The chief metropolitan magistrate or the district magistrate under clauses (a) and (b) of section 14(1) are bound to take possession of the secured assets as also the documents relating thereto, if the documents are to be obtained by them, the question of asking the secured creditor to produce the document in all cases does not arise. Therefore, they do not have jurisdiction even to call for the documents.[42]

The above principles of law have been further carried forward in *Shanthi Charitable Trust* v. *State Bank of India*[43] wherein the court held that it is evident from the language in section 14 of the Act that the metropolitan magistrate or the district magistrate is empowered to assist secured creditor in taking possession of secured asset. The provision also envisages that "within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found".

42 *Id*. at 135.

43 AIR 2011 Kar. 132.

Therefore, there is a reference to the territorial jurisdiction of these two officers, viz., metropolitan magistrate and executive magistrate. If the secured properties are situated within metropolitan area, undoubtedly, by implication, it is the metropolitan magistrate who will have the jurisdiction to exercise powers under section 14 of the Act and in cases otherwise; it is the executive magistrate who will have jurisdiction to exercise such powers. It is material to note that the name of the chief judicial magistrate is conspicuously absent and there is no mention of chief judicial magistrate in section 14 of the Act and only mention is to the metropolitan magistrate and district magistrate. The logical inference, therefore, is that the metropolitan magistrate and district magistrate would be competent to have the jurisdiction in respect of metropolitan area and in other areas like rural areas, it is the executive magistrate. Had there been mention of the chief judicial magistrate in section 14 of the Act, perhaps a view could have been taken that the jurisdiction is also conferred on the chief judicial magistrate, but that is not so.[44]

The Karnataka High Court was seen favouring *bonafide* lessees or tenants in *M/s. Nitco Roadways Private Ltd.* v. *Punjab National Bank*.[45] It was laid down that if the secured asset is in the possession of the borrower, its possession can be taken in accordance with the provisions contained in sections 13 and 14 of the Securitization Act but if the secured asset is in the possession of *bonafide* lessee or tenant, he cannot be thrown out by invoking sections 13 and 14. The secured creditor / bank can only take symbolic possession from the *bonafide* tenant invoking sections 13 and 14 and has to take recourse of the appropriate legal proceedings for taking actual possession of the petition properties from the tenants or lessee.

Status of borrower's counter claim

The Madras High Court in *Rajshree Sugar & Chemicals Ltd.* v. *Axis Bank Ltd.,*[46] found legislative lapse in section 19(11).[47] The court ruled that section 19(11) of the Recovery of Debts due to Banks and Financial Institutions Act, 1949 entitles a bank to contend before the DRT that the claim made by the defendant should not be disposed of by way of counter claim, but should be tried only as an independent action. If such a contention is raised by the bank in an application taken out before issues are settled in relation to the counter claim, then the tribunal is entitled to pass an order. Unfortunately, after having conferred a right upon the bank to oppose the claim of a defendant from being treated as a counter claim and after having conferred discretion upon the tribunal to treat such a claim as an independent action, the court observed, that section 19 is silent as to what would happen next. If the claim made by a defendant in an application before the DRT is chosen not to be treated as a

44 *Id*. at 134.

45 AIR 2011 Kar. 27.

46 AIR 2011 Mad. 144.

47 S.19(ii) reads as follows: where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not to be disposed of by way of counter claim but in an independent action, the applicant at any time before issues are settled in relation to the counter- claim, apply to the tribunal for an order that such counter-claim may be excluded, and the tribunal may , on the hearing of such application, make such order as it thinks fit.

counter claim but to be treated only as an independent action, the very maintainability of such an independent action may be in jeopardy, on account of the fact that section 19(1) enables only a bank or financial institution to file an application before the tribunal. But if the counter claim is treated as an independent action, the borrower would become the applicant. To this extent there is no clarity in the Act.

Recovery of debt

The Bombay High in *Kotak Mahindra Bank Ltd*. v. *State of Maharashtra*[48] came heavily in favour financial institutions. The court ruled that in view of sections 13, 14 and 17 of the Securitization Act, it is clear that the possession of the secured property can be taken either from the borrower/guarantor or any other person and the right of appeal under section 17 against the order passed under section 14(2) of the Act is available to any such party and section 34 of the Act bars the jurisdiction of any civil court.

Interlocutory order

The courts in *M/s. Vinay Container Services Pvt. Ltd.* v. *Axis Bank, Mumbai,*[49] *Bankim Saha* v. *Union of India*[50] and *Sand Plast (India)* v. *Punjab National Bank*[51] consistently leaned in favour of extending powers of Debts Recovery Appellate Tribunal (DRAT) by holding that it is a settled law that an appeal under section 17 of the Securitization Act by a party aggrieved against a measure taken by a secured creditor under section 13(4) of the said Act inheres in DRAT powers to pass interim directions and the tribunal would be empowered to pass such orders as it may consider appropriate and necessary in relation to the recourse taken by the secured creditors under sub-section 4 of section 13 of the Act. DRAT in exercise of its ancillary powers will have jurisdiction to pass such interim orders and subject to such conditions as it may deem fit and proper to impose. This power of the tribunal to pass interlocutory order is no longer *res integra*. This opinion of the court is in line with the decision of the apex court.[52]

It appears that the courts have shown unanimity in extending full legal support to financial institutions. This is evinced by the fact that the apex court[53] had in categorical terms refused to give this interim power to other tribunals that are similarly situated with DRAT but established under different Acts with of course different objects.[54]

In *Central Bank of India* v. *Ram Chandra Sahoo,*[55] the court thwarted any move of interference by any other court by issuing interim order. It was laid down that section 34 of the Securitization Act creates a bar that no injunction shall be granted by any court or other authority, in respect of any action taken or to be taken

48 AIR 2011 Bom. 188.
49 AIR 2011 Bom. 37.
50 AIR 2011 Cal. 36.
51 AIR 2011 Del. 196.
52 See *Mardia Chemicals Ltd.* v. *UOI*, AIR 2004 SC 371.
53 See *Morgan Stanely Mutual Fund* v. *Kartick Das* (1994) 4 SCC 225.
54 See The Consumer Protection Act, 1986.
55 AIR 2011 Ori. 164.

in pursuance of any power conferred by or under this Act or under Recovery of Debt Due to Bank and Financial Institutions Act,1993. The bar created applies to all the civil courts including consumer fora established under the Consumer Protection Act, 1986.

Jurisdiction of civil court

A superficial reading of section 34 shows that the jurisdiction of the civil court is specifically barred to entertain any suit or proceeding but deeper analysis of this provision reveals that this bar is only to the extent of the matters, which the DRT or the appellate tribunal is empowered to try under the said Act. There is a fine demarcating line with far reaching consequences. This legal position was elucidated by the Bombay High Court in *State Bank of India* v. *Sagar Pramod Deshmukh.*[56] The court laid down that once it is admitted that the suit property has in fact been mortgaged with the bank or financial institution, then it cannot be disputed that the "security interest" is created, as defined under section 2(z-f) of the said Act in favour of a "secured creditor", in respect of the suit property. The secured creditor thereupon becomes entitled to enforce its secured interest without the intervention of the courts or the tribunals, in accordance with the provisions of the Act and the rules framed thereunder, as stipulated under sub-section (1) of section 13 of the said Act and the jurisdiction of the DRT under section 17 of the said Act springs in. However, even if the property in respect of which security interest is found to be created in favour of a secured creditor, that by itself will not be enough to oust the jurisdiction of the civil court to decide other disputes in respect of such secured assets. The jurisdiction of the civil court to decide the suit involving such other disputes in respect of secured assets is barred only to the extent of the matters, which the DRT or its appellate tribunal is empowered by or under the said Act, to determine. The DRT is a court of limited jurisdiction, which cannot be enlarged beyond the examination of validity of the action of a secured creditor under section 13. In all other disputes in respect of secured assets, which do not fall within the jurisdiction of the DRT under section 17 or its appellate tribunal under section 18, the civil court shall have jurisdiction under section 9 of the CPC to decide other disputes in respect of the secured assets.

Jurisdiction of Debts Recovery Tribunal

A question most often debated before the courts is the jurisdiction of DRT and its possible overlap with the tribunals established under other enactments. The case in hand illustrates this point.

In *Rajkot Nagarik Sahakari Bank Limited* v. *Jignesh Jayantilal Ramanuj,*[57] the court was called to decide, while considering application under section 17(1) read with section 17 (2) of the Securitization Act, whether the DRT has a jurisdiction to receive and evaluate evidence regarding tenancy and to decide the dispute and factum regarding landlord- tenant relationship and whether under section 17(3) of the Securitization Act, the DRT has a power to direct the secured creditor, after the

56 AIR 2011 Bom. 144.
57 AIR 2011 Guj. 163.

action under section 13(4) of this Act is taken, to restore the possession to the borrower/ occupier.

It was laid down that the Securitization Act has been enacted with the object of speedy and effective recovery of the secured debt of banks and financial institutions and for that purpose vast and stringent authority is vested with the banks and the financial institutions. At the same time, to ensure that there are sufficient checks and balances, the legislature has conferred powers and jurisdiction on the DRT to examine as to whether the measures taken by the secured creditor for enforcement of security have been taken in accordance with the provisions of the Act or not, which is evident from plain reading of sub-section (3) of section 17 and to declare the measure (taken by the secured creditor) as invalid and direct the secured creditor to restore possession of the secured assets to the borrower if the measures taken under section13(4) by the secured creditor are found to be not in accordance with the provisions of the Act.

The court further said that having regard to the scope and effect of the provision under section 17(3), it becomes clear that it cannot be said that the DRT has no jurisdiction to interfere with the action taken by the secured creditor after stage contemplated under section 13(4). Actually the law is otherwise and it postulates that the action taken by the secured creditor, in exercise of power under section 13(4), is open to scrutiny and not only it can be set aside by the DRT but even status anterior to the action taken by the secured creditor can be restored.

The court ruled that it would be misconceived and futile for the secured creditor to contend, while defending the measures taken by it for enforcing the security, that even if the tribunal finds that the measures taken by it are/were not in accordance with the provisions of the Act, it does not have jurisdiction to direct restoration of the possession of the secured assets to the borrower once the possession has been taken by it (i.e. secured creditor) in exercise of power under section 13(4) of the Act.

When the secured creditor takes measures (for enforcement of security so as to recover the secured debt) which are not in accordance with the provisions of the Act, the borrower or aggrieved person can, as provided by the Act, make an application to the DRT claiming that the measures taken by the secured creditor were not or are not in accordance with the Act. The DRT would, upon such application by the borrower or an aggrieved person, (a) examine as to whether the measures taken by the secured creditor were/are taken in accordance with the provisions of the Act or not and (b) if the measures taken are found to be not in accordance with the provisions of the Act, then it may direct restoration of the possession(or management) of secured assets and pass such order as may be necessary in relation to the recourse taken (c) but if the measures are found to be in accordance with the provisions of the Act, then the secured creditor may proceed further to take any measure specified under section 13(4) to recover its dues.

The use of words "as may consider appropriate and necessary" may, at first blush, appear to be of wide amplitude and as such, ordinarily they would provide a wide and broad canvass of jurisdiction, but the scope is circumscribed by the subsequent words, viz., "in relation to recourse taken under section 13(4)" in sub-section(3) and the said words put the "qualifying boundary" in as much as

the said section also provides that the DRT may pass such order as may be considered necessary but such order must be "in relation to recourse taken under section 13(4)".

To conclude, the court said that while it is true that wide power and jurisdiction is conferred on the DRT, it is also clear that ultimately the DRT is a creature constituted under the special statute and can exercise only so much of authority and jurisdiction as is conferred i.e. can exercise only special and prescribed jurisdiction and cannot travel beyond its confines.[58]

Coming to the crucial issue of whether the DRT has jurisdiction to entertain any suit or proceedings relating to the recovery of rent or recovery of possession of any premises, the court ruled that the fountain head of the jurisdiction of the DRT is section 17(2) read with section 17(1) of the Act and its power and jurisdiction flows from the said provisions. The said sections are empowering provisions in light of which the DRT can examine as to whether measures taken by the secured creditor are in accordance with the provisions of the Act or not. On the other hand, the jurisdiction of the court under the Rent Act flows from section 28 of the Rent Act. The court under this section shall have jurisdiction to entertain any suit or proceedings relating to the recovery of rent or recovery of possession of any premises to which the Act applies or to decide application made under the Act and to deal with any claim or question arising out of the Rent Act, between the land lord and tenant. The said section 28 not only prescribes the jurisdiction of the court under the Rent Act but also contains the exclusion clause or negative provision excluding the jurisdiction of other court by prescribing that "no other court shall entertain such suit or application or proceedings or deal with such claim" which are to be decided by the court under the Rent Act.

The court laid stress on the fact that the DRT is a creature of special Act and not a court of original and inherent jurisdiction and therefore it has to act within the confines of the limited jurisdiction conferred by the statute and it cannot exercise authority or jurisdiction which a court of original and inherent jurisdiction can. It cannot, like the court of original and /or inherent jurisdiction, decide all matters or issues except those that are expressly or impliedly barred.[59]

In *Indian Bank* v. *M/s. Nippon Enterprises South Chennai,*[60] the questions of great significance were raised. (i) can a lessee/ tenant in *bona fide* occupation of a secured asset for more than a period of one year, could claim the benefit of the lease under section 31(e) of the Securitization Act, in the event there was no registration of the lease deed as required under section 107 of the Transfer of Property Act? If so, whether the tenant is entitled to invoke the provisions of section 31(e) on the facts of the case? (ii) Whether in terms of section 35, the Securitization Act will override the provisions of the Tamil Nadu Buildings (Lease & Rent Control) Act, 1960 to enable the bank to evict a tenant by invoking the provisions of section 31(e).

58 *Id* at 170.
59 *Id* at 172.
60 *Supra* note 23 at 252.

The court held that a close reading of the above provisions would make it clear that under the provisions of the Tamil Nadu Rent Control Act, lease requires no registered instrument and the requirement would be only a jural relationship between the landlord and tenant as defined under sections 2(6) and 2(8) of the Tamil Nadu Rent Control Act, the lease deed could be the basis to establish that jural relationship between the owner of the property and the tenant. The bank has not disputed the fact that the tenant was in occupation of the portion in question and in fact it had asked the tenant to pay the rent directly to the bank. The tenant has also paid the rents which were accepted by the bank as well. The tenant can, therefore, claim that he was a *bonafide* tenant in occupation irrespective of the fact the lease is not registered. Therefore, it is not correct to contend that to claim the benefit of section 31(e) of the Securitization Act the lease should be registered as required by section 107 of the TP Act.

The court further said that a conjoint reading of sections 31(e) and 2 (zf) of the Securitization Act would show that only in respect of any of the transactions enumerated in section 31 (e) of the Securitization Act, in which no security interest has been created, the Act cannot be made applicable and not otherwise. The provisions of section 31(e) are not attracted in the event any security interest is created in contracts like contract of sale or hire purchase or lease, unless such transactions result in creation of security interest which is similar to loan.

The court ruled that under section 13 (4) of the Securitization Act, the secured creditor can take possession of the secured assets of the borrower. There can be no difficulty in taking such possession of the secured assets either under section 13(4) or under section 14 of the Securitization Act, if the secured asset is in the possession of the borrower or guarantor, as the case may be. The Securitization Act entitles the creditor to take possession of the secured assets either by issuing possession notice under section 13 (4) or by making application to the chief metropolitan magistrate / district magistrate to take physical possession under section 14. Though the function of chief metropolitan magistrate/ district magistrate is only ministerial, the provision of section 14 confers drastic power to take possession even by use of force. The difficulty arises only in cases where the possession of the property is in the hands of the tenant (lessee). On the other hand, the TN Rent Control Act contemplates that a tenant is entitled in law to continue to be in possession unless he is evicted under the provisions of the said Act. The Securitization Act is mainly procedural and the TN Rent Control Act is exclusively dealing with the substantive right of tenants, both the Acts operate on different fields. If there were provisions in the Securitization Act enabling the bank to take possession of a secured asset from a lessee, then only it could have held that there is conflict between the Securitization Act and the TN Rent Control Act in which case, the TN Rent Control Act should have given way to the Securitization Act. However, there is no such provision in the Securitization Act enabling the bank to take possession from the lessee, though the Act speaks of the right of the bank to take possession of the secured asset. Moreover, right from section 13(2) till exhausting the provision of appeal, the bank deals only with the borrower / guarantor and the lessee is nowhere in the picture, as the Act does not require the bank to involve the lessee/tenant as well in the proceedings. Thus, there is no such overlapping or repugnancy between these two

provisions in respect of taking possession from the lessee. The court held that physical possession of the secured assets from the lessee/tenant can be taken only by invoking the provisions of the Tamil Nadu Rent Control Act.[61]

Right to appeal

The apex court in *Narayan Chandra Ghosh* v. *UCO Bank*[62] seized an opportunity to answer whether the appellate tribunal has jurisdiction to exempt the person, preferring an appeal under section 18 of the Act, from making any pre-deposit in terms of the said proviso? The court observed that section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the DRT under section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates that no appeal shall be entertained unless the borrower has deposited with the appellate tribunal fifty percent of the amount of debt due from him, as claimed by the secured creditors or determined by the DRT whichever is less. However, under the third proviso to the sub-section, the appellate tribunal has the power to reduce the amount, for the reasons to be recorded in writing, not less than twenty five percent of debts referred to in the second proviso. Thus, there is an absolute bar to entertainment of an appeal under section 18 of the Act unless the condition precedent as stipulated is fulfilled. Unless the borrower makes with appellate tribunal, a pre-deposit of fifty percent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the appellate tribunal. The language of the said proviso is clear and admits of no ambiguity. It is well settled that when the legislature provides a right of appeal in a statute, it can impose conditions for the exercise of such right so long as these conditions are not onerous as to amount to unreasonable restrictions, rendering the right almost illusory. The court ruled that bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. The requirement of pre-deposit under sub section (1) of section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in section 18 of the Act. In that view of the matter, no court, much less the appellate tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the statute.[63]

A constitutional issue of great significance was raised in *Satyavol Venkat Rao* v. *Union of India*[64] and *National Polymers* v. *Union of India*.[65] The constitutional validity of first and second proviso to section 18 of the Act was challenged in these two writ petitions on the ground that they are discriminatory. This submission was based on its comparison with the provisions of section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDBFI) as the latter provision confers discretion upon the appellate tribunal to allow a complete waiver of the pre-deposit. As against this, the discretion of the appellate tribunal, while entertaining an appeal under section 18 of the Securitization Act is curtailed. The first proviso

61 *Id*. at 252.
62 AIR 2011 SC 1913.
63 *Id*. at 1916.
64 AIR 2011 Del.1.
65 AIR 2011 Bom. 132.

to section 18(1) provides that an appeal cannot be entertained unless the borrower has deposited an amount of 50% of the debt due as claimed by the secured creditor, or as determined by the tribunal whichever is less. By the second proviso, the appellate tribunal is empowered for reasons to be recorded in writing to reduce the amount to not less than 25% of the debt referred to in the second proviso.[66]

The courts expressed their unanimity and held that the constitutional challenge to the provisions of the second and third provisos of section 18 must fail. The reasons stated by these courts for this finding were that an appeal is a statutory creation. A statute which confers a right of appeal can condition the exercise of that right on the observance of conditions which the legislature may consider appropriate to impose. The court concluded that the whole scheme of the Securitization Act is consistent with the parliamentary intent of ensuring that this Act must follow an efficacious non-adjudicatory process for the enforcement of a security interest. The interposition of an adjudicatory function in the Securitization Act must, therefore, be confined to those areas as legislated upon by the parliament and subject to the restrictions imposed by the parliament while so legislating. Therefore, there were valid reasons why parliament made a different provision in the Securitization Act in the matter of the discretion of the appellate tribunal under section 18(1) in dispensing with the requirement of pre-deposit.[67]

Condonation of delay

In *Seth Banshidhar Kedia Rice Mills Pvt. Ltd.* v. *State Bank of India,*[68] the court was categorical in holding that section 18 of the Securitization Act, when compared with section 20 of the RDBFI Act, makes it amply clear that not only the period of limitation for filing an appeal has been reduced to 30 days from 45 days as provided in section 20 but the power of the appellate tribunal to condone delay has also been excluded which is otherwise provided in section 20 of the RDDBFI Act. Thus, it leaves no iota of doubt that the legislature has consciously intended not to confer the power of condonation of delay on the appellate tribunal under section 18 of the Securitization Act.

The court recorded this opinion on the ground that it is a well settled principle of law that if a particular expression is used in a statute in the same way as it was used in the earlier statute which is *pari materia* with the later statute, it is then suggestive of the intention of the legislature that the language so used in the latter statute is used in the same sense as in the earlier one, change of language in a latter statute in *pari materia* is suggestive that change is intended.

The above opinion of the court is fortified by the fact that there is also an identical provision in sub-section (7) of section 17 of the Securitization Act which states that the tribunal shall, as far as may be, dispose of the application in accordance with the provisions of RDDBFI Act. Under the RDDBFI Act the tribunal and the appellate tribunal are separately established and its section 24, which deals with

66 *Id*. at 133.
67 *Id.* at 136.
68 AIR 2011 MP 205.

Limitation Act, 1963 shall, as far as may be, apply to an application made to tribunal. The application under section 17 can be made by any aggrieved person to the tribunal within 45 days from the date on which he has suffered an action under any of the measures referred to in sub-section(4) of section 13 of the Securitization Act. Thereafter any person aggrieved by an order made by the tribunal under section 17 can prefer an appeal to the appellate tribunal under section 18 within 30 days from the date of receipt of the order of the tribunal. Section 24 of the RDDBFI Act has not made the provisions of the Limitation Act applicable to an appellate tribunal. This being the position, it is apparent that although the tribunal can give the benefit of section 5 of the Limitation Act, while dealing with an application under section 17 of the Securitization Act, the appellate tribunal cannot do so while considering the appeal under section 18.

The court concluded that having regard to the object of the Securitization Act that it intends to ensure speedy recovery of dues of banks and also for quick resolution of disputes arising out of the action taken for recovery of such dues, it can be safely said that the legislature has consciously excluded the applicability of the provisions of section 4 to section 24 of the Limitation Act insofar as they relate to section 18 of the Securitization Act.[69]

Powers of DRT

An interesting question was raised in the *State Bank of India* v. *Prafulchandra* v. *Patel.*[70] The court was asked to resolve as to whether DRT has power to prevent borrower from leaving the country. The court read powers of the DRT with article 21 of the Constitution. The court ruled that article 21 of the Constitution safeguards the right to go abroad against executive interference which is not supported by law; and law here means enacted law or state law. Thus no person can be deprived of his rights to go abroad unless there is a law made by the state prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure.

Sub-section (12), (13A), (17) and (18) of section 19 does not empower the tribunal to issue any prohibitory order prohibiting the defendant borrower from leaving the country without prior permission.

Thus, law has been made by the state regulating or depriving a person of such right in case proceedings under section 19 of the DRT Act, 1993 is pending. Section 19 (25) read with rule 18 of the DRT (Procedure) Rules, 1993 empowers the tribunal to make such orders and give such directions 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. It is an enabling provision empowering the tribunal to pass interim order to prevent abuse of its process or to secure the ends of justice.

Section 22 deals with the procedure and powers of the tribunal and the appellate tribunal. It relates to the summoning and enforcing the attendance, requiring the discovery and production of documents, receiving evidence on affidavits, issuing commissions for the examination of witness or documents, reviewing its decision,

69 *Id*. at 210.

70 AIR 2011 Guj. 81.

dismissing an application for default or deciding it *ex parte*, setting aside any order of dismissal or any application for default or any order passed by it *ex parte*, or any other matter which may be prescribed, but no provision has been made therein or by a separate notification issued by the central government empowering the tribunal to deprive a person of his personal liberty to move abroad as guaranteed under article 21 of the Indian Constitution. In absence of any such 'enacted law' or 'state law', tribunal has no jurisdiction to deprive the defendants/ borrowers of their right to go abroad.[71]

VI CONCLUSION

The survey gives an outline of the various interpretations altered/ affirmed by the courts under various statues, such as the Contract Act, Partnership Act, Securitization Act etc. Faced with several contentious issues between competing contractual parties, and on the jurisdiction of tribunals, the courts have made attempts to bring clarity to the existing laws.

71 *Id*. at 87.