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MERCANTILE LAW

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I INTRODUCTION

THIS PART of the survey analyses the cases decided by the different high courts and Supreme Court on the subjects of law of contract, negotiable instrument and banking laws. Only those cases which have either propounded debatable propositions or have added new dimension to the discourse on these subjects have been discussed. This is the reason that the cases on subjects of partnership and sale of goods have not been included as these cases have restated already established legal position.

II LAW OF CONTRACT

Construction of contract

The Supreme Court in *Rashtriya Ispat Nigam Ltd.* v. *M/s. Dewan Chand Ram Saran*[1] applied common law principle of *contra proferentem* for the interpretation of the given contract. In the present case, the respondent was appointed as a handling contractor and was to bear all taxes and duties in connection with discharge of his obligation. The appellant deducted service tax from the bills raised by the contractor which was contested by the respondent before the Bombay High Court. The Bombay High Court upheld the contention in its single as well as Division Benches. However the decision of the Bombay High Court was reversed by the Supreme Court.

The apex court took the help of the principle of *contra proferentem*[2] and held that there was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor to the effect that the burden of any tax arising out of obligations of the respondent under the contract would be borne by him. The court further said that where a clause in a contract is capable of two interpretations and the arbitrator has taken a view which is clearly a possible if not a plausible one, it is not possible to say that the arbitrator had travelled outside his jurisdiction or the view taken by him was against the terms of contract.[3]

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1 AIR 2012 SC 2829.

2 This rules provides that where the words used in an exclusion clause are capable of two constructions, a wider and a narrower one, than the narrower one should be preferred, for the rule is that every exemption clause is to be interpreted in case of ambiguity *contra proferentem*.

3 *Id*. at 2837.

Concluded contract

In *Sarita Karnwal* v. *Meerut Mandal Vikas Nigam,*[4] the court answered two interesting questions. Meerut Mandal Vikas Nigam Ltd. is a company registered under the Companies Act. This company had a rice mill which ran into losses and was closed. The board of directors took the decision to sell this mill and the petitioner emerged as a highest bidder by offering Rs. 12.52 lakhs. The petitioner then increased this amount to Rs. 12.62 lakhs through negotiations. The records revealed that the government approved the sale in favour of the petitioner but no formal communication was sent to him.

While the decision process was going on, it is alleged that one, Deepa Singhol submitted a letter offering Rs. 15.11 lakhs for the purchase of the rice mill. Though this offer was not accepted, nevertheless, it was indicated that a fresh tender should be invited. To thwart this move, the present writ petition was filed praying that the respondent should be directed to complete the formalities for the transfer of the rice mill in favour of the petitioner.

The petitioner contended that a contract had come into existence once his highest bid was accepted through negotiations, notwithstanding the fact that a formal acceptance letter had not been issued giving effect to the negotiated terms and conditions. It was also contended that once the bid by negotiations was accepted, the petitioner had legitimate expectations that a complete contract has come into existence and formal communication of acceptance was no more required.

The court took the help of the conditions incorporated in the tender document and turned down the contentions of the petitioner by holding that there is no formal letter of acceptance given by the respondent to the petitioner indicating that the offer of the petitioner has been accepted.[5]

The court further made a debatable observation by holding that so far as the noting made in the files of the respondents are concerned, it can at best be contended that a legitimate expectation had arisen for the petitioner, but such legitimate expectation could not override a half backed contract, that is to say, until and unless a concluded contract comes into existence the question of legitimate expectation could not arise. The legitimate expectations, if any, can only occur pursuant to a concluded contract.

The above observation of the court gives room for a counter argument that when there is a concluded contract enforceable by law, there is no need of invoking of doctrine of legitimate expectation because such a contract is enforceable immaterial of legitimate expectation. On the other hand, there is a legitimate expectation that the petitioners' offer stands accepted when his revised bid was accepted by the government and what was left was only the formal acceptance.

Notwithstanding the above counter argument, the surveyor prefers to go with the opinion of the court that no concluded contract has come into existence. This opinion is possible by invoking section 4 of the Contract Act and not on the basis of the doctrine of legitimate expectation as invoked by the court.

4 AIR 2012 Utr. 30.

5 *Id*. at 32.

Consideration

In *Prakashwati Jain* v. *Punjab State Industrial Development Corporation,*[6] a writ petition was filed challenging the act of taking possession of the property belonging to the petitioner by the state finance corporation.

The respondent no.2 had entered into a loan agreement with the first respondent for running a factory. He had executed a hypothecation deed on the present and future movable property and immovable assets of the property, apart from the document of mortgage. A collateral security by deposit of title deeds has been made by the petitioner to secure the loan for respondent no.2. The petitioner contended that he was only a surety for the loan advanced by respondent no.1 and hence the power of the corporation to take possession of the assets under section 29 of the State Financial Corporations Act, 1951 does not extend to his property. Furthermore, there was no consideration to the agreement between him and the corporation and therefore the whole agreement was *nudum pactum*. In response to this argument, the court said that the term consideration as defined under section 2 (d) of the Contract Act makes possible the enforceability of a debt even against a stranger to consideration, so long as the detriment suffered by the promisor is for the benefit of another person. The collateral security offered by the surety for the benefit obtained by the principal debtor is sufficient consideration to make it enforceable.[7]

It is submitted that the court erroneously invoked section 2 (d) which is not the relevant section to adjudicate upon the contract of guarantee. Sections 126-147 of the Contract Act form a complete code relating to issues surrounding the contract of guarantee. Otherwise, there will be practical difficulties in roping the surety. For instance, if the creditor has taken two securities; one from principal debtor and another from surety, section 2(d) will not prevent surety from contending that the creditor must first exhaust available remedy against principal debtor and only then he (creditor) can proceed against surety. After all, surety's security is collateral and logic demands that this collateral security is stand by and can be invoked only when the principal security of the principal debtor is exhausted.

Instead of section 2(d), the court should have taken support from section 127 of the Contract Act which in plain words makes it amply clear, without resorting to interpretational casuistry, that "anything done or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee". This section is squarely relevant to the case in hand and applies exclusively to the contract of guarantee.

Undue influence

The Madhya Pradesh High Court in *Shin-Etsu chemical Co. Ltd* v. *Vindhya Telelinks Ltd.*[8] has constricted the scope of doctrine of undue influence as provided under section 16 of the contract law. Taking help from illustration (d) appended to this section, the court pronounced that doctrine of undue influence cannot be applied to commercial contracts in the ordinary course of business.

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6 AIR 2012 P&H 13.

7 *Id*. at 14.

8 AIR 2012 MP 122.

The respondents in the present case have contended that the agreement in question was the result of undue influence based on inequality of bargaining power. The petitioner is a monopolistic supplier of the goods and the respondents having made large investment were solely dependent upon the petitioner for supply of the product and were thus a weaker party and contract is, therefore, unconscionable.

The court attached much importance to the commercial nature of the transaction and ruled that the principle that contract being vitiated on account of inequality of bargaining power may not apply where the parties are businessmen and the contract is a commercial transaction.

The above exposition of law, it is submitted, cannot be considered as a general principle of law on the subject determining applicability of the doctrine of undue influence on the commercial transactions immaterial of the nature and circumstances in which such transactions have come into existence. The opinion of the court cannot be said to have laid down *per se* rule that the principle of undue influence is inapplicable to the contract of commercial nature and all that the respondent has to prove is that the contract in question is a commercial one. This will be against the mandate of section 16 which does not admit such general interpretation. The analytical reading of section 16 makes it amply clear that each case has to be decided on its merits which calls for rule of reason and not *per se* approach as advocated by the court in case of commercial contracts.

Void contracts

The Karnataka High Court in *Prashant B. Narnaware* v. *Vijaya Bank*[9] was called to determine validity of a condition incorporated in the service contract by the respondent bank. The condition was that any person employed by the bank shall have to serve at least for 3 years, beginning from the date of his/her joining. Any person interested to leave the bank before the stipulated period shall have to pay Rs. 2 lakhs.

The petitioner joined the bank as an assistant manager and subsequently promoted as manager and senior manager but tendered resignation as a senior manager before completing 3 years period as required under the service contract. The petitioner was informed that his resignation will not be accepted unless he pays Rs. 2 lakhs. The petitioner requested for waving of the payment of this amount but his request was not accepted. He then made the payment and was relieved from the service. It was contended that the condition in the order of appointment and the bond obtained by the respondents to pay a sum of Rs. 2 lakhs are contrary to law. The court accepted the contention by holding that the impugned condition in the recruitment notification is unconscionable, unsustainable and unenforceable in law. The court in a brief judgment did not spell out clearly the reasons for its opinion. The cases cited by the respondent were not considered by the court because, in its opinion, those cases were decided on the touchstone of section 27 and not on section 23 which declares a contract void if it is *inter alia* against public policy or immorality or against one's conscience.

The court did not dwell on the point that the petitioner had accepted terms and conditions out of his free will and joined the services having full knowledge of the

9 AIR 2012 Kar 11.

terms of the service contract. Not only this, the petitioner enjoyed two subsequent promotions without raising any voice all these years against the un-conscienability of these terms. He should not have been allowed to blow hot and cold at one and the same time.

Restraint of trade

The Calcutta High Court in *Embee Software Private Ltd.* v. *Samir Kumar Shaw*[10] gave an unusual interpretation to section 27 of the Contract Act that encompasses copyright and tort principles. In this case, three employees, respondents in the present case, were working in, Embee Private Ltd. They left the company and incorporated their own private limited company. The plaintiff's company has a very large business network with diverse clientele. It renders services to them in the field of information technology. While rendering such services, files, programmes, know-how, formula are prepared by the plaintiff and stored in appropriate software. It was contended that many of these programmes contain a source code. This source code is supposed to be known exclusively by the plaintiff to operate the programmes and to update them. Whilst doing this programming and file preparation work, the said first, second and third respondents are in know of these source codes. With that knowledge, they are in a position to approach the clients of the plaintiff. They would render them the necessary services and update their programmes, files and so on. This would deprive the plaintiff of their business.

After hearing counter arguments, the court has made the following debatable observations.

> The three respondents together with the company they have incorporated cannot be prevented from carrying on the business of purchase of software and hardware of known manufacturers and brands and reselling them after tweaking the software to suit the needs of the clients. But they can only do so subject to the following conditions.
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> (a) The programmers, files, data, etc. of which the plaintiff has a source code can be considered to be the personal property and trade secrets of the plaintiff. The said defendant cannot deal in such programmes, files, data using that source code or otherwise.
>
> (b) The respondents will not be allowed to solicit the clients to break their contract or their legal relationships with the plaintiff or prevent them from entering into a contractual relationship with the plaintiff.
> The court decision has raised more issues than it has resolved.
>
> (i) The court on the one hand has laid down that the plaintiff has failed to disclose any specific data with sufficient details over which copyright can be claimed. On the other hand, the court ruled that source code is a personal property of the plaintiff and no one can deal in such programmes.
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> Can a person claim to be the owner of the source code without establishing copyright over it?

10 AIR 2012 Cal. 141.

(ii) The court has admitted that inducing a person to break a contract with another is a tort. How can then court order by invoking section 27 of the Contract Act that the respondents will not solicit the clients of the plaintiff?

It is pertinent to mention that section 27 declares a contract void that tends to prevent a person from exercising his lawful profession, trade or business. This section rests on a contract. The above order could be passed under law of torts, but not under section 27 as there should be a contract between the parties only then this section can be invoked.

Novation

In *BGR Mining and Infra Pvt Ltd* v. *Singareni Collieries Co. Ltd*,[11] the petitioner was entrusted the contract work described as "Blast Hole Drilling, Controlled Blasting etc." This work was to be stopped due to geographical disturbances and presence of clay layers. By the order of the director of Mines Safety, restrictions were placed on the excavations in this area. An additional area was allotted to the petitioner to be excavated in place of restricted area.

A fresh tender notice was issued for excavation including the area which was allotted to the petitioner and over which excavation was restricted. This was impugned by the petitioner on the ground that the tender notice indisputably falls within the area allotted to the petitioner and this contract is neither terminated nor there is any variation as contemplated under law with regard to the area allotted.

The court held that the correspondence undoubtedly establishes that the petitioner had accepted that revised quantity offered by the respondents in place of originally contracted quantity and in law, it would amount to novation of the original contract by substituting the same to that extent by a revised arrangement.

The court did not dwell on the issue of consent on which hinges the concept of novation under section 62. This section makes it abundantly clear that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not to be performed.

This provision cannot come into effect unless both the parties give consent. Unilateral consent cannot result into novation. In this instant case, records reveal that the petitioner in his correspondence had not responded to the proposed changes by the respondent to which much credence has not been given by the court.

The Supreme Court in *Purbanchal Cables and Conductors Pvt. Ltd.* v. *Assam State Electricity Board*[12] placed a rider on the invocation of doctrine of novation as provided in section 62 of the Contract Act by laying down that the ground or issue of novation of contract is a mixed question of fact and law. It is required to be urged evidentially and scrutinized by the court of Ist instance. If it is raised for the first time, at the time of hearing of the case before the present court, it can't be permitted.[13]

Unjust enrichment

The Supreme Court in *Chandi Prasad Uniyal* v. *State of Uttrakhand*[14] did not

11 AIR 2012 AP 71.
12 AIR 2012 SC 3167.
13 *Id*. at 3191.
14 AIR 2012 SC 2951.

follow its own earlier rulings[15] while interpreting section 72 of the Contract Act. Section 72 provides: A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it.

The apex court confined ratio of the earlier cases to their peculiar facts and circumstances and laid down that this court is not convinced that in earlier judgments any general preposition of law was propounded that only if the state or its officials establish that there was misrepresentation of fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered.

The court gave wide interpretation to section 72 by holding that the court is more concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over payment nor that of recipients. The court lamented by stating that "we fail to see why the concept of fraud or misrepresentation is being brought in such situations".

The court did not confine recovery of money paid by mistake or under coercion as enumerated under section 72 but laid down that question to be asked under this section is whether excess money has been paid or not. The court counted many instances where excess payment of public money by government officers may be effected which includes negligence, carelessness, collusion, favoritism etc. and said that money in such situations does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. The court extended reach of section 72 to situations where payments are being effected without any authority of law and payments have been received by the recipients also without any authority of law. The court opined that such money can always be recovered barring few exceptions of extreme hardship but not as a matter of right. In such situations, law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

Thus the apex court has widened the scope of section 72 which was hitherto confined to "doctrine of mistake of fact and mistake of law" and made it applicable to situations where either payer has made payment or payee has received payment without the mandate of law. While doing so, the court has also carved out an exception that an order to prevent unjust enrichment may be refused where such order itself is unjust because of the peculiar circumstances of the case. It is submitted that this exception has no basis of the law as laid down in section 72. It will encourage litigation and will in turn result into judicial hovering.

Co-extensive liability of surety

The apex court in *Ram Kishun* v. *State of U.P*[16] attempted to balance the competing interests of the surety and creditor. The court in the first instance favored creditor as against surety by holding that there can be no dispute to the settled legal propositions of law that in view of the provisions of section 128 of the Contract Act, the liability of the guarantor/surety is co-extensive with that of the debtor.

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15 *Shyman Babu Verma* v. *Union of India* (1994)2 SCC 521; *Sahib Ram* v. *State of Haryana,* 1995 Supp (1) SCC 18: 1995 AIR SCW 1780; *State of Bihar* v. *Pandey Jagdishwar Prasad* (2009) 3 SCC 117: 2009 AIR SCW 595 and *Yogeshwar Prasad* v. *National Institute of Education Planning and Administration* (2010) 14 SCC 323: 2010 AIR SCW 7136.

16 AIR 2012 SC 2288.

Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety /guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as how he should make the recovery and pursue his remedies against the principal debtor at his instance.

The court then imposed a duty on the financial institutions attempting to recover loan amount from the surety instead of creditor by holding that undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of statutory provisions.[17]

The apex court added a new dimension to this debate by ruling that a right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of a statute. The condition precedent for taking away someone's property or disposing of the secured assets is that the authority must ensure compliance of the statutory provisions.[18]

The essential ingredients of such sale remain a correct valuation report and fixing the reserved price. For that, there must be an application of mind by the authority concerned while approving/accepting the report of the approved values and fixing the reserve price as the failure to do so may cause substantial injury to the borrower/guarantor and that would amount to material irregularity and ultimately vitiate the subsequent proceedings. The authority is also duly bound to decide as to whether sale of a part of the property would meet the outstanding demand. Valuation is a question of fact and valuation of the property is required to be determined fairly and reasonably.

An interesting question of law was resolved by the Chhattisgarh High Court in the *State Bank of India* v. *Meghraj Contractor.*[19] The question involved was whether the acknowledgement of time barred debt by the borrower will bind the surety under section 128 which makes surety co-extensively liable with the principal debtor. The court rightly said that where the guarantee is a continuous one, acknowledgement of debt made by the principal debtor is binding on the guarantor in-spite of the fact that the debt is time barred but has been acknowledged in terms of section 25(3) which validates such contracts.

III NEGOTIABLE INSTRUMENTS ACT

Notice

The Kerala High Court *in Gopalkrishnan Lekshmanan* v. *Noorjahan Abdul Azeez*[20] resolved the nebulous issue surrounding the expression "the date of receipt

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17 *Id*. at 2291.

18 *Ibid*.

19 AIR 2012 Chh. 149.

20 AIR 2012 (NOC) 19 (KER).

of the said notice" as provided in proviso (c) of section 138 of the Negotiable Instrument Act (NIA). The court stated that under the provisions of clause (c) of Section 138 of the NIA the cause of action for the complaint arises on the failure of the drawer to make payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within 15 days of the receipt of the said notice given under clause (b) thereof and not before that. No such complaint can legally be filed before the aforesaid period. The material and relevant date for accrual of cause of action for such complaint is, therefore, the date of receipt of notice by the drawer. The complainant, being the sender of the notice, cannot clearly know the date of the actual service of the same and can only wait for the acknowledgement of the card. The receipt of the notice under clause (b) of section 138 of the NIA must be invariably by the drawer of the cheque to whom it is given. Knowledge of the sender about the date of receipt of notice by the drawer is, therefore, very much material as regards accrual of the cause of action for making the complaint. Where notice is sent by registered post with return acknowledgment, which is the usual mode of service, waiting for the acknowledgement card can hardly be avoided, if the parties do not belong to the same place. The knowledge of the sender (complainant) about the fact of and date of the receipt of such notice by the addressee/accused would variably be dependent upon the agencies, namely, the postal department, which is obliged to return back the acknowledgement card to the sender of the registered notice. Where acknowledgement card did not reach back to the sender, this necessitates correspondence with the postal department as to the delivery/service of the registered notice or the date of delivery /service of such notice. In such circumstances, the complainant cannot be compelled to draw the presumption regarding the due service of notice by the addressee/ accused as provided under section 27 of the General Clauses Act. Such presumption in support of service of notice would depend upon the facts and circumstances of each case. The expression "the date of receipt of the said notice" in proviso (c) of section 138 of the NIA must be realistically understood as 'the date of knowledge of receipt of the said notice' while computing the period of "1 month of the date on which cause of action arises" in section 142 (b) of the NIA. That alone would be a just purposive and realistic interpretation of the law. Any counter interpretation would be unjust and would result in frustration of the purpose of law.

The court gave purpose oriented interpretation to the above expression which would avoid inconvenience that might have been caused if the contrary view had been taken by the court.

The Supreme Court in *Yogendra Pratap Singh* v. *Savitri Pandey*[21] was called to resolve a vertical conflict not only amongst different high courts but also between the different benches of the same high court on the following two questions of law.

1. Can cognizance of an offence punishable under section 138 of the NIA, be taken on the basis of a complaint filed before the expiry of period of 15 days stipulated in the notice required to be served upon the drawer of the cheque in terms of section 138 (c) of the Act?

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21 AIR 2012 SC 2508.

2. If answer to the above question is in negative, then can the complainant be permitted to present the complaint again notwithstanding the fact that the period of one month stipulated under section 142 (b) for filing of such a complaint has expired?

The court set the conflict in the opinions at rest by delineating ambit and scope of proviso to sections 138 and 142 of the NIA. It was held that proviso to section 138 stipulates three distinct conditions precedent which must be satisfied before the dishonor of a cheque can constitute an offence.

The *first* condition is that the cheque is presented to the bank within a period of 6 months from the date on which it is drawn or within the period of its validity, whichever is earlier.

The *second* condition is that the payee or the holder in due course of the cheque, as the case may be, should demand payment of the said amount of money by giving a notice in writing to the drawee of the cheque, 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid.

The *third* condition is that the drawer of such a cheque should have failed to make payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

The court ruled that it is only upon the satisfaction of all the three conditions mentioned above and enumerated under the proviso to section 138 as clauses (a) (b) and (c) thereof that an offence under section 138 can be said to have been committed by the person issuing the cheque.

Section 142 of the NIA provides a provision for taking cognizance of the offence and starts with a non-obstante clause. It provides that no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or as the case may be, the holder in due course and such complaint is made within 1 month of the date on which the cause of action arises under clause (c) of the proviso to section 138. Furthermore, under sub-section (c) to section 142, no court inferior to that of a metropolitan magistrate or as judicial magistrate of the first class is competent to try any offence punishable under section 138.

A combined reading of sections 138 and 142 unfolds that a complaint under section 138 can be filed only after the cause of action to do so accrues to the complainant in terms of clause (c) of the proviso to section 138 which as noticed earlier happens only when the drawer of the cheque in question fails to make the payment of the cheque amount to the payee or the holder of the cheque within 15 days of receipt of the notice required to be sent in terms of clause (b) to proviso to section 138.

In the above back drop, the court opined that a complaint filed in anticipation of the accrual of the cause of action under clause (c) of the proviso to section 138 would be a premature complaint. The complainant will have no legal justification to file such a complaint for the cause of action to do so would not accrue to him till such time the drawer of the cheque fails to pay the amount covered by the cheque within the stipulated period of 15 days from the date of the receipt of the notice. It follows that on the date such a premature complaint is presented to the magistrate

the same can and ought to be dismissed as premature and hence not maintainable. The court held that this however has not happened in the case at hand.

Coming back to the facts of the present case, it was laid down by the court that the magistrate, in the present case, took cognizance of the offence on 14.10.08 by which time the stipulated period of 15 days had expired but no payment towards the cheque amount was made to the complainant even upto the date on which the cognizance was taken. The commission of the offence was thus complete on the date cognizance was taken, but the complaint on the basis whereof the cognizance was taken remained premature.

The question remains as to whether the subsequent development, namely, completion of the third requirement for the commission of an offence under section 138 could be taken note of for the purposes of cognizance under section 142 of the Act? The court opined that the complaint filed by the appellant was plainly premature. The fact that subsequent to the filing of the complaint an offence under section 138 had been committed was no reason for the court to ignore the fact that the complaint on the basis of which it was taking cognizance of the offence was not a valid complaint because section 142 of the NIA forbids taking of cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or the holder of the cheque in due course. Such a complaint in order to be treated as a complaint within the contemplation of section 142 must be a valid complaint. This in turn means that such a complaint must have been filed after the cause of action to do so under clause (c) of the proviso to section 138 had accrued to the complainant. A complaint that is premature is no complaint in the eyes of law and no cognizance could be taken on the basis thereof.

Dishonour of cheque

In *Shrimati Neena Chopra* v. *Mahendra Singh Vaishya,*[22] the principle of criminal law jurisprudence was borrowed to exonerate the descendants from the criminal liability of their ancestors. The court laid down that the statutory provisions of section 138 would show that the beneficiary of the cheque can proceed under section 138 only against a person who had issued the cheque which was returned unpaid on account of insufficiency of funds. Criminal liability is not transferred to the descendants or legal heirs of the person who had issued the cheque under section 138 of NIA. The cheque in question which is the subject matter of complaint against petitioner was not issued by her. She is, therefore not criminally liable in regard to the cheque issued by her mother.

The above ratio of the decision, it is submitted, has to be confined to only criminal liability which may arise due to dishonour of cheque but cannot be extended to civil liability which may arise due to the issuance of cheque as the descendants who have inherited the property of the author of the cheque may be asked to discharge the civil liability, if any, towards the payee of the cheque.

The Supreme Court in *R. Vijayan* v. *Baby*[23] has set right the legal position on the subject matter in order to ensure uniformity and consistency and also suggested amendments in the relevant provisions of law. It was observed that some courts

22 AIR 2012 (NOC) 22 (M.P).

23 AIR 2012 SC 528.

have awarded compensation in cheque dishonour cases by invoking section 138 of the NIA read with section 357(3) of the Cr Pc and some have insisted that a separate civil suit be instituted for this purpose as the proceedings for the dishonour of the cheque under section 138 cannot be treated as civil suit for recovery of the cheque amount with interest.

The court ruled that though a complaint under section 138 of the NIA is in regard to criminal liability for the offence of the dishonouring of the cheque and not for the recovery of the cheque amount, (which strictly speaking has to be enforced by a civil suit), but in practice, once the criminal complaint is lodged under section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque because of the reason that the relevant provision mandates the court to levy the fine and the usual direction in such cases is for payment of compensation equal to the cheque amount. Most of such cases (except those where liability is denied) get compounded at one stage or the other by payment of the cheque amount with or without interest. Even where the offences are not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers), view the proceedings under section 138, as a proceeding for the recovery of the cheque amount. The corporal punishment for the dishonouring of cheque to its drawer is not the primary purpose of such proceedings but has assumed secondary importance.

The court further said that having reached to the above mentioned stage, if some magistrates go by the traditional view that the criminal proceedings are for imposing punishment on the accused, either imprisonment or fine or both, and there is no need to compensate the complainant, particularly if the complainant is not a 'victim' in the real sense, but is a well-to-do financier or financing institution, difficulties and complications arise. In such cases, where the discretion to direct payment of compensation is not exercised, it causes considerable difficulty to the complainant. It is because of the reason that invariable by the time the criminal case is decided, the limitation for filing civil cases would have expired.

The court further observed that the provisions of chapter XVII of the Act strongly lean towards grant of re-imbursement of the loss by way of compensation. The courts, unless there are special circumstances, in all cases of the conviction, uniformly exercise the power to levy fine upto twice the cheque amount with simple interest thereon @ of 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different courts, not only increase the credibility of cheque as negotiable instrument, but also the credibility of the courts of justice.[24]

The apex court showed concern about the erosion of public faith in the justice delivery system and its possible fallout because of lack of consistency and uniformity

24 *Id*. at 533-34.

in decision formulation and observed that if in similar type of cheque dishonor cases, after convicting the accused, some courts grant compensation and some do not, the inconsistency though perfectly acceptable in the eye of law, will give rise to certain amount of uncertainty in the minds of litigants about the functioning of courts. Citizens will not be able to arrange or regulate their affairs in a proper manner as they will not know whether they should simultaneously file a civil suit or not.

The problem is compounded by the fact that in-spite section 143 (3) of the NIA provides that the complaints in regard to cheque dishonor cases under sections 138 of the Act have to be concluded within 6 months from the date of the filing of the complaint, such cases seldom reach finality before three or four years. These cases give rise to complications where civil suits have not been filed within 3 years on account of the pendency of the criminal cases, while it is not the duty of courts to ensure that successful complainants get the cheque amount also; it is their duty to have uniformity and consistency, with other courts dealing with similar cases.[25]

The other solution, in the opinion of the court, is to carry out amendment in the provision of chapter XVII so that in all cases where there is conviction, there should be a consequential levy of fine of an amount sufficient to cover the cheque amount and interest thereon at a fixed rate of 9% per annum followed by award of such sum as compensation from the fine amount. This would lead to uniformity in decisions, avoid multiplicity of proceedings (one for enforcing civil liability and another for enforcing criminal liability) and achieve the object of chapter XVII of the NIA, which is to increase the credibility of the instrument. This is, however, a matter for the Law Commission of India to consider.[26]

The apex court, however, did not suggest that the existing provision authorizing payment of compensation in the form of civil liability should be deleted once the above proposed amendment is effected. If the proposed amendment is made then it will not be in the interest of justice to have two provisions serving the same purpose, *i.e.*, to pay compensation to the drawee for dishonour of the cheque. Thus it is submitted that the above proposed amendment would weed out inconsistency but at the same time the existing provision imposing civil liability for dishonour of the cheque has to be repealed.

An interesting question of far reaching implications was debated before the apex court in *Sangeetaben Mahendrabhai Patel* v. *State of Gujarat*.[27] A case of dishonour of cheque was filed against appellant under section 138 of the NIA in which he was acquitted against which appeal is pending. Subsequently another case was filed under section 406/420 read with section 114 of IPC against the appellant for committing the criminal breach of trust, cheating and abetment etc. This case was also registered against the appellant because of the dishonour of the cheque to which appellant challenged before the high court on the ground that it amounts to abuse of process of law as he cannot be tried again for the same offence. The high court dismissed this application.

25 *Id.* at 534.

26 *Ibid.*

27 AIR 2012 SC 2844.

On appeal apex court after analyzing a good number of judicial pronouncements laid down that admittedly the appellant had been tried earlier for the offences punishable under the provisions of section 138, NIA and the case is *sub judice* before the high court. In the present appeal, he was involved under section 406/420 read with section 114 IPC. In the prosecution under section 138 NIA, the *mens rea* *i.e.*, fraudulent or dishonest intention at the time of issuance of cheque is not required to be proved.

The apex court compared the legal requirements of relevant provisions of these two enactments and held that the case under IPC as involved herein, the issue of *mens rea* may be relevant. The offence punishable under section 420 of IPC is a serious one as the sentence of 7 years can be imposed. In the case under NIA there is a legal presumption that the cheque had been issued for discharging the antecedent liability and that presumption can be rebutted only by the person who draws the cheque. Such a requirement is not there in the offences under IPC. In a case under the NIA, if a fine is imposed, it is to be adjusted to meet the legally enforceable liability. There cannot be such a requirement in the offences under IPC. The case under NIA can also be initiated by filing a complaint. However, in a case under the IPC such a condition is not necessary. The court then opined that there may be some overlapping of facts in both the cases but ingredients of offences are entirely different. Thus, the subsequent case is not barred by any of the aforesaid statutory provision.

Liability of director

In *Anita Malhotra* v. *Apparel export Promotion Council,*[28] the Supreme Court tried to safeguard the interest of directors who have no role in the issuance of a cheque which subsequently bounces for want of sufficient funds which is an offence under section 138 of the NIA. The apex court said that in case of a director, complaint should specifically spell out as to how and in what manner the director was incharge of or was responsible for conduct of its business and mere bald statement that he was incharge of and was responsible to the company for conduct of its business is not sufficient.

It is submitted that this ruling is bound to enhance the burden of proof on the complainant and would make prosecution of the accused difficult. After all, the cheque in question has been issued by a company to which the director either represented or represents. It should be the obligation of the director to prove to the satisfaction of the court that he/she is not in any way connected with the issuance of the cheque in question. If is further fortified by the fact that section 106 of the Evidence Act makes it clear that whosoever is having special knowledge of a fact, it is his burden to prove it. Thus, whether a director has or has not resigned from the service at a given time or whether issuance of cheque falls within the domain of the director or not, are the facts better known to the director himself. It should be, therefore, obligation of the director and not that of the complainant to specifically establish 'directors' role.

Madras High Court's decision in *Shri Venkatesa Paper and Boards Ltd* v. *Ramesh*[29] is noteworthy at this instance wherein it was laid down that section 141

28 AIR 2012 SC 31.

29 AIR 2012 (NOC) 23 (Mad.).

of the NIA relates to an offence committed by the company. Issuance of cheque is not an offence but the offence is completed when the company and every person who is incharge of and responsible for business of company failed to comply with the demand made in the statutory notice: A Director who is incharge of and is responsible for the business of the company is expected to exercise all due diligence to prevent the commission of an offence. Any person, who is incharge and is responsible for the business of the company, must be a person who can direct such payment or make such payment. If any person pleads that he had no knowledge about the transaction or is not in-charge and is also not responsible for the business of the company or has exercised all due diligence to comply the demand made in the statutory notice, he has to prove it by material evidence.

Offences by companies

The moot point for judicial consideration in *Aneeta Hada* v. *M/s Godfather Travels and Tours Pvt. Ltd.*[30] was whether an authorized signatory of a company would be liable for prosecution under section 138 of the NIA without the company being arraigned as an accused. The case was initially heard by a two judge bench and there was difference of opinion between the two judges in the interpretation of sections 138 and 141 of the NIA and therefore the matter was referred to the larger bench.

The apex court dissected section 138 which imposes punishment for the dishonor of a cheque. The court laid down that the main part of section 138 can be divided into 3 parts as follows:

1. The cheque is drawn by a person.
2. The cheque drawn on an account maintained by him with the banker for payment of money to another person for discharging in whole or part of a debt or other liabilityis returned unpaid, because the amount of money standing to the credit of that account is insufficient to honour the cheque.
3. Such person shall be deemed to have committed an offence and shall without prejudice to any other provision of the Act be punished with imprisonment for a term which may extend to twice the amount of the cheque or with both. The proviso to the said section postulates under what circumstances the section shall not apply.
4. The court ruled that it will not be out of place to state that the main part of the provision deals with the basic ingredients and the proviso deals with certain circumstances and lays certain conditions where it will not be applicable. The emphasis has been laid on the factum that the cheque has to be drawn by a person on the account maintained by him and he must have issued the cheque in discharge of any debt or other liability. Section 7 defines drawee as the maker of a bill of exchange or a cheque. An, authorized signatory of a company becomes a drawer as he has been authorized to do so in respect of the account maintained by the company.

The court then culled out plain meaning of section 141 and said that if a person commits offence under section 138 is in a company, the company as well as every

30 AIR 2012 SC 2795.

person incharge of and responsible to the company for the conduct of business of the company, at the time of commission of offence, is deemed to be guilty of the offence. The first proviso provides under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions, there is a deemed concept of criminal liability.

Section 139 creates a presumption in favour of the holder. The said provision has to be read in conjunction with section 118 (a) which occurs in chapter XIII of the Act that deals with special rules of evidences. Section 140 stipulates the defense which may not be allowed in a prosecution under section 138 of the Act. Thus there is a deemed fiction in relation to criminal liability, presumption in favour of the holder and denial of any defense in respect of certain aspects.

Section 141 uses the term person and refers it to a company. There is no trace of doubt that the company is a juristic person. The concept of corporate criminal liability is attached to a corporation and company, which is luminescent from the language employed under section 141. It is opposite to note that the present enactment is one where the company itself and certain categories of officers in certain circumstances are deemed to be guilty of the offence.

The court laid down that if a group of persons with criminal intent guides business of a company the criminal intent would be imputed to the body corporate. It is in this backdrop that section 141 of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of person's incharge as well as the company would be deemed to be liable for the offences under section 138. Thus, the statutory intendment is absolutely plain.

The provision makes the functionaries and the companies liable by deeming fiction. A deeming fiction has its own signification. It was further laid down that it is the burdened duty of the court to ascertain for what purpose the legal fiction has been created. It is also the duty of the court to imagine the fiction with all real consequences and instances unless prohibited from doing so. That apart, the use of the term 'deemed' has to be read in the context and further the fullest logical purpose and import are to be understood. It is because in modern legislation the term 'deemed' has been used for manifold purposes. The object of the legislation has to be kept in mind.[31]

The court further said that it is to be borne in mind that section 141 of the Act is concerned with the offences by the company. It makes other persons vicariously liable for commission of an offence on the part of the company. The vicarious liability gets attracted when the condition precedent laid down in section 141 stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be *sine quo non*.

The court concluded that they are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus it is only when the company can be prosecuted, then only

31 *Id*. at 2807-08.

the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be a situation when the corporate reputation is affected when a director is indicted.[32]

Finally the court said that the irresistible conclusion is that for maintaining the prosecution under section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in a dragnet on the touch stone of vicarious liability as the same has been stipulated in the provision itself.[33]

It is submitted that much of the judicial ink has been spent in driving home the point that under section 141 of the Act arraigning of a company as an accused is required. For holding this opinion, the apex court had to overrule its two earlier opinions[34] and had to restrict ratio of another opinion to its own facts.[35] The decision of the apex court rested more on the technicalities of law and dropped the prosecution against the directors simply on the ground that the company to which they represented was not arraigned. The moot question to be asked is: had the company been arraigned would it have made any difference so far as imposition of punishment is concerned? After all, no corporal punishment can be inflicted on the company. Only plausible reason given by the court, apart from technical interpretation to different provisions of the NIA, is that if a finding is recorded against a company, 'it would create a concavity in its reputation'. This fact prompted the apex court to allow the appeal and drop the prosecution against the directors forgetting the fact that the directors do not have any personal liability under the NIA. Their liability arises because of their representative capacity which identifies them with the company and makes company vicariously liable for the fault of its directors. Since the company cannot be punished, the punishment is imposed on the persons representing the company. Thus the decision of the court does not make any difference so far as punishment is concerned. The reputation of the company would be dented (about which the apex court seemingly was particular) immaterial of the facts whether corporal punishment is imposed on company (which cannot be executed) or on its officers. It nevertheless provides an escape route for the directors from liability where prosecution has advertently or inadvertently failed to arraign company.

IV BANKING LAWS

Debt

The ambit and scope of the term 'debt' as defined in the Recovery of Debts due to Banks and Financial Institutions Act, (RDDBFI) 1993 and adopted in the SARFAESI Act by virtue of section 2(ha) came for deliberation before the Allahabad High Court in *M/s Modern Times Industries Kashipur* v. *Debts Recovery Appellate*

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32 *Id*. at 2812.

33 *Id*. at 2813.

34 AIR 1984 SC 1824 and AIR 2000 SC 145.

35 AIR 1988 SC 1128.

Tribunal Allahabad[36] The court ruled that the definition of 'debt' is "any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or financial institution or the consortium under any law for the time being in force, in case or otherwise, whether secured or unsecured or assigned or whether payable under a decree or order of any civil court or an arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application".

A plain reading of the definition of the 'debt' as contained in the RDDBFI Act, 1993 would exemplify and demonstrate that a 'decree debt' could also be taken as a 'debt'. It is a matter of common knowledge and quite obvious and axiomatic that for obtaining decree, considerable time is taken by a litigant and in some cases, it might exceed even 10 years or 15 years and in such a case, if 12 years period of limitation for enforcing mortgage is calculated from the date of accrual of the cause of action based on mortgage due to the bank, then the relevant portion of the definition of debt as contemplated under the RDDBFI Act, 1993 as well as SARFAESI Act would be rendered nugatory or otiose.[37]

> A plain reading of the definition of financial asset under section 2 (1) would reveal that the term 'financial asset' includes debt and thereby the definition as contained in section 2(g) of the RDDBFI Act, 1993 is ushered in. As such, the phrase 'financial asset' and the term 'debt' including 'secured debt' are all interlinked and interwoven, interconnected and entwined with one another like a cobweb and the term 'debt' envisages the 'decree debt' as well as the 'debt recovery certificate'.

Moreover, section 13 sub-clauses (1), (2) and (4) are widely worded to include even mortgage debts, which got crystallized in the form of a decree and put up for execution. The term debt recovery certificate is not contemplated in the definition as contained under section 2(g) of the RDDBFI Act, 1993 but still the clause 'whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on and legally recoverable on, the date of the application, would amply make the point clear that the said clause is wide enough to include all live claims.

Overlapping of remedies

In *Kasturi Devi Jain v. Union Bank of India,*[38] the court was called to resolve whether it is open for the bank to take recourse of the remedy under the SARFAESI Act when it has already invoked the remedy under CPC.

The court laid down that a bare perusal of section 37 makes it clear that the provisions of the SARFAESI Act and the rules made thereunder are in addition to and not in derogation of the other laws. So, the remedy provided under the Act is an additional remedy which, unless barred by the statute, can be enforced at any point of time. This being the legal position, no illegality can be found in the action of

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36 AIR 2012 All 36.

37 *Id*. at 43.

38 AIR 2012 MP 4.

bank taking recourse of provisions of the SARFAESI Act.

Similarly, the Kerala High Court in *Punjab National Bank* v. *Consumer Disputes Redressal Forum*[39][CDRF] was asked to address the jurisdictional overlap between the Consumer Protection Act (CPA) and SARFAESI Act. The court said that the jurisdiction of the CDRF to interfere with the proceedings under the SARFAESI Act has to be appreciated in light of the provision of the SARFAESI Act, its object and purpose and the decisions of the Supreme Court upholding the primacy of this Act.

The court further said that the CPA is a general and the SARFAESI Act is a special enactment. Under section 34 of the SARFAESI Act, jurisdiction of the civil courts for entertaining, 'any suit or proceeding in respect of any matter which a debt recovery tribunal of the appellate tribunal is empowered Act to determine', is barred 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 said Act. Under section 35 of the SARFAESI Act, the provisions of the said Act are to have effect notwithstanding anything inconsistent therewith or contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

The SARFAESI Act is a comprehensive law providing for all aspects relating to the subject dealt with by that legislation and the Act provides that the persons aggrieved by measures taken under the Act have a remedy by way of challenging the action taken under the Act before a quasi-judicial authority, namely, the debt recovery tribunal with a right to file a further appeal before the debt recovery appellate tribunal, making the legislation a self-contained one.

The court further said that certainly the preamble to the CPA vows to provide for better protection of interests of consumer and for that purpose to make provisions for establishment of consumer courts. This Act protects the interests of consumers of 'service' which includes provisions of facilities in connection with banking and financing. This provision alone may give jurisdiction to consumer courts to resolve issues involving banking service but by going through section 14, it is quite clear that consumer forums have no power to issue injunction or restrain a bank from enforcing their rights under a loan agreement executed by a borrower with them, which would include sale of the mortgaged properties for recovery of the loan amount advanced by the bank to the borrower, for which specific purpose the SARFAESI Act was enacted.

As against this, although the first part of section 34 ousts the jurisdiction of only civil court, which will not apply to a CDRF which is not a civil court, the latter part of the section expressly bars the jurisdiction of not only civil courts but also other authorities, which could all include CDRF's also from granting injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under the SARFAESI Act. The CDRF can't, without granting an injunction, cannot restrain financial institutions like bank from proceeding with an action taken under the SARFAESI Act, for which CDRF has no power under section 14 (1) of the CPA and such power is expressly barred by section 34 of the SARFAESI Act.

39 AIR 2012 Ker 8.

As such, it is clear that the CDRF can't grant any relief against measures taken by the bank or Financial Institution under the SARFAESI Act. Therefore, going by the above said provisions of the two Acts themselves, the jurisdiction of the CDRF to deal with matters provided for in the SARFAESI Act is expressly excluded.

In the similar vein, the Kerala High Court in *N.P. Pushpanagadam* v. *Federal Bank Ltd (FB)*[40] laid down that non-obstante clause in section 35 of the SARFAESI Act makes it quite clear that when laws whether substantive or procedural are inconsistent with provisions of Securitisation Act, the former should give way to latter.

Non performing assets

In *Ind Synergy Ltd.* v. *Authorise officers,*[41] the court was called to resolve the conflict between section 2(o) of the SARFAESI Act defining non performing assets (NPA) and guidelines of RBI clarifying the issue of NPA. When a borrower has a liability to pay secured creditors but fails to make repayment of secured debt or any installment thereof, the account of borrower is classified as NPA. Such NPA cannot be used for any productive purpose. Section 2(o) which defines non performing asset *inter alia* states that non performing asset means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset.

The RBI guidelines entitled as "Income Recognition and Asset Classification Guidelines" also deal with NPA and provide that regular and adhoc credit limits need to be reviewed/regularised not later than three months from the due date/date of adhoc sanction. In case of constraints, such as non availability of financial statements and other data from the borrowers, the bank should furnish evidence to show that renewal/review of credit limit is already on and would be completed soon. In any case delay beyond six months is not considered desirable as a general discipline. Hence an account, where the regular/adhoc credit limits have been reviewed or have not been renewed within 180 days from the due date/date of adhoc sanction will be treated as NPA which period was reduced to 90 days from 31.03.04.

It was contended that the above RBI guidelines provide for criteria for classification of NPA which are purely based on default for a period of 90 days and these guidelines cannot be said to be in conformity with the true intent, meaning and purpose of provisions of section 2 (o) of the Act. It was further contented that the RBI guidelines cannot be applied mechanically without subjective decision.

The court rightly laid down that the RBI guidelines are complimentary to section 2(o) and there is no conflict between the two. Taking together these legal requirements, it can be safely said that there is an inbuilt procedure available to declare a secured asset a non performing one and there is a proper efficacious remedy available under section 17 to challenge this section.

The fact as to whether the account of the petitioners factory had become a NPA or not, is a question of fact which cannot be adjudicated in a writ petition and the

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40 (AIR 2012 Ker 27).

41 AIR 2012 Chh. 1.

appropriate remedy to ventilate such grievance is to file an appeal before the debts recovery tribunal.[42]

The above discussed debate has been further carried forward in *Munshi Ram Gupta* v. *State Bank of India*[43] wherein it was argued that the right to take recourse to a judicial proceeding arises as soon as the cause of action arises. The court said that the assertion by the respondent Bank that the account of the appellant has become a NPA and denial thereof by the appellant, did not give rise to any cause of action for the appellant to take recourse of any judicial proceedings.

The court further explained the law on the subject by stating that while a borrower, who has received a notice under section 13(2) of the Act, has become entitled to make a representation; the creditor is equally obliged to consider the same and to apply its mind thereto. Sub section (3A) of section 13 of the Act, however, makes it clear that the decision of the creditor, one way or the other, on the representation cannot be the subject-matter of a *lis* before the debt recovery tribunal for the simple reason that even if such a decision is averse to the borrower, still then it is not obligatory on the part of the creditor to take steps under sub-section (4) of section 13 of the Act. Only after a decision has been rendered in terms of sub-section (3A) of section 13, steps can be taken under section 13(4), entails the borrower to take recourse to legal remedies and the law on the subject directs the borrower to take such steps before the DRT. In the circumstances, whether the stand taken by the secured creditor within the meaning of the said Act that the credit facility granted by it to a borrower has become a non performing asset or not, can only be adjudicated by the Tribunal.[44]

The court summed up the legal position by concluding that the question whether the credit facility has or has not become a NPA cannot be answered in writ jurisdiction.

Inherent powers of the tribunal

The Madras High Court in *ICICI Bank Ltd.* v. *Debts Recovery Appellate Tribunal, Chennai*[45] was required to pronounce on the validity of the power exercised by the DRT to impound passport of the borrower a power which is not expressly mentioned in the RDDBHI Act, 1993.

The resolution of the above issue invoked constitutional debate as well as the DRT's inherent power. The court at the outset said that the provisions of the RDDBFI Act must be interpreted by the courts to give effect to the object for which such enactment was made. The court then laid down that though DRT constituted under the RDDBFI Act is not a court in *strict sensu*, still, undoubtedly, it exercises judicial powers and such judicial powers flow from the RDDBFI Act. The said Act not only empowers the Tribunal to pass interim orders in order to recover the dues, but also enables to regulate its own procedures. After laying this foundation, the court said that there is no specific provision in the Act for impounding a passport, such power

42 *Manokamma Steel Pvt. Ltd.* v. *Punjab National Bank,* AIR 2012 Utr. 1. See also *M/s. Sahara Industries Patrampur, Taspur* v. *State Bank of India* AIR 2012 Utr. 60.

43 AIR 2012 Utr. 4.

44 *Id*. at 6.

45 AIR 2012 Mad. 111.

is inherent in the tribunal conferred under section 19 (25) of the RDDBFI Act. The power of the tribunal to make such order can be traced to section 22 of the RDDBFI Act and rule 18 of its rules as well. Clause 75 of the second schedule to Income Tax Act is also made applicable to the tribunal by virtue of section 29 of the RDDBFI Act. The cumulative effect of these legal provisions is that the power of the tribunal or appellate tribunal to impound a passport has not been either expressly or impliedly excluded by the provisions of the Passport Act.

The court said that it is conscious of the fact that the Apex Court in *Maneka Gandhi's* case has plainly laid down that a right to hold passport cannot be deprived as it may amount to infringement of article 21 of the Constitution of India. So the power under section 19 (25) cannot be exercised as a matter of routine and has to be exercised in deserving cases and that too sparingly. The tribunal should satisfy itself as to whether such directions are absolutely necessary in the given set of facts and to meet the ends of justice since the satisfaction of the tribunal is subject to judicial review.[46]

Adjudication of debt recovery disputes by *lok adalats*

A welcome pronouncement was made by the Madras High Court in *M/s. Central Bank of India* v. *DRT, Coimbatore*[47] by holding that when the bank itself has agreed for the settlement of the case in the *lok adalat* and filed necessary application before the DRT for referring award passed by the *lok adalat*, in the absence of any proper reason, it is improper on the part of the DRT to make unnecessary and unwanted comments about the very authority of the bank in arriving at the settlement.

The court enjoined that settlement of disputes by *lok adalats* should be encouraged as it helps restitution of disputes in a cordial atmosphere. The court said that when the bank has accepted certain amount for settlement, it is certainly not for the DRT to question the same either in respect of the quantum of interest or quantum of waiver, which is certainly within the purview of the bank and not for the court to dictate. The court passed strictures against the concerned DRT by saying that the court is constrained to note that the tribunal, which forms part of the judiciary, has not chosen to appreciate the latest concept which has developed in this country.

Being disappointed by the pronouncement of the DRT, the court advised the government of India, which has enacted a noble legislation like that of the Legal Services Authorities Act with an avowed object of settling the dispute between the parties in an amicable manner which not only reduces the docket explosion, which is the main problem in the judiciary throughout the country, but also to make the parties to live peacefully, to appoint appropriate persons in charge of the tribunals like that of the DRT or at least give proper training before they take charge explaining to them various concepts of , Alternative Dispute Resolution (ADR) systems so that the idea of ADR can be inculcated in the mind of the Presiding officers in the larger interest of the country.

Third party interest and SARFAESI Act

Where an interest has been created by the landlord in favour of the third party

46 *Id* at 123.
47 AIR 2012 Mad. 108.

in the property that has been subsequently mortgaged to the bank, the question to be resolved is whether the third party interest is defeated or not.

Two high courts have not been in agreement on this issue. In *Vikes Book* v. *Bank of Baroda Jaipur,*[48] the Rajasthan High Court laid down that the third party interest created before or after mortgage in question cannot frustrate provisions of the SARFAESI Act which have an overriding effect on the other Acts.

As against this, the Kerela High Court in *N.P. Pushpagadam* v. *Federal Bank Ltd*.[49] laid down that the SARFAESI Act does not confer any right on secured creditor to trench upon rights of tenant inducted by the borrower before security interested is created. The court elucidated its findings by stating that the continued existence of the landlord-tenant relationship between the borrower and the stranger is not interdicted by a recourse taken by the secured creditor under sub section (4) of section 13. The expression "take possession of the secured assets of the borrower" occurring in clause (a) of sub-section (4) of section 13 only indicates the right of the secured creditor to take possession to the extent it is possible. Such possession could be immediate possession or mediate possession. Possession could be actual possession or symbolic possession. Even after taking symbolic possession, clause (a) of sub-section (4) of section 13 of the SARFAESI Act empowers the secured creditor to exercise his right to require the tenant to pay the rent to the secured creditor, exercising the power under clause (d) of sub-section (4) of section 13 of the SARFAESI Act.

The Supreme Court got an opportunity to remove mist of confusion in *Bable* v. *State of Chhatisgarh.*[50] However, this opportunity went on begging as the apex court laid down highly ambiguous proposition. The court stated that "coming to the facts of the case on hand the property of the judgment debtor is sought to be sold. The petitioner insists that such a sale should be subject to his rights of the alleged tenancy". Then the apex court opined that the petitioner herein is not resisting the delivery of possession but hindering the process of the sale itself.

The court denounced the application of the petitioner before the recovery officer praying that the proclamation of sale should indicate that the sale of the property in dispute would be subject to the tenancy right of the petitioner. This application was called by the court as "ill conceived". The court then turned around and laid an entirely opposite opinion by stating that rules no doubt enable the petitioner to object his dispossession on whatever grounds he believes are available to him. The recovery officer is obliged to examine the tenability of such objections and take an appropriate decision. If such a decision is adverse to the interest of the petitioner, the petitioner is entitled to file a suit and seek an adjudication of his right to protect his interest. Whether the petitioner is a tenant or a trespasser is a matter to be decided in such a suit.[51]

The above issue of third party interest *vis-à-vis* SARFAESI Act is yet not authoritatively resolved in-spite of the above three opinions on the same subject matter and ambiguity on this subject matter still persists.

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48 AIR 2012 Raj.93.

49 AIR 2012 Ker. 27.

50 AIR 2012 SC 2610.

51 *Id.* at 2620.

Appeal

A contentious issue relating to scope of section 17 of the SARFAESI Act was raised in *Allahabad Bank* v. *Canara Bank through its Branch Manager Agre.*[52] The court was required to expound the scope of the expression 'any person' used in section 17(1). The court opined that the expression 'any person' used in section 17(1) is having a wide import which takes within its fold the borrower, guarantor or any other person who may be affected by the action taken under section 13(4) or section 14. The plaintiff bank, in the instant case, felt aggrieved by the action of defendant bank under section 13(4) of the Act. And, therefore, have right to file appeal under the Act.

The court has further laid down that a conjoint reading of sections 17, 34 and 35 of the Act would show that for a measure taken under section 13(4) of the Act, jurisdiction of the civil court to grant injunction is barred. Section 35 of the Act gives overriding effect to the Act over other laws. Consequently, whether the plaintiff bank could initiate proceedings for the recovery of secured amount before the DRT or not is of little consequence. There is no such requirement of law under section 17 that only such aggrieved person can approach thereunder whose claim would be before the DRT. Any person who is aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by secured creditor can approach under section 17 of the SARFAESI Act.

Limitation period

In *M/s. Modern Times Industries Kashipur* v. *Debts Recovery Appellate Tribunal Allahabad*[53] the court was asked to resolve the issue of time barred claims in light of the relevant provision of the Limitation Act. It was laid down that section 62 of the Limitation Act deals with institution of suit to enforce payment of money accrued within 12 years, when the money sued for becomes due. Similarly, Section 136 provides 12 years limitation for execution of a decree from the date decree becomes enforceable or where decree or any subsequent order directing any payment of money or the delivery of any property to be made at a certain date or at certain intervals has not been honoured and subsequently execution of the decree or order is sought. Twelve years period has to be reckoned, keeping in view the peculiar facts and character of the case, and for that purpose, twelve years period can be reckoned from the date of decree. In cases where decree has been put for execution before the competent forum before twelve years from the date of decree, it has to be accepted as a live claim till it culminates into issuance of recovery certificate by tribunal. The court ruled that the live claims under the provisions of the RDDBFI Act, cannot be treated as time barred claims under the provisions of the SARFAESI Act.

V CONCLUSION

The courts have laid down a good number of principles on the subjects under discussion. However, some principles provide a room for counter view point. For

52 AIR 2012 All 77.

53 *Supra* note 36 at 43.

instance, is there any need of taking support of doctrine of legitimate expectations to enforce a concluded contract? Is 'consideration' as a condition of validity of contract of guarantee be determined on the basis of section 2 (d) or section 127 of the Contract Act? Can section 27 be invoked to prevent a party from soliciting customers of another party? Can unilateral consent result into novation of a contract? The courts have given in some cases purposive interpretation, nevertheless, in some cases technical justice has been rendered. It is also revealed that courts are supportive of resolution of disputes, especially bank cases, through alternate dispute resolution. The apex court has also suggested that the Law Commission of India should propose an amendment to be carried out in Chapter XVII of the Cr Pc in order to bring uniformity and consistency in all cases where there is conviction, there should be a consequential levy of fine of an amount sufficient to cover the cheque amount together with interest at a fixed rate of 9% per annum. A vertical disagreement has been observed in the opinions of the high courts together with the Supreme Court on the issue of third party interest created in a property under some local law which has been subsequently mortgaged to some financial institution under the SARFAESI Act. To sum up, the courts have resolved many nebulous issues and in that process many more new principles of law on the above discussed subjects have been enunciated.