26
MERCANTILE LAW

Farooq Ahmad Mir[*]

I INTRODUCTION

DURING THE year under survey, 2013 a good number of cases have been decided by the high courts and Supreme Court on various issues falling in the domain of Mercantile Law which include Contract Law, Sale of Good Act, 1930 Partnership Act, 1932 Negotiable Instruments Act, 1881 and Banking Law but in most of the cases established principles of law have been reiterated. However, all these decided cases have not been discussed. Only those cases have been analyzed that have either laid down new principles of law or propounded debatable propositions.

II LAW OF CONTRACT

Guiding principle

Generally the court should be reluctant in exercising its writ jurisdiction to enforce the contractual obligation. The fundamental object of a writ of *mandamus* is to safeguard and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (*ex debito justiae*) the grant or refusal of the writ cannot be considered unless it is proved that there is an existing legal right of the petitioner, or an existing legal duty of the respondent. It is to be remembered that the writ does not lie to create or to establish a new legal right, but to enforce one that is already in existence. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, *inter alia*, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensure by such grant or refusal. The writ court must exercise its discretion on the already established grounds which include public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles.[1]

Undue influence

A purpose oriented construction was given by the apex court to section 16 of the Indian Contract Act, 1872 hereinafter (IC Act, 1872) in *Joseph John Peter*

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* Professor of Law, Head and Dean, Faculty of Law, University of Kashmir, Srinagar

1 *R. S. I. D. I. Corpn.* v. *S.S. Co-op.Hsg. Society, Jaipur* AIR 2013 SC 1234.

Sandy v. *Veronica Thomas Rajkumar*[2] by laying down that if there are facts on the record sufficiently indicating the interference of undue influence, the omission to make an allegation of undue influence specifically, is not fatal to the plaintiff who is entitled to relief on that ground. All that the court has to see is that there is no surprise to the defendant. This decision is in line with the spirit encompassed in section 16 and will safeguard the interest of those for whose benefit this section is enacted.

A threadbare discussion on the ambit and scope of section 16 came to be seen in *Hardwar Bhikha* v. *Kulwanta Banshi*.[3] It was laid down that an influence will turn and become "undue" when a person, in a dominant position uses that position to obtain unfair advantage for himself at the cost of a person relying upon his authority or aid or position. In other words, undue influence means domination of a weak mind by strong mind to an extent which causes the behavior of the weak person to assume an unnatural character. Undue influence is any influence brought to bear upon a person entering into an agreement or consenting to a disposal of property which in normal circumstances one would not to have done or agreed to do. The essence of the "undue influence" is that a person is constrained to do against his will, but for the influence he would have refused to do it left to exercise his own judgment. It is an influence which acts to the injury of a person who is swayed by it and which compels that person to do something which he would not have done, if he had been a free person.

In the same vein, the court carried further its observations but not without creating a mix up amongst different grounds vitiating consent which are independent of each other and with different parameters *viz*., coercion, undue influence and fraud which could have been avoided. The court stated that "undue influence does not connote excessive, inordinate or disproportionate influence but something wrongful. Acts of undue influence sometime range themselves under either coercion or fraud. Persons having influence over another and by that influence induces the will of other to his subjection, then it is such coercion as is sufficient to constitute undue influence."[4] This observation can be assumed to have been made on the basis of the dictionary meaning given to the words "coercion" and "fraud" and not on the basis of the definitions[5] of these words provided under the IC Act, 1872 because these definitions have different ingredients than those provided for undue influence and cannot be read conjointly.

The court has then put legal exposition to section 16 in a right perspective by stating that it is an influence whereby control is obtained over the mind of the victim by insidious approaches and seductive artifices. It may arise where parties

2 AIR 2013 SC 2028.

3 AIR 2013 All. 129.

4 *Id*. at 133.

5 See ss. 14, 15 and 17 of the Indian Contract Act, 1872.

stand to one another in a relation of confidence which puts one of them in a position to exercise over the other, an influence which may be perfectly natural and proper in itself, but is capable of being unfairly used. The question whether a party is in a position to dominate other is broadly a question of fact. The court has very rightly said that thumb rule cannot be laid down in such cases. No general law can be laid down as to when one would be in a position to dominate over the will of the owing to complexities of human nature and relations. It may arise due to personal relationship or as a result of circumstances in which the contract was entered into.

Unlawful object

The Supreme Court has in *United Engineers & constructions* v. *Secretary to Govt, A.P.*[6] widened the reach of section 23. This section *inter alia* lays down that the consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the court regards it as immoral, or opposed to public policy. The court in the instant case ruled that since the sale deed was executed in favour of respondent no.1 in the teeth of the order of injunction passed by the trial court, the same appears to be unlawful. The court did not elaborate how section 23 is hit when a sale deed is executed in violation of interim injunction. The pertinent questions which the apex court was supposed to answer were; is it against public policy or against law to execute sale deed in violation of interim injunction? Can injunction issued by the court be called law which the party against whom it is issued should respect? Or should we say that public policy in an ordered society upholding rule of law demands that every direction of the court should be followed and any move to thwart that direction directly or indirectly should be denounced and be declared in violation of law.

Agreement in restraint of legal proceedings

In *Central ware Housing Corporation (Govt. of India Undertaking)* v. *M/S Ravi Constructions, Civil Engineering Contractors , Rpt. by its Partners*,[7] the court was called to determine validity of clause 25 of the agreement in question. This clause reads as follows: [8]

> .....[I]t is also a term of the contract that if the contractor(s) does not make any demand for arbitration in respect of any claim/s in writing within 90 days of receiving of intimation from the corporation that the Bill is ready for payment, the claim of the contractor (s) will be deemed to have been waived and absolutely barred and the corporation shall be discharged and released of all liabilities under the contract in respect of these claims….

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6 AIR 2013 SC 2235.

7 AIR 2013 Kar. 18.

8 *Id*. at 19.

The court analyzed the above clause in the agreement in dispute in the light of the amended section 28 of the IC Act, 1872. The court said that a perusal of the amended section 28 of the IC Act, 1872 extracted above would show that both kinds of agreements *i.e.*, agreements which restrict the period of limitation within which claims could be referred, and also agreements which extinguish the right of the party to prefer a claim or discharges any party from any liability under a contract on expiry of a specified period, are void to that extent.

The court very rightly pointed out that after the 1997 amendment to section 28 not only the agreement which curtails the period of limitation is void, but also the extinction of right, if sought to be brought by the agreement within a specified period, which period is less than the period of limitation prescribed for the suit under the contract in question, is also rendered void. In other words, after the amendment to section 28 of the IC Act, 1872 the distinction between curtailing of the period of limitation and extinction of the right itself, after the specified period no longer exists.

Measure of damages

The Delhi High Court in *Delhi Development Authority* v. *Construction and Design Service* [9] in a brief nevertheless significant decision overruled judgment of the single bench and held that for sections 73 and 74 of the IC Act, 1872 proof of actual loss or damage is not required. In the instant case DDA was awarded work of constructing a sewage pumping station to respondents. The tender document reads: [10]

> ….[T]he work shall throughout the stipulated period of the contract be proceeded with all due diligence and the contractor shall pay as compensation an amount equal to one percent, or such smaller amount as the Superintendant Engineer Delhi Development Authority (whose decision in writing shall be final) may decide on the amount of estimated cost of the whole work as shown in the tender, for every day that the work remains un-commenced or unfinished, after the proper dates ….

The single judge on the basis of the above facts of the case had observed that in the absence of proof of damages, compensation granted under clause 2 cannot be recovered. The division bench made pertinent observation by stating that a sewage Pumping station is not something from which revenue would be generated by the state. It is a public utility service and has a role to play in maintaining or preserving clean environment. If sewage pumping stations are not set up, sewage would stagnate as *cess* pool in low lying area and would cause environmental degradation, both air and soil. That aside, interest on blocked capital would obviously be a ground of measure of damages, where project has not been completed within the scheduled time. The ratio of this decision can form binding

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9 AIR 2013 Del. 97.

10 *Id*. at 97.

precedent on two points; one is that cause of loss or damage is necessary to prove in order to establish a claim for damages for breach of contract. Second is that where execution of a public service meant for public good was delayed, loss or damage is inherent as the public money has been blocked and interest to be earned on this money could be measure of damages. However, court has not considered it a potent ground to make it a case for punitive damages.

Contract of indemnity and guarantee

The Allahabad High court in *Punjab National bank* v. *Ram Dutt Sharma* [11] reiterated settled position of law but in a different way by stating that the contract of guarantee is essentially a contact of accessory nature being always ancillary and subsidiary to some other contract or liability on which it is founded without the support of which it must fail. The distinction between the contract of guarantee and contract of indemnity comes out from the definitions given in the relevant provisions. One of the apparent distinctions between two is that a contract of guarantee requires concurrence of three persons, namely, the principal debtor, creditor and surety, whereas the contract of indemnity is a contact between two parties; the promisor and the promisee.

Furthermore, the surety is always liable to the extent of precise terms of his commitment and not beyond that. In the case of contract of guarantee, section 128 of the IC Act, 1872 say that liability of surety is co-extensive with the principal debtor unless it is provided otherwise by the contract. In case the creditor finds that principal debtor has committed default as a result whereof liability has accrued, it is not necessary that the creditor must proceed first against the principal debtor or to give notice to it but the creditor can directly proceed against the surety.

III PARTNERSHIP

Effects of non registrations

The Bombay High court in *Valji Shamji Chheda* v. *Bhuderbhai Bajidas Patel* [12] was called to delineate the scope of section 69[13] of the Partnership Act, 1932 The court was called to adjudicate upon the prayers made in the plaint *inter alia to* declare; (a) that the partnership deed in question executed between the plaintiffs

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11 AIR 2013 All. 198.

12 AIR 2013 Bom.1.

13 S. 69 *inter alia* provides: Effects of Non Registration. (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the register of firms as partner in the firm. (2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the register of the firms as partners in the firm.

and the defendants is legal, valid and subsisting and binding upon the partners of the said partnership deed; (b) the said agreement in respect of the suit property is legal, valid and subsisting and binding upon the defendants and pursuant to the said agreement of sale the suit property vests and belongs to the partnership firm; (c) two joint venture agreements executed by the defendant no 1 in his purported capacity as the sole owner of the suit property be declared null and void and not binding upon the plaintiffs.

The court very rightly maintained that the language of section 69 admits a sharp distinction between 'enforcement of a right and mere declaration of a status'. The court found a common thread running in all these prayers, *i.e.*, the plaintiffs have sought a declaration and not a relief for enforcement of any contract. The court admitted that a suit for the enforcement of any right arising out of any contract of an unregistered firm is barred but declaration of a right is not. The declaration sought in the instant case is only in respect of a right and title already acquired by the partnership firm which is not hit by section 69.

IV NEGOTIABLE INSTRUMENTS ACT

In *Aparna A. Shah* v. *M/s Sheth Developers Pvt. Ltd.*[14] the apex court was seen rendering 'technical justice' instead of dwelling deep on the contours of section 141 of the Negotiable Instruments Act.[15] The apex court laid down that under section 138 of the N.I Act, 1881 in case of issuance of cheque from joint accounts, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception to section 141of the NI Act, 1881 which would have no application in the case in hand.

The criminal liability under section 138 primarily falls on the drawer. If drawer is a company, then drawer company and then it is extended to the officers of the drawer company. The court reiterated that the normal rule in the cases involving criminal liability is against vicarious liability. To make it clear, no one is held criminally liable for an act of another. This rule is subject to exception on account of specific provision being made in statutes extending liability to others. Section 141 of the N. I Act, 1881 is one of such exceptions which when read with section 138 makes it clear that when an offence under section 138 is committed by a company, the criminal liability for dishonor of a cheque will extend to the officers of the company. As a matter of fact section 141 contains conditions which have to be satisfied before the liability can be extended. In as much as the provision creates a criminal liability, the conditions have to be strictly complied with. In other words the persons who had nothing to do with the matter need not to be roped in. A company being a juristic person, all its deeds and functions are the result of the acts of others. Therefore, the officers of the company, who are responsible for the

14 AIR 2013 SC 3210.

15 Hereinafter N.I. Act, 1881.

acts done in the name of the company, are sought to be made personally liable for the acts which result in criminal action being taken against the company. In other words, it makes every person who, at the time offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, liable for the offence. The court admitted that it is true that that the proviso to sub-section enables certain persons to prove that the offence was committed without their knowledge or that they exercised all due diligence to prevent commission of the offence. The liability under section 141 of the N. Act, 1881 is sought to be fastened vicariously on a person connected with the company, the principal accused being the company itself, it is a departure from the rule in criminal law against vicarious liability.

The court did not accept the argument of the counsel for respondent no. 1 that the appellant's wife is being prosecuted as an "association of individuals".[16] The court without dwelling deep on this issue rejected this argument on the technical ground that it was never the case of respondent no.1 in the complaint filed before magistrate that the appellant's wife is being prosecuted as an 'association of individuals' and therefore on this ground alone this submission is liable to be rejected.

The court laid down the precise principle that under section 138 of the N I Act in case a cheque is issued from joint account, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. However this principle has exceptions incorporated in section 141 of the N I Act. The court warned that proceedings under section 138 cannot be used as an arm twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under section138. The culpability attached to dishonor of a cheque can in no case except in case of section 141 of the NI Act, 1881 be extended to those on whose behalf the cheque is issued. The court stressed by stating that "this court reiterates that it is only the drawer of the cheque who can be made an accused in any proceedings under section 138.

It appears that the apex court has given much importance to the signature on the cheque and did not attempt to peep beyond that precise point. The court did not appraise the situation where joint account holders had joint liability but the cheque was issued by only one of them nor was discussion on the issue of "association of persons" taken to logical conclusion instead the apex court preferred to ignore this issue on the pretext it was not taken up at the first instance.

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16 Explanation appended to S. 141 states: For the purposes of this section-

(a) "Company" means anybody corporate and includes a firm or other association of individuals; and

(b) "Director" in relation to a firm, means a partner in the firm.

V BANKING LAW

Enforcement of security interest

A very profitable discussion on section 13 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFEASI Act) was observed in *India Finlease Securities Ltd. Chennai* v. *Indian Overseas Bank*[17] The Andhra Pradesh High court not only dissented from the ruling giving by the Madras High Court[18] in a similar case but also adopted a balancing approach by given purposive interpretation to the words "sale" and "Transfer" in section 13.

It was held that where the borrower fails to discharge the liability of secured creditor within sixty days of notice as provided in sub-section (2) of section 13 of the SARFAESI Act, 2002 under sub-section (4) the secured creditor may take possession of the secured assets of borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset and has also power to take over the management of the business of the borrower including right to transfer by way of lease, assignment or sale for realizing the secured asset. Therefore the sale contemplated under sub –section (8) of section of section 13 is by way of transfer of the secured asset.

A logical question was raised by the high court by contended that if the sale is deemed to have been confirmed in favour of the purchaser on failure of the borrower to pay the amount before the date fixed for sale, then there was no need for the legislature to incorporate the words "transfer" and "transferred" in sub-section (8) of section 13 and confirmation of sale by the secured creditor referred to in sub- rule (2) and (6) of rule 9 by the legislature would be insignificant. The court very rightly read two plans of contingency in sub section (8)[19] of section 13 to execute the borrower's right to redeem the property. The words "at any time before the date fixed "incorporated in this section cannot be read only with the word "sale" ignoring the word "transfer."*Otherwise there was no need to incorporate the word "transfer" and "transferred" conjoined with the word "sale" in the same provision.*[20]

Explaining the scope of first contingency plan, the court ruled that if the borrower tenders the dues of the secured creditor together with all costs, charges and expenses incurred at any time before the date fixed for sale, then the secured

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17 AIR 2013AP 10.

18 AIR 2008 Mad. 108.

19 S. 13(8) reads as follows: if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of the secured asset.

20 Emphasis supplied by the author.

asset shall not be sold in the auction. However, if the borrower failed to tender the dues before the date fixed for sale, authorized officer will proceed further in the matter. However, the right of borrower to redeem property thereafter is not extinguished. He has still the right to redeem property but at any time before the date fixed for transfer of property. So long as the sale is not confirmed by the secured creditor as required under the rules, the right of the borrower to redeem property under second contingency is not taken away. He has a right to redeem the property before confirmation of the sale by secured creditor under the rules.

While interpreting the expression, "at any time before the date fixed" used by the legislature in sub section (8) of section 13, the court opined that ordinary, natural and grammatical meaning of these words suggest that the legislature intended to apply it both for sale and transfer and not exclusively for sale only and application of the phrase to the exclusion of expression "transfer" is contrary to the intendment of the legislature. The court ruled that from the language employed in the section, it is not possible to read down any other alternative construction.

Taking help from the dictionary meanings and definitions of 'sale and transfer', the court held that the sale is not complete unless the property for which the price was paid is transferred to the buyer by a written proceeding. The court further added that the intention of the legislature is that sale has to be confirmed by the secured creditor, transfer of secured asset is not affected. The court laid down that under the SARFAESI Act, 2002 a borrower has the right to redeem the property under sub-section (8) of section 13 of the Act at any time before the date the property is transferred to the auction purchaser by confirmation of sale by the secured creditor as required under sub-rule (6) of rule 9 of the rules.

While concluded the case on the above stated legal exposition, the court said that where the borrower fails to discharge the liability of the secured creditor within sixty days of notice as provided in sub-section (2) of section 13 of the Act, under sub section (4) the secured creditor may take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale by realizing the secured asset and has also power to take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset. Therefore, the sale contemplated under sub section (8) of section 13 is by way of transfer of the secured asset.

The combined effect of rule (8) read with its own sub-rule 6 together with sub section 8 of section 13 was elucidated by the court. Rule 8 provides for sale of immovable secured assets. Sub-rule (6) of rule 8 provides that sale of secured asset shall be effected by either inviting tenders from the public or by holding public auction after serving a notice of thirty days on the borrower. However, sub section(8) of section 13 provides that if the borrower tenders to the secured creditor all the dues of the secured creditor together with all cost, charges, and expenses incurred by him at any time before the date fixed for sale , then secured asset shall not be sold. If the borrower fails to repay dues together with all costs, charges and expenses incurred by the secured creditor before the date fixed for sale, the secured creditor will proceed further in the matter.

The court did not consider the weighty argument put forward by the appellant's counsel that if the borrower has failed to redeem the secured assets before the date fixed for sale and the sale is concluded, the borrower has no further right to redeem the secured assets and sale is deemed to have been confirmed in favour of the auction purchaser. The counsel for the appellant also vehemently argued that the intention of the legislature in selectively using the word "before the date fixed for sale" is that the borrower shall not be permitted to exercise his right after a particular date *i.e*., the date fixed for sale. The court refused to accept this interpretation and said,

If the sale is deemed to have been confirmed in favour of the purchaser on failure of the borrower to pay the amount before the date fixed for sale, then there is no need for the legislature to incorporate the words 'transfer' and 'transferred' in sub- section(8) of section 13. If such a construction is accepted, incorporation of the words " transfer" and "transferred" in sub section (8) of section 13 and confirmation of sale by the secured creditor referred to in sub- rules (2) and (6) of Rules by the legislature would be insignificant.

The court has adopted a balanced approach by giving yet another chance to the borrower to repay the secured loan and get back the mortgaged property. After all the primary object of the SAFAEASI Act is not to punish the creditor but to secure repayment of loan which is life line of country's economy.

Overriding effect of SARFEASI Act

In *M/S. Purnea Cold Storage* v. *State Bank of India*[21] the State Bank had initiated proceedings against appellant under SARFEASI Act earlier by issuing a notice under section 13(2). Subsequently, it had taken steps for invoking jurisdiction of the tribunal under DRT Act, 1993 also by filing an application under section 19 of Debts Recovery Tribunal (DRT). The court was called to decide whether this course of action of the bank or any other financial institution is permissible or not. The court had to decide this issue in the back ground of the apex court's ruling in *M/s Transcore* v. *Union of India*[22] wherein the apex court has observed that both the Acts are complimentary to each other and there was no provision in either of the Acts to debar initiation of the proceedings under the SARFEASI Act, 2002 during the pendency of a proceeding under the DRT Act, 1993. The court in the instant case attempted to distinguish the present case from the case decided by the apex court by stating that it cannot be disputed that in view of the provisions of section 35 of the SARFEASI Act, its provisions have overriding effect over other laws, while saving the application of other laws, including the DRT Act, 1993 by virtue of provisions of section 37. The court further said that if SARFEASI Act provided for remedy and lays down procedure thereof, recourse to it would have an overriding effect on any provision or recourse to remedy under any other Act.

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21 AIR 2013 at.1

22 AIR 2008 SC 712.

The court invoked section 13 (10)[23] of the SARFEASI Act, 2002 and ruled that it is amply clear that this sub section lays down that when the sale proceeds of the secured assets, put on auction sale under the provisions of SARFEASI Act, 2002 is not sufficient to satisfy the debts, then only a bank of financial institution has the liberty to file an application before the DRT having jurisdiction or to a competent court, as the case may, for the recovery of the balance amount from the borrower. This view is further fortified by the fact that sub-rule (i) of rule 11 prescribes for filing an application in terms of sub section (10) of section 13 in the form annexed as appendix (VI) to the rules. This form shows that at the time of filling of the application, a declaration has to be made that the matter regarding which application was being made, was not pending before the court of law or any other authority or any bench or tribunal. The court concluded that reading the said provisions of SARFEASI Act, 2002 together with the legislative intent emanating from the same, it is clear that if a secured creditor chooses to initiate a proceeding against the borrower under the SARFEASI Act, 2002 it is required to take all possible steps under the Act to satisfy its debts and it could take steps for realization of remainder of its debts, under any other law, only after provisions of the SARFEASI Act were exhausted.

The opinion of the court is diametrically opposite to the ruling of the apex court given in *M/S Transcore* [24] case and is against spirit of article 141 of the Indian Constitution which makes ruling of the apex court binding on all the subordinate courts within the territory of India. Nevertheless, the opinion of the high court is more balanced and in line with the letter and spirit of the provisions discussed in the judgment. This deadlock has to be resolved by the apex court otherwise divergent views of the high courts are bound to surface that will not be in the interest of these financial institutions.

In *Ratan Kumar* v. *State Bank of India*,[25] the Allahabad High Court was called to delineate the relationship between SARFEASI Act, 2002 and UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act. The court ruled that the relationship of tenant and landlord is regulated by the statutory scheme as delineated by 1972 Act and is not contemplated to exist only by registered lease rather relationship of landlord and tenant may exist without there being any written or registered deed of tenancy. Section 20 of the 1972 Act creates bar of suit for eviction of tenant except on specified grounds. When the right and interest of the borrower or guarantor in a premises is sold in exercise of power under section

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23 This section reads: where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

24 *Supra* note 22.

25 AIR 2013 All.115.

13(4) of 2002 Act by the bank, the auction purchaser steps into the shoes of the owner of the premises and he shall have the same right which the borrower or guarantor has prior to sale. Owner of the premises *i.e.*, landlord cannot evict a tenant except on specified grounds as mentioned in section 20 of the 1972 Act or by getting the premises released on an application filed under section 21. The same provision shall also be applicable to auction purchaser who steps in the shoes of the owner of the premises and the provisions of the 1972 Act cannot be diluted for auction purchaser who purchases a property in auction made by the bank in exercise of powers under section 13(4) of 2002 Act. The court expressed its unfounded apprehension in the following words: [26]

> ....[I]f it is held that auction purchaser who purchases the property by sale made by the Bank under section 13(4) of 2002 Act, shall have also right to evict the tenants, the sale of tenanted building through Bank by owners shall become a device of evicting the tenants by creating a security interest in the premises and after default permitting sale of the premises.

This reasoning of the court, it is submitted, does no appeal to logic as it is farfetched. When the bank gets tenant evicted through the provisions of SARFEASI Act, as suggested by the court, the property will not revert to the original landlord but will be sold by the bank through auction in accordance with the provisions of this Act.

Ownership of secured assets

In *Canara Bank* v. *Palco Recycle Industries Ltd.* [27]the court was seen making a balancing act by giving last chance to the debtor to pay the dues to the secured creditor at any time before sale of the secured assets and get them back even when secured creditor had taken their possession. This observation of the court came after analyzing all the sub-sections of section 13 of the SARFEASI Act. The court ruled that conjoint reading of all the sub sections of section 13 indicates that after taking possession of the assets in terms of section 13 (4), the secured creditor gets a right to sell the property for realization of its dues as if the sale has been made by the secured creditor himself. However, sub section 8 of this section clearly indicates that if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor and no further steps shall be taken by him for transfer or sale of that secured asset. Therefore, even after taking possession, if before sale of the property, a debtor pays the amount as mentioned in sub section (8) to the secured creditor, in that event no further steps should be taken by the secured creditor and the debtor will be entitled to get back the possession.

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26 *Id*. at 125

27 AIR 2013 Guj. 50

The court did not accept the argument that on taking possession of the property the title of the debtor extinguishes and it vests in the secured creditor. The reason for not accepting this argument was given by the court that if the debtor decides to pay the amount due in terms of sub section (8), a fresh deed was then required to be made by the secured creditor in favour of the debtor for re-conferring the title. The court was not prepared to accept the ratio of the ruling of Division Bench of the Bombay High Court[28] wherein it was laid down that the borrowers right, title and interest in the secured assets is extinguished the moment measures under section 13(4) are taken such as taking over symbolic or actual possession of the secured assets. In the opinion of the court it appears that the attention of the division bench was not drawn to sub section (8) of section 13 of the securitization Act and the exact language used in sub section (6), which do not support the contention that title of the property of the debtor extinguishes on taking actual or symbolic possession.

The opinion of the Gujarat High Court as against Division Bench of Bombay High Court represents correct preposition of law and serves the purpose for which this provision was enacted. The court cannot close the doors for the debtor to get the secured assets back by offering the amount due. The object of this provision is not to punish the debtor but to facilitate payment of the secured credit. This is possible either by debtor making payment or by the sale of secured assets by the creditor. Where the debtor makes payment even at the belated stage but before the sale of the secured assets that is to be encouraged and accepted.

Possession of secured assets

In *Authorized Officer, Karnataka Bank Ltd*. v. *M/s Bharat Engineering Company*[29] the issue was whether the chief judicial magistrate can delegate his powers to his subordinate to secure compliance with provisions of section 14(2)[30] of the SARFEASI Act. The single bench[31] had in its opinion stated that this delegation of powers is not permissible under rules. In an appeal against this ruling, the division bench in the instant case reversed the opinion of the single bench and laid down that section 14(2) of the SARFEASI Act permits the chief judicial magistrate or the district magistrate to take such steps himself or may cause to be taken such steps as may in his opinion be necessary for the purpose of securing compliance with the provisions of sub section (1) of section 14 of the Act. The

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28 *UCO Bank* v. *M/S Kanji Manji Kothari & Co*, (2008)1 MLR 749.

29 AIR 2013 Kar.22.

30 S. 14(2) reads: For the purposes of securing compliance with the provisions of sub-section(1) the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary. (3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

31 W. P No 80720 of 2010, D/ 8-7 2010

language employed in section (2) would clearly permit the district magistrate to direct any other officer to take possession of any secured asset. It is open to the district magistrate to delegate the power conferred on him under section 14(1) of the Act to take possession of any secured asset to any other officer. This opinion of the division bench is in line with the plain and unambiguous language of section 14 (2) which admits no other interpretation than the one given by the division bench. The single bench had clearly erred here and the mistake has been rectified by the division bench.

The Gujarat High Court in *Manjudevi R. Somani* v. *Union of India* [32] expressed conflicting opinion on the same issue by making misdirected discussion on sections 17 and 19 of the Cr. PC, 1973 without paying much attention to the language employed in section 14 of the SAFEASI Act, 2002.

In the instant case the issue to be resolved was as to whether additional chief metropolitan magistrate has power to take possession of secured assets under SARFEASI Act. The petitioner had contended that it is not possible unless high court issues orders under sections 17[33] and 19 of the Cr PC, 1973. The court ruled that the Chief Metropolitan Magistrate, Ahmadabad, by virtue of his authority under section 1, clause (3) of the Cr PC, 1973 could not have entrusted the additional chief metropolitan magistrate with his own determination and the allocation of business to an additional metropolitan magistrate must be in tune with the jurisdiction conferred upon him by the high court in exercise of powers under section 17, clause (2) of the Act. The court reminded that it is a well settled position of law that special orders to be made by the chief metropolitan magistrate as to "distribution of business" must be consistent with the code. Unless an additional chief metropolitan magistrate was expressly conferred the power by way of a notification to entertain an application under section 14 of the SARFEASI Act, 2002, he would have no jurisdiction to deal with such a proceeding.

The court attempted to dissect the language of section 17 clause (2) of the code by stating that to say that this section is expressed in disjunctive form, and therefore, as a matter of plain language that the words "as the High Court may direct" can qualify only the words "any of the powers of a Chief Judicial Magistrate" under this code or under any other law for the time being in force cannot be read as qualifying the words "all the powers of a Chief Metropolitan Magistrate under this Code or under any other law for the time being in force" will amount to causing violence to the object of the very section itself. The court did not accept this construction as it would not, in the opinion of the court, "be grammatically in

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32 AIR 2013 Guj. 242.

33 S.17 reads: (1) The High Court shall in relation to every metropolitan area within its local jurisdiction, appoint a Metropolitan Magistrate to be the chief Metropolitan Magistrate for such Metropolitan area. (2) The High Court may appoint any Metropolitan Magistrate to be an additional Chief Metropolitan Magistrate and such Magistrate shall have all or any of the powers.

form". The reasons given for not accepting this construction were outlined by the court in the following words: "If such a construction is accepted then the very power of the High Court to restrict those powers under section 17, clause (2) of the Code and to confer only some or particular powers upon the additional Chief Metropolitan Magistrate would be rendered nugatory."

The court on the basis of this reasoning declared that the order issued by the chief metropolitan magistrate in exercise of his powers under section 19, clause (3) of the Cr PC, 1973 regarding the distribution of business amongst the metropolitan magistrates thereby empowering the additional chief metropolitan magistrate to accept and decide cases under the provisions of SARFEASI Act, 2002 arising within the limits of Ahmadabad Municipal Corporation is without jurisdiction and consequently the order passed by the additional chief judicial magistrate would also be without jurisdiction and therefore void *ab initio.*

The high courts in India continue to express divergent views on this subject which will result in the uncertainty about this delegation of power. This matter has to be resolved authoritatively by the apex court as and when it is seized of the matter.

Jurisdiction

In *Amish Jain* v. *ICICI Bank Ltd. (FB)*[34] the Delhi High Court constituted full bench to remove the doubts about the correctness of the judgment of division bench of the same court in *Indira Devi* v. *Debt Recovery Appellate Tribunal*[35] which had held that an appeal under section 17 of the SARFAESI Act, 2002 can be filed not only in the DRT having jurisdiction where the mortgaged property is situated but also in the DRT having jurisdiction where branch of the bank/ financial institution which has disbursed the loan is situated as well as in all DRTs which would have jurisdiction in terms of section 19(1) of the DRT Act, 1993 read with Rule 6 of the Debts Recovery Tribunal (Procedure) Rule, 1993.

The full bench considered the reasons that prevailed with the division bench in *Indira Devi* case to hold that an appeal under section 17 (1) of the SARFEASI Act can be filed in any of the DRTs where the bank under section 19(1) of the DRT Act, 1993 could initiate proceedings, was predicated on the DRT Act making a departure from section 16 of the CPS in enabling the bank to initiate proceedings not necessarily within the jurisdiction of the DRT where the mortgaged property is situated but in any of the DRT. The full bench held that the division bench fell in error in assuming the debt / money recovery proceedings to be initiated by the bank under the DRT Act, 1993 as equivalent to legal proceedings subject whereof is a mortgaged property within the meaning section 16 of the CPC. The full bench

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34 AIR 2013 Del. 172.

35 171(2010) DLT 439.

observed that the proceedings referred to in section 19(1) of the DRT Act, 1993 are merely proceedings for recovery of debt and not for enforcement of mortgage. Even prior to coming into force of the DRT Act, 1993 the bank, even if a mortgagee, was not mandatorily required to enforce the mortgage and which under section 16 of the CPC could be done only within the territorial jurisdiction of the court where the mortgaged property was situated and the bank was free to institute a suite, only for recovery of money and territorial jurisdiction whereof was governed by section 20 of CPC, containing the same principles as in section 19(1) of the DRT Act, 1993. No departure qua territorial jurisdiction has been made in the DRT Act, 1993 as has been observed by the Division Bench in *Indira Devi.* It was further observed that the proceedings in the DRT for recovery of debt culminate in a "certificate of recovery" which is equivalent to a money decree of a civil court. Just like money decree of the civil court can be transferred for execution to another court where the assets of the judgment debtor from which recovery is to be effected are situated. Similarly under section 19(23) of the DRT Act also (where the property from which recoveries are to be effected, is situated outside the local limits of the jurisdiction of the DRT which has issued the certificate) the DRT is required to send a copy of the certificate for execution to the DRT within whose jurisdiction the property is situated . Section 25 provides for modes of recovery of the debts specified in the certificate, including by attachment and sale of property. The recovery proceedings under the DRT are thus equivalent to a suit for recovery of money before a civil court and cannot be said to be for enforcement of mortgage. Thus it cannot be said that the DRT has made any departure from section 16 of the CPC.

Application of Limitation Act

In *Sajida Begum* v. *State Bank of India Hyderabad* [36] the petitioner had challenged the order of the DRT before the Debt Recovery Appellate Tribunal (DRAT) and had also filed an application for condonation of delay of 16 days in filing the said appeal. This condonation application was dismissed by the DRAT by placing reliance upon a decision of the Madhya Pradesh High Court[37] in which the Madhya Pradesh High court had clearly stated that DRAT has no power to condone the delay. This order of the DRAT was challenged before the Andhra Pradesh court in the instant case. The Andhra Pradesh High Court at the outset ruled that the decision of the Madhya Pradesh High court which forms the basis of the impugned order by DRAT does not lay down correct law.

The court ruled that it is not in dispute that there is no exclusion of the Limitation Act, 1963 under the SARFEASI Act, 1993 and so far as DRT Act is

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36 AIR 2013 AP 24.

37 Madhya Pradesh High Court in *Seth Banshidhar Kedia Rice Mills Pvt. Ltd* v. *State Bank of India* (AIR 2011 MP 205) had held that under section 18 of the SARFEASI Act the appellate tribunal has no power to condone the delay in presentation of the appeal.

concerned under which the DRT and DRAT function and entertain original and appellate proceedings under the SARFEASI Act, 2002 they clearly exercise powers of the civil court under CPC and in addition, the limitation Act is expressly made applicable under section 24 of the DRT Act, 1993.

The court distinguished the present case from the ratio of long line of authorities quoted by the respondent[38] and reached to the conclusion that the case decided by the Madhya Pradesh High Court quoted above does not represent the correct exposition of law on the subject.[39]

The Andhra Pradesh High court has correctly expounded the relevant provisions and appraised the combined effect of sections 17,18 , 36, and 37 of the SAREFEASI Act, 2002. Sections 22 and 24 of DRT Act and section 29 of the Limitation Act correctly which make it amply clear that section 29 (2) of the Limitation Act is clearly attracted and thereby sections 4 to 24 (inclusive) of the Limitation Act would be applicable to proceedings under sections 17 and 18 of the SARFEASI Act before the DRT as well DRAT.

VI CONCLUSION

This part of the survey covers only those cases where courts have either cleared mist of confusion or created confusion by expressing conflicting opinions which have been discussed in the light of counter view point. In most of the cases, it has been found that courts have given constructive interpretation to the provisions by peeing beyond the letter of law so as to invoke spirit behind them. While interpreting section 16 of the IC Act, 1872 it has been held that if there are facts on the record justifying the interference of undue influence, the omission to make an allegation of undue influence specifically, is not fatal to the plaintiff who is entitled to relief on that ground. This interpretation will safeguard the interest of the gullible persons for whose benefit this section was enacted. Similarly, a very innovative interpretation was given by the court to section 73 of the IC Act, 1872 by holding that proof of damage in case of breach of contract is *sine quo non* for any action but where execution of a public service meant for public good was delayed, loss or damage is inherent as the public money has been blocked.

It has been found that courts have supported financial institutions while exercising their discretion and have fixed liability on the beneficiaries who have, after reaping the benefits of getting finances in time, attempted to blow hot and cold at one and the same time by dogging the genuine claims of the financial institutions.

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38 *L.S Synthetics Ltd*., AIR 2005 SC 1209; the Commissioner of Sales Tax, AIR 1975 SC 1039; Birla Cement Works ,AIR 1995 SC1111; Prakash H.Jain, AIR 2003SC4591; Mukri Gopalan AIR 1995 SC 2272; Noharlal Verma, AIR 2009 SC 664; Commissioner of Customs and Central Excise , AIR 2009 SC 2325.

39 *Supra* note 37.