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MERCANTILE LAW

*Farooq Ahmad Mir**

I INTRODUCTION

IN THIS survey an attempt has been made to encompass all the important branches of Mercantile law. It also discusses the role of the apex court in widening the scope of public policy under the Indian Contract Act, 1872. It also deals with the important aspects discussed by the apex court relating to Negotiable Instruments Act, 1881 and the compensatory principle in case of breach of contract by the parties. Only those judgments have been selected for this survey which have either resolved any conflict of opinions or have potential to give rise to possible conflict of opinions.

II LAW OF CONTRACT

Offer and acceptance

The High Court of Orissa came up with a curious finding in *Dibakar Swain* v. *Cashew Development Corporation, Orissa.*[1] The petitioner, in the present case, had accepted terms and conditions of the tender through negotiations to get the right of plucking of cashew and also made payment of Rs. 2,43,270/- leaving a balance of Rs. 5250/-. He then tried to walk out of the agreement as the crop had got destroyed due to hailstorm. He pleaded for refund of earnest money but was informed to pay balance money so that formal work order shall be issued. However, he failed to do so which resulted in the forfeiture of his earnest money. He challenged this in this present writ petition.

The court came to the conclusion that no contract was concluded. It laid emphasis on the written agreement without giving any weight to the negotiations in which terms and conditions were accepted by the petitioner and paid advance money also, leaving insignificant amount as balance. In the words of the court: [2]

* Professor of Law. Formerly, Head and Dean, Faculty of Law, University of Kashmir. Presently, Controller of Examinations, J&K Board of Professional Entrance Examinations

1 AIR 2015 Ori 1.

2 *Id.* at 9.

> The letter of acceptance order only stated the intention of the Authorities with regard to acceptance of offer of the petitioner but without the same being reduced to writing and entering into an agreement, it cannot be said that the contract had already been concluded. As per the provisions of the Contract Act, there must be an acceptance and that acceptance has to be made by executing an agreement between the parties. Mere issuance of acceptance order is to be construed as intention to accept, subject to compliance of payment of balance amount.

The court submitted that, it has wrongly been concluded that the acceptance is followed by a written agreement. It is not necessary that the contract must be in writing. A contract between the parties can be oral or even by conduct and it is only the contract without consideration that has to be in writing under section 25 of the Contract Act, 1872 (hereinafter IC Act) .

The court did not give any weight to acceptance letter issued in favour of the petitioner but gave importance to the balance amount left with him and non issuance of the work order by the respondent, ignoring that the work order is not prerequisite to the conclusion of the contract but is a subsequent act. Similarly, the balance amount left with the petitioner cannot make any difference as the consideration money for getting lease right was accepted by the petitioner and most of it was paid also. Delay in payment of part of consideration in a contract cannot make the contract *non est* in the eyes of law.

Public policy

In *City Industrial Development* v. *Platinum Entertainment,*[3] the apex court very rightly enlarged scope of section 23 of the IC, Act and invoked this provision to provide guidelines to the state in assigning contracts or distributing benefits. The apex court laid down: [4]

> State and its agencies and instrumentalities cannot give largesse to any person at sweet will and whim of the political entities or officers of the state. However, decisions and actions of the State must be founded on a sound, transparent and well defined policy which shall be made known to the public. The disposal of Govt. land by adopting a discriminatory and arbitrary method shall always be avoided and it should be done in a fair and equitable manner as the allotment on favoritism or nepotism influences the exercise of discretion. Even assuming that if the Rule or Regulation prescribes the mode of allotment by entertaining individual application or by tenders or by competitive bidding, the rule of law requires publicity to be given before such allotment is made.

3 AIR 2015 SC 341.

4 *Id.* at 356.

The apex court without saying so expressly made it a case of public policy which requires arbitrariness to be avoided and transparency to be enforced. It was made clear that a contract will be hit by section 23 of the IC Act and will be avoided where fairness and judicious exercise of power is wanting.

Payment of compensation

The apex court upheld the opinion of the High Court of Delhi in *M/s Construction & Design Services* v. *Delhi Development Authority*[5] wherein a very flexible interpretation of the language used in section 74,[6] which pertains to the measure of compensation in case of breach of the contract, was given.

In the instant case, the M/s Construction had executed a contract with the Delhi Development Authority for construction of a sewerage pumping station at CGHS, Kondli at Delhi within the stipulated time, failing which it undertook to pay compensation. M/s Construction failed to complete work even two and a half years after the prescribed timeline with the result the superintendant engineer rescinded the contract in line with the terms of the contract and fixed compensation to the tune of Rs 20,86,446. The process for recovery of this amount was initiated which was, however, stalled by the decision of the single bench of the High Court of Delhi on the ground that it was in the nature of penalty and the government had suffered no loss because of this delay which of course was reversed by the division bench which resulted in the present special leave petition (SLP).

The apex court made pertinent remarks which have far reaching implications. The court ruled that there is no dispute that the M/s Construction failed to discharge the contractual duty within the stipulated or extended time. The work undertaken was of great public importance as it would have helped in preserving and maintaining clean environment. The court also ruled that delay in execution of contract would result in loss of interest in blocked capital. Even if there is no specific evidence of loss suffered by the respondent- plaintiff, the project being a public utility project, the delay itself can be taken to have resulted in loss in the form of environmental degradation and loss of interest on the capital.

A very wide observation made by the apex court in the instant case was that even in absence of specific evidence; the respondent could be held to have suffered loss on account of breach of contract and is entitled to compensation to the extent of loss suffered. It is for the appellant to show that the stipulated damages are by way of penalty.

5 AIR 2015 SC 1282.

6 Indian Contract Act, 1872 , s. 74 reads as: When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the party knew, when they made the contract, to be likely result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

This ruling will definitely make parties accountable for their breach in government contracts where tangible loss or damage is not ascertainable. Though the court has not expressly said do, nevertheless, from the very nature of this judgment, it can be said that its ratio is confined to only government contracts.

Money paid by mistake or fraud

The apex court was called in *State of Punjab* v. *Rafiq Masih*[7] to resolve an apparent conflict amongst its earlier rulings, though it did not admit any such disagreement. The question of law in hand was whether salary/ pension wrongly paid by the government in excess of what the employee is otherwise entitled to in absence of any fraud or misrepresentation on his part is recoverable under section 72 of the IC, Act? The matter was initially heard by a division bench which observed that "in view of an apparent difference of views expressed on the one hand in *Shyam Babu Verma* v. *Union of India* [8] and *Sahib Ram Verma* v. *State of Haryana*[9] and in *Chandi Prasad Uniyal* v. *State of Uttarakhand*[10] on the other hand, we are of the view that the remaining special leave petitions should be placed before a Bench of three judges."

In *Shyam Babu Verma* case, the apex court while admitting that the petitioners were not entitled to the higher pay scale, yet came to the conclusion that the fixation of the scale in favour of the petitioners was made by the government official without the fault of the petitioners. It will not be just and proper to recover any excess amount which has already been paid to them. Similarly, the apex court in *Sahib Ram* case observed that it is true that the appellant did not possess requisite qualification which would have entitled him to higher pay scale which was given to him by mistake by the concerned principal but the petitioner was not in any way involved in this mistake nor committed any misrepresentation that would have necessitated indulgence of this court. The court refused to direct the recovery of amount paid to the appellant.

Diametrically opposite stand was taken by the apex court in *Chandi Prasad Uniyal* case by invoking the doctrine of "Taxpayers Money." The court showed concern about the public money which is often described as "tax payers" money which belongs neither to the officers who have made this payment nor to the recipient. The court said that the absence of fraud or misrepresentation on the part of the recipient of the benefit cannot make it a different case .The precise question in such cases that has to be asked is whether excess money has been paid or not, may be due to *bona fide* error. This may be because of the carelessness, favoritism, collision or negligence but the moot point is that the money in question does not belong to payee.

The apex court did not admit in the instant case that there is a conflict in the above discussed opinions, instead, took a high moral ground by stating that there is no such disagreement at all.[11] The court did not say that the facts of these cases were

7 AIR 2015 SC 1268.

8 (1994) 2 SCC 521.

9 (1995) Supp.1 SCC 18: (1995) AIR SCW 1780.

10 (2012) 8 SCC 417; AIR 2012 SC 295.

11 *Supra* note 7 at 1270.

different as is often said but held that the law invoked in the first two cases was different from the law that was invoked in the latter case. In the opinion of the apex court in the present case, help of article 142 of the Constitution was taken in the first two cases to issue direction. This article is supplementary in nature and cannot supplant the substantive provisions. It is a power that gives preference to equity over law. It is justice oriented approach as against the rigors of the law.[12]It is the exercise of jurisdiction to pass such enforceable decree or order as is necessary for doing complete justice in any cause or matter. As against this, in *Chandi Prasad Uniyal*, Article 136 was invoked which confers a wide discretionary power on the Supreme Court to interfere in suitable cases. It arms Supreme Court with corrective jurisdiction with discretion to settle law clear.[13]

The apex court went further by holding that the direction of the court under article 142 of the Constitution, that moulded relief and relaxed the application of law or exempt the case in hand from the rigour of law, in view of its peculiar facts and circumstances, do not comprise *ratio decidendi* and, therefore, lose its basic premise of making a binding precedent.[14] The apex court in its concluding words reasoned its findings in the following words:[15]

> Therefore in our opinion, the decisions of the court based on different scales of Articles 136 and 142 of the constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the view expressed in the first two judgments and the latter judgment.

It is submitted that the apex court simply attempted to neutralise the findings of its division bench, which had come to the conclusion that the apex court had at earlier occasions expressed conflicting opinions, without answering the primary question. The apex court in the present case shied in admitting that there was conflict of opinions but indirectly admitted that different reasoning was given by the apex court in first two cases without mincing any word on the appropriateness of that reasoning.

To put this discussion in a proper perspective, it will be profitable to reproduce here section 72 of the IC, Act which has resulted in this controversy. This section reads:

> A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

This section makes clear in its plain words that where money has been paid by mistake that is to be returned as the person who got it cannot retain it with "safe conscience" which indeed is the rational basis of the quasi contracts. There is a long

12 *Id.* at 1271.
13 *Id.* at 1270.
14 *Id.* at 1271.
15 *Ibid.*

line of judicial precedents to this effect. However, the above two rulings of the apex court invoked article 142 of the Constitution in order to do 'complete Justice' with the petitioners who got salary which was not due to them but were entitled to retain it, in the opinion of the apex court, only because they had neither committed fraud nor misrepresentation. As is clear from the language of section 72, repayment of money or return of goods does not depend upon the presence or absence of fraud or misrepresentation but the test is; can beneficiary retain it with 'safe conscience'?

The apex court in the instant case did not comment on the appropriateness of invocation of article 142 in the above two rulings but put all efforts to convince that there is no conflict of opinions. Had the apex court attempted to answer the fundamental question; *i.e.,* was invocation of article 142 justified in these two cases, the conflict in the opinions would have been apparent and the bone of contention would have been resolved once and for all?

The present author is of the considered opinion that the decision of the apex court in *Chandi Prasad Uniyal* is a correct exposition of section 72 wherein it has been rightly held that decision on this section does not require determination of presence or absence of fraud or misrepresentation and this requirement in earlier two judgments was wrongly read in section 72, otherwise collision, favouritism, carelessness or negligence on the part of payer resulting into undue payment to the payee will go unaccounted.

III NEGOTIABLE INSTRUMENTS

Cognizance of offence

In *Yogendra Pratap Singh* v. *Savitri Pandey,*[16] the apex court formulated two questions for judicial resolution. (i) Can cognizance of an offence punishable under section 138 of the Negotiable Instruments Act, 1881(hereinafter NI Act) be taken on the basis of a complaint filed before the expiry of the 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 NI Act? (ii) If answer to question no. 1 is in the negative, 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 filling of such a complaint has expired?

The background of the case is that two judges bench granted leave in SLP *Yogendra Pratap Singh* v. *Savitri Pandey*[17] who felt that the conflict in the judicial pronouncements needed to be resolved authoritatively. The same issue with split opinions had already heard by the High Courts of Orissa,[18] Bombay,[19] Punjab and Haryana,[20] Andhra Pradesh,[21]Allahabad,[22] Guahati,[23] Rajasthan,[24] Delhi,[25] Madhya

16 AIR 2015 SC 157.

17 AIR 2012 SC 2508.

18 *Niranjan Sahoo* v. *Utkal Sanitary BBSR* 1991 (I) RCR (Gri) 780.

19 *Rakesh Nemkumar Porwal* v. *Narayan Dhondu Joglekar* 1993 Cri.LJ.680.

20 *Ashok Verma* v. *Ritesh Agro Pvt. Ltd.*, 1994 Cri LJ (NOC) 370.

21 *N.Venkata Sivaram Prasad* v. *Rajeswari Constructions,* 1996 Cri L. J 3409.

Pradesh,[26]Karnataka,[27] and Jammu and Kashmir[28] and in two separate petitions, namely *Narsingh Das Tapadia* v. *Goverdhan Das Partani*[29] and *Sarav Investment & Financial Consultancy Private Limited* v. *Lioyds Register of Shiping Indian Office Staff Provident Fund*[30] by the Supreme Court with the result the present petition was heard by three judge bench.

Taking first question first, the apex court observed that the complaint defined in section 2(d) of the NI Act means any allegation made orally or in writing to a magistrate with a view to take action against a person who has committed an offence. Commission of an offence is *sine qua non* for filling a complaint and for taking cognizance of such offence. The court observed that a bare reading of the provision contained in clause (c) of the proviso makes it clear that no complaint can be filled for an offence under section 138 of the NI Act unless the period of 15 days has expired which means any complaint filed before the expiry of the stipulated time is not a complaint in the eyes of law. Indeed, it is not the question of prematurity of the complaint when it is filed before expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law, opined the court.

Reading section 142 with section 138, the apex court opined that the former section creates a bar on the court from taking cognizance of an offence under section 138 except upon a written complaint. As the notice served on the drawer/accused before the lapse of statutory period of 15 days, it is no complaint and no cognizance can be taken on the basis of such complaint.

The apex court remained unmoved on the argument that at the time of taking cognizance by the court, the period of 15 days has expired from the date on which notice has been served on the drawer/accused and opined that the court is not clothed with the jurisdiction to take cognizance of an offence under section 138 on a complaint before the expiry of receipt of notice by the drawer of the cheque as it cannot be said to have disclosed cause of action in terms of section 142 (b) which leaves no doubt that no offence can be said to have been committed unless and until the period of 15 days, as prescribed under section 138, has in fact elapsed. It is not open to the court to take cognizance of such a complaint merely because on the date of consideration or taking cognizance thereof a period of 15 days from the date on which the notice has been served on the drawer/accused has elapsed.

22 *Hema Lal Gupta* v. *State of UP*, 2002 Cri LJ 1522.

23 *Yunus Khan* v. *Mazhar Khan*, 2004 (1) GLT 652.

24 *Mahendra Agarwal* v. *Gopi Ram Mahajan* RLW, 2003 (1) Raj. 673.

25 *Zenith fashion Makers (P) Ltd.* v. *Ultimate Fashion Makers Ltd.* (2005) 121 DLT 297.

26 *Bapulal B. Kacchi* v. *Krupachand Jain,* 2004 Cri.L.J.1140.

27 *Ashok Hegde* v. *Jathin V. Attawan,* 1997 Cri LJ 3691.

28 *Harpreet Hosiery Rehari* v. *Nitu Mahajan,* 2000 Cri LJ 3625.

29 (2000) 7 SCC 183.

30 (2007) 14 SCC 753.

The apex court did not approve its own ruling in *Narsing Das*[31] but took side with its earlier ruling in *Sarav Investment*[32] and a good number of High court judgments following its ratio which have taken the view that the complaint filed before the expiry of 15 days of service of notice could not be treated as a complaint in the eye of law and criminal proceedings initiated on such complaint are liable to be quashed.

The apex court took more lenient view on second question by stating that section 142 (b) of the NI Act lays down mode and time within which complaint shall be filed against accused for an offence committed under section 138 which is to be made within one month from the date on which the cause of action has arisen under section 138(c) but where the complainant satisfies the court that he had sufficient grounds for not filing the complaint within the stipulated period of one month, a complaint may be taken by the court after the prescribed period.

The court took specific view dictated by the facts of the present case by holding:[33]

> since our answer to the first question is in negative, we observe that the payee or the holder in due course of the cheque may file a fresh complaint within one month from the date of decision in the criminal case and in that event, delay in filing the complaint will be treated as having been condoned under the proviso to clause (b) of section 142 of the NI Act.

Being quite conscious of the fall out of this ruling, the apex court further clarified:[34]

> This direction shall be deemed to be applicable to all such pending cases where the complaint does not proceed further in view of our answer to question (i).

The above ruling, it is submitted, satisfies only letter of law but is devoid of its spirit. To place this whole debate in right perspective, one has to answer fundamental questions and those are: why was payee or holder in due course compelled to file criminal complaint? Who made promise and who committed breach of his promise? In whose favour scales of justice tilt? Who needs here flexible interpretation of law? Out of two possible interpretations, which one serves the purpose of law?

The present interpretation, it is submitted, comes in no way near to the purpose of law, nor would it serve any purpose to ask the payee to file fresh complaint where the one in question has been filed before the expiry of the stipulated time but the court is required to take its cognizance only after the expiry of the prescribed time. One may go with the judgment only when the court is required to take cognizance of the complaint before the expiry of the statutory opportunity given to accused to make payment but

31 *Supra* note 30.

32 *Supra* note 31.

33 *Supra* note 17, para 16.

34 *Ibid,*

where the statutory period has elapsed during the pendency of the complaint, there is no reason to dismiss the complaint and ask the complainant to file a fresh complaint which will not only delay in the delivery of the justice but will also burden the justice delivery system without any apparent rationale. If the accused is interested in making payment, which he has not even after filing of the complaint, he should come forward and pray for it in order to escape from punishment. Instead, he is insisting on dismissing of complaint on technical grounds just to discourage the complainant to get his due through court process. The present judgment will favour the accused instead of the payee who has been robbed of his hard earned money by the former and has been furthering burden by this pronouncement.

IV BANKING LAWS

Applicability of SARFEASI Act

The Jammu and Kashmir High Court in *Bhupinder Singh* v. *Union of India*[35] attempted to reverse legislative process qua SARFEASI Act by holding that union Parliament has no competence to make laws contained in sections 13,17(A), 18 (B), 34,35 and 36 of the SARFEASI Act so far as they relate to the State of Jammu and Kashmir. The court maintained dichotomy on the basis of the place of residence and said that the SARFEASI Act can be invoked by the banks that originate from the State of Jammu and Kashmir for securing repayment of loan due to the borrowers provided these borrowers are not state subjects or permanent resident of the State of Jammu and Kashmir.

The decision arrived at rests on the reasoning that section 140 of the Transfer of Property Act, 1882 authorises for mortgage of property in favour of the institutions mentioned therein and schedule-1 authorises execution of simple mortgage in their favour. The sale of immovable property on the basis of a decree obtained by the bank cannot be made in favour of a non state subject. Some of the entries made in list – I extended to the State of Jammu and Kashmir do not authorise the union Parliament to legislate law which affects the interests of state subjects/ citizens of Jammu and Kashmir with reference to their immovable property. This makes Parliament devoid of its competence to legislate section 13 (1) and (4) to the extent of State of Jammu and Kashmir. Similarly, sub-section (1) of section 13 of the Act of 2002 which prescribes that "notwithstanding anything contained in sections 69 & 69- A of the Transfer of Property Act", would not be applicable to the State of Jammu and Kashmir, *inter alia*, the union Parliament has no legislative competence to enact law relating to transfer of property in the State of Jammu and Kashmir and secondly, the reference is made to the Transfer of Property Act, 1882 which is inapplicable to the State of Jammu and Kashmir which has its own Transfer of Property Act, 1882.

35 AIR 2015 (NOC) 1262 (J&K).

Similarly, Section 17 (A) of the SAEFEASI Act of 2002 is beyond the legislative reach of the Parliament as even extending the jurisdiction of the present court in the State of Jammu and Kashmir is covered by Entry "Administration of Justice" and union Parliament lacks legislative jurisdiction to enact such provision in respect of State of Jammu and Kashmir and the same reasoning holds true of Parliament's competence to legislate sections 13, 17(A), 18 (B), 34, 35 and 36 SARFEASI Act.

In the same vein, the court further laid down that the amendment to Rules of 2002 which provide that non state subject cannot purchase the immovable property in consequence to sale made in terms of section 13(4) of the Act of 2002 is rendered inconsequential and otiose in view of above reasons. Section 13 (4) empowers the non state subject to take possession of immovable property which is not countenanced by state Constitution and state laws. The SARFEASI Act modifies the state Transfer of Property Act, state Civil Procedure Code, Civil Courts Act, state Limitation Act, and above all adversely impacts inalienable property rights of state subjects.

The court admitted that entry 45 of list (I) of schedule 7th of Constitution of India has been extended to the State of Jammu and Kashmir in accordance with the procedure prescribed in article 370 paving way for the Parliament to legislate in respect of banking but has no power to legislate law about the subject "Administration of Justice", the land and the other immovable property. The state legislature has power to legislate on these matters as mandated by section 5 of the Jammu and Kashmir Constitution which would include creation of courts, defining of their jurisdiction which would also cover enlarging or restricting of jurisdiction. Similarly, entry 11-A of list (III) (concurrent list) has not been extended to the State of Jammu Kashmir which prevents Parliament to make provisions like section 17(A) and 18 (B) so far as the state of Jammu Kashmir is concerned as these provisions confer jurisdiction on the courts in the State of Jammu and Kashmir which is the exclusive domain of the state legislature.

The above decision has far reaching implications on the financial institutions as well constitutional scheme envisaged in the Indian Constitution. SLP has been already filed against this decision but so far as academic discourse on this subject is concerned, it remains to be seen how apex court interprets the word "Banking" and how 'administration of justice" which is a state subject will be interpreted here especially in the backdrop that entry 11-A of list (III) has not been extended to the State of Jammu and Kashmir.

The judgment, it is submitted, is the correct exposition of existing law holding the field but it has left financial institutions at the mercy of borrowers in absence of any equally effective and efficacious remedy available. The state has to come to the rescue of the financial institutions by legislating equally effective mechanism or SARFEASI Act has to be amended to accommodate constitutional settings separately governing the subjects of Jammu and Kashmir State.

Definition of debt

The Karnataka High Court gave a very flexible interpretation to the word "debt"[36] in *Srinivasa Desi* v. *M/s Canara Bank, Bengaluru*[37] which is pro- bank and is bound to rope in erring employees of the bank who with the connivance of the borrowers sanction loan without ascertaining papers and fulfilling other requirements.

In the present case, the borrower was in league with the bank officials who sanctioned him housing loan without ascertaining papers and the property to be mortgaged. The moot question for judicial determination was whether the petitioner can be considered as a debtor within the meaning of section 2(g) of the Act who was primarily responsible for processing of the loan papers which he did wrongly and circumvented the normal procedure? In other words, can bank file an application along with principal borrower for recovery of debt against its employees?

The court ruled that if the bank employees had been scrupulous in verifying papers and had acted in a *bona fide* manner and there was no negligence on their part in processing the papers and based on such *bona fide* acts the loan had been sanctioned in the usual course, the court had no hesitation in accepting the contention that the bank employees cannot be called as a debtors but where the bank employees fraudulently and knowing fully that they are processing the papers for sanctioning the loan in respect of a non existing property and has no title and are parties to the fraud with an intention to sanction the loan to favour the borrower and they are beneficiary directly or indirectly, then it has to be construed that such debts are legally recoverable from such employees of the bank.

The above opinion of the court was handed down in-spite of the contrary opinion of the Gujarat High Court[38] wherein it was empathetically laid down that the misappropriation of amount by the bank employee cannot be construed as a debt for the recovery of which application cannot lie before debt recovery tribunal.

The court in the instant case cited the opinion of the apex court in *Union Bank of India* v. *DRT*[39] with approval in which it was suggested to give meaning of widest amplitude to the expression of "debt" but the facts of that case were different from the present one and also the apex court though suggested in that case to give flexible meaning to the term "debt", nowhere said that it should be recovered from the bank employee also who has been negligent or who has committed fraud in sanctioning the loan to the borrower.

36 The Recovery of Debts Due To Banks And Financial Institutions Act, 1993, s. 2(g) defines "Debt" as 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 the financial institutions or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or 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. 37 AIR 2015 Kar. 65.

38 *Bank of India* v. *Vija Ramniklal Kapadia*, AIR 1997 Guj. 75.

39 AIR 1999 SC 1381.

It can be said that the court has decided this case on the basis of the policy dictated by economic reasons and not on the letter of law. Otherwise this interpretation cannot under any stretch of imagination be near to the clear provision of law as contained in section 2(g).

Definition of non- performing assets

In *Keshavlal Khemchand & Sons Pvt. Ltd.* v. *Union of India,*[40] the definition of non-performing assets (NPA) in section 2(1)(o) of the SARFEASI Act as amended by Act 30 of 2004 was challenged before the Supreme Court in the backdrop of vertical division between Gujarat and Madras High Courts on this issue. In a batch of writ petitions, the Gujarat High Court in its common order declared amended definition of the NPA as *ultra vires* to article 14 of the Constitution and ordered restoration of the provisions which existed prior to the amendment of 2004 but the Madras High Court again in a batch of writ petitions by a common order on May 18, 2014 rejected the challenge. Even some borrowers and secured creditors invoked article 32 against whom proceedings were initiated during the pendency of the appeals from the two judgments referred above.

NPA prior to its amendment was defined as an account of a borrower which has been classified by a creditor either "as a substandard asset or a doubtful asset or a loss asset" of the creditor and such a classification is required to be made in accordance with the directions or guidelines relating to assets classification issued by the RBI. But under the amended definition, which is under challenge, such classification of the account is required to be made in accordance with the directions or guidelines issued by an authority or body either established or constituted or appointed by any law for the time being in force in all those cases where the creditor is either administered or regulated by such an authority. If the creditor is not regulated by such an authority, then the creditor is required to classify the account of a borrower as NPA in accordance with the guidelines and directions issued by the RBI.

The apex court outrightly rejected the argument that the function of prescribing norms for classifying the borrowers account as NPA is a legislative function. The formulation of these norms require constant and close monitoring of the financial system which require fair amount of expertise in the area of public finance, banking *etc*. and the norms may require periodic revision. The gist of the Act in question is that secured creditor is within his rights to initiate action against secured creditor as contemplated under section 13(4) if the borrower commits default. The court ruled that the creditor could take action for recovery of loan even if this Act was not on the statute book, the moment there is a breach of the terms of the contract under which the loan or advance is granted. The stipulation under the Act of classifying the account of the borrower as NPA as condition precedent for enforcing the security interest is an additional obligation imposed by the Act on the creditor. It is not right on the part of the borrower to contend that defining of the conditions subject which the creditor could classify the account as NPA is a part of essential legislative function.

40 AIR 2015 SC 1168.

The court opined that if the parliament did not choose to define the expression NPA at all, courts will be bound to interpret that expression as long as that expression occurs in section 13(2). In such situation, courts would have resorted to the principles of interpretation (i) as to how that expression is understood in the commercial world and (ii) to the existing practice if any of either the particular creditor or creditors as a class generally. If parliament chooses to define a particular expression in the manner as is understood by experts in the field and more familiar with the subject matter of the legislation, it does not amount to any delegation of power. [41]

The apex court was also not impressed by the argument that different norms for identification of NPA with reference to different creditors amount to unreasonable classification. The court found innumerable differences among the creditors, based on legal structure of the creditor's organization, nature of the loan advanced, terms and conditions subject to which such loan or advances are made by each of those creditors *etc*. Since the creditors do not form a uniform/ homogeneous class, how come norms can be uniform? The apex court very rightly declared amended definition of NPA as constitutionally valid.[42]

Sale of secured assets

In *Mathew Varghese* v. *M. Amritha Kumar*,[43] a very balanced approach was adopted by the apex court by ruling out that under section 13(8) of the SARFEASI Act any sale or transfer of secured asset, cannot be legally valid unless borrower has been informed about the time and date of such sale or transfer in order to enable him to tender the dues of the secured creditor with all costs, charges and expenses. The net result of sub-rule (6) of rule 8 and sub rule (1) of rule 9 together is that 30 days time gap for effecting any sale of immovable secured asset is a statutory mandate.

The court rightly opined that the detailed procedure prescribed under above rules has twin objectives to achieve. *Firstly*, the borrower should have clear notice of 30 days before the date and time when the sale or transfer of the secured asset would be made as that alone would enable the owner/ borrower to take all efforts to retain his / her ownership by offering the loaned amount to the secured creditor. *Secondly,* before the secured assets are put on sale, the prospective buyer must know the nature of the property, the extent of liability, any other encumbrance attached with the property, minimum price and the total liability of the borrower. It is further fortified by the fact that sub-rule (6) enjoins that any other critical detail should also be made known in the publication issued for general public.

The court concluded that the detailed prescribed procedure has been envisaged with paramount objective to provide reasonable time and opportunity to the borrower to make all efforts to protect his right of ownership either by offering the dues to the creditor before the stipulated date and time of proposed sale or transfer so as ensure

41 *Id.* at 1187.

42 *Id.* at 1189.

43 AIR 2015 SC 50.

that the secured assets fetch the maximum price and no one is allowed to exploit the vulnerable position in which the borrower is placed.[44]

The apex court also cautioned that merely because the secured creditor is empowered by the SARFEASI Act and the rules there under to take possession of secured assets and also empowers to deal with it by way of sale or transfer for the purpose of realising the secured debt of the borrower, it does not mean that such vast powers can be exercised arbitrarily or whimsically to the utter disadvantage of the borrower.[45]

It was finally concluded that unless and until 30 days notice is given to the borrower, no sale or transfer can be executed by a secured creditor. If for one reason or the other any such sale properly notified after giving 30 days clear notice to the borrower could not take place as scheduled for reasons which cannot be exclusively attributable to the borrower, the secured creditor cannot resort to the sale or transfer of the secured assets on any subsequent date by relying upon the earlier notification. In other words, where proposed sale does not take place pursuant to a notice issued under rules 8 and 9 read along with section 13(8) for which the entire blame cannot be thrown on the borrower, the process of sale comes to an end and for any subsequent move of the sale, it is obligatory to follow the prescribed procedure afresh as the notice issued earlier would no longer be valid as it stands lapsed. As it would be then governed by sub rule (8) of rule 8 which mandates that sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. The parties referred under sub rule 8 are the secured creditor and the borrower. It is, therefore, necessary that for the sale to be effected under section 13(8) read along with section 9(1) has to be necessarily followed in as much as that is the prescription of the law for effecting the sale and any other construction will be doing violence to the provisions of the SARFEASI Act, in particular section 13(1) and (8) of the said Act.[46]

Condonation of delay

The short question for judicial determination in *Baleshwar Dayal Jaiswal* v. *Bank of Indicf*[47] was whether delay in filing an appeal can be condoned by the tribunal by invoking section 18(2)[48] of the SARFEASI Act read with section 20 (3)[49] of the
Recovery of Debts Due to Banks and Financial Institution Act, 1993 together with section 29 (2)[50] of the Limitation Act, 1963.

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44 *Id.* at 63.

45 *Ibid.*

46 *Id.* at 70.

47 AIR 2015 SC 2881.

48 SARFEASI Act, s. 18 (2) reads: Save as otherwise provided in this Act, the appellate tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (51 of 1993) and rules made there under.

49 *Id.,* s. 20 (3) reads: Every appeal under sub-section (1) shall be filed within a period of forty five days from the date on which a copy of the order made by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed.

50 *Id.,* s. 29 (2) reads: Where any special or local law prescribes for any suit, appeal or application, a period of limitation different from the period prescribed by the schedule, the provisions of section
3 shall apply as if such period were the period prescribed by the schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal, or application by any special or local law, the provision contained in section 4-24(both inclusive) shall apply only in so far as, and to the extent to which, they are not

Recovery of Debts Due to Banks and Financial Institution Act, 1993 together with section 29 (2)[50] of the Limitation Act, 1963.

The apex court first declared that RDB Act and SARFEASI Act are complimentary to each other and provisions of the RBD Act stand incorporated in the SARFEASI Act for disposal of an appeal. It was further ruled that a bare perusal of section 18(2) makes it abundantly clear that the appellate tribunal under the SARFEASI Act has to dispose of an appeal in accordance with the provisions of the RDB Act. There is no reason to accept that appellate tribunal cannot entertain an appeal beyond the prescribed period even on being satisfied that there is sufficient cause for not filling such appeal within that period. Even if it is held that section 29(2) of the Limitation Act, 1963 is not to be applicable for condonation of delay, section 20(3) of the RDB will hold the field.

The court ruled that the above interpretation is clearly borne out from the provisions of two statutes and also advances cause of justices. Unless the scheme of two statutes expressly excludes the power of condonation, there is no reason to deny such power to an appellate tribunal when the statutory scheme so warrants.

The apex court also dealt with the conflicting opinions expressed by Madhya Pradesh High Court[51] on the one hand which had held quite opposite to what has been held above by the apex court and Andhra Pradesh High Court[52] on the other hand which had indirectly come in agreement with the above ruling of the apex court and emphatically laid down that the change intended in SARFEASI Act has to be seen from the statute and not from beyond it. It is true that the period of limitation for filing an appeal under section 18 of the SARFEASI Act is 30 days as against 45 days under section 20 of the RDB Act and to this extent, legislative intent may be deliberate. However, the absence of an express provision for condonation, when section 18(2) expressly adopts and incorporates the provisions of the RDB Act which contains provision for condonation of delay in filing of an appeal cannot be read as excluding the power of condonation. There is no reason to exclude the proviso to section 20 (3) in dealing with an appeal under the SARFEASI Act and taking such a view will be nullifying section 18(2) of the SARFEASI Act.[53]

50 *Id.*, s. 29 (2) reads: Where any special or local law prescribes for any suit, appeal or application, a period of limitation different from the period prescribed by the schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal, or application by any special or local law, the provision contained in section 4-24(both inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

51 AIR 2011 MP 205.

52 AIR 2013 AP 24.

53 *Supra* note 47 at 2885.

IV CONCLUSION

The contract may be express or implied and express contract may be oral or written.[54] This is a well settled legal position but the court laid emphasis on the written agreement and gave no importance to the negotiations which culminated into contract on the basis of which significant money was paid, leaving insignificant amount as balance.

The apex court ruled that government contracts should be free from arbitrariness and transparency should be their hallmark. The court without saying so expressly made it a case of public policy as laid down in section 23 of the IC, Act which mandates that a contract be avoided where fairness and judicious exercise of power is wanted.

The apex court has come with an opinion for measure of damages in case of breach of contract which has far reaching implications. The court has made it clear that it is not always necessary that loss should be suffered in case of breach of contract so as to enable the wronged party to claim compensation. Laying emphasis on importance of completion of public utility projects within the stipulated time, the court ruled that delay in execution of contract would result in loss of interest in blocked capital. Even if there is no specific evidence of loss suffered, where the project is of public utility, the delay itself can be taken to have resulted in loss in the form of environmental degradation and loss of interest on the capital.

The apex court delineated scope of section 72 of the IC, Act but while doing so ingredients of 'fraud' and/or 'misrepresentation' were also read in this section which made recovery of money paid by mistake difficult and thus diluted the purpose of this provision which needs a fresh look.

The apex court answered in negative to the question whether cognizance of the complaint filed before the expiry of the 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 NI Act can be taken. This seems logical as the person against whom complaint is filed should get at least reasonable time stipulated in the statute to respond to the notice. But where this time has already elapsed when the concerned court is prayed to take cognizance of the complaint, then dismissing the complaint merely on the ground that originally complaint was filed before the expiry of the statutory period is devoid of logic. If the accused is so particular about observance of notice period, then he should scrupulously tender the amount in question instantly instead of praying for it dismissal which would not serve any worthwhile purpose accept to discourage complainant to file a fresh complaint.

The High Court of Jammu and Kashmir has declared that the SARFEASI Act is inapplicable *qua* the permanent residents of the State of Jammu and Kashmir because of unique constitutional place of the this state. It is yet to be seen how apex court will interpret expressions like 'Banking" and 'Administration of Justice' which weighed

54 *Supra* note 6, s. 9; see also, *Coffee Board* v. *Commissioner Commercial Taxes* (1988) 3 SCC 263.

so heavily in the minds of the High Court of Jammu and Kashmir to come up with this interpretation.

The apex court opined that where Parliament has not defined the expression NPA at all, it will be the job of the courts to interpret it as long as that expression occurs in section 13(2). While doing so, it will be profitable to see how that expression is understood in the commercial world. It will be also worthwhile to see how the experts on the subject understood this term and by doing so it would not be called delegation of power.

A very balanced approach was adopted by the apex court by ruling out that any sale or transfer of secured asset under section 13(8) of the SARFEASI Act is invalid unless borrower has been informed about the time and date of such sale or transfer in order to enable him to tender the dues of the secured creditor with all costs, charges and expenses. The court insisted that the borrower must be given thirty days notice in order to give him sufficient opportunity to make up his mind either to be content with the proposed sale or to tender money and also prospective buyer must have notice of the encumbrances attached with this auction sale.

Also the RDB and SARFEASI Acts are complimentary to each other and provisions of the RBD Act have been incorporated in the SARFEASI Act for disposal of an appeal. A bare perusal of section 18(2) makes it amply clear that the appellate tribunal under the SARFEASI Act has to dispose of an appeal in accordance with the provisions of the RDB Act. The appeal can be filed within 45 days and even if it is held that section 29(2) of the Limitation Act, 1963 is not to applicable for condonation of delay, section 20(3) of the RDB Act will.